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# THE FEDERAL SENTENCING GUIDELINES ENDORSEMENT OF CORPORATE-LEVEL RESTITUTION: FURTHERANCE OF PUBLIC POLICY OR DISCRIMINATION ON THE BASIS OF ENTITY CAPITALIZATION?

HENRY AMOROSO\*

## I. INTRODUCTION

Prone to State-Simony, a sordid tribe,  
Bonturo singly scorns the golden bribe  
Nor sells the honours of his parent state.

- Dante Alighieri

The foregoing passage from *The Divine Comedy* makes clear reference to the ubiquitous presence, reprehensible as it may be, of financial inducements, and the readiness with which “simony” may intercede and direct the course of events or, with respect to individual experience, compel favorable reciprocity in action or judgment. Indeed, all of history is littered with episodes of the favor with which tidings or “munera”, however intellectually corrupt, may have been received as reflected in a judgment that may have been rendered in resolution of one’s cause. This article, while certainly not suggesting that current practices at all resemble the primitive turpitudes of an antiquated era, is intended to examine the disparity with which a corporate organizational transgressor capable of making restitution may redeem itself in the eyes of a sentencing jurist, as compared with a similar entity that is not as advantageously capitalized, and whether such disparity furthers the public policy goals contemplated by the Federal Sentencing Commission.

Historically, the object of a repentant criminal or moral transgressor has been to seek the equivalent of religious or societal redemption. Yet even “redemption”, when derived from its literal roots, suggests a payment in exchange for restored integrity. “Redemption” comes from the Latin “emere” or “to buy”; an “emptio” is a purchase, and a “re-(d)emptio” is therefore a repurchase, a

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ransom or a buying back. The curing of harm occasioned by wrongdoing, therefore, has a long history of being accomplished through the payment of tidings or a bartering of physical or political capital. Indeed, in antiquated times, wealthy tidings or even letters of influence submitted on behalf of a litigant and intended as an inducement influencing the performance of a judicial function to be otherwise exercised gratuitously were accepted practice. In fact, historically, restitution to the victim was rare; a "just judgment" signified the tolerable custom of a payment extorted by the judge for the rendering of justice.<sup>1</sup> Indeed, le Chantre wrote in 1192 that if one could not obtain justice without money at the secular court, a payoff must go to the judge, although the judge would then be obligated to return to the litigant any usurious costs the litigant incurred in endeavoring to raise the tolerably illicit tid- ing.<sup>2</sup> In this vein, John Bromyard did not characterize offerings by litigants to magistrates as illegal; rather, he postulated, any untoward abuse of this exchange would more appropriately be attributed to the ineffectiveness of secular law and the absence of any clear secular rules governing the receipt of restitution and gifts by judges.<sup>3</sup>

The act of restitution, in a more cerebral sense, has been characterized by Thomas Aquinas as a natural exponent of our commutative system of justice, *i.e.*, that system of justice which is directed toward the individuals that comprise a community, which is, in turn, founded upon the totality of exchanges that occur between its composite members. It is a system of exchange to cover actions and reactions benefitting and injuring people, and restitution is introduced to cover repayment for the physical and psychological effects of such actions and reactions.<sup>4</sup> In a primitive society, such a dynamic found expression in such tenets as "an eye for an eye" or, in the modern sense, "quid pro quo". In any event, restitution is a concept which, with the facility and development of capital as a means of exchange, has come to encapsulate social and economic utility, as well as fundamental notions of societal and punitive justice.

The United States Sentencing Commission, in its recent enactment of Chapter Eight of the United States Sentencing

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1. Letter from St. Augustine to Macedonius, Letter Number 153.

2. See JOHN T. NOONAN, JR., *BRIBES* (1984).

3. JOHN BROMYARD, *SUMMA PRAEDICANTUM*, reprinted in LEONARD E. BOYLE, *PASTORAL CARE, CLERICAL EDUCATION AND CANON LAW, 1200-1400* (1981).

4. THOMAS AQUINAS, *SUMMA THEOLOGICAE* (Timothy McDermott ed., 1989).

Guidelines, has erected a sophisticated sentencing scheme which places special emphasis upon the payment of restitution by an organization for the harm occasioned by its own criminal wrongdoing. Designed to give uniformity and consistency to the manner in which criminal sentences are imposed at the entity level, the new Chapter Eight features an empirical sentencing formula that provides for the mitigation of nominal pecuniary penalties associated with a corporate criminal offense in those instances where the defendant-firm has demonstrated clear recognition and affirmative responsibility for its criminal conduct. Although such recognition and responsibility is manifest in the entity's own admission of wrongdoing and the observable behavior associated with such accountability, the Sentencing Guidelines appear to have been carefully crafted so as to eliminate any special consideration or empirical weight attributed to the organization's voluntary payment of restitution. Although not specified in its preamble, the Guidelines are presumably so drafted in order to avoid discrimination against firms with a less advantageous balance sheet.

Notwithstanding, it may be observed that the Federal Sentencing Guidelines *do* permit a sentencing judge to invoke his discretion and depart downward from the punishment prescribed under the formula where it can be demonstrated that the corporate defendant has incurred substantial costs in remediating the harm visited by its own conduct. In recognition of a firm's efforts to redress the injury occasioned by its own nefarious conduct, the Sentencing Commission has characterized remedial efforts as the sort of mitigating factor that may justify a downward departure from a more elevated pecuniary penalty that would otherwise be prescribed under the rigid formula. Although perhaps intended to further the public policy goal of championing the victim, the effect of the sentencing formula in this regard may be to discriminate against smaller, more sparsely capitalized firms who do not possess the financial wherewithal to make restitution.

## II. CORPORATE FEDERAL SENTENCING GUIDELINES

The United States Sentencing Commission was created under the Sentencing Reform Act of 1984.<sup>5</sup> The Commission is an "independent commission in the judicial branch" and has the duty

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5. 18 U.S.C. §§ 3551-59 (Supp. II 1984), *amended by* 18 U.S.C. §§ 3551-59 (1994) and 28 U.S.C. §§ 991-998 (Supp. II 1984), *amended by* 28 U.S.C. §§ 991-998 (1994).

to establish determinative sentencing guidelines for the federal judicial system and "review and revise" the guidelines.<sup>6</sup> The guidelines are "binding on the courts, although . . . the judge has the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines."<sup>7</sup> Releasing its initial set of Sentencing Guidelines, which became effective on November 1, 1987, the Commission strove to further the basic purposes of punishment in the federal system: "detering crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."<sup>8</sup> In attempting to accommodate these diverse interests, the Guidelines specifically rejected the adoption of a single philosophical theory with respect to sentencing, and avoided any pronouncements with respect to the primacy of any of the goals espoused within the commentary.<sup>9</sup> Initially, therefore, the Guidelines did not demonstrate a preference for the attainment of any of the numerous goals originally contemplated by the Sentencing Commission in its drafting. The Commission's detached posture, however, would eventually change with respect to the sentencing of organizations.

In October 1986, the Commission issued its preliminary report on separate guidelines for corporate offenders. On May 1, 1991, and after solicitation of public commentary and a series of re-drafts, the Commission submitted to Congress its final proposal for what now constitutes Chapter Eight of the Federal Sentencing Guidelines. These proposed guidelines became law on November 1, 1991 and, as will be seen, expressed a significant predisposition in favor of payments of restitution.

The introductory comments to the sentencing guidelines recognize the legacy of case law surrounding corporate entity and director/officer liability in a criminal setting, namely, that corporations can act only through their agents and generally are vicariously liable for offenses committed by their agents.<sup>10</sup> However, in

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6. 28 U.S.C. §§ 991, 994, *quoted in* *Mistretta v. United States*, 488 U.S. 361, 368-69 (1989).

7. *Mistretta*, 488 U.S. at 367.

8. UNITED STATES SENTENCING COMM'N, SENTENCING AND POLICY STATEMENTS 1 (1987).

9. Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987).

10. UNITED STATES SENTENCING COMM'N, GUIDELINES MAN. (Nov.1995) [hereinafter U.S.S.G.], ch. 3 intro. cmt.

another vein these Introductory Comments make it clear that the first principle underlying this new Chapter is that "the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused."<sup>11</sup> This first indication of the Commission's acknowledgment of the unique ability of the firm to redress its injurious conduct for societal gain is a substantial departure from the more passive theorizing suggested by the Guidelines in the individual context.

The Guidelines further specify that "if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of *all* of its assets." [emphasis added]<sup>12</sup> Moreover, "the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization."<sup>13</sup> The seriousness of the offense generally will be reflected by the highest of the monetary gain, the monetary loss, or the amount in a guideline offense level fine table. "Culpability generally will be determined by the steps taken by the organization *prior* to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed."<sup>14</sup>

Finally, probation is considered an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or that internal steps will be taken within the organization to reduce the likelihood of future conduct.<sup>15</sup> This last provision, whose full import and significance has yet to find expression in the case law, notwithstanding shows the potential for a future channelling of the behavior and resources of corporate offenders in a manner so as to maximize social and economic utility.

### III. THE FORMULA

The guidelines' greatest impact deals with additional fines, after restitution, for organizations whose primary purpose was

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

not to engage in criminal activity. The fine is a function of the seriousness of the offense and the culpability of the organization.<sup>16</sup> Essentially, the Sentencing Guidelines prescribe that a base fine be established according to the gravity of the criminal harm.<sup>17</sup> This base fine is then multiplied by a "culpability multiplier", a number ranging from .05 to 4.00, which reflects a myriad of factors, including the degree of organizational participation in the criminal activity.<sup>18</sup> Thus, depending upon the extent of corporate misconduct, the base fine may be either increased or decreased by a significant percentage that will translate into the actual sanction that is eventually assessed upon the corporate wrongdoer. Once "Minimum" and "Maximum" Multipliers have been applied to the base fine, the sentencing court is provided with a range of fines within which it may derive the appropriate sanction.

The seriousness of the offense finds expression in the establishment of a "base fine", arrived at by adopting the greatest of the following: (1) the monetary loss suffered by the victim; (2) the monetary gain received by the defendant; or (3) a penalty determined by analyzing the offense Level Fine Table.<sup>19</sup> The Offense Level Fine Table is calculated by using the base offense level, with any adjustments, as established in Chapter Two of the Sentencing Guidelines.<sup>20</sup> The fine range from the Table, before any culpability score is applied, is \$5,000 to \$72,500,000.<sup>21</sup> With Minimum and Maximum Culpability Multipliers of 5% to 400%, respectively, this Table range is effectively extended from \$250 to \$290,000,000.

Regardless of how the base fine is calculated, this amount can be either increased or decreased, based on an the applied "culpability multiplier".<sup>22</sup> The actual multiplier, ranging from .05 to 4.00, is taken from a Table of Minimum and Maximum Multipliers<sup>23</sup> which converts an organization's "culpability score" (a score ranging from "zero" to "ten or above") to a Multiplier number.<sup>24</sup>

Every organization begins with a culpability score of five points which may be subsequently increased or decreased based

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16. U.S.S.G. §§ 8C2.4-8C2.6.

17. U.S.S.G. §§ 8C2.4

18. U.S.S.G. §§ 8C2.5-8C2.6.

19. U.S.S.G. § 8C2.4

20. U.S.S.G. §§ 8C2.3-8C2.4.

21. U.S.S.G. § 8C2.4(d)

22. U.S.S.G. § 8C2.6

23. *Id.*

24. *Id.*

on several factors previously addressed.<sup>25</sup> For example, the score will be increased based upon the judge's determination of the following:

- (1) The size of the organization: The larger the organization and the greater the number of persons it employs, the greater number of points that are added to the culpability score;<sup>26</sup>
- (2) The extent of involvement of top officials: Clearly, the determination that top executives or other officers of the firm had overtly contributed to the criminal act will add points to the culpability score;<sup>27</sup>
- (3) Existence of prior violations: A prior conviction, especially for the same or a similar offense, will raise the culpability score,<sup>28</sup> and
- (4) Acts which constitute obstruction of justice: Should the corporation be found to have impeded the progress of the prosecution of the offense, the firm will be penalized accordingly.<sup>29</sup>

The culpability score will be decreased based upon the court's determination of the following:

- (1) The presence of effective programs to prevent and detect violations: This form of organizational encouragement speaks directly to the establishment of an active internal ethics scheme as an integral part of the firm's organizational structure;<sup>30</sup>
- (2) The extent of voluntary disclosure to the appropriate authority;<sup>31</sup>
- (3) Cooperation with an investigation conducted by the appropriate authority: This mitigating factor, in conjunction with the second factor, contrasts with the penalty exacted upon the firm should it obstruct the investigation or prosecution of the crime;<sup>32</sup> and
- (4) Acceptance of responsibility by the organization.<sup>33</sup>

Once the culpability score is calculated, the Maximum and Minimum Multipliers are derived simply by taking those multipliers which correspond to the appropriate culpability score as

25. U.S.S.G. § 8C2.5(a)

26. See U.S.S.G. § 8C2.5(b). This reinforces the Commission's concern for structural changes within the organization.

27. U.S.S.G. § 8C2.5(b)

28. U.S.S.G. § 8C2.5(c)

29. U.S.S.G. § 8C2.5(e)

30. U.S.S.G. § 8C2.5(f).

31. U.S.S.G. § 8C2.5(g)(1).

32. U.S.S.G. § 8C2.5(g)(1),(2).

33. U.S.S.G. § 8C2.5(g)(2),(3).

reflected on the conversion table.<sup>34</sup> A higher culpability score establishes a higher minimum and maximum range of multipliers. The maximum multiplier is 400% of the fine<sup>35</sup>, which has the mathematical effect of multiplying a fine by four. A lower culpability score will act to decrease the minimum and maximum multipliers, which can have the effect of dramatically reducing a fine. The minimum multiplier is 5% of the fine<sup>36</sup>, which has the mathematical effect of dividing the base fine by twenty. Thus, the culpability score, once translated into a multiplier and applied to a predetermined base fine, will give rise to either a multiple or fraction of said base fine, depending on the degree to which the corporation's behavior may be characterized as nefarious or otherwise criminal.

#### IV. STATUTORY REFERENCE TO RESTITUTION

As alluded to above, the Sentencing Guidelines emphasize that the primary penalty to be extracted from the corporate offender following an adjudication of guilt is restitution, and that, in the absence of a firm's ability to make reparations, the calculation and imposition of a punitive assessment will not need to be reached by the sentencing court.<sup>37</sup> However, the import of redress in this context is objectively where the Guidelines' consideration of restitution ends. It is submitted that by failing to provide the firm greater incentives to actively make restitution or provide levels of public redress exceeding the nominal harm occasioned by the firm's conduct, the Guidelines do not punish corporate offenders appropriately to achieve paramount societal benefit. This is by its very terms inefficient.

According to the Guidelines, at several junctures within the formula, mitigating factors may attach and cause a diminution in the overall fine ultimately prescribed by the Guidelines. Although the Base Offense Level, and hence the Base Fine, is a function of the nature of the offense and is independent of the characteristics or culpability personal to the offender, the Culpability Score and its concomitant Minimum and Maximum Multipliers may be proportionately decreased by sufficiently extenuating circumstances. Furthermore, mitigating factors may further influence the judge to place the defendant nearer to the bottom of the range of appli-

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34. U.S.S.G. § 8C2.6.

35. *Id.*

36. *Id.*

37. *See supra* notes 10-11 and accompanying text.

cable fines ultimately prescribed by the Guidelines. Conspicuously absent from such mitigating considerations, however, is the object of restitution.

Once a Base Fine has been calculated, adjustments thereto are effectuated through the empirical representation of the firm's conduct in the Culpability Score. However, nowhere within the Guidelines is the firm's prompt and complete payment of restitution recognized as a mitigating factor capable of reducing the firm's overall culpability score. Although under Section 8C2.5(g) the Guidelines prescribe that the culpability score may be reduced by as much as five points through the existence of "[s]elf-reporting, [c]ooperation and [a]cceptance of [r]esponsibility",<sup>38</sup> the commentary thereto clearly defines this particular mitigating factor as evidence of the "truthful admission of involvement in the offense and related conduct." (emphasis added).<sup>39</sup> Restitution, therefore, has been excluded from consideration of a firm's "acceptance of responsibility".<sup>40</sup>

Upon application of the Minimum and Maximum Multipliers to the base Fine, the court is left with a range of fines from which it may select a final penalty. The Guidelines prescribe a series of factors which the court must consider in determining the fine within the range, but nowhere among such factors is the timely and complete payment of restitution considered.<sup>41</sup> This is again contrary to the deference accorded the acceptance of responsibility in the individual context.<sup>42</sup>

It is clear that the Guidelines have been carefully drawn so as to make restitution a primary goal, but it is equally clear that the Sentencing Commission has striven, at least objectively, to avoid disparate treatment of corporate defendants on the basis of status or financial wherewithal. However, as can be seen, the Guidelines do contain an inherent complexity in certain, albeit limited, discretion vested within the court to depart from the rigid formula, or to otherwise prescribe terms and conditions of probation.

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38. U.S.S.G. § 8C2.5(g)

39. U.S.S.G. § 8C2.5, cmt. (n. 13).

40. This exclusion is even more evident when comparing Section 8C2.5 with the corresponding definition as set forth under the "individual offender" counterpart to Chapter Eight, namely, Chapter Three which provides that "acceptance of responsibility" may be evidenced by the voluntary payment of restitution prior to the adjudication of guilt. U.S.S.G. § 3E1.1, cmt. (n. 1)(c).

41. U.S.S.G. § 8C2.8 and commentary thereto.

42. U.S.S.G. § 3E1.1 and commentary thereto.

## V. COURT'S DISCRETION IN DEPARTING FROM GUIDELINES

Although the formula set forth under the Sentencing Guidelines is intended to provide uniformity and constancy in the sentencing of organizational offenders, the sentencing court is vested with a certain measure of discretion to depart therefrom where the circumstances of a particular case so warrant. For example, under Sections 8C4.1 through 8C4.11 of Chapter Eight, the court is permitted to proportionately depart from the Guidelines when confronted with sufficiently persuasive aggravating or mitigating factors.<sup>43</sup> Interestingly, the Guidelines have included, among such circumstances, evidence of payment of remedial costs by the offender greatly exceeding the gain from criminal activity.<sup>44</sup> Without the benefit of further commentary or guidance, it appears that the Guidelines have hinted that restitution may yet serve to redeem the corporate wrongdoer in the eyes of the sentencing judge.

Similarly, under Section 8D1.1, the sentencing court is given broad latitude in determining whether to impose probation on the firm as a measure of its punishment.<sup>45</sup> Of course, the Guidelines do not provide for the particulars of such punishment, but nonetheless suggest a structured repayment of restitution or other productive utilization to which the assets, income potential, or human or capital resources of the corporate transgressor may be placed. It is submitted that such broad judicial discretion poses radical implications for the prospective nature of corporate punishment, if taken to its practical extreme, as judges could conceivably commit the resources of the corporate offender to what the court may determine to be its highest societal or economic utility, all of which would be accomplished under the authority of the court's punishing power. This perhaps is the subject of further research.

Although the Guidelines have been carefully drawn so as to remove the influence of restitution from the nominal calculation of the prescribed fine, the Sentencing Commission, in providing for a

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43. The overriding standard which must be identified to the court's satisfaction before departure will be sanctioned has been codified in 18 U.S.C. § 3553(b)(1994), *i.e.* where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Id.*

44. U.S.S.G. § 8C4.9.

45. U.S.S.G. § 8D1.1.

departure and the imposition of probation, appears to be laboring over the dynamic that exists between the remediation of harm and the disparity that may be thereby occasioned among corporate wrongdoers of varying capital resources. The practical implications of this dynamic are self-evident, but without further instruction from the Commentary to the Guidelines, it is necessary to look to the relevant decisional law for guidance.

## V. THE DECISIONAL LAW

The relative infancy of the newly enacted Chapter Eight is attended by a commensurate dearth in case law decisions interpreting the circumstances under which a departure from the Guidelines is appropriate. Notwithstanding, the body of decisional law pertaining to departures in the individual as opposed to entity context may prove instructive in suggesting how the discretionary aspects of Chapter Eight may prospectively be applied.

Generally, the sentencing court must select a sentence from within the range calculated under the formula. The Commission, in fact, has described the Guidelines as “carving out a ‘heartland’, a set of typical cases embodying the conduct that each guideline describes.”<sup>46</sup> A sentencing court may, however, impose a sentence outside of the presumptive range established under the appropriate guideline if the court finds that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”<sup>47</sup> Although the Guidelines enumerate various factors that may constitute the basis for a departure, the identification and application of other, perhaps non-enumerated factors is left to the discretion of the sentencing judge.<sup>48</sup> To this end, it has been uniformly held that a sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the goals of the Guidelines

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46. U.S.S.G. ch. 1, Pt. A, intro. cmt. (n. 4)(b).

47. 18 U.S.C. § 3553(b)(1994). One should note that a departure may be warranted under two separate conditions: a) qualitative, where a court finds an aggravating or mitigating circumstance “of a kind” not within the contemplation of the Sentencing Commission in formulating the Guidelines; or b) quantitative, where the court finds an aggravating or mitigating circumstance “present ‘to a degree’ neither readily envisioned nor frequently seen in connection with the offender and/or the offense of conviction.” *United States v. Sklar*, 920 F.2d 107, 115 (1st Cir. 1990).

48. *United States v. Lara*, 905 F.2d 599, 602 (2nd Cir. 1990).

themselves, so that their rigid mechanized application must be avoided.<sup>49</sup> For that reason, a court is provided significant flexibility in considering departures.<sup>50</sup>

Restitution has been traditionally frowned upon as a basis for departure from the Guidelines in determining a defendant's sentence.<sup>51</sup> Indeed, courts are wary of permitting individual defendants to "buy their way out of prison sentences",<sup>52</sup> and traditionally were predisposed against the double-counting of restitution in determining whether a departure under the guidelines was appropriate.<sup>53</sup> In *United States v. Carey*, for example, the Court reasoned that because restitution had already been contemplated by the Guidelines in permitting a reduction in the base offense level under Section 3E1.1 of the Act, under "acceptance of responsibility", the same mitigating factor could not subsequently be used to obtain a further downward adjustment in the defendant's sentence in the form of a departure.<sup>54</sup> More recent cases, however, have abandoned this proscription as courts have sought to find, where possible, behavior that exceeds what is normally present in the promptness, voluntariness or amount (i.e., degree) of restitution that is tendered.<sup>55</sup>

In *United States v. Garlich*<sup>56</sup>, for example, the defendant was charged with fraud in the form of over-encumbering collateral for certain bank loans. Before his indictment, and in conjunction with pending civil litigation, however, the defendant turned over his assets of \$1.4 million to the numerous banks as payment for the fraudulently obtained loans and capital loans against his automobile dealership. The district court found that the loss attributable to the defendant's scheme was approximately \$253,000.00, and awarded the defendant a two-level downward departure from the fine prescribed under the guidelines. The Eighth Circuit

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49. *See id.* at 603-05.

50. *United States v. Sturgis*, 869 F.2d 54, 57 (2d Cir. 1989). *See United States v. Lieberman*, 971 F.2d 989, 999 (3d Cir. 1992).

51. *United States v. Bean*, 18 F.3d 1367 (7th Cir. 1994). *See also United States v. Seacott*, 15 F.3d 1380, 1388-89 (7th Cir. 1994); *United States v. Carey*, 895 F.2d 318, 323 (7th Cir. 1990).

52. *Seacott*, 15 F.3d at 1389.

53. *Carey*, 895 F.2d at 323.

54. *Id.*

55. *United States v. Lieberman*, 971 F.2d 989 (3d Cir. 1992); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991).

56. 951 F.2d 161 (8th Cir. 1991).

affirmed this ruling on appeal and remanded the case for consideration of further departure.<sup>57</sup>

Similarly, in *United States v. Lieberman*<sup>58</sup>, the defendant plead guilty to a charge that he embezzled bank funds in the approximate amount of \$94,000.00. The plea agreement stipulated that the actual loss to the bank was between \$50,000.00 and \$100,000.00. However, it was learned at the time of sentencing that, pursuant to a companion civil suit, the defendant agreed to pay the bank damages in the amount of \$128,442.37 with pre-judgment interest in the amount of \$11,967.04. The Third Circuit concluded the district court was justified in its decision to depart downward.<sup>59</sup>

Interestingly, in *United States v. Bean*<sup>60</sup>, the Seventh Circuit acknowledged that a downward departure would be permissible even where the defendant denied all guilt for the crime with which he was charged, so long as extraordinary restitution had been tendered. In that case, the Court eventually vacated the departure and remanded, because the facts demonstrated that the defendant had merely paid the \$75,000.00 debt occasioned by his behavior without any interest penalty.<sup>61</sup>

These cases clearly demonstrate that the standard for departures set forth under 18 U.S.C. 3553(b) has been somewhat abrogated by the case law. Rather than requiring extraordinary responsiveness to guilt as contemplated under the foregoing statute and the commentary to the Sentencing Guidelines, the decisional law seems to favor downward departures even where the payment of restitution is less-than-voluntary (i.e., made in conjunction with a civil suit), or even where such payment is accompanied by a denial of culpability, so long as the amount of restitution paid is extraordinary. If one is to assume that the standard for a downward departure will be common to the prosecution of organizational as well as individual offenders, then corporate offenders will gain an advantage by structuring their finances in such a way as to accommodate the risks of criminal

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57. *Id.*

58. 971 F.2d 989 (3d Cir. 1992).

59. *Id.*

60. 18 F.3d 1367 (7th Cir. 1994).

61. *Id.* The Court drew an analogy to *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990), in which the departure accorded the defendant was vacated in the presence of information that he had paid through restitution only ninety-one percent of the debt, and without any interest component.

prosecution and the need to make exponential remediative efforts. This postulation necessarily brings to bear the dichotomy between apparent discrimination against corporate transgressors on the basis of financial wherewithal and the overriding public policy of victim rehabilitation and aggregate social and economic utility. It remains to be seen the manner in which these competing notions find expression in the decisions of our courts, and the manner in which the policies espoused by the Sentencing Commission in its 1991 enactment are given life and effect.

## VI. CONCLUSION

The Sentencing Guidelines have made clear the importance and primacy of restitution in its sentencing scheme with respect to corporate criminal offenders, and have rendered redress distinct from actual pecuniary punishment. That is, if an entity is capable of making restitution, such reparations will be ordered independent of any punishment exacted upon the wrongdoer. Indeed, the Guidelines have taken special measure to ensure that an entity's remedial efforts are not quantified within the variables that comprise the corporate sentencing formula.

With a certain measure of complexity, however, the Guidelines appear to permit the courts a modicum of discretion in construing the firm's acceptance of responsibility or payment of extraordinary remedial costs as a mitigating factor, and if interpretations of the corporate departure provisions mimic the case law standards set forth in the individual context, this window of redemption will be cast wide open as a sentencing consideration of significant force.

There exists within the Guidelines, therefore, an apparent dynamic contrasting the competing interests of an indiscriminate treatment of all defendants, regardless of financial wherewithal, with the efficient use of the resources of a well-endowed corporate defendant for the common good. The former speaks to the very foundations of equity and fairness upon which our criminal justice system has been erected. The latter recognizes the unique identity of the corporation, and the tremendous potential that exists for an efficient allocation and utilization of the corporate assets, income potential and human and capital resources to achieve maximum economic and societal utility. The ultimate fate of this dynamic is yet to be witnessed, and only with the rendering of decisions will it be seen whether restitution is championed as a pillar of our commutative system of justice, as contemplated by

**Aquinas, or wielded as an instrument of redemption, as symbolized in the exchange of “simony” characteristic of an era long since passed.**