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Organizational Sentencing Guidelines: The Cart Before the Horse

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ORGANIZATIONAL SENTENCING GUIDELINES: THE CART BEFORE THE HORSE*

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On November 1, 1991, after five years of dialogue, discussion, and study, the federal Sentencing Guidelines for organizations (the "Sentencing Guidelines" or the "Guidelines") went into effect.[1] These Guidelines allow organizations convicted of crimes to reduce substantially their punishment by showing corporate good citizenry. Such "good citizenry" includes effective internal compliance programs and cooperation with the government regarding the violation.[2] While this effort to promote corporate responsibility is commendable, it does not cure the jurisprudential dilemma presented by criminal prosecutions of fictional entities.[3]

Current standards for assessing corporate criminal liability are not jurisprudentially sound because they ignore the distinguishing characteristic of the criminal law: it punishes for intentional acts. This disregard is not just a theoretical problem; it leads to misguided decisions as to whether corporations should be prosecuted. Although the Guidelines fail to address the fundamental problem of how we should assess corporate criminal liability, they do point to a resolution of it. By rewarding good corporate citizenry, the Guidelines recognize what the current stan-

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1. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 8A1.1 (comment.) (Nov. 1992) [hereinafter U.S.S.G.].

2. *Id.* § 8C2.5.

3. Sources discussing this dilemma include HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 361-62 (1968); George F. Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469, 472-81 (1914); Brent Fisse, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983); Joseph F. Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305 (1924); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21 (1957); Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501 (1980); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1365-75 (1979) [hereinafter *Developments*].

dards of corporate criminal liability do not: the feasibility of assessing corporate intent.

Part I of this Article provides a brief overview of the Guidelines and discusses how they define and measure corporate culpability. Part II describes and critiques the current standards for assessing corporate criminal liability. Part III proposes a new standard of corporate criminal liability that builds upon premises inherent in the Guidelines. Finally, Part IV addresses the question of whether a need remains for a new standard of corporate criminal liability in light of the federal organizational Sentencing Guidelines.

I. MEASURING CORPORATE CULPABILITY UNDER THE SENTENCING GUIDELINES

Concerned about inconsistency in sentences imposed and variation in sentences actually served,[4] Congress passed the Sentencing Reform Act of 1984 ("Reform Act").[5] With this statute Congress rejected the rehabilitative philosophy of punishment that had guided federal sentencing standards for most of the twentieth century.[6]

Pre-Reform Act sentencing practices were based upon the philosophy that society can and should rehabilitate criminals.[7] To effectuate such rehabilitation, criminals were individually evaluated, both when the sentence was imposed and during service of the sentence. Such an individual evaluation is possible only if a court is accorded wide discretion in imposing sentences and if the criminal is monitored during incarceration to determine when rehabilitation has taken place. The federal criminal

4. SENATE JUDICIARY COMM., REPORT ON S. 1762, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 225, 98th Cong., 1st Sess. 65 (1983) [hereinafter S. REP. NO. 225]. For a compilation of sources discussing the disparity in pre-Guidelines sentencing, see William W. Wilkins, Jr., *A Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795, 798 n.9 (1992). Some scholars and practitioners support the view that the Guidelines have reduced sentencing disparity. Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity*, 29 AM. CRIM. L. REV. 875 (1992). Others argue that the Sentencing Guidelines have not reduced the inconsistency and lack of predictability in sentencing. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771 (1992).

5. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18, 28, and 29 U.S.C.).

6. S. REP. NO. 225, *supra* note 4, at 39-40.

7. S. REP. NO. 225, *supra* note 4, at 37-38; Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 894-95 (1990); William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 357 (1991).

code provided sentencing courts with this discretion by delineating maximum sentences, limited in only a few instances by minimum sentences. This sentencing structure permitted judges the discretion to impose a wide span of sentences.[8] Compounding this opportunity for disparate sentencing is the inevitable problem that exists in any criminal code that has evolved over hundreds of years—lack of internal consistency in the crimes set forth.[9]

Under pre-Reform Act sentencing, rehabilitation of incarcerated defendants was monitored by the United States Parole Commission, which was given broad discretion to release prisoners who demonstrated sufficient rehabilitation. Consequently, releases from prison were unpredictable—at the time of sentencing no one, not the judge, the prosecutor, the victim(s), nor the defendant, knew how much of the sentence imposed would actually be served.[10]

Over the years, because of its inconsistency and unpredictability, experts and observers became disillusioned with the rehabilitation approach to sentencing.[11] Rejection of the rehabilitative model for sentencing corporate defendants has been especially long overdue. With its emphasis on incarceration flexibility, rehabilitative theory is particularly inappropriate for sentencing fictional entities that cannot be imprisoned.

In passing the Sentencing Reform Act of 1984, Congress directed that judges should no longer impose prison sentences with a view toward rehabilitation, but rather with the multiple goals of imposing just punishment, deterring future crime, protecting the public, and providing a criminal with effective treatment and training.[12] Congress also established a sentencing commission to set forth mandatory guidelines for judges to use in sentencing criminals.[13] Since beginning full-time service

8. S. REP. NO. 225, *supra* note 4, at 39-40; Wilkins, *supra* note 4, at 797.

9. S. REP. NO. 225, *supra* note 4, at 39-40; Wilkins et al., *supra* note 7, at 365-66.

10. 18 U.S.C. § 4203 (1982), *repealed by* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 2027 (1984) (giving the Parole Commission power to promulgate guidelines regarding parole of those incarcerated). *See* U.S.S.G., *supra* note 1, at 2; S. REP. NO. 225, *supra* note 4, at 46-49; Nagel, *supra* note 7, at 895; Wilkins et al., *supra* note 7, at 362-63.

11. S. REP. NO. 225, *supra* note 4, at 40 & n.16; Wilkins et al., *supra* note 7, at 357-58, 362.

12. 18 U.S.C. § 3553(a)(2) (1988). Some critics suggest that the emphasis in the Guidelines has shifted too greatly by assigning punishment based upon the victim's harm rather than the defendant's characteristics. *See, e.g.*, Alschuler, *supra* note 4, at 908-09; Heaney, *supra* note 4, at 783-84; Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 607-08 (1992).

13. Congress created the United States Sentencing Commission to:

establish sentencing policies and practices for the federal criminal justice system that . . .

in 1985[14] the United States Sentencing Commission (the "Sentencing Commission") has promulgated Sentencing Guidelines for individuals and organizations convicted of all but a few crimes.

The Sentencing Guidelines for organizations were among the last guidelines promulgated by the Sentencing Commission. They became effective on November 1, 1991, and apply to organizations found guilty of committing crimes after this date.[15] The Guidelines provide the sentencing judge with a variety of options when sentencing a convicted organization: restitution, disgorgement of ill-gotten gains, probation, and fines.[16] In determining the amount of an organizational fine, the court first assesses a "base fine," determined by reference to a schedule of crimes.[17] The court then adjusts the base fine by considering the organization's level of culpability. Culpability is measured by the organization's conduct: whether the organization maintained an "effective" program to prevent and detect criminal violations; whether it voluntarily disclosed corporate wrongdoing; whether it fully cooperated with government investigators.[18] By engaging in such acts of "corporate good citizenship," an organization may reduce its base fine by as much as ninety-five percent. At the other extreme, if the organization failed to engage in such acts of corporate responsibility and if its high-level personnel participated in, condoned, or were willfully ignorant of or tolerated the criminal activity, a convicted organization's base fine could increase by as much as 400%.[19]

In giving organizations credit for encouraging law-abiding behavior among its employees and, conversely, by severely punishing those organi-

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provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B) (1988).

14. Nagel, *supra* note 7, at 884.

15. U.S.S.G., *supra* note 1, § 8A1.1 (comment.).

16. *Id.* § 8B (Introductory comment.).

17. *Id.* § 8C2.4.

18. *Id.* § 8C2.5.

19. For example, if a court convicts an organization of defrauding an individual of $100,000 and initially assesses the fine under § 8C2.4 at $100,000, the corporation may reduce the fine to a range of $5000-$20,000 by qualifying for the lowest possible "culpability score" under § 8C2.5. On the other hand, if the organization qualifies for the highest possible "culpability score" under § 8C2.5, its fine would range from $200,000 to $400,000. *See id.* § 8C2.6 (minimum and maximum multipliers).

zations that encourage unlawful conduct, the Guidelines make several assumptions that provide the groundwork for devising a jurisprudentially sound standard of corporate criminal liability. The Guidelines assume that each organization is different and should be treated differently; that it is possible to assess an organization's culpability by examining its internal policies and procedures; and, that it is wise to reward corporations which encourage law-abiding behavior.

II. ASSESSING THE CURRENT STANDARDS OF CORPORATE CRIMINAL LIABILITY

American jurisprudence currently employs two major standards to determine organizational criminal liability. Both standards impose vicarious liability[20] by imputing the criminal acts and intent of corporate agents to the corporation. The "traditional" or "respondeat superior" standard is a common-law rule developed primarily in the federal courts and adopted by some state courts.[21] Derived from agency principles in tort law,[22] this standard provides that a corporation "may be held criminally liable for the acts of any of its agents [who] (1) commit[ ] a crime (2) within the scope of employment (3) with the intent to benefit the corporation."[23] As construed by most courts, the latter two requirements are almost meaningless.[24] Courts deem an agent's criminal conduct to be "within the scope of employment" even when corporate policy specifically forbids such conduct and the corporation has made a good-faith effort to discourage such behavior.[25] Similarly, courts deem criminal conduct by an agent to be "with the intent to benefit the corporation"

20. Vicarious liability occurs when a court holds *B* liable for an act of *A* "although *B* has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984). Vicarious liability is sometimes called imputed liability and "is given the Latin name of *respondeat superior*." *Id.*

21. James V. Dolan & Richard S. Rebeck, Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L.J. 547, 547-51 (1962). States that have adopted the traditional respondeat superior standard of liability include Indiana, *see* IND. CODE ANN. § 35-41-2-3 (Burns 1985), and Kansas, *see* KAN. STAT. ANN. § 21-3206 (1971).

22. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493-94 (1909).

23. *Developments*, *supra* note 3, at 1247. *See also* Dolan & Rebeck, *supra* note 21, at 547-48 (arguing that courts have gone beyond vicarious liability in holding corporations criminally liable for actions of their employees when the corporations have general policies prohibiting such acts).

24. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1148-50 (1991).

25. 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 3:01 (2d ed. 1991); *Developments*, *supra* note 3, at 1249-50.

even when the corporation received no actual benefit from the offense and no one else within the corporation knew of the criminal conduct at the time it occurred.[26] With these latter two requirements thus weakened, a court may hold a corporation criminally liable whenever one of its agents (even an independent contractor in some circumstances) commits a crime related in almost any way to the agent's employment.[27]

The American Law Institute's Model Penal Code ("MPC") provides the major alternative standard for assessing an organization's criminal liability. Developed in the 1950s, the MPC provides three standards for such liability.[28] The type of criminal offense charged determines which standard applies. For the majority of corporate crimes,[29] the MPC provides that a corporation may be held criminally liable if the criminal conduct was "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[30] This standard is still based upon a respondeat superior model, but in a limited fashion—a corporation is criminally liable for the conduct of only *some* of its agents (directors, officers, or other higher echelon employees).

The critical weakness in both the traditional respondeat superior and MPC standards is that by automatically imputing the agent's criminal liability to the corporation, they fail to consider the culpability of the corporation itself. Two Fourth Circuit cases, *United States v. Hilton Hotels Corp.*[31] and *United States v. Basic Construction Co.*,[32] aptly demonstrate this. In *United States v. Hilton Hotels Corp.*,[33] the purchasing

26. BRICKEY, *supra* note 25, § 4:02; *Developments*, *supra* note 3, at 1250.

27. Bucy, *supra* note 24, at 1148-50.

28. MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962).

29. The MPC includes two additional standards of corporate liability. Section 2.07(1)(a) applies to minor infractions and non-Code penal offenses "in which a legislative purpose to impose liability on corporations plainly appears." *Id.* § 2.07(1)(a). Section 2.07(1)(a) is a broad respondeat superior standard because a court will hold a corporation liable whenever "the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment." *Id.* Section 2.07(1)(b) applies to omissions and provides strict liability for the corporation that fails to discharge a "specific duty" imposed on corporations by law. *Id.* § 2.07(1)(b).

For an excellent discussion of the tension created by these multiple standards of liability, especially between §§ 2.07(1)(a) and 2.07(1)(c), see Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 604-11 (1988).

30. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962).

31. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

32. 711 F.2d 570 (4th Cir.), *cert. denied*, 464 U.S. 956, 1008 (1983).

33. 467 F.2d 1000.

agent at a Hilton Hotel in Portland, Oregon threatened a supplier of goods with the loss of the hotel's business if the supplier did not contribute to an association created to attract conventions to Portland.[34] Hilton Hotel's president testified that such action was contrary to corporate policy.[35] Moreover, the manager and assistant manager of the Portland Hilton Hotel testified that they specifically told the purchasing agent not to threaten suppliers.[36] Nevertheless, the court convicted Hilton Hotels of antitrust violations under the respondeat superior standard of liability.[37]

In *United States v. Basic Construction Co.*,[38] the court found the defendant corporation liable for bid rigging on state road paving contracts. The bid rigging was conducted by "two relatively minor officials, . . . [was] done without the knowledge of high level corporate officers," and was in violation of the company's "longstanding, well known, and strictly enforced policy against bid rigging."[39] Basic objected to the trial court's instruction informing the jury that a "corporation may be responsible for the action of its agents . . . even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position."[40] Basic argued that this instruction allowed the jury to "fix absolute criminal liability on a corporation for acts done by its employees"[41] and that this relieved the government from proving that the corporation "had an intent separate from that of its lower level employees to violate the antitrust laws."[42] The Fourth Circuit rejected Basic's argument by noting that the law allowed exactly what Basic complained of—absolute criminal liability of corporations for acts committed by corporate agents.[43]

The failure of the traditional respondeat superior and the MPC stan-

34. *Id.* at 1002.

35. *Id.* at 1004.

36. *Id.*

37. *Id.* The court noted that "Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment." *Id.*

38. 711 F.2d 570.

39. *Id.* at 572.

40. *Id.*

41. *Id.* at 572-73.

42. *Id.* at 573.

43. *Id.* at 573 (citing United States v. Hilton Hotels Corp., 467 F.2d at 1004-07; United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981)).

dards to focus on corporate intent is antithetical to the criminal law. The mens rea requirement is essential to a fair application of criminal justice. It serves at least three functions: it enhances social stability; it promotes more consistent and more appropriate exercise of prosecutorial discretion; and it facilitates planning by potential defendants—including efforts by potential defendants to comply with the law.

Requiring proof of criminal intent as a prerequisite for criminal liability enhances social stability by promoting voluntary compliance with the law.[44] For laws to succeed in promoting social stability, the vast majority of citizens must comply with them.[45] Resources are not available, nor should they be, to fuel the large law enforcement machine that universal lawlessness would require. Voluntary compliance will wane, however, if the law is viewed as unjust, unfair, or arbitrary. The law will be so perceived if it punishes *A* for acts that occur despite *A*'s best effort to avoid such conduct (strict liability),[46] or it punishes *A* for what *B* did even when *A* had no knowledge of *B*'s behavior (vicarious liability).[47] The criminal intent requirement avoids both of these possibilities by narrowing liability to voluntary acts committed by a defendant.[48]

Realistically, a few exceptions of strict or vicarious liability will not so

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44. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 50 (1968) (explaining that people obey the law "because it offers a guarantee that the antisocial minority who would not otherwise obey will be coerced into obedience by fear").

45. According to Hart, "two minimum conditions" are

> necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.

H.L.A. HART, THE CONCEPT OF LAW 113 (1961).

46. "Strict liability . . . means liability that is imposed on an actor apart from either . . . an intent . . . or . . . a breach of duty. . . . This is often referred to as liability without fault." KEETON ET AL., *supra* note 20, § 75, at 534.

47. GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 8.5, at 647 (1978) ("That liability is 'vicarious' simply expresses the conclusion that the defendant will be held liable for the acts of another.").

48. H.L.A. Hart discusses this point when he distinguishes characteristics that separate legal rules from moral rules. Hart notes that a person who involuntarily abridges a moral rule "is excused from moral responsibility, and to blame him in these circumstances would itself be considered morally objectionable." HART, THE CONCEPT OF LAW, *supra* note 45, at 173. In contrast, Hart notes that with objective standards of mens rea and notions such as strict liability, an individual can involuntarily violate a legal rule and a court will still hold the person legally responsible. Although Hart acknowledges this distinction, he cautions that "[i]n any developed legal system," the mens rea requirement must be an "element in criminal responsibility" for "[a] legal system would be open to serious moral condemnation if this were not so." *Id.* at 173-74.

greatly taint the public's perception of the criminal justice system so as to substantially curtail voluntary compliance. Extending these exceptions to most offenses, however, creates such a risk. Because vicarious liability currently is the universal rule of liability seen by the group of people most directly affected by corporate criminal liability, namely, corporate executives, these individuals may view the criminal justice system as unreasonable and unfair—and choose to disregard it.

Requiring proof of criminal intent before imposing criminal liability serves a second function: it enhances consistent enforcement of the law. The current, broad, vicarious liability standards for charging organizations with crimes offer prosecutors little guidance as to which of the many corporations that fall within the literal terms of these standards should be charged. Between 1984 and 1987, an average of 320 corporations per year were convicted of crimes.[49] Surely there were more corporations than this which broke the law and are liable under the current standards of corporate criminal liability. What this statistic really represents is the wide discretion prosecutors exercise when deciding which corporations to charge.

Because resources do not exist to prosecute every offending corporation that meets our current standards of organizational criminal liability, prosecutors must pick and choose which organizations to prosecute.[50] Assuming, arguendo, that prosecutors responsibly attempt to make the decision whether to charge an organization, individual prosecutors must resort to their personal, and therefore variable, views on whether to indict a corporation.[51] Forcing prosecutors to select cases based on corpo-

49. Mark A. Cohen et al., *Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 1984-1987*, 10 WHITTIER L. REV. 103 (1988). This study of federal prosecutions showed that organizational prosecutions accounted for fewer than one percent of all federal criminal prosecution. *Id.* at 111.

50. Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-34 (1970); Orland, *supra* note 3, at 511 ("Thousands of corporate crime statutes are enacted by Congress but relatively few are actively enforced by federal prosecutors."); James Vorenburg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525, 1548-49 (1981). Vorenburg notes that "prosecutors increasingly have been forced to allocate resources by deciding whether to charge and whether to offer leniency in exchange for guilty pleas." *Id.* at 1525. *See also* Jed S. Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions*, *in* CORRIGIBLE CORPORATIONS AND UNRULY LAW 173 (Brent Fisse & Peter A. French eds., 1985) (detailing numerous policies and guidelines that prosecutors follow when deciding whether to prosecute).

51. Constitutional and ethical restrictions, as well as Department of Justice guidelines and customs, limit the exercise of prosecutorial discretion. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Undertaking and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); *see generally* Rakoff, *supra* note 50. The

rate criminal intent, however, curtails this broad discretion and decreases the potential for abuse and arbitrariness. Furthermore, focusing corporate criminal prosecutions on organizations with criminal intent wisely utilizes scarce prosecutorial resources.

The third major function served by the criminal intent requirement is that it allows potential defendants to better predict and plan their futures. Under the broad vicarious liability standards of respondeat superior and the MPC, a corporation has no way of predicting whether an individual prosecutor will seek criminal charges against it for any given crime. However, when a corporation knows that criminal liability depends upon its own voluntary acts, it can better plan and predict its future[52] by choosing whether to engage in activities that limit or expand its exposure to criminal liability. Thus, by standardizing prosecutorial decisions, the criminal intent requirement allows corporate executives to assess more accurately the costs of engaging in unlawful behavior.

In summary, because corporations are and historically have been convicted of criminal offenses without an assessment of intent, those most affected by this standard of liability, corporate executives, see the criminal law at its worst. They see the criminal law used arbitrarily, with no guidance for prosecutors, no direction for businesses that wish to plan ahead, and no incentive for corporations to engage in law-abiding behavior.

III. A PROPOSED STANDARD OF CORPORATE CRIMINAL LIABILITY

A focus on the individual actor pervades our jurisprudence on intent.[53] To date, our approach to corporate criminal liability has been to impute

exercise of such discretion, however, remains within "one's own considered judgment and conscience." *Id.* at 171; *see also* Vorenberg, *supra* note 50 (arguing that current restraints on prosecutorial discretion are insufficient).

52. *See* HART, PUNISHMENT AND RESPONSIBILITY, *supra* note 44, at 23. Hart notes that a system that punishes for unintentional conduct means that individuals will "have their plans frustrated by punishments for what they do unintentionally, in ignorance, by accident or mistake. Such a system . . . would diminish the individual's power to identify beforehand particular periods during which he will be free from [punishment]." *Id. See also id.* at 181-82 (asserting that a system that punishes only voluntary acts permits individuals to determine their own fates).

53. As Australian Reader-in-Law Brent Fisse notes: "Modern corporate criminal law owes its origin and design more to crude borrowings from individual criminal and civil law than to any coherent assessment of the objectives of corporate criminal law and of how those objectives might be attained." Fisse, *supra* note 3, at 1143; *see also id.* at 1143 n.1 (listing other American, British, and Australian literature "recognizing the unsystematic historical development of corporate criminal law").

an individual actor's criminal intent to the corporation. This approach is not only inadequate, but also harmful to the integrity and power of the criminal law.[54] With the rising prominence of corporate actors, courts and legislatures must develop the concept of intent beyond the context of individual actors to focus on corporate intent. Such a focus should begin by acknowledging that each organization has an identifiable character or "ethos." Before convicting an organization, the government should be required to prove that the organization's "ethos" encouraged the corporation's agents to commit the criminal act.

In a sense, this standard takes its cue from notions of intent developed in the context of individual liability. When considering whether an individual should be held criminally liable, we ask whether the person committed the act accidentally or purposely. If the individual committed the act purposely, we consider it to be a crime, while if the individual committed the act accidentally, we do not. Similarly, the corporate ethos standard imposes criminal liability on a corporation only if the corporation encouraged the criminal conduct at issue. If it did, the criminal conduct is not an accident or the unpredictable act of a maverick employee. Instead, the criminal conduct is predictable and consistent with corporate goals, policies, and ethos. In the context of a fictional entity, this translates into intention.

If the corporate ethos standard represents a more jurisprudentially sound use of the criminal law, one may wonder why courts or legislatures have not adopted such a standard. At least three possible explanations exist. The first is precedent. American jurisprudence has never employed anything but strict, vicarious liability in assessing an organization's criminal liability. Yet an examination of precedent reveals that courts adopted and perpetuated this standard with little analysis of its jurisprudential soundness. As O.W. Mueller noted, "[m]any weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these . . . is corporate criminal liability . . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew."[55]

The Supreme Court's opinion in *New York Central & Hudson River Railroad v. United States*[56] sheds light on this growth. Not only is *New York Central* the premier decision establishing criminal liability for cor-

54. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

55. Mueller, *supra* note 3, at 21.

56. 212 U.S. 481 (1909).

porations in American law,[57] but its flawed and outdated reasoning exemplifies subsequent courts' analysis of corporate criminal liability.[58] The New York Central Railroad employed an assistant traffic manager who gave "rebates" on railroad rates to certain railroad users. As a result, the effective shipping rate for these users was less than the mandated rates.[59] The federal trial court held New York Central Railroad criminally liable under bribery statutes for the acts of its assistant traffic manager.[60] Noting that the principle of respondeat superior was well established in civil tort law, the Supreme Court stated that "every reason in public policy" justified "go[ing] only a step farther" and applying respondeat superior to criminal law.[61] Based upon this rationale, the Court established the traditional respondeat superior standard of criminal liability for corporations.[62]

The Court's reasoning in *New York Central* contains three major flaws which subsequent courts have perpetuated and exacerbated. First, the Court failed to appreciate the difference between civil and criminal law. The only indication that the Court recognized such a difference was when it disregarded it, stating "we see no good reason" for not applying the civil concept of respondeat superior to criminal corporate liability.[63] Lower courts have followed the Supreme Court's lead. For example, the United States Court of Appeals for the Eighth Circuit, in affirming the conviction of a utilities corporation, stated that "[i]f the act was . . . done [by a corporate employee] it will be imputed to the corporation. . . . There is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose."[64]

The second flaw in the *New York Central* reasoning is its failure to consider civil alternatives to corporate criminal liability. The Court stated that failure to impose criminal liability on corporations would

57. Dolan & Rebeck, *supra* note 21, at 548.

58. For other analyses critical of the *New York Central* reasoning, see Francis, *supra* note 3, at 313, 315, 320-23; Orland, *supra* note 3, at 502-04; Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 311 (1991).

59. 212 U.S. at 489-90.

60. The trial court fined New York Central & Hudson River Railroad $18,000 on each of six counts for a total fine of $108,000. The court fined the assistant manager $1000 on each of the six counts for a total fine of $6000. *Id.* at 490.

61. *Id.* at 493-95.

62. *Id.* at 494.

63. *Id.*

64. Egan v. United States, 137 F.2d 369, 379 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943).

"virtually take away the *only* means of effectually controlling the subject matter and correcting the abuses aimed at."[65] This conclusion ignores the two major options to imposing criminal liability upon corporations: (1) criminal liability of the responsible individuals within the corporation,[66] and (2) civil remedies against the corporation,[67] both of which are probably more viable methods of controlling behavior today than they were in 1909 when the Court decided *New York Central*. Nevertheless, without assessing the development, success, or greater propriety of these alternatives, subsequent courts have continued to rely on this rationale in imposing criminal liability on corporate entities. For example, the United States Court of Appeals for the Second Circuit, in affirming the conviction of a corporate wholesaler of fruits and vegetables for evading price regulations, noted that not to impose criminal liability in this case was "to immunize the offender."[68]

The third flaw in the *New York Central* reasoning is its failure to consider the conceptual alternatives to respondeat superior as the standard for corporate criminal liability. The Supreme Court assumed it had only two options for imposing criminal liability on corporations: respondeat superior[69] or no criminal liability.[70] Such a rigid view of its available options is understandable given the posture of the case (the Court was dealing with a strict liability statute) and the historical setting of this opinion. Courts have extended the rationale of *New York Central* beyond the context of strict liability statutes, however, and almost a full century has passed since it was decided. During this time, there has been

65. 212 U.S. at 496 (emphasis added).

66. Brickey, *supra* note 29, at 621-22; Canfield, *supra* note 3, at 472.

67. *Developments*, *supra* note 3, at 1301-11.

68. United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

69. In this case, a court could hold New York Central liable for acts of its assistant traffic manager because of the language in the Elkins Act, which provided a broad respondeat superior standard. The Elkins Act provided:

> In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person.

49 U.S.C. § 41(2) (1906), *repealed by* Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 4(a), (b), 92 Stat. 1466, 1470, *quoted in New York Central*, 212 U.S. at 496.

70. In 1909, the question whether corporations should be liable for crimes of intent was seriously debated. *Compare* BRICKEY, *supra* note 25, § 4.01 (stating that only certain classes of crimes could be committed by corporations) *with* Canfield, *supra* note 3, at 472-77 (discussion published in 1914 of whether a corporation could be liable for crimes requiring knowledge or intent).

considerable experience with and substantial scholarship on the nature of organizations. The *New York Central* Court's simplistic choice between two options, while understandable, ignores the subtleties of organizational behavior that today's courts are better able to identify and appreciate. Thus, in this early effort to impose criminal liability on fictional entities, the Supreme Court gave as precedent a sledgehammer when a scalpel is needed. As in other areas where sophisticated tools have replaced primitive ones, the criminal law needs a more sophisticated and refined mechanism for imposing corporate criminal liability.

Another possible reason that our standards for assessing an organization's criminal liability have not evolved to include an assessment of corporate mens rea is the perception that such an assessment is not possible. Yet it is, theoretically and practically. The strongest evidence of the workability of such a standard for assessing corporate criminal liability is the willingness of the United States Sentencing Commission to focus on organizational culpability and its demonstration of how to do so. In requiring that any criminal fine assessed against an organization be based, in part, on the organization's "culpability," the Guidelines demonstrate the viability of identifying corporate intent.[71] By directing courts to examine factors such as involvement in or tolerance of criminal activity, commission of prior criminal offenses, cooperation with the government in its investigation of the criminal conduct, and existence of effective internal programs to prevent and detect violations of the law,[72] the Guidelines point the way to identifying corporate intent.

The Guidelines are not the first effort to identify corporate intent. During the past twenty years or so, as organizations increasingly have been targets of criminal and civil lawsuits, jurists and scholars have demonstrated their willingness to identify the intent, or ethos, of fictional entities. For example, in assessing municipal liability under 42 U.S.C. § 1983, which provides that persons, including fictional persons, who deprive citizens of certain rights are liable to the injured person,[73] courts repeatedly focus on the intent of municipal organizations as manifested

71. U.S.S.G., *supra* note 1, § 8C2.5.

72. *Id.*

73. 42 U.S.C. § 1983 provides in pertinent part:

> Every person [including fictional persons] who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

42 U.S.C. § 1983 (1988).

by their policies. In *Monell v. New York City Department of Social Services*,[74] the Supreme Court held that section 1983 clearly envisions liability of municipal corporations "only where the municipality *itself* causes the constitutional violation at issue."[75] Rather than employing traditional respondeat superior theory, whereby a corporation would be found liable for an employee's isolated act,[76] section 1983, like the corporate ethos standard for corporate criminal liability, provides for a "faultbased analysis for imposing . . . liability."[77] Such an analysis requires courts to focus on the municipal "custom" or "policy"[78] which is the "moving force"[79] of the constitutional deprivation. Under section 1983, liability is imposed only if the evidence shows that "some official policy[] 'causes' an employee to violate another's constitutional rights."[80] Thus, since at least the *Monell* decision in 1978, courts and juries have worked with and applied the notion that a fictional entity assumes responsibility for acts of its agents only when it employs an internal custom or policy that encourages such violations.[81]

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74. 436 U.S. 658 (1978).

75. City of Canton v. Harris, 489 U.S. 378, 385 (1989) (citing *Monell*, 436 U.S. at 694-95). The *Monell* Court overruled Monroe v. Pape, 365 U.S. 167 (1961), and held that "persons" within § 1983 includes municipal corporations. 436 U.S. at 690, 701.

76. *Monell*, 436 U.S. at 691 ("In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

77. City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 (1985).

78. *Monell*, 436 U.S. at 691.

79. *Id.* at 694.

80. *Id.* at 692.

81. *See, e.g.*, City of Canton v. Harris, 489 U.S. at 385; City of Springfield v. Kibbe, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting). Although this line of cases, like the corporate ethos standard of liability, reflects the view that fictional entities are capable of promulgating a policy or custom for which a court should hold the entity itself liable, they do not clearly reflect a mechanism for determining the policy or custom.

The *Monell* Court did not require a showing of "formal approval through the body's official decisionmaking channels" before finding the existence of a policy subjecting a municipality to § 1983 liability. 436 U.S. at 690-91. In later cases, however, the Court appears to require just that. In *Tuttle*, the Court found an isolated incident by a single low-level officer insufficient to subject a municipality to liability. 471 U.S. at 824. In Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), the Court found the four-word response by a single county employee (a county prosecutor) sufficient to constitute county policy. *Id.* at 484-85. The Court's discussions in both cases focused on formal aspects of the decisionmaking process. In *Tuttle*, the Court emphasized the lack of involvement by official policymakers. 471 U.S. at 821-23. In *Pembaur*, the Court focused on the prosecutor's authority as described in state statutes. 475 U.S. at 484-85.

In contrast, the corporate ethos standard emphasizes many aspects of a corporation's structure when identifying corporate ethos, custom or policy. The formal decisionmaking process and the status of participants involved in the activity constitute only two relevant factors.

Perhaps the most direct example of courts' willingness to consider corporate intent is the use of the concept of "collective intent." *United States v. Bank of New England* [82] exemplifies this concept. The Bank of New England was convicted on thirty-one counts of violating 31 U.S.C. §§ 5313 and 5322 for failing to file Currency Transaction Reports ("CTRs") on cash transactions of more than $10,000.[83] On thirty-one occasions, James McDonough, a bank customer, withdrew more than $10,000 in cash from a single account by simultaneously presenting multiple checks in sums less than $10,000 to a single bank teller.[84]

Acknowledging that under applicable law a corporation's criminal intent is imputed from an agent's intent, the bank argued that it was not liable because no one bank employee had sufficient criminal intent of McDonough's transactions.[85] In other words, according to the bank, the teller who conducted the McDonough transactions did not know that the law required the filing of CTRs when a customer withdraws $10,000 from a single account using multiple checks all of which are less than $10,000, and the bank employee who knew of the CTR requirement did not know of the McDonough transactions. Thus, according to the bank, there was no single bank employee with sufficient mens rea to impute to the corporation. The court rejected the bank's argument, and gave an instruction to the jury describing "collective intent":

> [Y]ou have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment.[86]

By employing the notion of "collective intent," courts are, in effect, recognizing the existence of an organizational identity that exceeds the sum of its parts and exists independently of the individuals who work for it.

Law developing in other countries has begun to require a finding of corporate intent before holding corporations criminally liable. In several instances Dutch courts, for example, have held a corporation criminally liable if, but only if, the organization itself has demonstrated culpability.[87] To assess culpability, the Dutch courts have looked to the corpora-

82. 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

83. *Id.* at 847.

84. *Id.*

85. *Id.* at 855-56.

86. *Id.* at 855.

87. Stewart Field & Nico Jörg, *Corporate Liability and Manslaughter: Should We be Going Dutch?*, 1991 CRIM. L. REV. 156, 163-71.

tion's efforts, or lack of efforts, to remedy the situation that led to the criminal conduct. In a 1981 case, *Kabeljauw*,[88] a Dutch court acquitted a corporate shipowner on criminal charges that it had violated shipping regulations when one of its vessels caught prohibited species of animals. Both the trial and appellate courts based their decisions of acquittal on the fact that the corporation had taken affirmative steps to prohibit such unlawful fishing by equipping its ships with nets specially designed for fishing only permitted species.[89] Likewise, in 1987, a Dutch appellate court affirmed the first conviction of a corporation for manslaughter based upon a finding of numerous instances of poor monitoring by a hospital of its equipment and employees, which led to the death of a patient.[90]

Australian law currently follows the MPC approach of imposing criminal liability on corporations if the conduct was committed by higher echelon corporate agents.[91] The Attorneys General of Australia, however, have suggested legislation that would amend this standard to also hold criminally liable any organization that "expressly, tacitly or impliedly authorized or permitted the commission of the offense."[92] Such authorization or permission could be proven by showing that a "corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision."[93] The proposed legislation defines corporate culture as "an attitude, policy, rule, course of conduct or practice existing within the body corporate."[94]

In explaining the rationale for moving from the current standard which focuses only on vicarious liability to one that also focuses on an organization's culpability, the Attorneys General found that the strict liability approach was "no longer appropriate" and indicated that it was striving to deal with organizational blameworthiness by developing

88. Hoge Raad, July 1, 1981, N.J. 1982, 80 (summarized in Field & Jörg, *supra* note 87, at 164).

89. *Id.*

90. *Hospital Case*, Rechtbank Leeuwarden, Dec. 23, 1987, *partially reported at* N.J. 1988, 981 (summarized in Field & Jörg, *supra* note 87, at 158, 164-65).

91. Standing Committee of Attorneys General, Criminal Law Officers Committee, *Model Criminal Code, Discussion Draft* 95 (July 1992).

92. *Id.* § 501.2.

93. *Id.* § 501.2.1.

94. *Id.* § 501.2.2.

"rules which fairly adapt the general principles of criminal responsibility to the complexities of the corporate form."[95]

Assessment of corporate intent is not only theoretically sound, but making such an assessment is practicable, workable, and provable from concrete information already available in grand jury investigations of corporate crime. To ascertain the ethos of a corporation, and to determine whether this ethos encouraged the criminal conduct at issue, the factfinder would examine the following corporate policies and procedures: (1) the corporate hierarchy; (2) the corporation's goals and policies; (3) the corporation's historical treatment of prior offenses; (4) the corporation's efforts to educate and monitor employees' compliance with the law; and (5) the corporation's compensation scheme, especially its policy on indemnification of corporate employees.

Not only is access to these facts obtainable through a grand jury investigation of corporate activity, but such facts are subject to proof in court. For example, inquiry into corporate hierarchy would begin with the board of directors' role. Does the board operate as a figurehead or does it monitor the corporation's efforts to comply with the law? If the board or any board member allegedly performs this function, does the board or the member have effective access and resources? In addition to examining the board of directors' role, the factfinder should also examine management's organizational structure. As Professor Braithwaite has stated: "The key to understanding so much organizational crime . . . is the way that organizational complexity can be used to protect people from . . . exposure to criminal liability."[96] The factfinder should focus on whether management left unmonitored or inaccessible positions within the corporation where illegal behavior could have occurred easily. If positions were left unattended, the factfinder should scrutinize the reason: was the oversight an honest error in judgment or was it a callous recognition that if corporate employees commit illegal activity, it is best done outside the usual channels of supervision? Intentional gaps in the corporate hierarchy that allowed the criminal conduct to occur would weigh in favor of finding a corporation criminally liable. On the other hand, a finding that a corporation's organizational structure provides for effective supervision of all aspects of the organization weighs against finding a corporation

95. *Id.* at 95 (comment. to § 501).

96. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 147 (1989).

criminally liable, even though corporate agents committed the criminal act.

When considering the corporate goals, the factfinder should examine whether the goals set for the relevant division, subsidiary, or employee promote lawful behavior or implicitly encourage illegal behavior. As the American Law Institute noted in devising the Model Penal Code's standard of corporate criminal liability, "the economic pressures within the corporate body [may be] sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain."[97]

In some corporations, employees have the opportunity to disobey or to comply with the law many times each day. These corporations have a greater duty to educate their employees about legal requirements than do corporations where employees do not have such opportunities. Likewise, a corporation's duty to educate its employees about legal requirements varies with the type of employee involved. For example, few would disagree that a banking corporation has a duty to educate all of its tellers about reporting requirements for cash transactions, but that it has no duty to so educate its janitorial employees. The factfinder, therefore, should consider whether the corporation has made *reasonable* efforts to educate its employees about legal requirements. Relevant inquiries in assessing these efforts include: (1) Whether the corporation informed the appropriate employees of regulatory changes that affect their duties; (2) Whether the corporation explained new regulations in a comprehensible manner; (3) Whether middle management executives held regular meetings to discuss problems of compliance; (4) Whether the corporation made its legal staff available for discussions on compliance; and (5) Whether middle management attended or held specific training programs on ethics and government regulation.

In a study of corporations conducted by Marshall Clinard, middle level managers cited effective employee monitoring as one of the practices important in cultivating an ethical corporation.[98] A factfinder applying the corporate ethos standard should determine how effectively the corporation monitors employee compliance with applicable legal requirements. To determine effectiveness, the factfinder should ask: (1) Does the company conduct internal audits? (2) Does the corporation maintain open channels of communication throughout the management hierarchy?

97. MODEL PENAL CODE, Comments § 2.07, at 148-49 (Tentative Draft No. 4, 1955).

98. MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME 159 (1983).

(3) Does the corporation require employees to sign an annual statement indicating that they are familiar with pertinent government regulations *and* acknowledging that they realize such violations will result in dismissal? (4) Does the corporation have an ombudsman?

The factfinder also should determine who committed the criminal violation, who contributed to its success, and which (if any) higher echelon officials "recklessly tolerated" the offense. At this point, the corporate ethos standard deviates from current vicarious liability standards for corporate criminal liability. Under traditional respondeat superior doctrine, if a corporate agent intentionally commits a criminal offense while acting within the scope of her duties and for the benefit of the corporation, a court will find the corporation itself guilty.[99] Under the MPC standard, if higher echelon officials participate in or recklessly tolerate the offense, corporate liability results.[100] Under the corporate ethos standard, however, such facts do not conclusively establish criminal liability. The government must go further to demonstrate that the corporation encouraged such conduct. Admittedly, the chance of finding a corporate ethos that encouraged the criminal conduct increases if higher echelon officials are involved, but such officials' participation or acquiescence is not decisive. Rather, the conduct of higher level officials is simply more relevant and indicative of corporate intent than is the action of lower level officials.

According to Marshall Clinard's study, a corporation's reaction to a prior violation of the law may be one of the more important factors encouraging ethical patterns in the corporation: "[P]rior enforcement actions . . . not only affected compliance in the particular area in which they were brought, but also had tended to affect compliance with government regulations generally."[101] The factfinder should consider the corporation's prior treatment of employees who violated the law. Relevant inquiries include: (1) Did the corporation discipline, or promote, the violators? (2) Did the corporation reimburse the violators for criminal or civil fines assessed in their individual capacity or pay their attorneys' fees? (3) What steps did the corporation take to prevent such action from occurring again? (4) Did the corporation make efforts to rectify the situation that led to the violations, or did it attempt to conceal the violations? If a corporation conscientiously and in good faith attempted to

99. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.10(a) (2d ed. 1986).

100. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962).

101. CLINARD, *supra* note 98, at 157-58.

remove the cause of the prior violation, it is unlikely that an ethos existed within that corporation that encouraged the criminal conduct. However, if a corporation took few or no steps to remedy the situation that encouraged a violation, or if it attempted to conceal misconduct, a corporate ethos which promotes illegal behavior likely exists and should subject the corporation to criminal liability.

One must concede to the critics of a "corporate intent" standard for assessing criminal liability that we cannot fully, completely, and accurately ascertain a corporate ethos. This is true, it is not possible. But if we are candid we will admit the criminal law's requirement of proof of mens rea has long imposed a factually impossible burden on the government. We are accustomed to this burden, however, and so do not easily realize that direct proof of intent is impossible and that we have simply become comfortable with approximations that do not overcome the impossibility of our task. However, our inability to prove directly an individual's intent does not cause us to reject the entire concept or, given sufficient circumstantial evidence, to question whether the factfinders have accurately deduced an individual's intent. So it is with corporate ethos. When the government presents sufficient circumstantial evidence, we can and should feel confident in the factfinders' deduction of a corporation's ethos.

The third major hurdle in adopting a standard of corporate criminal liability that hinges upon finding corporate intent is the perception by some that such a standard is "soft" on corporate crime. Certainly it is expected that under such a standard, some corporations that are criminally liable under the current standards would not be liable, yet this is because our current standards hold *all* corporations criminally liable for crimes committed by their agents or, with the MPC, some of their agents. To exempt from criminal liability law-abiding corporations that make every effort to ensure that their employees follow the law is not being "soft" on crime. It is using the criminal law wisely. Under a standard of criminal liability that focuses on corporate intent, the corporations that will be convicted are culpable and deserve punishment. Our criminal justice resources will be saved for these corporations rather than spent on corporations that have objectively and in good faith performed as good corporate citizens.

IV. ARE THE SENTENCING GUIDELINES A SUFFICIENT ANSWER TO THE PROBLEMS PRESENTED BY CURRENT STANDARDS FOR ASSESSING CORPORATE CRIMINAL LIABILITY?

If the Sentencing Guidelines for organizations and the corporate ethos standard of corporate criminal liability both focus on a corporation's culpability, has the Sentencing Commission remedied any unfairness or jurisprudential unsoundness caused by our current standards for assessing corporate liability? Some scholars suggest this. These scholars focus on problems caused by the "blurring" of civil and criminal liability, which is typified by the imposition of criminal liability on organizations.

Professor Coffee attributes this blurring, in part, to the current law's failure to focus on the criminal intent of the corporate actor.[102] Highlighting the need to differentiate between civil and criminal liability, Professor Coffee reviews the components of our criminal justice system and concludes that neither courts, nor legislatures, nor prosecutors can be counted upon to decide when civil or criminal liability should be imposed.[103] He concludes that the Sentencing Commission, through its Guidelines, represents the "last, best hope" for the criminal justice system to preserve the distinction between crimes and torts.[104]

Professors Yellen and Mayer also address problems presented by the blurring of civil and criminal liability.[105] They emphasize that a criminal conviction often triggers the imposition of severe civil and administrative sanctions that are extremely disruptive, if not devastating, for the convicted organization. Noting that little effort has been made to coordinate the imposition of criminal and collateral sanctions, they suggest that such coordination take place at the criminal sentencing proceeding: "punitive collateral consequences . . . [should] be considered in calibrating the proper level of punishment for criminally convicted defendants."[106]

While both Professor Coffee's and Professors Yellen and Mayer's proposals represent reasonable solutions to practical problems resulting from the blurring of organizational civil and criminal liability, these proposals address the effects, not the cause, of these problems. The cause is the use of jurisprudentially unsound standards for assessing corporate

102. Coffee, *supra* note 54, at 239, 246.

103. *Id.* at 240-41.

104. *Id.* at 241-42, 246.

105. David Yellen & Carl J. Mayer, *Coordinating Sanctions for Corporate Misconduct: Civil or Criminal Punishment*, 29 AM. CRIM. L. REV. 961 (1991).

106. *Id.* at 964.

criminal liability. Solutions that fail to address the root of this problem are doomed to be never-ending efforts to fix something that always breaks.

There are four reasons we cannot rely on the jurisprudential soundness of the Guidelines to remedy our defective standards for allocating corporate criminal liability. The first reason is the most abstract but most important. The power of the criminal law is diminished when criminal liability is imposed for accidents or mistakes, regardless of how egregious the consequences.[107] As our world becomes more crowded, more stressful, and more violent, society must have effective tools for dealing with those who intentionally disregard societal rules. Properly used, the criminal law is society's most powerful tool. It alone has the potential for imposing the ultimate punishment and uniquely stigmatizing the offender. To maintain the power of the criminal law, however, society must acknowledge and protect its unique nature. When we convict actors, whether individuals or organizations, who have made every effort to comply with the law, we have convicted without a finding of culpability. This compromises the power of the criminal law. We must resist the temptation to use criminal sanctions as a "quick fix" for problems that are better handled through other responses. Although these alternative responses may be more complex and work more slowly and less dramatically, they may be more suited to unintentional violations of the law. Failure to restrict our use of the criminal law to intentional violations will squander the power of the criminal conviction.

The second reason is related: because our criminal justice system has finite human, financial, and institutional resources, prosecuting one case necessarily means that other criminal violations cannot be prosecuted. Inappropriate prosecutions thus have a double cost—not only do they weaken the impact of the criminal law, but they also divert scarce resources from other cases. This double cost is especially high when the

107. *But see* Chris Tollefson, *Ideologies Clashing: Corporations, Criminal Law, and the Regulator Offence*, 29 OSGOODE HALL L.J. 705, 740 (1991) (suggesting that for regulatory offenses the criminal law should move away from defining culpability in terms of moral fault and toward defining culpability in terms of harm caused).

Presumably such an approach would, for example, make it easier for courts to impose criminal liability on the corporation that pollutes—not because the corporation has acted intentionally, but because of the "social costs" of its action. *Cf. id.* at 741. Professor Tollefson correctly articulates the view of those who advocate a focus on the harm caused rather than on corporate intent. Like others following this view, Tollefson does not address issues such as the nature of the criminal law and the costs of ignoring this nature when attempting to control these harms through criminal sanctions.

case pursued is complex and consumes more resources than most, which is true of prosecutions of organizations.

The third reason not to rely simply upon the Sentencing Guidelines to distinguish between organizations that deserve criminal liability and organizations that do not is the high cost of a conviction to a business entity. Even for the organization that is able to reduce substantially its criminal fine through the Guidelines' culpability factors, a criminal conviction carries high costs. There are out-of-pocket expenses in defending the prosecution, such as attorneys' fees and travel and investigative expenses. There are also indirect costs such as the loss of time and attention to business matters by corporate executives and corporate counsel who must involve themselves in the criminal investigation and defense. Other devastating costs may follow a conviction. Even if the sentencing court reduces the criminal fine by applying the culpability factors, collateral consequences may arise which the Guidelines cannot reduce.[108] As Professors Yellen and Mayer note,[109] collateral consequences such as suspension or elimination from governmental programs,[110] loss of professional licenses necessary to continue in business,[111] imposition of substantial administrative and civil fines,[112] termination of insurance,[113] and denial of applications for expansion may effectively ruin a corporation. In addition to these collateral consequences, the convicted corporation may face adverse publicity. In some instances adverse publicity alone can cause corporate devastation, as when depositors flock to withdraw

108. The Guidelines instruct the sentencing court to consider civil or administrative collateral consequences that a corporate defendant may face. U.S.S.G., *supra* note 1, § 8C2.8(a)(3). But the sentencing court considers collateral consequences only when assessing a particular fine within the mandated fine range.

109. Professors Yellen and Mayer provide an excellent discussion of these collateral consequences and the increasing frequency with which courts have imposed them. Yellen & Mayer, *supra* note 105, at 962-1000.

110. *See, e.g.*, Federal Acquisition Regulations System (FARS), 48 C.F.R. § 9.400-.409 (1991) (defense contractors); 42 C.F.R. § 1001.1-.953 (1991) (Medicare and Medicaid providers).

111. *See, e.g.*, GA. CODE ANN. § 43-34-37 (Michie Supp. 1992) (State Board of Medical Examiners has authority to discipline a licensed physician upon a finding that, *inter alia*, the physician has been convicted of a felony or has committed a crime involving moral turpitude); MO. REV. STAT. § 484.190 (1987) (authorizing the suspension or removal of any attorney convicted of "any criminal offense involving moral turpitude").

112. *See, e.g.*, 31 U.S.C. §§ 3729-3731 (1988) (establishing civil penalties of up to $10,000 for each false claim submitted to the federal government plus treble damages).

113. 12 U.S.C. § 1818 (Supp. III 1991) (regarding federally insured financial institutions).

deposits from a convicted, or even indicted, financial institution.[114]

There is, of course, nothing wrong with requiring an organization that deserves prosecution to pay its legal expenses, or in imposing collateral consequences on an organization that deserves conviction. To the contrary, coordination between the criminal justice system and the agencies imposing the collateral consequences is commendable. The problem is that under the current standards of corporate criminal liability, organizations that never should have been convicted in the first place will be subjected to these collateral costs and consequences upon conviction. Such organizations will derive little comfort from the fact that they can obtain a reduction in their criminal fines under the Guidelines.

The fourth reason we cannot rely upon the Guidelines to cure our inappropriate use of the criminal law is that the Guidelines themselves may cause adverse reactions within the convicted, or even within the indicted, corporation. These reactions may occur as the corporate defendant strives to obtain an optimal culpability score or if the court imposes certain conditions of probation on the corporation.

To obtain the best possible culpability score, a corporation must fully cooperate with the government. This cooperation requires the corporation to disclose "all pertinent information known by the organization."[115] The comments to the Guidelines explain that "pertinent information" is "information . . . sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct."[116] Thus, to obtain the lowest possible fine a corporation must, in effect, act as the government's agent in interrogating corporate employees and in targeting employees for potential criminal prosecution. This type of cooperation with the government creates a conflict of interest between the corporation, its corporate counsel, and its employees. It may well demoralize employees and leave a lasting adverse impact on a corporation that, under a corporate ethos standard, would never have been indicted in the first place.

The Guidelines also provide that a sentencing court may place a convicted organization on probation. Conceivably, if not predictably, one standard condition of probation will be requiring the organization to submit to interrogation of employees and examination of its books and

114. E. Lawrence Barcella, Jr., *The New Guidelines*, 2 MONEY LAUNDERING L. REP. 1, 5 (Nov. 1991).

115. U.S.S.G., *supra* note 1, § 8C2.5 (comment. (n.12)).

116. *Id.*

records by probation officers or court-appointed experts.[117] Again, for the culpable corporation that encouraged criminal behavior by its employees, such a condition of probation is entirely proper. For the corporation that never should have been convicted, however, such monitoring may not be constructive but may unnecessarily stigmatize a corporation and waste corporate resources.

CONCLUSION

Standards for imposing criminal liability on organizations are a good example of why jurisprudential soundness matters. Currently, the organization that takes every step possible to educate, motivate, and monitor its employees to ensure that they follow the law may be criminally liable when a maverick employee, acting against clear corporate policy, commits a crime while employed by the organization. To acknowledge that our current standards for holding corporations criminally liable have serious problems is not tantamount to sympathizing with corporate America. Rather, it is acknowledging that the criminal law has an essential character: to hold liable only those who intentionally engage in criminal wrongdoing. Failure to recognize this essential character causes specific, concrete problems for our criminal justice system. Prosecutors have too little guidance as to which organizations they should prosecute. Citizens (in this context, those who control organizations) are powerless to take steps to guard against the imposition of criminal liability for the organization. Lastly, the power of the criminal sanction is diminished.

Commendably, the Sentencing Guidelines provide a theoretical mechanism for assessing an organization's culpability and an incentive for corporations to encourage employees to comply with the law. Thus, whatever success the Guidelines achieve in standardizing sentences meted out to convicted organizations, the Guidelines break significant ground.

By enacting the Guidelines, Congress has acknowledged, however unwittingly, that it is possible, and fair, to identify an organization's intent for purposes of assessing criminal punishment. Congress has, however, begun at the end of the problem rather than at the beginning. By the time an organization is sentenced under the Sentencing Guidelines, it has already been convicted under an inappropriate standard of liability and is well on its way to suffering the consequences that flow from a criminal

117. *Id.* § 8D1.4(b)(2).

investigation and conviction. Congress should complete the task of analyzing organizational criminal liability and enact a jurisprudentially sound standard of criminal liability that furthers, rather than diminishes, the power of the criminal law.