

TOWARDS AN ORGANIZATIONAL JURISPRUDENCE: TRANSFORMING CORPORATE CRIMINAL LAW THROUGH FEDERAL SENTENCING REFORM

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The issuance of the United States Sentencing Commission's sentencing guidelines for organizational offenders¹ is prompting a wide-ranging reappraisal of corporate criminal liability and sentencing.² Much of this reappraisal is driven by concern over the enormous corporate fines recommended under the new guidelines. Models of corporate deterrence incorporated in the guidelines are raising new questions about the desirability of corporate criminal liability and fines as means to prevent corporate offenses.³ Guideline provisions measuring corporate culpability and making corresponding upward and downward fine adjustments are focusing new attention on criteria for assessing corporate blameworthiness in criminal offenses by corporate employees. Large fines threatened under the guidelines and reductions available to firms that

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1. The Commission's guidelines for the sentencing of organizations comprise Chapter 8 of its Sentencing Guidelines Manual. See U.S. SENTENCING COMM'N, SENTENCING GUIDELINES MANUAL 393-433 (1993) [hereinafter SENTENCING GUIDELINES].

2. Corporate criminal liability differs from individual criminal liability in several respects. The most important are differences in standards for liability, available sentencing options, and the importance of collateral remedies outside criminal law. These fundamental differences justify a different sentencing approach for corporate offenders than that applied to individuals. See Otto G. Obermaier, *Sentencing Redux VIII—Corporate Sentencing*, N.Y. L.J., Nov. 1, 1988, at 3.

3. Federal standards hold firms criminally liable for employee crimes without the need for a showing of corporate fault. See, e.g., *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, *aff'd*, 212 U.S. 500 (1909); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). This type of vicarious corporate criminal liability for the acts of agents has been seen as inconsistent with traditional criminal culpability requirements by a number of commentators. To reinject organizational culpability measures into federal criminal law, numerous commentators have argued in favor of tests for organizational culpability as a prerequisite to corporate criminal liability, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095, 1121-64 (1991); Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1306-11 (1990); Harvey L. Pitt & Karl A. Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U. L. REV. 447, 449-53 (1991), or due diligence defenses permitting firms to avoid criminal liability where they establish their lack of organizational culpability, e.g., *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1257 (1979) (proposing a criminal defense allowing a corporation subjected to liability under respondeat superior principles to "rebut [the] presumption of liability by proving by a preponderance of the evidence that it, as an organization, exercised due diligence to prevent the crime").

maintain effective law compliance programs are encouraging firm managers to revise and expand crime prevention systems in corporate organizations.⁴

This article describes the new organizational sentencing guidelines, the policy choices they embrace, key questions they leave unanswered, and the changes they are likely to make in criminal law enforcement within corporate organizations.

I. THE RECENT HISTORY OF CORPORATE SENTENCING FOR FEDERAL OFFENSES

A. Pre-Guideline Practices

For many years, corporate criminal prosecutions were insignificant in both number and impact. Between 1984 and 1987, only 41 publicly-traded firms were prosecuted for federal crimes nationwide.⁵ The mean fine imposed on the 288 corporations sentenced by federal courts during this period was only \$48,164.⁶ In part, the paucity of corporate prosecutions stemmed from the small fines available for corporate offenses and a corresponding lack of prosecutorial interest in corporate prosecutions.⁷ Given that corporations cannot be incarcerated, the maximum corporate penalties threatened for most offenses are the maximum fines. Before 1984, the maximum corporate fines for most federal offenses were quite small. For example, federal wire fraud was formerly punishable by up to five years in prison, but a maximum corporate fine of only \$1,000 per offense.⁸

The unavailability of large corporate fines led to anomalous sentencing proceedings in which federal courts imposed modest penalties on firms convicted of serious crimes. In some cases, maximum corporate fines were far less than the illegal profits or cost savings firms gained through illegal conduct given that such conduct was only occasionally detected and prosecuted. With such an imbalance of gains and penalties, the implicit sentencing message was that corporate crime paid.

The Allegheny Bottling case reflects the frustration felt by sentencing courts in this period and the lengths they were willing to go to fashion adequate corporate penalties.⁹ During the early 1980s, executives from Allegheny Bottling Company ("Allegheny") and Mid-Atlantic Coca-Cola Bottling Company ("Mid-Atlantic") conspired to fix prices for a wide range of soft drinks they distributed. The maximum penalties for price fixing then stood at 3 years in prison and a \$1,000,000 fine.¹⁰ Noting that Allegheny made approxi-

4. The creation of incentives for firms to adopt monitoring apparatus to control their agents is one of the primary goals of corporate criminal liability. See Obermaier, *supra* note 2, at 3.

5. Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 252 (1991).

6. *Id.* at 254.

7. See Jed S. Rakoff, *The Corporation as Policeman: At What Price?*, N.Y. L.J., Jan. 9, 1992, at 3.

8. See 18 U.S.C. § 1343 (1984).

9. Allegheny's offense and sentencing are described in *United States v. Harford*, 870 F.2d 656 (4th Cir. 1989) (unpublished disposition; text in Westlaw), *aff'g in part and remanding in part*, *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856 (E.D. Va. 1988).

10. 15 U.S.C. § 1 (1982).

mately \$5,000,000 in illegal profits from its price fixing, the district court fashioning Allegheny's sentence concluded that the maximum fine of \$1,000,000 was inadequate to reflect the seriousness of Allegheny's offense. It attempted to impose further penalties by "imprisoning" Allegheny. The court equated imprisonment with restraint and sought to restrain the company by compelling its officials to undertake onerous activities. In addition to imposing a \$50,000 fine, the court placed the corporation on probation and required as a probation condition that several top Allegheny executives perform full-time community service for as long as two years.¹¹ This creative attempt to overcome the lack of corporate sentencing alternatives did not survive on appeal. The Court of Appeals for the Fourth Circuit overturned the corporate incarceration sentence, holding that it was not authorized by antitrust statutes.¹²

B. The Sentencing Reform Act of 1984

Amidst this backdrop of inadequate corporate sentencing tools and practices, the Sentencing Reform Act of 1984 ["the Act"] implemented "the most broad reaching reform of federal sentencing in this century."¹³ It made two key changes in corporate sentencing standards for federal crimes. First, it raised maximum fines for corporate offenders. Second, it created the United States Sentencing Commission and authorized the Commission to enact guidelines governing the sentencing of organizational offenders including corporations.

The Sentencing Reform Act raised maximum fines for corporate felonies and serious misdemeanors to \$500,000 per offense.¹⁴ Separate legislation established potentially higher fine limits of twice the gross loss or gain resulting from a corporate crime.¹⁵

The creation of the United States Sentencing Commission was part of broader changes in federal sentencing practices under the Sentencing Reform Act. Prior federal sentencing was based on a rehabilitative model of incarceration, with the length of a defendant's prison term set by a parole board based on its assessment of the offender's degree of rehabilitation following an offense. However, recognizing that offender rehabilitation in the penal system was largely unsuccessful and that the sentencing and parole process produced substantial disparities in offender treatment, Congress substituted a system of

11. See *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856, 858-59 (E.D. Va. 1988).

12. *United States v. Harford*, 870 F.2d 656 (4th Cir. 1989) (unpublished disposition; text in Westlaw). The court of appeals affirmed Allegheny's \$1 million fine which the trial court had suspended in favor of corporate incarceration. *Id.*

Recent changes in the Sherman Act have elevated the maximum corporate fine to \$10 million, thereby somewhat alleviating the problem in *Allegheny Bottling*. 15 U.S.C. § 1 (1992). For an assessment of Allegheny's probable sentencing if its offense were committed today, see Richard S. Gruner, *Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines*, 66 S. CAL. L. REV. 225, 272-76 (1992).

13. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990).

14. 18 U.S.C. § 3571(c) (1988). The \$500,000 maximum fine applies to all corporate felonies and those corporate misdemeanors which result in the loss of human life. *Id.* For other Class A misdemeanors, the maximum corporate fine is \$200,000, while for other misdemeanors that do not result in death and all infractions the maximum corporate fine is \$10,000. *Id.*

15. 18 U.S.C. § 3571(d) (1988).

determinant sentencing under the Sentencing Reform Act.

The Sentencing Reform Act authorized the Sentencing Commission to implement this system by drafting guidelines for federal sentencing. In addition, it eliminated parole for offenders, providing instead that the sentence a judge imposes will be the sentence an offender serves.¹⁶ These changes were aimed at two goals. First, they promoted "honesty" in sentencing by solidifying court control over sentencing and clarifying the reasons for sentences given various offenders.¹⁷ Second, they established constraints on court discretion that were expected to reduce "unjustifiably wide" sentencing disparity between similarly situated offenders.¹⁸ These changes were not intended to eliminate court discretion and individual attention to defendant circumstances in sentencing.¹⁹ Rather, as the Senate Judiciary Committee report on the Sentencing Reform Act described:

The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence.... The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and ... the thoughtful imposition of individualized sentences.²⁰

Congress instructed the Sentencing Commission to draft guidelines to aid sentencing courts in furthering the goals and purposes of federal sentencing. The sentencing goals and purposes articulated by Congress included:

- (1) [the need] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (2) [the need] to afford adequate deterrence to criminal conduct;
- (3) [the need] to protect the public from further crimes of the defendant; and
- (4) [the need] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.²¹

C. Sentencing Guidelines for Individuals

The Commission worked from October 1985 to April 1987 to produce sentencing guidelines for individual offenders.²² The resulting guidelines reflect the following design:

- 1) Similar offenses are grouped together under a single generic heading like fraud, robbery, or drugs;
- 2) A base sentence for each offense is determined through an analysis anchored by, but not bound to, an evaluation of the average time served in the past by offenders convicted of the same offense;

16. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

17. *Id.*

18. S. REP. NO. 225, 98th Cong., 2d Sess. 38, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3221; Breyer, *supra* note 16, at 4-5.

19. See Nagel, *supra* note 13, at 899-902.

20. S. REP. NO. 225, *supra* note 18, at 51-52.

21. 18 U.S.C. § 3553(a) (1988).

22. For a detailed description of the evolution of the individual sentencing guidelines, see Nagel, *supra* note 13, at 913-32.

3) Base sentences are raised or lowered to reflect further aggravating or mitigating offense characteristics; and

4) Offenders' criminal histories are used to increase sentences for offenders who have previously received severe sentences.²³

The Commission's guidelines for individual sentencing went into effect on November 1, 1987 and apply to any crime committed, at least in part, after that date.²⁴ Federal courts can depart from the sentences recommended under the guidelines when they conclude that an offense involves aggravating or mitigating offense circumstances of a kind, or to a degree, not contemplated in the guidelines.²⁵ However, such departures are rare. In calendar year 1989, for example, 89 percent of all federal sentences for individuals were within the ranges recommended under the guidelines, 3.5 percent were above those ranges, and 14.5 percent were below.²⁶ Hence, sentences conforming to the Commission's guidelines for individual sentencing predominate in the federal system.

D. Sentencing Guidelines for Organizations

Early work on the Commission's sentencing guidelines for organizational offenders began in 1986.²⁷ The Commission considered several organizational sentencing issues in this early phase. One approach considered, but ultimately rejected, was a proposal to scale corporate fines based on percentages of a defendant firm's income or assets. This approach was aimed at standardizing organizational penalties by imposing fines having similar impacts on large and small organizations.²⁸ However, the Commission ultimately rejected organizational size as a sentencing factor, reasoning that organizational size should only influence corporate fines where organizational size affects the scope of criminal conduct undertaken or the ability of a corporation to pay restitution.²⁹ Another

23. See *id.* at 922-23.

24. See 28 U.S.C. § 994(q) (1992).

25. 18 U.S.C. § 3553(b) (1988).

26. U.S. SENTENCING COMM'N, ANNUAL REPORT 46-47 (1990).

27. For overviews of the Commission's efforts in developing the organizational sentencing guidelines, see U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 1-4 (1991) [hereinafter SUPPLEMENTARY REPORT]; Jeffery S. Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 FED. SENTENCING REP. 133 (1990).

28. *Preliminary Draft of Sentencing Guidelines for United States Courts*, 51 FED. REG. 35,079, 35,129 (1986).

29. The Commissioners believed that organizational size alone did not render an offense more harmful in terms of loss or detectability and that size alone was neither favored nor disfavored under federal criminal laws. See Obermaier, *supra* note 2, at 3. Given the ability of a large corporation to shield some internal operations from scrutiny by outsiders to the organization, the Commission's treatment of crimes within small and large organizations as equally detectable is suspect. A more valid objection to the use of organization size as a sentence scaling factor is the lack of data presently available to determine what degree of sentence enhancement should accompany increases in offender size.

Commissioner Michael Block offered an alternate rationale for the exclusion of organization size as a factor increasing corporate sentences. Since large corporations are often publicly held, guidelines that imposed especially high fines on large concerns would also be especially costly to innocent, uninvolved shareholders. See *id.*

In the Commission's final sentencing guidelines for organizations, organization size is considered indirectly under a number of guideline provisions. Organizational size has the following impacts on corporate sentences under the final guidelines:

1) fines for small firms are reduced where they would threaten the "viability" of the

rejected approach considered at this early stage would have set organizational fines equal to the total harm caused by an offense divided by the probability of conviction for that offense.³⁰

The next step in the development of corporate sentencing standards was the issuance of the Commission's sentencing guidelines for individuals.³¹ While those guidelines generally ignored organizational sentencing, the provisions on antitrust offenses included both individual and organizational sentencing guidelines.³² For an individual, the recommended antitrust fine was 4 to 10 percent of the volume of commerce affected by the offense, but not less than \$20,000.³³ A further term of imprisonment was recommended for most offenses.³⁴ For an organization, the recommended fine was 20 to 50 percent of the volume of commerce affected, but not less than \$100,000.³⁵ This organizational sentencing standard reflected two conclusions by the Commission. The first was that organizational profits from antitrust offenses average about 10% of the affected commerce.³⁶ The second was that fines two to five times higher than these profits are necessary to adequately deter antitrust offenses given the difficulty of identifying organizational offenses.³⁷

In 1988, the Commission issued a discussion draft of a comprehensive set of organizational sentencing guidelines.³⁸ Under this proposal, organizational fines were to be set by measuring the losses flowing from an offense, adding to that amount the incremental cost of detecting the violation, multiplying this sum by a factor reflecting the difficulty of detecting and prosecuting that type of offense, and adding a further amount equal to the cost of prosecuting and sentencing the defendant.³⁹ The goal of this proposal was to minimize the total

firm;

2) corporate culpability assessments and resulting fines are higher where top executives of large concerns participate in offenses than if top executives of small concerns are involved;

3) standards for the sufficiency of corporate law compliance programs are more demanding for large concerns than for small ones;

4) probation sentences are required for defendant firms lacking law compliance programs only if the firms have at least 50 employees; and

5) courts are permitted to reduce the fines of certain closely held firms to reflect fines imposed on their owners, a benefit that will not apply to large, publicly held concerns.

See Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 248-51 (1993).

30. Nagel & Swenson, *supra* note 29, at 248-51.

31. The original text of these guidelines is contained in U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1988).

32. *Id.* § 2R1.1(c).

33. *Id.*

34. *Id.* § 2R1.1 (application note 5 and background commentary).

35. *Id.* § 2R1.1(c).

36. *Id.* § 2R1.1 (background commentary).

37. *Id.*

38. U.S. SENTENCING COMM'N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS (1988), reprinted in 10 WHITTIER L. REV. 1, 7 (1988). For an explanation and a defense of the sentencing approach reflected in this proposal, see Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 397-410 (1991).

39. The optimal fine was thus:

$$F^* = [(L+C)(1/P)] + S$$

Where:

L = Losses From The Offense

C = Cost of Detection

costs of criminal behavior and law enforcement to society by imposing fines that deter offenses involving social losses greater than corporate gains, while encouraging firms to commit offenses and pay associated fines if social losses from offenses are low and corporate gains are substantial.⁴⁰ In short, this proposal distinguished between good (i.e., profitable after subtracting social losses) and bad (i.e., unprofitable after subtracting social losses) corporate crimes and tailored fines to deter only the latter.

A storm of protest met this proposal.⁴¹ It placed the Commission in the awkward position of seeming to endorse (or at least not penalize) some types of corporate crime. It entailed very difficult loss determinations in every case and gave little attention to deterring crimes with poorly measurable losses. The proposal's loss multipliers, used to adjust fines upward to offset partial prosecution rates, were probably too small to fully offset actual prosecution levels. The proposal disregarded corporate gains from an offense as a sentencing factor. Finally, the proposal did not take into account differing managerial blameworthiness in corporate offenses as reflected in factors like the presence of a reasonable system to prevent offenses (indicating low blameworthiness) or the involvement of top corporate managers (indicating high blameworthiness).

The evolution of the final corporate sentencing guidelines began in 1989. Drawing heavily from suggestions of the Department of Justice,⁴² the Commission completed a new draft of the guidelines in November 1989. This draft introduced two fundamental notions carried forward into the final guidelines. First, victim losses and offender gains were used as alternate measures of offense severity, with the measure indicating the greater severity controlling the fine in a given case. Second, offense severity analyses under the Commission's earlier sentencing guidelines for individuals were suggested as possible further measures of corporate offense severity. These analyses under the sentencing guidelines for individuals grade the seriousness of offenses in terms of numerical offense levels. The offense level for a given offense is determined based on factors considered in the past by federal courts in sentencing individuals for similar offenses.

Public comment on these proposals continued into the spring of 1990. Unable to reach a consensus on organizational sentencing approaches—and lacking three members on the Commission due to resignations—the Commission decided to defer final action on organizational sentencing guidelines for a year.

In October 1990, the Commission and the Department of Justice (DOJ) each distributed additional guideline drafts. The DOJ proposal relied exclusively on offense-level determinations, translating offense levels directly into organizational fines. The Commission draft provided for fines based on the greatest of offense losses, gains, or an amount derived from the offense level for the violation. However, the Commission draft added a further important

P = Probability That Offense Will Be Detected

S = Costs of Prosecution and Sentencing

See Block, *supra* note 38, at 397.

40. Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 516-17 (1989).

41. For a summary of the objections to this proposal deemed significant by the Sentencing Commission, see Nagel & Swenson, *supra* note 29, at 219-22.

42. See Parker, *supra* note 27, at 134.

factor. Besides scaling fines to offense characteristics, the new draft provided for significantly reduced corporate fines where offense or offender characteristics indicated low organizational culpability in an offense.⁴³ It added this fault assessment as a means to differentiate between organizational managers playing large and small roles in corporate offenses and to reward and encourage desirable corporate behavior.⁴⁴

With some minor adjustments, the structure of the 1990 Commission draft was carried forward into the final organizational sentencing guidelines transmitted to Congress on May, 1, 1991.⁴⁵ Under the Sentencing Reform Act, Congress had six months to review the guidelines before they took effect automatically.⁴⁶ Congress took no action to reject the guidelines and they became effective on November 1, 1991.

II. SENTENCING UNDER THE CORPORATE SENTENCING GUIDELINES

A. *Underlying Principles*

The guidelines and policy statements comprising the Sentencing Commission's corporate sentencing guidelines⁴⁷ reflect four broad principles.⁴⁸ First, sentencing courts must, whenever possible, order a corporate offender to remedy any harm caused by an offense. Required efforts to remedy such harm should not be viewed as punishment, but rather as means of making victims whole for the harm caused. Second, if a corporation operates primarily for a criminal purpose or primarily by criminal means, its fine should be set sufficiently high to divest the organization of all its assets. Third, the fine for a normal business corporation should be based on the seriousness of its offense and the culpability of the organization. The seriousness of the offense will be measured from the offender's pecuniary gain, the victims' pecuniary losses, and other factors considered in determining the offense level for the crime. Corporate culpability generally will be determined from the steps taken by an organization before an offense to prevent and detect criminal conduct, the involvement in or tolerance of an offense by corporate managers and personnel, and an organization's actions to aid law enforcement after an offense is discovered. Fourth, probation is an appropriate sentence for a corporate defendant when needed to ensure that another sanction will be fully carried out, or to ensure that steps will be taken within a convicted firm to reduce the likelihood of future criminal conduct.

43. Where a firm obtained a maximum score, reflecting minimal culpability, it could reduce its recommended fine as much as 92 percent.

44. See William W. Wilkins, Jr., *Sentencing Guidelines for Organizational Defendants*, 3 FED. SENTENCING REP. 118, 119 (1990).

45. See SUPPLEMENTARY REPORT, *supra* note 27, at 1-3.

46. See 28 U.S.C. § 994(p) (1992).

47. These standards are contained in Chapter 8 of the Commission's *Sentencing Guidelines Manual* entitled "Sentencing of Organizations". See SENTENCING GUIDELINES, *supra* note 1, at 393-433.

48. See *id.* at 393.

B. Sentencing Covered by the Guidelines

1. Entities Covered

The Sentencing Commission's guidelines apply to the sentencing of all organizations convicted of federal felonies and Class A misdemeanors.⁴⁹ An organization for these purposes is any "person other than an individual."⁵⁰ Thus, organizations covered by the guidelines include corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.⁵¹

While the range of entities covered by the organizational sentencing guidelines is broader, the discussions in this Article address corporate sentencing only. However, many of the observations here will apply equally to the sentencing of other types of organizations to the extent that they commit the same sorts of offenses as business corporations.

2. Offenses Covered

The fine-setting standards of the organizational sentencing guidelines apply only to certain types of federal offenses listed in the guidelines. These offenses include most crimes committed for corporate benefit, including fraud, bribery, money laundering, theft, tax offenses, and antitrust offenses.⁵² Crimes not addressed by the fine-setting standards of the organizational sentencing guidelines include environmental crimes, food, drug and agricultural offenses, export control violations, and obstruction of justice.⁵³ The Commission excluded these offenses because it felt that pecuniary gains and losses—the primary criteria for scaling fines under the organizational sentencing guidelines—do not adequately reflect the seriousness of offenses like these which often involve personal injuries or other non-pecuniary harms.⁵⁴

The exclusion of these types of offenses from the fine-setting provisions of the guidelines is subject to an important exception. Some offenses in the excluded categories mentioned above are still covered by the fine-setting provisions of the organizational sentencing guidelines. They fall under those provisions because their seriousness is measured under offense level standards for covered offenses. If the offense level for a corporate offense is determined under guidelines applicable to a different type of offense covered by the fine-setting provisions of the organizational sentencing guidelines, then the first offense is also covered by those provisions despite the fact that it is within an

49. See SENTENCING GUIDELINES, *supra* note 1, § 1B1.9. Class B and C misdemeanors and infractions were excluded from the sentencing guidelines for reasons of judicial economy. See *id.* (background commentary). A Class A misdemeanor is an offense with a maximum authorized term of imprisonment of one year or less but more than six months, while Class B and C misdemeanors are offenses with authorized maximum imprisonment of thirty days to six months and five to thirty days respectively. See 18 U.S.C. § 3559(a)(6–8) (1994).

50. SENTENCING GUIDELINES, *supra* note 1, § 8A1.1 (application note 1); see also 18 U.S.C. § 18 (1992).

51. SENTENCING GUIDELINES, *supra* note 1, § 8A1.1 (application note 1).

52. *Id.* § 8C2.1(a).

53. *Id.*

54. See SUPPLEMENTARY REPORT, *supra* note 27, at 8.

offense category normally excluded from the fine-setting provisions.⁵⁵

For example, food, drug, or agricultural offenses are normally excluded from the fine-setting provisions of the organizational sentencing guidelines. However, food, drug, or agricultural offenses involving fraud are evaluated under guideline provisions for fraud offenses to determine corresponding offense levels.⁵⁶ Since fraud offenses are covered by the fine-setting provisions of the organizational sentencing guidelines, food, drug, and agricultural offenses involving fraud and evaluated under the fraud guidelines are also included.⁵⁷ This conforms the treatment of fraud offenses related to food, drug, or agricultural matters to fraud crimes generally. A broad range of food, drug, and agricultural offenses involving fraud may be brought within the fine-setting provisions of the organizational sentencing guidelines under this arrangement.⁵⁸

Fewer environmental offenses are likely to be included under the fine-setting provisions of the organizational sentencing guidelines on this basis. Only two narrow types of environmental crimes are subject to sentencing guidelines that will bring them within the fine-setting provisions of the organizational sentencing guidelines. Those guidelines address 1) the placement of hazardous or injurious devices on federal lands to obstruct the harvesting of timber with resulting property damage⁵⁹ and 2) protected wildlife and plant offenses.⁶⁰ Only environmental crimes in these two narrow categories have fines specified under the organizational sentencing guidelines.

For offenses not covered by the fine-setting standards of the organizational sentencing guidelines, the guidelines provide that fines should be determined according to the general statutory provisions governing federal sentencing.⁶¹ Factors to be considered in setting a fine include:

- 1) the nature and circumstances of the offense and the history and characteristics of the defendant;⁶²
- (2) the size of penalty needed to reflect the seriousness of the offense, to

55. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.1 (application note 2).

56. *Id.* § 2N2.1 (application note 2).

57. *Id.* § 8C2.1(a).

58. For an example of how these provisions may apply, see Richard S. Gruner, *Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines*, 66 S. CAL. L. REV. 225, 280-84 (1992).

59. Under *U.S. Sentencing Guidelines* § 2Q1.6(a)(2), such offenses are sentenced in accordance with *U.S. Sentencing Guidelines* § 2B1.3 relating to property damage or destruction. Offenses sentenced under the latter section are covered by the fine setting provisions of the new guidelines. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.1(a). Consequently, organizations sentenced for environmental offenses covered by § 2Q1.6(a)(2) are also sentenced under the fine setting provisions of the organizational sentencing guidelines. See *id.* § 8C2.1, (application note 2).

60. Under the *U.S. Sentencing Guidelines* § 2Q2.1(b)(3)(A), a protected wildlife or plant offense involving fish, wildlife, or plants exceeding \$2,000 in value may be sentenced in accordance with *U.S. Sentencing Guidelines* § 2F1.1 governing offenses based on fraud and deceit. SENTENCING GUIDELINES, *supra* note 1, § 2F1.1. The latter are covered by the fine setting standards of the organizational sentencing guidelines. See *id.* § 8C2.1(a). Hence, these standards apply to any offense covered by *Sentencing Guidelines* § 2Q2.1(b)(3)(A) and sentenced through reference to *Sentencing Guidelines* § 2F1.1. See *id.* § 8C2.1 (application note 2).

61. *Id.* § 8C2.10.

62. 18 U.S.C. § 3553(a)(1) (1990).

promote respect for the law, and to provide just punishment for the offense,⁶³

(3) the degree of punishment necessary to adequately deter similar criminal conduct,⁶⁴ and

(4) the need to avoid fines so high that they preclude the defendant from providing restitution to crime victims.⁶⁵

In determining whether to impose a fine, and in specifying the amount of a fine, when it will be paid, and the pattern of partial payments to be allowed, if any,⁶⁶ a sentencing court must also consider:

(1) "the defendant's income, earning capacity, and financial resources;"⁶⁷

(2) the burden that a fine will impose upon the defendant, any persons who are financially dependent on the defendant (for example, employees), or any other person (including a government agency) that would be responsible for the welfare of any persons financially dependent on the defendant, compared with the burdens alternate punishments would impose;⁶⁸

(3) any pecuniary loss inflicted upon others because of the offense;⁶⁹

(4) "whether restitution is ordered or made and the amount of such restitution;"⁷⁰

(5) "the need to deprive the defendant of illegally obtained gains from the offense;"⁷¹

(6) "whether the defendant can pass on to consumers or other persons the expense of the fine;"⁷² and

(7) "the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense."⁷³

Finally, even in the absence of a directly applicable sentencing guideline, a sentencing court must consider the relationship of a proposed sentence to sentences prescribed by guidelines for similar offenses and offenders, and to the policy statements of the Sentencing Commission.⁷⁴

In contrast to their fine-setting provisions, other portions of the

63. *Id.* § 3553(a)(2)(A).

64. *Id.* § 3553(a)(2)(B).

65. *Id.* §§ 3553(a)(7), 3572(b).

66. A person sentenced to pay a fine or other monetary penalty ... [is required to] make such payment immediately, unless, in the interest of justice, the sentencing court provides for payment on a later date or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule. If the judgment permits other than immediate payment, the period provided for shall not exceed five years

Id. § 3572(d).

67. *Id.* § 3572(a)(1).

68. *Id.* § 3572(a)(2).

69. *Id.* § 3572(a)(3).

70. *Id.* § 3572(a)(4).

71. *Id.* § 3572(a)(5).

72. *Id.* § 3572(a)(6).

73. *Id.* § 3572(a)(7). This factor is only considered where the defendant is an organization. *Id.*

74. *Id.* § 3553(b). The requirement that courts consider related sentencing guidelines and policy statements does not extend to petty offenses. *Id.*

organizational sentencing guidelines apply to all federal felonies and Class A misdemeanors.⁷⁵ Thus, even if a corporate offense such as an environmental crime falls outside the fine-setting standards in the corporate sentencing guidelines, the guidelines will still govern probation and restitution sentences for the corporate offender.

C. Federal Sentencing Procedures for Corporate Offenders

Sentencing procedures for corporations convicted of federal offenses are governed by the Federal Rules of Criminal Procedure.⁷⁶ Following a conviction, a pre-sentence report is prepared on each defendant unless the sentencing court finds that the record before it already contains sufficient information for sentencing and the court explains this finding.⁷⁷ Pre-sentence reports are prepared by federal probation officers,⁷⁸ who have broad discretion concerning the contents of these reports.⁷⁹ Required contents include:

1) Information about the history and characteristics of the defendant, including the defendant's prior criminal history, financial condition, and past activities that may bear on sentencing,⁸⁰

2) The probation officer's analysis of the recommended sentence for the defendant's offense under the sentencing guidelines,⁸¹

3) An assessment of policy statements of the Sentencing Commission pertinent to the defendant's sentence,⁸²

4) Verified information regarding the financial, social, psychological, and medical impact of the offense on its victims and related costs to those victims,⁸³ and

5) Further information required by the sentencing court.⁸⁴

In addition to providing a basis for the court's sentencing determinations, information in a pre-sentence report can also be used by the Government to aid in collecting an assessment, criminal fine, forfeiture or restitution payment imposed at sentencing.⁸⁵

Beyond obtaining a pre-sentencing report, a sentencing court can order a study of an organizational offender to gain further sentencing information.⁸⁶ This study is performed by a qualified consultant⁸⁷ who must inquire into

75. SENTENCING GUIDELINES, *supra* note 1, § 8A1.1 (application note 2).

76. See FED. R. CRIM. P. 32.

77. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c)(1).

78. The fact-finding role of federal probation officers has been held to be consistent with constitutional separation of powers and due process requirements. See *United States v. Belgard*, 894 F.2d 1092 (9th Cir. 1990).

79. The role of the probation officer in preparing presentencing reports is to provide the sentencing court with as much information as possible to enable the judge to make informed sentencing decisions. *Id.*

80. FED. R. CRIM. P. 32(c)(2)(A).

81. *Id.* at 32(c)(2)(B).

82. *Id.* at 32(c)(2)(C).

83. *Id.* at 32(c)(2)(D).

84. *Id.* at 32(c)(2)(F).

85. 18 U.S.C. § 3552(d) (Supp. 1993).

86. *Id.* § 3552(b).

87. For example, consultants qualified to assess the culpability of a corporate defendant and its need for restrictive probation terms to prevent repeat offenses might include an attorney specializing in the field of the violation or a business executive who is familiar with the type of

matters specified by the court, but may also consider anything else that he believes bears on the factors to be considered by the sentencing court in rendering a sentence.⁸⁸ The period of the study will normally be no more than 60 days, but a court can extend this period for another 60 days.⁸⁹ The consultant must provide the court with a written report of the results of his study and should include whatever recommendations the consultant believes will aid in sentencing the organization.

A pre-sentence or consultant's report filed with the court must be disclosed to the defendant, counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum notice period is waived by the defendant.⁹⁰ However, the following will not be disclosed:

- 1) Any final recommendation as to the defendant's sentence,
- 2) Diagnostic opinions which, if disclosed, might seriously disrupt rehabilitation of the defendant's conduct,
- 3) "[S]ources of information obtained upon a promise of confidentiality," and
- 4) "[O]ther information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons."⁹¹

"The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it."⁹² If the court is of the view that there is information in a pre-sentence report which should not be disclosed, a summary may be disclosed instead. The court, in lieu of making the report or any part thereof available, shall state orally or in writing a summary of the factual information contained in the report that the court expects to rely on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment on that summary.⁹³ This summary may be provided to the parties in camera.⁹⁴

If a defendant challenges information in a pre-sentence or consultant's report, the sentencing court must make findings regarding the disputed facts or determine that the disputed facts will not be considered in sentencing.⁹⁵

Sentencing courts have flexibility to consider diverse types and sources of

business practices leading to the offense. In general, a consultant should be a person with sufficient training or experience to effectively gather and analyze information relevant to the organizational defendant's sentencing. See John C. Coffee, Jr. et al., *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 WHITTIER L. REV. 77, 96-99 (1988).

88. 18 U.S.C. § 3553(b).

89. *Id.*

90. *Id.* § 3552(d).

91. FED. R. CRIM. P. 32 (c)(3)(A). Where a sentencing court withholds disclosure on one of these grounds, it must make an oral or written summary of the information in the report that will be relied on in sentencing and must give the defendant and the defendant's counsel time to comment on that information. *Id.* at 32(c)(3)(B).

92. *Id.* at 32(c)(3)(A).

93. *Id.* at 32(c)(3)(B).

94. *Id.*

95. *Id.* at 32(c)(3)(D).

information in rendering sentences. Federal law rejects limits on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.⁹⁶ "[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."⁹⁷ A sentencing court may rely on information of alleged criminal activity for which the defendant was not prosecuted.⁹⁸ A court may also consider hearsay evidence in determining a sentence, but the defendant must be given an opportunity to refute it, and the evidence must bear some minimal indicia of reliability in respect of the defendant's right to due process.⁹⁹ In challenges to a sentence based on the evidence considered by a sentencing court, a defendant must establish that contested evidence is materially false or unreliable, and that such false or unreliable information actually served as the basis for the sentence.¹⁰⁰

In general, a sentence must be imposed without unnecessary delay following a conviction or guilty plea.¹⁰¹ However, where there is a factor important to sentencing which is not capable of being resolved immediately, a court may defer sentencing for a reasonable period.¹⁰² This sort of delay may be particularly important in sentencing corporate defendants because complex corporate offenses involving poorly understood corporate practices or a large number of victims may require extended investigations by probation officers to produce pre-sentence reports. Unlike consultant reports, the preparation of pre-sentence reports are not subject to a general requirement of completion within 60 days.¹⁰³

Sentences are imposed at a sentencing hearing. At the hearing, a sentencing court must afford counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's pre-sentencing report and on other matters relating to the appropriate sentence.¹⁰⁴ The court must also (1) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the pre-sentence report (or a summary of that report if portions have been withheld as described above), (2) "afford counsel for the defendant an opportunity to speak on behalf of the defendant," and (3) "determine if the defendant wishes to make a statement ... [or] present any information in mitigation of the sentence."¹⁰⁵ The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear statements by the defendant, counsel for the

96. 18 U.S.C. § 3661 (1984) (original version at 18 U.S.C. § 3577).

97. *United States v. Tucker*, 404 U.S. 443, 446 (1972), *quoted in* *Roberts v. United States*, 445 U.S. 552, 556 (1980).

98. *Tucker*, 404 U.S. at 446-47; *Williams v. New York*, 337 U.S. 241, 246-47 (1949); *Smith v. United States*, 551 F.2d 1193, 1196 (10th Cir.), *cert. denied*, 434 U.S. 830 (1977).

99. *United States v. Rodriguez*, 765 F.2d 1546, 1555 (11th Cir. 1985); *United States v. Otero*, 868 F.2d 1412 (5th Cir. 1989).

100. *Rodriguez*, 765 F.2d at 1555.

101. FED. R. CRIM. P. 32(a)(1).

102. *Id.*

103. *See* 18 U.S.C. § 3552(a)-(b).

104. FED. R. CRIM. P. 32(a)(1).

105. *Id.* at 32(a)(1)(A)-(C).

defendant, or the attorney for the Government in camera.¹⁰⁶

A court's judgment must be signed by the court and entered by the clerk.¹⁰⁷ A judgment of conviction must set forth the plea, the verdict or findings, and the adjudication and sentence.¹⁰⁸ When a verdict contains a finding of property subject to criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.¹⁰⁹

III. DETERMINING RECOMMENDED CORPORATE SENTENCES UNDER THE GUIDELINES

A. Corporate Fines

1. General Standards

Fine-setting analyses under the organizational sentencing guidelines proceed in three phases.¹¹⁰ First, a base fine is determined from factors measuring the seriousness of an organization's offense. Second, that base fine is transformed into a recommended fine range based on the degree of organizational culpability involved in the offense. Third, a sentencing court either selects a fine within the recommended range or imposes a fine outside that range by justifying its departure from the recommended range in terms of sentencing factors not adequately taken into account in the sentencing guidelines.

The base fine for a corporate offender will equal the greatest of (1) a minimum fine determined from the offense level the offender would have received if sentenced under the Commission's sentencing guidelines for individuals, (2) the corporation's pecuniary gain from the offense, and (3) the pecuniary loss resulting from the offense, considering only loss caused intentionally, knowingly, or recklessly.¹¹¹

A base fine determined this way is transformed into a recommended sentence range through the computation of a "culpability score" for the corporate defendant.¹¹² While this score can range from 0 to 10, each corporate defendant begins the analysis at the middle of this range with a score of 5.¹¹³ That score is adjusted upward or downward based on aggravating or mitigating

106. *Id.* at 32(a)(1).

107. *Id.* at 32(b)(1).

108. *Id.*

109. *Id.* at 32(b)(2).

110. See SENTENCING GUIDELINES, *supra* note 1, § 8A1.2(b). The fine-setting process described here applies to offenses by legitimate business corporations. For organizations operated primarily for criminal purposes or by criminal means, sentencing courts are directed by the guidelines to impose "capital punishment"—that is, fines "sufficient to divest the organization of all its net assets." *Id.*, § 8C1.1.

Sentences rendered under these draconian sentencing provisions will probably be infrequent. From 1988 to June 1990, only 3 percent of the organizational defendants in federal courts were criminal purpose organizations subject to these provisions. See Nagel & Swenson, *supra* note 29, at 233 n.138.

111. SENTENCING GUIDELINES, *supra* note 1, § 8C2.4(a)(1)–(3).

112. See *id.* § 8C2.5.

113. *Id.* § 8C2.5(a).

factors indicating high or low organizational culpability. Aggravating factors include the involvement of top corporate managers in an offense¹¹⁴ and past instances of similar corporate misconduct.¹¹⁵ Mitigating circumstances include the adoption of a generally effective law compliance program prior to an offense¹¹⁶ or corporate detection and reporting of an offense to public authorities before officials learn of the offense from other sources.¹¹⁷

Variations in corporate culpability can produce considerable differences in recommended fines for offenses having similar societal impacts. For an offender with the lowest possible culpability score, recommended fines are only 5% to 20% of the base fine for the violation.¹¹⁸ However, for an offender with the highest possible culpability score, recommended fines are 200% to 400% of the base fine.¹¹⁹ Thus, for a fraud offense with intended losses of \$1,000,000 (and lesser gains), the recommended fine for an offender with the lowest culpability score is \$50,000 to \$200,000 while the recommended fine for an offender with the maximum score is \$2,000,000 to \$4,000,000. All these recommended fines are punitive in the sense that they are imposed in addition to restitution and profit disgorgement payments sufficient to deprive an offender of any gains from an offense.¹²⁰

Special fine-setting rules apply to antitrust, bribery and money laundering offenses under the corporate sentencing guidelines. These special standards will tend to make corporate penalties for antitrust and bribery offenses harsher than for other federal offenses, but may reduce penalties for some money laundering and related monetary offenses.

2. Antitrust Offenses

Three special rules apply to fines for antitrust offenses under the corporate sentencing guidelines. The first relates to the determination of victim losses. Unlike most offenses for which victim losses equal the pecuniary losses directly resulting from an offense, antitrust losses are conclusively presumed to be 20 percent of the volume of commerce affected by an antitrust offense.¹²¹ The Commission adopted this loss estimation formula in recognition that antitrust offenses inflict significant losses on both persons who buy affected products and persons who would have bought such products but were deterred by illegally inflated prices.¹²² The Commission arrived at its antitrust loss formula by estimating that the average price inflation from price fixing is about 10 percent of the selling price of affected goods. The Commission concluded that the losses to consumers purchasing goods subject to price fixing were roughly equal to this amount. The Commission then doubled the 10 percent figure to reflect further losses to potential customers who did not buy affected goods, losses which the Commission felt were approximately equal to those

114. *Id.* § 8C2.5(b).

115. *Id.* § 8C2.5(c).

116. *Id.* § 8C2.5(f).

117. *Id.* § 8C2.5(g)(1).

118. *Id.* § 8C2.6.

119. *Id.*

120. *Id.* § 8C2.9.

121. *Id.* § 2R1.1(d)(1).

122. *Id.* § 2R1.1 (application note 3).

suffered by product buyers.¹²³

A second special standard for antitrust offenses applies to the measurement of the volume of commerce affected by bid-rigging offenses. In general, the volume of commerce used in determining antitrust fines is the volume of commerce engaged in by an offender in goods or services that were affected by a violation.¹²⁴ However, for bid-rigging offenses in which an organizational offender submits one or more complementary bids, the corporate sentencing guidelines provide that the volume of commerce used in determining victim losses¹²⁵ and the offense level for the violation¹²⁶ is "the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy."¹²⁷

The third special sentencing standard affecting antitrust offenses is perhaps the most important. It limits the fine reductions that antitrust defendants can obtain for effective law compliance programs and post-offense cooperation with public authorities. For most offenses, these types of desirable corporate actions can bring recommended fines down as low as 5 percent of an offender's base fine.¹²⁸ However, under standards applicable only to antitrust offenses, a recommended corporate fine must at least equal 75 percent of a defendant's base fine. Coupled with the loss-measurement rule above, this means that a corporate antitrust offender will have a recommended fine of at least 15 percent of the commerce affected by its offense,¹²⁹ substantially higher than the 10 percent average gain estimated by the Commission for such an offense.¹³⁰ The Commission concluded that this minimum fine level is needed to insure adequate deterrence of antitrust offenses.¹³¹ At the same time, it claimed that greater sentencing reductions to encourage self-reporting of offenses are not needed since the Department of Justice's amnesty program for organizations that self-report antitrust offenses provides adequate incentives for self-reporting.¹³²

3. Bribery Offenses

Bribery offenses are also governed by special loss-measurement standards under the corporate sentencing guidelines. These standards produce especially severe sanctions for such crimes. In sentencing an organization convicted of commercial bribery, bribery of a public official, bribery affecting an employee welfare plan, or bribery related to union organizing activities,

123. *Id.*

124. *See id.* § 2R1.1(b)(2).

125. *See id.* § 2R1.1(d)(1).

126. *See id.* § 2R1.1(b)(2).

127. *Id.* § 2R1.1(d)(3).

128. *Id.* §§ 8C2.5(f)-(g), 8C2.6.

129. Losses for antitrust offenses are measured at 20 percent or .20 of the volume of commerce affected. *Id.* § 2R1.1(d)(1). Where corporate gains and a base fine determined from the defendant's offense level are not higher, antitrust losses will equal the defendant's base fine. *Id.* § 8C2.4. With a minimum multiplier of .75, *see id.* § 2R1.1(d)(2), this implies a minimum recommended fine for corporate antitrust offenses of (.75)(.20) or .15 of the affected commerce.

130. *See id.* § 2R1.1 (background commentary).

131. *Id.*

132. *Id.*

courts are instructed to ignore pecuniary loss as a basis for the defendant's base fine and instead "use the greatest of: (A) the value of the unlawful payment, (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment."¹³³ This standard recognizes that social losses from bribery offenses often are not limited to the amount of the bribe paid, but rather extend to the value of benefits misallocated to the offender and further harms facilitated by the bribery offense.

The consideration of consequential damages may produce large bribery fines in certain settings. For example, if corporate employees bribe a federal inspector to overlook safety violations in a nuclear power plant and an accident stemming from the concealed violations subsequently produces extensive losses to nearby residents, the company's bribery fine would be determined from those losses rather than the small amount of the bribe paid or the immediate economic value to the company (if any) of violations overlooked in the affected safety inspection.

4. Monetary Offenses

Corporate offenses involving money laundering and monetary transactions derived from illegal activities also are covered by special fine-setting standards in the corporate sentencing guidelines. Instead of considering offense levels for these types of violations, sentencing courts are required to determine base fine candidates directly from the amounts of funds affected by illegal monetary transactions. The percentages of the funds used in determining these base fine candidates vary with the types of offenses involved. For example, if corporate personnel engage in money laundering to conceal the source of proceeds of a serious federal offense, the guidelines provide for a base fine candidate in the amount of \$150,000 or 50 percent of the funds involved, whichever is greater.¹³⁴ This will be the base fine for the offense if it exceeds offender gains and victim losses.¹³⁵

The impact of this distinctive approach to fines for monetary offenses will vary by offense type and size. Sometimes, corporate fines set under this standard will be much less than those recommended under the normal fine-setting standards of the organizational sentencing guidelines. For example, if a monetary laundering offense of the sort described above involves a \$1.2 million transaction, the violation will have an offense level of 25.¹³⁶ Using the fine-setting table normally used to translate offense levels into corporate fines, this corresponds to a base fine candidate of \$2,800,000.¹³⁷ However, using the special standards for monetary offenses, the base fine candidate is 50 percent of

133. *Id.* §§ 2B4.1(c), 2C1.1(d), 2E5.1(c), 2E5.6(c). For the related offenses involving offering or receiving a gratuity, the guidelines provide that the value of the unlawful payment will substitute for victim loss in organizational fine determinations. *Id.* § 2C1.2(c).

134. *Id.* § 2S1.1(c)(1)(D). Similar provisions for special organizational fines apply to monetary transactions in property derived from serious federal offenses. *See id.* § 2S1.2(c). Earlier standards in force between November 1, 1991 and November 1, 1993 included parallel standards for failures to report monetary transactions and failures to file currency and monetary reports. *See* U.S. SENTENCING COMM'N, SENTENCING GUIDELINES MANUAL §§ 2S1.3(C), 2S1.4(C) (1992).

135. *See* SENTENCING GUIDELINES, *supra* note 1, § 2S1.1(c).

136. *Id.* § 2S1.1(a)(2), (b)(2)(F).

137. *Id.* § 8C2.4(d).

\$1.2 million or \$600,000. If offense gains and losses are smaller than this figure (as they typically will be for a money laundering violation), \$600,000 is the base fine. A typical offender with no special culpability characteristics will have a recommended fine of \$600,000 to \$1,200,000 using this base fine rather than the \$2,800,000 to \$5,600,000 range recommended under normal guideline standards. Obviously, for this size and type of transaction, the special fine-setting standards for money laundering offenses produce a much lower corporate fine than those imposed for other corporate crimes with similar offense levels.

However, in a few cases, the special standards for money laundering offenses may produce fines that are higher than would be the case under normal standards. For example, assume that a corporate employee conducts a \$50 million money laundering transaction like that described above. The offense level for this crime is 31.¹³⁸ This corresponds to a base fine candidate of \$13.5 million under normal corporate sentencing standards.¹³⁹ However, under the special standards for monetary offenses, the base fine is 50 percent of \$50 million or \$25 million.¹⁴⁰ Here, the special standard for monetary offenses produces a far larger fine than for other corporate offenses with similar offense levels.

5. *The Impact of Organizational Culpability*

Organizational culpability often has an enormous impact on corporate fines recommended under the corporate sentencing guidelines. The full scope of this impact is best appreciated from some examples of variations in fines that high and low culpability can produce. The following discussion describes the recommended fines for several alternate versions of a corporate violation of the federal Fraud and False Statements Act.¹⁴¹

Assume that the defendant corporation in this hypothetical case is a government contractor with no history of convictions. The firm was convicted based on misstatements by one of its employees to government negotiators. These misstatements described fabricated vendor quotes for material costs. Because of these misstatements, government officials negotiated a contract with the firm that cost the government \$1,000,000 more than it would have paid had it possessed accurate cost information. The corporate base fine for this offense equals the \$1,000,000 excess price.¹⁴² This base fine reflects the inherent seriousness of the offense for purposes of the guidelines. The sentencing variations described below reflect differences in corporate fines based on variations in corporate organizational culpability as measured under the guidelines.

High Culpability Offender: Assume that the division of the contractor involved in the offense had 5000 employees and that the senior manager of the division did not inquire into the accuracy of cost information being supplied to

138. *Id.* § 2S1.1(a)(2), (b)(2)(L).

139. *Id.* § 8C2.4(d).

140. *Id.* § 2S1.1(c)(1)(D).

141. 18 U.S.C. § 1001.

142. Since the negotiation of an elevated price was the object of the offense, government losses in the form of contract overpayments were intended losses. Thus, the base fine for the offense is the full amount of those intended losses. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.4(a)(3).

the government despite having received earlier reports that corporate personnel were fabricating cost reports in disclosures to government negotiators. The firm had no substantial law compliance program and resisted government investigation and prosecution of the offense.

The corporation receives a culpability score of 10 under the guidelines (an initial 5 points plus 5 more for willful ignorance of the offense by a manager of a division having 5,000 or more employees).¹⁴³ This corresponds to fine multipliers of 2.00 to 4.00 and a recommended fine range of \$2,000,000 to \$4,000,000.¹⁴⁴ The guidelines recommend that the firm be required to pay a fine in this range in addition to being compelled to disgorge any illegal profits from the offense and to provide restitution to the government for any losses resulting from the offense.¹⁴⁵

High Culpability Offender With Post-Offense Cooperation: Assume the same facts as before, but after government discovery of the offense, the corporation pled guilty and cooperated with government investigators. The firm's culpability score is 8 points (5 points plus 5 more for the division manager's willful ignorance of the offense minus 2 points for the corporation's guilty plea and cooperation).¹⁴⁶ This corresponds to fine multipliers of 1.6 to 3.2 and a recommended fine of \$1,600,000 to \$3,200,000.¹⁴⁷

Typical Offender: Assume now that the corporate division manager had no knowledge of the offense or related misconduct and that there was no managerial involvement in the offense. However, the firm had no substantial law compliance program. The corporation resisted the government's investigation and prosecution of the offense, provided no post-offense cooperation with authorities and displayed no recognition of guilt.

A firm with these characteristics matches the guidelines' notion of a typical offender—i.e., a corporate defendant with neither mitigating nor aggravating culpability features.¹⁴⁸ Such a firm has a culpability score of 5.¹⁴⁹ This corresponds to fine multipliers of 1.0 to 2.0 and a recommended fine of \$1,000,000 to \$2,000,000.¹⁵⁰

Offender With a Weak Compliance Program: Assume now that the corporate project manager for the item being sold to the government participated in the offense, but there was no other managerial knowledge or involvement. The company had a substantial compliance program, but did not detect the instant offense. Upon outside detection of the offense in a government audit, counsel for the company conducted a privileged investigation of the offense. The corporation publicly recognized its responsibility for the offense and pled guilty, but did not provide the government with information gathered in its internal investigation.

This corporation receives a culpability score of 4 (5 points minus 1 point for the firm's recognition of responsibility for the offense without further

143. *Id.* § 8C2.5(a), (b)(1)(A)(i).

144. *Id.* § 8C2.6.

145. *See id.* § 8C2.9.

146. *Id.* § 8C2.5(a), (b)(1)(A)(i), (g)(2).

147. *Id.* § 8C2.6.

148. *See id.* § 8C2.5.

149. *Id.* § 8C2.5(a).

150. *Id.* § 8C2.6.

cooperation).¹⁵¹ The firm receives no culpability score reduction for its compliance program because of the rebuttable presumption that the program was inadequate in light of the involvement in the offense of substantial authority personnel (i.e., the project manager).¹⁵² Furthermore, it receives no reduction for its internal investigation of the offense since it did not share the results with government authorities. With a culpability score of 4, the fine multipliers are .80 to 1.60 and the recommended fine is \$800,000 to \$1,600,000.¹⁵³

Model Offender With an Effective Compliance Program: Assume now that no managers were involved in the offense. The corporation had a generally effective compliance program, although corporate personnel did not detect the instant offense. However, once the offense came to the attention of law enforcement officials, the firm cooperated fully with the resulting investigation, recognized corporate responsibility for the offense, and pled guilty.

Under these circumstances the firm receives a culpability score of 0 (5 minus 3 points for its effective compliance program and minus another 2 points for its guilty plea and cooperation).¹⁵⁴ This corresponds to fine multipliers of .05 to .20 and a recommended fine of \$50,000 to \$200,000.¹⁵⁵

Model Offender With No Compliance Program, But an Effective Post-Offense Response: Assume again that the offense entailed no managerial involvement. The corporation had no compliance program (or one that did not qualify as an effective program under the guidelines). However, by aggressively investigating internal reports of misconduct, corporate managers detected the offense ahead of public authorities. They reported the offense to law enforcement officials, cooperated fully with the ensuing investigation by public authorities and pled guilty.

Under these circumstances the firm again receives a culpability score of 0 (5 minus 5 points for its reporting of the offense, cooperation with investigative personnel, and guilty plea).¹⁵⁶ This corresponds to fine multipliers of .05 to .20 and a recommended fine of \$50,000 to \$200,000.¹⁵⁷

B. Other Corporate Sentences

In addition to fines determined under these standards, the organizational sentencing guidelines authorize several other types of sentences aimed at remedying offense harms and preventing further offenses.

A restitution order is the simplest form of remedial sentence authorized under the guidelines.¹⁵⁸ Sentencing courts are instructed to order restitution for all corporate offenses, except where determination of victim injuries will significantly delay or otherwise impair the sentencing process.¹⁵⁹ If the present resources of a corporate defendant are inadequate to pay restitution, the future

151. *Id.* § 8C2.5(a), (g)(3).

152. *See id.* § 8C2.5(f).

153. *Id.* § 8C2.6.

154. *Id.* § 8C2.5(a), (f), (g)(2).

155. *Id.* § 8C2.6.

156. *Id.* § 8C2.5(a), (g)(1).

157. *Id.* § 8C2.6.

158. *Id.* § 8B1.1; see generally Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 267-89 (1993).

159. SENTENCING GUIDELINES, *supra* note 1, § 8B1.1.

earning capacity of the firm can be harnessed as well by ordering deferred payments spread over a term of up to five years.¹⁶⁰

Other remedial sanctions are also authorized. A court may order a corporate defendant to provide victims with notices about its criminal conduct to promote civil claims or other remedial actions.¹⁶¹ Where the identity of victims is unclear or where the full extent of harm from an offense cannot be determined at sentencing, a court can fashion remedial orders obligating a corporate offender to take actions likely to prevent or reduce harm stemming from an offense.¹⁶² Similarly, where a convicted organization possesses knowledge, facilities, or skills that uniquely qualify organization personnel to repair damage caused by an offense, a sentencing court can order the organization to undertake remedial community service.¹⁶³

The Sentencing Reform Act also authorizes several forms of sentences aimed at preventing further offenses. These include sentences providing for 1) mandatory publicity by a corporate offender about its offense to encourage heightened monitoring of subsequent corporate behavior in private relationships,¹⁶⁴ 2) court-ordered law compliance programs for firms having 50 or more employees that have not adopted such programs before sentencing,¹⁶⁵ and 3) additional compelled reforms in law compliance practices where the nature of a firm's offense, as measured from a pattern of similar offenses, the involvement of high-level officials, or other factors, shows that changes to reduce the likelihood of future criminal conduct are needed.¹⁶⁶

IV. THE IMPACT OF THE GUIDELINES ON CORPORATE CRIMINAL LIABILITY

While a full assessment must await prosecutions and sentences under the guidelines, some of the probable impacts of the organizational sentencing guidelines are recognizable now. The guidelines will influence the activities of prosecutors, potential corporate defendants, and individual corporate employees. They will affect the number, character, and resolution of corporate criminal prosecutions by increasing the attractiveness of each prosecution to authorities and the powers of federal prosecutors in resolving corporate charges. They will also increase and reshape the steps corporations use to avoid criminal prosecutions and to defend against such actions. The guidelines may also alter relationships between corporate employers and employees, making the former increasingly an agent of law enforcement personnel and thereby raising new tensions in intra-corporate investigations of employee misconduct.

160. *See id.* §§ 8D1.1(a)(2), 8D1.4(b).

161. SENTENCING GUIDELINES, *supra* note 1, § 8B1.4; *see generally* Gruner, *supra* note 158, at 295-97.

162. SENTENCING GUIDELINES, *supra* note 1, § 8B1.2; *see generally* Gruner, *supra* note 158, at 289-92.

163. SENTENCING GUIDELINES, *supra* note 1, § 8B1.3; *see generally* Gruner, *supra* note 158, at 292-95.

164. SENTENCING GUIDELINES, *supra* note 1, § 8D1.4(a); *see generally* Gruner, *supra* note 158, at 320-24; Andrew Cowan, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992).

165. SENTENCING GUIDELINES, *supra* note 1, §§ 8D1.1(3), 8D1.4(c); *see generally* Gruner, *supra* note 158, at 298-320.

166. SENTENCING GUIDELINES, *supra* note 1, §§ 8D1.1(4)-(6), 8D1.4(c); *see generally* Gruner, *supra* note 158, at 298-320.

A. Prosecutorial Impacts

1. Increased Numbers of Prosecutions

One change likely to flow from the new corporate sentencing guidelines is an increase in the number of corporate criminal prosecutions brought to deter and remedy corporate misconduct.¹⁶⁷ Deterrents and remedies available through corporate prosecutions are expanded significantly under the guidelines. Prosecutors who might have decided to forgo a criminal action against a corporate employer in the past because only a small sentence and weak deterrence would result may choose to prosecute now that larger penalties are likely. Similarly, the availability of broader remedial sanctions like criminal restitution and remedial orders may increase prosecutorial interest in corporate prosecutions that might have been passed up before.

If prosecutors already have decided to prosecute individuals for an offense committed in a corporate context, they may find it easy to add a further corporate count. Under federal standards, if an individual employee's guilt can be established, prosecutors need only show that the individual was acting within the scope of her employment and for corporate benefit to establish the criminal liability of her corporate employer as well.¹⁶⁸ Hence, if they perceive an advantage in imposing punitive or remedial sanctions available under the corporate sentencing guidelines, federal prosecutors may be likely to add corporate counts when individual corporate employees are indicted.¹⁶⁹

Individual indictments probably will increase under the corporate sentencing guidelines as well. Substantial sentence reductions available to firms that reveal internally detected crimes to federal prosecutors or that cooperate with prosecutors in identifying individuals responsible for a crime should bring prosecutors more information on individual offenses within corporate organizations than ever before. Additional sentence reductions available to firms that aid in the investigation of criminal conduct by parties outside their organizations may cause individual offenders and their firms to be turned in by their competitors or their co-conspirators more and more frequently.

Corporate prosecutions are also likely to increase for reasons unrelated to the corporate sentencing guidelines. Several current trends in white collar crime investigations and prosecutions should expand the information on corporate crimes available to prosecutors. Disgruntled former employees are increasingly disclosing past crimes by coworkers to gain revenge against their old firms. Individual corporate employees targeted for federal prosecution are seeking to minimize their punishment by disclosing other corporate misconduct

167. One observer has noted, with some cynicism, that "[f]or many prosecutors the guidelines will doubtless be seen as offering opportunities, rather than imposing burdens—particularly, the chance to make headlines with mega-fines imposed on prominent corporate defendants." Stanley S. Arkin, *Corporate Sentencing Guidelines*, N.Y.L.J., June 13, 1991, at 3.

168. See, e.g., *United States v. A&P Trucking Co.*, 358 U.S. 121, 125 (1958); *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

169. Of course, the addition of a corporate count may change the difficulty of a prosecution by causing the corporate defendant to commit more resources to defending itself and its employee against liability.

and aiding prosecutors in pursuing it.¹⁷⁰ *Quo tam* legislation is encouraging prosecutions for false monetary claims against the federal government by providing substantial bounties (sometimes in the multi-million dollar range) to employee-witnesses who reveal such offenses. In each of these types of cases, federal prosecutors often have the opportunity to add corporate counts to the indictments of responsible individuals. Given the substantial deterrent and remedial sanctions available under the organizational sentencing guidelines, prosecutors may often decide in favor of corporate prosecutions.

2. Expanded Scope of Prosecutions

When a corporate prosecution is initiated, the new sentencing guidelines may significantly expand the scope of proof presented. Changes are likely in the number of counts charged and in the range of information proven in connection with each count.

The fine-setting provisions of the corporate sentencing guidelines create strong incentives for multiple-count prosecutions. While the guidelines recommend high fines for many offenses, these recommendations are subject to the limit that they cannot exceed the statutory maximum fines for the offenses proven. Often, the maximum fine authorized by statutes for an offense is less than the fine recommended under the guidelines for the same offense. However, statutory fine limits are imposed per offense. Through prosecution and conviction of a firm for multiple offenses, the per offense limits are aggregated and often grow to exceed recommended fines under the guidelines. Hence, prosecutors seeking maximum penalties and deterrents may tend to bring multiple count corporate indictments in situations where they might have pursued fewer counts in the past.

For example, the statutory limit on corporate fines for most federal felonies involving modest gains and losses is \$500,000.¹⁷¹ For federal felonies involving gains or losses over \$250,000, the applicable per offense maximum is twice the gains or losses, whichever is larger.¹⁷² In many instances, however, the guidelines recommend maximum sentences beyond these amounts. Thus, for a fraud offense involving top corporate executives and netting a firm \$1,000,000 in illegal profits, the maximum fine allowed by statute is \$2,000,000, while the recommended fine range under the guidelines is \$2,000,000 to \$4,000,000.¹⁷³ However, if the misconduct involved eight or more fraudulent acts sufficient to support prosecutions for as many as eight counts of fraud, then the statutory maximum is \$4,000,000 (eight times the per offense maximum of \$500,000) and a fine up to the maximum level recommended under the guidelines can be imposed. If the nature of corporate criminal conduct gives prosecutors some choice about the number of counts to bring, the interplay between present statutory fine maximums and the

170. See Stanley S. Arkin & Jeffrey M. Kaplan, *Broader Ramifications of the New Organizational Sentencing Guidelines* (Mar. 1992), reprinted in STANLEY S. ARKIN, *BUSINESS CRIME* (1992).

171. See 18 U.S.C. § 3571(c)(3).

172. See *id.* § 3571(d).

173. The recommended fine under the guidelines in this case reflects a base fine equal to the corporation's illegal gain, elevated to a range of 2 to 4 times the base fine to reflect the company's culpability as indicated by the involvement of top executives. See SENTENCING GUIDELINES, *supra* note 1, §§ 8C2.5(b), 8C2.6.

provisions of the federal sentencing guidelines will encourage prosecutors to charge and prove more counts than would otherwise be the case.

Even for a single count, the corporate sentencing guidelines will alter the type of proof presented against a corporate defendant. Proof at trial will not only include evidence concerning the substantive elements necessary to establish corporate criminal liability, but will also extend to several further topics relevant to sentencing determinations. Specifically, the identities of crime victims and the scope of their losses will be relevant to corporate sentences in every case, leading prosecutors to present evidence and sentencing courts to make findings on subjects like these that often would have been overlooked before.

Not only will corporate defendants find themselves contesting factual findings on these issues more often, corporations may be strongly encouraged to stipulate to offense loss figures as part of plea bargains. Facing large corporate fines as an alternative, firm managers may be willing to stipulate to victim loss amounts in a plea bargain that they would have otherwise contested in civil damage suits. Therefore, the plea bargaining process may become an indirect aid to crime victims who will benefit from enlarged restitution orders or collateral estoppel advantages in later damage actions.

3. Changing Patterns of Prosecutorial Discretion

The corporate sentencing guidelines, like their counterparts for individual sentencing, give federal prosecutors significant control over sentencing results. Prosecutorial discretion affects corporate sentences under the guidelines in several ways. First, and perhaps most importantly, prosecutors have the discretion to withhold a corporate prosecution based on low corporate organizational culpability in an offense. The guidelines suggest key criteria prosecutors may wish to consider in making this determination. These include the absence of managerial involvement in an offense, corporate efforts to prevent like offenses, and cooperation by corporate managers in the reporting and investigation of individuals responsible for an offense. Federal prosecutorial standards for environmental crimes already recognize that corporate prosecutions should sometimes be withheld on such grounds.¹⁷⁴ Commentators have argued strenuously that immunity from corporate prosecutions based on employee offenses should be a universal reward for aggressive law compliance efforts.¹⁷⁵ The availability of such an exemption from corporate criminal liability would probably induce greater managerial enthusiasm for the sorts of aggressive law compliance programs and offense reporting mechanisms that—absent a liability exemption—might do as much harm to a firm as good by triggering liability that would otherwise have been overlooked. If prosecutors can be relied upon to withhold corporate charges and corporate managers are confident that cooperation with authorities will avoid the stigma and financial penalties associated with corporate charges and convictions, extensive corporate cooperation in the identification and investigation of individual offenders will

174. See U.S. DEP'T OF JUSTICE, *FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR* (July 1, 1991).

175. See, e.g., JAY S. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION* (1988).

be encouraged.

Second, prosecutors often have some discretion about the particular charges brought against a corporate defendant. The choice of criminal charges can affect a firm's sentence in several ways. Prosecutors can insure that corporations are sentenced outside the organizational sentencing guidelines by only bringing charges less serious than the felony and Class A misdemeanors addressed by the guidelines. Where several types of felonies or Class A misdemeanors are potentially chargeable, prosecutors sometimes can influence corporate sentences by charging offenses with low offense levels. As mentioned before, choices by prosecutors about the number of offenses charged may determine whether statutory fine limits constrain corporate fines. The selection of charges may affect the range of corporate gains relevant to a firm's sentence. Finally, choices among charges may affect the range of victims whose injuries are relevant in sentencing and thereby influence the size of victim losses considered. The scope of victim losses identified in sentencing analyses may affect the magnitude of corporate fines, the amount of restitution orders, and the nature of loss findings available for use by civil litigants in later litigation.

B. Corporate Impacts

The corporate sentencing guidelines seem likely to produce three types of changes in corporate law compliance efforts. First, the guidelines will focus new managerial attention on law compliance programs. Second, the guidelines will influence the targeting of law compliance programs and investigations. Third, the guidelines will create new incentives and adversarial relationships concerning post-offense responses to criminal conduct in corporate organizations.

The guidelines provide two types of encouragement for firms to adopt law compliance programs. The most compelling incentives are simply the enormous criminal fines at stake under the guidelines and the corresponding gains an effective compliance program can bring by preventing offenses and avoiding large corporate fines. By increasing the economic benefits gained by avoiding particular crimes, the guidelines increase the range of cost effective crime prevention measures in corporate law compliance programs. This message has not been lost on corporate executives. Law compliance programs are enjoying a resurgence of interest in large firms because of the draconian fines and penalties threatened under the corporate sentencing guidelines.¹⁷⁶ The guidelines create another, more subtle reason for new attention to corporate law compliance programs. Corporate culpability assessments under the guidelines provide a substantial fine reduction to a corporate offender that operate a generally effective law compliance program at the time of an

176. One commentator has suggested that the failure of corporate directors to implement a compliance plan meeting requirements of the guidelines may constitute gross negligence, either because of the potential fine reductions at stake or because of the ability of such programs to reduce levels of criminal conduct, see *Sentencing Guidelines Heighten Need to Pay Serious Attention to Whistleblowers' Allegations*, CORP. COUNS. WKLY. (BNA), Mar. 25, 1992, at 8. Similarly, corporate counsel's failure to advise corporate clients about compliance programs may amount to professional malpractice. See *id.*; *Keeping the Long Arm of the Law at Arm's Length*, BUS. WEEK, Apr. 22, 1991, at 104 (quoting John C. Coffee, Jr., Professor of Law, Columbia University).

offense.¹⁷⁷ This means that, even if a compliance program is not wholly successful and an offense slips through, the firm involved will still gain a substantial sentence reduction and financial reward if its program was generally effective.

The guidelines describe many of the necessary features of acceptable law compliance systems,¹⁷⁸ thereby providing a road map for the construction of such systems. The guidelines also suggest some criteria for targeting these systems. By defining offenses involving top executives or repeated misconduct as particularly severe for sentencing purposes, the guidelines suggest that such offenses ought to be primary focuses of corporate law compliance programs. Similarly, by increasing fines based on offense gains, losses, and the further offense features that raise offense levels for particular types of offenses, the guidelines suggest that these gains, losses and crime features influencing offense levels should be considered in identifying primary targets for compliance programs.

Post-offense responses by corporate managers also are likely to be transformed by the corporate sentencing guidelines. Once managers detect an offense by a corporate employee, they can significantly reduce their firm's sentence by reporting the offense to public authorities and by cooperating with the subsequent investigation of the offense by public officials.¹⁷⁹ However, to gain the maximum sentencing benefits from a post-offense response, corporate managers must detect and report an offense to authorities before officials learn of the offense from another source.¹⁸⁰ This implies three types of changes that are likely to result in corporate post-offense responses. First, once they receive a hint of possible corporate misconduct, managers will be more likely to quickly investigate to determine the scope of misconduct as early as possible.¹⁸¹ Second, because speed is important, decisions about how to respond to detected misconduct, including whether to report it to public authorities, will tend to be made under crisis conditions with corresponding pressures and potential for poor management decisions.¹⁸² Established techniques for "crisis manage-

177. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.5(f).

178. See *id.* § 8A1.2 (application note 3(k)).

179. *Id.* § 8C2.5(g).

180. See *id.* § 8C2.5(g)(1).

181. Beyond just the self-reporting advantages of this course, affirmative investigation of misconduct reports and actions to stop any ongoing misconduct found will avoid the implication that managers tolerated the reported misconduct. Where corporate managers tolerate illegal conduct by subordinates, the sentencing guidelines provide for enhanced corporate fines. See *id.* § 8C2.5(b).

182. While the contexts vary, corporate crises—including the aftermath of a criminal offense—have certain shared characteristics. See generally PAUL SHRIVASTAVA, *MANAGING INDUSTRIAL CRISES* 28–31 (1987).

Some similarities among corporate crises stem from the extreme threat posed to the businesses involved. Fear over the consequences of a crisis can cause managers to deny its existence for as long as possible and to be paralyzed or slow to act when they do appreciate the danger to their firm.

Another shared feature in corporate crises is the frequent lack of pre-existing policies or practices to guide a crisis response. Because they are, by definition, somewhat unexpected, corporate crises are seldom addressed in corporate planning. This means that managers responding to a crisis frequently must start from scratch in formulating and evaluating potential corporate responses. Their decision-making task is made even worse by the speed with which crisis response decisions often must be made.

Finally, crisis responses typically are based on partial or uncertain information. Because the time for new information gathering is short, crisis responses are often misguided because

ment"¹⁸³ are likely to aid firms in quickly formulating their best responses to internal offenses.¹⁸⁴ Third, because firms must be the first to report misconduct in order to gain full sentencing benefits, managers will be encouraged to establish strong whistleblower programs to insure that employees with information about internal corporate misconduct bring this information to management's attention as soon as possible. Where a company either does not have a whistleblower program or employees fear retaliation or inaction upon reporting misconduct, an employee wishing to report and stop misconduct may simply contact public authorities directly, thereby precluding the firm from gaining the maximum possible sentence reduction for its post-offense response. If firm managers wish the opportunity to be first to reveal misconduct to public authorities, they will need to keep channels of communication from operating employees open through whistleblower programs with high visibility and integrity. They will also need to follow through on these programs with vigorous investigative responses to misconduct reports.

C. Employment Impacts

As a corollary to probable changes in the post-offense responses of corporate managers, the corporate sentencing guidelines are likely to alter relationships between corporate employers and employees in connection with offenses within corporate organizations. These changes are consequences of the new law enforcement roles envisioned for firms and managers under the guidelines.

Several types of conduct encouraged by the guidelines will strain relations between employees and managers. Firms may frequently report individual offenders to public authorities to gain the significant corporate sentencing benefits for such reporting under the new guidelines. Firms adopting such a practice are likely to increase adversarial confrontations with employees.¹⁸⁵ Low-level employees may be particularly suspicious of the goals of internal investigations of misconduct since the sentencing guidelines create strong motivations for corporations to blame offenses solely on low-level operating personnel, thereby avoiding the substantial fine increases applied to

they are based on erroneous factual assumptions. In some cases, managers inadvertently rely on erroneous information originating in rumors about the crisis, thereby further diverting their firm's crisis response from the real problems to be solved.

183. While the notion of affirmatively managing something as unexpected as a corporate crisis may seem counterintuitive, crisis management techniques include methods for responding to corporate crises that help overcome information limitations and maximize management control over crisis outcomes even if they do not fully determine those outcomes.

For overviews of crisis management techniques and their relationship to broader corporate management measures, see Richard E. Hayes, *Corporate Crisis Management As Adoptive Control*, in CORP. CRISIS MGMT. 21 (S. Andriole ed., 1985); Ian I. Mitroff, *Crisis Management: Cutting Through the Confusion*, SLOAN MGMT. REV., Winter 1988, at 15.

184. For discussions of the ways crisis management techniques can improve post-offense responses by corporate managers, see Richard S. Gruner, *Reducing Corporate Criminal Liability Through Post-Offense Responses*, in ALL-ABA, ORGANIZING FOR CORPORATE COMPLIANCE 159 (1992); Harvey L. Pitt & Karl A. Groskaufmanis, *Current Climate Calls for Crisis Planning*, NAT'L L.J., May 25, 1992, at 20.

185. See Winthrop M. Swensen & Nolan E. Clark, *The New Federal Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, CORP. CONDUCT Q., Winter 1991, at 1, 3.

offenses involving top managers.¹⁸⁶

Internal investigations of misconduct will be increasingly adversarial, in part because employees will be at risk of greater internal corporate penalties. The corporate sentencing guidelines encourage employers to impose harsh discipline on employees for illegal conduct. Such discipline is an essential component of an effective law compliance program under the guidelines.¹⁸⁷ Firms will tend to impose substantial internal discipline once investigations reveal illegal conduct or similar behavior. Such responses will insure that the disciplinary features of company compliance programs pass muster and justify a fine reduction.¹⁸⁸ In addition, the guidelines suggest that firms must take precautions to avoid delegating substantial management authority to persons with a propensity to engage in illegal activities.¹⁸⁹ This means that firms have strong incentives to transfer or avoid promoting employees found to have engaged in illegal conduct or indicating a willingness to undertake such conduct. By so limiting the job responsibilities of employees exhibiting a higher than usual likelihood of misconduct, firms can insure that such employees do not subsequently wield significant managerial power. However, if employees feel that disclosures about their own conduct will be grounds for harsh internal penalties like these, they will be unlikely to cooperate with corporate investigations. Their coworkers may also refuse to cooperate out of sympathy for the responsible individuals.

Even more than the increased threat of internal discipline, the probable external consequences of an internal investigation will make the relationship between an employee suspected of misconduct and his corporate employer inherently adversarial.¹⁹⁰ Given the rewards available for self-reporting of offenses to public authorities, firms conducting internal investigations of illegal misconduct will often do so with an aim toward using investigative results in offense reports to authorities. However, these reports will clearly be against the interest of the individual employees who are the targets of the investigation. Therefore, the corporation must approach the investigation as one between adversaries, not confederates.

The adversarial nature of these investigations will affect not just the tone of the inquiries, but also the role of counsel. Counsel interviewing employees who are targets of an internal investigation of criminal conduct will need to point out that statements made to internal investigators may be passed on to public authorities to advance corporate interests. Absent such a warning, interviewees will have insufficient notice of the potential (indeed, probable) divergence between corporate and employee interests regarding later disclosures of incriminating evidence.¹⁹¹

Firms and employees targeted in investigations may have some difficulty in reconciling their adverse positions and cooperating in an investigation. One solution may be a joint defense agreement under which a corporation and its

186. See Samuel R. Miller & Daniel E. Kritz, *Detection of Corporate Criminal Liability: A Not-So-Bright Idea?*, RECORDER, Mar. 12, 1992, at 6.

187. See SENTENCING GUIDELINES, *supra* note 1, § 8A1.2 (application note 3(k)(6)).

188. See *id.*

189. See *id.* § 8A1.2 (application note 3(k)(3)).

190. See Miller & Kritz, *supra* note 186, at 6.

191. David M. Zornow & Benjamin B. Klubes, *The New Organizational Sentencing Guidelines*, AM. LAW., Mar. 1992, at 8.

employee agree on joint positions to be taken in defending criminal charges. However, such an agreement may be problematic under the corporate sentencing guidelines. A firm wishing to retain the option of reporting an offense and cooperating with prosecutors will not wish to constrain those options through a joint defense agreement. On the other hand, such an agreement may be advantageous if firm managers wish to defend against corporate criminal charges while discouraging the individual employee involved from providing cooperation to the government.

If corporate managers wish to retain their self-reporting options, they may be forced to forgo the cooperation of employees suspected of misconduct. In such situations, corporate managers investigating reports of illegal conduct often will need to rely on information from the coworkers of a suspected employee. However, if those coworkers empathize with the target of the investigation, they may lie or otherwise refuse to cooperate with the investigation in order to protect their fellow employee. Firms wishing to conduct effective investigations of internally detected misconduct may need to enforce "talk or walk" policies as conditions of employment, potentially leading to wrongful termination suits when these policies are enforced against reluctant witnesses.¹⁹²

Not only will some employees not be willing to cooperate with management-initiated investigations, they may be equally unwilling to bring misconduct to the attention of corporate managers if severe consequences for fellow workers are likely to result. This type of thinking is already present in some corporate workforces where cynics have labeled corporate whistleblower hotlines as "snitchlines" and "ratlines."¹⁹³ The guidelines assume that corporate managers can serve as both "father confessors" and "secret police" with respect to offenses by corporate employees, a difficult if not impossible combination to maintain.¹⁹⁴

V. CONSTITUTIONAL AND STATUTORY LIMITS ON CORPORATE SENTENCING

A. Constitutional Constraints on the Sentencing Commission

Constitutional issues concerning the authority of the United States Sentencing Commission to issue corporate sentencing guidelines are largely settled following the Supreme Court's consideration of similar constitutional questions in *Mistretta v. United States*.¹⁹⁵ In *Mistretta*, the Court upheld the constitutionality of the Commission's sentencing guidelines for individual offenders.¹⁹⁶ The discussion below summarizes the Court's analysis in *Mistretta* and then goes on to consider several constitutional questions regarding corporate sentencing that the Court did not fully resolve in *Mistretta*.

192. See *Special Report: Organizational Prosecutions Present New High-Stakes Game*, SEC. REG. L. REP. (BNA), Feb. 21, 1992, at 239 (comment of Richard A. Sauber of Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C.).

193. Barnaby J. Feder, *Helping Corporate America Hew to the Straight and Narrow*, N.Y. TIMES, Nov. 3, 1991, at 5.

194. David M. Zornow & Benjamin B. Klubes, *The New Organizational Sentencing Guidelines*, AM. LAW., Mar. 1992, at 8.

195. 488 U.S. 361 (1989).

Mistretta presented several constitutional challenges to the Commission's sentencing guidelines for individuals. The case followed a period of near chaos in federal sentencing. After the Sentencing Commission's sentencing guidelines for individuals became effective on November 1, 1987, numerous federal courts reviewed the constitutionality of those guidelines, with varying results. By the summer of 1988, over 200 district courts had ruled the guidelines unconstitutional on various grounds, while another 120 judges had upheld the guidelines.¹⁹⁷ To resolve the confusion and disparity in sentences this conflict was producing, the Supreme Court granted a petition for certiorari before judgment in *Mistretta*. The Court authorized this extraordinary expedited appeal due to the "imperative public importance" of the federal sentencing issues raised and the disarray among sentencing courts.¹⁹⁸

Mistretta involved two types of constitutional challenges to the guidelines. First, Congress' deferral to the Sentencing Commission for the drafting of sentencing guidelines was claimed to be an excessive delegation of legislative powers. Second, the Commission's composition was challenged as failing to maintain an adequate separation of powers.

In rejecting *Mistretta's* assertion that Congress unconstitutionally delegated authority to the Sentencing Commission, Justice Blackman, writing for an eight-member Court majority, relied on the standard for permissible delegation of rule-making powers set forth in *J.W. Hampton, Jr. & Co. v. United States*.¹⁹⁹ There the Court noted that: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."²⁰⁰ A sufficient "intelligible principle" is present where Congress defines the general policy that the public entity is to promote in exercising its authority.²⁰¹

Applying this standard to the Commission, the Court found that Congress gave sufficient direction to the Commission regarding sentencing guideline drafting. It noted that the Sentencing Reform Act of 1984 which created the Commission contained detailed provisions setting out "a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories."²⁰² In the Court's view, "'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the [Sentencing Reform] Act."²⁰³

In a strongly worded dissent, Justice Scalia argued that the majority had mistakenly framed the delegation inquiry. For Scalia, the important question was not the degree of direction Congress provided to the Commission, but

196. *Id.* at 412.

197. Nagel, *supra* note 13, at 906.

198. *Mistretta*, 488 U.S. at 371.

199. 276 U.S. 394 (1928), *cited in Mistretta*, 488 U.S. at 372.

200. *Hampton*, 276 U.S. at 409.

201. *Mistretta*, 488 U.S. at 372-73 (citing *American Power & Light Co. v. SEC*, 298 U.S. 90, 105 (1946)).

202. *Id.* at 377.

203. *Id.* at 379 (quoting *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).

rather the character of the power it delegated.²⁰⁴ Since the sentencing guidelines reflect "basic policy decisions" regarding sentencing, and these sorts of decisions are generally made in the legislative branch, the authority to enact them was a legislative power in Justice Scalia's view.²⁰⁵ Delegating that power to the Commission made it, in his words, "a sort of junior-varsity Congress."²⁰⁶ He concluded that no delegation of legislative power was constitutionally permissible and, hence, that the sentencing guidelines were improperly promulgated.

Separate from these objections to the Commission's delegated powers, *Mistretta* raised three distinct separation of powers issues. The defendant asserted the Commission was improperly constituted due to: 1) its placement in the Judicial Branch, 2) the requirement that federal judges sit as members, and 3) the exposure of these judges to the removal power of the President. The Court rejected all of these claims.

The Court found that the placement of the Commission in the Judicial Branch was a proper means for carrying out the traditionally judicial function of sentencing.²⁰⁷ It analogized the sentencing rules produced by the Commission to judicially promulgated rules of civil procedure and other rules issued by judicial bodies like the Judicial Conference of the United States, the Rules Advisory Committees, and the Administrative Office of the United States Courts. Although these earlier rules were generally procedural while the sentencing guidelines were generally substantive, the Court did not view this as a meaningful distinction for purposes of separation of powers analyses. It rejected the notion that substantive sentencing guidelines issued by the Commission were produced through a process that was any more political than the processes governing judge-made rules previously upheld by the Court.

The Court found *Mistretta's* other separation of powers arguments equally unpersuasive. It noted that service by judges on the Commission was comparable to other forms of extra-judicial court service upheld in the past. It concluded that the presence of judges on the Commission was not objectionable because it did not undermine the integrity of the federal courts, affect a serving judge's subsequent ability to impartially conduct sentencing analyses, reduce the impartiality of the judicial branch, or entail the sharing of judicial powers with non-judges.²⁰⁸ The Court also rejected the claim that the President's power to remove judges from their positions on the Sentencing Commission gave the President impermissible sway over judicial activities. The Court regarded this threat to judicial impartiality as simply too small, seeing "no risk that the [Sentencing Reform] Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies."²⁰⁹

After *Mistretta*, several federal courts have considered additional due process challenges to the sentencing guidelines.²¹⁰ Some defendants have

204. *Id.* at 413-27 (Scalia, J., dissenting).

205. *Id.* at 415, 416-22 (Scalia, J., dissenting).

206. *Id.* at 427 (Scalia, J., dissenting).

207. *Id.* at 384-97.

208. *Id.* at 404-08.

209. *Id.* at 408-11.

210. See generally Gerald Bard Tjoflat, *A Practical Look At the Sentencing Provisions of S. 1722*, 72 J. CRIM. L. & CRIMINOLOGY 555 (1981) (outlining possible due process attacks

asserted that the guidelines require federal courts to impose sentences that are insufficiently tailored to the individual circumstances of particular defendants to meet due process requirements. This challenge has been rejected by several circuit courts on two grounds. First, the guidelines do not eliminate individualized sentences, but rather identify the criteria to be considered in tailoring sentences to individual circumstances.²¹¹ The guidelines merely standardize the considerations to be used in individualizing sentences, not the sentences themselves.²¹² The guidelines do not limit permissible considerations, but rather identify considerations which should be included in formulating every sentence for a particular type of crime, while permitting sentencing courts to consider further factors as grounds for departures from the guidelines' recommendations.²¹³

Second, even if sentences under the guidelines lack individual tailoring, there is no constitutional right to individualized sentences in non-capital cases.²¹⁴ Several defendants have argued that there is a substantive due process interest in individualized sentences that derives from basic human respect for the individual. However, the prevailing view is that there is no such constitutionally protected interest in individualized criminal sentences for non-capital cases. A requirement that sentences match individual circumstances in all cases would be inconsistent with long-standing acceptance of retribution (with its emphasis on victim interests in setting sentences) and deterrence (with its emphasis on societal interests in setting sentences) as legitimate sentencing criteria.²¹⁵

Several other types of due process challenges to the guidelines also have failed. For example, the scope of prosecutorial control over the sentencing process was the basis for a due process challenge in one case. The defendant asserted that the guidelines impermissibly constrain information available to sentencing courts by permitting consideration of certain sentence reductions for defendant cooperation only upon a motion by the government.²¹⁶ This claim was rejected on the ground that courts can still consider defendant cooperation as a basis for a departure from the sentences recommended under the guidelines even if prosecutors have not made a motion certifying a defendant's cooperation.²¹⁷

Other due process challenges have focused on federal sentencing processes. Sentencing analyses relying on information established by a preponderance of the evidence rather than beyond a reasonable doubt have been

on the sentencing guidelines).

211. *See, e.g.*, *United States v. Henry*, No. 88-3129, 1990 WL 2290 (D.C. Cir. Jan. 11, 1990); *United States v. Seluk*, 873 F.2d 15, 16 (1st Cir. 1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Pinto*, 875 F.2d 143 (7th Cir. 1989).

212. There is little question that Congress has the authority to specify a sentencing guidelines system, that as part of its power it may define the factors that courts may consider in setting a sentence, and that Congress may delegate its power to identify sentencing factors to a body such as the Sentencing Commission. *See United States v. La Guardia*, 902 F.2d 1010, 1013-16 (1st Cir. 1990).

213. *Seluk*, 873 F.2d at 16-17.

214. *See Pinto*, 875 F.2d at 145; *United States v. Frank*, 864 F.2d 992, 1008-10 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989).

215. *See Frank*, 864 F.2d at 1009-10.

216. *See La Guardia*, 902 F.2d at 1013-16.

217. *Id.* at 1013 n.4, 1016.

upheld against due process challenges. Proof beyond a reasonable doubt has been held to be required only to establish criminal liability, not for sentencing determinations.²¹⁸ The use of reports by probation officers as a primary information source for sentencing also meets due process requirements. Such reports have sufficient accuracy and reliability for critical sentencing analyses given the expertise of probation officers in creating pre-sentencing reports summarizing criminal histories and sentencing considerations and the ability of counsel for the government and the defendant to review and challenge these reports prior to sentencing.²¹⁹

B. Unresolved Constitutional Issues Concerning the Organizational Sentencing Guidelines

The Supreme Court's analysis in *Mistretta* leaves several questions regarding the Commission's organizational sentencing guidelines unresolved. In the Court's analysis of the delegation of powers to the Sentencing Commission, the Court emphasized in *Mistretta* that the Commission's authority was adequately limited because Congress had defined "intelligible principles" to direct the exercise of that authority.²²⁰ The Court emphasized two types of direction in the Sentencing Reform Act: first, the specification of the range of individual penalties which sentencing guidelines should address²²¹ and, second, the identification of factors that the guidelines should emphasize in scaling recommended sentences within the available penalty range.²²²

Congress was less clear in expressing "intelligible principles" for use in developing corporate sentencing guidelines. As with individual sentencing, the Sentencing Reform Act provided some direction to the Commission regarding the drafting of corporate sentencing guidelines. However, this guidance was less complete than the comparable Congressional instructions concerning individual sentencing guidelines.

Congressional direction to the Commission regarding corporate sentencing guidelines was limited for two reasons. First, Congress focused mainly on the sentencing of individuals when it articulated sentencing standards in the Sentencing Reform Act.²²³ For example, while Congress provided substantial direction to the Commission concerning the construction of imprisonment standards,²²⁴ these standards and related Congressional commentary on proper guideline provisions concerning imprisonment are not directly relevant to corporate sentencing. Second, while Congress required that both individual and corporate sentencing guidelines be anchored to past sentencing practices insofar as those practices suggested well-founded sentencing patterns, this anchor provided little restraint on the drafting of corporate sentencing guidelines because instances of past corporate sentencing were few and based on outdated

218. See, e.g., *United States v. Mobley*, 956 F.2d 450, 455 (3d Cir. 1992); *United States v. Wilson*, 900 F.2d 1350, 1353 (9th Cir. 1990); *United States v. Lee*, 818 F.2d 1052, 1057 (2d Cir.), cert. denied, 484 U.S. 956 (1987).

219. See, e.g., *United States v. Belgard*, 894 F.2d 1092, 1099 (9th Cir.), cert. denied, 498 U.S. 860 (1990).

220. *Mistretta v. United States*, 488 U.S. 361, 372-79 (1989).

221. *Id.* at 374-75.

222. *Id.* at 375-77.

223. See Nagel & Swenson, *supra* note 29, at 212.

224. See 28 U.S.C. § 994(h)-(k).

fine provisions.²²⁵

Hence, there is little question that the Commission's drafting of organizational sentencing guidelines was less closely directed by Congress than its work on individual sentencing standards. The question remains, however, whether this weaker Congressional direction was so insubstantial as to make the delegation to the Commission of authority to draft corporate sentencing guidelines an unconstitutional delegation of legislative power. The answer to this question depends on a careful analysis of the Congressional standards governing the Commission's development of corporate sentencing guidelines.

Congress provided the Sentencing Commission with several forms of guidance regarding the drafting of corporate sentencing standards. The Sentencing Reform Act and related federal statutes defined the range of criminal sentences the Commission's corporate sentencing guidelines should address and the criteria that should be used to scale penalties within that range. The minimum corporate criminal sanction was set by statute at the level of a simple probation sentence involving few if any restrictions on corporate conduct.²²⁶ The maximum corporate penalty available for most felonies was defined by statute as the greatest of (1) a fine of \$500,000, (2) twice the gross gain from an offense, or (3) twice the gross loss from an offense, plus a further term of up to five years of restrictive probation.²²⁷ The Commission was, therefore, directed by statute to define corporate sentencing recommendations within a definite sanction spectrum.

The Sentencing Reform Act also specified many factors the Commission should include in guidelines concerning fines and other organizational sanctions. The Act required the Commission to take the following criteria into account insofar as they were relevant:

- (1) the grade of the offense under sentencing;
- (2) mitigating and aggravating circumstances affecting the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, several persons, or a breach of public trust;
- (4) the community view of the gravity of the offense;
- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the Nation as a whole.²²⁸

In addition, the Commission was instructed to consider increased penalties for repeated misconduct and for offenses committed by a corporation while under judicial supervision.²²⁹ Finally, the Commission was required to consider the average corporate sentences imposed in the past for various types of crimes

225. See *infra* text at notes 267-71.

226. 18 U.S.C. § 3551(c).

227. 18 U.S.C. §§ 3551(c), 3571(c).

228. 28 U.S.C. § 994(c).

229. 28 U.S.C. § 994(l).

as a starting point for its development of sentencing guidelines. However, since "in many cases, current sentences do not accurately reflect the seriousness of the offense," the Act provided that the Commission was not bound by such average sentences, but was instead to independently develop sentencing guidelines that were consistent with the general purposes of federal sentencing.²³⁰

These criteria for corporate sentencing guidelines seem adequate to meet the Supreme Court's test in *Mistretta* for the proper delegation of rule-making powers. Congress laid out the range of corporate sentences to be structured through sentencing guidelines. It required that corporate sentencing guidelines serve the general punitive, deterrent, and rehabilitative goals of federal sentencing. It specified several further criteria that the Commission should address in the guidelines to the extent that they were relevant. With this direction, the Commission certainly was subject to "intelligible principles" governing the drafting of its corporate sentencing guidelines. Therefore, the guidelines should be immune from constitutional attack on delegation of powers grounds.

The Court would probably reach a different result were it to adopt the delegation standard articulated in Justice Scalia's dissent in *Mistretta*. To the extent that policy decisions are indicative that the exercise of a delegated power is legislative and improper for a Judicial Branch entity like the Sentencing Commission, the development of the corporate sentencing guidelines probably involved far more basic policy decisions than the development of comparable sentencing guidelines for individuals.²³¹ The range of previously unresolved policy questions about such fundamental matters as corporate deterrence mechanisms, the desirability of corporate punishment under a just deserts model, and the likelihood of corporate rehabilitation under probation sentences necessitated several important policy decisions by the Commission in the course of its development of corporate sentencing guidelines.²³² Hence, if the presence of policy decisions indicates an improper delegation of power as reasoned by Justice Scalia, there is little question that the Commission's role in developing corporate sentencing guidelines would be viewed as improper.

The Commission's development of corporate sentencing guidelines also raises somewhat different separation of powers issues than its work on individual sentencing guidelines. The Court in *Mistretta* emphasized that the assignment to a Judicial Branch entity such as the Sentencing Commission of powers more appropriately belonging to another branch would raise serious separation of powers issues. However, the Court found no such misplaced powers in *Mistretta* because the authority to promulgate individual sentencing guidelines was appropriate to the Judicial Branch in two key respects. First, the Commission's substantive choices about individual sentencing standards involved sentencing matters within the Judiciary's special knowledge and expertise.²³³ Second, the Commission's substantive policy choices in promul-

230. 28 U.S.C. § 994(m).

231. Past sentencing practice played a smaller role in shaping the corporate sentencing guidelines than it did in shaping the Commission's individual sentencing guidelines. Original policy choices by the Commission necessarily played a larger role in the drafting of the corporate sentencing guidelines to fill this gap. *See* Nagel & Swenson, *supra* note 29, at 223, 226, 233, 236.

232. *See, e.g., id.* at 233, 236.

233. *Mistretta v. United States*, 488 U.S. 361, 396 (1989).

gating individual sentencing guidelines were constrained in that the Commission was, for the most part, choosing among preexisting sentencing standards already employed by federal courts.²³⁴

The Commission's authority to promulgate corporate sentencing guidelines raises more substantial separation of powers questions in both these areas. Corporate criminal convictions and sentencing determinations have arisen infrequently, giving federal courts far less experience in corporate sentencing than in individual sentencing. Furthermore, the sentencing of corporate principals for the crimes of their agents involves many unresolved questions about corporate blameworthiness for such crimes and the feasibility of deterring offenses by individuals through corporate penalties. In resolving such fundamental policy issues, the Sentencing Commission was forced to make a broader range of original policy choices in enacting corporate sentencing guidelines than was necessary in producing its individual sentencing guidelines.²³⁵ The Commission obtained far less guidance from prior sentences imposed on corporations and other organizations than was available in prior individual sentences. Given the broad scope of original policy making involved and the minimal judicial experience with organizational sentencing which informed it, the Commission's promulgation of corporate sentencing guidelines might be viewed as an inappropriate Judicial Branch function under the Supreme Court's standards in *Mistretta*.

However, on further examination, these considerations are no more compelling concerning the corporate sentencing guidelines than they were concerning the individual sentencing guidelines at issue in *Mistretta*. Whatever the substantive policy decisions necessary to define corporate sentences, federal courts have had the authority to make those decisions for particular corporate defendants for as long as federal law has recognized corporate criminal liability for offenses by corporate agents. The general sentencing expertise of federal courts has consistently been deemed sufficient to inform the selection of corporate sentences. Furthermore, several types of undeniable court expertise were valuable in developing corporate sentencing guidelines, including knowledge about sentencing procedures and the capability of sentencing courts to oversee various types of sanctions. Finally, the political independence of a Judicial Branch body in selecting sentencing criteria was equally valuable in setting corporate and individual sentencing standards. Hence, the placement of authority over corporate sentencing guidelines in a Judicial Branch entity like the Sentencing Commission was justified for the same reasons that the Court found sufficient in *Mistretta* to justify the Commission's authority over standards for individual sentences. Consequently, the Commission's promulgation of corporate sentencing guidelines will probably survive any separation of powers challenge asserting that it involved an inappropriate Judicial Branch function.

Other separation of powers concerns related to the potential interference of Commission membership with the normal functions of federal courts and the implications of the President's removal powers regarding judges sitting on the Commission seem no more substantial concerning corporate sentencing than they were in the individual sentencing context where they were rejected in

234. *Id.*

235. *Cf. id.*

Mistretta. Hence, they are not addressed further here.

A final constitutional issue left open after *Mistretta* concerns the adequacy of corporate sentencing determinations to meet due process requirements. The sentencing procedures applicable to corporate defendants are the same as those for individual defendants.²³⁶ Since these procedures have been held to satisfy procedural due process requirements for individual sentencing,²³⁷ corporate sentencing procedures also seem likely to meet procedural due process standards.

Only where the implications of corporate sentencing procedures diverge from those for individuals will a procedural due process challenge in a corporate sentencing context have some chance for success. One point of divergence relates to the competency of probation officers to gather factual information about corporate offenses and offenders. While these officers typically have considerable experience with individual crimes and offender backgrounds and the records and information sources covering both, they will be far less adept in assessing corporate defendants and their crimes. Consequently, fact-finding procedures incident to corporate sentencing, which rely heavily on probation officer reports as a source of information concerning sentencing factors not already proven in the prosecution's case, may be sufficiently error-prone to fail to provide due process.

This argument seems unlikely to prevail, however. In the context of individual sentencing, probation officers gather information about even the most sophisticated and complicated federal crimes. To the extent that investigations by probation officers are deemed a constitutionally sufficient basis for decisions about imprisonment, they will probably also be seen as adequate to support the less serious penalties involved in the economic sanctions applied to corporations.

In cases where probation officers with sufficient sophistication and resources to complete an effective sentencing evaluation are lacking, sentencing courts can supplement the reports of such officers with information gathered by court appointed experts.²³⁸ The availability of specialized fact finders under this procedure, coupled with the ability of corporate defendants to request that sentencing courts invoke this mechanism if the capabilities of probation officers are in doubt, further limit the possibility of a denial of due process because of the limited expertise of probation officers concerning corporate sentencing.

Finally, even if fact-finding by probation officers concerning corporate sentencing factors is inaccurate in some cases, counsel for corporate defendants have opportunities to present corrective evidence for consideration prior to sentencing.²³⁹ Counsel can present additional factual information or argue that a probation officer's report misinterprets the information it analyzes. Given this opportunity to correct inaccurate reports by probation officers and the likelihood that inaccurate reports will be rare in light of the general reliability of probation officers in complex fact-finding, corporate sentencing procedures appear to meet due process requirements.

236. See FED. R. CRIM. P. 32.

237. See, e.g., *United States v. Belgard*, 894 F.2d 1092, 1099 (9th Cir.), cert. denied, 498 U.S. 860 (1990).

238. See *supra* text at notes 86-89.

Some further due process challenges may be raised concerning the guidelines' standards for sentence reductions. Once a corporate base fine is determined, the guidelines assign a defendant a culpability score of five, midway between the extreme values of zero and ten.²⁴⁰ They then allow the corporate defendant to establish that its organizational culpability is lower than that of a typical defendant and that it qualifies for a lower culpability score and a reduced fine accordingly.²⁴¹ Hence, in seeking a reduced sentence, the burden is on the defendant to prove low corporate culpability. By contrast, in sentencing individuals the government must establish the presence of most culpability factors and criminal history features shaping sentences. One commentator has argued that the assignment of an initial culpability score of five to all corporate defendants implies a presumption of median culpability on the part of corporate defendants and that sentencing based on this presumption denies due process because the corresponding corporate culpability in an offense may not be present in a particular case.²⁴²

This argument seems flawed in several respects. The median culpability score utilized at the outset of a culpability evaluation does not carry with it any assessment of corporate culpability. Rather, the initial culpability score serves merely as an entry point to a system of culpability rewards and penalties. By entering at a central score, this system leaves substantial room for both increased and decreased corporate fines. The use of a single culpability score and the entry into the culpability analysis at a middle value permits the impact of aggravating and mitigating sentencing factors to be considered along the same scale and, where more than one are present, to offset or accumulate culpability considerations to produce a final sentencing recommendation.

A functionally identical albeit less convenient system could have been implemented without any initial culpability score. The guidelines could have specified a set of fine multipliers for defendants lacking unusual culpability features and a series of multiplier increases for aggravating factors and reductions for mitigating factors. Such a system would still vary fines based on mitigating and aggravating factors related to corporate culpability, but would involve no initial culpability assessment or assumption.

Finally, while corporate defendants bear the burden of establishing the presence of mitigating factors justifying sentence reductions, this burden is shared by individual defendants seeking reductions for mitigating offense characteristics.²⁴³ The allocation of this burden to individual defendants has been held not to deny due process since prosecutors must still bear their primary burden of establishing liability.²⁴⁴ The allocation of similar burdens to corporate defendants to establish mitigating culpability factors once corporate liability is proven is no more of a denial of due process.

239. *See id.*

240. *See* SENTENCING GUIDELINES, *supra* note 1, § 8C2.5.

241. *See id.*

242. Parker, *supra* note 27, at 136.

243. *See* United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989) ("the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence"); United States v. Williams, 905 F.2d 217, 218 (8th Cir. 1990), *cert. denied*, 498 U.S. 1030 (1991); United States v. Kirk, 894 F.2d 1162, 1164 (10th Cir. 1990); United States v. Wilson, 884 F.2d 1355, 1356 (11th Cir. 1989).

244. *See* United States v. Oransky, 908 F.2d 307, 309 (8th Cir. 1990).

C. Statutory Limitations on the Corporate Sentencing Guidelines

The rule-making powers of the Sentencing Commission are further limited by the scope of the Commission's statutory charter in the Sentencing Reform Act of 1984.²⁴⁵ This charter authorizes the Commission to promulgate binding sentencing guidelines and advisory policy statements for federal sentencing.²⁴⁶ However, the statute is vague about the topics that the Commission can choose to address in sentencing guidelines rather than policy statements. Since federal courts are only required to conform to the former, the breadth of the Commission's authority to issue sentencing guidelines rather than policy statements directly affects its influence over federal sentencing and its ability to reduce sentencing disparities.

The only specific indication of Congressional intent regarding the impact of the Sentencing Reform Act on corporate sentencing standards is a brief suggestion in the legislative history of the Act that the Sentencing Commission "might" wish to issue policy statements regarding corporate sentencing.²⁴⁷ Several commentators have argued that this legislative history reflects a Congressional mandate that the entire field of corporate sentencing be addressed by the Sentencing Commission only through policy statements.²⁴⁸ Such an approach would leave sentencing courts with no binding direction from the Commission regarding corporate sentences.

However, the language of the Sentencing Reform Act and other portions of its legislative history indicate that the Commission has a broader authority and obligation to issue corporate sentencing guidelines. The Act requires the Commission to promulgate "guidelines... for use of a sentencing court in determining the sentence to be imposed in a criminal case."²⁴⁹ It goes on to specify several topics the Commission should address in sentencing guidelines. Many of these topics involve imprisonment and, hence, are irrelevant to corporate sentencing. However, a number of required guideline topics are relevant to corporate sentencing, including:

- 1) whether to impose a sentence of probation or a fine;

245. See 28 U.S.C. §§ 991, 994, 995.

246. For an overview of the Sentencing Commission's role in federal sentencing, see *Mistretta v. United States*, 488 U.S. 361, 362-70 (1989).

247. The Senate Judiciary Committee Report on the Sentencing Reform Act included the following suggestions:

Another area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses.... Given the breadth of discretion thus available to the court in the context of sentencing an organizational defendant, the Committee believes that it would be appropriate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning such matters as: (1) considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available under the circumstances; (2) considerations relevant to the imposition of sanctions involving forfeiture, notice to victims, and restitution; and (3) considerations relevant to the selection of conditions of probation involving such judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case.

S. REP. NO. 225, *supra* note 18, at 166.

248. Benson B. Weintraub & Alan J. Chaset, *Federal Sentencing Guidelines for Organizations*, CHAMPION, May, 1992, at 4, 10; Victoria Toensing, *Statutory and Policy Arguments in Favor of Judicial Discretion in Corporate Sentencing*, 3 FED. SENTENCING REP. 145, 145 (1990).

249. 28 U.S.C. § 994(a)(1).

- 2) the appropriate amount of a fine; and
- 3) the appropriate period of probation.²⁵⁰

The issuance of a wide range of corporate sentencing guidelines, including corporate fine-setting standards, is authorized by this language. The legislative history of the Act goes further, confirming that the broad statutory language described above was intended to authorize sentencing guidelines addressing matters beyond the topics enumerated in the statute.²⁵¹ Thus, the enumeration in the Sentencing Reform Act of several specific sentencing topics to be addressed in corporate sentencing guidelines is not, of itself, a limitation on guidelines addressing further topics related to corporate sentences.²⁵²

Several members of the Sentencing Commission interpreted the broad language in their statutory charter as compelling them to promulgate corporate sentencing guidelines.²⁵³ They based this interpretation primarily on three features of federal sentencing laws: provisions requiring fines or probation sentences for corporate offenders, the mandate in the Commission's charter that it promulgate guidelines for fines and probation sentences, and the lack of any exemption in that charter for corporate sentencing guidelines.²⁵⁴

Other commissioners felt that the Commission had the discretion to issue corporate sentencing guidelines in carrying out Congress' instructions to "establish sentencing policies and practices for the [f]ederal criminal justice system" that further federal sentencing goals.²⁵⁵ Initial studies of past corporate sentences provided clear evidence that sentencing guidelines were needed to improve the furtherance of federal sentencing goals concerning corporate offenses.²⁵⁶ Past corporate fines were found to have been so small that they often failed to even deprive offenders of their illegal gains. These sentences reflected substantial disparities among corporate sentences for similar crimes. They also reflected no coherent sentencing philosophy or approach, suggesting the need for guideline standards to relate corporate sentences to federal sentencing goals in a rational and effective manner. Standards instructing individual courts about the relevant considerations in corporate sentencing were seen as particularly desirable given the complexity of many corporate sentencing determinations and the difficulty of accumulating expertise in such determina-

250. *Id.*

251. The Senate Judiciary Committee Report on the Sentencing Reform Act includes the following description of the powers of the Commission to issue sentencing guidelines:

The list of determinations concerning which the guidelines should make recommendations is not necessarily inclusive. For example, the Sentencing Commission may wish to make recommendations in the guidelines in some cases as to, for example, a requirement of restitution or a particularly appropriate condition of probation for a category of offender convicted of a particular offense.

S. REP. NO. 225, *supra* note 18, at 165; *see also id.* at 169 ("The Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing").

252. Nor is the statutory enumeration of topics which the Commission is authorized to address in policy statements a bar to sentencing guidelines addressing the same topics. For example, the Act indicates that conditions of probation and terms of restitution are appropriate topics for Commission policy statements. *See* 28 U.S.C. § 994(a)(2)(A)-(B). However, the legislative history of the Act indicates that these are also appropriate topics for sentencing guidelines. *See* S. REP. NO. 225, *supra* note 18, at 165.

253. *See* Nagel & Swenson, *supra* note 29, at 213.

254. *Id.*

255. *Id.* at 214 (quoting 28 U.S.C. § 991(b) (1988)).

256. *Id.* at 215-17 & n.55.

tions due to the infrequency of corporate sentencing by any particular federal court.

What, then, are the statutory limits on legitimate organizational sentencing guidelines? In general, sentencing guidelines can address any matter at issue in determining the sentence to be imposed in a federal criminal case.²⁵⁷ However, sentencing guidelines must meet three further tests:²⁵⁸

1) The guidelines must provide for sentences sufficient, but not greater than necessary, to promote the purposes of federal sentencing, including just punishment, general deterrence, specific deterrence, and rehabilitation;²⁵⁹

2) The guidelines must provide certainty and fairness in sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have committed similar offenses while maintaining sufficient flexibility to permit sentence increases or decreases for particular defendants where warranted by mitigating or aggravating features not taken into account in the establishment of general sentencing practices;²⁶⁰ and

3) The guidelines must reflect advancement in knowledge of human behavior as it relates to the criminal justice process.²⁶¹

A direct relationship between past sentencing practices and sentencing guideline provisions is not required under the Sentencing Reform Act. While the Act specifies that a study of average sentences in past cases should precede the development of sentencing guidelines, it also provides that "[t]he Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing."²⁶² This last provision reflects a Congressional belief that "in many cases, current sentences do not accurately reflect the seriousness of the offense."²⁶³ It also reflects Congress' expectation that the Commission would utilize improvements in the understanding of human behavior to modify past sentencing patterns.²⁶⁴

In developing sentencing standards for individual offenders, the Commission conducted extensive statistical studies to anchor its sentencing guidelines to past sentencing practices. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as defined by federal statutes, the United States Parole Commission's guidelines and statistics, and other data to identify offense distinctions that were important in pre-guidelines sentencing.²⁶⁵ The Commission's final sentencing guidelines for individuals generally reflected past sentencing averages, with adjustments to

257. 28 U.S.C. § 994(a)(1) (1988); *see also* S. REP. NO. 225, *supra* note 18, at 169 (recognizing that sentencing guidelines can address a broad range of sentencing alternatives pertinent to the purposes of federal sentencing).

258. *See* 28 U.S.C. § 994(f) (1988).

259. The Commission is required to issue guidelines that assure the meeting of the purposes of federal sentencing. 28 U.S.C. § 991(b)(1)(A) (1988). These include the imposition of sentences no more onerous than necessary to meet federal sentencing goals. 18 U.S.C. § 3553(a)(2) (1988).

260. 28 U.S.C. § 991(b)(1)(B) (1988).

261. *Id.* § 991(b)(1)(C).

262. *Id.* § 994(m).

263. *Id.*

264. *See id.* § 991(b)(1)(C).

265. *See* SENTENCING GUIDELINES, *supra* note 1, at 3-4.

remove unwanted disparities between related crimes and to accommodate recent legislation not included in past sentencing.²⁶⁶

Empirical studies of past sentencing played a much smaller role in the Commission's development of the corporate sentencing guidelines.²⁶⁷ The Commission encountered several problems in examining past corporate sentences.²⁶⁸ Until recently, federal courts sentenced corporations infrequently. For those few firms that were sentenced, the Commission was not always able to obtain pre-sentencing reports necessary for it to understand the bases for corporate sentences. Furthermore, sentences for which information was available concerned a diverse set of corporate defendants and offenses, so that useful sentencing patterns were difficult if not impossible to discern.

In addition to these measurement problems, corporate sentences for the economic crimes comprising the bulk of past corporate offenses was of questionable value in defining future corporate sentencing standards. In its work on sentencing guidelines for individuals, the Commission found that economic offenses tended to be underpenalized relative to other offenses with similar societal impacts.²⁶⁹ Economic offenses by corporate offenders were probably similarly underpenalized. Furthermore, corporate sentences for economic offenses formerly were restricted by statutory fine limits that have been replaced by much higher limits. Basing present sentencing guidelines on sentences artificially limited by outdated restrictions would not properly array the penalties available under present statutory standards.

Due to such problems, empirical data on corporate sentencing played little part in the development of the corporate sentencing guidelines.²⁷⁰ To a far greater extent than the Commission's earlier individual sentencing guidelines, the corporate sentencing guidelines are based on sentencing theories rather than past practices.²⁷¹ This means that the validity of the Commission's views about the proper theoretic bases of corporate crime and sentencing are critical to the legitimacy of the corporate sentencing guidelines.²⁷² It also suggests that ambiguities in the corporate sentencing guidelines may be more troublesome to resolve than similar ambiguities in the individual sentencing guidelines since courts will have little past sentencing practice to fall back on to clarify ambigu-

266. See *id.*; U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 15-16 (1987).

267. See generally Nagel & Swenson, *supra* note 29, at 223-26.

268. See SUPPLEMENTARY REPORT, *supra* note 27, at 5.

269. See SENTENCING GUIDELINES, *supra* note 1, at 5.

270. Rakoff, *supra* note 7, at 3.

271. In particular, two behavioral models of corporate managerial and employee conduct underlie the most important components of the corporate sentencing guidelines. The first is the view that corporate managers are rational cost avoiders and will seek to avoid corporate crimes if such crimes have no expected corporate gains in light of applicable fines and other penalties. See John C. Coffee, *Sentencing Guidelines Let Big Business Off Easy*, MANHATTAN LAW., June 1991, at 17. The second is that corporate managers will adopt systems to prevent corporate crimes if those systems produce tangible benefits to firms in mitigating corporate fines when occasional offenses occur. See Winthrop M. Swensen & Nolan E. Clark, *The New Federal Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, CORP. CONDUCT Q., Winter 1991, at 1, 3.

272. Professor Harry First of the New York University School of Law noted the importance of a clear theoretic model as a basis for corporate sentencing guidelines when he observed that the drafting of guidelines without a proper theoretic base is like "trying to get to the moon by driving uphill." Harry First, *Presentation to the U.S. Sentencing Commission* (Oct. 11, 1988), quoted in Obermaier, *supra* note 2, at 3.

ous guideline terms. Similarly, the discretion left sentencing courts under the new guidelines may be particularly ripe for abuse in that it is subject to few norms derived from past sentencing practices.²⁷³

While several observers have attacked the Commission's failure to conduct more substantial empirical studies of corporate sentencing prior to its promulgation of corporate sentencing guidelines,²⁷⁴ it is doubtful that this is a sufficient defect to invalidate the guidelines. The legislative history of the Sentencing Reform Act recognizes that empirical studies of past sentencing practices are mere tools to inform the Commission in its development of new sentencing standards. To the extent that such studies were deemed problematic and unrevealing, as was the case with corporate sentencing studies, the Commission was entitled to forego these studies and to draft guidelines reflecting its best judgment about what sentences will best further federal sentencing goals.²⁷⁵

A more substantial objection to the new corporate sentencing guidelines may be that the sentences they recommend do not always adhere to what some commentators have called "the principle of parsimony."²⁷⁶ The Sentencing Reform Act authorizes only corporate sentences that are "sufficient, but not greater than necessary" to serve federal sentencing goals.²⁷⁷ According to the Chairman of the Sentencing Commission, in the context of corporate sentencing the legislative history of the Sentencing Reform Act sends a "strong message ... that judicial intrusion must be tailored to achieve the purposes of sentencing without interfering with internal management beyond the degree necessary to satisfy these limited objectives."²⁷⁸

Fines imposed under the corporate sentencing guidelines may fail to meet this standard for two reasons. First, by using fines based on the largest of several alternative base fines, each reflecting a different sentencing goal, the corporate sentencing guidelines insure that some fines will be larger than necessary to serve the sentencing goals underlying the rejected base fines. However, the need to serve multiple sentencing goals, each suggesting a different sentence, probably necessitates this sort of choice. The use of the largest alternative penalty suggested by several sentencing policies implicitly rejects partial attainment of some sentencing goals in favor of full attainment of all goals with sentences that are excessive in relation to some individual goals. The Commission correctly chose full attainment of sentencing goals over

273. See Rakoff, *supra* note 7, at 3.

274. See, e.g., Jonathan M. Karpoff & John R. Lott, Jr., *Why the Commission's Corporate Guidelines May Create Disparity*, 3 FED. SENTENCING REP. 140, 140 (1990); Parker, *supra* note 27, at 133; *Oversight on the U.S. Sentencing Comm. and Guidelines for Organizational Sanctions, Hearings Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 246-48, 255-56 (1990) (statement of James P. Carty, on behalf of the National Ass'n of Manufacturers); cf. Weintraub & Chaset, *supra* note 248, at 4, 10.

275. See S. REP. NO. 225, *supra* note 18, at 177-78 (noting that where insufficient data exists on a particular type of sentencing the Commission should "exercise its best judgment as to what sentences would adequately reflect the purposes of sentencing.")

276. Weintraub & Chaset, *supra* note 248, at 4, 11.

277. 18 U.S.C. § 3553(a) (1988).

278. *Oversight on the U.S. Sentencing Comm. and Guidelines for Organizational Sanctions: Hearings Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 190 (1990) (statement of Judge William W. Wilkins, Jr.) [hereinafter *Oversight on the U.S. Sentencing Comm.*].

parsimony with respect to each sentencing goal. It did so by insuring that fines are large enough to serve the most demanding sentencing goal in each case.

The Commission only has violated the principle of parsimony if the fines recommended under its guidelines exceed those needed to serve any federal sentencing goal. For example, the fine multipliers chosen by the Commission may impose corporate sanctions that are larger than needed to produce adequate deterrence or retribution for corporate crimes, particularly in cases where managerial involvement is slight and criminal penalties are combined with the deterrent impact of reputation losses and civil recoveries. At present, we have insufficient information about sentencing patterns and corporate reactions to know if the fines called for by the guidelines are excessive. The Commission's deterrence logic seems generally sound and should be adequate to uphold the guidelines against challenges based on the principle of parsimony absent empirical studies indicating that the Commission's treatment is excessive.

A final issue regarding the parsimony of corporate sentences under the guidelines involves probation terms aimed at compelling corporate reforms following an offense. Probation terms imposing highly burdensome obligations on corporate managers while achieving little or no benefit in implementing or monitoring reforms would appear to be invalid under the statutory requirement of parsimony in corporate sentencing. However, if valuable reforms are furthered and the likelihood of subsequent corporate law compliance is increased, it should not matter that compliance with probation terms involves significant corporate expense. So long as probation terms do not drive a firm out of business, the guidelines and the statutory provisions underlying them suggest that it is reasonable and appropriate for a sentencing court to order a corporate offender to undertake whatever steps are necessary to comply with criminal laws and to maintain and monitor that compliance.²⁷⁹

VI. UNRESOLVED POLICY QUESTIONS UNDERLYING THE CORPORATE SENTENCING GUIDELINES

The Sentencing Commission's corporate sentencing guidelines leave several key policy questions unresolved. An understanding of these open questions is important for two reasons. Conflict between different policy approaches is evident in several parts of the guidelines; understanding this conflict enhances our ability to interpret related guideline sections. In addition, where the guidelines are ambiguous or incomplete, answers to outstanding policy questions may be critical in interpreting or amending the guidelines.

A. *Governing Sentencing Rationales*

1. *Divergent Principles*

Perhaps the most important issue raised by the new guidelines concerns the sentencing rationales governing the size of corporate fines. Like the

279. Anything less would be a recognition that firms do not need to comply with criminal laws or need to insure that their employees so comply when it is expensive to do so. The general sentencing scheme in the new corporate sentencing guidelines is based on the view that, if the expense of responsible practices to ensure compliance with criminal laws is great, the responsible course is for a firm to forgo the activities that raise risks of criminal law violations rather than undertaking business actions without preventive compliance measures.

individual sentencing guidelines before them,²⁸⁰ the corporate sentencing guidelines reflect an unresolved conflict between two divergent sentencing philosophies.²⁸¹ The first, based on just deserts principles, emphasizes penalties scaled to the seriousness of offenses and the culpability of defendants in committing offenses. The second, based on a utilitarian sentencing model, specifies sanctions sufficient to deter further crimes.

2. Just Deserts

Under a just deserts sentencing philosophy, criminals are punished because they deserve ill treatment.²⁸² Punishment should vary according to the blameworthiness of the offender as measured from offense seriousness and the culpability of the offender. Similarly blameworthy crimes should receive similar sentences; more blameworthy offenses should receive harsher sentences than less blameworthy offenses.²⁸³

A corporate sentencing system based on just deserts principles would impose varying corporate fines based on organizational blameworthiness concerning offenses by corporate agents.²⁸⁴ However, such a system would need to overcome several problems. First, assessing corporate organizational culpability for offenses by individual employees is problematic.²⁸⁵ Even if a simple notion of organizational culpability is used equating managerial involvement with corporate culpability, organizational culpability is difficult to

280. The lengthy debate within the Sentencing Commission over the proper rationale for individual sentencing guidelines is summarized in Nagel, *supra* note 13, at 914-25.

281. The conflicts underlying the corporate sentencing guidelines are, arguably, more fundamental than those affecting individual sentencing. In the field of corporate criminal liability, the basis for imposing any criminal liability on corporations for the actions of their employees is, according to some observers, "devoid of strong theoretical underpinnings." See Rakoff, *supra* note 7, at 3. Under this view, sentencing guidelines aimed at implementing uncertain corporate criminal law policies are necessarily equally uncertain in their policy goals. See *id.*

The Sentencing Commission believed that corporate criminal liability served a number of policy goals, including just punishment and crime deterrence. It intended that the corporate sentencing guidelines served the multiple goals of corporate criminal liability. See SUPPLEMENTARY REPORT, *supra* note 27, at 5.

282. See generally ERNEST VAN DEN HAAG, PUNISHING CRIMINALS (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979).

283. Sentences under a just deserts model must be proportional in two senses. Ordinal proportionality involves the punishment of more severe offenses more harshly. Cardinal proportionality involves the selection of the end points of an ordinal scale of punishment (i.e., the most and least severe punishments) to correspond to the severity of that category of crime. Desert theory does not specify how these extreme punishments should be selected. In many instances, the anchoring points for a system of punishment will be chosen for reasons other than just deserts, such as the need to impose penalties at a certain level to achieve deterrence or the unavailability of criminal justice resources to impose administratively burdensome punishments in numerous cases. See ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 40-46 (1985).

284. Corporate sentencing guidelines which ignored just deserts principles entirely would be inconsistent with the historical emphasis of the criminal law on a just deserts theory of punishment. See Obermaier, *supra* note 2, at 3. For a thorough analysis of a corporate sentencing system based on just deserts principles, see KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS (1990).

285. The members of the Sentencing Commission were not insensitive to these difficulties. For example, the Chairman of the Commission noted that one of the difficulties the Commission faced in developing corporate sentencing guidelines was that measuring corporate culpability features like corporate knowledge was far more difficult than for individual defendants. See *Oversight on the U.S. Sentencing Comm.*, *supra* note 278, at 187-88.

measure. Some offenses by corporate agents are individually initiated with little involvement of other organization members, while others are initiated or promoted by corporate managers and their policies. Distinguishing between offenses with and without managerial involvement is hard for fact finders (like courts and juries) located outside defendant organizations, yet would be critical in organizational fault determinations. Therefore, accurate determinations of corporate culpability concerning particular offenses may be difficult or impossible.²⁸⁶

Even if organizational culpability in an offense is clear, the degree of punishment to impose under a just deserts model may be uncertain. One version of just deserts sentencing embraces the notion that just punishment should equalize the circumstances of the offender and the victim by imposing punishment equal to the harm that an offense inflicted.²⁸⁷ However, in a corporate context, it is unclear that economic punishment through a fine is adequate to equate corporate hardship with harms inflicted on human victims. Often, those harms will be non-monetary and poorly translated into economic terms. Even where offense harms are primarily economic, it may be impossible to equalize the position of a multi-million dollar organization with that of an impoverished fraud victim by imposing a \$10,000 fine on the firm in response to a fraud inflicting a \$10,000 loss on the individual.²⁸⁸

Under an alternate view of just deserts, punishment is aimed at vengeance, pure and simple.²⁸⁹ In such a system, the infliction of serious punishment on culpable parties following an offense satisfies a community desire for vindication. Punishment of offenders vindicates the importance of law compliance by giving concrete notice that the community will not tolerate one party's disregard of legal standards that are observed by most of the community. To parties accepting this basis for criminal sentencing, culpable corporations are as legitimate targets of sentencing penalties as culpable individuals.²⁹⁰ However, this approach provides little information about the proper size of criminal penalties, except that they must be serious enough to satisfy the general community.

While they do not fully embrace a just deserts approach,²⁹¹ the corporate sentencing guidelines do reflect a just deserts philosophy in two key fine-setting standards.

First, corporate fines are matched to offense seriousness through guide-

286. See John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 725-27 (1982).

287. This view is derived from the notion that law compliance is a reciprocal obligation among community members. Where one party violates the law, the offender has benefitted from the forbearance of criminal conduct by other community members while failing to provide an equal service through similar law compliance. By imposing punishment equal to the harm inflicted through an offense, the violator is thought to cease to be at advantage over other non-violating members of the community. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 99-107 (Bobbs-Merrill ed., 1965); HIRSCH, *supra* note 282, at 47.

288. See Braithwaite, *supra* note 286, at 730-31.

289. See Stanley Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861 (1975).

290. See Braithwaite, *supra* note 286, at 731.

291. The guidelines cite "just punishment" as one of several sentencing goals they seek to implement. See SENTENCING GUIDELINES, *supra* note 1, at 393 (introductory comments to guidelines for sentencing of organizations).

line provisions varying fines in accordance with victim losses and offense levels. Victim losses and offense levels will each control the size of corporate fines in somewhat different situations.²⁹² For the types of economic crimes generally committed by corporate agents, victim losses are often a good measure of offense seriousness.²⁹³ Recommended corporate fines for typical offenders are at least as large under the guidelines as victim losses intentionally, knowingly, or recklessly inflicted through offenses.²⁹⁴ To the extent that these losses are not overshadowed by larger offender gains or fine amounts determined from offense levels,²⁹⁵ corporate fines under the guidelines are scaled to offense seriousness as measured by victim losses.

Offense levels are used to order corporate fines for offenses involving few pecuniary losses and gains. A table in the corporate sentencing guidelines translates offense levels into base fine candidates.²⁹⁶ Provided that measurable offense losses and gains are small, base fines derived from offense levels will govern recommended fines under the guidelines. This orders corporate fines according to offense levels and the offense seriousness distinctions underlying those levels. In general, those distinctions reflect the past practices of federal courts in sentencing individual defendants.²⁹⁷ In most respects, then, the Commission's offense levels—and corporate fines based on those offense levels—reflect past rankings of offense seriousness by federal courts.²⁹⁸

Organizational culpability concerning offenses committed by corporate agents is another measure of blameworthiness that also affects fines under the corporate sentencing guidelines.²⁹⁹ Organizational culpability is measured in terms of demonstrated management regard for corporate law compliance.³⁰⁰ High culpability is indicated by managerial involvement in or indifference to the crimes of corporate employees while low culpability is indicated by managerial actions likely to discourage employee crimes.

The guidelines identify a number of offense characteristics that significantly raise or lower recommended corporate fines because they reflect varying

292. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.4.

293. Cf. SCHLEGEL, *supra* note 284, at 98–103, 180–81 (arguing that the seriousness of corporate offenses should be ranked based on resulting injuries to welfare, security, and accumulative interests of individuals).

294. See SENTENCING GUIDELINES, *supra* note 1, §§ 8C2.4, 8C2.6.

295. Victim gains and fines determined from offense levels will be used to set corporate fines if they are larger than victim losses intentionally, knowingly, or recklessly caused. *See id.* § 8C2.4.

296. *See id.* § 8C2.4(d).

297. In creating offense level categories and determining sentence lengths, the Commission, by and large, followed typical past practice, determined by an analysis of 10,000 actual cases. Breyer, *supra* note 16, at 7.

298. The Sentencing Commission considered offense seriousness ranking schemes based on just deserts notions, public perceptions of offense severity, and economic deterrence theories, but was unable to gain sufficient information from these sources to draft detailed sentencing standards for most offenses. *See id.* at 15–18.

299. While earlier drafts emphasized offense characteristics as the primary criteria for setting corporate fines, the Commission's final guidelines incorporated culpability tests that vary fines in accordance with the organizational culpability of corporate defendants. *See Principles Adopted by the U.S. Sentencing Commission to Guide the Drafting of the November, 1990 Organizational Sentencing Guidelines*, in SUPPLEMENTARY REPORT, *supra* note 27, at A–2 to –3.

300. *See Nagel & Swenson, supra* note 29, at 210–11, 240.

degrees of organizational culpability in an offense.³⁰¹ Mitigating factors indicating low corporate culpability in an offense include managerial actions before an offense to prevent criminal behavior and further conduct after an offense to insure criminal accountability of responsible individuals.³⁰² Aggravating factors indicating high corporate culpability include the involvement of corporate officials in an offense, repeated offenses, the violation of a prior judicial order during an offense, and the obstruction of justice by corporate employees following an offense.³⁰³ These organizational culpability measures add another dimension of corporate penalty ordering in accordance with corporate blameworthiness and just desert principles.

3. Utilitarian Deterrence

In contrast to a just deserts system, a utilitarian sentencing scheme is aimed at controlling future crimes. One means to further this end is to impose fines large enough to deter future offenses.³⁰⁴ Sentences imposed on particular defendants are tailored to warn others considering similar offenses of the likely consequences. This makes further offenses less likely by making them less attractive. When used this way, sentences are set based on the characteristics of offenses to be deterred and the likely motivations of potential offenders.

General deterrence was a central aim of the Commission in developing the fine-setting standards of the corporate sentencing guidelines.³⁰⁵ However, debate over the deterrent implications of corporate sentences was complicated by a controversy within the Commission over the types of crimes a utilitarian sentencing approach should prevent.³⁰⁶ One view emphasized that sentencing should promote economic efficiency. Hence, only crimes that are more harmful than the costs of prevention should be deterred through corporate criminal sanctions. Under this approach, optimal corporate fines would equal the social and enforcement costs of crimes, leaving corporate actors to determine if these penalties are more than potential corporate gains from criminal conduct (in which case firms should avoid offenses) or less than those corporate gains (in which case firms should commit offenses).

However, an alternate view on the Commission considered the criminalization of particular conduct as a signal from Congress that most or all such conduct should be eliminated, making near total crime prevention the proper goal of utilitarian sentencing. Under this approach, corporate fines should raise a large enough threat to make all crimes appear unprofitable.

These two utilitarian models held sway at different stages in the development of the corporate sentencing guidelines. The former approach

301. Culpability considerations can vary recommended corporate fines from as low as .05 the defendant's base fine to as high as 4.00 the base fine. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.6.

302. *Id.* § 8C2.5(f), (g).

303. *Id.* § 8C2.5(b)-(e).

304. Beyond sentences imposed for such deterrence purposes, a utilitarian sentencing system with the goal of crime control might also include types of sentences aimed at offender rehabilitation and incapacitation.

305. The final guidelines cite "adequate deterrence" as a primary goal. See SENTENCING GUIDELINES, *supra* note 1, at 393 (introductory comments to guidelines for sentencing of organizations).

306. See *supra* text at notes 38-41.

emphasizing economic efficiency was reflected in the Commission's 1988 discussion draft of organizational sentencing guidelines, but was ultimately abandoned. The second approach aimed at complete crime deterrence was adopted in the final guidelines.³⁰⁷

The most direct reflection of utilitarian deterrence in the final guidelines lies in the Commission's use of offense gains as criteria for setting corporate fines. The Commission selected this fine-scaling measure to insure that corporate fines were set high enough "to deter organizations from seeking to obtain financial reward through criminal conduct."³⁰⁸ In short, the Commission assumed that by making corporate crimes unprofitable, it would reduce decisions by corporate employees and managers to initiate or tolerate illegal conduct. Beyond just deterring crimes that would otherwise be directly profitable through increased corporate revenues, the guidelines also create economic deterrents to the toleration of criminal conduct just to save law compliance costs. They achieve this by including compliance savings in computations of illegal gains for fine-setting purposes.³⁰⁹

This approach to corporate deterrence is consistent with prior federal case law emphasizing that corporate fines should offset gains from illegal corporate conduct.³¹⁰ However, it may reflect too optimistic a view of the threatened impact of corporate fines. The threat of corporate fines often produces unpredictable results other than desired corporate deterrence.³¹¹ Whatever their size, threatened corporate fines may fail to deter an individual within a large corporate organization from committing an offense if criminal behavior, although costly to the firm, is advantageous to the individual in attaining performance goals and increased compensation and promotions.³¹² Large corporate fines risk inflicting hardship on innocent corporate employees, shareholders, or customers if firms are thereby driven out of business, stock prices are driven down, or product prices are driven up.³¹³ Furthermore, corporate fines may be far less successful in preventing repeat offenses by sentenced firms than probation sentences mandating specific changes in corporate operations.³¹⁴

307. See *supra* text at notes 42-46.

308. SENTENCING GUIDELINES, *supra* note 1, § 8C2.4 (background commentary).

309. *Id.* § 8A1.2 (application note 3(h)).

310. See, e.g., *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).

311. See John C. Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1276 (1977).

312. See CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* 46-50 (1975); John C. Coffee, "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 393-400 (1981); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1215-21 (1983).

313. See S. REP. NO. 225, 98th Cong., 1st Sess. 106 (1983); MODEL PENAL CODE § 2.07, Comment (Tentative Draft Nov. 4, 1955); Coffee, *supra* note 312, at 400-05; Stanford Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 433 (1963).

314. See SENTENCING GUIDELINES, *supra* note 1, §§ 8D1.1-8D1.5; Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988).

4. Preventive Incentives

In addition to provisions aimed at deterring corporate crime by making it appear unprofitable, the corporate sentencing guidelines incorporate a second incentive scheme aimed at encouraging affirmative corporate efforts to prevent and detect crimes by corporate agents. Sentences are varied under the guidelines to promote "crime-controlling actions" by corporations and thereby achieve crime prevention through the assistance of internal corporate processes and deterrents.³¹⁵ Incentives for desirable crime control behaviors are created by guideline provisions promising significant sentence reductions to firms that operate preventive law compliance programs, report detected employee offenses to public authorities, and assist prosecutors in the investigation of offenses by employees and others.³¹⁶ In the words of the Chairman of the Sentencing Commission, large fines coupled with substantial reductions for corporate actions aiding law enforcement implement a "carrot and stick" philosophy of corporate sentencing.³¹⁷

While still part of a utilitarian scheme aimed at crime control, these rewards for preventive behavior are based on a fundamentally different view of the corporate defendant than the guideline provisions tying corporate fines to illegal corporate profits. Rather than being viewed as a potential source of corporate crime, corporations are treated as parties independent of their employees, but in a position to control those employees and with a duty to do so in a manner that promotes law compliance. In essence, firms and their managers are treated as public trustees with responsibilities for promoting corporate law compliance and rewards for valuable public service in crime prevention and detection.

Whether these crime control incentives will produce desirable corporate responses remains to be seen. Corporate enthusiasm for the rewards available under these provisions has been tempered by the recognition that, in several respects, the systematic steps necessary for firms to qualify for reduced sentences are ones that may also make the external detection of corporate offenses more likely. For example, to operate an effective law compliance program, firms must undertake substantial crime monitoring and auditing procedures. These procedures are likely to produce records aiding later law enforcement investigations.³¹⁸ Similarly, firms without law compliance programs must detect and be the first to report employee offenses to public authorities, cooperate in subsequent investigations by law enforcement personnel, and accept corporate responsibility for an offense in order to obtain

315. See Nagel & Swenson, *supra* note 29, at 240.

316. See SENTENCING GUIDELINES, *supra* note 1, §§ 8A1.2, 8C2.5(f)-(g), 8C4.1. The inclusion of these rewards in the guidelines responds to requests by corporate leaders for greater reliance on self-policing in corporate organizations and associated rewards for corporate diligence. Rakoff, *supra* note 7, at 3. For an example of a proposal advocating corporate liability reductions for preventive compliance programs, see Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1560 (1990).

317. *Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions, Hearings before the Subcomm on Crim. Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 188-89 (1990) (statement of Judge William W. Wilkins, Jr.).

318. SENTENCING GUIDELINES, *supra* note 1, § 8A1.2 (application note 3(k)(5)), § 8C2.5(f)).

maximum sentence reductions.³¹⁹ Because these actions may reveal offenses that would otherwise have gone undetected and unpunished, firms may lose as much in more frequent fines as they gain in reduced fine amounts.³²⁰

For example, the guidelines grant a firm with an effective law compliance program a 60 percent reduction in its recommended fine.³²¹ However, the significance of this reduction must be gauged in terms of the impact of the program on internal corporate crime levels and prosecutorial success concerning future offenses. If a company's law compliance program fails to reduce corporate crime levels while permitting public officials to successfully prosecute three or more times as many corporate offenses as would otherwise be the case, the firm operating the program will suffer rather than benefit from its preventive efforts. For example, if the program trebles successful corporate prosecutions, total recommended fines for the firm (even after reduction for its compliance program) would be 120 percent of the recommended fines the firm would face without its compliance program.³²² Even if operation of a compliance program does not produce as much as a threefold increase in prosecutions, any increase will reduce the net benefit to the firm in operating the program and, hence, the amounts the firm will be willing to spend on such preventive efforts.

5. Reconciling Multiple Sentencing Rationales

As the above discussion suggests, the corporate sentencing guidelines combine several disparate sentencing philosophies.³²³ Two means were used by the Commission to reconcile these differing philosophies and produce a single sentencing recommendation in a given case. First, the guidelines provide for fines based on the greatest of offender gain, victim loss, or an amount reflecting the offense seriousness criteria underlying offense levels.³²⁴ This ensures that fines will be large enough to reflect the most serious characterization of an offense from these three seriousness perspectives.

The second method used in the guidelines to reconcile multiple sentencing goals in a single sentencing recommendation involves the adjustment of fine multipliers to create incentives for crime prevention and detection efforts by corporations. Recommended fines are reduced by a particular percentage for each type of desirable corporate action. For example, regardless of their

319. *Id.* § 8C2.5(g).

320. This risk is explored in more formal economic terms in Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, ___ J. LEGAL STUD. ___ (forthcoming 1994).

321. SENTENCING GUIDELINES, *supra* note 1, §§ 8C2.5(f), 8C2.6.

322. This analysis assumes the base fines for the offenses involved are about equal. If the firm is a typical offender and does not operate a compliance program, its minimum recommended fine for X offenses will be:

$$X*(1.00)*(base\ fine)$$

If the firm operates a compliance program, is successfully prosecuted for 3X offenses, and is given a reduced fine for each, the firm's minimum recommended fine will be:

$$3X*(.40)*(base\ fine)$$

or

$$X*(1.20)*(base\ fine)$$

an increase of 20 percent over the minimum fine without the law compliance program. Maximum recommended fines will increase in a similar fashion.

323. See SUPPLEMENTARY REPORT, *supra* note 27, at 5.

324. See *supra* text at notes 110-20.

original recommended level, recommended fines are reduced by 40 percent if a defendant firm cooperates in the investigation of an offense previously detected by public authorities and affirmatively recognizes corporate responsibility for the offense.³²⁵

Mitigating factors reduce corporate fines under the guidelines even when an offense involves other aggravating factors justifying an increased sentence. Aggravating factors are considered in these circumstances, but may be offset by fine reductions rewarding desirable crime prevention or detection behavior. For example, where the top executive of a large firm is involved in an offense, but the firm cooperates with authorities in the manner described above, the corporation will have recommended fines that are 60 percent above those for the typical offender.³²⁶ This corresponds to the difference between the 100 percent increase provided for the involvement of a top executive in a large firm and the 40 percent reduction granted to the firm for its cooperation.³²⁷

One desirable feature of this fine reduction scheme is that it creates incentives for desirable corporate conduct regardless of the nature of a corporation's offense. Furthermore, by providing rewards to firms through a percentage reduction in recommended fines, rewards for post-offense cooperation with public authorities are scaled to the seriousness of the offense involved. Post-offense reporting and cooperation with public authorities will produce the greatest fine reductions for corporate defendants in connection with their most serious offenses.

While this means of rewarding desirable conduct seems sound, the amount of the rewards provided under the Commission's formulas may be either too small or too large to promote desirable corporate conduct in certain circumstances. The rewards provided by the guidelines will be insufficient to promote adequate preventive efforts where firms must maintain broad compliance programs aimed at rarely sentenced offenses to qualify for fine reductions concerning more likely offenses. For example, assume that managers of a firm expect their concern to be convicted of antitrust offenses rarely, if ever. However, similar firms in their industry has been convicted of fraud offenses involving up to \$100,000 in victim losses. Efforts to monitor possible antitrust offenses in the firm will cost \$150,000 and those to monitor fraud offenses will cost \$50,000. Assuming a worst case offense inflicting \$100,000 in victim losses, the firm will have a probable fine of \$100,000 to \$200,000 absent any law compliance efforts. An effective law compliance program would save the firm 60 percent of these amounts, or from \$60,000 to \$120,000. If the corporation must seek to prevent both rare antitrust offenses and more probable fraud offenses to have its law compliance program deemed effective and qualify for this fine savings, firm managers will tend to forego the law compliance program as its total cost (\$200,000) will be less than the likely fine reduction (at most a \$140,000 drop from \$200,000 to \$60,000) that it will produce. The source of this problem is that corporate managers will measure rewards for compliance efforts in terms of offenses most likely to be sentenced, while sentencing courts may evaluate the sufficiency of compliance efforts by demanding preventive efforts concerning a wider range of offenses.

325. SENTENCING GUIDELINES, *supra* note 1, §§ 8C2.5(g)(2), 8C2.6.

326. *Id.*

327. *Id.*

In some circumstances, the guidelines may provide rewards for crime prevention activities that are too large to maintain adequate crime deterrents. This problem arises because, once a firm adopts practices that qualify it for reduced fines under the guidelines, the marginal cost to the firm of an additional offense may be only a modest fine with little deterrent force.

For example, if a firm maintains a cosmetic law compliance program sufficient to be recognized as effective at sentencing, a firm's maximum recommended fine for a fraud offense inflicting \$100,000 in victim losses is \$80,000, for a total sanction after restitution of \$180,000. If fraud offenses are successfully prosecuted in about 10% of all cases, this implies a projected sanction cost of \$18,000 per offense. When compared with the projected illegal gains of \$100,000 per fraud offense, this small fine may suggest to corporate managers that tolerating fraud offenses by subordinates is a good bet and ultimately profitable to their firm.

Hence, while nominally promoting systemic law compliance efforts, the crime control rewards offered under the guidelines may undercut crime deterrents created elsewhere in the guidelines. This follows from the Commission's decision to provide crime control incentives through large downward adjustments in fine multipliers. By reducing the marginal disincentives to further corporate crimes, the Commission may have inadvertently encouraged some corporate offenses rather than discouraged them.³²⁸

C. Real Offense Versus Charged Offense Sentencing

In developing both its individual and corporate sentencing guidelines, the Sentencing Commission was forced to decide whether to base sentences solely on charged offense conduct or to include in sentencing considerations further conduct or circumstances proven at sentencing. The former approach establishes a "charged offense" sentencing system, while the later is a "real offense" sentencing system since it is based on the offender's "real" conduct rather than just the subset of conduct supporting the defendant's conviction.

In its sentencing guidelines for individuals, the Commission settled on a hybrid of real and charged offense sentencing.³²⁹ An individual's sentence is tied to his or her charged offense through the determination of a base offense level from charged offense conduct. However, the base offense level is then modified by considering real offense conduct. Offense level adjustments are made for such factors as offense characteristics not taken into account in determining liability, victim characteristics, and the offender's role in the offense.

For corporate offenders, the Commission adopted a somewhat different hybrid of charged and real offense sentencing. When corporate base fines are determined from offense levels, charged offense conduct plays the same role in corporate sentencing as for individual sentencing. However, to a much greater degree than for individuals, the corporate sentencing guidelines determine fines from conduct and circumstances that generally will not need to be proven to establish corporate liability. The size of victim losses and offender gains are good examples of offense characteristics that may not need to be shown to

328. See Coffee, *supra* note 271, at 17.

329. See Nagel, *supra* note 13, at 925-27.

establish corporate criminal liability, but which now play a central role in determining corporate sentences.³³⁰ Similarly, offense and offender characteristics affecting corporate culpability determinations and corresponding fine increases or decreases also produce substantial fine variations based on considerations beyond charged conduct.

The emphasis on real conduct under the corporate sentencing guidelines promises to both help and hurt corporate defendants. The provisions for sentence reductions based on such extra-offense conduct as the operation of a substantial law compliance program and post-offense responses aiding law enforcement officials offer corporations means to reduce their fines from levels determined from offense conduct alone. However, guideline provisions tying fines to victim losses and offender gains and further provisions raising fines based on aggravating factors like the participation of top firm managers in an offense establish real conduct tests that will often work to the disadvantage of corporate defendants.

One of the most significant implications of the emphasis in the corporate sentencing guidelines on real offense conduct lies in the burden of proof that will apply to the bulk of corporate sentencing determinations. Unlike charged offense conduct that must be established beyond a reasonable doubt to impose liability, further conduct or circumstances affecting corporate sentencing need only be established by a preponderance of the evidence.³³¹ Furthermore, findings regarding these sentencing factors are made by sentencing courts without any additional jury participation and, in the courts' discretion, without the presentation of additional testimony.³³² This is true even for determinations of restitution amounts, despite the fact that equivalent damage findings in civil damage actions would be subject to jury trial requirements.³³³

D. The Role of Sentencing Patterns for Individuals

As previously discussed, past corporate sentencing played almost no role in defining the Commission's corporate sentencing guidelines. Curiously, past patterns of individual sentencing indirectly shaped recommended corporate sentences through the Commission's incorporation of offense level analyses into the corporate sentencing guidelines. Where measurable offender gains and victim losses are small, the Commission's earlier offense level analyses for individual sentences will control corporate fines as well.³³⁴

Several considerations apparently motivated this choice of corporate sentencing standards by the Commission. First, in the absence of substantial measurable gains or losses, the Commission recognized that there would be crimes that threaten or inflict serious public injuries and therefore warrant

330. Beyond the need under some statutes to show the involvement of a jurisdictional amount of harm or loss in an offense, the full amount of victim losses or offender gains involved in an offense rarely need to be established to impose corporate liability.

331. Cf. *United States v. Mobley*, 956 F.2d 450, 455 (3d Cir. 1992) (proof by a preponderance of the evidence upheld for individual sentencing determinations); *United States v. Lee*, 818 F.2d 1052, 1057 (2d Cir. 1987) (same); *United States v. Wilson*, 900 F.2d 1350, 1353 (9th Cir. 1990) (same).

332. See FED. R. CRIM. P. 32(a) and (c)(3)(A).

333. See *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985).

334. See SENTENCING GUIDELINES, *supra* note 1, § 8C2.4 (a)(3), (d).

significant corporate penalties. Offense level analyses provide a means to identify these offenses based on both sentencing criteria used in the past by federal courts and the Commission's prior review and organization of those criteria in promulgating the individual sentencing guidelines. Second, the use of offense levels as offense severity measures insures that offenses deemed serious for individual offenders will also be treated as serious for corporate defendants. The use of offense levels equalizes the severity rankings of corporate and individual offenses, at least where victim losses and gains are modest.³³⁵

The wisdom of equalizing sentences in this manner is unclear. The use of offense levels assigned for individual offenders in gauging the seriousness of corporate offenses involves a casual anthropomorphization of corporate offenders that may be misguided. In many settings, the offense behaviors or characteristics leading to substantial offense levels for corporate offenses involve actions by corporate agents for which corporate principals should not be held accountable. For example, the guidelines for sentencing fraud offenses provide for a substantial offense level increase based on the involvement of a conscious or reckless risk of serious bodily injury in a fraud offense.³³⁶ However, if a corporate employee chooses to use physical threats to further corporate interests, it is unclear why his firm should automatically be held accountable in sentencing analyses for this choice. It is unlikely that most firms would openly authorize or tolerate violent business techniques. While it is conceivable that managers might tolerate violence for corporate advantage, this will presumably be the exception, not the rule. More likely, physical threats to crime victims will result from personal choices by individual corporate employees to use these methods. The basis for holding the employee's firm accountable for this choice is unclear, yet this is precisely the result that follows from using offense levels as a basis for corporate sentences.

Of course, in assessing corporate criminal liability under federal law, firms are held accountable for all actions of their employees within the scope of their employment and undertaken for corporate benefit.³³⁷ Hence, it is superficially consistent with this vicarious liability rule to impose sentences through automatic attribution to their corporate employers of all aspects of work-related employee actions and decisions. However, just as a battery might be considered outside an individual's scope of employment while a fraud offense to sell corporate products was considered within that scope of employment, so too may certain aspects of how an offense is carried out be outside an individual's scope of employment and not fairly attributable to his firm for purposes of sentencing analyses. In providing for sentence reductions based on minimal organizational culpability concerning offenses by corporate agents, the Commission recognized that the blameworthiness of a firm in initiating or promoting offenses should affect the size of corporate fines. It seems surprising, then, that in adopting offense levels as a fundamental fine-setting measure the Commission seems to have operated on the opposite assumption, treating all employee actions as equally attributable to corporate defendants regardless of

335. Of course, this is not the case where offense gains or losses are large. Where either of these overshadow base fines determined from offense levels, corporate offenses will receive heightened fines reflecting gains or losses and their offenses will be treated as relatively more serious than similar individual offenses.

336. See SENTENCING GUIDELINES, *supra* note 1, § 2F1.1(b)(4).

337. See, e.g., *United States v. A&P Trucking Co.*, 358 U.S. 121, 125 (1958).

the responsibility of firm managers or firm policies for those actions or the foreseeability of the actions to superiors in a position to prevent misconduct by the employees.

One possible way to explain this sort of corporate accountability for the seriousness of private agent behavior is to view the corporation's liability as not a punishment for the commission of an offense by a corporate agent, but rather for the firm's failure to prevent or stop it. In this framework, a fraud offense involving threats of violence would be a more serious offense than typical fraud and a corporation's failure to prevent a violent fraud would be correspondingly more serious than the failure to prevent everyday fraud. While this logic for grading the seriousness of corporate crimes is consistent with other portions of the guidelines treating firms as public trustees for the purpose of law enforcement, it may still beg the question of what sorts of offenses or components of offenses firm managers should anticipate that their employees may commit and should take steps to prevent.

VII. THE EFFECT OF THE GUIDELINES ON CRIMINAL LAW ENFORCEMENT IN CORPORATE ORGANIZATIONS

A. Corporations as Public Trustees Concerning the Prevention of Internal Crimes

At the heart of the corporate sentencing guidelines is a new model of criminal law enforcement in corporate organizations.³³⁸ Rather than viewing all crimes by corporate agents as offenses subtly initiated or promoted by corporate principals, the guidelines recognize that many corporate crimes involve deviance by low-level corporate employees in which corporate managers have little or no role. Federal law and the sentencing guidelines impose criminal penalties on corporations for crimes like these not because corporate managers caused or promoted the crimes, but rather to encourage managerial attention to preventing and detecting them.

Conceived this way, corporate criminal liability encourages a corporation (acting through its managers) to serve as a public trustee, with responsibilities to actively promote law compliance and the administration of justice in connection with business activities initiated by the firm and undertaken on its behalf or for its benefit.³³⁹ This quasi-official role involves obligations that are coextensive with a firm's business reach. It entails both duties to assist public authorities in preventing crimes and to aid in law enforcement investigations once an offense is committed by a corporate employee or agent.³⁴⁰

While this role of corporations as law enforcement trustees is not

338. See Weintraub & Chaset, *supra* note 248, at 4, 7.

339. See Otto G. Obermaier, *Drafting Companies to Fight Crime*, N. Y. TIMES, May 24, 1992, § 3, at 11 (statement by the U.S. Attorney for the Southern District of New York that, under the guidelines, "[g]ood corporate citizenship is now defined by expanded obligations: the traditional prevention and detection of crime, and now the reporting of crime when detected."); Rakoff, *supra* note 7, at 3 (noting that the guidelines treat a corporation like "an arm of the law").

340. See *Sentencing Guidelines Heighten Need to Pay Serious Attention to Whistleblowers' Allegations*, *supra* note 176, at 8 (noting that the corporate sentencing guidelines are built on the premise that it is the responsibility of a corporation to ferret out crime and turn itself in).

explicitly recognized under federal statutes, federal *respondeat superior* standards for attributing criminal liability to firms have been interpreted in a manner consistent with such a trustee model. Corporate criminal liability is imposed under federal case law for most employee crimes, even where employees are acting against managers' instructions in committing offenses.³⁴¹ Such cases suggest that corporate criminal liability is premised not on the notion that the employee involved is an agent of the firm for purposes of illegal conduct, but rather on the failure of corporate managers to fulfill their law enforcement obligations. That is, criminal liability is imposed due to a firm's failure in its role as a public trustee for intra-organizational law enforcement.³⁴²

B. An Agency Analysis of Criminal Law Enforcement Through Corporate Trustees

The imposition of corporate criminal liability on this basis and the creation of corresponding law enforcement incentives for corporate managers has sound underpinnings in agency principles. The use of corporate managers and employees as law enforcement agents is aimed in part at overcoming barriers to effective law enforcement through traditional means. To the extent that large corporate organizations operate in substantial isolation from public scrutiny, the information gathering costs for detecting of corporate crimes by traditional means are often large. However, equivalent information is often available to corporate managers during normal management activities. Furthermore, corporate managers can use their accumulated insight into firm operating methods to identify sources of useful information and to interpret data gathered on possible misconduct. Finally, corporate managers will typically be more effective in gathering information from employees than outside investigators since managers can threaten termination or other discipline towards recalcitrant information holders.

However, if corporate managers are to serve as a sort of private police force regarding corporate misconduct, some very substantial corporate rewards for effective law enforcement are probably necessary to encourage diligent action. Viewing corporate managers as agents of the public for law enforcement purposes, the challenge in agency terms is to provide either positive incentives for successful law enforcement efforts or negative consequences for failures in these efforts sufficient to motivate corporate managers to act as public agents and to undertake desired law enforcement efforts.

The sentencing guidelines establish these types of incentives in several

341. See, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

342. Incentives for corporate managers to act as private police are a clear consequence of corporate criminal liability. Professor Albert W. Alschuler of the University of Chicago describes the governing logic as follows:

Roughly speaking, the claimed justification for punishing corporations as criminals [rather than just punishing responsible individual offenders] is that innocent managers, anxious to avoid the punishment of innocent shareholders, will act as patrol officers. Everyone will police everyone else and will have appropriate incentives to create a law-observing corporate culture.

Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312 (1991).

ways. Two important incentives are created by provisions for fine reductions based on corporate compliance programs and post-offense responses aiding law enforcement. In providing reduced fines for these types of desirable conduct, the federal sentencing guidelines offer direct rewards to firms that perform in a socially desirable fashion as public agents or trustees for corporate law enforcement purposes.³⁴³

Of course, the rewards involved here are not incremental monetary payments, but rather the avoidance of greater losses for trustee lapses. Hence, rather than establishing a true reward system, the guidelines create a form of bonding system in which an increased fine serves as the equivalent of a forfeited bond. The presence of this bond and the chance that it will be forfeited under specified circumstances help insure that a corporation's managers will maintain fidelity to the law enforcement tasks they need to perform to make the firm an effective public trustee. If the bond amount—that is, the amount of sentence reduction forfeited through lax law compliance efforts—is sufficient to pose a threat to corporate managers, the presence of this bond can create a valuable agency relationship in which corporate managers undertake significant law enforcement responsibilities as agents of the public and partial substitutes for traditional law enforcement personnel.

This shift in responsibilities from public to private law enforcers has not gone unnoticed. Some corporate counsel view the operation of compliance programs as “doing government’s job” and have argued for more substantial corporate rewards to compensate for this private allocation of law enforcement responsibilities.³⁴⁴ Beyond the fine reductions in the guidelines, additional rewards for sound compliance programs might include immunity from liability for aberrational offenses, qualification for special government opportunities (such as a preferred status as a government supplier), or public recognition by government officials of superior compliance efforts to improve the reputation of the firms involved.

While these more substantial rewards might motivate greater voluntary efforts, for the moment corporations and their managers are expected to undertake criminal law enforcement efforts as conscripts, not volunteers.³⁴⁵ Internal law enforcement duties are demands placed on firm managers in exchange for the privilege of operating through a corporate form. To the extent that operating a business through a complex and often socially isolated corporate organization tends to shield internal misconduct from detection, this mode of business operation may facilitate more crime than would be undertaken by independent individuals engaged in similar business activities. It is both desirable and fair to expect that parties operating businesses through corporate organizations and receiving the benefits of those operations should

343. While the guidelines provide valuable rewards for corporations furthering criminal law enforcement, they unfortunately send a mixed signal amidst privilege rules that provide little or no protection for disclosed law compliance program reports or internal investigation results and thereby put firms that create them at greater risk in later civil or criminal investigations. See Jay A. Sigler & Joseph E. Murphy, *The Corporate Lawyer As Unsung Hero*, PA. LAW., June 1989, at 12, 13 (calling for a self-evaluation privilege that would protect against disclosures of compliance records and avoid negative incentives towards such programs).

344. See *id.*

345. See, e.g., Obermaier, *supra* note 339, at 11 (describing the sentencing guidelines as having “conscripted” corporations into the fight against crimes).

take extra law enforcement steps to counteract the relative isolation of many corporate activities from most traditional law enforcement scrutiny.³⁴⁶

C. *The Need for Private Policing in Corporate Organizations*

Reliance on corporate managers as law enforcement monitors akin to a private police force³⁴⁷ within corporate organizations is consistent with society's demands for police activities in general. Societal demands for policing by state agents tends to increase where three circumstances are present: inequality in social conditions is large, social relationships between crime victims and other persons in direct contact with offenders are distant and intermittent, and there are few other institutions to address social conflicts.³⁴⁸ In connection with traditional types of crime, if public resources do not meet demands for police activity under these circumstances, various forms of non-state policing such as private guard services or citizen anti-crime organizations may be called on to fill the gap.³⁴⁹

Demands for policing stem from two characteristics of social fragmentation.³⁵⁰ First, persons who are not in daily contact with parties they perceive as potential criminals lack the information sources about incipient criminal activities that would exist in a small, close-knit community. They expect police personnel to obtain this information. Second, potential victims in a fragmented society may expect that persons sharing community backgrounds with criminals will identify with offenders more readily than with remote crime victims and, therefore, will not come forth to aid in law enforcement efforts. Hence, demands for police activities of various sorts grow with increases in the diversity of populations and with the isolation of particular community segments from others.

The growing complexity and isolation of large corporate organizations from other portions of society therefore explains increasing public demands for regulatory oversight and criminal investigations of corporate activities. Many persons with little or no access to corporate operations or decision making have no basis to evaluate the social responsibility of corporate actors. However, they fear—correctly in some cases—that strong pressures for corporate profits may result in the sacrifice of public interests to corporate gains. Coupled with this fear is a sense that when misconduct occurs inside a firm, the tendency of corporations toward secrecy and a desire to protect co-workers will encourage concealment of the misconduct rather than revelations to public authorities. In light of such suspicion about corporate motives and the forthrightness of corporate disclosures concerning internal misconduct, the public increasingly looks to regulators, law enforcement personnel, and prosecutors to provide checks on illegal corporate conduct that individual citizens cannot adequately

346. The corporate sentencing guidelines are "based on the principle that the Government deals most effectively with the crimes of organizations when the organizations themselves—primarily corporations—become partners in the endeavor." *Id.*

347. See Rakoff, *supra* note 7, at 3 (observing that sentence reductions under the corporate sentencing guidelines are aimed at "having private corporate managers act as policemen").

348. See DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* (1980).

349. See generally Eduard A. Ziegenhagen & Dolores Brosnan, *Citizen Orientations Toward State and Non-State Policing*, 13 L. & POL'Y 245 (1991).

350. See *id.*

monitor themselves. Many individuals no doubt perceive themselves as potential victims of misconduct by large firms, yet feel helpless to prevent and avoid injuries absent the deterrent efforts of public officials. Hence, they expect regulators and law enforcement personnel to undertake corporate crime prevention efforts on their behalf.

The emphasis in the corporate sentencing guidelines on new law enforcement steps by corporate managers is an outgrowth of these expectations. If present resources of traditional law enforcement personnel do not permit sufficient enforcement efforts to achieve a high level of corporate crime prevention, it may be possible to produce equivalent results through the efforts of corporate managers. From this instrumental perspective, reliance on internal corporate law enforcement efforts is a way to accommodate increased public suspicion of isolated corporate bureaucracies in a period of decreasing public resources available to provide an independent law enforcement check on those bureaucracies.

D. Entrustment Models for Corporate Law Enforcement Efforts

Viewing corporations as public trustees concerning internal law enforcement is useful in that it suggests some of the crime prevention activities federal prosecutors and courts should recognize as sufficiently meritorious to justify sentence reductions under the guidelines. Some rough analogies to familiar entrustment roles provide useful (albeit imperfect) insights into the nature of corporate efforts that should be sufficient to gain sentencing rewards.

For example, consider the household watchdog as a simple law enforcement trustee. In their provisions on law compliance programs, the guidelines envision a law enforcement role for corporations akin to that of a watchdog guarding a property for an absent owner. The role of the watchdog is to enforce trespass prohibitions as a stand-in for the owner, just as the role of corporate managers under the guidelines is to enforce a variety of criminal standards as stand-ins for law enforcement officials and the public generally. The features of a good watchdog match the features of an effective compliance program to a surprising degree. An aggressive watchdog educates the unaware about property boundaries and corresponding limits on acceptable behavior. An effective watchdog will snarl loudly at persons considering improper activity, thereby signaling the likelihood of a painful penalty for misconduct and establishing strong deterrents to undesirable conduct. A watchdog can often detect potential offenders from subtle clues—indeed, sometimes better than the owner he serves. If a trespass occurs, a watchdog will sometimes catch the offender and render swift justice. The watchdog's record in catching offenders, if widely known, will expand its deterrent impact.

Each of these features of a watchdog's performance has direct counterparts in the operation of a successful compliance program. A law compliance program should include efforts to identify organization members who are potential violators of various legal requirements and to educate those persons about the requirements and the specific work behaviors necessary to satisfy them. These educational efforts should emphasize the probable penalties—both within the criminal justice system and under the company's own disciplinary system—for criminal conduct. An effective law compliance system should include ongoing monitoring to identify behavior by corporate employees

suggesting possible misconduct and the need to investigate further. When criminal activity is discovered, reactions by company managers should include discipline of responsible individuals sufficiently harsh to send a signal to those individuals and fellow employees that such conduct will not be tolerated. These consequences will also notify potential offenders that there is a reasonable probability further misconduct will be caught, resulting in additional discipline and possible disclosures to public authorities. As the expected likelihood of these adverse consequences goes up in the minds of potential offenders, crime deterrence will rise as well.

The analogy of corporate law compliance programs to the efforts of watchdogs also suggests some problems that will plague both watchdog owners and compliance system operators. For example, one common problem with watchdogs is that their policing efforts are sometimes misdirected, resulting in bites or other injuries to welcome intruders like mailpersons. Likewise, it is critical that internal corporate efforts aimed at crime detection and discipline be properly targeted. An employee who is inaccurately charged by company managers with misconduct may later bring an action for defamation or wrongful discharge. Hopefully, standards governing these sorts of tort liability will be interpreted to withhold liability for good faith errors by corporate managers in the operation of generally accurate and valuable law compliance programs. However, insofar as private corporations possess far less immunity from tort liability for erroneous law enforcement efforts than do public authorities, the corporate risks of errors in conducting the law compliance programs encouraged under the corporate sentencing guidelines may be considerable.

Provisions of the sentencing guidelines addressing post-offense responses seem to adopt another entrustment model. Under these provisions, a corporate defendant stands in a role comparable to the bounty hunter of the old West. The bounty hunter was the frontier marshall's solution to the lack of sufficient law enforcement personnel. The government paid private parties for law enforcement results—that is, for the capture of wanted criminals. Under the sentencing guidelines, sentence reductions available for post-offense responses also reward firms for law enforcement results. The standards encourage corporate managers to serve as bounty hunters, seeking corporate rewards for gathering and disclosing inculpatory evidence concerning employee offenders. The justification for these guideline provisions is the same as that for payments to bounty hunters in the old West—traditional law enforcement personnel are spread too thin to do the job and it is more productive to pay for results than to engage more official personnel.

However, like the relationship between bounty hunters and their targets in the old West, the relationship between a corporation and an employee targeted in an internal investigation of possible criminal conduct will be inherently adversarial, at least from the point when probable misconduct is confirmed by corporate investigators. Furthermore, if the sympathies of other employees lie with a targeted employee, a corporation conducting a post-offense investigation and turning the results over to public authorities may acquire a negative reputation like that of old time bounty hunters.

E. Altered Managerial Relationships Following the Internalization of Corporate Law Enforcement

While expanded managerial roles in crime detection may improve law enforcement and compliance in corporate organizations, they are also likely to alter relationships between corporate managers and traditional law enforcement personnel and between managers and their employees. On the one hand, law enforcement officials and corporate managers may move towards greater cooperation instead of the adversarial confrontations that have generally characterized their relationship to this point. On the other hand, firms and their employees (particularly those engaged in misconduct or with information about internal misconduct but not wishing to divulge it) may move toward more adversarial relationships.

The nature of the relationship between firm managers and law enforcement personnel encouraged under the sentencing guidelines is a matter of continuing debate. According to some law enforcement personnel, the guidelines recognize that federal prosecutors, investigators, and corporate managers share a "practical partnership" in combating corporate crime.³⁵¹ However, unlike a business partnership, corporate membership in this arrangement is compelled, not voluntary. As the U.S. Attorney for the Southern District of New York has observed, "[m]anagements of publicly held corporations are left with few alternatives to attempting to prevent wrongdoing in the corporation, detecting it when it occurs and reporting it to the authorities."³⁵²

If a true law enforcement partnership is to develop between law enforcement officials and corporate managers, their relationship will need to be premised on a much higher degree of trust than presently prevails between these parties. Changes in both managerial and prosecutorial behavior are needed.

For corporate managers, prosecutors' trust can only be gained through a track record of reliable assistance to law enforcement officials. If managers wish to be seen as responsibly promoting law enforcement, they cannot pick and choose when to aid law enforcement officials and when to resist. Rather, they must consistently engage in active crime detection and disclosure, erring, when in doubt, toward over-inclusive rather than under-inclusive revelations. With such a pattern of cooperation and public service, prosecutors will have good reason to believe they are receiving complete corporate cooperation in a given case.

For their part, prosecutors need to provide greater assurances of desirable corporate treatment following law enforcement assistance if they are to build managerial trust in the desirability of such assistance. Two types of prosecutorial actions would be desirable. First, prosecutors need to establish firm standards for withholding corporate prosecutions or agreeing to lesser corporate charges and penalties when corporations detect, disclose, and seek to prevent internal crimes. These standards for prosecutorial discretion will help insure consistency among prosecutors. They will also provide managers with

351. See, e.g., Otto G. Obermaier, *A Practical Partnership*, NAT'L L.J., Nov. 11, 1991, at 13.

352. *Id.*

law compliance targets to aim for without fear that criteria for beneficial treatment will be constantly changed to be kept just out of reach. Second, if formal standards for beneficial treatment are not met, but firms nonetheless provide significant assistance in discovering illegal conduct that probably would otherwise have gone undetected and in bringing responsible individuals to justice, prosecutors should still recognize this corporate conduct with favorable charging decisions. A consistent practice of withholding prosecutions on these grounds will help reassure firm managers that, regardless of the formal status of corporate compliance programs, their cooperation and efforts to reveal incriminating information to public prosecutors will work to their advantage by reducing corporate liability. It will also indicate that prosecutors have due regard for the legitimate interests of innocent shareholders, managers and employees and will not impose fines and related hardships on those parties if corporate managers have served the public by contributing meaningfully to law enforcement.³⁵³

The notion that firms cooperating with prosecutors should never be treated more harshly than they would likely have been absent such cooperation suggests a strategy for government decisions about prosecuting corporate defendants. Where firms (1) cooperate by revealing information about corporate offenses that prosecutors would probably not have detected from other sources and that was not otherwise required to be revealed and (2) undertake significant self-studies and reforms to reduce the chance of a repeat offense, favorable prosecutorial treatment should follow. In most cases, this treatment should include the withholding of corporate prosecutions. Where one or more of these steps are lacking, but some desirable corporate actions are taken, then less favorable treatment should follow, such as withholding the most serious charges available against the firm and bringing only lesser charges.

This strategy for targeting corporate prosecutions is desirable because, absent positive prosecutorial responses in a predictable pattern, corporate managers will have no reason to cooperate with prosecutors concerning offenses detected within firms but unlikely to be detected or fully investigated by outside authorities. Given that managerial cooperation concerning such offenses may result in increased corporate costs if followed by corporate changes and liability, managers will tend to refuse to cooperate unless they are confident that prosecutors will reciprocate in kind. Put into economic terms, corporate managers possessing information about a corporate offense and considering cooperation with prosecutors are placed in a form of prisoner's dilemma. Their optimal result would be achieved by cooperating with prosecutors and having prosecutors cooperate with them through favorable prosecutorial treatment producing no corporate penalty. However, if corporate managers perceive that disclosures to prosecutors may hurt their firm by triggering new corporate charges and liability, they may conclude that their optimal strategy is to withhold cooperation with prosecutors. That is—in the absence of certainty about prosecutors' responses—corporate managers may believe, perhaps correctly, that the interests of their firms are best served by avoiding disclosures and hoping that, absent the information the managers hold,

353. Cf. Arkin, *supra* note 167, at 3 (calling on federal prosecutors to exercise restraint in bringing cases against corporations given the potentially devastating effect of the large fines provided for under the guidelines).

prosecutors will not detect the crime involved or will be unable to prove it. The only way out of this dilemma is to increase managerial confidence in the linkage between corporate cooperation and beneficial corporate treatment by prosecutors.

Changes in corporate criminal liability standards that increase managerial incentives to monitor and disclose offenses by corporate employees will also change relationships between firms and their employees.³⁵⁴ If firms adopt the sorts of internal policing activities encouraged by the guidelines, corporate managers conducting internal audits and investigations and regularly disclosing detected misconduct will pose obvious threats to internal wrongdoers and those who wish to shield such parties from harm.³⁵⁵ These changes are likely to create new tensions between corporate managers and employees both inside and outside law compliance processes. In settings where employees are unsure about the bounds of lawful activities, the adoption of a significant internal "policing" apparatus may also hamper legitimate employee creativity and lower employee moral.³⁵⁶

One answer to these problems is that firms must prepare employees for law compliance monitoring and the investigative aftermath of an internal offense. Corporate employees engaging in offenses in their jobs must be characterized as acting as much against corporate interests as employees stealing corporate property. Employee attitudes towards corporate offenders should be shaped accordingly. A firm must also convince employees that resisting an audit or investigation or altering evidence with the aim of protecting an individual offender is not in the corporate interest. To the extent that employees are convinced of this by internal discipline imposed on employees who engage in such abuses, audits, investigations and disclosures will proceed more smoothly. Perhaps more importantly, potential offenders will be more strongly deterred because they will not count on internal corporate shelter to protect them from prosecutions and criminal punishments.

VIII. CONCLUSION: RISKS AND OPPORTUNITIES CONCERNING CORPORATE CRIMINAL LIABILITY

Even given the possibility of some problems in implementing particular sentences, the reward structure of the new corporate sentencing guidelines seems likely to usher in a new era in which officials and corporate managers share criminal law enforcement responsibilities concerning corporate offenses. It remains to be seen whether this change will transform corporate managers into public trustees regarding internal criminal law enforcement or, as some have complained, create pervasive employee monitoring systems resembling a police state.³⁵⁷ At present, all that is certain is that federal criminal law has

354. See, e.g., Obermaier, *supra* note 351, at 13; Winthrop M. Swensen & Nolan E. Clark, *The New Federal Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, CORP. CONDUCT Q., Winter 1991, at 1, 3.

355. See *Sentencing Guidelines Heighten Need to Pay Serious Attention to Whistleblowers' Allegations*, *supra* note 176, at 8 (noting that the guidelines reflect the premise that it is the responsibility of corporations to ferret out crime and turn in responsible parties to law enforcement officials).

356. See David M. Zornow & Benjamin B. Klubes, *The New Organizational Sentencing Guidelines*, AM. LAW., Mar. 1992, at 8.

357. See *id.* at 8 ("the guidelines pose the risk of turning corporations into policemen,

been transformed by the Sentencing Commission's innovative sentencing guidelines for organizations. The guidelines have "raised the stakes" concerning corporate crime, creating new risks and opportunities that are focusing long overdue attention on means to prevent corporate offenses. While the final outcome of this new attention to crime control is still evolving, the new organizational sentencing guidelines seem likely to create compelling incentives for firms to privatize corporate criminal law enforcement by adopting law compliance programs and post-offense responses to detect and reveal internal offenses.