CORPORATE CULPABILITY UNDER THE FEDERAL SENTENCING GUIDELINES

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INTRODUCTION

In 1984, Congress created the United States Sentencing Commission to promulgate criminal sentencing guidelines for the federal courts.[1] The first task of the Commission was the development of sentencing guidelines for individuals.[2] When these were completed in 1987, the Commission began to formulate guidelines for organizations. The fourth and final draft of the organizational guidelines became law on November 1, 1991.[3]

The new organizational guidelines take an explicitly "carrot and stick" approach to sentencing.[4] Under section 8C2, calculating the appropriate fine for an organizational offender begins with the determination of a "base fine" chosen to reflect the seriousness of the offense.[5] The base fine is then adjusted according to a series of aggravating and mitigating factors: the participation of authority personnel, the history of the organization, cooperation with law enforcement authorities, and the presence or absence of a program to prevent and detect crime.[6] In part, these factors are intended to provide an incentive for organizations to "strengthen internal mechanisms for deterring, detecting and reporting criminal conduct by their agents and employees."[7] But an additional result of the Guidelines is to make corporate punishment proportional to what would, in an individual, be called "culpability": the deliberateness of the offense, the extent of the offender's involvement, and the offender's "character."[8] Indeed, the Guidelines explicitly use the term "culpability" and refer to the list of aggravating and mitigating factors as the organization's "culpability score."[9]

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1. Sentencing Reform Act of 1984, Pub. L. No. 98–473, tit. II, ch. 2, §§ 211–239, 98 Stat. 1837, 1936, 1987–2040 (1984).

2. *See* United States Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, (Nov. 1991) [hereinafter U.S.S.G.].

3. 50 Crim. L. Rep. (BNA) 1139 (Nov. 6, 1991).

4. *United States Sentencing Commission Draft Guidelines for Organizational Defendents*, Crim L. Rep. (BNA) No. 48 at 2001, 2002 (Oct. 1990) [hereinafter *1990 Draft Guidelines*].

5. U.S.S.G. § 8C2.4.

6. *Id.* § 8C2.5.

7. *1990 Draft Guidelines*, *supra* note 4, at 2002. *See also Principles Adopted by the U.S. Sentencing Commission to Guide the Drafting of the November 1990 Draft Organizational Guidelines* [hereinafter *Guiding Principles*], *reprinted in* UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS, A–3 (August 30, 1991) [hereinafter SUPPLEMENTARY REPORT]. These principles were developed to guide the formulation of the *1990 Draft Guidelines*, *supra* note 4, but, as their inclusion in the *Supplementary Report* suggests, they also informed the final version of the guidelines.

8. The Introductory Commentary to the organizational guidelines states that the fine range "should be based on the seriousness of the offense and the culpability of the organization." U.S.S.G. ch.8, intro. cmt. *See also Guiding Principles*, *supra* note 7, at A–2, A–3 ("Mitigating factors should be designed to reduce fines for two primary reasons: to recognize an organization's relative degree of culpability, and to encourage desirable organizational behavior. ... For example, the guidelines should permit an organization a reduction if it demonstrates that the offense was caused by a rogue employee rather than at the direction or with the tacit approval of 'management.'")

9. U.S.S.G. § 8C2.5.

Although the Guidelines are applicable to all "organizations,"[10] they were designed with corporations in mind, and it is on corporations that they are expected to have their greatest impact.[11] Yet the Guidelines' use of organizational culpability represents a departure from the traditional principles of substantive corporate criminal law. The dominant aim of corporate criminal law has been deterrence rather than retribution, rehabilitation, or incapacitation. This has meant that culpability has played a relatively minor role. To be sure, courts have had to develop theories of corporate mens rea in order to hold corporations liable for crimes requiring intent. But these theories are the products of necessity rather than careful analysis or conceptual rigor; they stem less from a belief in the importance of corporate culpability than from the perceived need to extend criminal liability to corporations.[12] The Guidelines, in contrast, employ a well-considered, theoretically satisfying conception of corporate culpability that is driven by the purposes of sentencing set out in 18 U.S.C. § 3553(a)(2): just punishment, adequate deterrence, protection of the public, rehabilitation of the offender, proportionality with the seriousness of the offense, and the need to promote respect for the law.[13]

This Article examines the use of corporate culpability in the Federal Sentencing Guidelines and addresses three major questions: In light of the traditional unimportance of culpability in corporate criminal law, is corporate culpability an appropriate concern of the Guidelines? If so, how is corporate culpability best conceptualized? Finally, how do the Guidelines understand corporate culpability, and how close do they come to embodying this most satisfying theory? Part I of the Article discusses the principal reasons why culpability has been important at the trial and sentencing of individual criminals, and argues that similar reasons justify concern with culpability in the sentencing of corporate offenders. Although culpability is not the only important factor in corporate sentencing, Part I concludes, it is a legitimate concern of the Guidelines. Part II sets out three alternative conceptions of corporate culpability, those implicit in the two prevailing theories of corporate criminal liability—the doctrine of respondeat superior and the doctrine of Section 2.07 of the *Model Penal Code*—and a third conception that has received considerable support from scholars of corporate crime. Part II argues that it is this third conception, termed the "corporate character theory," that provides the most adequate understanding of corporate culpability, and that this theory is particularly well-suited for use in the sentencing of organizational criminals. Finally, Part III explores the use of culpability by the organizational guidelines themselves, and contends that they employ a conception of corporate culpability that is closely related to the corporate character theory. In addition, it attempts to show how the adoption of the corporate character theory allows

10. The guidelines define "organization" to include "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and nonprofit organizations." *Id.* § 8A1.1, cmt. n.1.

11. Michael K. Block, *Guest Editor's Observations*, 3 FED. SENT. R. 115 (Nov./Dec., 1990).

12. *See infra* notes 80–83 and accompanying text.

13. These are the purposes of 18 U.S.C. § 3553(a)(3) (1988) as recounted in *Guiding Principles*, *supra* note 7, at A–3. Section 3553(a)(3) itself uses slightly different language.

the Guidelines to pursue a wider range of sentencing aims than is traditional in the sentencing of corporations.

Although this Article argues that culpability is a legitimate consideration in corporate criminal sentencing, it does not contend that it is the only factor, or even that it trumps all others. Ultimately, the success of the organizational guidelines depends not merely on their treatment of culpability, but on their ability to achieve the entire range of sentencing goals. In some cases, achievement of these goals may require that corporate culpability be ignored. This paper does not attempt to determine whether the Guidelines in fact accomplish all the objectives of corporate sentencing. Its aim is more modest: to show that the Sentencing Commission's deference to corporate culpability is not misplaced, and that, to the extent that culpability is important, the Guidelines accurately assess it.

I. CULPABILITY AND THE CRIMINAL LAW

Culpability has been defined as "the degree to which [an offender] may justly be held to blame for the consequences or risks of his act[s]."[14] In individual criminal law, culpability has traditionally played a formal role at two distinct stages of the criminal justice process.[15] At the trial stage, factfinders are generally required to decide *whether* the defendant possessed the level of culpability necessary for conviction of the crime. At the sentencing stage, judges frequently attempt to determine the *degree* of the offender's culpability in order to assign a sentence proportional to it. Culpability is not a factor in every conviction or every sentence.[16] Moreover, it may play a role at one stage and not the other.[17] Generally, however, an assessment of culpability has been important at both the trial and the sentencing of individual offenders.

But should culpability play a role in *corporate* criminal law? At first blush, it is not clear that corporations can be "justly held to blame" for their acts at all. Even if they can, corporate culpability is likely to differ in significant ways from its individual counterpart. This section briefly examines the reasons for the importance of culpability in the trial and sentencing of individuals, and argues that the same rationales justify attention to culpability in corporate criminal law. The section contends that although corporations cannot be culpable in the same way that individuals can, there is a sense in which they may

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14. ANDREW VON HIRSCH, DOING JUSTICE 80 (1976).

15. These are not the only points at which culpability plays a role; they are simply the points at which the role of culpability is formalized. Culpability may also be important to a prosecutor's decision to bring a criminal case or to the decision to accept a plea bargain.

16. No finding of culpability is required for strict liability crimes, for example. Strict liability is often described as "liability without fault." Similarly, culpability need not be given a role at the sentencing stage. For example, for some time people believed that the key question in sentencing was how likely the offender was to commit another crime, and culpability was virtually ignored. *See infra* note 39 and accompanying text.

17. The question of whether culpability is a necessary condition of punishment is distinct from the question of how punishment should be distributed once the decision to punish has been made. For example, it would be possible to convict both a knowing offender and an inadvertent offender of a strict liability crime, but to give the inadvertent offender a more lenient sentence because he or she is less culpable. Conversely, it would be possible to convict only those whose violations of a law are purposeful, knowing, or reckless, but to give both purposeful and reckless violators the same sentence.

be held to blame for the criminal acts of their agents. Corporate culpability is, therefore, a legitimate concern of the Sentencing Commission.

A. Culpability at the Trial Stage

At the trial stage, culpability is usually equated with the mens rea, or guilty mind, of the defendant. The principle that mens rea is a necessary prerequisite for punishment—what H.L.A. Hart calls the "principle of responsibility"[18]—has a long and venerable history in Anglo-American law. Hart argues that "[a]ll civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of ... mind or will."[19] The principle of responsibility is reflected in the requirement that the prosecution prove mens rea, and in the availability of certain excuses—such as insanity, diminished capacity, duress, or necessity—to negate mens rea and defeat liability.[20]

As the proliferation of strict liability offenses attests, the principle of responsibility is not absolute, and some commentators see the growth of strict liability as a repudiation of the traditional link between culpability and punishment.[21] But strict liability offenses may simply be special cases, occasions in which the importance of culpability is outweighed by other factors fundamental to the criminal law. Traditionally, strict liability has been reserved for a special class of "public welfare offenses"[22] which carry a small penalty and no moral stigma. The scope of this class of offenses has expanded, but the Supreme Court recently made clear in *Liparota v. United States*[23] that it still regards strict liability crimes as exceptions to the general rule of adherence to the principle of responsibility. Quoting *Morisette v. United States*, the Court said:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[24]

Omission of the mental element of an offense has been upheld, the Court explained, where a statute "rendered criminal a type of conduct that a rea-

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18. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 181 (1970).

19. *Id.* at 114.

20. The *Model Penal Code* sets out four of these guilty mental states and establishes a presumption that a defendant is not guilty of an offense unless he acted with the required mental state with respect to each material element of the offense. MODEL PENAL CODE § 2.02(3) (1962).

21. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 201, 221 (1991). Coffee argues that "a theory may be on the verge of acceptance that effectively severs [the traditional] linkage between blameworthiness and criminal punishment." *Id.*

22. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); Morisette v. United States, 342 U.S. 246, 252–53 (1952).

23. 471 U.S. 419 (1985).

24. *Id.* at 425 (quoting *Morisette*, 342 U.S. at 250–51 (Jackson, J.)). The *Morisette* court had continued, "[a] relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to ....'" *Morisette*, 342 U.S. at 250–51 (Jackson, J.).

sonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[25] But strict liability statutes have a "generally disfavored status";[26] faced with a statute that does not provide explicitly for strict liability, the Court will refuse to impose it.

The principle that culpability is a necessary condition for punishment is most closely associated with a retributive theory of punishment. If the aim of punishment is to express communal blame and to give the offender his or her "just deserts," then culpability is obviously central. A person who is not culpable is not to blame and thus does not "deserve" to be punished. But the principle of responsibility has been endorsed even by scholars who hold a utilitarian theory of punishment. Herbert Packer, for example, argues that abandoning the principle would eliminate an important source of the deterrent efficacy of the criminal law. Criminal law deters not merely by its crude *in terrorem* effect on would-be criminals, Packer contends, but also by its ability to create "conscious and unconscious moralizing and habit-forming effects" on the law-abiding public that "go far beyond the crassness of a narrowly conceived deterrence."[27] This ability, in turn, depends on adherence to the general rule that culpability is a necessary prerequisite for punishment:

> If it is not thought enough of a justification that the law *be* fair, the argument may seem appealing that a criminal law system cannot attract and retain the respect of its most important constituents—the habitually law-abiding—unless it *is seen to be* fair. And ... [the] simplest meaning [of fairness] is that no one should be subjected to punishment without having an opportunity to litigate the issue of his culpability.[28]

In a slightly different version of this argument, Packer contends that much of the deterrent value of criminal sanctions lies in the "stigma" of moral blameworthiness they confer on the offender. But, Packer argues, criminal sanctions only carry such stigma if they are generally reserved for the culpable.[29] If people who are not culpable are frequently subjected to criminal sanctions, the association of the sanctions with stigma will eventually erode, and the effectiveness of the criminal law will be undermined.[30] Packer

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25. *Liparota,* 471 U.S. at 433.

26. *Id.* at 426 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978)).

27. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 69 (1968).

28. *Id. See also* JOEL FEINBERG, DOING AND DESERVING 98 (1970). Feinberg argues that a theory of criminal law that ignores its function of moral condemnation will be "offensively irrelevant."

29. PACKER, *supra* note 27, at 273. *See also* Coffee, *supra* note 21, at 245. "Stigma," Coffee contends, "is a scarce resource. Society does not have an unlimited capacity to express condemnation or to feel revulsion." *Id.* Packer agrees: "The more indiscriminate we are in treating conduct as criminal, the less stigma resides in the fact that a man has been convicted of something called a crime." PACKER, *supra* note 27, at 273. *See also* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

30. The presence of strict liability and "regulatory" offenses undermines this argument to some extent, but the strict liability explosion is probably too recent to support any conclusions about the results of "overcriminalization." Ultimately, the question is an empirical one. For a sociological argument that the use of criminal law to punish behavior not traditionally regarded as immoral does not reduce the moral force of the criminal law, see Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A*

concedes that making culpability a necessary condition of punishment reduces deterrence in the "narrow" or "crass" sense, but he believes that this loss is outweighed by the accompanying gain of preserving the criminal law as "a carrier of our shared morality."[31] Even if adherence to the principle of responsibility were to yield a net loss in deterrent power, however, Packer and other utilitarians argue that the principle should be retained to protect other social goods, such as liberty, fairness and respect for individual autonomy. H.L.A. Hart is perhaps the best-known proponent of this view. Hart acknowledges that observing the principle of responsibility costs the criminal law some deterrent power.[32] But, he argues, the benefits of the principle generally outweigh these costs. A system that routinely punished the non-culpable would create an intolerably high level of anxiety and apprehension, because citizens could no longer rely on their own, voluntary efforts to avoid confrontations with the criminal law.[33] Such a system would reduce individual liberty by restricting citizens' power over the circumstances under which they become subject to criminal sanctions, and by making it more difficult for them to plan their future.[34] In contrast, a society in which the principle of responsibility is recognized

> maximizes individual freedom within the coercive framework of [the] law .... First, the individual has an option between obeying [the law] or paying [the prescribed penalty]. The worse the laws are, the more valuable the possibility of exercising this choice becomes in enabling an individual to decide how he shall live. Secondly, this system not only enables individuals to exercise this choice but increases the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly.[35]

In addition, Hart argues, a system that recognizes the principle of responsibility

> offer[s] individuals including the criminal the protection of the laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework each individual is given a *fair* opportunity to choose between keeping the law required for society's protection or paying the penalty.[36]

Packer echoes these arguments: "The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect, and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free."[37]

Sociological View, 17 STAN. L. REV. 197, 206–07 (1965). For a more extended discussion of the overcriminalization argument, see Coffee, *supra* note 21, at 242–46.

31. PACKER, *supra* note 27, at 65.

32. HART, *supra* note 18, at 19–20, 183. Both Hart and Packer point out that excuses increase the likelihood of deception and place a heavier burden on the prosecution. They thus lower the probability that the offender will be convicted and punished, thereby decreasing "crass" deterrence. *See* PACKER, *supra* note 27, at 65.

33. HART, *supra* note 18, at 22–24, 181–82.

34. *Id.* at 181–82. For an extended discussion of this point in the context of the organizational sentencing guidelines, see Coffee, *supra* note 21.

35. HART, *supra* note 18, at 23.

36. *Id.* at 22–23. *See also id.* at 181.

37. PACKER, *supra* note 27, at 65.

As utilitarians, both Hart and Packer are prepared to override the principle of responsibility in cases in which adhering to it brings about counter-utilitarian results.[38] If utility were understood solely in terms of crime prevention, and the principle were shown to cause a net loss in deterrent power, neither would hesitate to abandon the principle. Where utility is understood broadly, however, in terms of a good society, Hart and Packer believe that it will usually—although not always—be advanced by making culpability a necessary condition of punishment.

B. Culpability at the Sentencing Stage

Unless the crime is a strict liability offense, culpability will enter the sentencing decision automatically, simply through the fact that conviction requires proof of a guilty mental state. It would be possible to determine the offender's sentence without further consideration of culpability, on the basis of purely forward-looking factors such as the possibility of rehabilitation or the risk of recidivism. Indeed, for many years, this was the prevailing theory of sentencing.[39] Recently, however, it it has been argued by a growing number of theorists that judges should, and in fact do, hand down sentences that are proportional to the degree of the offender's culpability. This principle has also been incorporated into a number of model sentencing codes and guidelines.[40]

Culpability is generally conceived of more broadly at sentencing than it is at the trial stage.[41] At trial, the question is simply whether the defendant had the mental state required for conviction. The structure of a criminal trial requires a "yes" or "no" answer to this question. The assessment of culpability at the sentencing stage, in contrast, is as much an inquiry into the offender's character as it is a determination of his or her mental state at the time of the crime. Factors such as the offender's past law enforcement record, life history, remorse, or role as a "leader" or "follower" in the crime, are commonly taken into account by sentencing judges.[42] These factors are often inadmissible at trial, but they are considered relevant at sentencing because they allow the judge to assess the character of the offender. Of course, a sentencing judge may also take the opportunity to re-examine the mental state of the defendant and "fine tune" the determination of mens rea made at trial. A factor that failed to rise to the level of a defense to the crime; but which

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38. Hart, for example, concludes that "[w]e must be prepared *both* to consider exceptions to the principle [of responsibility] on their merits *and* to be careful that unnecessary invasions of it are not made ...." HART, *supra* note 18, at 183. *See also* PACKER, *supra* note 27, at 67.

39. From the late nineteenth century to the mid–1960s, sentencing theory was driven primarily by a belief in the possibility of rehabilitating the criminal. The most important goals of sentencing were rehabilitation and incapacitation. In the mid–1960s, this approach began to receive criticism, and by the mid–1970s, it was widely attacked for its ineffectiveness and its tendency to result in extremely disparate sentences for similar offenses. Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 7–10 (1983).

40. *See infra* notes 49–52 and accompanying text.

41. As a matter of constitutional law, a judge framing a sentence is not limited to the information received at trial, but is entitled to take into account a wide range of information about the offender. *See* Williams v. New York, 337 U.S. 241, 246 (1949) (holding sentencing judge may take into account evidence of prior crimes inadmissible at trial); United States v. Grayson, 438 U.S. 41, 50 (1978) (holding sentencing judge may take into account judge's own belief that defendant testified falsely at trial).

42. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT 81 (1988).

lessens the degree of the offender's culpability, may become a mitigating factor at sentencing.[43]

Much of the recent emphasis on culpability can be attributed to the rise of the "just deserts" school of sentencing theory.[44] A version of retributivism, this theory of punishment holds that the most important purpose of punishment is to assign blame and to give the offender his "just deserts." For an offender to be punished as he "deserves," punishment must be proportional to the factors that establish blameworthiness: the seriousness of the offense and the degree of the offender's culpability. Other things being equal, a more culpable offender should receive a harsher sentence, a less culpable offender a lighter one. We may call this rule the "principle of proportionality."

It is not only retributivists who support the principle of proportionality, however. Utilitarians such as Norval Morris and John Coffee view the principle as an important "side constraint" on the allocation of punishment according to other criteria such as deterrence, incapacitation, and rehabilitation.[45] Like Hart and Packer, who defend the principle of responsibility for utilitarian rather than retributive reasons, these theorists believe the principle of proportionality advances such independent values as the principle of treating equals equally or the need for a coherence between morality and the criminal law.[46]

Finally, culpability is likely to be an important factor at sentencing even for theorists who reject the principle of proportionality as such, because the broad assessment of culpability made at the sentencing stage is relevant to the goals of incapacitation, rehabilitation, and deterrence. An offender who has committed similar crimes in the past, who was a "leader" rather than a "follower" in the criminal enterprise, or who is unrepentant at trial, has a "worse character" and thus deserves more punishment than his or her less culpable counterpart. But such an offender is also more likely to repeat the crime, to be less ripe for rehabilitation, and to require a harsher punishment before he or she is deterred. An inquiry into the offender's character—his or her culpability, in the broad sense—is likely to prove helpful even where desert is not a concern, and the sole goals of sentencing are rehabilitation, incapacitation, and deterrence.

It is not surprising, then, that judges have weighed culpability heavily in making sentencing decisions. In a recent study of the pre-Guidelines sentencing practices of federal judges with respect to white collar offenders, Wheeler, et al., found that

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43. *See id.* at 93–97.

44. Andrew von Hirsch is perhaps the foremost representative of the just deserts theory. *See* VON HIRSCH, *supra* note 14; ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985). *See also* JOHN KLEINIG, PUNISHMENT AND DESERT (1973); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY (1979); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUITY AND DESERT (1979).

45. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); John C. Coffee, Jr., *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

46. MORRIS, *supra* note 45, at 73–77. Coffee offers a Rawlsian argument in favor of the principle of proportionality, arguing that rational, self-interested people behind a "veil of ignorance" would choose to observe the principle of proportionality. Coffee, *supra* note 45, at 1080–99.

> in order for judges to arrive at what they feel is an appropriate sentence, they find it essential to locate defendants at least roughly in terms of their blameworthiness. ... [Judges] may or may not use the term blameworthy, but ... they describe offenders and the differences between them in terms that enable an assessment of relative degrees of blame, fault, or responsibility. Not a single judge claimed to be able to sentence convicted offenders without regard to some such assessment. Indeed, characterizations of the offender along the dimension of relative blameworthiness, culpability, or responsibility would appear to loom at least as large in the judge's thinking as any of the other considerations in approaching sentencing.[47]

Wheeler, et. al., found that judges employ a broad conception of culpability at sentencing:

> [T]he moral character of the person who committed the crime ... is very much a part of the sentencing stage. Judges go beyond the limited moral texture of the contemporary substantive criminal law, expanding their inquiry so that they evaluate many features of a case that touch on a broad measure of moral blameworthiness.[48]

Although the development of sentencing guidelines has restricted the discretion of sentencing judges, it has not eliminated the importance of culpability. On the contrary, culpability has been given an express role in several sets of sentencing guidelines. The Federal Sentencing Guidelines for individual offenders authorize both adjustments to an offender's "base penalty" and departures from guideline sentences on the basis of factors relating to culpability.[49] The *Model Penal Code* allows a judge to place a defendant on probation if one or more of several culpability-related criteria is present.[50] The Minnesota Sentencing Guidelines also direct sentencing judges to consider culpability.[51] There is substantial disagreement among these guidelines as to how broadly culpability should be conceived at sentencing. The Federal Guidelines, for example, employ a much narrower conception of culpability than do the *Model Penal Code* and some state guidelines.[52] Nevertheless, the

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47. WHEELER ET AL., *supra* note 42, at 82.

48. *Id.* at 81, 87.

49. U.S.S.G. §§ 3B1.1, 3B1.2, 3E1.1, 4A, 5H1.8.

50. The *Model Penal Code* lists the following criteria as grounds on which to withhold a prison sentence and place a defendant on probation:

> (b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
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> (c) the defendant acted under strong provocation;
>
> (d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (e) the victim of the defendant's criminal conduct induced or facilitated its commission;
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> ...
>
> (g) the defendant has no history of prior delinquency or criminal activity.

MODEL PENAL CODE § 7.01(2) (1962).

51. For example, the Minnesota Sentencing Guidelines provide for mitigation if the offender "participated under circumstances of coercion or duress" or if the victim "was an aggressor in the incident." MINNESOTA STATE GUIDELINES §§ II.D.2d(1), (2).

52. Under the Federal Sentencing Guidelines, sentencing judges are permitted to take into consideration the offender's degree of involvement and prior law enforcement record. In addition, judges may depart from the guideline sentence on the basis of excuses that do not completely defeat mens rea, but still work to mitigate culpability. However, several

culpability of the offender remains a significant factor in an age of guideline sentencing.

C. Corporate Culpability

Culpability, then, plays an important role in the conviction and sentencing of individual criminals. But it is not yet clear that it should serve a function in corporate criminal law. There are several reasons why one might believe that corporate culpability is not an appropriate concern. Corporations are artificial entities, not biological persons, and thus may seem unsuitable objects of moral blame and accompanying "stigma." Even if there is a sense in which corporations can be "culpable," they are likely to have weaker claims to the fair treatment, liberty, and reduction of anxiety emphasized by Hart than individuals do. Finally, the high number of strict liability offenses for which corporations can be liable suggests a lack of legislative concern with the issue of corporate culpability. These arguments are ultimately unpersuasive, however. I will argue that, although corporations cannot be blameworthy in the literal sense in which individuals can, corporations cause and direct the acts of their agents in a way that makes it natural to call them "culpable." Once this is conceded, corporate culpability merits attention in the criminal law for the same reasons that individual culpability does.

Although corporations always act through individual agents, and it is always an individual agent or group of agents who breaks the law, it is fair to say that corporations frequently *cause* their agents to violate the law. The behavior of individuals in corporations is not merely the product of individual choice; it is stimulated and shaped by goals, rules, policies, and procedures that are features of the corporation as an entity.[53] How to design these features to ensure that agents act predictably and in the interest of the organization—that is, how to control the behavior of corporate agents—is the central question of organizational theory.[54] Establishing a chain of command, delegating to each member a sphere of authority, setting up standard operating procedures, training members, and controlling the flow of information are all part of this task.[55] Ultimately, organizational theorist Herbert Simon explains, the goal is for the organization to "take[] from the individual some of his decisional autonomy, and substitute[] for it an organization decision-making process."[56] Where this process is likely to result in violations on behalf of the corporation on the part of its agents, it seems natural to say that the corporation is "culpable" or "at fault."

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considerations that are relevant under other schemes, such as the provocation of the defendant and the deliberateness of the crime, do not play a role.

53. *See generally* HENRY MINTZBERG, THE STRUCTURING OF ORGANIZATIONS (1979); HENRY TOSI, THEORIES OF ORGANIZATION (1975). Ultimately, of course, some individual or group of individuals may be responsible for these goals, rules, policies and procedures. But this is not always the case. The rules may have sprung up without conscious planning in the course of daily activity, and have taken on a life of their own. Or they may be of such long standing that it is no longer possible to identify their creators.

54. This is true even for organizational theorists who prefer terms like "cooperation" to "control." The problem is essentially the same: getting individuals to act in ways that 1) are predictable and 2) benefit the corporation and conform to its aims. *See generally* TOSI, *supra* note 53; MINTZBERG, *supra* note 53.

55. *See* MINTZBERG, *supra* note 53, at 181–213.

56. HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 8 (3d ed. 1976).

It is important to distinguish this argument from the claim that it is sometimes difficult to locate the specific corporate agents responsible for a criminal act. Although this claim is true, it is an evidentiary point rather than a philosophical one. My argument is somewhat different: Because of the diffusion of responsibility in organizations and the ways in which individual decisions are channelled by corporate rules, policies and structures, there may in fact *be* no individual or group of individuals that is "justly to blame" for the crime.[57] Individuals in corporations frequently operate in a kind of "twilight zone" of autonomy; they may simply exert insufficient choice or control to be suitable recipients of blame. In this situation, the "overflow" blame is properly attributed to the corporation.

Scholars of corporate crime recognize that characteristics of the corporation can cause criminal behavior on the part of its agents. Martin and Carolyn Needleman, for example, argue that "at least some criminal behavior usefully may be viewed not as personal deviance, but rather as a predictable product of the individual's membership in or contact with certain organizational systems."[58] Many theorists have identified a corporate character or "corporate culture"[59] which endures over time and transcends the character of the corporation's members. Christopher Stone has found that corporations, like political administrations, have distinct and characteristic attitudes toward the demands of law and morality.[60] "In [the corporate] setting," Stone writes, "each man's own wants, ideas—even his perceptions and emotions—are swayed and directed by an institutional structure so pervasive that it might be construed as having a set of goals and constraints (if not a mind and purpose) of *its* own."[61] Marshall Clinard and Peter Yeager argue:

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57. Of course, the evidentiary and the philosophical points are related. If there are no individuals who may be justly held to blame for corporate crime, it is not surprising that it is difficult to "locate" these individuals.

58. Martin Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517 (1979). *See also* MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 58–60, 63–67 (1980) (cultural norms of the corporation can encourage criminal behavior); Laura S. Schrager & James R. Short, Jr., *Toward a Sociology of Organizational Crime*, 25 SOC. PROBS. 407, 410 (1978) (criminal behavior is caused more by roles assigned to members of the corporation than by personalities of the members); Note, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 282 (1961) (goal of criminal acts by members of corporations is frequently enrichment of the corporation rather than of individuals).

59. *See, e.g.*, TERENCE E. DEAL & ALLEN A. KENNEDY, CORPORATE CULTURES (1982); THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE (1982); CHRISTOPHER D. STONE, WHERE THE LAW ENDS, 228–48 (1975). Although the corporate culture is strongly influenced by top management, it is independent of it. Clinard and Yeager argue that corporate executives "are subject ... to the same kinds of indoctrination into the corprate mind as are employees at lower levels." CLINARD & YEAGER, *supra* note 58, at 66.

60. STONE, *supra* note 59, at 237. Stone discusses a study finding that coal mines owned by steel firms have significantly better worker safety records than coal mines owned by coal mining companies. One of the most commonly given explanations for the discrepancy, he reports, is simply a difference in attitude between steel companies and coal companies: "[t]he steel companies have just not evolved what was called 'a "coal mentality"' that accepts a great loss of life and limb as the price of digging coal." *Id.* at 238 (citing *Coal-Mines Study Shows Record Can Be Improved When Firms Really Try*, WALL ST. J., Jan. 18, 1973, at p. 1, col. 6).

61. STONE, *supra* note 59, at 7.

> When certain corporations are charged more than once with violations, it is possible, of course, that enforcement agencies, alerted to the possibility of repeat violations, have policed these particular firms more closely and thereby increased the odds that subsequent violations will be discovered. It is more likely, however, that some corporations ... have developed a corporate atmosphere favorable to unethical and illegal behavior and that executives and other employees of these corporations may have become socialized to violate the law.[62]

There appear to be "good" and "bad" corporations, law-abiding corporations and recidivists, and there is a remarkable consensus as to which corporations are which.[63] The ability of theorists to identify corporate characters is evidence that it is not inappropriate to speak of corporate culpability.

The idea of corporate culpability is not merely a product of organizational theory and research on corporate crime; it is part of ordinary moral discourse. People behave in ways that suggest they blame corporations and feel retributive sentiments toward them.[64] They frequently voice moral judgments about corporations, such as "Union Carbide is indifferent to safety" or "Johns–Manville took advantage of its employees." Such statements may be merely shorthand ways of blaming corporate executives whose identities are unknown to the speaker. But they can also be read as judgments passed on the character or policies of the corporation. This interpretation is strengthened when the judgments apply to the corporation over a substantial period of time, or are accompanied by acts directed at the corporation as an entity, such as picketing or boycotts. Moreover, there is evidence that the stigma of moral blameworthiness that accompanies these judgments is capable of seriously injuring not merely individuals, but the corporation as a whole.[65] The effect of

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62. CLINARD & YEAGER, *supra* note 58, at p. 117.

63. *See, e.g.*, MARSHALL CLINARD, CORPORATE CORRUPTION 17–18 (1990) (listing companies which "demonstrat[e] a high degree of social responsibility and compliance with the law"); TAD F. TULEJA, BEYOND THE BOTTOM LINE 193–98 (1985) (comparing results of different studies of "socially responsible" Fortune 500 companies). The consensus is not merely among scholars of corporate crime, but exists in the popular media as well. *Id.* Certain companies, such as Johnson & Johnson, Procter & Gamble, Digital Equipment, 3M, and Hershey Foods are mentioned again and again as having "good" characters. *Id.*; CLINARD, *supra*, at 17–18. Conversely, certain companies are said to have "bad" characters: Clinard writes that "[a]lthough its advertising motto is 'GE Brings Good Things to Life,' General Electric actually has a long history of unethical and illegal practices, according to an in-depth study done by John Woodmansee." CLINARD, *supra*, at 16 (citing JOHN WOODMANSEE, THE WORLD OF THE GIANT CORPORATIONS: A REPORT FROM THE GE PROJECT (1975)).

64. *See* Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 L. & HUM. BEHAV. 151, 163 (1989). That people blame corporations should not be surprising. They blame other groups and organizations as well, including governments, nations, and races.

65. *See* BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983) (a study of the impact of adverse publicity on 17 corporate offenders); CLINARD, *supra* note 63, at 177–78. A recent example of the impact of stigma on a corporation is that of Salomon Brothers, which lost several of its largest customers after the firm was found to have engaged in illegal bidding in Federal Treasury auctions. The California pension fund known as "Calpers" and other major clients withdrew their business from Salomon when the scandal broke, expressing "outrage and concern" at Salomon's illegal activities. Salomon responded by attempting to reform the "character" of the corporation, replacing top management and introducing "new policies and [control] procedures." Stan Hinden, *Salomon Loses Major Bond Customer*, WASH. POST, Aug. 21, 1991, at F1, F2. Calpers and other

such stigma is so strong that several commentators have suggested the use of court-ordered adverse publicity as a criminal sanction against corporate offenders.[66]

Once it is conceded that corporations can be culpable, retribution and rehabilitation join deterrence and incapacitation as potential aims of corporate criminal law. The extent to which corporate culpability plays a role will depend upon which of these aims are pursued, and the relative importance of each aim. If retribution were adopted as a goal, corporate culpability would assume a central role in the allocation of punishment; it would be necessary to inquire whether the corporation was culpable (at the trial stage) and, if so, how culpable (at sentencing), in order to determine the corporation's "just deserts." Retribution has not been a traditional aim of corporate criminal law, but once the sense in which corporations are culpable has been more clearly identified, there is no reason why it should not become one. The public response to corporate violations noted above suggests that the idea of giving corporate offenders their "just deserts" is not entirely farfetched.[67] Indeed, the need to provide "just punishment," a requirement of § 3553(a)(2)(A) of the Sentencing Reform Act,[68] was one of the controlling principles in the drafting of the organizational guidelines,[69] and Congress appears to equate § 3553(a)(2)(A) with the "just deserts" principle.[70]

Corporate culpability will also play a role if a choice is made to rehabilitate corporate offenders. In order to decide whether to rehabilitate, and, if so, what kind of rehabilitation is appropriate, a sentencing judge would need to inquire carefully into the corporate character—that is, to make precisely the kind of broad-based culpability assessment that is made in the sentencing of individuals. Like retribution, rehabilitation has not been a traditional goal of corporate criminal law. But the fact that corporations have distinctive characters that may cause their agents to commit crimes on their behalf suggests that rehabilitation is a worthwhile goal. In the past few years, the idea of

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customers have since begun to do business with Salomon again. *A Salomon Client Is Back*, N.Y. TIMES, Dec. 23, 1991, at D9.

66. Adverse publicity was proposed as an organizational sanction in UNITED STATES NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 405(1)(a) (1970). *See also* FISSE & BRAITHWATE, *supra* note 65; CLINARD, *supra* note 63, at 179–80; Peter A. French, *Publicity and the Control of Corporate Conduct: Hester Prynne's New Image*, *in* CORRIGIBLE CORPORATIONS AND UNRULY LAW 159 (Brent Fisse & Peter A. French eds., 1985). *But see* John C. Coffee, Jr., *"No Soul To Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 424–34 (1981) (pointing out several difficulties with the use of publicity as a sanction, and suggesting that the sanction would be more effective if directed to individual agents rather than to the corporation as a whole).

67. Theorists who argue in favor of retribution as an aim of corporate criminal law include KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS (1991) and Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983).

68. 18 U.S.C. § 3553(a)(2)(A) provides that, "in determining the particular sentence to be imposed, [a court] shall consider ... the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

69. SUPPLEMENTARY REPORT, *supra* note 7, at 5.

70. S. REP. NO. 225, 98th Cong., 2d Sess. 38, 75 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3258. (§ 3553(a)(2)(A) represents "essentially the 'just deserts' concept.").

organizational sanctions designed to rehabilitate the corporation, such as "corporate probation," have received increasingly strong support.[71] The organizational guidelines include creative and broad-reaching provisions for corporate probation,[72] and the Sentencing Commission has explicitly endorsed the goal of rehabilitating corporate offenders.[73]

Corporate culpability may also be important for reasons independent of the purposes of sentencing. As noted above, recognition of the principles of responsibility and proportionality helps protect such social values as liberty, equality, and fair treatment. As legal fictions, corporations have weaker claims to participation in these values than do individuals. Nevertheless, they do have some claim. Corporations are associations of individuals, and as such, are repositories of individual interests. These interests are entitled to protection, and it may turn out that the only way, the most effective way, or simply the most convenient way to protect them is to protect the interests of the corporation as an entity. This may be why, even though they are merely fictional persons, corporations have limited constitutional rights to free speech, due process, equal protection, and protection against unreasonable searches and seizures.[74] The fact that corporations have weaker claims to rights than individuals means that, in a utilitarian scheme, corporate rights can be overridden more easily than individual rights. We need less powerful reasons to ignore the principles of responsibility and proportionality with respect to corporate offenders than we do with respect to individuals. This does not mean that corporate culpability is an inappropriate concern for the organizational sentencing guidelines, however. It simply suggests that it is not the only factor that comes into play in deciding whether, and if so, how much, to punish a corporate criminal.

II. CONCEPTUALIZING CORPORATE CULPABILITY

Part I has argued that there is a sense in which corporations can be culpable, and that culpability is thus a legitimate concern of the organizational sentencing guidelines. But it is not yet clear how corporate culpability is best conceptualized. Part II examines three theories of corporate culpability in an attempt to determine how the concept should be understood.

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71. *See, e.g.*, STONE, *supra* note 59; Coffee, *supra* note 66; Fisse, *supra* note 67; Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988).

72. U.S.S.G. § 8D. *See generally* Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017 (1992).

73. SUPPLEMENTARY REPORT, *supra* note 7, at 5.

74. *See* Hale v. Henkel, 201 U.S. 43, 76 (1906) ("A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal [id]entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."). Of course, even if the corporation is a repository of individual interests, adherence to the principles of responsiblity and proportionality is not necessarily the only way, or the best way, to protect these interests. To determine whether it is requires an examination of the relationship between the corporation and these groups of individuals, a task beyond the scope of this Article. Consider shareholders and customers, for example. Several commentators have argued that in fact any sanctions against the corporation are passed on to "innocent" parties such as shareholders and customers. It is not clear that punishing the corporation only when it is "culpable," and only in proportion to the degree of its culpability, protects these interests in a meaningful sense.

Although the law has produced no independent doctrine of corporate culpability, courts have had to develop conceptions of corporate mens rea in order to hold corporations liable for crimes requiring intent. The two prevailing doctrines of corporate criminal liability—the common-law doctrine of respondeat superior and the doctrine found in section 2.07 of the *Model Penal Code*—thus provide a natural starting point for a theory of corporate culpability. In addition, there is a third, competing theory of corporate criminal liability that has received considerable academic support. This theory, which will be referred to as the "corporate character" theory, has its closest legal analogue in the doctrine of municipality liability under 42 U.S.C. § 1983. I will argue that the "corporate character" theory contains a more satisfactory concept of corporate culpability than either the doctrine of respondeat superior or the *Model Penal Code*. Moreover, the theory contains a notion of corporate culpability that is particularly appropriate at the sentencing stage. In Part III, I will argue that it is this concept of corporate culpability that most closely approximates the one employed by the organizational sentencing guidelines.

A. Respondeat Superior

Although corporations were held liable for strict liability crimes in the United States as early as 1834,[75] it was not until the early 1900s that they began to be convicted for crimes requiring mens rea.[76] The early view was that because corporations have no mind or soul, they are incapable of having an "evil intent." In order to circumvent this objection, the courts borrowed the doctrine of respondeat superior from the law of tort,[77] and "imputed" to the corporation both the act and the intent of the corporate agent who committed the crime. The result was that the corporation was "culpable" precisely when, and to the extent that, its agent was culpable. The United States Supreme Court expressly endorsed this approach in the 1909 case *New York Central & Hudson River Railroad v. United States*.[78] Under *New York Central*, a corporation is liable for a criminal act if: 1) an agent of the corporation committed the crime; 2) the agent acted within the scope of his or her employment; and 3) the agent acted to benefit the corporation.[79] The formulation of *New York Central* is the doctrine of corporate criminal liability used today in the federal courts and in some state jurisdictions.

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75. Initially, corporations were held liable for acts of nonfeasance and misfeasance causing a public nuisance.

76. *See, e.g.*, United States v. Alaska Packers' Ass'n, 1 Alaska 217, 220 (1901) ("If, for example, the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do these acts, and can act therein as well viciously as virtuously."); United States v. John Kelso Co., 86 F. 304 (N.D. Cal. 1898).

77. *See generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 70, at 460–70 (4th ed. 1971); RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

78. 212 U.S. 481 (S.D.N.Y. 1908).

79. *Id.* at 493. The Supreme Court limited its holding to crimes which required general intent to perform the prohibited act, and seemed to exclude crimes that require specific intent. It acknowledged that "there are some crimes which in their nature cannot be committed by corporations." *Id.* at 494. Since that time, however, corporations have been held liable for crimes requiring specific intent, including contempt of court, conspiracy to violate antitrust laws, knowingly mailing obscene materials, and manslaughter. Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 415 (1982).

As its history suggests, the doctrine of imputed mens rea was the creation of expediency rather than careful reflection.[80] Early decisions on corporate criminal liability tend to emphasize not the plausibility of the idea of corporate culpability, but the dire consequences of failure to extend criminal liability to corporations. The comments of Judge Hough in *United States v. MacAndrews & Forbes Co.*[81] are typical: "The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not ... bear discussion."[82] The Supreme Court's reasoning in *New York Central* also emphasizes public policy rather than conceptual analysis.[83] It is not surprising, then, that the theory of imputed culpability has encountered serious theoretical problems.

1. Problems of Overinclusiveness

The first troubling feature of the theory of imputed culpability is that it imputes to the corporation only the mens rea of the agent who committed the crime, and ignores the mental states of other corporate agents. But if corporations have "characters," as argued above, and if corporate policies and procedures can cause crime, the culpability of the corporate entity is likely to depend on more than the intent of a single agent.[84] By imputing only the mens rea of the criminal, the imputed culpability theory fails to distinguish between offenses committed with the participation or encouragement of upper management, pursuant to corporate policies or procedures, and those committed by "rogue employees" whose acts violated company policy or could not have been prevented by careful supervision. For this reason, the theory has seemed to many commentators to be unfairly overinclusive.[85] It labels corporations "culpable" even when they do not have a "bad" character, that is, even where corporate policies and procedures bear no causal relationship to the crime.

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80. *See* Gerhard O.W. Mueller, Mens Rea *and the Corporation*, 19 U. PITT. L. REV. 21 (1957). Mueller characterizes corporate criminal liability as a "weed" on the acre of criminal jurisprudence: "[T]he rationale of corporate criminal liability is all but clear. It is safe to say that, for the most part, the law has proceeded without rationale whatsoever .... It simply rests on an assumption that such liability is a necessary and useful thing." *Id.* at 23.

81. 149 F. 823 (S.D.N.Y. 1906).

82. *Id.* at 836.

83. *See* 212 U.S. at 495. The Court stated:

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act ... and whose knowledge and purposes may well be attributed to the corporation for which the agents act.

Id.

84. This may not always be true. As will become clear below, there may be some agents who are so closely identified with the corporation that their culpable acts make the corporation culpable. *See infra* notes 117–18 and accompanying text.

85. *See, e.g.*, SCHLEGEL, *supra* note 67, at 79; Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1103–05 (1991); *Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1243 (1979) [hereinafter *Developments in the Law*].

One way to resolve the problem of overinclusiveness would be to read the "scope of employment" requirement narrowly, so as to exclude acts that are not authorized, encouraged, or negligently permitted by corporate policy. The "scope of employment" requirement has been used this way in tort law to distinguish between conduct that is controlled or authorized by the principal and conduct that is not.[86] In the criminal context, however, courts and commentators seem to fear that this approach would allow corporations to defeat liability too easily. For example, corporate officials might tolerate illegal behavior on an informal basis, yet place the behavior outside the "scope of employment" by declaring a formal corporate "policy" against it.[87] This result could be avoided by a well-crafted definition of corporate policy.[88] However, courts have not attempted to frame such a definition, and have chosen instead to hold corporations criminally liable for the acts of their employees even when those acts contravened corporate policy or violated the express orders of a corporate official. As presently interpreted, the "scope of employment" requirement thus provides no protection against overinclusiveness.

In *United States v. Hilton Hotels Corp.*,[89] for example, the hotel was held liable for its purchasing agent's participation in a boycott even though the agent twice received express instructions not to take part in the boycott, and violated those instructions out of "anger and personal pique."[90] The Ninth Circuit affirmed that "within the scope of employment" meant "in the corporation's behalf in performance of the agent's general line of work," and that a corporation was "responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."[91] Subsequent cases have followed the *Hilton Hotels* holding.[92]

A second strategy to combat overinclusiveness would be to read the benefit requirement narrowly, holding that an employee acts "for the benefit of the corporation" only where the act is authorized, tolerated, or encouraged by corporate policy. At least one case suggests sympathy for this approach, affirming instructions which allowed jurors to consider corporate policy and actual directions from superiors in determining whether an employee acted to benefit the corporation.[93] However, this case made consideration of policy

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86. *See* RESTATEMENT (SECOND) OF AGENCY § 228. Principals often attempt to show that the negligent act was committed while the employee was on a "frolic and detour," for example. PROSSER, *supra* note 78, at § 70. There is no comparable "frolic and detour" litigation in corporate criminal law.

87. *See, e.g.*, Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945).

88. In Parts II.C.1., 2., *infra*, I discuss some ways in which organizational policy might be defined so as to serve as a factor in a theory of organizational culpability. *See infra* text accompanying notes 124–30, 148–56.

89. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

90. *Id.* at 1004.

91. *Id.*

92. *See, e.g.*, United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983); United States v. Beusch, 596 F.2d 871, 877–78 (9th Cir. 1979); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir. 1978). *See also* United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204–05 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

93. *Basic Constr.*, 711 F.2d at 570. In this case, the Fourth Circuit upheld jury instructions stating: "A corporation may be responsible for the action of its agents done or made

permissible, not mandatory. And in the absence of a clear definition of corporate policy, this approach has the same defect as a narrow reading of the scope of employment requirement: it allows corporations to defeat liability for the criminal acts of employees simply by declaring crimes to be against company policy.

Even without the proposed narrowing, the benefit requirement would help guard against overinclusiveness if it were read to require a showing that the crime would actually have benefited the corporation if it had been successful. The fact that an action benefits a corporation makes it more likely that the act was encouraged, authorized or tolerated by corporate policy. However, actual benefit is not a completely reliable surrogate for corporate policy. There are cases in which corporate policies and procedures seem to have encouraged violations even without a discernable direct benefit to the corporation. For this reason, courts generally hold a corporation liable for the criminal acts of its employees even where it has received no benefit, except where it is clear that the act is committed exclusively for the benefit of the employee[94] or where it actively harms the corporation.[95]

Ultimately, the respondeat superior theory is overinclusive because it is a theory of imputed culpability. Under a theory of imputed culpability, what makes a corporation "culpable" is not (primarily) any feature of the corporation as such, but the mere fact that an agent committed a crime. Thus the theory will frequently label a corporation culpable even when the corporation does not have a bad character—that is, even when the corporation's policies or procedures suggest that it is not "justly to blame" for the crime. In short, the respondeat superior theory is overinclusive because it is not a theory of *corporate* culpability at all. The problem of overinclusiveness could be corrected if imputation of guilt to the corporation were made to depend on some feature of the corporate entity. The refinements of the "scope of employment" and "benefit" requirements suggested above attempt to do precisely this. But corporate criminal law has not proved hospitable to such developments.

In practice, the theory of respondeat superior may pose little genuine threat of overinclusiveness. There is some evidence that prosecutors examine features of the corporation before deciding to seek criminal sanctions, and pursue primarily corporations with "bad characters," whose policies or policymakers can be causally linked with the crimes of their agents.[96] Such prosecutorial restraint is evidence of the intuitive appeal of a theory of corporate entity culpability. Nevertheless, prosecutorial self-restraint does not provide the inherent or legal protection against the problem of overinclusiveness that a genuine theory of corporate culpability would provide.

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within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position. However, the existence of such instructions and policies ... may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation." *Id.* at 572.

94. *See* United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966).

95. *See* Standard Oil Co. of Texas v. United States, 307 F.2d 120 (5th Cir. 1962).

96. *See, e.g.*, Testimony of Gary Lynch, Public Hearings on the July, 1988 Discussion Draft, October 11, 1988 (on file with author); CLINARD & YEAGER, *supra* note 58, at 93.

2. Problems of Underinclusiveness

The problem discussed above was one of overinclusiveness: the theory of imputed culpability used in the doctrine of respondeat superior treats corporations as culpable even when no feature of the corporate entity caused the crime. But the theory is potentially underinclusive, as well. There are some situations in which corporate policies or procedures do cause a crime, yet the doctrine of respondeat superior is unable to find the corporation culpable because there is no individual culpability to impute. As a practical matter, this difficulty has been resolved by the introduction of new doctrines of corporate mens rea that have been superimposed upon the respondeat superior theory. But these doctrines represent a significant departure from, rather than a development of, the rationale underlying respondeat superior. The fact that the doctrine must be gerrymandered in order to prevent underinclusiveness suggests that it is an inadequate theory of corporate culpability.

An illustration of the problem of underinclusiveness is the handing down of inconsistent verdicts in cases in which a corporation and its agents are tried together in front of the same jury. Because it works by imputing to the corporation the act and intent of the agent who committed the crime, the doctrine of respondeat superior requires that the verdicts be identical: If the agent is found guilty, the corporation must be found guilty; if the agent is found not guilty, the corporation must be found not guilty as well. But juries often render inconsistent verdicts, acquitting corporate agents but holding the corporation liable, or vice-versa. Most courts have rejected such results as inconsistent with the doctrine of respondeat superior.[97] But some have upheld inconsistent verdicts.[98] In *American Medical Association v. United States*,[99] for example, the court upheld a guilty verdict against an association for antitrust violations even though the individuals indicted were acquitted. The court reasoned that "[w]hen a corporation is guilty of crime it is because of a corporate act, a corporate intent .... The fact that a corporation can act only by human agents is immaterial."[100] The fact that juries hand down, and courts uphold, such inconsistent verdicts suggests that many people believe that the culpability of a corporation is not coextensive with the culpability of a corporate agent.[101] Upholding inconsistent verdicts represents one way to avoid the

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97. *See, e.g.*, Imperial Meat Co. v. United States, 316 F.2d 435, 440 (10th Cir. 1963), *cert denied*, 375 U.S. 820 (1963); Pevely Dairy Co. v. United States, 178 F.2d 363, 370–71 (8th Cir. 1949), *cert denied*, 339 U.S. 942 (1950).

98. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943); American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir. 1941), *cert. denied*, 314 U.S. 613 (1941).

99. 130 F.2d at 233.

100. *Id.* at 253.

101. Of course, it may just suggest jury irrationality. Juries hand down inconsistent verdicts in other situations, as well. The general rule has been to tolerate inconsistent verdicts on the ground that they may give voice to the "rough common sense of the community." If this is so, it suggests that the community believes that corporate guilt is not the same as individual guilt. Or, in cases in which the corporation is convicted and the individual is acquitted, it may simply be that there is less "regret" about convicting a corporation. *See* Stephen T. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y.L. SCH. L. REV. 713 (1979); Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUM. L. REV. 999, 1002–04 (1960).

underinclusiveness that would result if the doctrine of respondeat superior were followed.

A second way in which courts have coped with the problem of underinclusiveness is the development of the "collective knowledge" doctrine. This doctrine enables courts to find liability in cases in which the corporation seems "justly to blame" for the crime, but no single individual has the required mens rea. It permits a finding of corporate mens rea to be derived from the *collective* knowledge of the corporation's members. In *United States v. Bank of New England, N.A.*,[102] for example, the bank was found guilty of "willfully" violating the Currency Transaction Reporting Act even though no one of its agents was found to have had the required "willfulness." The First Circuit upheld a collective knowledge instruction to the jury:

> A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability .... Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.[103]

The fact that some employees were aware of the Act's reporting requirements, while other employees were aware of the transactions, was enough to constitute willfulness on the part of the Bank. A similar approach was taken in *United States v. T.I.M.E.–D.C.*[104] In that case, the company adopted a policy under which truck drivers who called in sick were marked absent unexcused; if a driver later verified his illness, the unexcused absence was stricken from his record. The court combined knowledge on the part of some employees that a particular truck driver was sick, with knowledge on the part of other employees that drivers generally were concerned about and confused by the policy, and held the company liable for knowingly permitting a driver to operate a motor vehicle while his alertness was impaired:

> [A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.[105]

Although it is often presented as a simple extension of respondeat superior liability, the doctrine of collective knowledge represents a marked departure from the theory of imputed culpability articulated in *New York Central*. Under the theory of imputed culpability, a corporation is culpable if and only if an individual is culpable. Strictly speaking, if no individual has the requisite mens rea, no "crime" has been committed by a corporate employee, and thus

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102. 821 F.2d 844 (1st Cir. 1987).

103. *Id.* at 856.

104. 381 F. Supp. 730, 738–39 (W.D. Va. 1974). *See also* Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 723 (5th Cir. 1963); Riss & Company v. United States, 262 F.2d 245, 250 (8th Cir. 1958); Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951); United States v. Sawyer Transp., Inc., 337 F. Supp. 29, 31 (D. Minn. 1971).

105. *T.I.M.E.–D.C.*, 381 F. Supp. at 738.

no crime can be imputed. Under the doctrine of collective knowledge, in contrast, no individual culpability is required. Fragments of knowledge that do not rise to the level of mens rea may be aggregated to form a sufficient whole. This approach only makes sense if employees are viewed as aspects of a corporate entity which is distinct from each of them, and the crime is understood not as the act of an individual, but as the act of the corporate entity as such. The doctrine thus represents a step away from the concept of imputed culpability and toward a theory of genuine corporate fault.

As a practical matter, the toleration of inconsistent verdicts and the development of the doctrine of collective knowledge largely resolve the problem of underinclusiveness posed by the doctrine of respondeat superior. The fact that it was necessary to gerrymander the theory in order to achieve this goal, however, highlights the theory's weaknesses. A more effective and principled approach would be to develop a genuine theory of corporate entity culpability. Such a theory would not only alleviate the problem of underinclusiveness without resort to a legal fiction; it would also provide a check against overinclusiveness in addition to the present one of prosecutorial self-restraint.

B. The Model Penal Code

The second principal theory of corporate criminal liability is found in section 2.07 of the *Model Penal Code*. Unlike the doctrine of respondeat superior, section 2.07 was adopted after sustained theoretical reflection.[106] The drafters of the Code appear to have believed that a corporation should not be judged culpable for the mere act of a "rogue employee," and attempted to correct the overinclusiveness of the doctrine of respondeat superior by providing a genuine theory of corporate entity culpablity.[107] Most commentators,[108] however, believe that the Code errs on the side of underinclusiveness, and that although section 2.07 captures part of what is meant by corporate culpability, it is ultimately too narrow.

The *Model Penal Code*'s scheme is threefold, depending on the kind of offense involved: 1) For offenses defined in statutes other than the Code itself, in which a legislative purpose to impose liability on corporations "plainly appears,"[109] section 2.07(a) adopts a version of the common law theory of respondeat superior: corporations are liable for offenses committed by agents

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106. *See* Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 595–96 (1988); Mueller, *supra* note 80.

107. The drafters intended the approach of the Code to be consistent with § 909 of the *Restatement of Torts*, which restricts the circumstances under which a principal is liable for punitive damages for the act of an agent to those in which the principal is personally at fault. Comment b to § 909 states: "The rule stated in this Section results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." RESTATEMENT (SECOND) OF TORTS § 909, cmt. b (1977). However, if the principal orders, ratifies, or expresses approval of the agent's action, or has recklessly employed an agent known to be inclined to act tortiously, § 909 states that punitive damages are appropriate. 1 KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY § 3.03, at 96 (1992).

108. *See, e.g.*, Brickey, *supra* note 106; *Developments in the Law*, *supra* note 85, at 1255.

109. An example would be the Elkins Act, under which the Railroad was held liable in *New York Cent. & Hudson River R.R. v. United States* in 1909. *See supra* notes 78–79 and accompanying text.

acting on behalf of the corporation within the scope of their employment.[110] The Code departs from common law, however, by providing a defense if the corporation can prove by a preponderance of the evidence that "the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."[111] 2) For strict liability crimes and offenses that consist of an omission to discharge a specific statutory duty, the principles of respondeat superior also apply, but no due diligence defense is available.[112] 3) For all other offenses, the Code holds corporations liable only if the offense was "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[113]

Much of the impact of the Code depends on when a legislative purpose to impose liability on corporations can be said to "plainly appear." The answer to this question determines whether most crimes fall into category one or category three above. On its face, the Code's language suggests a presumption that criminal statutes do not apply to corporations, and thus that the drafters intended most crimes to fall into the third category. Even if this were not so, however, it is fair to say that the most significant feature of the Code is the emphasis it places on the behavior of "high managerial officials" in the corporation.

Although it focuses on the behavior of corporate agents, the theory of culpability underlying the *Model Penal Code* is not, strictly speaking, one of "imputed culpability." With the exception of crimes of nonfeasance,[114] the Code does not simply impute to the corporation the mens rea of the agent who committed the crime; it requires a *corporate* mens rea, a causal link between the crime and the corporate entity. This link is assumed to lie in the acts, or failures to act, of "high managerial officials." Such officials are important, not because their behavior is imputed to the corporation, but because their place in the company puts them in a position to stand for its policies, intentions, or character. The Code defines high managerial officials as agents "having duties of such responsibility that [their] conduct may fairly be assumed to represent the policy of the corporation."[115] Under section 2.07, Gerhard Mueller explains, upper-level managers are thought of as the "mind" of the corporation, lower-level employees as its "hands." The Code's scheme reduces the number of instances in which corporations are held liable for mere movements of the hand without an "order from the brain."[116]

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110. MODEL PENAL CODE § 2.07(1)(a) (1962). This standard also applies to "violations," that is, "minor offenses that are not classified as crimes." *Id.* at cmt. 2(a). In short, respondeat superior liability is only intended to apply to regulatory offenses, rather than "true" crimes like murder, manslaughter, and so forth; even in these cases, a due diligence defense is provided.

111. *Id.* § 2.07(5). The defense is not available for strict liability offenses, or if the defense would be "plainly inconsistent with the legislative purpose in defining the particular offense." *Id.*

112. *Id.* § 2.07(1)(b), 2.07(2), 2.07(5).

113. *Id.* § 2.07(1)(c).

114. And, of course, strict liability crimes. But these are never crimes of imputed intent, because intent is irrelevant for these crimes.

115. MODEL PENAL CODE § 2.07(4)(c).

116. Mueller, *supra* note 80, at 41.

The Code's association of corporate policy with the behavior of high managerial officials is generally consistent with the observations of organizational theorists. Delegation of authority to such officials is one of the primary ways in which organizations direct and control the behavior of their agents. Some officials are so closely identified with the organization that their participation in or toleration of criminal activities sends a message that such activities are consistent with corporate policy.[117] According to scholars of corporate crime, the behavior of high managerial officials is perhaps the most important factor in determining the likelihood that a corporation will engage in crime.[118] Moreover, by insisting on a form of corporate entity culpability as a condition of liability for most crimes, the Code avoids the overinclusiveness of the doctrine of respondeat superior. Under the Code, it is unlikely that a corporation will be found culpable if it has a "good character" and no causal link with the crime. In the *Hilton Hotels* case noted above, for example, the corporation would probably not be liable under section 2.07(1)(a) or (1)(c) for its purchasing agent's violation of antitrust law, because the crime violated the express orders of a "high managerial employee."[119]

In its attempt to avoid overinclusiveness, however, the *Model Penal Code* adopts too narrow a theory of corporate culpability. Although "high managerial officials" are the employees most closely identified with the corporation, they are not the only shapers of corporate policy and character. Rules, goals, and standard operating procedures implemented by lower-level managers can also create an unethical "corporate character" and encourage violations of the law:

> The facts of modern corporate life discredit the notion that a pattern of wrongdoing cannot reflect corporate policy unless a corporate official who sets general business policy authorized or ratified the conduct. In today's corporate environment, "corporate policy" is a multifaceted concept. Because responsibility is so diffused, policy is made and implemented at various levels in the corporate hierarchy without first seeking approval from the highest levels of management. ... Thus, although the model of corporate liability that relies upon the acquiescence of the Board of Directors or a high managerial agent may be workable in the context of small, closely-held corporations, to the extent that we are concerned about holding large organizations

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117. Some theorists argue that even a high managerial official can be a "rogue employee." *See* PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBLITY (1984). But this position ignores the role of the official's authority and position in controlling the activities of other corporate agents. The higher an official is in the corporate hierarchy, the more likely it is that his order will be followed and the less likely it is that it will be countermanded by another official. To be sure, some officials may have more de facto authority than others, and the inquiry into how much authority they have is a fact-dependent one.

118. *See* MARSHALL CLINARD, CORPORATE ETHICS AND CRIME 132 (1983) (identifying the behavior of upper management as the most important factor in the development of an unethical corporate culture).

119. Of course, the company would be liable if the purchasing agent counted as a "high managerial employee." However, comments to the Code suggest that he or she would not count as such. *See* MODEL PENAL CODE § 2.07, cmt. 2(c) (1962). In general, corporations are unlikely to be liable under the Code for crimes committed by low-level employees against the orders of upper management, because such orders are likely to constitute a due diligence defense.

> accountable for serious misconduct, this model of liability is self-defeating.[120]

In some cases, there may be no clear authorization or participation by a high managerial official, yet an illegal practice may be so pervasive that it amounts to a way of doing business. Such conduct cannot easily be dismissed as the initative of a few "rogue employees." The corporation as an entity seems at fault, and an assessment of culpability should not depend upon proof of the involvement of a high managerial official. In addition, critics charge that corporations can easily evade liability under the *Model Penal Code* by delegating to subordinates acts that might result in criminal liability and by avoiding knowledge of such acts. Although the Code attempts to provide a theory of corporate entity liability, then, its conception of corporate fault is inadequate. Significantly, of the approximately twenty-five states that have adopted some version of the *Model Penal Code*, almost none retain the scheme in its pure form, and all the states that have altered it have enacted theories of corporate culpability broader than that employed by the Code.[121]

C. The Corporate Character Theory

Neither of the theories of corporate culpability currently employed at the trial stage, then, is completely satisfactory. The respondeat superior theory assigns culpability to the corporation even when the agent's crime was the work of a "rogue employee," with no link to corporate character or policy. Moreover, without substantial gerrymandering, the theory is unable to find corporations culpable for acts that cannot be attributed to an identifiable agent or group of agents. These problems plague the theory of respondeat superior because it does not provide a genuine theory of corporate entity culpability, but rather works by borrowing the culpability of a corporate agent. The *Model Penal Code,* in contrast, does contain a theory of corporate entity culpability, but its conception is too narrow. It fails to take account of the fact that corporations may be "justly to blame" even without the direct participation, authorization or tolerance of high managerial officials. What is needed is a concept of corporate culpability capable of assigning fault not only when high managerial officials are involved, but also when corporate rules, policies, structures or procedures encourage criminal acts in less direct, more subtle, ways.

For such a concept, we must turn to a theory of corporate culpability that has received considerable attention from academics, but has not been explicitly adopted by the courts. This theory builds on the findings of organizational research by recognizing that corporations shape and control the behavior of their agents not only through direct supervision by high managerial officials, but also through the use of such devices as standard operating procedures, hierarchical structures, decision rules and disciplinary sanctions.[122] As noted in Part I, rules, structures, policies and procedures are appropriate loci of corporate fault because they are intended to replace agents' decisional autonomy with an organizational decision-making process. Their effect is to create a corporate "culture" or "character" which endures over time and

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120. Brickey, *supra* note 106, at 628.
121. *See id.* at 629–34.
122. *See supra* notes 53–55 and accompanying text.

which channels behavior in ways that are in the interest of the corporation.[123] Because this third theory of corporate culpability makes fault depend upon the character of the corporation, it will be termed the "corporate character theory." Under the corporate character theory, a corporation is culpable when its policies, structures, or procedures—features of the corporate character—cause its agents to commit illegal acts on its behalf. Generally, the corporate character theory is advanced as an alternative to the two theories of corporate criminal liability presently in use at the trial stage. However, it can also be used to assess the degree of a corporate offender's liability at sentencing. Indeed, in Part II.C.3., I will contend that the corporate character theory is *more* suitable for use at sentencing than at trial. In Part III, I will argue that a version of this theory has been adopted by the Federal Sentencing Guidelines for organizations.

1. Contours of the Corporate Character Theory

There are many proponents of the corporate character theory, and each has articulated the theory in a slightly different way.[124] Nevertheless, it is possible to discern from the literature three distinct sets of circumstances under which most corporate character theorists would find the corporation at fault. First, and most straightforwardly, a corporation is culpable under the corporate character theory if it has adopted a policy that is illegal, and an agent of the corporation carries out that policy. In such a case, it is clear that the resulting illegal act is a product of the corporate character, rather than the act of a rogue employee, and that the corporation is "justly to blame." In some cases, the illegal policy may be formally adopted by the company's board of directors. However, for a board to formally authorize illegal activity is rare. More often, illegal acts by corporate agents result from de facto illegal policies which are communicated indirectly, or from policies which are not as such illegal, but which a reasonable person would foresee would lead to violations on the corporation's behalf. A practice of rewarding or failing to discipline employees found guilty of past violations, for example, is likely to encourage similar violations in the future. Inadequate instruction about legal standards governing employees' day-to-day activities is likely to lead to violation of those standards. In some industries, a policy of sharing information about production costs with competitors is likely to lead to price-fixing.[125] For this reason, the corporate character theory holds that for a corporation to be culpable, it is not necessary for it to have formally adopted the policy in question, nor is it necessary for the policy itself to be illegal. Rather, a corporation is justly to blame

123. *See supra* notes 56, 60–63 and accompanying text.

124. One author, for example, argues that a corporation is justly to blame for the criminal act of an agent if: 1) a corporate practice or policy violated the law, or 2) it was reasonably foreseeable that a corporate practice or policy would result in a corporate agent's violation of the law, or 3) the corporation adopted or ratified a corporate agent's violation of the law. Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1306 (1990). Another author contends that the corporation is culpable when its "ethos" (that is, its culture or "characteristic spirit") "encourages criminal conduct by agents of the corporation." Bucy, *supra* note 85, at 1121. For other versions of the theory, see FRENCH, *supra* note 117; SCHLEGEL, *supra* note 67; Fisse, *supra* note 67; *Developments in the Law*, *supra* note 85, at 1257.

125. *See* Jeffrey Sonnenfeld & Paul Lawrence, *Why Do Companies Succumb to Price Fixing?*, HARV. BUS. REV. July–Aug. 1978, at 145.

for the illegal act of an agent whenever it was reasonably foreseeable that a corporate policy or practice would lead to the crime.[126] The effect of this principle is to adopt a negligence standard for corporate fault. Under the theory, culpability would be established by proof that a certain policy or practice was part of the day-to-day operation of the organization, and by a showing that the policy or practice was the proximate cause of the crime.

Second, like the *Model Penal Code*, most versions of the corporate character theory find the corporation culpable when an illegal act is committed, authorized, ordered or endorsed by a high managerial official in the corporation.[127] As the drafters of the *Model Penal Code* recognized, some corporate officials are so closely identified with the organization and have so much authority within it, that their acts per se count as "corporate policy."[128] The participation of a high managerial official in an illegal act makes it extremely likely that the act will be carried out. It is difficult to imagine an organization with a "good" character whose officials tolerate or participate in criminal activity. Of course, the question of who counts as a high managerial official is a difficult one, heavily dependent on the circumstances in each case. Generally, the higher an official, the more likely it is that he or she does represent corporate policy; but lower officials may also represent corporate policy if they have been delegated sufficient discretion.

Third, several corporate character theorists argue that a corporation should be found culpable of an employee's illegal act if it implicitly ratifies or endorses the violation. There are at least two ways in which such ratification can take place. First, the organization may fail to correct a particular violation once it is discovered.[129] Even if an act is initially committed by a rogue employee, failure to correct it suggests that the violation is consistent with corporate policy. Second, the organization may have a history of similar violations. Such a history suggests that the crimes are not mere anomalies, but are the result of some feature of the corporation; failure to correct the circumstances leading to the violation endorses it by implication. In both cases, there is strong evidence that the bad act is a product of the corporate character. Similar assumptions are commonly made in making judgments about the culpability of individuals. While a first offender can plausibly repudiate his crime by arguing that the crime does not genuinely reflect his character, this argu-

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126. *See* Foerschler, *supra* note 124, at 1308–09. *But see* Bucy, *supra* note 85, at 1138 (arguing that involvement of high managerial officials is "not decisive").

127. This feature often appears implicitly, rather than explicitly, in the various versions of the corporate character theory. For example, some theorists state that a corporation is culpable when an act by a lower official is endorsed or ratified by a higher official. *See* Foerschler, *supra* note 125, at 1310. Others claim that the involvement of high managerial officials is "not decisive," *see* Bucy, *supra* note 85, at 1138, but list other factors, such as the corporate hierarchy or the response of high level officials to employee wrongdoing, that suggest the close relation of high managerial officials to corporate policy. *Id.* at 1101. *See also* FRENCH, *supra* note 117 (arguing that the corporation should be given an opportunity to rebut responsibility for the acts of high officials that are not consistent with corporate policy, but making identification of corporate policy depend on "recognitors" that include the position of policy-makers in the corporate hierarchy). These variations suggest that, while corporate character theorists may disagree about the level of the corporate hierarchy at which the acts of officials are identified with company policy, there is some level at which such an identification can be made.

128. *See supra* note 115 and accompanying text.

129. Foerschler, *supra* note 124.

ment is not persuasive for a recidivist. Repetition of a crime, and failure to respond appropriately to the harms it caused, suggests that the crime was not a mistake, but a genuine outgrowth of the character of the offender.[130]

Finally, though few of its proponents have addressed the issue directly,[131] the corporate character theory is best understood as containing a "benefit" requirement similar to that found in the doctrine of respondeat superior and the *Model Penal Code*. An act which harms the corporation, or which is clearly committed solely for the benefit of an individual agent, is not one for which a corporation would be found culpable under the corporate character theory. Indeed, the theory suggests a rationale for the benefit requirement: Under the corporate character theory, culpability is located in features of the organization which are intended to replace individual decisional autonomy with an organizational decision-making process. When an agent acts solely for his or her own benefit, or actively harms the organization, it is clear that this replacement process has failed. An act that harms the organization or that was committed for solely individual gain is unlikely to be a product of organizational policy.

Although it is difficult to anticipate the precise results if it were to be adopted at the trial stage, the corporate character theory appears to avoid problems presented by both the doctrine of respondeat superior and the *Model Penal Code*. Unlike the doctrine of respondeat superior, the corporate character theory does not hold that a corporation is culpable for all criminal acts committed by corporate agents on its behalf, but requires a showing that a corporate policy or practice proximately caused the crime. It thus avoids the problem of overinclusiveness noted in Part II.A.1. In the *Hilton Hotels* case,[132] for example, the corporate character theory would most likely find the corporation not culpable, because the violation appeared to be the result of personal pique on the part of the corporate agent, and there was no evidence of a corporate policy or practice which gave rise to the crime.

Moreover, the corporate character theory avoids the problem of underinclusiveness posed by respondeat superior liability without resorting to the fiction of "collective knowledge." In *United States v. Bank of New England*,[133] the corporate character theory would hold the corporation at fault for its agent's violation of the Currency Transaction Reporting Act, not because the partial knowledge of several employees could be combined to comprise the required mental state, but because the company maintained a poor reporting network which prevented officials from acquiring complete information, and failed to train its employees in the requirements of the Act. Both practices are reasonably likely to result in violations. Similarly, there is no need to invoke

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130. *See* FRENCH, *supra* note 117; Fisse, *supra* note 67. Both French and Fisse argue for what they call "retroactive fault," under which a corporation can be regarded as "culpable" for an earlier act if it later commits another offense of the same type. This is an implausible claim if, as French suggests, the later event reaches back and renders the corporation morally responsible for the earlier offense. FRENCH, *supra* note 117, at 155. However, it is quite reasonable if it is seen as an inference about the character of the corporate offender.

131. *But see* Bucy, *supra* note 85, at 1150.

132. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See supra* notes 89–91 and accompanying text.

133. 821 F.2d 844 (1st Cir. 1987). *See supra* notes 102–03 and accompanying text.

collective knowledge in *T.I.M.E.–D.C.*,[134] the case in which a trucking company adopted a policy marking drivers who called in sick "unexcused" unless they submitted verification from a doctor. Although absences could be marked excused retroactively upon presentation of a doctor's note, this was not clearly conveyed to the drivers. Many sick drivers came to work in order to avoid a loss in pay, violating a statute prohibiting driving while ill. Because the "aura of confusion and concern"[135] created by the policy was reasonably likely to lead to violations of the statute, the corporation would be found culpable under the corporate character theory.

The corporate character theory also avoids the problems of underinclusiveness presented by the *Model Penal Code*. Corporations would still be held liable when high managerial officials authorize, participate in, or recklessly tolerate criminal activity, but the involvement of high managerial officials is only one source of liability. The corporate character theory recognizes that illegal activity also results from de facto policies not traceable to individual officials. Under the corporate character theory an organization could not evade liability for pervasive illegal activity simply because it was impossible to show the involvement of a high managerial official.

The corporate character theory is not without precedent. An analogue to the theory can be found in the tort doctrine of municipality liability under 42 U.S.C. § 1983, a statute creating a cause of action for deprivation of constitutional rights under color of state law.[136] In *Monell v. New York City Department of Social Services*,[137] the Supreme Court overturned a 1961 holding that municipalities were immune from § 1983 liability, and ruled that municipalities can be held liable under the statute.[138] However, the Court rejected a respondeat superior theory for municipalities.[139] Instead, it held that a municipality is only liable where the municipal entity *itself* is at fault, that is, where a policy or custom of the municipality was the "moving force"[140] behind the injury:

> [W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be

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134. 381 F. Supp. 730 (W.D. Va. 1974). *See supra* notes 104–05 and accompanying text.

135. *Id.* at 736.

136. Any person who, "under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1981).

137. 436 U.S. 658 (1978).

138. *Id.* at 664–89. *Monell* overturned Monroe v. Pape, 365 U.S. 167 (1961), insofar as it held that municipalities were not "persons" within the meaning of § 1983, and thus could not be held liable under the statute.

139. The Court stated that municipalities could not be held liable under a doctrine of respondeat superior for two reasons: 1) Although Congress had the constitutional power to hold municipal governments liable for their own acts, it may not have the power to require municipal governments to control others. This meant that any act falling under the purview of § 1983 must be an act of the municipal entity, and not merely an act of the munipality's agent. *Monell*, 436 U.S. at 693. 2) The language of § 1983 required a causal connection in order for one party to be held liable for the acts of another. This meant that the act must be caused by the municipality itself, not just by the municipality's agent. *Id.* at 694.

140. *Id.* at 694.

> held liable under § 1983 on a *respondeat superior* theory .... Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[141]

Municipalities may incur liability under § 1983 in two ways, the Court explained. First, municipalities are liable where an unconstitutional act implements a policy that has been officially adopted and/or promulgated by a local governing body.[142] *Monell* itself, which involved an official policy requiring pregnant employees to take unpaid leaves of absence, was this kind of case. But municipalities may also be held liable for "constitutional deprivations visited pursuant to a governmental 'custom,' even though such a custom has not received formal approval through the body's official decisionmaking channels."[143] Quoting Justice Harlan in *Adickes v. S.H. Kress & Co.*, the Court reasoned that "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials. ... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."[144]

There are, of course, significant differences between the legal context of the doctrine of municipality liability and that of the corporate character theory, as well as substantive differences between the two.[145] Courts have generally employed a higher standard of fault for municipal liability than the one proposed by adherents of the corporate character theory—a standard of gross negligence or deliberate indifference rather than one of negligence. In addition, recent Supreme Court decisions have cut back on the doctrine of municipality liability in ways that significantly diminish the role of informal custom.[146] Nevertheless, the basic thrust of the two theories is the same: the rejection of respondeat superior liability in favor of a doctrine of "organizational fault," and the location of such fault in the policies and customs of the organization.[147] For this reason, the doctrine of municipality liability provides at least a partial legal model for the corporate character theory, and its development provides some information about how the theory might work in practice.

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141. *Id.* at 691–94.

142. *Id.* at 690.

143. *Id.* at 691.

144. *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970) (Harlan, J.)).

145. Municipality liability under § 1983 is a tort doctrine, not a theory of criminal liability; municipalities are public, not private corporations, and thus there may be reasons for shielding them from liability that do not apply to corporations. Finally, the standard of liability under § 1983 is a result of statutory language which requires that a person violate or cause another to violate the victim's constitutional rights before liability can attach.

146. *See infra* notes 157–66 and accompanying text.

147. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 831 (1985) (Brennan, J., concurring) ("[W]ithout some evidence of municipal policy or custom independent of the [individual agent's] misconduct, there is no way of knowing whether the city is at fault."). *See also id.*, at 818 (plurality opinion); *id.* at 824.

2. Municipality Liability Under § 1983

According to *Monell*, a municipality is liable under § 1983 where a municipal policy or custom causes the violation of a plaintiff's constitutional rights. *Monell* thus raises two key questions: 1) What counts as a municipal "policy" or "custom"? and 2) When does such a policy or custom "cause" a violation? Because the answers to these questions frequently depend on the same factual issues, courts have often blurred them, refusing to find a policy or custom absent some evidence suggesting a causal link to the injury. In addition, courts have tied the answers to both questions to the question of a standard of fault for municipalities.

In *Monell*, both the question of the existence of a municipal "policy" or "custom"[148] and the question of causation were quite straightforward. The rule that pregnant employees must take unpaid sick leave was formally approved and promulgated as a city regulation, and because the rule was itself unconstitutional, there was no question that it had "caused" a constitutional violation. *Monell* offered little guidance, however, for cases in which the alleged constitutional policy or custom had not been formally adopted or promulgated, or where the policy or custom was not unconstitutional, but was merely alleged to have led to constitutional violations. In the years following *Monell*, the lower courts found two sets of circumstances under which a municipality could be found liable under § 1983, even if it had not formally approved an unconstitutional policy.

First, courts held municipalities liable for unconstitutional acts by policy-making officials, even where such acts were one-time events, not intended to establish city-wide routines.[149] In some jurisdictions, only "final policy-making authorities" or "ultimate repositories of power" were held to be sufficiently identified with the municipality for their acts to constitute municipal policy per se. In others, it was enough that the city had delegated final authority to perform the act or make the decision in question. In *Williams v. Butler*,[150] for example, the Eighth Circuit held that a municipality could be held liable for a traffic court judge's dismissal of his clerk in violation of her First Amendment rights. Because the city had granted the judge "*carte blanche* authority" to hire and fire, the court held, his action constituted a municipal policy under *Monell*.[151]

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148. Most courts have not distinguished between "policy" and "custom" in § 1983 cases.

149. *See, e.g.*, Williams v. Butler, 746 F.2d 431, 436 (8th Cir. 1984), and cases cited therein.

150. *Id.*

151. *Id.* at 436. The court held that where "a local governmental official ... is the 'final authority or ultimate repository of ... power,' that official's 'conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy"' for purposes of § 1983." *Id.* at 436 (quoting Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980)). The court noted that if there had been a procedure to protect the clerk from constitutional violations, then the judge would not have had final authority and the municipality would not have been liable. The court also noted that it was not the act of delegating to the judge that was unconstitutional. *See also* Wilson v. Taylor, 733 F.2d 1539, 1545–47 (11th Cir. 1984) (city liable for unconstitutional discharge of police officer by police chief); Rookard v. Health & Hosps. Corp., 710 F.2d 41 (2d Cir. 1983) (city liable for unconstitutional discharge of employee by supervisors with final authority over personnel decisions for city's health and hospitals corporation); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) (police chief's choice and implementation of practices and procedures constituted governmental

Second, in a series of police brutality cases, courts held municipalities liable for constitutional violations committed by police officers where the municipality had a policy or custom of failing properly to train, supervise, or discipline members of the police force. *Spell v. McDaniel*,[152] for example, held that a city could be held liable for police misconduct where it it failed to institute procedures to ensure the safety of people in custody, failed to investigate charges of misconduct or to discipline officers who were known to have committed abuse, and established quota systems for arrests and citations that encouraged the use of force.[153] In some jurisdictions, courts required a showing of a widespread "pattern" of constitutional violations before inferring a municipal policy or custom.[154] Other courts rejected the pattern requirement, holding that "while some causal link must be made between the county's failure to train and the violation of constitutional rights, a single brutal incident ... may be sufficient to suggest that link. ... 'A city's citizens do not have to endure a "pattern" of past police misconduct before they can sue the city under section 1983.'"[155] In all the police brutality cases, the causal link required between policy and violation was a strong one. The violation must have been a "reasonable probability," "almost inevitable," or "substantially certain" to result from the policy before a municipality was found at fault.[156] The effect was the adoption of a "deliberate indifference" or "gross negligence" standard of fault.

Recent Supreme Court cases have cut back on both of these rationales. In *Pembaur v. City of Cincinnati*,[157] the Court endorsed the view that the act of a policy-making official could constitute municipal policy for purposes of § 1983, but narrowed the meaning of "policy-making official" to mean the official or officials who, under state law, are granted final authority to set pol-

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"policy," but evidence insufficient to conclude that chief had encouraged a policy of police brutality); McKinley v. Eloy, 705 F.2d 1110 (9th Cir. 1983) (city liable for unconstitutional discharge of police officer by city manager with final authority over personnel decisions); Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981), *cert denied*, 455 U.S. 1008 (1982) (city liable for policy promulgated by police chief which led to filing of false charges by police officer against a citizen complainant). *But see* Bennett v. Sliddell, 728 F.2d 762 (5th Cir. 1984), in which the Fifth Circuit held that the local governing body itself must have acted unconstitutionally or must have been directly responsible for the policy pursuant to which the unconstitutional act was taken. Unless the governing body expressly or impliedly appointed the official to act in its place, the body cannot be held responsible for acts of that official, even if the authorities were final authorities on the decision in question. The Supreme Court later endorsed the Fifth Circuit's position in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (plurality opinion). *See infra* note 157 and accompanying text.

152. 824 F.2d 1380 (4th Cir. 1987).

153. *Id.* at 1392.

154. Languirand v. Hayden, 717 F.2d 220, 227–28 (5th Cir. 1983); Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979); Popow v. Margate, 476 F. Supp. 1237 (D.N.J. 1979).

155. Owen v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (quoting Leite v. City of Providence, 463 F. Supp. 585, 590–91 (D.R.I. 1978)). *See also* Hays v. Jefferson County, 668 F.2d 869 (6th Cir.), *cert denied*, 459 U.S. 833 (1982); Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980). In Rymer v. Davis, 754 F.2d 198, 201 (6th Cir. 1985), *vacated*, City of Shepherdsville, Kentucky v. Rymer, 473 U.S. 901 (1985), *aff'd on remand*, 775 F.2d 756 (6th Cir. 1985), the Sixth Circuit took a similar position, and held that the amount of training necessary to avoid such an inference is a question for the jury.

156. *Rymer*, 754 F.2d at 200.

157. 475 U.S. 469, 483 (1986) (plurality opinion). *See also* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion).

icy in the relevant area of the city's business. Under this definition, the decision of the judge to fire his clerk, at issue in *Butler,* would not constitute municipal policy because, although the judge has the authority to hire and fire employees, he does not have authority under state law to make employment *policy* for the city.[158] In *City of St. Louis v. Praprotnik,*[159] the Court went on to state that only officials whose decisions are not subject to review by any higher authority properly have "final" power, suggesting that only the very highest city officials are "policy-makers" for the purposes of § 1983.[160] Any broader definition, the Court argued, would collapse the *Monell* doctrine into a version of respondeat superior.[161]

In addition, the Court has nearly eliminated the possibility of municipality liability on the basis of an informal, de facto policy developed and carried out by lower municipal officials, and has moved progressively toward the view that a municipal policy cannot exist in the absence of intentional choice by policy-making officials. In *Pembaur*, for example, the Court held that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by city policy-makers.[162] The Court has not entirely closed off the avenue of custom, because it has conceded that in rare cases, police misconduct may be so widespread and egregious, or a training program so obviously poor, that city policy-makers can be said to have deliberately authorized the violation.[163] But these cases, the Court suggests, will be rare.[164] In addition, the Court has held that municipal liability can never be based solely on a single incident; rather, a "pattern" of constitutional violations is required.[165] Again, the Court seems to believe that, without such standards, the *Monell* doctrine will collapse into a version of respondeat superior:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. Thus, permitting cases against cities for their failure to train employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell.*[166]

If the point is to distinguish municipality liability from respondeat superior, however, the Court went further than it needed to. Under respondeat superior, a municipality is liable for the torts of its employees "solely because it employed a tort-feasor,"[167] regardless of municipal fault. To avoid collapsing into respondeat superior, the doctrine of municipality liability need only insist

158. *See Pembaur*, 475 U.S. at 483 n.12.
159. 485 U.S. 112 (1988).
160. *Id.* at 126.
161. *Id.* at 124–25.
162. 475 U.S. at 483–84.
163. City of Canton v. Harris, 489 U.S. 378, 389 (1989).
164. *Id.* at 390 ("It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees.").
165. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).
166. *Harris*, 489 U.S. at 391–92.
167. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691 (1978).

on *some* fault standard, not necessarily one of "conscious choice" or "deliberate indifference." For example, it would be possible to adopt a negligence standard, under which municipalities would be found liable when they have policies or customs that are reasonably likely to result in constitutional violations. To be sure, this approach would expose municipalities to "unprecedented liability," but it would not collapse the *Monell* decision into a form of respondeat superior.

The Supreme Court's requirement that a policy be the product of an intentional choice on the part of policy-making officials conflates two analytically distinct questions—that of the existence of a policy or custom and that of the appropriate standard of fault. The existence of a municipal policy can be established on the basis of evidence independent of fault, such as testimony from municipal employees and city residents, internal records, and other documents tending to show that the practice in question has become part of the municipality's ordinary course of business. Whether and at what level the policy must be consciously adopted, and the strength of the link required between the policy and the violation, are separate questions.

As noted above, moreover, organizational theory suggests that tacitly accepted, de facto policies may have a more significant impact on the operation of an organization than policies that are formally adopted and promulgated. Making a "conscious choice among alternatives" a prerequisite for the existence of a policy places violations caused by such policies beyond the reach of § 1983. Similarly, organizational theory suggests that it is not merely the behavior of employees who are "final policy-making authorities" as a matter of state law that shapes the character and ethos of the municipality. As Justice Stevens argued in his dissent in *City of St. Louis v. Praprotnik*:

> Every act of a high official constitutes a kind of "statement" about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decision-making; they are not perceived as the actions of the city itself. If a County police officer had ... [committed the constitutional violation] on the officer's own initiative, this would have been seen as the action of an overanxious officer, and would not have sent a message to other officers that similar actions would be countenanced. One reason for this is that the County Prosecutor himself could step forward and say "that was wrong"; when the County Prosecutor authorized the action himself, only a self-correction would accomplish the same task, and until such time his action would have countywide ramifications.[168]

Because an order from the County Prosecutor does send a message that "similar actions will be countenanced," it is likely to lead to similar violations in the future, and contributes to a "bad character" on the part of the municipality.

Whether a person is the kind of official whose actions "dictate the responses of ... subordinates" is, of course, a heavily fact-dependent question. If it is widely known that an official has little de facto power in the area in question, or that, if a superior were approached, the likelihood that the order

168. City of St. Louis v. Praprotnik, 485 U.S. 112, 170–71 (1988).

would be countermanded is high, the official's action might not send the message Justice Stevens fears. Nevertheless, limiting those who can act for the city to "final policy-makers" under state law will often foreclose the question of municipal culpability in a needlessly formalistic way. Again, limiting the tort liability of municipalities may be desirable as a matter of policy, but it is not a necessary outcome of the theory underlying *Monell.*

3. Implementing the Corporate Character Theory

Most proponents of the corporate character theory argue for its adoption as a theory of corporate criminal liability.[169] Because the corporate character theory holds corporations liable when and only when they are culpable, proponents contend, the theory comes closer than either the doctrine of respondeat superior or the *Model Penal Code* to realizing the principle of responsibility discussed in Part I.[170] It thus contributes to fairness, deterrence in the broad sense, and liberty in corporate criminal law.

Moreover, *Monell*'s presence on the legal landscape suggests that the use of the corporate character theory at the trial stage is not impracticable. Courts have proved capable of assigning liability based on the existence of an organizational policy or custom and the causal connection between policy or custom and a legal violation. Of course, the *Monell* doctrine in its present form results in liability far more limited in scope than that proposed by corporate culpability theorists. But the narrow scope of *Monell* represents a policy choice; it is not an inevitable outgrowth of the focus on organizational policy and custom. It would be possible to recast the doctrine in the context of the private corporation, where the arguments for protection against liability are less strong.

Nevertheless, the courts' struggle to articulate and apply the doctrine of municipality liability justifies some caution in adopting the corporate character theory for use at the trial stage. There are several reasons to be hesitant about adopting a theory of corporate criminal liability based on the corporate character theory. First, as the case law following *Monell* shows, the question of whether an organizational policy or custom causes a violation requires a difficult, fact-dependent inquiry. An assessment of the "character" of an organization involves several different variables, among them the existence of an "official" policy or custom, the degree of involvement of policy-making officials, the strength of the link between the policy and the violation, the existence of de facto authority, and the prior history of the organization. Moreover, the case law suggests that these variables are interdependent: Where a policy is merely de facto, or the creation of lower-level officials, a finding of liability is likely to require a stronger link between policy and violation than is needed where final policy-making officials expressly adopt and promulgate a policy that leads to violations. Similarly, the existence of a "pattern" of similar violations in the organization's history makes it more likely that policy-making officials are involved. The multiplicity of variables and their interdependence suggests that the question of liability under the corporate character theory is what

169. *See* theorists cited *supra* note 124.
170. *See supra* note 18 and accompanying text.

Lon Fuller has called a "polycentric" problem,[171] not easily amenable to traditional adjudication. Although the theory is capable of assessing the *degree* of a corporation's culpability, it may be ill-suited to produce a verdict of "guilty" or "not-guilty," the only two alternatives at the trial stage.

Second, making liability dependent on proof that a corporate policy or custom caused an agent's violation of the law places an enormous burden on prosecutorial resources. Evidence of prior incidents of similar conduct may be fairly accessible to the prosecution, but other evidence of policy or custom is likely to be internal to the organization: corporate records, internal memos, and the cooperation of witnesses whose interests may be adverse to those of the government. This difficulty is partially avoided if, as some proponents of the theory recommend, a corporation is presumed liable for a criminal act on the part of its agent, and is permitted to defeat liability by a showing that no corporate policy or custom caused the violation.[172] But this approach, while not constitutionally impermissible, stands in tension with the due process value of proof beyond a reasonable doubt in criminal trials.[173]

Third, the corporate character theory is in tension with evidentiary rules designed to protect criminal defendants from conviction on the basis of bad character. Federal Rule of Evidence 404(a), for example, restricts the admissibility of character evidence that is used to show that a defendant acted in accordance with his or her character.[174] Rule 404(b) limits the admissibility of evidence of prior crimes or other bad acts to show that a defendant had a propensity to commit the crime.[175] In contrast, evaluation of the corporate

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171. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978). According to Fuller, a polycentric problem is one with many centers, in which the resolution of one question implicates several others:

> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. ... This is a 'polycentric' situation because it is 'many centered'—each crossing of strands is a distinct center for distributing tensions.

Id.

172. This suggestion is offered in *Developments in the Law*, *supra* note 85, at 1257.

173. In In re *Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This requirement has been interpreted to mean merely that the prosecution bears the burden of proving every element of the offense; it does not prevent the government from defining an offense in such a way that what might have been included as an element becomes an affirmative defense that the defendant has the burden of proving. *See* Patterson v. New York, 432 U.S. 197 (1977). Thus, it is unlikely that placing the burden on a corporate offender to prove that no policy or custom caused a criminal violation would be found constitutionally impermissible. Nevertheless, if we believe that corporate culpability should be a necessary element in most corporate crimes, presupposing such culpability by placing the burden on the corporation to disprove it contradicts the spirit of the Due Process Clause.

174. Rule 404(a) provides: "Evidence of a person's character or a trait of character is not admissible for the purpose of providing action in conformity therewith on a particular occasion," and provides exceptions for character evidence offered by an accused, prosecutorial evidence offered in response to character evidence offered by an accused, evidence of a relevant character trait of a victim, and some evidence offered to demonstrate the character of a witness. FED. R. EVID. 404(a).

175. Rule 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

character and the propensity its policies and customs have to result in crime is precisely what the corporate character theory requires. Moreover, an assessment of corporate character is likely to require a wide-ranging inquiry, broader than that traditionally conducted at trial. Although the numerous exceptions to the rules of evidence mean that the rules are unlikely to pose a genuine barrier to the use of the corporate character theory,[176] their presence reveals the extent of the difference between the inquiry demanded by the corporate character theory and that which presently takes place in a criminal trial.

The problems discussed above do not pose insurmountable obstacles to the adoption of the corporate character theory at trial; they merely indicate points of tension between the theory and current criminal law. These tensions, and the long entrenchment of the theories of respondeat superior and the *Model Penal Code*, make imminent adoption of the corporate character theory at the trial stage unlikely. At the sentencing stage, however, the tensions between the corporate character theory and the criminal law disappear. The existence of a corporate policy or custom that causes violations of the law continues to be a fact-intensive, polycentric problem—but courts have traditionally dealt with such problems at sentencing. Unlike the trial stage, where the fact-finder must find the defendant "guilty" or "not-guilty," the sentencing judge attempts to determine the *degree* of the offender's culpability, a task to which the corporate character theory is well-suited. Evidence of corporate character is still difficult for the prosecution to obtain, but placing the burden on the offender to bring forth evidence in mitigation of the crime is traditional practice at sentencing, and does not threaten the principle of proof beyond a reasonable doubt. Finally, sentencing has never been governed by the restrictive rules of evidence that obtain at the trial stage. Determining the degree of an offender's culpability involves a broad-ranging inquiry into questions as diverse as past history, reputation in the community, and remorse. Indeed, the ultimate goal of the sentencing inquiry is an assessment of the offender's character. This makes the corporate character theory particularly well-suited for the sentencing of corporations. In the following Part, I argue that the Federal Sentencing Guidelines for organizations adopt a version of the corporate character theory.

III. THE CORPORATE CHARACTER THEORY AND THE FEDERAL SENTENCING GUIDELINES

Part II showed that the "corporate character theory" is the most theoretically satisfying of the three principal theories of corporate culpability. Under the corporate character theory, a corporation is culpable when a corporate policy or custom causes an agent of the corporation to violate the law on the corporation's behalf. Although use of the corporate character theory at the trial stage presents several difficulties, the theory is well-suited for use at

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preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

176. For example, where character is directly relevant to an element of the offense, as it would be in a defamation suit, character evidence is admissible. If the corporate character theory were adopted, character would become an element of the offense and much evidence which is currently regarded as collateral would have to be taken into account.

sentencing, where judges have traditionally engaged in a broad-based assessment of the character of offenders. In this section of the paper, I explain the ways in which the Federal Sentencing Guidelines are informed by the corporate character theory.

Given the traditional unimportance of culpability in corporate criminal law, one would expect the Guidelines to ignore culpability altogether. At most, the Guidelines would be expected to employ a concept of imputed culpability, consistent with the doctrine of respondeat superior used at the trial stage in the federal courts. Instead, Part III shows, the Guidelines adopt a genuine theory of organizational entity culpability, and give it concrete content through the device of the "culpability score." The argument of Part III is threefold: Section A describes the evolution of the Guidelines and the decision of the Sentencing Commission to make culpability a significant part of the sentencing process. Section B analyzes the "culpability score" and concludes that the Guidelines require an assessment of the organization's character strikingly similar to that prescribed by the corporate character theory. Section C shows how the adoption of a version of the corporate character theory enables the Guidelines to pursue a wider range of sentencing aims than is traditional in the sentencing of organizations.

A. The Use of Culpability in the Organizational Sentencing Guidelines

The Sentencing Commission did not initially regard culpability as important to organizational sentencing. The first proposed draft of the Guidelines, issued in 1988,[177] contained no mention of culpability and adopted what has come to be called the "optimal penalty" approach to sentencing.[178] Under the optimal penalty approach, the goal of criminal law is to minimize the total social costs of crime—the costs of both crime *and* punishment—to arrive at an optimal level of deterrence. This goal is achieved when an offender is fined an amount equal to the total cost of the offense times a multiple representing the probability that the offender will be caught. Proponents of optimal penalties predict that under an optimal penalty regime, organizations will invest in crime prevention up to the point at which the cost of prevention equals the expected cost of the harm, but will not be overdeterred.

Following these principles, the 1988 draft focused primarily on deterrence,[179] and relied almost exclusively on monetary sanctions. Courts were directed to set fines by determining the monetary costs of the offense (called the "offense loss"), multiplying this number by a figure representing the likelihood of detection (the "offense multiple"), and adding enforcement costs.

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177. *Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations, reprinted in* 10 WHITTIER L. REV. 7 (1988) [hereinafter *1988 Discussion Draft*].

178. The optimal penalty approach was pioneered by Gary Becker in *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). For a defense of the optimal penalty approach in corporate sentencing, see Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991); Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513 (1989) [hereinafter Parker, *Optimal Penalties*]; Jeffrey S. Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 FED. SENT. R. 133 (1990) [hereinafter Parker, *Corporate Sentencing Proposals*].

179. Restitution was also an important feature of the 1988 Discussion Draft. *See 1988 Discussion Draft, supra* note 177, § 8C2.1, at 50.

There was no provision for aggravating or mitigating factors in the calculation of the fine. The draft did authorize probation for organizational offenders in addition to fines, restitution, and forfeitures, but probation was viewed primarily as a means of enforcing the payment of monetary penalties. "Preventive" probation—judicial oversight of the operation of the organization to prevent future crime—was authorized only in rare cases.[180]

By the Commission's 1990 proposal,[181] the Guidelines had changed shape considerably. Fines remained the primary weapon in the Commission's punitive arsenal, and they were still arrived at by multiplying an initial figure by a "multiplier." But the initial figure was no longer determined solely by the costs of the offense,[182] and the multiplier was derived from the organization's "mitigation score," a number which depended on factors related to the corporation's culpability,[183] rather than on the chances of detection. The final version of the Guidelines, sent to Congress on May 1, 1991, stated explicitly that the appropriate punishment depends in part on culpability, and changed the term "mitigation score" to "culpability score." The May 1 Guidelines became chapter eight of the Federal Sentencing Guidelines, and took effect on November 1, 1991.

The new Guidelines are complex and reflect a broad range of sentencing principles. Section 8B requires offenders to remedy any harm resulting from an offense and to compensate victims. It also provides for restitution orders,[184] remedial orders,[185] community service,[186] and notice to victims.[187] Section 8C1 subjects "criminal purpose organizations" to the organizational equivalent of the death penalty—a fine large enough to divest them of all their assets.[188] Criminal purpose organizations are defined as organizations operating "primarily for criminal purposes or primarily for criminal means."[189] Section 8C2.9 provides for the disgorgement of any gain from an offense that is not removed by fine or restitution order. The central portions of the Guidelines, however, are the provisions for fines for non-criminal purpose organizations and the provisions for probation. In both portions, culpability plays a substantial role.

The principle underlying section 8C2 (fines for non-criminal purpose organizations) is that "the fine range ... should be based on the seriousness of the offense and the culpability of the organization."[190] The seriousness of an

180. The draft authorized "preventive probation" only where 1) the offense was a felony; 2) senior management participated in or encouraged the offense; 3) the organization or senior management had a history of similar offenses, and 4) the court determines that the offense is likely to recur, and probation is likely to prevent recurrence in a cost-justified manner. *1988 Discussion Draft, supra* note 177, § 8D2.1(c), at 65. Interestingly, three of these factors are circumstances in which the organization would be found culpable under the corporate character theory.

181. *1990 Draft Guidelines, supra* note 4.

182. *Id.* § 8C.2.1 at 2007.

183. *Id.* § 8C2.1 at 2012.

184. U.S.S.G. § 8B1.1.

185. *Id.* § 8B1.2.

186. *Id.* § 8B1.3.

187. *Id.* § 8B11.4.

188. *Id.* § 8C1.1.

189. *Id.*

190. *Id.* ch. 8, intro. cmt.

offense is represented by its appropriate "base fine." An organization's culpability depends on its "culpability score." A sentencing judge is directed to start with the base fine, and multiply it by a set of numbers derived from its culpability score to arrive at the "guideline fine range." Adjustments within the range and, in special cases, departures from the range, determine the final fine (See Figure 1).

An organization's base fine is determined in one of three ways, whichever results in the highest base fine.[191] First, the base fine may be set at the amount of money gained by the organization from the crime. Second, "to the extent the offense was caused intentionally, knowingly, or recklessly," the base fine may be set at the amount of monetary loss caused by the offense.[192] Finally, in cases in which neither monetary loss nor monetary gain are high enough to adequately reflect the severity of the offense, the court is directed to turn to chapter two of the Guidelines, where crimes are ranked according to their seriousness. From this ranking, termed the crime's "offense level," section 8C2 then assigns a corresponding fine. The base fine is whichever of the three numbers is the highest: monetary gain, monetary loss (when applicable), or offense level fine.[193]

191. *Id.* § 8C2.4.

192. Commentary to the Guidelines states that "[i]n order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances." *Id.* § 8C2.4 cmt., backg'd.

193. In some cases, Chapter Two of the Guidelines offers specific instructions regarding the determination of the base fine. Those instructions are to be followed in such cases. *Id.* § 8C2.4(b). In addition, where the calculation of loss or gain would "unduly complicate or prolong the sentencing process," the court is directed to use the offense level fine. *Id.* § 8C2.4(c).

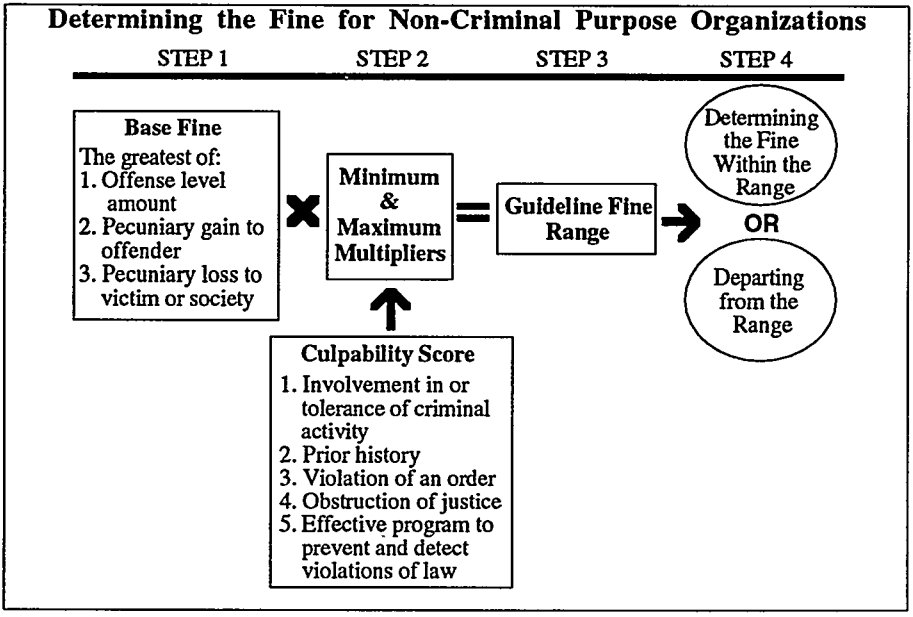

Figure 1[194]

194. Offense levels in Step 1 are determined by referring to the provisions of chapter two or, in the case of multiple counts, chapter three of the Guidelines. Once the offense level is determined, U.S.S.G. § 8C2.4 prescribes the following fines for each offense level:

Offense Level	Fine	Offense Level	Fine
6 or less	$5,000	23	$1,600,000
7	7,500	24	2,100,000
8	10,000	25	2,800,000
9	15,000	26	3,700,000
10	20,000	27	4,800,000
11	30,000	28	6,300,000
12	40,000	29	8,100,000
13	60,000	30	10,500,000
14	85,000	31	13,500,000
15	125,000	32	17,500,000
16	175,000	33	22,000,000
17	250,000	34	28,500,000
18	350,000	35	36,000,000
19	500,000	36	45,500,000
20	650,000	37	57,500,000
21	910,000	38 or more	72,500,500
22	1,200,000		

Pecuniary loss may be used to determine the base fine only "to the extent the loss was caused intentionally, knowingly, or recklessly." *Id.* § 8C2.5(a)(3).

Under § 8C2.6, the following multipliers are applicable to each culpability score (Step 2):

Once the court has determined the base fine, it calculates the organization's culpability score. Convicted organizations begin the sentencing process with a culpability score of five. The score can be raised to as high as ten or reduced to as little as zero by the presence of one or more aggravating or mitigating factors.[195] The four aggravating factors are 1) the involvement in or tolerance of criminal activity by "high level" or "substantial authority" personnel; 2) a recent history of similar misconduct on the part of the organization; 3) violation of a judicial order or condition of probation; and 4) obstruction of justice. The two mitigating factors are 1) the presence of "an effective program to prevent and detect violations of law" on the part of corporate agents and 2) cooperation with law enforcement officials. Aggravating and mitigating factors will be explored in more detail below. The base fine is multiplied by a maximum and a minimum multiplier, which correspond to its culpability score, to arrive at the organization's guideline fine range. For example, if an organization's base fine is $100,000, and its culpability score is six, $100,000 is multiplied by 1.2 and 2.4 to arrive at a fine range of $120,000–240,000.[196]

The court is entitled to consider both offense seriousness and culpability again once the Guideline fine range is determined. The organization's role in the offense, any prior criminal or civil misconduct that was not taken into account in determining the culpability score, an unusually high or low culpability score, or the presence of any aggravating or mitigating factor may warrant adjustments within the range.[197] In addition, the court may consider any of the purposes of sentencing set out in 18 U.S.C. § 3553.[198] In unusual cases, departures from the fine range are authorized on grounds of culpability as well.[199]

Culpability also plays a major role in section 8D, on probation. The "culpability score" is not referred to explicitly in this section, but several of the aggravating and mitigating factors from the score re-appear. For organizations

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

195. *Id.* § 8C2.5.

196. *Id.* § 8C2.7. The figures 1.2 and 2.4 are the multipliers associated with a culpability score of six. *See supra* Figure 1 & note 191.

197. U.S.S.G. § 8C2.8.

198. *Id.* § 8C2.8(a)(10).

199. *See id.* § 8C4.11 (authorizes upward departures when the organization has a culpability score above ten, and downward departures when the fine range is higher than necessary to achieve the purposes of sentencing and organizational culpability is exceptionally low. In general, however, departures from the fine range are authorized on the basis of the seriousness of the offense, not on the basis of culpability).

with over fifty employees, for example, a court is required to order a term of probation if the organization does not have an effective program to prevent and detect violations of law.[200] Where the organization or a high-level official within the organization recently engaged in similar misconduct, probation is likewise required.[201] As in the 1988 Draft, probation is used in conjunction with other Guideline sanctions as a method of enforcement. Thus, courts are directed to order probation if it is necessary to secure payment of restitution or fine, to enforce a remedial order, or to ensure completion of community service.[202] But the most significant feature of the probation section is its authorization of intrusion into the organizational decision-making process to change features of the organization that lead to crime. Development of a program to prevent and detect violations of the law, for example, may be made a condition of probation.[203] This "incapacitation" and "rehabilitation" of the organization is predicated on the possibility of organizational culpability.

B. The Organizational Guidelines and the Corporate Character Theory

The Guidelines not only make organizational culpability a central feature of their provisions on fines and probation, they give concrete content to the notion of organizational culpability through the device of the organization's "culpability score." Significantly, the aggravating and mitigating factors in the score include the same features of the organization which serve as the locus for organizational culpability under the corporate character theory: the conduct of high managerial officials, prior history, and corporate policies, customs, and procedures. The Guidelines never explicitly adopt any theory of corporate culpability, and they are not consistent with the corporate character theory in every respect. Nevertheless, the determination of an organization's culpability score under the Guidelines is best understood as an assessment of the character of the organization.

1. Participation of High Managerial Officials

As noted in Part II, corporate character theorists generally agree that some organizational officials are so closely identified with the organization that their acts can be said to represent corporate policy. Where such an official authorizes, participates in, or knowingly tolerates a criminal act on the part of an employee of the organization, the organization is therefore culpable. The

200. *Id.* § 8D1.1(a)(3).
201. *Id.* § 8D1.1(a)(4),(5).
202. *Id.* § 8D1.1(a)(1).
203. *Id.* § 8D1.4(c)(1). Several other conditions of probation are also authorized. The condition that the organization shall not commit another federal, state, or local crime during the term of probation is required by the Sentencing Reform Act. The Act also requires that if the offender was convicted of a felony, a fine, restitution, or community service must be ordered as a condition of probation. *Id.* § 8D1.3. Other conditions are permissive rather than mandatory: The court may order the organization to publicize, at its own expense, the nature of its offense, its conviction, and the steps it will take to prevent similar offenses in the future; it may require the organization to make periodic reports on its financial conditions and business operations to a probation officer; it may demand that the organization submit to unannounced examinations of its books and records, and to interrogation of its personnel; and it may order the organization to inform the court or probation officer of any adverse changes in its business or financial conditions. Finally, the court is authorized to impose other conditions that are "reasonably related to the nature and circumstances of the offense" and "involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing." *Id.* § 8D1.3(c).

Guidelines adopt a similar principle, stating that "an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct."[204] In keeping with this principle, the Guidelines make the participation of high managerial officials an aggravating factor in an organizational offender's culpability score. Depending on the size of the organization, the Guidelines add as many as five points to the score when "an individual within high-level personnel of the organization [or the unit of the organization within which the offense was committed] participated in, condoned, or was willfully ignorant of the offense."[205] The additional five points result in a 100–200% increase in the organization's base fine. "High-level personnel" are defined as

> individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization ... an individual with substantial ownership interest.[206]

"High level personnel" are not the only officials whose actions can result in organizational culpability, however. As noted in Part II, even the participation of agents who do not have official authority to make policy may have sufficient de facto authority to "send a message" to other members of the organization that illegal acts "will be countenanced."[207] Whether a given individual has such de facto authority is a difficult, fact-dependent question; nevertheless, an attempt to avoid the issue by adopting a formalistic definition of persons with policy-making authority is likely to result in culpable organizations being judged not at fault. The Guidelines avoid this temptation. Instead, they add as many as five points to an organization's culpability score where "tolerance by substantial authority personnel was pervasive throughout the organization."[208] "Substantial authority personnel" are "individuals who within the scope of their authority exercise a measure of discretion in acting on behalf of the organization. ... Whether an individual falls within this category must be determined on a case-by-case basis."[209] "Pervasiveness" depends upon

> the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority.[210]

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204. *Id.* § 8C2.5, cmt.

205. *Id.* § 8C2.5(b) makes the number of aggravation points earned from the involvement of high-level or substantial authority personnel dependent on the size of the organization or organizational unit. Organizations/units with 5000 or more employees receive five points; those with 1000 or more receive four points; those with 200 or more receive three points; those with 50 or more receive two points; and those with 10 or more receive one point.

206. U.S.S.G. § 8A1.1, cmt. 3(b).

207. *See supra* text accompanying note 168.

208. U.S.S.G. § 8C2.5(b). Once the organization has as few as 50 employees, the Guidelines cease adding points for pervasive tolerance by substantial authority personnel.

209. *Id.* § 8A.1.1, cmt. 3(c).

210. *Id.* § 8C2.5, cmt. 4.

The requirement that tolerance by substantial authority personnel must be "pervasive" before points are added to the culpability score represents an oversimplification, and may result in underestimating the culpability of some organizations. Nevertheless, the Guidelines' approach is consistent with the corporate character theory. When a practice is pervasive, it becomes a way of doing business, part of the organizational decision-making process. It has an influence that it would not have if only a single employee with "substantial authority" had engaged in it. The more "pervasive" tolerance of illegal activity is, in other words, the more likely it is that the activity represents an organizational custom or policy, and the more likely it is that the organization is culpable.

The Guidelines depart from the corporate character theory by giving larger organizations or units more aggravation points, and smaller organizations fewer points, for the same level of official participation.[211] This strategy would be understandable if it were part of a general attempt to punish large organizations more harshly than smaller ones; but the Guidelines make no systematic attempt to tailor punishment to organizational size.[212] Instead, the Sentencing Commission believes that, where the participation of high level officials is concerned, the size of the organization is directly related to its culpability:

> [A]s organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. ... [A]s organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive.[213]

As principles of organizational culpability, however, these statements are puzzling. The first principle seems to state that it is worse for the management of a large organization to commit a crime than it is for that of a smaller organization. But this point speaks to the seriousness of the offense, not to the culpability of the organization. As for the second principle, although it is true that where management tolerates crime, a large firm can do more damage than a smaller one, it is not clear that such tolerance makes criminal behavior more likely in a larger firm. Indeed, precisely the opposite may be true. The more closely held the corporation, the more high-level personnel *are* the firm, the more influence their acts have over the organizational decision-making process, and the more control they exert over subordinates. In a larger firm, high-level personnel are further removed from those who carry out their orders, and the organizational decision-making structure is more complex. Thus, small firms whose officials tolerate illegal activity may well be more culpable than larger firms.

2. Prior History

The question of whether a defendant is a first-time or repeat offender has long been central to the sentencing of individual criminals. Before the

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211. *See supra* note 205.
212. *See* SUPPLEMENTARY REPORT, *supra* note 7, at 9.
213. U.S.S.G. § 8C2.5, cmt., backg'd.

advent of the "just deserts" school, information about an offender's prior conduct was considered essential because it enabled the court to determine the need for incapacitation and the offender's susceptibility to rehabilitation. As Andrew von Hirsch points out, however, an offender's past conduct is also relevant to his or her culpability and "desert."[214] A first offender can plausibly argue that an offense was an anomaly, a lone departure from past standards of behavior. The act should not really be attributed to him, the offender can argue, because it was not "in character." After the first offense, however, this claim lacks credibility. Repetition has the effect of "endorsing" the earlier offense. It becomes safe to conclude that subsequent offenses are genuinely a product of the offender's character.

A similar argument can be made in the organizational context. Repeat offenses by an organization suggest that the offenses are not mere anomalies, but were caused by some feature of the organizational entity. Moreover, the fact that the organization has not changed this feature to prevent further offenses indicates that the offenses are consistent with the organization's policy or character. The corporate character theory builds on this insight by holding that repeated misconduct on the part of an organization constitutes a "ratification" or "endorsement" of its agent's criminal acts.[215] Where the organization is a recidivist, its crimes cannot be dismissed as the acts of a "rogue employee."

Consistent with the corporate character theory, the Guidelines take account of prior history by adding one point to the culpability score of an organizational offender if it "committed any part of the instant offense" within ten years after either a "criminal adjudication based on similar misconduct" or a "civil or administrative adjudication based on two or more separate instances of similar misconduct."[216] Two points are added if the instant offense took place within five years of the criminal or civil adjudication.[217] "Similar misconduct" is defined as "prior conduct that is similar in nature to the instant offense, without regard to whether or not such conduct violated the same statutory provision."[218] For example, the Guidelines explain that prior Medicare fraud would constitute misconduct similar to an offense involving another type of fraud.[219] Additional points are added to the culpability score if the offense violated a judicial order, injunction, or condition of probation.[220]

Because prior conduct is one of the most important and accessible sources of evidence about the character of the organization, the Guidelines would have been justified in giving it more weight in the culpability score than they do. In contrast to participation by high level officials, recidivism earns an offending organization relatively few aggravation points.[221] In addition, by

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214. VON HIRSCH, *supra* note 44, at 82.
215. *See supra* notes 129–30 and accompanying text.
216. U.S.S.G. § 8C2.5(c).
217. *Id.*
218. *Id.* § 8A1.1, cmt. 3(f).
219. *Id.*
220. *Id.* § 8C2.5(d) represents a separate provision under which aggravation points are added to the organization's culpability score for "violation of an order."
221. Assigning more aggravation points for a history of similar offenses is not the only way to make use of the insight that repeated offenses reflect a bad corporate character. John Coffee has suggested that any mitigation credit awarded an organizational offender for an

requiring a "prior civil or criminal adjudication," the Guidelines fail to build misconduct not resulting in litigation into the culpability score. Nevertheless, even one aggravation point raises a fine by twenty to forty percent, and courts are given some authorization to take prior conduct into account at other points in the Guidelines. When determining the fine within the Guideline range, for example, the court is permitted to consider "any prior civil or criminal misconduct that was not considered" in the culpability score.[222] Conduct that is not similar to the instant offense is not as probative of culpability as is similar conduct, but it may suggest an organizational culture characterized by indifference to legal compliance. The court may also take into account "partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors" set forth in the culpability score.[223] Thus the Guidelines' inclusion of prior conduct in the culpability score is generally sound, and is consistent with the corporate character theory.

3. Obstruction of Justice and Cooperation with Authorities

The Guidelines add three points to the organization's culpability score if the organization willfully obstructed justice, attempted to obstruct justice, or failed to prevent obstruction of justice during the investigation, prosecution or sentencing of the organization's offense.[224] This aggravating factor is best understood in conjunction with a mitigating factor of "self-reporting, cooperation, and acceptance of responsibility."[225] An organization that cooperates with prosecutors not only avoids the addition of three points to its culpability score; it may subtract five points from its score if "prior to an imminent threat of disclosure" and "within a reasonably prompt time after becoming aware of the offense, [it] reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct."[226] If the organization did not report the offense, but fully cooperated and demonstrated acceptance of responsibility, it is entitled to subtract two points from its culpability score.[227] Acceptance of responsibility alone entitles the organization to subtract one point from its score.[228]

At first glance, ex-post obstruction of justice and cooperation with authorities seem to have little to do with culpability. The corporate character theory makes no mention of such post-offense behavior. The twin aggravating/mitigating factors seem primarily a way to lower law enforcement costs and increase the likelihood of conviction. By making entry of a guilty plea and admission of involvement in the offense "significant evidence of affirmative

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effective program to prevent and detect crime should be granted on a provisional basis, and revoked if the organization commits a similar offense within the next three to five years. John Coffee, *"Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants*, 3 FED. SENT. R. 126, 128 (Nov./Dec. 1990).

222. U.S.S.G. § 8C2.8(a)(7).

223. *Id.* § 8C2.8(a)(9).

224. *Id.* §8C2.5(e). For the provision to apply, the obstruction must have been committed on behalf of the organization; attempts by an individual to conceal misconduct *from* the organization do not qualify.

225. *Id.* § 8C2.5(g).

226. *Id.* § 8C2.5(g)(1).

227. *Id.* § 8C2.5(g)(2).

228. *Id.* § 8C2.5(g)(3)

acceptance of responsibility,"[229] the Guidelines encourage organizations to plead guilty. In addition, self-reporting must be "thorough" in order for the organization to qualify for the mitigation credit, and the Guidelines state that "[a] prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct."[230] These provisions encourage organizations to uncover violations by their agents and to turn in the individuals responsible.

Nevertheless, cooperation with authorities and acceptance of responsibility are not irrelevant to culpability. They have long been important in the sentencing of individuals. Although cooperation and acceptance of responsibility can involve an admission of guilt, they also express remorse, contrition, and renunciation of the crime. They are thus relevant to the broad-based character assessment of the offender that has traditionally taken place at the sentencing stage. Like the first offender who plausibly argues that his crime is not "in character," the genuinely remorseful criminal distances himself from the commission of the crime and expresses an intent to reform. Obstruction of justice, in contrast, represents a continued identification with and continuation of the crime.

Obstruction of justice and cooperation with authorities are also capable of revealing organizational character. When an organization attempts to conceal a crime, it ratifies it, endorses it, and accepts it as its own. The protection of an employee who has violated the law implies that it is the corporation's policy to support such violations; an organization with a "good" character would likely have disciplined or fired the offending employee. Eliminating a criminal employee from the organizational decision-making process improves the corporate character and represents an important first step in the reform of the organization.

Because post-offense behavior is easily manipulable and may not represent genuine remorse and intent to reform, there is danger in giving it more weight than pre-offense conduct in assessing culpability. The Guidelines appear to do precisely this by allowing a cooperating organization not only to avoid three additional points, but also to subtract as many as five points from its culpability score. The only other factor that commands as many points is the involvement of high-level personnel in large organizations. This emphasis on post-offense behavior suggests that the Sentencing Commission intended the culpability score to serve other ends in addition to culpability assessment. Nevertheless, the presence of aggravating and mitigating factors for obstruction of justice and cooperation with authorities is not inconsistent with the task of evaluating culpability or with the corporate character theory.

4. Program to Prevent and Detect Violations of the Law

The corporate character theory holds that an organization is at fault, even when there is no involvement by policy-making officials, if an organizational policy or custom causes an agent of the organization to commit a violation on the organization's behalf. The policy or custom need not have been

229. *Id.* § 8C2.5, cmt. 13.
230. *Id.* § 8C2.5, cmt. 12.

formally adopted, nor is it necessary for the policy itself to be illegal.[231] Rather, a corporation is justly to blame for the illegal act of an agent whenever it was reasonably foreseeable that a corporate policy or practice would lead to the crime. The Guidelines provide no aggravating factor for offenses that are caused by organizational policy or custom. Instead, they appear to assume a causal link between policy and offense, and offer the organization the opportunity to rebut this assumption. To do so, the organization must show that the offense occurred "despite an effective program to prevent and detect violations of law."[232] If it is successful, three points are subtracted from its culpability score.

Under the Guidelines, mitigation credit for an effective program is not always available to the organizational offender. Where an individual within "high-level personnel" or an individual responsible for administering and enforcing a compliance program was involved in the offense, the credit does not apply. The credit is also inapplicable if, after becoming aware of an offense, the organization "unreasonably delayed" reporting it to the government. Finally, the involvement of "substantial authority personnel" creates a rebuttable presumption that the organization lacked an effective program.[233]

The mitigation credit for an effective program to prevent and detect violations of the law is arguably the most innovative and controversial element in the culpability score. The other factors, while new, are less novel: Attention is given to the participation of high-level personnel in the *Model Penal Code*, and prior history and cooperation with authorities are traditional elements of the sentencing of individuals. It is in their use of the program to prevent and detect crime that the Guidelines most clearly demonstrate their commitment to the corporate character theory. Because they make mitigation depend on the existence of a discrete and identifiable compliance program, rather than on an assessment of the general policies and customs of the organization, the Guidelines' formulation differs from that of the corporate character theory and has potentially different results. Results would be different if, as some critics fear, the effective program to prevent and detect violations were a pro forma matter, which could peacefully coexist with corporate policies and customs that encourage crime.[234] More experience with the practical impact of the Guidelines, of course, is necessary to assess this charge. However, the criteria for an effective program are designed in such a way that if an organization's policies or customs do cause an offense, the mitigation credit will probably be denied. The Guidelines' formulation is thus likely to have the same results as the corporate character theory.

The Guidelines state that "[t]he hallmark of an effective program to prevent and detect violations of law is that the organization exercised due dili-

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231. If an organization were to formally adopt an illegal policy, it might fall into the Guidelines' category of "criminal purpose organization" and be destined for dissolution.

232. *Id.* § 8C2.5(f).

233. *Id.*

234. *See, e.g.*, Coffee, *supra* note 221, at 126 (expressing the fear that "eight of the nine possible mitigation points will be awarded if the corporation's lawyers have done their job properly"); Parker, *Corporate Sentencing Proposals*, *supra* note 178, at 135 (suggesting that "the principal means for [firms to reduce their penalty exposure] is for firms to engage in activities that will earn them mitigation 'points' quite independently of whether they actually prevent crime.").

gence in seeking to prevent and detect criminal conduct by its employees and other agents."[235] The exercise of due diligence, in turn, requires several specific steps. Among other things, the organization must establish clear compliance standards reasonably capable of reducing the likelihood of violations; it must communicate them clearly to employees through training programs or written materials; it must monitor employees for compliance with the standards; and it must consistently enforce the standards by disciplining individuals who violate them.[236] Generally, the larger the organization, the more formal the program should be.[237] When it detects an offense, the organization must take "all reasonable steps" to prevent similar offenses, including any necessary modifications of its program.[238] An organization is expected to pay special attention to the possibility of offenses which, due to the nature of its business, are particularly likely. Thus, for example, "[i]f an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing."[239] Finally, an organization's prior history is used to determine what kinds of offenses it should have anticipated, and repeated misconduct suggests that the organization did not take all reasonable steps to prevent violations of the law.[240] Significantly, the criteria for an effective program include precisely the kinds of factors that are important in determining culpability under the corporate character theory. In Part II, for example, we noted that the Bank of New England would be found culpable under the corporate character theory because it failed to instruct its employees adequately about the law and lacked effective communication procedures.[241] In many of the police brutality cases, violation of the Guidelines' prescribed steps was the source of municipality liability under § 1983.[242] It is likely, then, that an organization will receive mitigation credit under the Guidelines when, and only when, it is not culpable under the corporate character theory.[243]

C. Corporate Culpability and the Aims of Corporate Criminal Law

The Sentencing Reform Act of 1984 sets out five purposes of criminal sentencing: just punishment, adequate deterrence, protection of the public, the

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235. *Id.* § 8A1.1, cmt. 3(k).
236. *Id.* § 8A1.1, cmt. 3(k)(1)–(7).
237. *Id.* § 8A1.1, cmt. (k)(7)(i).
238. *Id.* § 8A1.1, cmt. (k)(7).
239. *Id.* § 8A1.1, cmt. (k)(7)(ii).
240. *Id.* § 8A1.1, cmt. (k)(7)(iii).
241. *See supra* note 133 and accompanying text (discussing United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987)).
242. *See supra* text accompanying note 153.
243. The fact that the credit for an effective program is not available when high-level personnel are involved is also consistent with the corporate character theory. An otherwise effective program is unlikely to become part of the organizational decision-making process if it is clear that policy-making officials in the organization do not respect it. Similarly, the involvement of "substantial authority personnel" merits the Guidelines' presumption that an organization's program is ineffective. Such personnel can have de facto authority to make organizational policy, but they do not always have it. The ability to rebut the presumption that the program is ineffective permits the organization to demonstrate that this is the case. Where the participation of substantial authority personnel is particularly likely to result in violations, that is, where it is "pervasive," the organization will probably not succeed in such a rebuttal.

provision of correctional treatment, and restitution.[244] Four of these correspond roughly to the traditionally-cited aims of sentencing: deterrence, retribution, incapacitation and rehabilitation. As shown in Parts I and II, corporate criminal law has customarily ignored culpability and emphasized deterrence at the expense of other purposes of sentencing. Even early drafts of the Guidelines took such an approach. By making culpability a central feature of organizational sentencing, in contrast, the final version of the Guidelines is able to serve the full range of sentencing aims.

1. Retribution/Just Deserts

As noted in Part I, the retributivist school believes that one of the primary aims of punishment is to assign blame and give offenders their "just deserts." At the heart of the just deserts theory is the "principle of proportionality," which states that, other things being equal, offenders should be punished in proportion to the degree of their culpability.[245] Retribution has not been an aim of corporate criminal law for an obvious reason: The law lacked a coherent concept of corporate culpability. Without culpability, an offender is not blameworthy and does not "deserve" to be punished. Once a theory of corporate culpability has been developed, however, it becomes possible to sentence corporate offenders according to their "just deserts."

Although "just deserts" is not the only, or even the most important, objective of the organizational guidelines, it is clear that it played a role in their formulation. Section 3552(a)(2) of the United States Code Title 18 specifically cites "just punishment" as one of the goals of the Federal Guidelines, and legislative history makes clear that Congress understood "just punishment" to mean "just deserts."[246] Explanations of the Commission's work suggest an awareness that some organizations deserve greater punishment than others for the same crime and a desire that organizations not be given more punishment than they deserve. The Supplementary Report explains:

> [A]n organization should be given the opportunity to establish that it was in fact less culpable than the guidelines presumed. For example, the guidelines should permit an organization a reduction if it demonstrates that the offense was caused by a rogue employee rather than at the direction or with the tacit approval of management.[247]

This chance is all the more important, the Commission hints, because the respondeat superior theory employed at the trial stage ignores culpability.[248] Discussion at the draft stage of the Guidelines also reveals a concern with just

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244. 18 U.S.C. § 3553(a)(2), (a)(7). Section 3553(a)(6) also emphasizes "the need to avoid unwanted sentence disparities among defendants with similar records who have been found guilty of similar conduct." But this is less a purpose of sentencing than a criterion of a good sentence.

245. *See supra* text accompanying note 44.

246. S. REP. NO. 225, 98th Cong., 2d Sess. 3875 (1984), *reprinted in* U.S.C.C.A.N. 3182, 3258.

247. SUPPLEMENTARY REPORT, *supra* note 7, at A–2.

248. *Id.* at 6. ("Because an organization is vicariously liable for actions taken by its agents, the Commission determined that the base fine, which measures the seriousness of the offense, should not be the sole basis for determining an appropriate sentence. Rather, the applicable culpability score, which is determined primarily by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level, etc., also influences the determination of the fine range.")

deserts. At the October, 1988 discussion, for example, several commentators urged the Commission to recognize a retributive rationale for corporate criminal law.[249]

Even if the just deserts theory was not a primary motivation for the Commission, however, it is clear that the Guidelines' fine provisions are consistent with a retributive objective. Instead of making fines dependent solely on the seriousness of the crime, the Guidelines require sentencing judges to calculate and incorporate the organization's "culpability score." The culpability score, in turn, is founded on a genuine and coherent theory of organizational culpability, a version of the corporate character theory. The end result of the Guidelines' fine provisions is thus the adoption of the principle of proportionality. Under the Guidelines, organizations are punished in proportion to their blameworthiness—that is, to the extent they deserve.

2. Incapacitation and Rehabilitation

Like retribution, neither incapacitation nor rehabilitation has been a traditional aim of corporate criminal law. Both objectives have been frustrated by an impoverished understanding of corporate culpability. If corporate crimes are solely the product of individual employees, it makes no sense to incapacitate or rehabilitate corporations. Corporate incapacitation and rehabilitation are reasonable objectives only if the corporate entity itself is viewed as responsible for corporate crimes. Moreover, pursuit of both objectives requires a well-developed theory of organizational character. Organizational incapacitation has been impeded by the fact that organizations have "no body to kick," and thus cannot be imprisoned. Insight into the workings of the corporate character suggests ways to incapacitate other than the traditional physical deprivation of liberty. Similarly, rehabilitation is essentially a reformation or rebuilding of character, and a clear understanding of corporate character is necessary to determine what sort of rehabilitative measures will be effective. Giving organizational culpability a central role and adopting the corporate character theory enables the Guidelines to pursue both the incapacitation and the rehabilitation of organizations.

The Guidelines meet the objective of incapacitation in two ways. First, they provide for the permanent incapacitation of "criminal purpose organizations" by mandating fines large enough to divest such organizations of all their assets.[250] Second, through provisions authorizing "preventive probation," they empower the court to intrude upon the decision-making processes of organizational offenders and to deprive them of liberty. Organizational offenders may be forced to submit to periodic examination of their books and records and interrogation of their personnel.[251] They may be required to develop and implement a program to prevent and detect violations of the law, and the court may closely supervise them to ensure that this requirement is carried out.[252] Additional conditions of probation are authorized by a catch-all

249. *See, e.g.*, Testimony of Gary Lynch, Harry First, and John Coffee, Public Hearings on the July, 1988 Discussion Draft, October 11, 1988 (on file with author).

250. *Id.* § 8C1.1.

251. *Id.* § 8C1.1, cmt., backg'd.

252. *Id.* § 8D1.4(c).

provision.[253] The main thrust of the Guidelines' probation provisions, however, is rehabilitative.[254] Consistent with the corporate character theory, their ultimate goal is to change the structures, procedures, and decision-making processes of the organization in order to reform its character. As one would expect, the preventive probation provisions come into play primarily in situations in which the organizational character is most in need of reform: where the organization has fifty or more employees and lacks a program to prevent and detect crime; where the organization, or a high-level official involved in the offense within the organization, recently engaged in similar criminal misconduct; or where probation was ordered because it was "necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct."[255] The objective of rehabilitation is reinforced by the culpability score, which gives organizations an incentive to reshape the organizational character before violations of the law occur.

3. Deterrence

Although the Guidelines add retribution, incapacitation, and rehabilitation to the traditional list of organizational sentencing objectives, they do not abandon the aim of deterrence. Commentary and explanation from the Commission repeatedly emphasize the deterrence objective. However, the adoption of the corporate character theory enables the Guidelines to pursue a broader form of deterrence than has been usual in corporate criminal law. Traditional organizational sentencing treated the organization as an inscrutable "black box." Fines, the punitive weapon of choice, were intended to effect changes within the box, but no effort was made to examine its inner workings. The Guidelines continue to rely on fines and other monetary payments to deter organizational crime. In addition, however, probation provisions threaten offenders with judicial intervention in the decision-making processes of the organization. This strategy is made possible by the adoption of a theory of organizational crime that recognizes the role of the policies, customs and procedures of the organization.

Because the Guidelines' fine provisions offer a lighter sentence for organizations that are less culpable, some commentators have argued that they will deter less effectively than uniform fines. In particular, critics have argued that the Guidelines should not provide a mitigation credit for an effective program to prevent and detect crime.[256] As noted in Part I, the provision of an excuse or justification at the trial stage can undermine deterrence in the "crass" sense by increasing the likelihood of deception and placing a heavier

253. *Id.* § 8D1.3(c). (The court may impose other conditions of probation provided they are "1) reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization and 2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.")

254. SUPPLEMENTARY REPORT, *supra* note 7, at 5.

255. U.S.S.G. § 8D1.4(c). The Guidelines authorize these conditions of probation when probation is ordered under (3), (4), (5), or (6) of § 8D1.1(a), suggesting that they are not authorized if none of these conditions obtain. However, the Guidelines do not say explicitly that they are not authorized under other conditions, and condition (6) provides the sentencing judge with a tremendous amount of discretion in deciding to impose these conditions.

256. *See, e.g.*, Jennifer Arlen, *Why the Commission's Proposal Is Not Good Economics*, 3 FED. SENT. R. 138, (Nov./Dec. 1990); Parker, *Corporate Sentencing Proposals*, *supra* note 178, at 135.

burden on prosecutors.[257] A mitigating factor at the sentencing stage creates similar uncertainty and makes it less likely that offenders will be suitably punished.

An assessment of the deterrent efficacy of the Guidelines is beyond the scope of this Article. Nevertheless, it is worth pointing briefly to two reasons why the mitigation credit for a compliance program is not inconsistent with effective deterrence. First, providing an incentive for organizations to develop compliance programs makes it possible for the Guidelines to tailor the remedy directly to the problem of corporate crime. Without such an incentive—with only a "stick" instead of a "carrot"—organizations might develop compliance programs, but the Guidelines would have no control over the way in which such programs are designed. If the corporate character theory is correct, and the Guidelines have correctly stated the criteria for an effective program, the credit for such a program will increase, rather than decrease, deterrence.[258] Second, as the discussion of deterrence in Part I indicated, the efficacy of the criminal law depends on more than its crude *in terrorem* effect.[259] Herbert Packer and others have argued that much of the deterrent value of criminal sanctions derives from the stigma of moral blameworthiness they carry and the perception that they are fair.[260] Because it results in lighter punishments for organizations that are not to blame, the credit for a compliance program may strengthen deterrence in the broad sense by reinforcing the connection between morality and corporate criminal law.

CONCLUSION

Although corporations cannot be culpable in the same way that individuals can, this Article has argued that there is a sense in which they may be "justly held to blame" for the acts of their agents. Corporate crime is not always the result of individual choice. Often, it is the product of goals, rules, policies and procedures that are features of the organization as an entity. By substituting an organizational decision-making process for its agents' individual autonomy, the corporation shapes and controls their behavior. When this process is likely to result in violations on behalf of the corporation on the part of its agents, the corporate entity may be said to be at fault.

Corporate criminal law has generally failed to take adequate account of the culpability of the corporate entity. The principal doctrine of corporate criminal liability, that of respondeat superior, works by imputing to the corporation the culpability of the agent who committed the crime. The *Model Penal Code*'s location of corporate culpability in the participation of high managerial officials is more promising, but ultimately too narrow. The lack of a coherent theory of corporate culpability at the trial stage results in the risk that some corporations will be held liable even when they are not culpable, and, conversely, that some culpable corporations will succeed in evading liability. At

257. *See supra* note 32 and accompanying text.

258. Of course, the Guidelines also tailor the remedy to the problem through provisions on preventive probation. But at this point, the offense has already occurred. If the corporate character theory is correct, an effective program can really *prevent* crime before it occurs. An incentive will thus have the effect of decreasing the overall level of organizational crime.

259. See *supra* notes 27–31 and accompanying text.

260. *Id.*

the sentencing stage, failure to recognize corporate culpability has led to an impoverished vision of the range of sentencing options and of the purposes of corporate sentencing.

The Federal Sentencing Guidelines for organizations represent a significant advance over the current treatment of corporate culpability in the criminal law. In a marked departure from tradition, the Guidelines give culpability an explicit and important role in organizational sentencing. They flesh out the concept of organizational culpability concretely through the device of the culpability score. The Guidelines employ a version of the most theoretically satisfying of three competing theories of corporate culpability, the "corporate character theory." The theory builds on the insights of organizational scholars by holding that an organization is culpable when its policies, customs and procedures—features of the organizational character—cause its agents to violate the law on its behalf. Adopting the corporate character theory, I have argued, makes it possible for the Guidelines to employ innovative organizational sentencing strategies and to pursue the full range of sentencing aims.

To be sure, the Guidelines are not a perfect embodiment of the corporate character theory. The weight given to post-offense cooperation and obstruction of justice, for example, is heavier than justified under the theory. The different treatment of large and small organizations whose high-level or substantial authority personnel were involved in violations also conflicts with conclusions that follow from the theory. In addition, there is an arbitrariness to portions of the Guidelines that is endemic to every attempt to establish bright-line rules: Why must similar misconduct have taken place within the timeframes of five and ten years, rather than two and seven? Why does the participation of high-level personnel earn a large company organization five aggravation points, rather than four? The corporate character theory provides little guidance for these choices. However, changes that would bring the Guidelines into greater conformity with the corporate character theory involve minor tinkering rather than major revisions. Congress has expressly left room for such tinkering by providing for periodic amendments to the Guidelines,[261] and it will become clearer what sort of adjustments are appropriate as the Guidelines are increasingly applied. In the meantime, the Guidelines are the best institutional expression of a theory of organizational culpability available in our legal system. As such, they represent a step toward a fairer, more unified, and more effective corporate criminal law.

261. 28 U.S.C. §§ 994(o), (p) (1992) instructs the United States Sentencing Commission to periodically review and revise the sentencing guidelines, and to submit amendments to Congress by May 1 each year.