Organizational Ethos and Corporate Criminal Liability

Henry J. Amoroso

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Business Organizations Law Commons

Recommended Citation
ORGANIZATIONAL ETHOS AND CORPORATE CRIMINAL LIABILITY

HENRY J. AMOROSO*

The quintessential principal of corporate governance is that the corporation’s business should be conducted in order to enhance corporate profit and shareholder gain. Traditionally, corporations have been required to act within the boundaries established by the law and have been permitted to take into account ethical considerations that are reasonably regarded as appropriate for the conduct of the business. Professor Amoroso canvasses the case law and literature addressing the standard of corporate criminal liability and hypothesizes that the recently enacted Chapter Eight of the Federal Sentencing Guidelines will ensure that organizational ethics will assume a more significant role in the conduct of corporate business. Chapter Eight will encourage the establishment of internal ethics mechanisms, will ensure that compliance with ethical codes will no longer be dismissed as irrelevant by the courts, and may encourage a movement away from traditional standards of corporate criminal liability by encouraging firms to actively detect and discourage corporate misconduct.

I. INTRODUCTION

In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.¹

This quotation embraces the fundamental principle that the corporation “should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”² Regardless of whether corporate profit and shareholder gain are enhanced, the corporation is obliged to act within

* Associate Professor, Seton Hall University, S. Orange, New Jersey.
the boundaries of the laws and "may take into account ethical considerations that are reasonably regarded as appropriate for the responsible conduct of the business." This may include devoting a reasonable amount of resources to the public welfare and other humanitarian and philanthropic purposes.

The American Law Institute's (hereinafter "ALI") Principles of Corporate Governance section 2.01 does not impose a legal obligation to take ethical considerations into account because such an obligation might be too onerous or imprecise to enforce fairly. Rather, the ALI permits corporations to use ethical concerns to explain actions that would otherwise be viewed by shareholders with skepticism.

This Article evaluates a separate and rapidly emerging facet of corporate governance. This facet involves the reliance upon ethical precepts and internal corporate ethical mechanisms in the guidance of a firm away from industrial impropriety. Although during its infancy corporate ethics found expression in the sparse language of such statutes as the ALI, cited above, as well as some esoteric and relatively "toothless" decisional law, the United States Sentencing Commission recently has decided that internal and organizational ethics will assume a more significant role in the conduct of daily corporate affairs.

This Article begins with a brief analysis of traditional case law surrounding the standards of corporate criminal liability and the liability of individual corporate officers or members of the board of directors. Each of these will be viewed with an eye towards factors that courts have traditionally relied upon in determining criminal liability. An underlying theme is the body of law governing corporate criminal liability has not adequately met the goals of our criminal statutes; namely, specific and general deterrence and a cure for the societal harm resulting from the criminal activity. A secondary theme is the significant strides made by Chapter Eight of the Federal Sentencing Guidelines in directing corporate organizational behavior towards greater compliance with ethical standards and criminal statutes. Following the analysis of the law is an evaluation of the existing literature regarding the sentencing trends and the inherent problems of the previous sentencing scheme. The Article will also review the existing dia-

3. Id. at § 2.01(b).
4. Id.
logue concerning the efficacy and practical considerations in holding corporations criminally liable, as well as the economic, managerial, and theoretical limitations.

Chapter Eight of the Sentencing Guidelines (hereinafter “Chapter Eight”) was drafted to encourage organizations to establish internal ethics mechanisms and heed the tenets of ethical codes, to restrengthen the deterrent and curative powers lacking in the present body of corporate criminal law, and to foster within the corporation a renewed cognizance of the need for operational ethos throughout the daily activities of the corporation. These goals will be effectuated by a modification of the traditional corporate organizational structure, specifically through the creation and/or enhancement of the role of a corporate ethics officer. Such a revised role will be an active one because of a firm’s desire to capitalize on the mitigating factors found in the Sentencing Guidelines. This will raise the level of accountability for the actions of a corporation as well as its employees, and it will facilitate the means by which a firm may discover and prevent criminal behavior. Most significantly, it will provide a firm with an objective mitigating factor that will either affect the imposition of criminal liability or at least the magnitude of sanctions assessed.

Chapter Eight also will encourage a movement away from historical standards of corporate criminal liability. These standards traditionally have required overt corporate violation of the penal code or tolerance or ratification of criminal activity, under a theory of respondeat superior. The Sentencing Commission has suggested to the courts the need to make corporate organizations responsible for detecting and preventing the criminal conduct committed by its employees or agents. This is a significant departure from the passive “foreseeability-negligence” standard to the proactive policing of its own ranks.6 This discussion, in addition, addresses the substance of Chapter Eight, including the legislative history surrounding the enactment, its precise text and application of the “culpability formula,”7 and the anticipated impact it will have on corporate organization and behavior.

II. TRADITIONAL THEORY OF CORPORATE LIABILITY

Traditionally, corporations retained a unique “entity” status akin to that of a “person” within the meaning of statutes making

7. See infra text accompanying note 103.
certain acts by "persons" an offense. However, the term "persons" as used in a criminal statute does not include corporations where it is not the intent or purpose of the statute to do so. Nevertheless, a provision in a general construction statute may extend the term to corporations. This is especially evident where another applicable statute, such as the general definition section of a penal code, so provides.

Thus, a corporation can be prosecuted for violating a penal statute, and may further be held criminally liable if agents or employees who have the power to bind the corporation engage in the requisite criminal behavior. Under one view, since a corporation may be punished by a fine but not imprisonment, where the only penalty prescribed for the violation of a criminal statute is imprisonment or death, a corporation cannot be prosecuted under such a statute. In the presence of a monetary sanction, however, the corporation may be prosecuted whether or not an alternative penalty of imprisonment is prescribed. In some jurisdictions, a court may sentence a corporation to serve a term of years, and since such a sentence is incapable of enforcement, it may suspend that sentence and impose a fine.

A corporation may be held criminally responsible for the acts of its officers, agents, or employees under the theory of respondeat superior. Corporations are particularly susceptible when their officers, agents or employees act within the scope of their employment and, at least in part, for the benefit of the corporation.

Despite possessing rights and obligations which are separate and apart from those belonging to individual stockholders, a firm may be severally liable with its officers for crimes committed by

8. First Nat'l Bank v. United States, 206 F. 374 (8th Cir. 1911).
13. Id.
15. United States v. Automated Medical Lab., Inc., 770 F.2d 399, 406 (4th Cir. 1985); United States v. Richmond, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983); United States v. Cincotta, 689 F.2d 238, 241 (1st Cir. 1982), cert. denied, 459 U.S. 991 (1982).
such officers on behalf of the corporation.\textsuperscript{16} Thus, a corporation may be prosecuted along with its officers, and both the agent and the corporation may be convicted where the agent, in the course of the employer's business, obtains anything of value for the corporation by the illegal conduct.\textsuperscript{17}

Additionally, a corporation may be held criminally liable for actual or apparent acts committed by its agents, provided such acts were committed within the course of their employment or the scope of their authority. Such acts may be imputed to the corporation, even if they are forbidden and against corporate policy or express instructions.\textsuperscript{18} Many jurisdictions have created agency liability by characterizing those instances where the agent performs acts of the kind which he is authorized to perform as "within the scope of employment." These acts must be substantially within the authorized limits of time and space, and they must be motivated, at least in part, by an intent to benefit the corporation, or to benefit the agent first and the corporation second.\textsuperscript{19}

"Apparent authority" is the authority that an outsider would normally assume the agent to possess, judging from the agent's position within the company and the circumstances surrounding his or her past conduct.\textsuperscript{20} Title or position of an individual in the corporation, however, is not conclusively determinative in ascribing criminal responsibility to the corporation for an agent's acts. Additional factors to consider in determining a corporation's criminal responsibility for the acts of its agent include: 1) the extent of control and authority exercised by the individual over and within the corporation; 2) the extent and manner to which corporate funds were used in the crime; and 3) a repeated pattern of criminal conduct tending to indicate corporate toleration or ratification of the agent's acts.\textsuperscript{21} It is not essential that the particular acts be expressly authorized by the corporation. It has been held, however, that in order to charge a corporation with liability for the

\textsuperscript{16} United States v. Rodgers, 624 F.2d 1303, 1308 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1980).

\textsuperscript{17} Id. at 1308 n.13.


\textsuperscript{19} Cincotta, 689 F.2d at 241-42; See also United States v. Demauro, 581 F.2d 50, 53-54 (2d Cir. 1978); Gold, 743 F.2d at 823.

\textsuperscript{20} United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984).

acts of its agent in committing a crime involving criminal intent, the acts must appear to be authorized by the corporate officers or at least acquiesced to by them.\textsuperscript{22}

Of course, in certain instances where corporate criminal culpability is at issue, the court must assess the level of criminal intent, i.e., \textsl{mens rea}, on the part of the organization either inherent in an established corporate policy or the acts of its officers. The guilty intent of corporate officers may be imputed to the corporation, so that a corporation may be liable for certain offenses of which specific intent is a necessary element. Such instances occur where the crime consists of purposely doing the things prohibited by statute, or where the crime involves knowledge and willfulness. Corporate knowledge, in turn, depends upon the combined knowledge of the employees and agents of a corporation acting within the scope of their employment. A corporate defendant is deemed to have had knowledge of a violation of law, if the means were present by which the company could have detected the infractions.\textsuperscript{23}

However, because of its very nature, there are certain crimes which a corporation cannot commit, such as crimes involving the personal malicious intent that a non-person manifestly cannot exhibit. Nonetheless, even as to such crimes, where the facts of the case warrant it, a corporation may be charged criminally with the unlawful purpose and motive of its agents while acting on its behalf within the real or apparent scope of their authority.\textsuperscript{24} The requisites of imputing an agent's criminal intent to a corporation are essentially the same as those required to impute malice to a corporation in a civil action, a cardinal principle being that the intent must be shown to be that of the corporation and not merely that of the agent.\textsuperscript{25}

Thus, to a large extent, traditional law pertaining to corporate criminal liability has sought to define criminal intent under a variety of factual scenarios. In the process, one may conclude that corporate criminal sanction traditionally has been warranted only in the presence of \textit{respondeat superior}, or where the corporation acted wilfully, i.e., through the ratification of wrongdoing, or where the corporation’s behavior has a criminally negligent qual-

\begin{itemize}
\item \textsuperscript{22} United States v. Wilson, 59 F.2d 97 (W.D. Wash. 1932).
\item \textsuperscript{24} Mininsohn v. United States, 101 F.2d 477, 478 (3d Cir. 1939).
\item \textsuperscript{25} People v. Canadian Fur Trappers Corp., 161 N.E. 455 (N.Y. 1928).
\end{itemize}
ity. The end result was to absolve the corporate entity where the perceived equivalence of active participation in the criminal process has been avoided or prevented. A more recent series of decisions, however, suggests that courts are inclined to expand the base of corporate liability by retreating from the rigid "active participant" requirement and moving toward a less compelling one that only demands a showing of mere negligence on the part of the organization in permitting the occurrence of corporate wrongdoing.26

III. RECENT CASE LAW & LITERATURE

A. Recent Case Law

Recently decided cases have demonstrated that courts are willing to go beyond traditional norms by attributing criminal liability to corporations who have failed to take active measures to prevent violations of the law by their employees. These recent decisions, however, have skirted the perimeter of requiring active policing, and, instead, hold corporations to an industry-specific "foreseeability-negligence" standard. For example, in 1991, the First Circuit ruled in United States v. MacDonald & Watson Waste Oil Co.27 that a corporate president could be convicted of transporting contaminated soil to an unpermitted facility.28 The First Circuit declared that the fact-finder may draw an inference that the president knew of the illegal shipment solely because of his status as a company officer, based on the president's knowledge of past violations and his failure to ensure compliance.29

In United States v. Dee,30 another hazardous waste disposal case, the Fourth Circuit held the government need not prove that the defendants knew their actions were criminal or that they were overtly violating a statute.31 Rather, the court approved instructions allowing the jury to infer willful "blindness," the requisite degree of knowledge to support a conviction based solely upon the defendants' positions of responsibility. The court also allowed instructions that the defendants could be found guilty of hazardous waste disposal violations as managers if the jury found each of

26. See infra text accompanying notes 26-49.
27. 933 F.2d 35 (1st Cir. 1991).
28. Id. at 50-51.
29. Id. at 51.
31. Id. at 745.
the following: (1) the manager had a "responsibility relationship" to the violation, i.e., it occurred in an area under his authority and supervisory responsibility; (2) the manager had the power or capacity to prevent the violation; and (3) the manager acted knowingly in failing to prevent, detect, or correct the violation.

Additionally, in United States v. Bank of New England, N.A., the First Circuit upheld the conviction of the bank on thirty-one violations of the Currency Transaction Reporting Act. The Court arrived at its decision by declaring that the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation and that the aggregate of these components constitutes the corporation's knowledge of a particular operation.

Nevertheless, there was an earlier leading case which seemed to suggest a departure from the traditional standards of liability. In United States v. Park, the chief executive officer, Park, for Acme Markets, Inc., and later, Acme, was charged criminally with the sale of contaminated food in violation of various Food & Drug laws. In his defense, Park claimed that the corporate structure of Acme was one of extreme delegation and compartmentalization, which meant that daily activities escaped his direct supervision. Park conceded that he did not have any internal mechanisms in place by which to monitor the occurrence of violations. In upholding Park's conviction, the Supreme Court ruled that acts such as the ones at issue impose "not only a positive duty to seek out and remedy violations when they occur, but also, and primarily, a duty to implement measures which will insure that violations will not occur." The Court reasoned that, without a doubt, the "requirements of foresight and vigilance imposed upon responsible corporate agents are demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."  

32. 821 F.2d 844 (1st Cir.), cert. denied, 484 U.S. 943 (1987).
33. Id. at 848.
34. Id. at 856.
36. Id. at 660.
37. Id. at 663-64.
38. Id.
39. Id. at 672.
40. Id.
Regrettably, even these decisions and recent trend in the prevailing legal norm have done little to impel corporate behavior toward greater ethical standards. A simple hypothetical demonstrates this unfortunate notion. As elicited above, federal courts will hold a corporation liable for crimes committed by employees while acting within the scope of their employment if the conduct is intended to benefit the employer. Yet the inconsistencies in such a rule become most apparent when a sole employee deviates from the employer’s carefully-honed internal compliance program. In such an instance, the courts still hold an employer criminally liable for criminal acts, even when the employee violates the employer’s express instructions in committing such acts. Additionally, prosecutors take this position one step further. They contend that corporate compliance programs, however extensive, are irrelevant as a matter of law and, therefore, as a practical matter, the company that guards against employee malfeasance may be no better situated than the company’s most delinquent competitor.

Two recent cases highlight the disincentive embodied in the foregoing hypothetical. In United States v. Twentieth Century Fox Film Corp., the defendant initiated an extensive antitrust compliance program which had been cited as an industry model. At issue in the case was the misconduct of one regional manager. The Second Circuit determined that the compliance program, “however extensive,” would not constitute a defense for the company.

Similarly, in United States v. Rockwell International Corp., after pleading guilty to double-billing charges, the defendant cor-
poration's pre-sentencing papers pointed to its elaborate compliance program. The company asserted that it had distributed codes of ethics to all employees, implemented an ethics training program, developed a corporate ombudsman program, and commissioned outside auditor reviews of its compliance systems. In fact, it was defendant's own voluntary disclosure policy which helped bolster the government's case against its employees. Yet the defendant corporation accrued considerably less benefit from its compliance program, and the trial judge imposed a fine of $5,500,000.49 The results in these two cases reinforce the Misanthrope's adage that "no good deed goes unpunished."

The Sentencing Commission has attempted to foster effective corporate supervision of employees by incorporating a simple incentive into its penalty structure for organizations.50 Under the Chapter Eight, if a defendant corporation can demonstrate that an internal corporate program was carefully tailored, disseminated and enforced, that fact will militate against the size of any criminal penalty.51

Clearly, the case law surrounding corporate criminal liability has been characterized traditionally as endorsing punishment where overt corporate violation of the penal code exists, where tolerance or ratification of the violation exists, where violations by a corporate employee or agent under a theory of respondeat superior occur, or where corporate control over the circumstances surrounding the penal violation existed. Alternatively, a significant portion of the case law has been devoted to defining that behavior which rises to the level of intent, knowledge, or, at least, negligence in the context of an entity-level violation of the penal statutes. They also distinguish whether such conduct was performed on behalf of the corporation or was made capable of being performed significantly through the use of the corporation by the agent. The writer submits that this type of emphasis in the courts has not effectively guided corporate behavior away from criminality, further suggesting that the Sentencing Guidelines are an affirmative step towards ameliorating such ethical stagnation within the corporation while providing consistency to the applicable body of law.

49. See Rockwell Fine Sends Message, Sides Differ as to What It Is, 3 CRIM. PRAC. MAN. BNA 163 (1989).
50. See U.S.S.G. ch. 8.
B. Literature and Case Law

As corporations have become increasingly pervasive actors in our society, the issues of criminal prosecution and sentencing of corporations have frequented much of the recent literature. There are essentially two unresolved issues that have been the subject of the traditional case law and which now predominate the body of scholarly work. The first of these issues is the difficulty in identifying, assessing, or proving criminal intent on behalf of the corporation. Criminal law has been reserved for intentional violations, yet prosecutions of corporations have been marked by floundering efforts to identify the intent of intangible, fictional entities. In many respects, scholarly literature has paralleled decisional law in attempting to assist the courts in establishing a hard and fast rule as to what constitutes intentional conduct on the part of the corporation. One author has proposed the use of a new "corporate ethos" paradigm in determining whether a corporation acted "purposely" and, hence, whether criminal liability should follow. The concept of a corporate ethos, or personality, i.e., in the same context as individual personality, rests upon the aggregation of those circumstances which gave rise to the criminal behavior. The author concludes that, among other elements, the firm's organizational structure, enunciated goals and decision-making prior and subsequent to the criminal act, when taken together, must demonstrate a policy of encouragement on the part of the corporation with respect to the complained of behavior. Thus, if the criminal act was consistent with the corporation's goals and policies, that is, its "ethos", then this would translate into intent for purposes of assessing criminal liability. To a great extent, this author's proposals seem to have anticipated the guidelines set forth by Chapter Eight, especially in the factors which the Commission has identified in determining the "culpability score."

53. See Fisse, supra note 52; Mueller, supra note 52.
55. Id. at 1121.
56. Id. at 1121-50.
57. Id. at 1112.
58. See infra text accompanying note 111.
Chapter Eight's primary goal, however, is the progressive modification of corporate behavior rather than an exhaustive determination of corporate criminal intent under a variety of situations and, as such, represents a significant departure from the focus of existing case law and related scholarship.

As indicated earlier, there is another concern which dominates the literature. The second issue in the debate concerns sanctions. In addition to proof of intent, a major distinguishing characteristic of the criminal law has been the threat of imprisonment. Critics of corporate criminal liability suggest that because a corporation cannot be imprisoned, the criminal law is not an appropriate vehicle for controlling criminal behavior. Much of the current literature on the topic has addressed the penalty issue.59 Recent scholarship has been relatively critical of the Sentencing Commission's proposals, collectively portending that the Commission will fail, or, at least, be less than effective in influencing corporate conduct. Specifically, Barry Baysinger60 suggests that the Sentencing Commission's schedule of fines and its underlying assumptions regarding the corporate world's reaction to heightened monetary sanctions is fundamentally flawed.61 The Commission, says Baysinger, presumes that as fines increase, the cost of violating the law will motivate owners and their most responsive managers to monitor and discipline lower level employees to ensure compliance with the law.62 Baysinger is critical of this approach in two respects. Primarily, and especially in the case of the larger M-form corporations, the relationship between management and the successive levels which exist in the corporate hierarchy become increasingly attenuated. Thus, the impact of a large monetary fine is less likely to be translated to subordinates with fluid efficiency, thereby diminishing the prospect for shifts in organizational behavior.63

61. Id. at 341-42.
62. Id.
63. Id. at 343-44.
Additionally, Baysinger points out, the increased monetary sanctions as prescribed in the Commission's proposals "could push the total societal costs of white collar crime beyond the efficient margin." That is to say, as corporations internalize the heightened sanctions as "costs of production," the result could be a retreat from more ambitious areas of corporate activity, a general fall in business productivity, or the "trickling-down" of the sanctions assessed against the corporation to some group of dependent persons, all of which lessen the aggregate societal benefit to a level below that which is recouped through the imposition of a fine in the first place. This is referred to elsewhere as the "pricing of criminal behavior."

Another author, John Macey, concurs in Baysinger's allegations surrounding the inefficacy of pecuniary sanctions with respect to the corporation, albeit from another perspective, i.e., an "individual-interest" analysis. Macey's "individual-interest" analysis implies that the true criminal actors are those agents or employees of the corporation who may be engaging in behavior with or without a concern for the welfare of the corporate entity in mind. The underlying theorem, therefore, for Macey, is that codified sentencing instructions must be fashioned so as to contemplate the behavior of the individual. Macey characterizes the Sentencing Commission's Guidelines as simply "very high---

---

64. Id. at 363.
65. While, of course, discounting the magnitude of the fine by the probability of detection and prosecution.
66. Id. at 341-42.
67. See John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 196 (1991); Jeffrey S. Parker, Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties, 26 Am. Crim. L. Rev. 513, 553 (1989). Alternatively, several scholars have argued that the imposition of sanctions was never well-placed vis-a-vis the corporate criminal defendant. They reason that the defendant is disinclined to give deference to the relatively uncertain threat of criminal sanction when balanced against the more precisely ascertainable risks inherent in the marketplace. See Baysinger, supra note 60.
69. Id. at 325.
70. Id. at 324-29.
71. Id. at 320-22.
and apparently arbitrary—fine amounts." Macey indicates that the Sentencing Commission admittedly has based its fine schedule on the generally accepted premise that corporations are risk-neutral. He later argues, however, that the employees and agents of the corporation, i.e., the true actors, are typically risk-averse personality types, which means the Sentencing Guidelines, in their present form, create an "over-deterrent" effect and are therefore inefficient in a fashion similar to that contemplated by Baysinger. Of course, such critical theorizing can only be borne out over time and with a witnessing of the effectiveness with which the Sentencing Guidelines are able to inspire corporate behavior.

C. Cohen's Statistics Leading to the Sentencing Guidelines

One author, Mark Cohen, in his study of the sentencing practice in the federal courts, noted that expected penalties which equal the social costs of criminal behavior may induce corporate organizations to comply with the law. In his survey of criminal convictions in the federal courts between the years 1984-87, Cohen concluded that mean and median fines assessed for such convictions "seldom exceed—and often are much less than—the total harm." In citing data regarding 178 corporate defenders, Cohen found that the same was true of the total monetary sanctions, which include fines, restitution and other sanctions but not civil damages recoveries. In fact, in his 1989 study, Cohen found that median of all fines levied against a corporate defender in cases for which harm was actually calculated was thirteen percent; the total fine expressed as a percentage of the total harm. This may suggest that the offender may not be able to pay the large fines commensurate with the total harm caused. The same study reveals, however, that of 129 offenders who could afford to fully compensate for the harm caused, the "harm ratio" was only twenty-four percent. Thus, the fraction of corporations which were actually convicted and penalized were subjected to fines amounting to only thirteen percent, and when factoring in such

72. Id. at 315 (quoting Jeffrey S. Parker & Michael K. Block, The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?, 27 AM. CRIM. L. REV. 289, 322 (1990)).
74. Id. at 618.
75. Id. at 619.
ancillary payments as restitution, this figure increased to only thirty-three percent.\textsuperscript{76}

Cohen recently has updated his study, indicating that more recent sentencings suggest some increase in the severity of fines, which Cohen suggests may be a reaction to the Criminal Fine Enforcement Act of 1984.\textsuperscript{77} These figures demonstrate that the base fine remained at thirteen percent of the total harm, while, when including the ancillary fines, the harm ratio increased to seventy-two percent. Thus, corporations that are caught and convicted are still being systematically fined for only a fraction of the harm they cause.\textsuperscript{78}

In his more recent study Cohen suggests that the relative leniency in sentencing may be due to other mechanisms within the judicial system which have served as a deterrent to corporate criminal behavior, including a barrage of ancillary criminal actions imposed on individual wrongdoers within the corporate organization and ballooning civil damages claims which are tacked on to already existing sanctions imposed by a criminal court.\textsuperscript{79} Logical reasoning, however, indicates that despite such alternative deterrence the findings of Cohen must nonetheless be adjusted downward, for the following reasons.

First, the fines do not represent the totality of the harm created. In addition to the tangible costs and damages which may be quantified, there is an additional component to the harm element which the body of criminal jurisprudence has long identified as "societal harm." This has been loosely defined as the collective societal anger and disruption caused by the offender's breach of the societal compact.

Another factor suggesting that the results of Cohen's study may be inflated is the fact that the actual fine assessed against the offender must necessarily be discounted by the likelihood or relative probability of detection and conviction. For instance, if the aggregate of fines and sanctions emanating from a violation amounts to seventy-two percent of the total harm caused, and if

\textsuperscript{76} Id. at 618.


\textsuperscript{78} Id. at 253. These figures are based on corporations sentenced for harms in excess of one million dollars.

\textsuperscript{79} Id. at 268. Cohen states that in upwards of seventy percent of the criminal actions brought against corporations there are corresponding criminal suits brought against one or more of that offender's individual employees.
the type of offense at issue is one in which the offender is detected only once every ten times, then the true "harm ratio" is the seventy-two percent discounted by the ten percent probability, that is, a little over seven percent.

From a review of these unhappy statistics, one conclusion is inescapable: any impact which the new Sentencing Guidelines may have will certainly be mitigated if it is determined that convicted corporations are continually burdened with a sanction which is but inconsequential relative to the harm caused by the firm's criminal conduct. It is the writer's opinion, however, that the revised fine structure of the new Sentencing Guidelines, in conjunction with the "culpability multiplier" have, to some extent, addressed this inconsistency and have further strengthened the governing body of corporate criminal law.

IV. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES

A. Sentencing of Organizations

The United States Sentencing Commission (hereinafter "Commission") was created under the Sentencing Reform Act of 1984. The Commission is an "independent commission in the judicial branch" and is charged with the task of establishing determinative sentencing guidelines for the federal judicial system and to "review and revise" the guidelines. The guidelines are "binding on the courts, although it preserves for the judge 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."

80. U.S.S.G. §§ 8C2.4 & 8C2.6. The "Base Fine" structure, when taken together with the "culpability multiplier", has extended the outer range of potential criminal fines to $290,000,000.00. Id. Of course, as the enabling statute indicates, a court is always accorded the discretion to deviate from the Guidelines if, in the opinion the court, such a deviation is so compelled by the circumstances at bar.


83. Mistretta, 488 U.S. at 367.
The Commission enacted Chapter Eight in November 1991.\textsuperscript{84} The introductory commentary to Chapter Eight recognizes 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.\textsuperscript{85} The introductory commentary, however, also makes it clear that the purpose of this new chapter is to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct."\textsuperscript{86}

Chapter Eight reflects the following principles:

First, 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.\textsuperscript{87}

Second, 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.\textsuperscript{88}

Third, the fine range for any other organization should be based upon the seriousness of the offense and the culpability of the organization. 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 will generally 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 once an offense has been committed.\textsuperscript{89}

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future conduct.\textsuperscript{90}

Thus, by the tone set forth in the introductory comments there is a clear departure from the traditional case law pertaining

\textsuperscript{84} U.S.S.G. ch. 8.
\textsuperscript{85} U.S.S.G. ch. 8, intro. cmt.
\textsuperscript{86} Id. (emphasis added).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
to corporate liability. With respect to the legacy of the common law, there are several significant and self-evident changes:

1. The basis for criminal liability has become more demanding (i.e., a corporation may now be prosecuted for any type of crime, regardless of the prescribed sentence, and may be decimated with exorbitant monetary fines and sanctions);

2. The standard of criminal liability has also been modified, suggesting a departure from the traditional prohibition against overt criminal behavior to the affirmative requirements of detection, prevention and cure;

3. The trend encourages, if not mandates, an objective manifestation on the part of the corporation of a separate and identifiable internal organizational mechanism existing for the purpose of detecting and preventing criminal conduct. 91

Chapter Eight makes it incumbent upon the organization and its officers to investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred. This represents a significant departure from the overt involvement/ratification standard to a duty to discover and prevent.

Chapter Eight, through its sentencing formula, makes organization "culpability" significantly determined by the extent to which the organization has taken steps to implement an effective program to prevent and detect violations of law. 92 Such a program has been loosely defined to mean a program that has been designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. 93 Although the sentencing commission concedes that failure to prevent or detect the instant offense by itself does not mean the program was ineffective, the organization is expected to exercise "due diligence" in seeking to prevent and detect criminal conduct by its employees and other agents. 94 The sentencing commission has enumerated several factors which are determinative of whether the organization has exercised "due diligence," and those factors are:

(1) The organization must have established compliance standards and procedures to be followed by its employees and other

91. Id.
92. U.S.S.G. § 8C2.5
93. U.S.S.G. § 8A1.2, cmt. (n.3(k)).
94. Id.
agents that are reasonably capable of reducing the prospect of criminal conduct. 95

(2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures. 96

(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities. 97

(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or disseminating publications that explain in a practical manner what is required. 98

(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct of others within the organization without fear of retribution. 99

(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline will be case specific. 100

(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent future similar offenses - including any necessary modifications to its program to prevent and detect violations of the law. 101

These steps also vary according to the following factors:

95. U.S.S.G. § 8A1.2, cmt. (n.3(k)(1)).
96. U.S.S.G. § 8A1.2, cmt. (n.3(k)(2)). This seems to indicate specific endorsement for the establishment of a corporate ethics officer position.
97. U.S.S.G. § 8A1.2, cmt. (n.3(k)(3)).
98. U.S.S.G. § 8A1.2, cmt. (n.3(k)(4)).
99. U.S.S.G. § 8A1.2, cmt. (n.3(k)(5)).
100. U.S.S.G. § 8A1.2, cmt. (n.3(k)(6)).
101. U.S.S.G. § 8A1.2, cmt. (n.3(k)(7)).
a. Size of the organization - The requisite degree of formality of a program to prevent and detect violations of the law will vary with the size of the organization. The larger the organization, the more formal the program should typically be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.\(^{102}\)

b. Likelihood that certain offenses may occur because of the nature of organization’s business - If because of the nature of an organization’s business there is a substantial risk that certain types of offenses may occur, management must take the steps necessary to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are handled properly at all times. If an organization employs sales personnel who have the flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent and detect fraud.\(^{103}\)

c. Prior history of the organization - An organization’s prior history may indicate the types of offenses it should have taken to prevent them. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct depending on the nature of the prior offense and its proximity in time to the present offense for which the corporation is being charged.\(^{104}\)

All of these factors are then quantified and incorporated into an empirical sentencing formula.

B. The Formula

Chapter Eight’s greatest impact deals with additional fines, after restitution, for organizations whose primary purpose was not to engage in criminal activity. The fine is a function of the

\(^{102}\) U.S.S.G. § 8A1.2, cmt. (n.3(k)(7)(i)). The Commission’s rationale for increasing the penalty with an organization’s increased size is based on the theory that as a company becomes larger, its management becomes increasingly professional. Moreover, that increased size indicates a greater likelihood of criminal activity pervading the organization.

\(^{103}\) U.S.S.G. § 8A1.2, cmt. (n.3(k)(7)(ii)).

\(^{104}\) U.S.S.G. § 8A1.2, cmt. (n.3(k)(7)(iii)).
seriousness of the offense and the culpability of the organization. Essentially, Chapter Eight prescribes that a base fine be established according to the gravity of the criminal harm. This base fine is then multiplied by a "culpability multiplier," a number ranging from .05 to 4.00, which reflects the degree of organizational participation in the criminal activity. 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." The fine is calculated by using the base offense level, with any adjustments, as established in Chapter Two of the Sentencing Guidelines. The fine range from the Table, before any culpability score is applied, is $5,000 to $72,500,000. With minimum and maximum culpability multipliers of five percent to four hundred percent, 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 applied "culpability multiplier." The actual multiplier, ranging from .05 to 4.00, is taken from a Table of Minimum and Maximum Multipliers which converts an organization's "culpability score" (a score ranging from "zero" to "ten or above") to a multiplier number.

Every organization begins with a culpability score of five points which may be subsequently increased or decreased based on their involvement in the offense.
on several factors previously addressed.\textsuperscript{114} 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 persons it employs, the greater number of points that are added to the culpability score;\textsuperscript{115}

(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;\textsuperscript{116}

(3) Existence of prior violations: A prior conviction, especially for the same or a similar offense, will raise the culpability score;\textsuperscript{117} 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.\textsuperscript{118}

Additionally, 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;\textsuperscript{119}

(2) The extent of voluntary disclosure to the appropriate authority;\textsuperscript{120}

(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;\textsuperscript{121} and

(4) Acceptance of responsibility by the organization.\textsuperscript{122}

\textsuperscript{114} U.S.S.G. § 8C2.5(a).
\textsuperscript{115} See U.S.S.G. § 8C2.5(b). This reinforces the Commission's concern for structural changes within the organization.
\textsuperscript{116} U.S.S.G. § 8C2.5(b).
\textsuperscript{117} U.S.S.G. § 8C2.5(c).
\textsuperscript{118} U.S.S.C. § 8C2.5(e).
\textsuperscript{119} U.S.S.G. § 8C2.5(f).
\textsuperscript{120} U.S.S.G. § 8C2.5(g)(1).
\textsuperscript{121} U.S.S.G. § 8C2.5(g)(1),(2).
\textsuperscript{122} U.S.S.G. § 8C2.5(g)(2),(3).
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 reflected on the conversion table.\textsuperscript{123} A higher culpability score establishes a higher minimum and maximum range of multipliers. The maximum multiplier is four hundred percent of the fine,\textsuperscript{124} 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 five percent of the fine,\textsuperscript{125} 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 pre-determined 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.

V. Conclusion

This Article has been written not with the purpose of exploring every perspective from which the newly enacted Chapter Eight may be viewed, whether these perspectives be grounded in economics, management or organizational theory, or corporate criminal jurisprudence. Rather, the Article canvasses these topics for the purpose of suggesting what the anticipated impact of the new guidelines may be, as well as to indicate those areas which must be further studied and monitored in order to gauge whether the purposes of the Sentencing Commission have indeed been achieved.

The writer hypothesizes that the new Sentencing Guidelines will assure that organizational ethics will henceforth assume a more significant role in the conduct of daily corporate business. The Sentencing Guidelines will provide consistency within the body of corporate criminal law where uniformity was previously lacking. They will guarantee that the establishment of internal ethics mechanisms and strict compliance with ethical codes will no longer be dismissed as "irrelevant" by the courts in the face of a corporate defendant's genuine attempts to avoid and mitigate criminal harm. Finally, by encouraging firms to actively detect

\textsuperscript{123} U.S.S.G. § 8C2.6.
\textsuperscript{124} U.S.S.G. § 8C2.6.
\textsuperscript{125} Id.
and prevent corporate misconduct, the Sentencing Guidelines may have initiated a movement away from the traditional standards of corporate criminal liability, which tend to exculpate the firm so long as it has not overtly participated or even negligently permitted illicit behavior. If this is so, perhaps we are not far from the day when corporate entities are no longer perceived as nefarious profit-seekers tenuously restrained by the outer boundaries of the law, as they were so characterized by Mr. Friedman two decades ago.126

126. See supra text accompanying note 1.