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# COMMENTS

## CRIMINAL SANCTIONS FOR CORPORATE ILLEGALITY

Increasing numbers of Americans have become aware that crime exists in the suites of many corporations just as surely as it exists in the streets of their cities and suburbs. The relative complexity and diffuse effects of corporate crime<sup>1</sup> have often hidden its true impact on society, but its costs—both economic<sup>2</sup> and physical<sup>3</sup>—are staggering. Efforts to utilize legal processes to counteract this phenomenon have proceeded on several fronts: the consumer movement, today acknowledged as one of the most significant social movements of this century,<sup>4</sup> has sought to combat corporate crime and irresponsibility by lobbying for consumer

"watchdog" agencies which would enforce consumer protection laws;<sup>5</sup> the Supreme Court has re-affirmed the principle of strict criminal liability for violations of the Federal Food, Drug and Cosmetic Act<sup>6</sup> and has left the door open for the application of such a standard in other areas as well;<sup>7</sup> federal regulatory agencies have responded with stringent sentencing recommendations for corporate offenders who

<sup>1</sup> For purposes of this Comment, "corporate crime" encompasses any illegal activity through which the actor seeks to use the corporate form to increase corporate wealth, rather than personal wealth. This type of misconduct has been labeled "acquisitive corporate crime." Comment, *Increasing Community Control Over Corporate Crime*, 71 YALE L.J. 280, 281 (1961). Thus, on the federal level, for example, corporate crime would include violations of the criminal provisions of the antitrust, securities, public welfare and labor laws.

<sup>2</sup> The U.S. Chamber of Commerce estimates that even the short term direct cost of white collar crime is at least \$40 billion annually. *White Collar Justice*, 759 ANTITRUST & TRADE REG. REP. (BNA 1976) Part II [hereinafter cited as *White Collar Justice*].

<sup>3</sup> In the industries regulated by the Food and Drug Administration alone, recent data indicate that "over-prescription" promoted by the drug companies leads to 60,000 to 140,000 deaths each year, and that cosmetics injure an estimated 60,000 persons annually. R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 25-26 (1976) [hereinafter cited as *TAMING THE GIANT CORPORATION*].

<sup>4</sup> THE CONSUMER AND CORPORATE ACCOUNTABILITY 2 (R. Nader ed. 1973). Due largely to increased levels of education and sophistication among the American people, consumer expectations have risen dramatically in the last 20 years. In addition to any legal changes the movement has wrought, significant changes in corporate policy and structure have been effected which expedite the corporations' responsiveness to consumers. Examples include consumer "hot lines," systematic complaint-handling mechanisms, expanded warranty coverage and increased point-of-sale product information. See D. RICE, *CONSUMER TRANSACTIONS* 2-24 (1975).

<sup>5</sup> For example, bills which would establish an "Agency for Consumer Advocacy" have been introduced in Congress for several years. Although such a proposal was only narrowly defeated in the 94th Congress, the following "consumer agency" bills have been introduced in the 95th Congress (1st Sess.): H. 7014, H. 7185, H. 6118 and H. 6437. In the 94th Congress version, the agency was to have no direct enforcement authority, but was to act as a centralized consumer advocate and fact-finding body on the federal level.

<sup>6</sup> In *United States v. Park*, 421 U.S. 658 (1975) [hereinafter cited as *Park*], the Court sustained the principle first set down in *United States v. Dotterweich*, 320 U.S. 277 (1943), which held that no criminal intent need be shown to establish a violation of the Federal Food, Drug & Cosmetic Act of 1938, 21 U.S.C. §§ 301-92 (1970). In *Park*, the Court held the president and chief executive officer of a large national food chain criminally liable for unsanitary storage conditions in one of the company's warehouses by virtue of the power and responsibility of his position. The Court found unconvincing Park's arguments that normal operating duties, including sanitation, had in fact been delegated to a division vice president. Chief Justice Burger justified the imposition of strict criminal liability, which presently does not exist outside of the food and drug area, by noting that the Food and Drug Act's purpose is the protection of the public welfare, that Park had assumed his duties voluntarily, and that Park had in fact had the power to prevent and correct the violation. 421 U.S. at 672.

<sup>7</sup> Among the factors which could determine if the *Park* notion of strict criminal liability will be applied to other areas of the law are: (1) the nature of the public interest to be protected, (2) the nature of the penalties already authorized for the offense, (3) the purposes of such penalties, and (4) the legislative history of the relevant statute. For an analysis of the applicability of the *Park* principles to other federal or state regulatory statutes, see 13 AM. CRIM. L. REV. 299, 313-14 (1975).

breach the public trust which the agencies oversee;<sup>8</sup> and several federal judges have invoked the imprisonment sanction for businessmen who violate federal laws.<sup>9</sup>

While these efforts to combat "crime in the suites" have at times succeeded in "raising the consciousness" of some corporate executives,<sup>10</sup> success in actually reducing the incidence of corporate crime has been elusive. As will be

<sup>8</sup> In November, 1976, the Antitrust Division of the Department of Justice announced guidelines for its attorneys to follow in recommending sentences for antitrust violations. The plan calls for a standard sentence of 18 months in prison, with various aggravating and mitigating factors to be considered in altering that term. 790 ANTITRUST & TRADE REG. REP. AA-1 (BNA 1976).

The sentencing recommendations were at least in part a response to the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 1 as amended Dec. 21, 1974 Pub. L. 93-528, § 3, 88 Stat. 1708, which, *inter alia*, upgraded a violation of the Sherman Act from a misdemeanor to a felony, increased the maximum jail sentence to three years, raised the maximum corporate fine to \$1 million and the maximum individual fine to \$100,000. The purpose of these changes was to achieve greater deterrence of illegal conduct and practices which prevent effective competition. *Hearings on S. 782 Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 5 (1974) [hereinafter cited as *Antitrust Hearings*].

<sup>9</sup> For example, in one five-month period in late 1976 and early 1977 three cases resulted in prison sentences for the corporate executives. On November 30, 1976, Judge James B. Parsons of the Northern District of Illinois sentenced 15 executives of paper box board concerns to jail terms ranging from five days to 60 days and fines ranging from \$5,000 to \$35,000. *United States v. Alton Box Board Co.*, 792 ANTITRUST & TRADE REG. REP. A-11 (BNA 1976). The executives and their corporations had earlier pleaded *nolo contendere* to charges of price-fixing.

Federal District Judge Edward B. Boyle, Sr. of the Eastern District of Louisiana in November, 1976, imposed a three-month prison term on a high ranking grain company executive who had pleaded guilty to a charge of conspiring to cheat foreign customers for his company's benefit by short weighting ships. *N.Y. Times*, Nov. 18, 1976, at 20.

Finally, Judge Marvin Frankel of the Federal District Court in Manhattan in March, 1977, sentenced several executives convicted of stock fraud to prison terms in *In Re Sterling Homex Corp.*, [1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,904 (S.D.N.Y.), *N.Y. Times*, March 12, 1977, at 29, col. 6.

<sup>10</sup> According to *Business Week* magazine, for example, the *Park* case, coupled with the FDA's increased efforts to notify heads of companies of alleged criminal violations have "succeeded spectacularly at 'executive consciousness-raising'." *Business Week*, May 10, 1976, at 111.

demonstrated, this failure is due in large part to a marked lack of appropriate penalties in the federal laws which regulate American business. The burden is on Congress to devise new sanctions if regulatory legislation is to be effective.<sup>11</sup> This Comment discusses three major issues which policy-makers must reckon within the process of selecting appropriate sanctions. First, there are the inherent moral questions: Is the corporate crime immoral? Should moralists make a difference as to whether a criminal law ought to be used as a vehicle for social control? Second, if corporate crime is an appropriate vehicle, the purposes of criminal penalties must be delineated. Are we seeking only deterrence or should we also consider retribution, education and rehabilitation in devising sanctions? Finally, policy-makers must make as careful a matching as possible between the purposes identified and the proposals for new and reformed criminal sanctions directed at corporate criminals.

#### THE PROBLEM OF MORAL NEUTRALITY

A basic theoretical problem regarding the use of criminal sanctions for corporate illegality is that there is no clear correlation between what is commercially acceptable vs. legally acceptable behavior. Activities such as price-fixing and bribery of foreign officials, for example, are well-entrenched in the conventional businessman's "moral code."<sup>12</sup> Thus, as Her-

<sup>11</sup> There is no serious question today that the federal government has broad powers to proscribe the criminal acts of corporations and their agents. "The determinative test of exercise of power by Congress is simply whether the activity sought to be regulated is 'commerce which concerns more than one state' and has a real and substantial relation to the national interest." *Heart of Atlanta Hotel v. United States*, 379 U.S. 241, 255 (1964).

<sup>12</sup> A poll of the presidents of *Fortune's* top 1000 industrial firms showed that 60% of those responding agreed that "many [businessmen] price-fix." In a similar study it was found that nearly one half of U.S. business leaders see nothing wrong with bribing foreign officials in order to attract or retain contracts. *White Collar Justice*, *supra* note 2, at 3.

In 1961 *Harvard Business Review* survey, four-fifths of its subscribers agreed that within their own industries there were accepted business practices which the respondents regarded as unethical. M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 283 (1971) (Preliminary Draft for the Nader Study Group Report on Antitrust Enforcement) [hereinafter cited as *CLOSED ENTERPRISE SYSTEM*].

bert Packer noted,<sup>13</sup> such behavior fails "to excite the necessary sense of indignation and outrage that it takes for criminal sanctions to be unsparingly applied."<sup>14</sup> Viewed only from the somewhat narrow perspective of corporate executives, it is not difficult to perceive why businessmen refuse to see themselves as criminals even when convicted,<sup>15</sup> and why they resist the use of criminal sanctions for corporate wrongdoing in general.

For the most part, the judiciary appears to share the view that there is nothing morally reprehensible about corporate crime, and that is a situation which obviously impedes successful prosecution of corporate offenders. Many judges refuse, for example, to view price-fixing that is unaccompanied by threats or coercion as immoral conduct.<sup>16</sup> More generally, Professor Henry M. Hart has commented that judges rarely express to any defendant "with all possible solemnity a judgment of condemnation . . . in society's behalf."<sup>17</sup> Studies which show that sentencing judges discriminate in favor of white

collar offenders corroborate the existence of this judicial attitude.<sup>18</sup>

Traditionally, it has been thought that the general public also viewed corporate crime as morally neutral because potential resentment of such illegality was relatively unorganized. Sociologist Edwin Sutherland has attributed this lack of organization to the complexity of the violations, their diffuse effects, their relative newness (*vis-à-vis* common law crimes) and their high level of specialization.<sup>19</sup> In addition, Sutherland believed that the public was not aware of the nature and extent of white collar crime because of the de-emphasis of such crime by the media.<sup>20</sup>

While it does not appear that the media have substantially altered their coverage of corporate crime,<sup>21</sup> an argument can be made that public resentment is nonetheless coalescing to a point where the public would readily accept greater use of criminal sanctions for corporate wrongdoing. First, the development of the consumer movement has only been possible because of higher levels of education and sophistication in the population. Consumers understand the nature of corporate crime, particularly when they

<sup>13</sup> Late Professor of Law, Stanford University.

<sup>14</sup> H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 359 (1968) [hereinafter cited as PACKER]. While Packer did not reject the use of the criminal sanction in the "common regulatory sphere," he did believe that the sanction would have to be expanded in scope if a better match between punishment and crime is to be realized. *Id.* at 362.

<sup>15</sup> A former General Electric vice president who was convicted of price-fixing and sent to prison for his part in the massive electrical equipment price-fixing conspiracy of the early 1960's wrote the following before serving his jail term: "All of you know that next Monday, in Philadelphia, I will start serving a thirty day jail term, along with six other *businessmen* for conduct which has been *interpreted* as being in conflict with the *complex* antitrust laws." Geis, *Detering Corporate Crime*, in *THE CONSUMER AND CORPORATE ACCOUNTABILITY* 349 (1973) [hereinafter cited as Geis].

<sup>16</sup> The District Court of Los Angeles, where many antitrust cases are heard, is among the nation's most extreme in this regard. Several judges on that court are openly hostile to Antitrust Division attorneys. CLOSED ENTERPRISE SYSTEM, *supra* note 12, at 312. Even Judge James B. Parsons, who sentenced the *Alton Box Board* defendants to prison, stated that whether the defendants' price-fixing earned the Government's description of being immoral or antisocial could only be determined from facts not available. Sentencing Transcript, United States v. *Alton Box Board Co.*, 792 ANTITRUST & TRADE REG. REP. D-1 D-3, (BNA 1976) [hereinafter cited as *Alton Sentencing Transcript*].

<sup>17</sup> Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 436-37 (1958).

<sup>18</sup> See *White Collar Justice*, *supra* note 2, at 6-7, 10-11. One study was conducted by the U.S. Attorney's Office for the Southern District of New York, where many white collar criminals are prosecuted. It found that white collar offenders receive more lenient treatment "as a general rule." *Id.* at 7.

<sup>19</sup> E. SUTHERLAND, *WHITE COLLAR CRIME* 49-52 (1949) [hereinafter cited as SUTHERLAND].

<sup>20</sup> *Id.* at 50-51. This finding was corroborated by two studies of the news coverage surrounding the electrical equipment price-fixing conspiracies in 1961. Generally, the studies found that news reports of both the pleadings and the sentencing were most often relegated to a brief paragraph on an inner page. See Comment, *Increasing Community Control Over Corporate Crime*, 71 YALE L.J. 280 n.35 (1961).

<sup>21</sup> A brief survey of six major newspapers (*Chicago Tribune*, *Los Angeles Times*, *New Orleans Times-Picayune*, *New York Times*, *Wall Street Journal* and *Washington Post*) following the sentencing of the *Alton Box Board* defendants on November 30, 1976 revealed that only two newspapers gave the story front page status (*Wall Street Journal*, *New York Times*), while the rest ran comparatively brief stories in the financial section. Interestingly, every newspaper on the day following the sentencing ran front page stories on the right of Gary Gilmore to die in a Utah electric chair. In addition, it is noteworthy that both *Time* and *Newsweek*, as well as four of the above newspapers covered the sentencing story in their business sections, as opposed to "national affairs" or "law" sections.

perceive the economic and physical injury which may flow to them as a result.<sup>22</sup> Second, when the public becomes aware of white collar crime the use of criminal sanctions is clearly favored. Surveys indicate that people feel the wearing of a white collar is a privilege which should carry with it a sort of public trust which, when violated, requires severe criminal punishment.<sup>23</sup>

There appears, then, to be a genuine lack of consensus regarding the immorality of corporate crime. Businessmen and a large segment of the judiciary do not equate corporate wrongdoing with anti-social conduct, while it appears that much of the general public disagrees. The question is thus raised whether the criminal law is an appropriate vehicle for social change—here, of corporate malfeasance—when such a moral consensus does not exist. One view is to reject the use of the criminal law because, it is argued, we cannot persuade people to see conduct as wrongful simply by making it criminal.<sup>24</sup> In addition, many contend that overuse of the criminal sanction when little moral culpability is associated with the offense tends to dull any moral stigma which might attach to the penalty and causes the public to resent efforts to enforce the law.<sup>25</sup>

<sup>22</sup> For example, when the Antitrust Division of the Justice Department first established an "antitrust hotline" in Pittsburgh to encourage citizens to report possible violations of the antitrust laws, speculation was that many calls would be received from shoppers complaining of price-fixing at the retail level. Wall St. J., Apr. 7, 1977 (Business Bulletin), at 1, col. 5.

<sup>23</sup> The Joint Commission on Correctional Manpower found, for instance, a strong public disposition to sentence accountants who embezzle more harshly than either young burglars or persons caught looting during a riot. Geis, *supra* note 15, at 343. Similarly, a 1953 survey of people who were shown the sentences actually imposed in several food adulteration cases arising under the Food and Drug Act revealed that 78% would have imposed penalties more severe than those actually dispensed. Newman, *Public Attitudes Toward a Form of White Collar Crime*, in WHITE COLLAR CRIMINAL 287, 290 (G. Geis ed. 1968).

<sup>24</sup> PACKER, *supra* note 14, at 359. Witness, for example, the repeal of the eighteenth amendment which prohibited the manufacture or sale of intoxicating liquors.

<sup>25</sup> Where this argument appears to have its greatest merit is in the area of local public welfare laws, such as housing codes and health regulations, where violations that are technically criminal are treated in a very routine, almost casual manner. See F. GRAD, PUBLIC HEALTH LAW MANUAL 140 (1965).

Supporters of the view that criminal sanctions are not appropriate for corporate crime would not rely totally on a private civil enforcement scheme, but have advocated a system of "civil penalties" to accompany the traditional civil sanctions of reparations and injunctions.<sup>26</sup> Civil penalties represent a legal hybrid insofar as they are a means of punishment which do not carry the stigma of moral culpability which accompanies a criminal sanction.<sup>27</sup> Apart from any question of morality, a system of civil penalties would eliminate many of the procedural burdens found in criminal prosecutions, vis-à-vis civil suits.<sup>28</sup>

There are several factors, however, which demonstrate that criminal sanctions are a viable means of combating corporate wrongdoing and that a purely civil enforcement system is not necessary. First, it must be recognized that there has never been a correlation between morality and the criminal law. Conduct which is generally considered immoral is often not criminal; for example, the failure to save a drowning person when physically able to do so is not criminally punishable.<sup>29</sup> On the other

<sup>26</sup> See Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URBAN L. 153 (1968). The author argues that in light of the "undeveloped moral sense of the community" with regard to pollution, regulatory efforts in this area should not be handicapped by the use of criminal sanctions.

<sup>27</sup> A second approach taken by others who object to the use of the criminal sanction when the element of moral culpability is lacking would be to *downgrade* the offense in some fashion. The Model Penal Code, for example, makes a "frontal attack" on strict liability in penal statutes—where there is absolutely no element of moral wrongdoing—by reducing the grade of the offense to a "violation." MODEL PENAL CODE § 2.05, Comment (Tent. Draft No. 4, 1955). A violation is not a "crime" under the Code and no sentence harsher than a fine, forfeiture or other civil remedy may result.

<sup>28</sup> There are five advantages to proceeding civilly to enact a penalty: (1) pleading requirements are simpler; (2) no delay is caused by a failure of the defendant to appear—a default judgment is simply entered; (3) there is a relaxation of the burden of proof; (4) the guarantee of a right to a jury trial is avoided; and (5) the government can appeal if it loses a civil action. Kovel, *A Case for Civil Penalties* 46 J. URBAN L. 153, 156-58 (1968).

<sup>29</sup> Contrary to the law in the United States, most countries in western Europe have adopted legislation which makes it a criminal offense to fail to render help in cases of accident or necessity where there is no danger to the rescuer. See Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 1073, 1105 (1961).

hand, acceptance of strict criminal liability for public welfare offenses shows that the law will label some conduct as criminal which is not immoral.<sup>30</sup> In short, it appears that when legislatures provide for criminal sanctions for certain acts, they often do so not because the immediate conduct is either rightful or wrongful in itself, but because they believe that some social advantage will result.<sup>31</sup> Second, empirical evidence tends to show that moral approval by the regulated is not a necessary condition for compliance with the law.<sup>32</sup> Third, there is little danger of overuse of the criminal sanction in the present regulation of business. Criminal sanctions are largely ancillary to a variety of other authorized sanctions—including civil

penalties—in most federal regulatory legislation,<sup>33</sup> and are generally reserved for repeated offenses or egregious violations.<sup>34</sup> Thus, from this pragmatic perspective the criminal sanction can be seen as a viable weapon for counteracting corporate wrongdoing.

#### THE PURPOSES OF THE CRIMINAL SANCTION

Once the criminal law is accepted as a set of techniques which can be manipulated for social ends,<sup>35</sup> the question becomes what precisely our goals are when we impose a criminal sanction. As with any type of crime, no unitary and comprehensive theory exists for explaining the purposes of criminal sanctions for corporate crime. Rather, four main theories have been relied upon: general deterrence, specific deterrence, retribution and education. The goals of rehabilitation and incapacitation are generally not regarded as applicable to individual white collar offenders. However, several proposals for reform of criminal sanctions directed at the corporate entity seem to be directed at these purposes.<sup>36</sup> Unfortunately, there is a basic lack of empirical research on the extent to which any goal is actually realized.<sup>37</sup> This fact ought

<sup>30</sup> See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 281 (1943), where the Supreme Court construed the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-92 (1938), to dispense with the traditional element of "awareness of some wrongdoing" in finding a violation of the Act. See note 6 *supra* and accompanying text.

Despite judicial and legislative acceptance of strict criminal liability, many have argued that the real menace to society is the intentional commission of undesirable acts, and that evil intent must remain an element of the criminal law. See Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973).

<sup>31</sup> Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 417 (1958). It can also be argued that a good deal of criminal law is the result of pressure from narrowly-defined groups who are more concerned with their own self interest than with any notion of morality. For example, city automobile dealers who are prevented from selling automobiles on Sunday by local ordinance have at times convinced state legislatures to make the selling of cars throughout the state on that day a crime. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 10 (1972) [hereinafter cited as LAFAVE & SCOTT].

<sup>32</sup> Robert E. Lane's study of compliance with governmental regulations in general demonstrated that "there was no tendency to react against a wide range of laws, no evident general antiregulation animus," and that it was "the position of the firm, rather than the emotional qualities of its management, which led it to violate." R. LANE, *THE REGULATION OF BUSINESSMEN—SOCIAL CONDITIONS OF GOVERNMENT ECONOMIC CONTROL* 106 (1954). See also Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 208-11 (1965) [hereinafter cited as Ball & Friedman] ("grumbling acceptance of the income tax, food and drug laws and the antitrust laws serve the purposes of the legal order perfectly well; wild enthusiasm is not necessary").

<sup>33</sup> See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2069 (a)(1) (1974), which provides for a maximum \$500,000 civil penalty. See generally, Note, *Statutory Penalties*, 51 HARV. L. REV. 1092 (1938).

<sup>34</sup> The Food and Drug Administration's policy, for example, is to proceed criminally only as a last resort. O'Keefe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug and Cosmetic Act*, 30 FOOD, DRUG & COSM. L.J. 5, 28 (1975). Less than 10% of the actions taken by the FDA in 1976 were criminal prosecutions, with seizures, injunctions and recalls comprising the balance. See, e.g., FOOD DRUG COS. L. REP. (CCH) ¶ 37,074 (FDA Enforcement Report April-September, 1976). *Business Week* reported, however, that the agency notified 175 heads of companies of alleged criminal violations in the last six months of 1975 alone. *Business Week*, May 10, 1976, at 111.

Similarly, approximately two-thirds of the cases brought by the Antitrust Division of the Justice Department are civil suits seeking to prevent and restrain violations of the antitrust laws. CLOSED ENTERPRISE SYSTEM, *supra* note 12, at 340.

<sup>35</sup> Ball & Friedman, *supra* note 32, at 211.

<sup>36</sup> For discussion, see text accompanying notes 94-127 *infra*.

<sup>37</sup> This fact has been noted by academicians and judges alike. See, e.g., Kadish, *Some Observations on the Use of the Criminal Sanction in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 434 (1963) [hereinafter cited as Kadish]; *Tigner v. Texas*, 310 U.S. 141, 148 (1949) (Frankfurter, J., concurring).

For a detailed proposal for how such empirical re-

not, however, to keep policy-makers from articulating and applying the ends sought to be achieved by means of criminal sanctions—however theoretical—when they devise new sanctions for corporate crime.

General deterrence is regarded as the primary justification for use of criminal sanctions for corporate crime. Academicians,<sup>38</sup> all levels of the judiciary,<sup>39</sup> enforcement officials<sup>40</sup> and Congress<sup>41</sup> have accepted the idea that the use of the criminal penalty is a legitimate means of checking an offense not yet committed, by associating with it a deterrent threat. The degree to which threats can be effectively used to induce compliance with the law is determined by the responses of the threatened audiences. Six interrelated variables are thought to influence responsiveness to a legal threat:<sup>42</sup> (1) dif-

ferences among persons; (2) types of threatened behavior; (3) communication of the threat; (4) types of threatened consequences; (5) variations in the severity of the consequences; and (6) the credibility of the threat. Application of these variables to the corporate context tends to support general deterrence as a sound basis for criminal sanctions for corporate illegality.

First, in terms of differences among people the following characteristics have been identified as making a person especially responsive to legal threats: future orientation, risk avoidance, a high level of socialization, respect for authority and high socio-economic status.<sup>43</sup> Obviously, these traits are characteristic of most persons who occupy the corporate suites. Theoretically, then, persons who hold positions of leadership in corporations would seem to be a particularly threat-sensitive audience.

Second, the type of behavior threatened by the criminal sanction will influence the effectiveness of that sanction. In particular, the "emotional context" of the crime is thought to be significant in this regard. Thus, deliberate corporate crimes, such as price-fixing and product safety violations, where willfulness must be shown to secure a criminal conviction, should be most responsive to legal threats. This is due to the fact that the criminal is not acting on impulse and has time to ponder the legal consequences of his actions.<sup>44</sup>

Third, even if businessmen do not always heed the threat of criminal punishment, it does appear that the threat is often communicated to them. Businessmen reacted swiftly and vehemently, for example, to *United States v. Park*<sup>45</sup> and to recent attempts to increase corporate penalties through reform of the Federal Criminal Code.<sup>46</sup> There is little doubt that the in-

search should proceed, see F. ZIMRING & G. HAWKINS, *DETERRENCE* 195 (1973) [hereinafter cited as ZIMRING].

<sup>38</sup> See, e.g., PACKER, *supra* note 14, at 356 (1968); Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377, 380 (1972).

Philosophers have at times placed both general and specific deterrence into a utilitarian model of criminal sanctions. Punishment, which is regarded by utilitarians as a *prima facie* evil, is thus justifiable only insofar as it prevents an even greater evil from occurring, such as physical or economic harm. Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1535 (1975) [hereinafter cited as *A Philosophical Perspective*].

<sup>39</sup> In *Pell v. Proconier*, 417 U.S. 817, 822 (1974), Justice Stewart wrote:

An important function of the corrections system is the deterrence of crime. The premise that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses.

For the views of many judges who likewise accept the value of punishment for its general deterrence purposes, see *Pilot Institute on Sentencing*, 26 F.R.D. 231, at 282-84 (1959) (under the auspices of the Judicial Conference of the United States).

<sup>40</sup> See, e.g., Government Sentencing Memorandum, *United States v. Alton Box Board Co.*, 784 ANTITRUST & TRADE REG. REP. D-1 (BNA 1976).

<sup>41</sup> For example, the legislative history of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 1 (1976), shows that the purpose of the increase in the criminal sanctions there for antitrust violations was to better deter illegal conduct which prevents effective competition. *Antitrust Hearings*, *supra* note 8, at 4.

<sup>42</sup> See generally, ZIMRING, *supra* note 37, at 91-194. The authors derived their variables from findings in experimental psychology.

<sup>43</sup> *Id.* at 98-127.

<sup>44</sup> An argument can be made that even violations of the Food and Drug Act are deliberate crimes, despite the fact that the violator need have no evil intent to be convicted. This is due to the FDA's practice of sending several warning letters in advance of actual criminal prosecution. In *Park*, for example, the company president was indeed on notice of the sanitary violations before the criminal charges were brought. Merrill, *The Park Case*, 30 FOOD, DRUG & COSM. L.J. 683, 684 (1975).

<sup>45</sup> For the negative reaction of a Washington, D.C., attorney specializing in food and drug law, see Lambert, *Dancing With the Gorilla*, 30 FOOD, DRUG & COSM. L.J. 410 (1975).

<sup>46</sup> Businessmen almost uniformly opposed the pro-

creased use of the jail sanction for white collar offenders has stirred some serious concern as well.

The fourth variable affecting responsiveness to legal threats is the type of consequences which can flow from a criminal conviction. Businessmen will clearly not respond to a threat if the consequences of ignoring that threat do not truly alter their lifestyle. However, if the corporate executive realizes that actual economic deprivation, a loss of privileges, or particularly, stigmatization could result, he might be more responsive.

Next, variations in the severity of the consequences are thought to have some influence on the response to threats. There is, however, much disagreement as to exactly how this factor operates. Using a strictly economic analysis, general deterrence would be achieved by a punishment set at such a level that the cost of criminal activity is greater than the value of that activity to the perpetrator.<sup>47</sup> Insofar as the motives and effects of corporate crime can be translated into economic terms,<sup>48</sup> such an analysis would seem to be helpful in assessing the efficacy of general deterrence as a goal of corporate criminal sanctions. However, where no motive at all is required to secure a criminal conviction, as in strict liability corporate crimes,

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posals related to corporate crime which were embodied in S. 1 and S. 1400 in the 93d and 94th Congresses. See, e.g., *Testimony on S. 1 and S. 1400 Before the Subcomm. on Crim. Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., 5586-608 (1973) (statement of Mark Crane).

<sup>47</sup> See R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 357-65 (1972) [hereinafter cited as POSNER]. Posner argues that the economic content of the law is nowhere clearer than in the rationale of criminal punishment. His formula for deterrence is premised on the assumption that "people engage in acts that will yield them the most value net of cost." *Id.* at 357.

<sup>48</sup> In Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 *YALE L.J.* 280 (1961), the author advances the following hypothesis for corporate crime which is economically motivated, such as price-fixing or bribery of foreign officials:

The rate of acquisitive corporate crime engaged in on behalf of any [widely-held] corporation will a) vary directly with the expectation of net gain to that corporation from the crime, and will b) vary inversely with the certainty and severity of the impact with which the criminal sanction personally falls upon these who formulate corporate policy.

*Id.* at 282.

this analysis would seem to have less value.<sup>49</sup>

Up to this point, the discussion of the variables related to general deterrence might seem to indicate that criminal sanctions have considerable potential to deter corporate wrongdoing. Why, then, is corporate crime increasing? The answer appears to lie at least in part in the final variable, the credibility of the sanction itself. For a criminal sanction to be credible, a two-step process must take place. First, the would-be criminal must believe that there is a reasonable probability of being caught. Unfortunately, this probability is considerably less than one considering the ability to conceal and the increasing complexity of much white collar crime,<sup>50</sup> as well as the inadequate law enforcement resources devoted to the problem of corporate crime.<sup>51</sup> Second, the potential criminal must believe that if he is apprehended there is a high probability of being *seriously* punished. This probability is likewise very low for corporate crime because, as will be shown, either the punishment itself is not serious or, even if it is substantial, there is little likelihood of its imposition.

Under the theory of specific deterrence the goal of criminal punishment is to deter the criminal himself, rather than others, from committing further crimes. This is accomplished by giving him an unpleasant experience that he will not wish to endure again.<sup>52</sup> Although enforcement officials claim that criminal penalties are not really aimed at the person standing before the judge,<sup>53</sup> some salutary effects

<sup>49</sup> For example, Zimring and Hawkins reject the price system model which Posner favors. They feel that the analogy is incomplete because a potential buyer will know the price of a product before making a purchase decision. No such assumption can be made, they argue, about the potential criminal's knowledge of the consequences threatened for particular criminal behavior. ZIMRING, *supra* note 37, at 194-200.

<sup>50</sup> Most securities crimes today, for example, relate to inadequate disclosure, and thus are more difficult to detect than manipulative schemes. See *White Collar Justice*, *supra* note 2, at 4.

<sup>51</sup> The Los Angeles U.S. Attorney's Office is a typical situation. For a district of almost 10 million people only eight out of 55 criminal assistants are designated to specialize in complex white collar crime cases. *Id.* at 3-4.

<sup>52</sup> LAFAYE & SCOTT, *supra* note 31, at 22.

<sup>53</sup> The former head of the Antitrust Division, Donald I. Baker, stated that the stiffer penalties his agency sought for antitrust violators were designed



have nevertheless been shown when corporate executives have indeed been seriously punished. For example, a former General Electric vice president who was convicted of price-fixing and was sent to prison for his part in the massive electrical equipment price-fixing conspiracy of the early 1960's stated that "I would starve before I would [price-fix] again," because of "what I have been through and what I have done to my family."<sup>54</sup>

Despite the emphasis given to general and specific deterrence as the primary theories of punishment, a very discernible thread of the oldest theory, retribution, also underlies the use of the criminal sanction for white collar offenders. Under this theory, punishment is imposed by society on the criminal in an effort to vindicate its wrath.<sup>55</sup> Thus, findings that the public favors harsher penalties for white collar offenders who breach a public trust might be an indication that the public wants retribution. In two recent cases where corporate executives were sentenced to prison for violation of federal laws, the sentencing judges explicitly stated that a notion of "just deserts" was at the root of the imposition of prison sentences.<sup>56</sup> From a legislative perspective, recent efforts to reform the sentencing process in federal courts have identified retribution as the principal justification for imprisonment, with rehabilitation only a beneficial by-product.<sup>57</sup> As persuasive as this

idea of "squaring accounts" might be, however, it should not become the sole justification for the use of criminal sanctions directed at corporate crime. The desire for retribution is, after all, basically an emotion, and to have to quantify and apply so volatile a factor in a criminal sanction would be difficult indeed.

Under the education theory of criminal punishment, the publicity which accompanies the imposition of a criminal sanction serves to inculcate a sense of morality—or at least awareness—in the public that might otherwise be lacking.<sup>58</sup> At the present time, this purpose for criminal sanctions can only be realized as a positive by-product which occurs when the mass media publicizes an indictment, trial or sentencing proceeding. Although one can argue that there is increasing awareness of corporate crime among the public, it is doubtful that this can be attributed to publicity surrounding the use of criminal sanctions for corporate wrongdoing, considering the media's general de-emphasis of such crime.<sup>59</sup> Still, this potential for added awareness which could flow from the use of criminal sanctions ought to be considered in the process of shaping new criminal sanctions.

#### THE EFFECTIVENESS OF EXISTING CRIMINAL SANCTIONS

##### *Sanctions Directed Against the Corporation*

Under present federal case law corporations can be held criminally liable for statutory violations regardless of whether the statute specifically mentions corporations as subject to its sanctions.<sup>60</sup> The purpose of a sanction directed at a corporation—be it criminal prosecution, private civil actions, injunctions or other civil penalties—is to control the corporation through

to influence the person who is in a conspiracy and may want to get out, or one who is thinking of engaging in price-fixing.

<sup>54</sup> *Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 17067 (1961).

<sup>55</sup> Philosophically, this theory is opposite of utilitarianism, with its emphasis on society being ordered such that the good are happy and the wicked suffer, each in proportion to his moral desert. *A Philosophical Perspective*, *supra* note 38, at 1560.

<sup>56</sup> *United States v. Alton Box Board Co.*, 792 Antitrust & Trade Reg. Rep. D-1 (BNA 1976); Alton Sentencing Transcript, *supra* note 16, at D-3; *In re Sterling Homex*, [1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,904. In *Sterling Homex* Judge Marvin Frankel stated that one reason for his imposition of the prison sentences in that stock fraud case was "the notion of just deserts" that called for punishing people who do serious wrong. He added, "We don't use the word retribution anymore, but that's what it means." N.Y. Times, Mar. 12, 1977, at 29, col. 6.

<sup>57</sup> Sentencing Guidelines Bill, S. 2699, 94th Cong., 2d Sess. (1976). See also, Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUD. 208 (1976).

<sup>58</sup> LAFAYE & SCOTT, *supra* note 31, at 23.

<sup>59</sup> See note 21 *supra* and accompanying text.

<sup>60</sup> Many federal regulatory statutes hold only "persons" subject to their criminal sanctions. However, 1 U.S.C. § 1 defines "person" as including "corporations, companies, associations, firms, partnerships, societies, joint stock companies, as well as individuals," unless the context of the statute dictates otherwise. 1 U.S.C. § 1 (1970).

In civil law countries, the idea of *societas delinquere non potest*—"the corporation can do no wrong"—is still recognized. Thus, anyone who acts for a corporation knows that he or she cannot escape criminal liability by shifting the blame to the corporate entity. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 28 (1957).

threats to its profits. Presumably, then, whether a particular sanction has any deterrent value will depend on whether the costs of the criminal sanction to the corporation outweigh the benefits of continuing the illegality.<sup>61</sup>

As presently administered, corporate fines lack credibility as profit-diminishing sanctions. This is due largely to the exceedingly low maximum penalties found in most statutes, relative to both the assets of the offender<sup>62</sup> and the extent of the damage caused by the misconduct.<sup>63</sup> Moreover, these maximum amounts are rarely imposed by judges and juries.<sup>64</sup> This failure to penalize corporate offenders to the maximum extent possible could be due in part to the use of the *nolo contendere* plea. Although legally a plea of no contest can subject the defendant to the same fine as if he had pleaded guilty,<sup>65</sup> in fact, judges sentence far more leniently after a *nolo* plea than after a conviction which follows a plea of either guilty or not guilty.<sup>66</sup>

Not only is the criminal fine incapable of

<sup>61</sup> See note 47 *supra* and accompanying text.

<sup>62</sup> For example, the effect of the \$437,500 fine levied on General Electric for its part in the electrical equipment price-fixing conspiracy was roughly equivalent to a \$3.00 parking fine for a man with an income of \$15,000 per year. CLOSED ENTERPRISE SYSTEM, *supra* note 12, at 324.

<sup>63</sup> Although the Antitrust Procedures and Penalties Act did raise the maximum corporate fine to one million dollars for violations of the Sherman Act, even this amount appears insignificant when one realizes that some seven billion dollars of commerce was affected by the electrical equipment price-fixing conspiracy. *Id.* at 323.

For Food and Drug Act violations this contrast becomes even more pronounced if one considers the economic and physical damage which can result in relation to the maximum \$1,000 fine. 21 U.S.C. § 333(a) (1970). See note 3 *supra*.

<sup>64</sup> In the *Alton* case, for instance, 13 of the 22 corporate defendants received fines less than even the previous \$50,000 maximum under the Sherman Act. TRADE REG. REP. ¶53,645-46. In the electrical equipment case, the average corporate fine was only \$16,500. CLOSED ENTERPRISES SYSTEM, *supra* note 12, at 323.

<sup>65</sup> *Cf.* United States v. Frankfort Distillers, 324 U.S. 293 (1945); Hudson v. United States, 272 U.S. 451, 455 (1926).

<sup>66</sup> In the history of the antitrust laws, for example, 73% of all convictions have been obtained via *nolo contendere* pleas. Moreover, between 1960 and 1970 courts accepted *nolo* pleas in antitrust cases in 95% of the cases where the government opposed such a plea. CLOSED ENTERPRISE SYSTEM, *supra* note 12, at 308-11.

significantly diminishing a corporation's profits directly, but it also fails to do so indirectly by damage to the company's goodwill. It is likely that the media's unwillingness to report fully the use of criminal sanctions for corporate crime which is at fault here.<sup>67</sup> Theoretically, if consumers were made aware of corporate illegality when a criminal sanction was imposed they might be more inclined to take their business to more responsible companies. In this manner, criminal sanctions could supplement the efforts of the consumer movement in fighting corporate criminality. At the present time, however, any cost/benefit analysis for most major corporations would reveal that the corporate fine amounts to little more than a reasonable license fee—just another cost of doing business imposed by the government.<sup>68</sup>

#### *Sanctions Directed Against the Individual*

In light of the inadequacies of the present system of criminal sanctions for the corporations, prosecutions of individuals might seem to be the answer to more effective enforcement of corporate criminal laws. In particular, the stigmatization that follows an individual prosecution is thought to be an excellent general and specific deterrent for white collar offenders.<sup>69</sup> However, despite the potential value and relative ease of proceeding criminally against a "person" under most statutes, criminal sanctions directed at the corporation's policy-makers have proved to be largely ineffectual.

Practically speaking, the major obstacle to

<sup>67</sup> See note 23 *supra*.

<sup>68</sup> 71 YALE L.J. at 287. Christopher Stone argues that in general legal threats constitute only a small range of the threats that a corporation faces in dealing with the outside world. Moreover, he notes that having profits cut by a law suit does not involve the same "loss of face" as losses attributable to other causes, such as a poor marketing decision. C. STONE, WHERE THE LAW ENDS 39-40 (1975) [hereinafter cited as STONE].

<sup>69</sup> Zimring and Hawkins note that often the fact that the individual was punished is what is considered disgraceful, rather than the commission of the crime itself. ZIMRING, *supra* note 37, at 190-94. In the *Alton* case, the individual defendants argued prior to sentencing that there was no need for Judge Parsons to impose prison sentences since "mere 'conviction' of an antitrust offense carries a 'devastating result.'" 787 ANTITRUST & TRADE REG. REP. A-13 (BNA 1976). Note also, the statement of the former General Electric executive who had spent time in prison. Note 54 *supra* and accompanying text.

individual prosecutions is that the corporate entity tends to conceal the real actors in a given situation. In many cases, this has raised problems of identifying which persons in the corporate structure are actually responsible for the wrongful act.<sup>70</sup> A somewhat more perplexing problem is the not infrequent phenomenon of a jury convicting a corporate defendant, yet acquitting an individual for the same offense at the same trial. The reason for this appears to be that jurors tend to separate conduct which they condemn from the individual with whom they often sympathize.<sup>71</sup> Finally, judicial hostility to criminal prosecutions of white collar offenders, and their acceptance of the *nolo contendere* plea, are significant bars to effective individual prosecutions.

The fine is the most common criminal sanction imposed upon the individual convicted of corporate crime. However, even apart from the general problems of establishing complicity within the corporate structure and the attitudes of judges and jurors, individual fines will remain an ineffective deterrent as long as defendants can be indemnified. Not only are the by-laws of most major corporations extremely liberal in their basic indemnification provisions,<sup>72</sup> but more than seventeen states today permit

<sup>70</sup> In the electrical equipment cases, for example, "the high policy makers of General Electric and other companies involved escaped personal accountability for a criminal conspiracy . . . despite the belief of the trial judge and most observers that these higher officials either knew of and condoned these activities [price-fixing] or were willfully ignorant of them." Kadish, *supra* note 37, at 431.

In *Alton Box Board*, however, the Government apparently had little difficulty pinpointing who within each of the 23 manufacturers was responsible for that company's participation in the bid-rigging conspiracy. Those identified ranged from persons of the chief executive officer level down to the product vice president level. *See* Wall St. J., Dec. 1, 1976, at 4.

<sup>71</sup> Ball & Friedman, *supra* note 32, at 219. Several courts have commented on this phenomenon. *See, e.g.,* United States v. Austen-Bagley Corporation, 31 F.2d 229, 233 (2d Cir. 1929), *cert. denied*, 279 U.S. 863 (1929), where the judge exclaimed, "How an intelligent jury could have acquitted any of the defendants we cannot conceive."

<sup>72</sup> General Motors, for example, indemnifies all its directors and officers "against any and all judgments, fines, amounts paid in settlements and reasonable expenses, including attorney fees." General Motors Corp., By-Laws No. 31, "Indemnification of Directors and Officers."

corporations to purchase indemnification insurance on behalf of their directors and officers.<sup>73</sup> As written, the provisions of several state statutes, including the Delaware General Corporation Law,<sup>74</sup> would permit such insurance to cover *any* wrongful act, regardless of whether the corporation would have the power to indemnify the individual "directly" under the statute.<sup>75</sup>

Admittedly, corporations might not be able to attract qualified leadership if there were not indemnification insurance. In addition, there is nothing to stop the corporation from making a larger compensation arrangement with the executive and letting him pay for this insurance himself. Despite the validity of these arguments, they should not outweigh the fact that overbroad indemnification statutes, such as that in Delaware, not only reduce the deterrent effect of the criminal fine on the individual, but in the process create the possibility that a corporation can insure its executives against their own intentional wrongdoing.

The other sanction available in nearly every

<sup>73</sup> Although the corporation laws of only 17 states authorize indemnification insurance, a 1974 survey of the Fortune 500 list revealed that 80% of those companies carried such insurance. TAMING THE GIANT CORPORATION, *supra* note 3, at 107.

<sup>74</sup> At least one-half of the major industrial corporations are incorporated in Delaware. *See* R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR FEDERAL CHARTERING OF GIANT CORPORATIONS 501-02 (1976).

<sup>75</sup> Section 145(a) of the Delaware statute permits a corporation to indemnify an officer or director against expenses and fines in a criminal action only if he acted in good faith and in a manner he reasonably believed to be in the best interest of the corporation, and if he had no reasonable cause to believe his action was unlawful.

However, § 145(g) then permits the corporation: [T]o purchase and maintain insurance on behalf of every person who is or was a director, officer, employee or agent of the corporation . . . against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, *whether or not the corporation would have the power to indemnify him against any such liability under the provisions of this section.* DEL. CODE tit. 8, §145(a), (g) (emphasis added).

Thus, following the provisions of the statute literally, insurance could be purchased which would insulate executives not only from negligence but from deliberate violations of federal safety, civil rights, environmental, tax or antitrust laws as well. TAMING THE GIANT CORPORATION, *supra* note 3, at 108.

statute that provides criminal penalties for individuals convicted of corporate crime is imprisonment. However, this sanction is almost never imposed, largely because judges and juries are particularly loathe to sentence an individual corporate offender to prison.<sup>76</sup> As a result, for example, a higher percentage of persons convicted of violating the migratory bird laws are sentenced to prison for longer terms, than those who violate the antitrust laws.<sup>77</sup> Moreover, even when corporate officials go to jail, prosecutors complain that they are sent to the relatively "luxurious" prison facilities.<sup>78</sup>

Ironically, all of this occurs at a time when the available evidence shows that the threat of a prison term, even at a facility designed for low-risk white collar criminals, could well be the single most effective deterrent for corporate crime. Theoretically, the unpleasantness which accompanies a stay in prison is anathema to a corporate executive. Apart from the very significant stigma of a criminal conviction,<sup>79</sup> the offender faces a marked invasion of his privacy as well as a deprivation of his opportunity to make a living. In addition, a felony conviction can mean a loss of privileges such as the right to vote, the right to hold public office and the right to practice certain occupations or professions.<sup>80</sup> In sum, for the corporate offender, presumably highly responsive to others'

opinions about him, the threat of such demeaning social sanctions is especially effective.

#### PROPOSALS FOR REFORM

A number of remedies recently have been suggested to improve the present inadequate network of criminal sanctions directed at corporate offenders. In this section the effectiveness and feasibility of several of these proposals will be examined, keeping in mind the potential purposes of the sanctions: general deterrence, specific deterrence, retribution, education, incapacitation and rehabilitation. A basic problem in the criminal enforcement of federal regulatory legislation today is the fact that judges and juries do not impose even the currently available criminal sanctions upon corporate offenders in the same manner as they do regular criminals. While this phenomenon is certainly related to the moral neutrality of corporate crime, it can also be attributed to two additional factors. First, there is no uniformity among the penalties provided in federal statutes regulating business.<sup>81</sup> This lack of uniformity can in turn be explained by the fact that laws have been drafted over time by different Congresses with different views as to the purposes of the criminal sanction and its place in the statute's total enforcement scheme.

Congress could do much to alleviate the problem by providing a reasoned *range* of penalties in new criminal sanctions. While the range of alternatives should be wide enough to enable the sentencing judge to make the punishment fit the criminal,<sup>82</sup> the range itself should be set within bounds which reflect the legislators' view of the purposes of the sanction as well as the moral reprehensibility of the

<sup>76</sup> "[E]ven when the evidence is strong [against an individual white collar defendant], a form of jury nullification can occur, where the jurors realize that a well-dressed, white, wealthy, articulate father of three, might actually go to jail with unkempt, non-white poor, uneducated street criminals." CLOSED ENTERPRISE SYSTEM, *supra* note 3, at 317.

<sup>77</sup> This statistic was revealed by the former head of the Antitrust Division, Donald I. Baker, when he announced the Division's new sentencing guides, which proposed a standard sentence for price-fixers of 18 months in prison. 790 ANTITRUST & TRADE REG. REP. AA-1 (BNA 1976). See note 8 *supra*.

<sup>78</sup> Many white collar criminals convicted of federal offenses are, in fact, sentenced to the Allenwood Federal Prison Camp, a low-security facility with no walls, fences, barred windows or even locked doors to keep the inmates from leaving. See *White Collar Justice*, *supra* note 2, at 4-5.

<sup>79</sup> See note 42 *supra* and accompanying text.

<sup>80</sup> E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 309 (8th ed. 1970). The right to vote, for example, is lost by conviction for almost all felonious or infamous crimes in all states except Indiana, Massachusetts, New Hampshire and Vermont. *Id.*

<sup>81</sup> In a study of the enforcement mechanisms found in 28 federal "public welfare" statutes, no common thread was found to explain the variation in the type and degree of the penalties used in the laws. O'Keefe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug and Cosmetic Act*, 30 FOOD, DRUG & COSM. L.J. 33-38 (1975).

<sup>82</sup> In the American Bar Association's Standards Relating to Sentencing Alternatives and Procedures, it is recommended that authority to determine a sentence should be vested in the trial judge and not in the jury, and that the legislature should not fix specific sentences which would be imposed regardless of the circumstances. ABA STANDARDS RELATING TO THE ADMIN. OF CRIM. JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 342 (1974) [hereinafter cited as ABA SENTENCING STANDARDS].

crime. For example, assuming that Congress views criminal violations of the Food and Drug Law<sup>83</sup> and the Consumer Product Safety Act<sup>84</sup> as roughly equivalent,<sup>85</sup> the maximum criminal fine for each should likewise be roughly the same. Presently, however, a violator of the Consumer Product Safety Act is subject to a \$50,000 maximum criminal fine, whereas a violator of the Food and Drug Act is subject to a maximum fine of only \$1000.

The second explanation for the disparity in sentences which operates in favor of white collar offenders is that in general there is no list of criteria set down that a sentencing judge can use to decide which penalty to impose and to what degree. Useful criteria for corporate criminals would include the purposes of the criminal sanction for the particular crime or class of corporate offenses, as well as factors related to the defendant himself, such as level of responsibility, size of the corporation<sup>86</sup> and remorse and rehabilitation. There are a number of ways a set of criteria might be developed. Congress could establish an independent administrative agency which would establish specific, fixed sentence ranges for similar defendants who commit similar crimes.<sup>87</sup> Alternatively, sentencing "institutes" for judges could be held to perform this function.<sup>88</sup> A third possibility is that each regulatory agency would promulgate specific sentencing guidelines for violations of the laws they enforce.<sup>89</sup>

<sup>83</sup> 21 U.S.C. §333 (1970).

<sup>84</sup> 15 U.S.C. §2070 (Supp. 1975).

<sup>85</sup> Arguably, both violations carry the same level of moral opprobrium and are capable of causing considerable physical and economic damage. The public interest at stake in public welfare offenses such as these has traditionally justified the use of harsh criminal sanctions. See generally Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

<sup>86</sup> The size of the corporation would presumably determine the amount of commerce affected by the illegal act.

<sup>87</sup> Such an agency would be established by at least seven bills which have been introduced in the 95th Congress (1st Sess.): S. 181, S. 204, H. 1182, H. 2312, H. 7690, H. 9307 and H. 5344.

<sup>88</sup> ABA SENTENCING STANDARDS, *supra* note 82, at 349. The ABA also recommends that sentencing councils be established at which different judges of the same court could discuss the most desirable sentences for particular defendants prior to sentencing. *Id.*

<sup>89</sup> In November, 1976, the Antitrust Division announced such guidelines for price-fixers. See note 8 *supra*.

Apart from efforts to establish sentencing criteria independent of actual cases, there should also be a requirement that sentencing proceedings be made a matter of public record.<sup>90</sup> This might promote a more reasoned sentencing opinion by the judge and could ensure a greater degree of consistency among sentencing judges. Similarly, appellate review of sentences<sup>91</sup> would promote greater rationality of sentences as well as respect for the system in general.<sup>92</sup>

### *Sanctions Directed Against the Corporation*

#### *Fines*

For corporate fines to serve equity and the purposes of deterrence, they must be calibrated to both the magnitude of the harm caused as well as the size of the corporation. The latter factor could be provided for by replacing absolute maximum fines with fines set at a fixed percentage of a corporation's assets or profits for a given period of time. For example, a fine could be set at ten percent of the company's gross sales receipts for the period covered by the indictment.<sup>93</sup> Such a method avoids the possible unfairness to small corporations which could result if maximum amounts were simply increased.

Taking into account the gradient of the victim's harm in corporate fines is an idea that has received much support from commentators.<sup>94</sup> Moreover, this principle was incorpo-

<sup>90</sup> See ABA SENTENCING STANDARDS, *supra* note 82, at 375-76.

<sup>91</sup> Appellate review of sentences would be established by H. 7245, 95th Congress (1st Sess.), introduced by Rep. Rodino.

<sup>92</sup> ABA SENTENCING STANDARDS, *supra* note 82, at 407, 412-13 (1974). In addition, appellate review could guard against excessive sentences and would better focus the issues on the appellate level in general since many appeals are now taken because the defendant is dissatisfied with his sentence.

<sup>93</sup> "In Common Market nations such as West Germany, antitrust and other laws now impose fines on the basis of a percentage of the gross annual sales or profits of the firm, rather than in stated currency amounts. . . ." TAMING THE GIANT CORPORATION, *supra* note 3, at 250.

<sup>94</sup> See, e.g., 71 YALE L.J. at 297-300. The author argues that a civil attachment proceeding should accompany a criminal proceeding against a corporate offender whereby the government could recover from the convicted corporation all profits illegally earned. The government would then be obliged to return to any injured party compensation for any

rated into the ill-fated S. 1 and S. 1400 of the 93d and 94th Congresses.<sup>95</sup> Adduced as evidence at trial, factors such as personal injury, property damage, or loss caused by the illegal act, or the pecuniary benefit derived, could go into the calculation of the fine. The ultimate figure could serve as the upper boundary for the fine,<sup>96</sup> or, as Posner suggests, could be divided by the probability of detection and successful prosecution in that type of case to set the *exact* amount of the fine.<sup>97</sup>

The principal disadvantages of this type of system are the bookkeeping difficulties, particularly with the Posner method, and the problem of coordination with private civil suits.<sup>98</sup> Moreover, it has been argued that a basic flaw in *any* sanction directed at the corporate entity is that the real punishment is visited upon shareholders, creditors and eventually the public if the fine is translated into higher prices. Although it may well be unrealistic to think

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damages which he can prove resulted proximately from the crime. *Id.* at 297-98.

The Model Penal Code authorizes a fine of up to double the offender's gain. MODEL PENAL CODE § 6.03(5) (Proposed Official Draft 1962).

<sup>95</sup> S. 1, 93d Cong., 1st Sess. (1973); S. 1400, 93d Cong., 1st Sess. (1973) [hereinafter cited as S. 1 and S. 1400]. S. 1400 provided that a fine could be set for an amount up to the gross gain derived or twice the gross loss caused, whichever is greater. S. 1400 at § 2201(c). In November, 1977, a somewhat smaller version of S. 1 and S. 1400 was reported out of the Senate Committee on the Judiciary in the form of S. 1437. It is expected to reach the Senate floor in early 1978. A companion bill, H. 6869, has been introduced in the House.

<sup>96</sup> See, e.g., MODEL PENAL CODE § 6.03(5), *supra* note 95.

<sup>97</sup> Thus, the damages in a particular case will exceed the losses to victims *in that case*, but if the apprehension rate was estimated correctly, the sum of the damages awarded in all such cases will equal the sum of the losses of *all* the victims. For example, if there is a .25 probability of apprehension and successful prosecution for a particular corporate crime, and the actual damages were \$100,000, the amount of the fine would be \$100,000/.25, or \$400,000. Posner feels that the private treble damage remedy available under § 4 of the Clayton Act, 15 U.S.C. § 4, is a step in the right direction, but is too rigid to be applied in all circumstances. POSNER, *supra* note 47, at 357-65.

<sup>98</sup> At least one observer felt that the alternative fines set out in S. 1 and S. 1400 would have a particularly adverse impact on the treble damage suit remedy under the antitrust laws. *Hearings before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 1 and S. 1400*, 93d Cong., 1st Sess. 5605 (1973) (statement of Mark Crane).

that shareholders or creditors have any significant direct control over corporate policy in the modern publicly-held corporation,<sup>99</sup> an argument can be made that consumers have such control, albeit indirect. Assuming there is competition in the convicted corporation's industry, prices cannot rise to absorb the fine. If this occurs, profits will go down, debt and equity financing will become difficult, expansion will be curtailed, and investors will look for a more law-abiding corporation.

### *Formal Publicity*

Under this proposal corporations would be required to give some sort of notice of a criminal conviction to the public in general, or at least to those who might be financially interested. The notice could take the form of advertisements in appropriate media, or required clauses in contracts and other corporate documents. Precedents already exist to a limited extent. The Food and Drug Act requires that the FDA give public notice of all criminal prosecutions,<sup>100</sup> and this is reportedly an effective deterrent within the industry.<sup>101</sup> In the labor relations field the National Labor Relations Board has at times required employers guilty of "massive" unfair labor practices to post notice of the Board's order, as well as to mail the order to the individual employees.<sup>102</sup> Such requirements have the effect of impressing upon the employees the seriousness of the employer's offense.

The major drawback of the formal publicity sanction is, however, that it will be very difficult to predict the effect of the sanction. Negative consumer reaction to an advertisement could well punish the corporation beyond the damage actually done. Conversely, the corporation

<sup>99</sup> As documented by Berle and Means, shareholders in the modern corporation have "in fact surrendered any theoretical ability they might have to change management or alter corporate policy." A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY*, 277-87 (1934). Indeed, very few shareholder proposals, the major method of effecting shareholder democracy, are ever passed at annual corporate meetings. L. LOSS, *SECURITIES REGULATION* 910 (1961).

<sup>100</sup> 21 U.S.C. § 375(a) (1970).

<sup>101</sup> Note, *Developments in the Law: The Federal Food, Drug and Cosmetic Act*, 67 HARV. L. REV., 632, 694 (1954).

<sup>102</sup> *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967).

would be free to counter the adverse publicity with a barrage of positive image-oriented advertising.

### *Corporate Rehabilitation*

While rehabilitation has been a popular theory for individual punishment,<sup>103</sup> it has not been applied to the corporate offender. Two proposals have been advanced which would provide "treatment" for the convicted corporation in order to "return" it to society so reformed that it will not commit further crimes. The first, corporate probation, would require the establishment of a public trusteeship whereby the corporation is allowed to continue in business as long as it promises to fulfill certain conditions. Modest precedent for such a procedure comes from a federal court in the Northern District of Illinois where the court stipulated that if an oil company did not correct an oil spillage problem within forty-five days, a special probation officer would be appointed who would have the powers of a trustee under the supervision of the court, and could ensure that steps were being taken to correct the problem.<sup>104</sup> However, for any federal sanction to be effective, where the ultimate threat is the revocation of a state-granted corporate charter, the inherent federalism conflict must be reckoned with. A federal charter to replace the current system of state charters for corporations is one solution.<sup>105</sup> A less sweeping remedy would be to establish prosecutors who would

be authorized to act against white collar criminals in both federal and state courts.<sup>106</sup>

A second rehabilitative proposal is to facilitate employees' "blowing the whistle" on corporate illegality.<sup>107</sup> Obviously a great deal of corporate crime goes unreported because dissent within the corporate hierarchy is not possible. Although this could be due to a sense of loyalty to one's superiors and/or corporation, a more likely explanation is that it stems from the "love it or leave it" philosophy which permeates the law of private employment relationships.<sup>108</sup>

There are two means by which whistle-blowing could be encouraged. The first is to devise a sanction which would require corporations convicted of criminal violations to employ "supervisors" for key tasks, who would be responsible for compliance with the law.<sup>109</sup> This approach would seem particularly effective for public welfare offenses which are less easily concealed, for example, than price-fixing conspiracies. The second approach to this problem is to devise a new sanction or utilize existing ones which would protect from employer retaliation regular employees who decide to blow the whistle. Model statutory provisions include the "just cause" requirements of the National Labor Relations Act<sup>110</sup> and the anti-employee discrimination provisions in the Federal Water

<sup>106</sup> ABA SECTION OF CRIMINAL JUSTICE, COMM. ON ECONOMIC OFFENSES, RECOMMENDATIONS 7 (1977).

<sup>107</sup> For a thorough analysis of this approach, see R. NADER, P. PETKAS & K. BLACKWELL, WHISTLE BLOWING (1972) [hereinafter cited as WHISTLE BLOWING].

<sup>108</sup> Because of his comparative mobility, the individual worker has long been highly vulnerable to private economic power. In fact, the traditional rule is that all employers "may dismiss their employees at will . . . for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of legal wrong." *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV., 1404, 1405 (1967) (quoting *Payne v. Western Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915)).

<sup>109</sup> Christopher Stone suggests that such supervisors could be at all levels of the corporation, from "general public directors" to function in the public interest at the board level, to quality control personnel responsible for potential safety, environmental health problems. C. STONE, *WHERE THE LAW ENDS*, 118-248 (1975).

<sup>110</sup> Section 8(a) (4) of the National Labor Relations Act, 29 U.S.C. § 158 (1970), makes it an unfair labor practice for an employer "to discharge or otherwise

<sup>103</sup> See, e.g., Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226-32 (1959).

<sup>104</sup> *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972) (referring to the district court decision). Interestingly, it was Judge Parsons who devised this plan, the same judge who sent the *Alton Box Board* price-fixers to prison.

<sup>105</sup> See the proposed Federal Chartering Act as advanced by the Corporate Accountability Research Group. TAMING THE GIANT CORPORATION, *supra* note 3. The Group contends that state chartering has become a "costly anachronism" that allows major corporations to avoid accountability for their actions. (e.g., the Delaware provision for indemnification insurance.) A federal charter would "constitutionalize the corporation" by, *inter alia*, providing for a new array of criminal penalties. See generally TAMING THE GIANT CORPORATION, *supra* note 3. See also CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR FEDERAL CHARTERING OF GIANT CORPORATIONS (1976); Symposium, *Federal Chartering of Corporations*, 61 GEO. L.J. 71-149 (1972).

Pollution Control Act.<sup>111</sup> A problem with this latter proposal, however, is that there is no guarantee that, even with the promise of job protection, there are sufficient numbers of employees who would be aware of corporate illegality and, more importantly, would be willing to "rock the boat" by reporting it.<sup>112</sup>

### *Corporate Quarantine*

First articulated in S. 1, this sanction would suspend the right of the corporation to engage in interstate or foreign commerce for a term to which an individual would have been sentenced to prison for the same offense.<sup>113</sup> Such a procedure is similar to the Securities Exchange Commission's power to suspend operations or revoke the registration of brokers and dealers.<sup>114</sup> The chief advantages of this form of "corporate incapacitation" are that it would overcome the bookkeeping problems of the proposed corporate fine, and it would impress upon shareholders, employees, customers and other businesses the severity of the offense. However, there are several problems with the proposal which make its realization unlikely. First, its deterrent, retributive and educational value could probably be achieved by less draconian measures, such as a fine or limited publicity requirement. Second, employees and the community surrounding a quarantined corporation would suffer for the period of suspension. Third, the proposal fails to protect the contractual and other obligations of the corporation to innocent lenders and customers. Finally, the enforcement problems would be enormous, particularly for a large corporation with dispersed operations.

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discriminate against an employee because he has filed charges or given testimony under this subchapter."

<sup>111</sup> Section 507 of the Federal Water Pollution Control Act protects employees from discharge or discrimination resulting from their institution of or participation in any proceedings under the Act. 33 U.S.C. § 1367 (1976).

<sup>112</sup> For several case studies of persons from all levels of the corporate and governmental hierarchies, who were willing to blow the whistle for the sake of the public interest, see WHISTLE BLOWING, *supra* note 107, at 35-179.

<sup>113</sup> S. 1, *supra* note 95, at § 1-44(c) (1).

<sup>114</sup> See § 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 780(b)(4)(1970).

### *Forced Dissolution*

Section 6.04 of the Model Penal Code<sup>115</sup> authorizes a prosecuting attorney in a criminal action to institute *quo warranto* proceedings in a state court of general jurisdiction to forfeit the charter of a corporation organized under the state's laws. The court may order the charter forfeited upon finding that the corporation or its agents have purposefully engaged in a course of criminal conduct, and that the public interest requires protection from further illegality. For criminal violations of federal regulatory laws, some plan integrating state and federal prosecutions would have to be devised.<sup>116</sup> Moreover, because this sanction is the equivalent of "corporate capital punishment," it would have to be reserved for only the most persistent and egregious instances of corporate criminality. However, the relative infrequency of the use of the sanction itself would probably tend to render its general and specific deterrent value negligible.<sup>117</sup> Finally, even if the corporation's charter is revoked, there would be little to stop a corporation from re-incorporating in another state.<sup>118</sup>

### *Liberal Construction of Existing Statutes and Regulations*

There are at least three existing federal sanctions which might be deployed against a corporation subsequent to a criminal conviction. None has as yet been used to combat corporate crime, but all could conceivably appear in a government brief arguing in favor of stricter criminal penalties for a corporate defendant.

1. *Conspiracy Against the Rights of Citizens*, 18 U.S.C. § 241, provides that a \$10,000 fine and ten years imprisonment may be imposed "[i]f two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution of

<sup>115</sup> MODEL PENAL CODE, § 6.04(2)(a), *supra* note 94.

<sup>116</sup> See note 106 *supra* and accompanying text.

<sup>117</sup> If the probability of the sanctions being imposed is extremely low, it is unlikely that a corporation will even consider the costs of dissolution when weighing the benefits and costs of a course of illegal conduct.

<sup>118</sup> A federal charter for the corporations would, of course, solve this particular problem. See note 105 *supra*.



the United States."<sup>119</sup> Theoretically, this statute could protect a citizen's "right" to a clean environment,<sup>120</sup> to a competitive market place,<sup>121</sup> or to be safe from unadulterated food and drugs, were such rights to be constitutionally recognized. However, the uncertainty of such recognition, as well as the courts' unwillingness to extend this section beyond the civil rights area into the commercial world,<sup>122</sup> greatly diminish the present effectiveness of this sanction.

2. *Forfeiture of Property in Transit*, 15 U.S.C. §6, authorizes the United States to confiscate all goods used in any federal conspiracy in restraint of trade covered by the Sherman Act and to sell them at auction.<sup>123</sup> Although there is no evidence that this section has been used in the past for such purposes, it has been suggested that it be the basis for selling off divisions of a corporation which has been convicted of repeated antitrust violations.<sup>124</sup> This procedure would have the effect of a partial dissolution, without the need to revoke the state charter. A less drastic use of the statute would be to confiscate only particular items of inventory; the effect of which could be similar to that of a direct monetary fine on the corporation.

3. *Federal Procurement Regulations*, 41 C.F.R. §1-1.6, authorizes "suspension" or "debarment" from government contracting for criminal offenses incidental to obtaining a public or private contract, or for "other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the agency to warrant sus-

<sup>119</sup> 18 U.S.C. §241 (1970).

<sup>120</sup> For a provocative argument that environmental protection would be best achieved via amendment to the federal and state constitutions, see Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061 (1970).

<sup>121</sup> "The Sherman Antitrust Law . . . represents a settled tradition in favor of free competition and free enterprise. . . . A violation of the antitrust law is a violation of strongly entrenched moral sentiments." SUTHERLAND, *supra*, note 19, at 45.

<sup>122</sup> The section and its predecessors have not been held to protect either contractual rights, *e.g.*, *Haywood v. United States*, 268 F. 795 (7th Cir. 1920), *cert. denied*, 256 U.S. 689 (1921), or rights arising out of labor relations. *E.g.*, *United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974).

<sup>123</sup> 15 U.S.C. §6 (1970).

<sup>124</sup> CLOSED ENTERPRISE SYSTEM, *supra* note 12, at 333-34.

pension."<sup>125</sup> This latter clause could conceivably include causes such as poor quality control procedures which resulted in a criminal violation of a federal public welfare law, or a price-fixing conviction for conspiring to rig private contract bidding. Considering the importance of federal government contracts to many American corporations,<sup>126</sup> particularly those in the defense industry, invocation of this regulation could produce some remarkable consciousness-raising. There are, however, drawbacks to the use of this regulation as a supplement to criminal sanctions. First, it might be unduly harsh to so penalize a corporation for wrongdoing in the private sphere, particularly when it is heavily dependent on government work. Second, strict application of the statute could well result in higher costs to the government if the lowest bidders happen to be suspended or disbarred.

### *Sanctions Aimed at the Individual*

#### *Individual Fines*

Modification of overbroad indemnification statutes is the primary remedy for the present ineffectiveness of individual fines. Although there have been proposals that would prohibit indemnification against the penalty and expenses of any criminal action,<sup>127</sup> a more realistic reform would be to bar indemnification and indemnification insurance for criminal violations which require either a showing of willfulness or gross negligence for conviction. This would ensure that a corporate executive could not be indemnified for his intentional misconduct.<sup>128</sup> Two additional remedies for indemni-

<sup>125</sup> 41 C.F.R. §1-1.605-1 (2) (1976). Suspensions may be imposed for up to a maximum of 18 months, debarment for up to three years. 41 C.F.R. §1-1.605-1(a), 1-1.604(5)(c) (1976).

<sup>126</sup> For example, some 39% of Rockwell International's 1976 sales were under government contracts. Rockwell International 1976 Annual Report, at 48. For Litton Industries, this figure was 34%. Litton Industries, Inc., Annual Report for the Fiscal Year 1976.

<sup>127</sup> See note 105 *supra* (Proposed Federal Chartering Act).

<sup>128</sup> Under current law indemnification would be permissible for criminal violations of the Food and Drug Act, where there is no intent requirement and only a minimal participation requirement after *United States v. Park*, 421 U.S. 658 (1975). Indemnification would not be permissible, however, for crim-

fication statutes which seem warranted are greater judicial control of settled and compromised actions and mandatory disclosure of all indemnity payments. The disclosure requirement could serve by itself as an effective deterrent since most executives are probably loathe to having their misdeeds made known. In addition, it could serve educational and retributive goals by indicating to shareholders and creditors the seriousness of the executive's offense.

Once the factor of indemnification is eliminated from criminal fines, the certainty of the fine as well as the appropriateness of the amount must be ensured such that the sanction has credibility and does indeed function as a deterrent. A mandatory minimum amount would accomplish the objective of certainty, as would judicial acceptance of the principle that the *nolo contendere* plea is truly equivalent to a guilty plea or guilty conviction, and that it should not mean greater leniency. As for the appropriateness of the amount of the fine itself, this is an area where very little is known in terms of deterrence of individuals.<sup>129</sup> Thus, apart from a minimum amount required by law, the actual amount should be left to the discretion of the sentencing judge to decide in the circumstances of each case. One very important circumstance is whether the individual is receiving compensation from his corporation for the fine, even if not in the form of direct indemnification for expenses or indemnification insurance. For example, if it appears that the executive is being given greater compensation in order to pay his own indemnification premiums, either a higher fine or alternative sanction ought to be employed.

### *Imprisonment*

Greater certainty of a sentence of imprisonment following a criminal violation is likely to be the best means of bridging the gap which exists between the deterrent effects of a prison stay (or threat of one) and the infrequency of its use for corporate criminals. Thus, a mandatory sentence of some minimum length could

inal violations of the Sherman Act, or recent public welfare laws such as the Consumer Product Safety Act, 15 U.S.C. § 2070 (Supp. 1975), where intent must be shown.

<sup>129</sup> ZIMRING, *supra* note 37, at 194-95.

be established in the statute,<sup>130</sup> with various mitigating factors which the sentencing judge could rely upon to vary the length of the sentence. For example, the Justice Department suggests four mitigating factors be taken into account in reducing its recommended eighteen month sentence for antitrust violators: cooperation with the government, health, special family circumstances and factors mitigating the defendant's role in the offense.<sup>131</sup> From a purely economic standpoint, however, it can be argued that imprisonment is not an appropriate remedy, at least for corporate executives who have sufficient current assets to cover the amount of the penalty. Under this argument, fines and imprisonment are simply different ways of imposing economic costs on violators.<sup>132</sup> Considering the high costs to society of imprisonment,<sup>133</sup> a fine exacted from a financially-capable defendant is a much better allocation of resources than imprisonment. In addition, Posner argues that any attempt to translate the costs to society of corporate crime into a non-monetary term of imprisonment, will only result in leniency.<sup>134</sup>

### *Disqualification*

As suggested in both the proposed Federal Charteing Act<sup>135</sup> and in S. 1<sup>136</sup> this sanction would disqualify a corporate executive from serving as an officer or director of any Ameri-

<sup>130</sup> In January, 1977, Sen. Kennedy and the late Sen. McClellan introduced S. 260 which would establish minimum sentences for certain federal offenses.

<sup>131</sup> Government Sentencing Memorandum, United States v. Alton Box Board, 784 ANTITRUST & TRADE REG. REP. D-3 (BNA 1976). The Government did not believe that there was any basis for differentiating among defendants with respect to involvement in church or community affairs or lack of a prior criminal record.

<sup>132</sup> POSNER, *supra* note 47, at 364. Thus for the judgment proof defendant, a term of imprisonment is a means of imposing an economic cost in terms of work opportunities lost.

<sup>133</sup> The costs include: (1) the expense of constructing, maintaining and operating the prison; (2) the loss of the incarcerated individual's legitimate production; and (3) the probable impairment of any legitimate productivity after release from prison. POSNER, *supra* note 47, at 365.

<sup>134</sup> R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 225 (1976).

<sup>135</sup> TAMING THE GIANT CORPORATION, *supra* note 3, at 249-51.

<sup>136</sup> S. 1, *supra* note 95, §§ 1-4A1(c)(8), 1-4A3(b).

can corporation or partnership for five years following a conviction or *nolo contendere* plea. The harshness of the sanction is lessened if the individual is not actually fired, but merely barred from holding a position of trust. Arguably, however, the deterrent and retributive value of the sanction is reduced concomitantly. An analogous precedent in the civil area exists under the Labor-Management Reporting and Disclosure Procedure.<sup>137</sup> Section 504 of that Act provides that conviction of a felony, or of the reporting and trusteeship provisions of the Act, prohibits a person from employment in a labor organization.<sup>138</sup>

### *Behavioral Sanctions*

Recently, several federal district court judges have exercised their sentencing discretion by imposing so-called "alternative sanctions" on white collar criminals. Examples include requiring the defendant to make charitable donations in lieu of a fine and ordering a group of convicted price-fixers to make speeches

about the evils of price-fixing.<sup>139</sup> There is considerable disagreement over whether such sentences actually promote any of the purposes of the criminal law. Some argue that the publicity which often surrounds such sanctions carries a greater deterrent effect than the often less publicized jail term.<sup>140</sup> On the other hand, while such sanctions may serve as adequate deterrents the first time they are imposed, when repeated they could actually become counterproductive if people begin to view the offenses as mere technical violations and not crimes.<sup>141</sup> Another general problem associated with the use of behavioral sanctions today is that they simply are not contemplated by current statutes. Moreover, appeal of such sentences is often frustrated by a judge who simply defers sentencing for several months while advising the defendants that charity work done in the interim, for example, would be considered a mitigating factor.<sup>142</sup> A possible solution is to include behavioral sanctions within the statute for first offenses only, with the exact nature of the sanction left to the discretion of the sentencing judge. In this way, the sentence could be appealed by the Government if necessary, and at the same time the judge would not need to resort to the ruse of sentencing deferral.

### CONCLUSION

The federal government is confronted today with a major dilemma in its regulation of American business. On the one hand, the rate of corporate crime is increasing and public awareness of such criminality appears to be building. On the other hand, the available network of criminal sanctions applicable to corporate crime has proven ineffective. Despite its failure up to this point, however, the criminal law is a viable weapon for reconciling these two phenomena and reducing the incidence of corporate illegality. Granted, there is no clear consensus re-

<sup>137</sup> 29 U.S.C. §§401-531 (1970).

<sup>138</sup> Section 504 provides in pertinent part:

Prohibition against certain persons holding office; violations and penalties

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment . . . .

29 U.S.C. §504 (1975).

<sup>139</sup> See *White Collar Justice*, *supra* note 2, at 5-12.

<sup>140</sup> *Id.* at 10.

<sup>141</sup> The Antitrust Division has opposed such alternative sentences not only because they are not contemplated by the statutes, but because the Division believes they are of little deterrent value. Former head of the Division, Donald I. Baker, derided such sanctions as transforming "a criminal into a luncheon circuit speaker." 790 ANTITRUST & TRADE REG. REP. AA-1 (BNA).

<sup>142</sup> *White Collar Justice*, *supra* note 2, at 10.

garding the morality of corporate crime, but realistically none is needed. As long as there is *some* sense of moral opprobrium attached to such crime in our society, Congress should continue to employ criminal sanctions to combat it.

The primary purpose to which new criminal sanctions should be directed is general deterrence. Although our knowledge of the actual effects of criminal punishment in general is limited, deterrence seems to be the theory most easily quantified in terms of fixing a type of punishment for corporate crime which will produce the desired effect. This is particularly true when the motives and effects of the corporate illegality can be translated into economic terms. Retribution and education are legitimate goals as well, but their very nature dictates that they can be treated as beneficial by-products of criminal sanctions designed chiefly as deterrents. In addition, rehabilitation and incapacitation ought to be recognized as goals for criminal sanctions directed against the corporate entity.

As for the specific proposals for new criminal sanctions, there are in most cases persuasive arguments on both sides regarding their feasibility and effectiveness. For example, the fine

which takes into account the size of the corporate offender, as well as the gradient of the harm caused by the violation, would seem to be a good general and specific deterrent. However, the possibility might exist that the modern corporation is able to absorb punishment such that the real burden falls upon shareholders, creditors, consumers and the community. Similarly, no amount of reform of indemnification statutes will achieve greater deterrent effect for individual criminal fines if corporations simply increase an executive's salary such that the individual is able to pay his or her own insurance premiums. In short, our knowledge of the relationship between the theories of criminal punishment and the nature of the modern corporation is not sufficiently developed to permit a commitment to a particular sanction for a particular class of crimes. Instead, an effort should be made to authorize as wide a range of credible penalties as possible and to then examine their effectiveness. In this manner the sentencing judge will be able to adjust sentences for corporate crime both for the circumstances of each case, as well as for the observed effectiveness of the available sanctions.

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