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Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines

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BEYOND FINES: INNOVATIVE CORPORATE SENTENCES UNDER FEDERAL SENTENCING GUIDELINES

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The United States Sentencing Commission's recent Sentencing Guidelines for organizations¹ (the "Guidelines" or "Sentencing Guidelines") have prompted a long overdue reappraisal of corporate criminal liability and sentencing. Much of this reappraisal has focused on the fines imposed under the new Guidelines.² Large corporate fines recommended under the Guidelines have encouraged firm managers to consider new crime prevention methods in corporate organizations. Corporate blameworthiness standards specified in the Guidelines as bases for upward and downward fine adjustments have focused new attention on standards for assessing corporate fault in criminal offenses. The Guidelines' reliance on large fines to deter corporate crimes has renewed debate about the desirability of corporate criminal liability and fines as means to prevent corporate offenses.

These reactions to the corporate fines recommended under the Guidelines are important, but they overlook another important advance in the new Sentencing Guidelines. The Guidelines authorize several innovative corporate sentences aimed at ameliorating the impact of corporate crimes and at preventing repeat offenses. These sentences include restitution orders for broad categories of crimes, remedial orders mandating cleanups and other restorative actions beyond restitution, notices to crime victims

1. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, ch. 8 (1992) [hereinafter U.S.S.G.].

2. The Sentencing Guidelines set corporate fines based on offense and offender characteristics. Offense characteristics affecting fine levels include offender gains, victim losses, and other crime characteristics significant in individual offender sentencing. Corporate offender characteristics that affect fine size include the participation of top corporate managers in offenses, the scope of preexisting law compliance programs aimed at preventing offenses, and the reporting of internally detected crimes to public authorities. See U.S.S.G., *supra* note 1, §§ 8C2.1-8C2.10.

For a detailed discussion of factors affecting corporate fines under the federal Sentencing Guidelines, see Richard S. Gruner, *Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines*, 66 S. CAL. L. REV. 225 (1992).

to promote individual recoveries, restrictive probation sentences to prevent repeat offenses, and adverse publicity aimed at modifying public attitudes toward corporate offenders.

The significance of these innovative sentencing options can be measured in three frameworks. On one level, these new sanctions permit sentencing courts to render direct aid to a broad range of parties affected by organizational offenses. The range of parties potentially benefitted by these measures include: (1) victims of offenses who are not cognizant of their status as victims, (2) other victims who are aware that they are crime victims, but have insufficient resources to press individual damage claims, (3) further victims who will be prejudiced by the delays required to obtain damage recoveries through civil suits, (4) employees, customers, suppliers, lenders, investors, or other parties who may wish to redefine their relationships with corporate offenders (or avoid such relationships altogether) based on full information about corporate offenses, and (5) the public generally insofar as sentences impose special conduct constraints or law enforcement monitoring to prevent future offenses.³

A second framework for measuring the significance of the new sentencing options set forth in the Guidelines relates to their probable impact on corporate prosecutions. The new types of corporate sentences recommended under the Guidelines appear likely to increase the frequency of corporate prosecutions.⁴ The availability of corporate sentences serving the broad remedial and preventive goals described above may prompt prosecutors to pursue corporate prosecutions that would be ignored if corporate fines alone were available. This will be particularly likely when an offense has large numbers of victims and sentencing options such as victim notices or restitution orders will serve the interests of numerous parties. The availability of innovative probation or remedial sanctions also may encourage corporate prosecutions for environmental offenses. Prosecutors may see these sanctions as means to aid victims who do not appreciate the source or scope of their injury or to

3. See *Special Report: Organizational Prosecutions Present New High-Stakes Game*, 8 SEC. REG. & L. REP. (BNA) 239, 240 (Feb. 21, 1992) (noting that restitution payments determined by sentencing courts may avoid long discovery and civil trials to resolve damage claims) [hereinafter *Special Report*].

4. If prosecutors decide to prosecute corporate employees for an offense benefitting their firm, the further decision to prosecute the firm will turn on balancing the additional corporate deterrents and victim remedies to be gained from a corporate conviction against the likelihood that the corporation will mount a more vigorous defense if joined as a defendant.

remedy non-pecuniary harm to the environment. The availability of restrictive probation sanctions also may make corporate prosecutions more attractive in environmental or workplace safety cases where the government's primary goal is to prevent future injuries rather than just to punish a corporate offender for past violations.

A third perspective on innovative corporate sanctions is that of corporate managers in convicted firms. Beyond adding to the general deterrence impact of corporate fines, the threat of innovative and often restrictive criminal sanctions may be particularly important in shaping post-offense responses to corporate crimes. When imposing innovative sentences like restitution orders, remedial requirements, or restrictive probation sentences, sentencing courts will consider the actions of the corporate defendant up to the point of sentencing and the need for sanctions given those actions. Hence, the threat of restrictive sanctions will encourage firms to take remedial and reform actions themselves before they are required to take similar actions in potentially less desirable ways by a sentencing court. Once managers appreciate that corporate criminal liability is probable, the sentencing options specified in the Guidelines identify an agenda for change and remedial action that corporate offenders will often wish to implement voluntarily. Thus, even when they are not imposed because a defendant organization has already taken corrective actions before sentencing, the innovative corporate sentences recommended under the new Sentencing Guidelines serve a valuable public purpose by guiding and motivating desirable corporate responses to offenses.

This Article examines innovative corporate sentences beyond fines. It emphasizes types of corporate sentences recommended under the United States Sentencing Commission's Sentencing Guidelines for Organizations. The Article has four goals. First, it seeks to inform judges, prosecutors, defense attorneys and others in the criminal justice community about these as yet unfamiliar corporate sentencing options. Second, it explores the policy rationales supporting innovative corporate sentences. Third, it considers ambiguities in the Guidelines authorizing innovative corporate sentences and suggests means to resolve these ambiguities. Fourth, the Article articulates principles for sentencing courts to use in crafting specific corporate sentences within the broad authorizing language of the Sentencing Guidelines. Finally, the Article identifies circumstances warranting innovative sanctions under the Guidelines, some

limitations on their use, and sentencing and prosecutorial strategies that will maximize public benefits from these sanctions.

I. THE ROLE OF NON-TRADITIONAL SANCTIONS IN CORPORATE SENTENCING

Innovative criminal sanctions like expanded restitution orders, remedial orders or restrictive probation sentences serve important sentencing goals that are often unsatisfied through other criminal sentences. These goals include remedying damage from offenses, specifically deterring corporate offenders, and changing corporate management behavior to prevent repeat offenses.

The Sentencing Reform Act of 1984⁵ placed remedial and reform goals at the heart of federal sentencing. The Act requires federal courts "in determining the particular sentence to be imposed" on a criminal offender to consider "the need to provide restitution to any victims of the offense."⁶ The Act authorized sentences including restitution orders for a wide range of offenses.⁷ Restitution is even more strongly supported under the new Guidelines. The Guidelines reflect the Sentencing Commission's view that, in sentencing an organizational offender, a court "must, whenever practicable, order the organization to remedy any harm caused by the offense."⁸

The Sentencing Reform Act also established preventive and reform goals for corporate sentencing. The Act identifies specific deterrence and offender reform as primary goals of federal sentencing.⁹ The drafters of the Act expected criminal sentences for both individuals and organizations to further these goals. For example, they anticipated that sentencing restrictions on organizational operations would be used to prevent repeat offenses.¹⁰ In its corporate sentencing guidelines, the Sentencing

5. The Sentencing Reform Act of 1984 was enacted as part of the Comprehensive Crime Control Act of 1984. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

6. 18 U.S.C. § 3553(a)(7) (1988).

7. The Act added § 3556 to Title 18 of the United States Code. That section provides for restitution for all violations of Title 18 and of designated sections of 49 U.S.C. § 1472. See 18 U.S.C. § 3556 (1988). For all other offenses, federal legislation supports restitution orders imposed as a condition of probation. See 18 U.S.C. § 3563(b)(3) (Supp. III 1985).

8. U.S.S.G., *supra* note 1, ch. 8 (Introductory comment.).

9. 18 U.S.C. § 3553(a) (Supp. III 1985); S. REP. NO. 225, 98th Cong., 2d Sess. 76 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 [hereinafter S. REP. NO. 225].

10. See S. REP. NO. 225, *supra* note 9, at 96 ("[A]n organization convicted of executing a fraudulent scheme might be directed to operate that part of the business in a manner that was not fraudulent.").

Commission provided for a number of sanctions aimed at corporate reform and specific deterrence. These include: (1) mandatory publicity by a corporate offender about its offense to encourage heightened monitoring of offender behavior in private relationships;¹¹ (2) a court-ordered law compliance program where a firm having fifty or more employees has not adopted such a program before sentencing;¹² and (3) additional law compliance measures where the nature of a firm's offense indicates that changes to reduce the likelihood of future criminal conduct are needed.¹³

Given their elaborate nature in comparison with a simple order to pay a fine, there may be unusual judicial administration costs associated with these innovative sanctions. However, these appear to be costs that Congress intended sentencing courts and convicted firms to bear in the interest of reducing corporate crime and preventing repeat offenses. Furthermore, since sentencing courts can require corporate probationers to pay for many of the expensive components of sanction administration, most, if not all, of the costs of innovative sanctions can be placed on corporate offenders, rather than on sentencing courts or government agencies.¹⁴

Even if some costs of changed offender behavior (for example, the business impact of probation terms that preclude certain sales tactics) are significant, the notion of imposing exceptional burdens and costs on convicted parties to insure that they avoid future crimes is not peculiar to corporate sentencing. Sentencing courts impose many costly probation restrictions on individuals to prevent further offenses and to encourage offender rehabilitation.¹⁵ These added burdens on individual probationers constitute a fair complement to the criminal behavior leading to sentencing and a necessary cost to further sentencing goals that courts

11. U.S.S.G., *supra* note 1, § 8D1.4(a).

12. U.S.S.G., *supra* note 1, §§ 8D1.1(a)(3), 8D1.4(c).

13. U.S.S.G., *supra* note 1, §§ 8D1.1(4)-(6), 8D1.4(c).

14. Where the development or enforcement of innovative sanctions requires special expertise or monitoring of offender conduct, sentencing courts can shift associated burdens to offenders by imposing probation terms that provide for the appointment of experts to aid the court and can require offenders to pay costs associated with these appointments.

15. Many of the probation conditions authorized for individuals sentenced under the Sentencing Reform Act and recommended by the United States Sentencing Commission involve limitations on individual conduct that will entail losses of income or costly conduct by probationers. These include restrictions on work activities, required support payments to family members, and mandated community service. See 18 U.S.C. § 3563(b)(1), (5), (6), (13); U.S.S.G., *supra* note 1, §§ 5B1.4(a)(4), (b)(21), (b)(22).

cannot achieve in other ways. Similar considerations justify special preventive demands on corporate probationers.

II. REMEDIAL SANCTIONS

The new Guidelines embrace ambitious remedial goals. Except where determinations of victim injuries will significantly delay or otherwise impair the sentencing process, the Guidelines instruct sentencing courts to order restitution for a wide range of offenses. Restitution orders can provide for deferred payments if a convicted firm lacks the resources to make immediate restitution. Where a sentencing court chooses to withhold a restitution order, but believes that with greater information about an offense individual victims may be able to appreciate their status and seek civil remedies, the court can order a convicted corporation to provide notices about its offense to probable victims. Finally, where the identity of crime victims is unclear or offense damages are neither presently identifiable physical injuries nor pecuniary losses, a sentencing court can fashion remedial orders obligating a convicted corporation to take actions likely to prevent or reduce harm stemming from an offense. Similarly, where a convicted organization possesses knowledge, facilities, or skills that uniquely qualify organization personnel to repair damage resulting from an offense, a sentencing court can order the corporation to engage in remedial community service.

A. Immediate Restitution

A criminal restitution order requires an offender to make a monetary payment to a crime victim with the aim of "making the victim whole for the harm caused" by an offense.¹⁶ Restitution is an important corporate sentencing objective for several reasons.¹⁷ Restitution by convicted corporations reduces the impact of crimes on victims.¹⁸ Several considera-

16. William W. Wilkins, Jr., *Sentencing Guidelines for Organizational Defendants*, 3 FED. SENTENCING REP. 118, 119 (1990); cf. *Kelly v. Robinson*, 479 U.S. 36, 46 (1986) (for bankruptcy law purposes, restitution is deemed part of a criminal penalty, not compensation for victim losses).

17. See generally Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 U.C.L.A. L. REV. 52, 119-26 (1982).

18. See *Hughey v. United States*, 495 U.S. 411, 416 (1990) (federal restitution sentences are imposed to restore victims to the positions they occupied prior to offenses); S. REP. NO. 532, 97th Cong., 2d Sess. 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2515 (the purpose of restitution is to "restore the victim to his or her prior state of well-being"). But see *Kelly v. Robinson*, 479 U.S. 36, 41 (1986) (restitution payments by a criminal offender are aimed at rehabilitating the offender, not at compensating the victim).

tions support the furtherance of this objective through criminal rather than civil processes. First, the policy rationales that support criminalizing certain types of conduct and related government efforts to minimize physical injuries and property losses by preventing crimes also justify state pursuit of victim compensation once prevention has failed.¹⁹ Second, the state often bears some responsibility for failing to prevent or stop crimes; restitution serves as a form of substitute service to victims in cases where prevention and deterrence have failed.²⁰ Third, the state has an interest in maintaining the security of property and public confidence in the ability of private parties to keep rewards for past achievements. Restitution awards offset arbitrary, criminal interference with personal fulfillment and indirectly support public confidence in a wide variety of merit-based processes.²¹ Fourth, where a corporate offense produces illegal gains or losses to competitors, the state has an interest in restitution that will restore the competitive equilibrium that existed before the commission of the offense.²² By depriving offenders of illegal gains and compensating their competitors for offense-related losses, the state can help restore the relative resources and competitive abilities of these parties and insure that offenses do not skew subsequent market discipline and product or service availability. Fifth, the use of criminal proceedings for the administration of both penal sanctions and compensatory restitution provides an efficient means to avoid duplication of procedural steps that

19. The same considerations that justify criminalization and deterrence of specific offense conduct will often justify public efforts to reduce the impact of such conduct once it occurs. For example, the law prohibits antitrust offenses primarily to deter conduct that will impair competition. Where an offense such as price fixing has skewed normal competitive equilibria, compensatory payments can restore both offender and victim to approximately the competitive position that they would have occupied had the offense not occurred. While restitution payments may not perfectly restore victims and offenders to this position, even a roughly accurate restitution award will achieve a closer approximation of normal competitive results than inaction. Hence, restitution serves many of the same goals as crime deterrence and prevention.

20. See CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION: A RESTITUTIONARY APPROACH TO CRIME AND THE CRIMINAL 4-5 (1984). This view of the government's partial responsibility for corporate offenses may be particularly appropriate in heavily regulated fields where the scope of government monitoring and enforcement often correlate with crime levels. For example, the deregulation policies and the associated reductions in savings and loan oversight initiated by the Reagan administration probably explain some of the subsequent rise in fraudulent business practices by savings and loan executives.

21. *Id.* at 94-96.

22. While competitive impacts from illegal conduct are most commonly associated with antitrust offenses, they can also arise from other crimes. For example, a fraud that produces increased sales could give an organization a significant advantage over its competitors if the fraud gains are not disgorged.

might result if compensatory victim recoveries could only be obtained through civil proceedings following criminal prosecutions.²³ This justification is particularly important in connection with corporate prosecutions because victim losses will often figure in corporate fine setting and, consequently, sentencing courts will regularly make the loss determinations necessary to fashion restitution orders.²⁴ Sixth, because prosecutors can threaten to seek harsh sanctions such as large fines or restrictive probation sentences, managers of corporate offenders may decide to avoid these sanctions by agreeing to broader restitution arrangements under plea bargains than they would accept under civil settlements. Federal law presently recognizes the legitimacy of such broad restitution agreements by making restitution obligations agreed to in plea bargains enforceable even where the same type of restitution would be beyond court authority to order directly.²⁵ Finally, federal prosecutors may have greater resources to prove offender misconduct and related harm than individual plaintiffs can muster in civil damage proceedings.

Beyond serving these functions related to victim compensation, restitution sentencing can further several other goals. Viewed as punishment, restitution entails unpleasant consequences for convicted corporations whose agents have interfered with victim activities, while setting the amount of punishment equal to the harm inflicted.²⁶ Restitution sentencing promises predictable costs to offenders that should encourage firm managers to internalize victim losses and shape crime prevention activities in light of those losses. Restitution sentences also create well-tailored deterrents. They threaten crime consequences scaled under the predictable principle of punishment equal to (or enhanced by) the scope of victim losses. Besides being easily understood, this principle for scaling criminal sanctions may be less controversial in our pluralist society than other notions of just deserts or appropriate deterrents.²⁷ Finally, restitution can aid in reforming a convicted corporation by forcing top manag-

23. While the collateral estoppel effect of a criminal conviction might make subsequent civil proceedings less substantively demanding, some procedural duplication would be unavoidable. This duplication would include the need to gain jurisdiction over the participants, assemble them, and empanel another jury. It might also include some duplication of testimony as individual plaintiffs sought to identify themselves as victims of the defendant's illegal acts.

24. A court must consider pecuniary losses caused intentionally, knowingly, or recklessly by corporate personnel when setting corporate sentences, unless the calculation of these losses will unduly complicate or prolong the sentencing process. See U.S.S.G., *supra* note 1, § 8C2.4(a)(3), (c).

25. 18 U.S.C. § 3663(a)(3) (1988).

26. See ABEL & MARSH, *supra* note 20, at 18-19.

27. See *id.* at 94-96.

ers to face the economic hardships created by criminal misconduct and to defend the misconduct and related corporate actions before shareholders who, as residuary claimants in the firm, are most likely to suffer from restitution payments.

Expanding on earlier victim compensation statutes, the Sentencing Guidelines mandate restitution for all federal offenses, except where a sentencing court "determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process."²⁸ Restitution is a sentencing objective independent of punishment. Hence, if a convicted organization can pay restitution, a sentencing court should order restitution payments regardless of the degree of organizational culpability underlying an offense or the nature of any other sanctions imposed.²⁹

The Guidelines provide for two types of restitution arrangements. For offenses under Title 18 of the United States Code and certain air piracy offenses,³⁰ the Guidelines require restitution orders in the form specified in the Victim and Witness Protection Act of 1982.³¹ For other offenses, the Guidelines require sentencing courts to impose restitution obligations as probation terms.³²

The government can enforce a restitution order in the same manner as a fine³³ or a judgment in a civil action. Victims can also enforce a restitution order in the same manner as a civil judgment. The Sentencing Guidelines expand the enforcement options for restitution orders, however, by authorizing sentencing courts to make the payment of restitution a condition of probation, thereby threatening convicted corporations with probation violation sanctions including resentencing for failure to pay restitution.³⁴

While some aspects of restitution sentencing under the Guidelines simply incorporate prior practices, many features are new and unique to corporate sentencing. New restitution issues raised by the Guidelines include the discretionary power of sentencing courts to withhold restitu-

28. U.S.S.G., *supra* note 1, § 8B1.1(b).

29. Wilkins, *supra* note 16, at 119.

30. These air piracy offenses arise under 49 U.S.C. §§ 1472 (h), (i), (j), (n) (1988).

31. 18 U.S.C. §§ 3663, 3664 (1988).

32. U.S.S.G., *supra* note 1, § 8B1.1(a)(2).

33. *See* 18 U.S.C. §§ 3661-3665 (1988).

34. *See* U.S.S.G., *supra* note 1, §§ 8D1.1(a)(1), 8D1.5.

tion, the types of victims eligible for compensation, the principles for determining the compensation due to each victim, and standards for ascertaining when restitution sentencing is too burdensome and a restitution order should be withheld.

1. *Judicial Discretion Regarding Restitution Sentencing*

The Sentencing Guidelines do not clearly delineate the discretion that sentencing courts have to withhold restitution sentences. The Guidelines appear to make restitution orders or equivalent probation terms mandatory, except where a sentencing court determines that a convicted organization has already made full restitution or that the fashioning of a restitution order would be exceptionally burdensome.³⁵ However, the Guidelines mandate restitution to the extent that restitution is authorized under the Victim and Witness Protection Act of 1982.³⁶ Under that Act, sentencing courts have the discretion to withhold restitution orders based on criteria other than the difficulty of fashioning a restitution order.³⁷ It remains unclear whether this combination of mandatory guideline language referring to discretionary statutory language produces a mandatory or discretionary restitution standard for sentencing courts.

If, as one court has concluded in an analogous context,³⁸ the Guidelines on corporate restitution sentences are viewed as mere cross-references to the earlier Victim and Witness Protection Act, sentencing courts have broad discretion to withhold restitution sentences. However, if the new restitution guidelines for corporate offenders are seen as attempts by the Sentencing Commission to limit court discretion and further victim restitution in all circumstances except where the fashioning of a restitution order will be exceptionally burdensome, then this type of sentencing burden constitutes the only legitimate ground for refusing to require a corporate offender to pay restitution.

It seems clear that the Sentencing Commission intended the latter interpretation to prevail. The Guidelines provide that a sentencing court

35. See U.S.S.G., *supra* note 1, § 8B1.1(a) (providing that a sentencing court "shall" compel restitution, except under certain enumerated circumstances).

36. *Id.*

37. See 18 U.S.C. § 3663(b) (providing that sentencing courts "may" order restitution for certain types of injuries).

38. See *United States v. Owens*, 901 F.2d 1457, 1459 (8th Cir. 1990) (finding that § 5E4.1, concerning restitutionary sentences for individuals, merely cross-references the Victim and Witness Protection Act and does not, despite its mandatory terms, impose an obligation on sentencing courts to order restitution).

“shall” compel restitution if it was “authorized” by the Victim and Witness Protection Act of 1982 or would have been so authorized if the offense under sentencing had fallen within the limited range of offenses addressed by the Act.³⁹ The Commission therefore required restitution except where the Act precluded it. Where restitution was authorized, but discretionary under the Act, the Commission’s guidelines now make restitution mandatory. This approach retains the specific discretion limits in the Victim and Witness Protection Act, but precludes sentencing courts from injecting other grounds for withholding restitution.

The Commission confirmed this interpretation of its restitution standards in commentary introducing the new Sentencing Guidelines. The Commission stated that it expected sentencing courts to impose restitution obligations in all cases where the formulation of those obligations was practical.⁴⁰ In addition, the Commission promulgated its restitution standards as judicially binding sentencing guidelines rather than advisory policy statements, despite having the option to choose the latter approach. It seems doubtful that the Commission would adopt guideline language mandating restitution while simultaneously intending that sentencing courts be able to withhold restitution sentences based on their own criteria.

A final question, then, is whether the Commission had the authority to issue restitution standards binding federal courts to the degree just described. At least one commentator has suggested that the promulgation of mandatory restitution standards exceeds the statutory charter of the Sentencing Commission.⁴¹ The statute creating the Commission recognizes its authority to develop “general policy statements” (i.e., advisory standards) regarding restitution orders, while particularly authorizing the Commission to issue judicially binding guidelines for sentences like fines, probation, or imprisonment.⁴² Thus, because the Commission’s statutory charter does not directly address its authority to issue sentencing guidelines concerning restitution sentences, the Commission’s pro-

39. U.S.S.G., *supra* note 1, § 8B1.1(a).

40. *See* U.S.S.G., *supra* note 1, ch. 8 (Introductory comment.).

41. *See* Victoria Toensing, *Statutory and Policy Arguments in Favor of Judicial Discretion in Corporate Sentencing*, 3 FED. SENTENCING REP. 145, 145 (1990). *Cf.* THOMAS W. HUTCHISON & DAVID YELLEN, *FEDERAL SENTENCING LAW AND PRACTICE* 340 (1989) (noting that the Sentencing Commission’s guideline on restitution sentences for individual defendants is not a guideline contemplated by the Commission’s statutory charter).

42. *Compare* 28 U.S.C. § 994(a)(2)(A) (1988) (restitution) *with* 28 U.S.C. § 994(a)(1)(A) (1988) (other sentences).

mulgation of standards mandating restitution in certain circumstances arguably exceeds its statutory authority.⁴³

However, this analysis ignores two alternate sources of Commission authority to issue binding sentencing guidelines regarding restitution sentences. First, the Commission's statutory charter grants the Commission the authority to promulgate guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case," *including* guidelines that address the proper circumstances for imposing probation, fines, or imprisonment, the amount or duration of those sentences, whether imprisonment should accompany a term of supervised release, and whether multiple sentences should run concurrently or consecutively.⁴⁴ The enumeration of specific topics which the Commission was directed to address in sentencing guidelines did not preclude it from issuing guidelines on other topics related to determining the sentence to be imposed in a criminal case. The Commission's authority to promulgate sentencing guidelines concerning restitution sentences is supported by this general grant of authority to specify standards for determining sentences.

Alternatively, even if it is assumed that Congress limited the authority of the Commission to the issuance of sentencing guidelines on the specific topics mentioned above, the authority to specify standards for restitution is present in the Commission's authority to issue binding sentencing guidelines regarding probation sentences. The Sentencing Reform Act recognizes that probation conditions imposing restitution obligations are a legitimate type of probation sentence.⁴⁵ The Commission's authority to determine sentencing guidelines for probation sentences presumably includes the authority to promulgate guidelines for a particular type of probation sentence—i.e., probation sentences compelling restitution.

By mandating restitution to the full extent allowed by the Victim and Witness Protection Act, the Commission has chosen one of a range of restitution sentencing approaches which it had the authority to endorse as part of its authority over probation standards. Admittedly, this choice

43. See Toensing, *supra* note 41, at 145.

44. 28 U.S.C. § 994(a)(1). Of course, the vesting of these broad rule-making powers in the Commission must comport with constitutional limits on the delegation of legislative power and on the proper functions of a judicial branch body such as the Commission. The Commission's authority over individual sentencing standards has been upheld in the face of such challenges. See *Mistretta v. United States*, 488 U.S. 361 (1989). See generally Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990).

45. See 18 U.S.C. §§ 3563(a)(2), (b)(3).

constrains the pre-existing discretion of sentencing courts to withhold restitution for reasons beyond those specified by the Sentencing Commission. However, this lessening of judicial discretion over restitution sentencing and corresponding reductions in restitution disparities from case to case and court to court should further Congress' general goal of imposing determinant sentencing standards through the creation of the Sentencing Commission and its authorization to issue binding sentencing guidelines.

2. *Eligible Victims*

Ideally, the range of victims eligible for restitution under corporate criminal sentences should depend on the societal interests underlying restitution. Generally, restitution sentences attempt to stabilize social activities and shield them from the disruptive effects of criminal conduct.⁴⁶ This objective suggests that restitution should be coextensive with the harm fairly attributed to an organization's criminal conduct.

One implication of this principle is that the form of the victim should play little or no role in restitution sentencing. Nonhuman entities affected by criminal conduct can suffer disruption of business or other activities to the same extent as individuals engaging in the same activities. Hence, nonhuman actors such as corporations⁴⁷ and governmental agencies⁴⁸ can qualify for restitution payments along with human victims. Furthermore, when a corporate insurer of a human victim has already provided compensation for physical injuries or property damage flowing

46. See ABEL & MARSH, *supra* note 20, at 161.

47. See *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

48. See, e.g., *United States v. Hand*, 863 F.2d 1100, 1103 (3d Cir. 1988) (government was a victim entitled to restitution where offender, sitting as a juror, made illegal contact with a criminal defendant, resulting in additional expense, salaries, and witness fees expended on further criminal proceedings); *United States v. House*, 808 F.2d 508 (7th Cir. 1986) (government was a victim entitled to restitution for autopsy, funeral, and burial expenses when defendant killed fellow prisoner); *United States v. Ruffen*, 780 F.2d 1493, 1496 (9th Cir.) *cert. denied*, 479 U.S. 963 (1986) (county social services agency was entitled to restitution for \$50,000 in welfare benefits illegally obtained by the defendant).

Restitution to government agencies will be particularly important for offenses affecting government procurement. In these cases, the amounts at stake are often enormous. For example, where suppliers of turbines used in a government dam construction project engage in price fixing, the offending firms may be liable for millions of dollars in overpayments by the government. Firms that ignore safety obligations may be in even worse positions. For example, where personnel of a military supplier intentionally fail to inspect a 15¢ bolt that later breaks causing a \$30 million aircraft to crash, the firm's restitution obligations may extend to the full value of the aircraft. See *Special Report*, *supra* note 3, at 239.

from an offense, the insurer is treated as a crime victim for purposes of restitution payments.⁴⁹

The proximity of injuries to offense conduct that is necessary to qualify a party as a victim for restitution purposes is not addressed in the Guidelines. Certainly, restitution should extend to victims who suffer identifiable damage as a direct, immediate consequence of criminal conduct. However, victims whose injuries are more remote from an offense also may deserve restitution where criminal conduct initiates a sequence of events that results in harm and where no independently initiated act constitutes a more significant cause of the harm.

One consideration that may be important in assessing the proper scope of restitution for remote injuries is whether a type of harm (or at least the mechanism of harm) was foreseeable to the offender at the time of the offense. If restitution is primarily a means to insure that corporations internalize crime costs—thereby encouraging corporate managers to increase their crime prevention efforts when further efforts will tend to avoid more costly offense harms—then compensating unforeseeable harms through restitution is not justified. While this approach might encourage a greater margin of preventive behavior than restitution based on foreseeable harms alone, there is no reason to expect that corporations would properly direct this extra effort or that it would be sufficient to prevent unforeseeable harms. This follows because corporate managers will generally be equally unaware of the need or means to prevent unforeseeable harms. Hence, if the main goal of criminal restitution by corporate defendants is to induce organizations to internalize crime costs and gauge the need for greater crime prevention efforts, courts should exclude unforeseeable harms from restitution sentences.

This view of restitution is flawed for several reasons. The social stabilization purpose of restitution will be equally furthered by restitution to victims of foreseeable and unforeseeable harms. The disruption to a crime victim that restitution will offset will be approximately the same regardless of whether the victim's harm or the mechanism by which it occurred were foreseeable to the offender at the time of the offense. Furthermore, to the extent that the line between foreseeable and unforeseeable harms is ambiguous and evolving, holding corporate offenders accountable for all harm resulting from their offenses places the burden

49. 18 U.S.C. § 3663(e)(1). When a court orders restitution payments to both victims and insurers who have compensated victims, the victims must receive complete restitution before any payments to insurers are made. *Id.*

on firms to adopt optimal means to predict the harmful consequences of corporate conduct and to take cost effective measures to prevent offenses.

The characteristics of crime victims warranting restitution may be subject to several additional limitations. One key question is whether courts must limit restitution to harm resulting from conduct supporting a conviction or whether, once a conviction is obtained, restitution can extend to other instances of similar conduct not within the proven offense, provided that this additional conduct and the injuries it caused are established by a preponderance of the evidence at sentencing. These models of restitution present a difficult choice between the efficiency of resolving all compensation for similar conduct in a single proceeding and the potential unfairness to the defendant in applying a criminal restitution sentence to conduct that was never proven to be criminal under normal liability standards.

In *Hughey v. United States*,⁵⁰ the Supreme Court faced a choice between these two restitution models. *Hughey* involved a defendant who pled guilty to one count of unauthorized use of a credit card in exchange for prosecutors' agreement to drop two further counts of unauthorized credit card use and three counts of theft by a Postal Service employee.⁵¹ During the defendant's presentencing hearing, prosecutors offered evidence that he had stolen and used twenty-one credit cards. Although the use of these cards was not covered by the defendant's guilty plea, prosecutors sought restitution for bank losses related to the use of all twenty-one cards.⁵² The sentencing court ordered restitution for all these losses and the Fifth Circuit Court of Appeals affirmed.⁵³

The Supreme Court granted certiorari to consider whether the Victim and Witness Protection Act authorizes sentencing courts to compel defendants such as Hughey to pay restitution for injuries stemming from conduct that is not the basis for a conviction or guilty plea. In concluding that the Act does not authorize such restitution orders, the Court criticized an "open-ended approach to restitution" that would expand restitution sentences beyond those supported by a straightforward interpretation of the Victim and Witness Protection Act.⁵⁴ The Court was unpersuaded by arguments that this approach would make the scope of

50. 495 U.S. 411 (1990).

51. *Id.* at 413.

52. *Id.* at 414.

53. *Id.*

54. *See id.* at 416-20.

federal restitution orders a function of charging and plea bargaining decisions by federal prosecutors that often have little relation to the scope of victim injuries.⁵⁵

The Guidelines require corporate restitution sentences to the extent that restitution is authorized under the Victim and Witness Protection Act, except that mandatory restitution is not restricted to the few types of offenses addressed by that Act.⁵⁶ Hence, the limitation recognized in *Hughey* as a constraint on restitution under the Victim and Witness Protection Act also applies to mandatory restitution sentencing under the Guidelines.

While the Court's limitation of mandatory restitution to proven offenses somewhat narrows the scope of mandatory restitution sentences, it still leaves several key questions unanswered. For example, is restitution limited to harm caused by conduct that was a necessary element of a proven offense or can restitution extend to actions that surrounded an offense, but were not required elements of the offense? Consider the following case. Employees of a corporation illegally transport hazardous wastes, dispose of the wastes on another party's property, and thereby reduce the value of the affected property. The defendant corporation pleads guilty to one count of illegal transportation of hazardous wastes. Can a federal court order restitution for the reduction in value of the affected property even though the offense for which the defendant was convicted was completed when the waste transportation began and proof of that offense did not require proof of the dumping that produced the property owner's losses?

In *United States v. Mounts*,⁵⁷ the Sixth Circuit Court of Appeals gave an affirmative answer to a similar question, reasoning that the class of victims eligible for restitution under the Victim and Witness Protection Act includes all persons within the range of risks addressed by the statute violated by a defendant.⁵⁸ In the hypothetical case above, unauthorized waste disposal following illegal transportation of hazardous wastes probably was a type of harm Congress expected to prevent through criminal-

55. Prosecutors typically choose to withhold or drop particular counts because of concern over their ability to prove necessary crime elements or because they are seeking to induce defendants to plead guilty to other charges and thereby avoid a trial. Under either motivation, victims of offenses not leading to a conviction will have no basis for criminal restitution due to reasons unrelated to the scope of their injuries or their ability to gain compensation through other means. *See id.* at 420-21.

56. *See* U.S.S.G., *supra* note 1, § 8B1.1(a).

57. 793 F.2d 125 (6th Cir.), *cert. denied*, 479 U.S. 1019 (1986).

58. *Id.* at 128.

izing waste transportation without proper permits. Hence, injured property owners such as the one in this hypothetical would be proper recipients of restitution under the zone of risk test adopted in *Mounts*. Under this approach, the goals of the criminal statute violated define the range of victims who qualify for restitution, rather than the particular conduct forming the basis for a conviction or guilty plea.

A narrower reading limiting restitution to those persons harmed by conduct proven to establish an offense would severely restrict the reach of restitution sentencing. Many crimes, like the hazardous waste transportation offense in the example above, can be completed with little or no immediate harm. The behavior constituting the offense is criminalized because of its propensity to result in harm, but harm need not be shown to establish the offense. If courts limit restitution to the harmful consequences of conduct that must be shown to establish an offense, little compensable harm would ever be identified except where harmful consequences are an element of an offense.

While it is inappropriate to limit restitution to immediate consequences of essential offense conduct, courts may find it problematic to use a zone of risk standard like that applied in *Mounts*. Judicial estimates of the range of hazards that Congress sought to prevent when it enacted a specific criminal statute will be highly speculative and likely to produce restitution orders that vary considerably across factually similar cases.

A preferable approach would be to extend restitution to all victims who suffer harm as a direct consequence of either offense conduct or further defendant actions related to offense conduct.⁵⁹ Thus, in the hazardous waste handling case above, the owner of the affected property would be eligible for restitution because the defendant's illegal transportation of hazardous wastes led directly to the dumping on the victim's property. Similarly, restitution would be proper if the dumping were concealed for some time and the property owner suffered crop losses due to the presence of the illegally transported waste. Even though a significant period had passed, the property owner would be eligible for restitution for his crop losses because those losses would not have occurred but for the illegal waste hauling and there was no other independent action that was a

59. Cf. *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985) (for purposes of the Victim and Witness Protection Act, a "victim" [is] a person who suffered injury as a result of the defendant's actions that surround the commission of the offense, regardless of whether the actions are elements of the offense charged").

more significant cause of the victim's loss. By contrast, the property owner might not qualify for restitution under the *Mounts* standard because crop losses resulting from illegal waste handling and subsequent dumping may not have been within the range of risks that Congress sought to diminish through legislation criminalizing unauthorized transportation of hazardous waste.

More remote victim injuries flowing from an offense might warrant restitution even if those injuries were not a direct result of offense conduct. For example, if the defendant in the above waste transportation example stole a car to escape from the dumping scene and damaged the car while fleeing, is the owner of the car a victim of the illegal waste transportation offense for restitution purposes? The issue under the Victim and Witness Protection Act is whether the car owner is a victim of the offense or of independent defendant conduct.

There are several reasons why a sentencing court might consider damage to a car under these circumstances to be an injury stemming from the underlying waste handling offense. First, the defendant may have planned, if threatened with detection, to steal a car to escape from the waste disposal scene and thereby avoid detection for his waste transportation offense. A common plan such as this linking the offense and the injury-inducing conduct may be sufficient to justify restitution. Second, the car owner might be considered a victim for restitution purposes because the conduct that damaged the car was aimed at concealing the defendant's offense. Under this approach, damages warranting restitution include those stemming from efforts to conceal an offense. Finally, a court might consider the car owner a victim for restitution purposes simply because the damage to the car occurred through an uninterrupted series of events that included the defendant's offense.⁶⁰ Under this test, any injury directly caused by an uninterrupted sequence of defendant conduct that includes an offense makes the injured party a victim for restitution purposes.⁶¹

It is tempting in this context to adopt causation formalisms from other legal contexts to determine how far offender responsibility and restitution payments should extend. Two extensively analyzed causation models are the tests for proximate causation governing negligence recoveries⁶² and

60. 793 F.2d at 127 (adopting a broad definition of "victim" articulated in its earlier decision in *Durham*).

61. *Id.* at 128.

62. See KEETON ET AL., PROSSER & KEETON ON TORTS 263-321 (5th ed. 1984).

causation standards used to gauge the scope of offender culpability in criminal cases.⁶³ Yet, as well considered as these standards may be in their own domains, they are crafted for different purposes than causation tests governing restitution. For example, limiting defendant responsibility for certain harms under proximate cause standards serves to adjust the actual costs of negligent conduct to those the tortfeasor could have anticipated and avoided. It thereby encourages parties to make this same assessment without concern that modest errors in comparing prevention costs with likely harms may produce enormous losses. By contrast, causation standards under the Model Penal Code serve to gauge defendant culpability by rating offenses based on the range of consequences knowingly, intentionally, or recklessly inflicted.

Causation tests in restitution analyses serve a different purpose. Given that a defendant has committed an offense, a causation analysis is aimed at identifying the losses resulting from the offense that the offender should bear. If this analysis begins from the assumption that the defendant's illegal conduct should not have occurred, then a strong case can be made for a rule extending restitution to all harms that only resulted because of the forbidden act. The victims suffering these losses are typically less responsible for their infliction than the criminal actor. As to many if not all those losses, the actor will have had the sole opportunity to avoid them. Furthermore, forced restitution payments for all these losses would reinforce the public's legitimate expectations that societal actors will not engage in offenses or, where they do, they will bear the full consequences of restoring victims to the condition that would have prevailed without the offense. These considerations all support a causation analysis for restitution purposes that extends payments to all losses which would not have resulted but for the defendant's offense and related conduct which the defendant would not have undertaken but for the offense.⁶⁴

3. *Compensable Injuries*

The Guidelines require courts to order restitution for types of injuries compensable under the Victim and Witness Protection Act.⁶⁵ In general,

63. MODEL PENAL CODE § 2.03.

64. See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIME LAWS, FINAL REPORT 31-32 (1971) [hereinafter FINAL REPORT].

65. The Sentencing Guidelines require restitution to the extent that it would have been authorized under the earlier Victim and Witness Protection Act. To the extent that the Act did not com-

compensable injuries under the Act are limited to pecuniary damage traceable to an offense. Restitution amounts are reduced by compensation already paid to victims prior to sentencing.⁶⁶ Where a third party (for example, an insurance company) compensates a victim prior to sentencing, that third party is considered the victim for purposes of restitution sentencing and can recover sums paid to the victim up to the amount the victim would have recovered.⁶⁷ Conversely, amounts paid as restitution reduce the amounts a compensated victim can recover in later federal or state civil proceedings.⁶⁸

The Victim and Witness Protection Act confines injuries subject to restitution to several narrow categories. Restitution for these same types of injuries is mandated under the Guidelines. However, as discussed below, sentencing courts may have discretionary authority to order restitution for broader types of injury.

a. *Damage to or Loss of Property*

When an offense involves damage to or loss of property, the Victim and Witness Protection Act authorizes a restitution order requiring return of the affected property. If return is impossible, impractical, or inadequate to make the victim whole, a sentencing court may require further restitution payments equal to the greater of (a) the difference between the value of the property on the date of damage or loss and the value, as of the date of return, of any part of the property returned or (b) the value of the property on the date of sentencing and the value, as of the date of return, of any part of the property returned.⁶⁹ By using the greater of these two property loss figures, the restitution computation

pensate certain types of injuries, restitution for those injuries was not authorized. Hence, similar restitution is not required under the Guidelines. See U.S.S.G., *supra* note 1, § 8B1.1(a).

For an overview of types of restitution authorized under the Victim and Witness Protection Act, see John F. Wagner, Jr., *Who is a "Victim" So As to Be Entitled to Restitution Under the Victim and Witness Protection Act*, 108 A.L.R. FED. 828 (1992).

66. 18 U.S.C. § 3663(e)(1). This implies, however, that the sufficiency of a prior civil damage award to make a victim whole may be reassessed by a sentencing court considering a restitution order. The amount of compensation necessary to satisfy federal restitution statutes may differ from satisfactory compensation under state tort standards or other civil measures.

67. 18 U.S.C. § 3663(e)(1). However, before an insurer can receive any amount of restitution, the victim must first be fully compensated. *Id.*

68. 18 U.S.C. § 3663(e)(2). It is unclear whether amounts paid as restitution will also reduce the base harm figure used to compute treble damages where such damages are available to civil plaintiffs. See *Special Report*, *supra* note 3, at 239 (suggesting that restitution sentences may reduce treble damages).

69. 18 U.S.C. § 3663(b)(1).

effectively places the risk of rising property values in the period between an offense and sentencing on the defendant. While the restitution standard in the Victim and Witness Protection Act is drafted in terms of the "return" of property, where property is damaged while never leaving the control of its owner, the value on the date of return equals the value of the property immediately following the damage caused by the defendant.⁷⁰

b. Bodily Injury or Death

When an offense results in bodily injury to a victim, compensable expenses under the Victim and Witness Protection Act include amounts paid for medical expenses and related professional care (including psychiatric and psychological care), costs of physical therapy, occupational therapy and rehabilitation, and lost wages due to the injury.⁷¹

When an offense results in death, compensable expenses include funeral costs and related expenses.⁷²

c. Excluded Damage

Restitution standards in the Victim and Witness Protection Act deny restitution for several important types of victim damage. For example, almost all consequential damages are excluded. A victim can recover neither lost business income due to the unavailability of assets damaged through criminal conduct⁷³ nor expenses incurred in recovering stolen property.⁷⁴ Also, except for medical expenses and lost wages, a victim cannot recover losses due to physical injuries. Future wages lost due to physical injuries are unrecoverable if their computation with sufficient certainty to fashion a restitution order would unduly complicate the sentencing process.⁷⁵

Several other types of damage also are excluded from restitution orders under the Victim and Witness Protection Act apparently because the measurement of these types of damage would be speculative or difficult. These excluded damages include property losses not measurable in

70. See *United States v. Tyler*, 767 F.2d 1350, 1352 (9th Cir. 1985).

71. 18 U.S.C. § 3663(b)(2).

72. 18 U.S.C. § 3663(b)(3).

73. See, e.g., *United States v. Bengimina*, 699 F. Supp. 214 (W.D. Mo. 1988); *United States v. Trettenaro*, 601 F. Supp. 183, 185 (D. Colo. 1985).

74. See *Trettenaro*, 601 F. Supp. at 185.

75. See *United States v. Fountain*, 768 F.2d 790, 802 (7th Cir.), *reh'g denied*, 777 F.2d 345 (1985), *cert. denied*, 475 U.S. 1124 (1986).

pecuniary terms, environmental harm not reflected in property losses,⁷⁶ recoveries for pain and suffering from physical injuries, and losses due to altered victim conduct following criminal behavior.

d. Court Authority to Order Restitution for Broader Harm

The new Sentencing Guidelines do not indicate whether sentencing courts have the discretion to order restitution for types of damage beyond those discussed above. While the Guidelines require sentencing courts to order restitution under circumstances where the Victim and Witness Protection Act authorizes restitution payments, the Guidelines do not include a negative admonition "and in no other circumstances." Courts may have some flexibility to award restitution beyond those types authorized under the Victim and Witness Protection Act. This flexibility is present if either the Guidelines mandating specific forms of restitution do not bar further types of restitution, or, contrary to my previous conclusion, the restitution provisions of the Guidelines represent no more than advisory policy statements that leave sentencing courts with discretion to act differently.

If sentencing courts do possess this type of discretion under the Guidelines, then their ability to order restitution is limited only by statutory constraints on restitution. The Sentencing Reform Act appears to authorize sentencing courts to impose broader types of restitution obligations under probation conditions than courts could previously compel under the Victim and Witness Protection Act.⁷⁷ The Sentencing Reform Act grants a sentencing court the authority to require a convicted corporation to meet "such . . . conditions as the court may impose," subject only to requirements that these conditions reasonably relate to federal sentencing goals and involve only those deprivations of liberty and property that are reasonably necessary to meet those objectives.⁷⁸ The legislative history of the Sentencing Reform Act indicates that the Act was viewed as granting courts the authority to order previously unauthorized types of restitution.⁷⁹ For example, Congress felt that sentencing courts could properly impose probation terms mandating restitution for victim

76. For thorough analyses of environmental losses beyond property devaluation and of means to measure those losses in restitution proceedings, see Kathryn C. MacDonald, *The Recovery of Restoration Costs: An Analytical Synthesis of Common-Law Property Damages, Restitution, and Natural Resource Damages Under CERCLA*, 5 TUL. ENVTL. L.J. 255 (1991).

77. See S. REP. NO. 225, *supra* note 9, at 96.

78. 18 U.S.C. §§ 3563(b), (b)(21).

79. See S. REP. NO. 225, *supra* note 9, at 96.

costs beyond medical expenses and other amounts payable under the Victim and Witness Protection Act.⁸⁰ Consequently, if the Guidelines do not constrain the exercise of this court authority, sentencing courts appear to have discretionary authority to require restitution for all reasonably ascertainable victim losses from federal offenses.

4. *Complication and Prolongation of the Sentencing Process as Grounds for Withholding Restitution*

The Guidelines provide that a sentencing court need not impose restitution where the court “determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.”⁸¹

Several considerations may influence this determination. These include (1) the difficulty of identifying affected victims, (2) the court’s ability to measure compensable victim losses with reasonable certainty, (3) the fraction of the victims’ total harm that restitution will compensate and the likelihood that victims will still resort to civil litigation even if the court orders restitution, (4) the victims’ resources and other factors that will affect the ability of victims to seek civil recoveries if the court withholds restitution, and (5) the problems that the court may encounter in articulating and administering a restitution order or related probation conditions.

The inclusion of victim loss assessments in most corporate sentencing analyses may prompt courts to balance these factors differently for convicted corporations than for convicted individuals. Pursuant to the Federal Rules of Criminal Procedure, a probation officer’s presentencing investigation report on a defendant awaiting sentencing must contain a victim impact statement that describes the financial impact of the offense on its victims.⁸² For a convicted organization, a sentencing court must consider victim losses in setting every corporate fine unless the calculation of those losses would unduly complicate or prolong the sentencing process. To the extent that courts regularly measure victim losses to sup-

80. *Id.*

81. U.S.S.G., *supra* note 1, § 8B1.1(b). When partial restitution can be ordered without substantial complication and prolongation of the sentencing process, courts are required to order partial restitution. See 128 CONG. REC. H8469 (Oct. 1, 1982) (remarks of Rep. Peter Rodino); HUTCHISON & YELLEN, *supra* note 41, at 341.

82. FED. R. CRIM. P. 32(c)(2)(D).

port corporate fine determinations, the same information will be available for fashioning restitution orders. Courts may tolerate longer delays and expend more effort to measure victim losses in determining corporate fines than they would if the only issue at stake was the proper amount of restitution payments. To the extent that the need for victim loss information in fine setting produces more of this information, it will correspondingly reduce objections to restitution orders based on the difficulty of victim loss measurements. This may produce more frequent restitution orders in corporate sentencing than in individual sentencing.

5. *Constitutional Limitations on Restitution Sentences*

A number of decisions under the Victim and Witness Protection Act have tested the constitutional limits of restitution sentences. These same constitutional boundaries will govern corporate restitution sentences under the Sentencing Guidelines.

Constitutional due process constraints limit restitution sentencing procedures because factual determinations leading to restitution orders affect significant property interests of defendants forced to pay restitution.⁸³ The Victim and Witness Protection Act delineates procedures for issuing restitution orders⁸⁴ that also apply to restitution sentencing under the Guidelines.⁸⁵ These procedures require that, prior to sentencing, probation officers must collect information on victim losses resulting from an offense, the financial resources of the offender, the financial needs and earning ability of the offender and such other matters as the sentencing court deems appropriate.⁸⁶ A sentencing court must consider this information in determining whether to order restitution and must make the information available to both the defendant and the attorney for the government to allow each party to challenge the probation officer's findings.⁸⁷ The sentencing court will resolve any dispute regarding the amount or type of restitution based on the preponderance of the evidence.⁸⁸ The government bears the burden of proving the amount of

83. See, e.g., *United States v. Sunrhodes*, 831 F.2d 1537, 1541 (10th Cir. 1987). See generally Diane M. Allen, *Restitution Sentencing Under the Victim and Witness Protection Act*, 79 A.L.R. FED. 724, 732-37 (1986).

84. See 18 U.S.C. § 3664.

85. See U.S.S.G., *supra* note 1, § 8B1.1(a) (indicating that restitution obligations must conform to 18 U.S.C. § 3664, the procedural portion of the Victim and Witness Protection Act).

86. 18 U.S.C. §§ 3664(a), (b).

87. See 18 U.S.C. § 3664(c).

88. 18 U.S.C. § 3664(d).

losses sustained by offense victims, while the convicted corporation bears the burden of proving both the limit of its financial resources and its future financial needs.⁸⁹ A sentencing court can impose restitution obligations based on a documentary record alone without holding a separate hearing on restitution issues.

In determining whether these restitution procedures satisfy due process requirements, relevant considerations include the private and governmental interests at stake, the risk of an erroneous deprivation of private interests through the procedures in place, and the probable value of additional or substitute procedures.⁹⁰ Given the availability of presentencing reports to both parties and their opportunity to respond prior to sentencing, federal appellate courts have concluded that the present procedures governing restitution orders are sufficiently accurate and protective of defendant interests to meet due process requirements.⁹¹

Courts also have rejected other constitutional challenges to restitution sentencing procedures. The formulation of a restitution order without a hearing involving the presentation of witnesses does not infringe upon constitutionally protected confrontation rights because a convicted party has only a right to a restitution order based on accurate information, not an absolute right to confront witnesses.⁹² The determination of restitution sentences is treated by courts as an aspect of criminal sentencing. As such, a restitution determination does not trigger the Seventh Amendment right to a jury trial even though a separate assessment of civil liability for the same victim losses would be subject to jury trial requirements.⁹³ Finally, the possibility of variations in restitution imposed on similarly situated offenders who differ only in the degree of harm resulting from their crimes or their ability to pay restitution does not constitute a denial of equal protection because the criminal justice system has always allowed variations in criminal sentences based on individual circumstances and offense consequences.⁹⁴

89. *Id.*

90. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Sunrhodes*, 831 F.2d at 1540-41 (10th Cir. 1987).

91. *See Sunrhodes*, 831 F.2d at 1542-43.

92. *Id.* at 1543-44.

93. *See United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984). *See generally* Allen, *supra* note 83, at 740-42.

94. *See United States v. Palma*, 760 F.2d 475, 478 (3d Cir. 1985). *See generally* Allen, *supra* note 83, at 737-40.

B. *Deferred Restitution*

Instead of ordering immediate restitution payments, sentencing courts can impose probation conditions obligating convicted corporations to make restitution payments over time.⁹⁵ These deferred restitution obligations can extend over the maximum period allowed for probation sentences—five years for a felony or misdemeanor and one year for an infraction.⁹⁶

Deferred restitution obligations reflect concern for the interests of both victims and convicted corporations. The total amount of restitution that can be paid over time may be substantially greater than a defendant's immediate ability to pay. Deferred restitution payments draw upon a convicted corporation's future earning potential as well as its assets at the time of sentencing.⁹⁷ By providing victims greater compensation, deferred restitution can increase the restorative effect of restitution sentences and offset a greater degree of criminal disruption than immediate restitution payments alone.

However, deferred restitution also serves offender interests by relieving financial pressures for larger immediate payments to crime victims. Overly large restitution sentences may threaten the viability of a convicted firm and risk collateral harm to innocent third parties like employees, customers, suppliers, and shareholders.⁹⁸ While these collateral interests do not outweigh victim interests to the extent that courts should withhold restitution altogether, these interests do merit consideration in placing proper limits on restitution amounts and in assessing the need for flexible restitution payment schemes.

The Guidelines encourage this balancing of victim and third party interests. The Guidelines limit mandatory restitution to types of payments authorized by the Victim and Witness Protection Act, which in turn requires courts to limit restitution orders to reflect a convicted corporation's ability to pay. A corporate defendant's ability to pay restitution will be measured by comparing the firm's financial resources (both present and future estimated revenues) with the needs of the firm.

In a parallel context, the Guidelines indicate that courts should reduce corporate fines to a level that will not threaten a defendant firm's contin-

95. U.S.S.G., *supra* note 1, §§ 8D1.1(a)(1), (2).

96. 18 U.S.C. § 3561(b).

97. *See* ABEL & MARSH, *supra* note 20, at 131-33.

98. *See id.* at 180.

ued viability.⁹⁹ This principle should also apply to limit restitution orders. Note that protection of a firm's continued viability requires more than the mere avoidance of bankruptcy. Rather, with the satisfaction of its restitution obligations, a firm should have the ability to compete successfully for customers and remain fiscally sound.

Where the payment of both restitution and fines would threaten an organization's financial soundness, the new Sentencing Guidelines state a clear preference for restitution payments. The Guidelines require sentencing courts to reduce fines to insure that a convicted firm can make full restitution.¹⁰⁰ Also, where the offender makes deferred payments, the amounts involved are applied first to restitution obligations, next to outstanding fines, and finally to any other monetary sanction obligations.¹⁰¹

Various patterns of deferred restitution payments can be required under probation terms. Payment can be compelled in specific installments or by a certain date. Restitution arrangements tailored to corporate environments might require payment of restitution amounts before any dividends are paid to shareholders or payments of restitution amounts in a specified proportion to dividends.

Probation terms can include provisions to secure the payment of deferred restitution obligations. A corporate offender can be compelled to report on aspects of firm performance that will affect its ability to pay deferred restitution.¹⁰² For example, a sentencing court might require reporting on progress toward setting aside funds sufficient to meet later payment obligations. Alternatively, a sentencing court might require a convicted firm to report plans to transfer assets over a certain dollar value, thereby allowing the court to determine whether the transfer will materially affect the firm's ability to meet its restitution obligations. A court can require a corporation to submit to periodic examinations of its books and interrogation of knowledgeable individuals regarding the organization's ability to pay restitution amounts when due.¹⁰³ Probation conditions also can mandate that a corporation pay the fees and costs of experts retained by a sentencing court to review reports submitted by the

99. U.S.S.G., *supra* note 1, § 8C3.3. A fine must be reduced when, even with an installment schedule, payment of the full fine would "substantially jeopardize the continued existence of the organization." *Id.* (Application (n.1)).

100. *Id.* § 8C3.3(a).

101. *Id.* § 8D1.4(b)(4).

102. *Id.* § 8D1.4(b).

103. *Id.*

corporation, to examine corporate records, or to interview corporate personnel for the purpose of assessing the likelihood of the corporation's compliance with a restitution order.¹⁰⁴

C. Remedial Orders

As an alternative to criminal restitution, a convicted organization can be ordered to remedy the harm caused by an offense and to eliminate or reduce the risk that the instant offense will cause future harm.¹⁰⁵ Compliance with a remedial order will be enforced as a condition of probation.¹⁰⁶ Authorized requirements include the creation of trust funds sufficient to compensate victims in the future as they suffer or recognize harm from an offense.¹⁰⁷ Remedial orders such as these were intended by the Sentencing Commission to be fallback sanctions for corporate offenders, imposed only when restitution orders are insufficient to address victim injuries.¹⁰⁸ Reasons why restitution might be inadequate—and remedial orders correspondingly justified—include difficulty in identifying crime victims and the scope of their economic damage,¹⁰⁹ the presence of small damage to numerous victims making individual recoveries procedurally inefficient, or the involvement of aesthetic or other non-pecuniary harm in an offense.

Where a federal regulatory agency has authority over activities potentially covered by a remedial order, the sentencing court must coordinate the order with agency actions.¹¹⁰ This may entail withholding a remedial order if a regulatory agency has the authority to enforce similar remedial requirements or tailoring a remedial order to provide for reporting to and oversight by regulatory officials.

A wide range of remedial efforts are within court discretion to order under these provisions. Two areas where these orders may be particularly important are food and drug violations and environmental offenses. For example, where a firm is convicted of illegally marketing drugs, the

104. *See id.*

105. *Id.* § 8B1.2(a).

106. *See id.*

107. *Id.* § 8B1.2(b).

108. *Id.* § 8B1.2(a).

109. *Cf.* E. ALLAN FARNSWORTH, *CONTRACTS* 910 (2d ed. 1990) (noting that remedies restoring injured parties to their circumstances prior to injury can compensate them for the full measure of their losses, not just those reflected in the diminution of the market value of affected property).

110. U.S.S.G., *supra* note 1, § 8B1.2 (comment.).

firm might be required to recall unsold product units¹¹¹ and contact users of the drug to prevent further usage. The firm also might be compelled to provide medical screening to past users of the drug to help them recognize harm resulting from use of the drug. In an environmental context, remedial orders might be used to require an offender to clean up after an illegal oil spill,¹¹² to conduct follow-up studies of related environmental damage, and to take affirmative actions to aid in the restoration of plant and wildlife populations.¹¹³

The potential breadth of remedial orders following criminal corporate conduct represents both the strength and weakness of these sanctions. Corrective measures like the examples described above can lessen the disruptive impact of corporate offenses. However, the Sentencing Guidelines state no limiting principles for determining how far a sentencing court should extend remedial orders. Two types of considerations will properly limit these orders. First, offender resource limitations should play a role in determining the proper scope of offender obligations under remedial orders. Second, the efficacy of further remedial activity should be considered in crafting remedial orders.

Offender resource limitations are probably the easier of these two restrictions for courts to apply. The expense of complying with remedial orders should probably be limited under the same principles governing restitution orders and corporate fines. Thus, courts should not order remedial tasks that are sufficiently expensive to threaten a convicted firm's viability. While courts should remain skeptical about possibly inflated remedial cost estimates by convicted firms, where courts can estimate remedial costs objectively—perhaps through independent expert testimony—those costs should be compared to a convicted firm's future financial needs to determine the proper scope of compelled remedial efforts. Often, firm resources will place a clear limit on the range of remedial tasks that a convicted corporation can be expected to undertake, preempting more difficult issues about the sufficiency of further remedial efforts that might be required were cost not a limiting factor.

If firm assets and income do not significantly limit remedial alternatives available to a sentencing court, questions about the sufficiency of

111. *Id.*

112. *See id.*; *cf.* *United States v. Allied Chem. Corp.*, 420 F. Supp. 122 (E.D. Va. 1976) (firm guilty of illegal pollution discharges required to clean up affected river).

113. *See United States v. Seest*, 631 F.2d 107 (8th Cir. 1980) (defendant required to restore wetlands destroyed for irrigation).

various remedial alternatives will be unavoidable. The standards under which courts should measure the sufficiency of various remedial steps are far from clear. The circumstances of the Exxon Valdez oil spill illustrate the problems that may face courts considering remedial orders. There, the resources of the Exxon Corporation were more than sufficient to cover vast remedial efforts. Yet, at some point, the marginal environmental gain from additional remedial steps was not worth the costs to both Exxon and society of those steps. Had Exxon been less aggressive in pursuing clean-up efforts on its own, a sentencing court fashioning a remedial order to compel clean-up efforts would have been forced to select an approach or standard for measuring the sufficiency of Exxon's remedial efforts. Full environmental restoration will typically be impossible in a case like the Exxon Valdez spill. In lieu of complete restoration, a sentencing court might require that remedial efforts continue until further remedial steps would achieve no net environmental benefit—i.e., until further remedial steps would inflict as much new damage as the damage they alleviate. As another alternative, a court might measure the sufficiency of remedial efforts based on the availability of untried remedial conduct likely to produce substantial environmental improvements. A convicted corporation would be permitted to cease remedial efforts once no more of these highly effective techniques were available. This alternative avoids requiring offenders to undertake expensive remedial efforts of modest environmental benefit.¹¹⁴

Even when sufficient remedial action can be defined, it must also be recorded in a policeable remedial order. Terms of a remedial order must be sufficiently specific to allow both the corporate offender and those who will enforce the order, such as probation officers, regulatory officials and subsequent courts, to fairly determine its requirements.¹¹⁵ It will be inadequate for a remedial order to provide that the sufficiency of remedial efforts will be determined during the course of those efforts without also

114. *Cf. Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 675 (1st Cir. 1980) (responsibility of illegal polluter extends to the restoration or rehabilitation of the environment in the affected area to its preexisting condition or as close thereto as is feasible without grossly disproportionate expenditures; restoration efforts should include those actions that a reasonable and prudent party would take to mitigate the harm done by the pollution, taking into account such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which expenditures beyond a certain point would be redundant or disproportionate to the environmental improvement achieved).

115. *Cf. United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972) (probation conditions invalidated because they were so vague that "the probationer may not know when they are satisfied").

including an objective standard for measuring the adequacy of the remedial efforts or the results achieved. A remedial order lacking such an objective standard will not only provide the offender with little, if any, notice of what is required, but will risk arbitrary determinations of compliance with the order.¹¹⁶

D. Community Service

Community service by convicted corporations is another form of remedial sanction authorized by the Sentencing Guidelines.¹¹⁷ Sentencing courts can require corporate offenders to engage in community service that is "reasonably designed to repair the harm caused by the offense."¹¹⁸ Community service should not be used as an indirect means to impose financial burdens on a convicted firm since a community service order is a less efficient means to achieve this end than a direct fine.¹¹⁹ Rather, courts should impose community service orders only when "the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense."¹²⁰

The Commission apparently considered acceptable community service to include activities that repair damage from the corporation's offense, as well as activities that help prevent similar offenses and harm in the future.¹²¹ The Guidelines endorse community service when a corporate offender can efficiently repair offense damage through its own efforts.¹²²

116. See, e.g., S. REP. NO. 225, *supra* note 9, at 100 (noting that a court must give a probationer a written statement of probation conditions to insure fair and efficient enforcement of probation terms).

117. For a thoughtful analysis of corporate community service as a means to promote deterrence, retribution, and redress in corporate sentencing, see Brent Fisse, *Community Service as a Sanction Against Corporations*, 1981 WIS. L. REV. 970, 978-90, 1001-16.

118. U.S.S.G., *supra* note 1, § 8B1.3.

119. However, community service may constitute a sensible sanction when a firm is unable to pay its full fine. See, e.g., *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1166-67 (S.D.N.Y. 1983) (community service obligations protect third parties from the adverse impact of firm failures due to large fines, yet still impose a high degree of punishment).

120. See U.S.S.G., *supra* note 1, § 8B1.3 (comment.). Even when a defendant firm does not have exceptional capabilities to repair offense harm, community service orders may be justified to achieve partial offense remedies where restitution would be unwise because the dollar value of injuries subject to restitution is small or difficult to measure or the identity of victims is hard to establish. See S. REP. NO. 225, *supra* note 9, at 98; Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 39 (1988).

121. See U.S.S.G., *supra* note 1, § 8B1.3 (comment.) (supporting community service involving preventive or corrective action directly related to an offense).

122. See U.S.S.G., *supra* note 1, § 8B1.3 (comment.) (community service order is appropriate

However, the Guidelines do not address community service arrangements benefitting other organizations or institutions that are well suited to repair damage from the instant offense or like damage to the same community. If a particularly well-qualified remedial institution exists, presumably actions by a convicted firm aiding that institution's reduction of harm from a particular offense would have equal social value to the firm's own community service. Corporate service aiding specialized organizations or groups that are particularly effective in preventing or minimizing damage from the type of offense committed by the corporation should be considered an authorized form of community service under the Guidelines.

The Sentencing Guidelines do not identify the features that distinguish corporate community service orders from remedial orders. The former are described as requiring a convicted corporation to "repair the harm caused by the offense,"¹²³ while the latter entail efforts to "remedy the harm caused by the offense."¹²⁴ While a common remedial focus is certainly present, there is little difference in the description of these types of orders other than the labels used.

However, these labels suggest that the Commission contemplated that community service orders would resemble community service obligations previously ordered by federal courts. In the past, corporate community service was required for three purposes beyond remedying harm from a particular offense: (1) increasing corporate punishment and deterrence by requiring embarrassing corporate activities, (2) heightening punishment and deterrence by requiring specific corporate officials to undertake burdensome service, and (3) offsetting community harm from offenses through corporate charitable contributions and other public service unrelated to the harm caused by an offense.

Community service orders can impose valuable types of punishment and deterrence in corporate sentencing. Such sentences have previously been employed by federal courts. For example, where a corporate defendant engaged in price fixing concerning some of its bakery products, the firm was required to give similar bakery products to charitable organizations, in part to draw public attention to the offense.¹²⁵ Similar re-

when convicted organization "possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense").

123. U.S.S.G., *supra* note 1, § 8B1.3.

124. U.S.S.G., *supra* note 1, § B1.2(a).

125. *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1166-67 (S.D.N.Y. 1983).

quirements that force convicted firms to perform onerous or embarrassing community service can play upon fears of corporate managers to produce punishment and deterrence that could not be imposed through fines alone.¹²⁶ To the extent that the administrative and reputational burdens of onerous community service are not easily translated into monetary terms, those burdens will fall on corporate personnel and cannot be externalized.¹²⁷

The Sentencing Guidelines do not recommend community service for punitive or deterrent purposes alone.¹²⁸ The Guidelines provide that compelled community service should remedy offense harm, suggesting that community service imposed for purely punitive or deterrent reasons is inappropriate. Even with this restriction, courts can tailor community service obligations to provide for some impact on corporate reputations along with remedial benefits and thereby serve punitive or deterrent goals as well as remedial ends.

Corporate community service has previously entailed service obligations imposed on specific executives who were not themselves convicted of an offense.¹²⁹ The involvement of high-level managers in corporate community service activities may be necessary for community service to have the types of reputational impacts that will have significant punitive and deterrent value. The reputation of a firm and the attitudes of its managers will be less likely to change if a firm can designate a low-level employee to perform its community service than if that service must be performed by a high-ranking corporate officer.¹³⁰ Yet these benefits come at the expense of a probation obligation that smacks of punishing unconvicted parties for the criminal conduct of corporations.¹³¹ In any case, because they are aimed at purely punitive and deterrent goals, com-

126. See John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 452-55 (1981).

127. See Fisse, *supra* note 117, at 1005-06.

128. However, since the provisions of the new guidelines on community service orders are only advisory policy statements, a sentencing court could choose to go beyond this portion of the guidelines and impose a community service order based on punitive or deterrent principles.

129. See *United States v. Yellow Freight Sys. Inc.*, 762 F.2d 737, 739 (9th Cir. 1985) (obligating sentenced corporation to devote 100 hours of corporate officer's time to community service); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982) (requiring corporation to loan one executive to ex-offender program for one year).

130. See Fisse, *supra* note 117, at 983, 985; Gruner, *supra* note 120, at 40-41.

131. Cf. *Fiore v. United States*, 696 F.2d 205, 208 (2d Cir. 1982) (corporate executive cannot be required to serve the sentence or pay the fine of his corporate co-defendant).

munity service obligations aimed at specific individuals or officers are disfavored under the Guidelines for the reasons discussed above.

Another form of corporate community service ordered in the past, but disfavored under the new Guidelines, is "community restitution"—that is, community service through charitable contributions or other monetary support of social programs benefitting a community as a whole, rather than victims of an offense. Under prior law, several sentencing courts imposed such requirements, including, for example, obligations to endow a chair at a university¹³² or to make contributions to designated charities.¹³³ Critics of this practice argued that it imposed too little hardship on firms in relationship to the seriousness of their crimes, diverted funds from public use that might otherwise have been collected as fines, involved standardless assessments of the adequacy of contribution levels and arrangements, ignored the institutional limitations of sentencing courts that make them poorly qualified to select among countless worthy charities and organizations, subjected sentencing courts to criticism over suspected favoritism in the selection of contribution recipients, and created possible conflicts of interest where charities solicited contributions from sentencing courts.¹³⁴ Probation terms requiring corporate charitable contributions were struck down by every circuit court that considered their validity.¹³⁵ While more recent sentencing statutes arguably support this practice,¹³⁶ the new Sentencing Guidelines wisely recommend against probation terms mandating charitable contributions.¹³⁷

E. Notices to Crime Victims

A final remedial sanction authorized under the Sentencing Guidelines is aimed not at directly remedying criminal conduct, but rather at facilitating individual recoveries.¹³⁸ For offenses involving fraud or "other in-

132. *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1545 (8th Cir. 1984) (en banc).

133. *E.g.*, *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976). *Cf.* *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 961 (3d Cir. 1984) (requiring convicted firm to promote concerts to raise funds for local charities).

134. *See Gruner, supra* note 120, at 22-23.

135. *See John Scher Presents*, 746 F.2d at 964; *Missouri Valley Constr.*, 741 F.2d at 1545-51; *United States v. Wright Contracting Co.*, 728 F.2d 648, 653 (4th Cir. 1984); *United States v. Prescon Corp.*, 695 F.2d 1236, 1238-40, 1242-44 (10th Cir. 1982); *Clovis Retail Liquor Dealers*, 540 F.2d at 1390-91.

136. *See Gruner, supra* note 120, at 37-38.

137. U.S.S.G., *supra* note 1, § 8B1.3 (comment.).

138. For discussions of the goals of victim notices as a sentencing tool, see S. REP. NO. 225,

tionally deceptive practices,"¹³⁹ a sentencing court may order a corporate defendant to give victims "reasonable notice and explanation of the conviction, in such form as the court may approve."¹⁴⁰ The court may not require a type of notice that will cost more than \$20,000 per offense.¹⁴¹ Furthermore, it must balance the costs entailed in providing notices to victims against the losses caused by the offense.¹⁴²

A sentencing court may order victim notices to be distributed by mail, advertisements in specific areas or through specific media, or by other means.¹⁴³ Judicial review of the form and scope of victim notice methods serves to insure that offenders make more than token efforts to provide victims with notice of an offense.¹⁴⁴

Victim notice orders will rarely be justified for regulatory offenses by corporations because these types of crimes typically lack the deceptive intent necessary to support a victim notice requirement.¹⁴⁵ Furthermore, these types of offenses seldom entail large victim losses of the sort that would justify substantial victim notice costs. By contrast, in cases of fraudulent or concealed misconduct like price fixing, corporate crime victims will often not appreciate their status as such.¹⁴⁶ Hence, victim notices will serve a valuable purpose in such cases and should be ordered if effective means of notifying victims can be devised.

supra note 9, at 83-84; Harvey M. Silets & Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 375-78 (1986).

139. 18 U.S.C. § 3555 (1988). Fraudulent conduct in concealing an otherwise non-deceptive offense may be sufficient to meet this test. *See id.*

140. *Id.* Obligations to provide victim notices can be imposed on both corporate and individual offenders. *See* U.S.S.G., *supra* note 1, §§ 5F1.4, 8B1.4; *cf.* FINAL REPORT, *supra* note 64, at 276 (proposing distribution of notices to victims as a special criminal sanction for organizational offenders).

141. 18 U.S.C. § 3555. It is unclear whether the \$20,000 cost limit on victim notices applies to each offense or to some other unit of activity. The interpretation of this amount as a per offense limit is consistent with the rest of the victim notice statute, which refers to notices ordered for particular, qualifying offenses. *See id.* The limit might also apply on a per victim or per case basis. The former interpretation seems unlikely because, in specifying advertising as a means of victim notice, Congress anticipated multi-victim cases and yet indicated that the \$20,000 limit would apply. The latter interpretation appears too restrictive. A larger pattern of offenses will typically involve more numerous and diverse victims than a single offense. Consequently, it is unlikely that Congress intended to limit permissible victim notice costs without regard to whether a case involves one conviction or many.

142. 18 U.S.C. § 3555.

143. *Id.*

144. *See* S. REP. NO. 225, *supra* note 9, at 84.

145. *Id.*

146. John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQ. 292, 295 (1982).

Actual notice to the greatest possible number of victims is the goal of a victim notice sanction.¹⁴⁷ This goal will often suggest the proper notice mechanism for a given offense. For example, when a corporation commits fraud against a few individuals, letters sent to those parties should be an adequate notice method.¹⁴⁸ By contrast, when a firm commits fraud on a broad scale or over a substantial period of time and the identity of affected victims is not known, a series of advertisements in publications likely to reach the victims would constitute an appropriate notice vehicle.¹⁴⁹

While the primary focus of victim notices is on furthering later civil claims against the offender, these notices also will spread adverse publicity about the offender. Such publicity can have its own punitive impact on a firm. In addition, the distribution of victim notices may alert regulatory or state enforcement agencies to corporate misconduct.¹⁵⁰ To the extent that victim notices describing an offense are distributed to persons considering future dealings with the offender, these notices also may prevent further offenses by reducing the likelihood that those persons will deal with the offender or by improving their abilities to monitor potentially criminal conduct by the offender.¹⁵¹

III. PREVENTIVE SANCTIONS

The Sentencing Guidelines also authorize a number of preventive corporate sanctions. The aim of these sanctions is to prevent further offenses by a firm whose past illegal conduct or other organizational features suggest that it is offense-prone.¹⁵² Even though an offense does not conclusively indicate a proclivity towards further corporate crime,

147. S. REP. NO. 225, *supra* note 9, at 84.

148. *Id.*

149. *Id.*

150. See Gruner, *supra* note 120, at 43-44.

151. See W. B. Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361, 408-09 (1978); Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107, 125 (1971).

152. Although rehabilitation of individual offenders within the federal penal system is viewed by many as a failed approach to street crime, see Robert Martinson, *What Works: Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974), rehabilitation of corporate offenders through probation sentences compelling improvements in offender practices is more likely to succeed. Although it may be difficult to reorient or rehabilitate a human psyche, "it is much easier to rearrange a corporation's standard operating procedures, defective control systems, inadequate communication mechanisms, and in general its internal structure." RUSSELL MOKHIBER, *CORPORATE CRIME AND VIOLENCE* 33 (1988).

the Guidelines adopt the view that an offense suggests the need for a detailed examination of a convicted corporation's internal law compliance standards and enforcement mechanisms, with compelled improvements where necessary to avoid further misconduct. As a corollary, the Guidelines support the notion that managers of corporate defendants should have the first opportunity to evaluate law compliance programs and make corrective adjustments following an offense. Sentencing courts are authorized to step in only to determine the sufficiency of corporate responses and to compel changes when firm managers do not adopt needed reforms voluntarily.

Several types of sanctions can be used to further these ends. Restrictive probation sentences constraining firm conduct during a period of court supervision are authorized in several forms. One variety directly constrains post-offense conduct by corporate personnel in ways that make further offenses less likely. A second type of probation sentence insures that sources of firm misconduct are identified and revealed to shareholders, employees, and other interested parties, thereby permitting this information to be taken into account in corporate governance and accountability processes. The aim of such disclosures is to assist private processes that tend to constrain corporate conduct within legal bounds. An additional type of preventive sentence under the new Guidelines involves adverse publicity aimed at transmitting information about a firm's offense to a broad range of parties such as potential consumers of a firm's products or services. With greater information about an offense, these parties can adjust their subsequent dealings with a convicted firm to better detect and prevent corporate crimes. Furthermore, the threat of adverse public reactions following offense publicity creates substantial crime deterrents for corporate managers.

A. Corporate Probation as a Criminal Sentence

1. Statutory Standards

One of the most important developments in corporate sentencing law during the past several years was the elevation of probation sanctions to the level of full-fledged sentences. Corporate probation sentences involve probation terms that exert a measure of continuing court control over narrow aspects of corporate conduct.¹⁵³ The Sentencing Reform Act of 1984 authorized corporate probation sentences to serve a variety of fed-

153. See generally Gruner, *supra* note 120.

eral sentencing goals.¹⁵⁴ The Act granted sentencing courts considerable flexibility in developing innovative probation conditions to achieve those goals.¹⁵⁵

Once a matter of grace offered by courts as an alternative to harsher fines, corporate probation was subject to rejection by managers of a corporate defendant if they felt that proposed probation terms were more onerous than the maximum fines facing their firm.¹⁵⁶ By contrast, corporate probation is now a sentence in its own right that, like other sentences such as fines, is not subject to rejection by convicted firms. Probation sentences can be imposed for essentially all crimes that corporate agents are likely to commit.¹⁵⁷ Under the Sentencing Reform Act of 1984, probation sentences can be imposed in addition to maximum fines.¹⁵⁸

The Act imposes several limitations on corporate probation. Probation can last between one and five years for a felony offense and up to five years for any other offense.¹⁵⁹ Probation terms are to be specified by a sentencing court following the preparation of a pre-sentencing report by a probation officer or court-appointed expert.¹⁶⁰ This report must address the nature of the convicted firm's offense and the types of sentences, including probation terms, that should be imposed.¹⁶¹ A pre-sentencing report must be disclosed to the defendant, the defendant's counsel and the attorney for the government at least ten days prior to sentencing to allow for submissions to the court challenging disputed findings or sentence recommendations.¹⁶² Once selected by a sentencing court, probation terms must be stated in clear terms that are sufficient to establish a standard against which personnel of the probationer, probation officials

154. See 18 U.S.C. § 3551 (Supp. III 1985); S. REP. NO. 225, *supra* note 9, at 50-51, 59, 68, 88 (sentences can be imposed in order to achieve any of the objectives outlined in 18 U.S.C. § 3553(a)(2)).

155. See 18 U.S.C. § 3563(b)(21); S. REP. NO. 225, *supra* note 9, at 131. Broad discretion in setting probation conditions is desirable if courts are to develop effective probation conditions for highly diverse corporate defendants. See W.B. Fisse, *Responsibility, Prevention, and Corporate Crime*, 5 N.Z.U. L. REV. 250, 276 (1973).

156. The history of corporate probation sentencing under the Federal Probation Act is discussed in detail in Gruner, *supra* note 120, at 11-26.

157. Corporate probation sentences are appropriate for all federal crimes except where a statute expressly prohibits probation. 18 U.S.C. § 3561(a).

158. See 18 U.S.C. § 3551(c).

159. 18 U.S.C. § 3561(b).

160. See 18 U.S.C. § 3552(b).

161. See S. REP. NO. 225, *supra* note 9, at 72.

162. 18 U.S.C. § 3552(d).

and reviewing courts can measure the probationer's compliance.¹⁶³

Certain substantive features of corporate probation are required under the Act. First, all corporate probation sentences must include a requirement that the firm involved not commit another federal, state, or local crime during the term of probation.¹⁶⁴ This provision retains the power of the sentencing court to revoke or modify probation conditions or to completely resentence the defendant firm in light of misconduct by corporate personnel during a term of probation.¹⁶⁵ The net effect is to raise the penalties at stake for a further offense during a probation term. Second, if a sentence of probation is imposed for a felony, the terms of probation must include a requirement that the corporate offender pay a fine, provide restitution, or complete community service.¹⁶⁶ This requirement is aimed at insuring that all felony offenders feel a substantial impact from an offense serious enough to constitute a felony. Third, when a sentence imposed on an organization does not include a fine, it must include some form of probation.¹⁶⁷ This requirement appears to reflect the view that convicted firms receiving a light sentence involving no fine should stay under court control, both as a means to facilitate harsher resentencing should subsequent misconduct indicate that the light sentence was a mistake and as a method of reminding firm managers that their organization has committed an offense, even if this was not reflected in a fine.

While the Sentencing Reform Act contains a list of probation conditions that can be imposed at the discretion of sentencing courts, this list is not exhaustive. Rather, sentencing courts can require compliance with a broad range of probation conditions, subject to two limitations. First,

163. 18 U.S.C. § 3563(d). *See also* *United States v. Whitney*, 785 F.2d 824 (9th Cir. 1986) (finding restitution requirement without maximum amount too vague); *United States v. Patterson*, 627 F.2d 760, 760 (5th Cir. 1980) (rejecting probation condition that would have precluded association with any group that advocates violation "of any local, state, or federal law"), *cert. denied* 450 U.S. 925 (1981); *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972) (finding condition requiring cleanup program within 45 days too vague).

164. 18 U.S.C. § 3563(a)(1).

165. Revocation or modification of probation terms and resentencing of a corporation to maximum fines are potential sanctions for probation violations. *See* 18 U.S.C. § 3565(a). Courts can impose such sanctions only following a hearing that meets the requirements of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 32.1(a).

166. 18 U.S.C. § 3563(a)(2). The exception to this general rule is that if a sentencing court finds that extraordinary circumstances exist which would make these conditions plainly unreasonable the court may impose such probation terms as it deems appropriate. 18 U.S.C. §§ 3563(a)(2), (b)(21).

167. 18 U.S.C. § 3551(c); U.S.S.G., *supra* note 1, § 8D1.1(a)(7).

probation conditions must bear a reasonable relationship to (1) the nature and circumstances of the offense, (2) the history and characteristics of the offender, and (3) federal sentencing goals, including rehabilitation, general deterrence, specific deterrence, and punishment.¹⁶⁸ Second, probation conditions should deprive the offender of liberty or property only to the extent reasonably necessary to further these same federal sentencing goals.¹⁶⁹

A variety of sanctions can be imposed for probation violations. A corporate probationer found to have violated a term of probation can either be continued on probation under enhanced probation terms or have its probation revoked and be resented to any sanction that was available at its original sentencing.¹⁷⁰ Individuals having notice of a sentencing court's order imposing probation terms who (1) willfully violate those terms, (2) prevent, obstruct, impede, or interfere with compliance with those terms by others, or (3) intentionally hinder or delay the communication of any probation violation to a court or probation officer, will be subject to contempt sanctions and individual criminal liability.¹⁷¹

2. *Some Lessons from Past Corporate Probation Sentences*

While probation sentences have been strengthened, Congress appears to have intended that corporate probation be employed in a manner similar to its use in past sentencing.¹⁷² Before the Sentencing Reform Act of

168. 18 U.S.C. § 3553(a).

169. 18 U.S.C. § 3563(b). The application of this limitation to corporate probation terms is problematic. Arguably, the types of liberty restrictions intended to be limited by this statutory provision were physical constraints on individual defendants such as partial confinement to a residence or other types of partial incarceration. If so, then the corporate probation conditions will not impose physical liberty constraints subject to this limitation. See Gruner, *supra* note 120, at 56.

With respect to property constraints, the question is not whether probation terms can affect corporate property, but rather what type of property the Sentencing Reform Act protects against deprivation. Specifically, the provisions of the statute restricting probation terms to reasonably necessary deprivations of property seem most logically interpreted as admonitions against excessive restitution or other requirements of direct transfers of money or assets. It is less clear, however, that Congress intended to limit probation terms merely because improvements in corporate law compliance practices and related monitoring of employee activities would entail additional corporate costs. *Id.* at 56-57. Even if amounts spent on such activities are property within the meaning of statutory limits on probation terms, courts will probably consider steps necessary to prevent subsequent corporate offenses as expenditures reasonably necessary to satisfy federal sentencing goals.

170. 18 U.S.C. § 3565(a).

171. See 18 U.S.C. §§ 1509, 1512 (1988).

172. The legislative history of the probation provisions of the Sentencing Reform Act refers with approval to cases imposing corporate probation under prior law. See S. REP. NO. 225, *supra* note 9, at 68 n.145.

1984 superseded it, the Federal Probation Act¹⁷³ provided the basis for several forms of corporate probation. Probation terms were imposed under the Probation Act to rehabilitate, deter, and punish corporate offenders and managers.¹⁷⁴

*United States v. Atlantic Richfield Co.*¹⁷⁵ illustrates one application of corporate probation under the Federal Probation Act and some of the problems attendant to using corporate probation as a sentencing tool. In that case, the Atlantic Richfield Company ("ARCO") was convicted of an illegal pollution discharge at one of its plants, following a prior conviction for similar conduct at the same facility.¹⁷⁶ The sentencing court imposed probation terms which gave ARCO sixty days to develop and implement a program to "handle oil spillage into the soil and/or stream."¹⁷⁷ If the firm failed to comply, the sentencing court threatened to appoint a special probation officer with powers similar to a corporate trustee who would insure that ARCO adopted sufficient pollution control practices.¹⁷⁸

Obviously, one objective of these probation terms was the immediate reform of ARCO's pollution control measures. A secondary concern of the sentencing court was that the maximum \$2500 fine for ARCO's crime was inadequate to reflect the seriousness of its repeat offense.¹⁷⁹ Hence, the company's probation conditions also were aimed at increasing the criminal penalties and deterrents for a repeat offender like ARCO.

ARCO's loosely stated probation terms were challenged by the firm on appeal. The United States Court of Appeals for the Ninth Circuit held that, while a corporation could be placed on probation, the particular terms of ARCO's probation were impermissibly vague.¹⁸⁰ The court found the terms invalid because "the probationer may not know when they are satisfied."¹⁸¹ It concluded that the vague probation terms failed to provide fair notice of probation requirements to ARCO personnel and

173. 18 U.S.C. §§ 3651-3656 (1970), *repealed by* Pub. L. No. 98-473, 98 Stat. 1987 (1985).

174. For a discussion of the purposes of corporate probation sentencing under the Federal Probation Act, see Gruner, *supra* note 120, at 16-18.

175. 465 F.2d 58 (7th Cir. 1972).

176. See CHRISTOPHER D. STONE, WHERE THE LAW ENDS 184 (1975).

177. 465 F.2d at 61, n.1.

178. See *id.*

179. See STONE, *supra* note 176, at 184-85. ARCO was potentially liable for fines totaling between \$500 and \$2500. A convicted individual would have faced the same fines plus imprisonment of not less than 30 days and not more than one year. 33 U.S.C. § 411 (1964).

180. See 465 F.2d at 60-61.

181. *Id.* at 61.

invited arbitrary or inequitable enforcement by probation officials.¹⁸² However, the court did not specify whether it considered these factors to be statutory limitations on probation terms under the Federal Probation Act or more basic constitutional due process limitations on probation conditions. Alternatively, the court's real concern may have been either that ARCO's probation terms effectively imposed a financial hardship on ARCO in excess of the maximum statutory fine for its offense,¹⁸³ or that the sixty day period allotted for the firm to develop and implement its pollution control program was unreasonably short.¹⁸⁴

The sentencing dilemma and outcome in *Atlantic Richfield* illustrate several things about corporate probation. First, corporate probation offers a means for sentencing courts to promote reform of organizational offenders and the prevention of subsequent offenses. Second, terms of probation can be tailored to the circumstances of a firm's offense and operations, providing standards for performance guidance and monitoring that are far more specific than general legal standards. Third, for probation terms to serve these goals, they must be reasonably specific in describing the conduct required of a probationer. Fourth, given the penalties that may attach to probation violations, corporate probationers have a right to concise statements of probation requirements against which they and probation enforcement personnel can measure their performance. All of these lessons remain relevant to corporate probation sentencing under the new Sentencing Guidelines.

B. Types of Corporate Probation Sentences

The Sentencing Guidelines clarify the role of probation sanctions in corporate sentencing. Three types of corporate probation sentences are recommended under the Guidelines: (1) probation terms designed to prevent future offenses by requiring specific changes or limitations on busi-

182. See STONE, *supra* note 176, at 188.

183. See *id.*; cf. Rignal W. Baldwin, Recent Development, 3 U. BALT. L. REV. 294, 299-300 (1974).

A number of other courts recognized maximum fines as limits on the financial impact of probation conditions imposed under the Federal Probation Act. See, e.g., *United States v. Interstate Cigar Co.*, 801 F.2d 555, 556-57 (1st Cir. 1986); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 788 (9th Cir. 1982). Because courts can impose probation sentences in addition to maximum fines under current sentencing law, this absolute cost constraint on probation terms no longer applies. See 18 U.S.C. § 3551(c); S. REP. NO. 225, *supra* note 9, at 88. However, the cost of probation compliance will affect the reasonableness of probation terms. See Gruner, *supra* note 120, at 60-63.

184. See Marjorie H. Levin, Note, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 FORDHAM L. REVIEW 637, 660 (1984).

ness practices; (2) mandated analyses and disclosures about sources of past offenses to improve outside monitoring of corporate behavior; and (3) probation terms necessary to further otherwise unsatisfied goals of federal sentencing.¹⁸⁵

1. Probation Sentences Requiring Offender Reforms

a. Advantages and Risks

Probation sentences requiring specific reforms by corporate offenders serve several sentencing goals that are poorly addressed by other sanctions. One important function of such probation sentences is to require changes in conduct at the corporate rather than the individual level. Systemic reforms of corporate practices will be particularly appropriate where individual responsibility for an offense is difficult or impossible to assign. Required improvements in management practices also may be needed where corporate managers bear some responsibility for an offense due to their adoption of a policy or practice that promoted its commission, their failure to detect and prevent the offense, or their failure to respond to prior similar offenses by investigating those offenses and developing new corporate practices to avoid repetitions.

Compelled reforms of corporate operating practices also may be necessary to serve the preventive goals of federal sentencing. Traditionally, the threat of corporate fines has been expected to cause corporate managers to avoid illegal conduct and to discourage such conduct by subordinates. However, corporate fines suffer from a number of deficiencies as means to deter and prevent corporate crimes. Even if fines impose sufficient costs at the corporate level to deter corporate managers from encouraging or tolerating corporate offenses, individuals within a corporate organization might still perceive discipline by corporate managers or personal criminal liability as distant and contingent threats that do not outweigh immediate corporate rewards for performance achieved through illegal conduct.

In addition to insuring conduct reforms that corporate fines may be insufficient to achieve,¹⁸⁶ mandated reforms may have other advantages.

185. Courts can also impose corporate probation to secure payment of deferred financial obligations such as restitution and fines. For a discussion of this use of corporate probation terms in the context of deferred restitution, see *supra* text accompanying notes 90-100.

186. Compelled reforms provide a non-market alternative to fines as means to control corporate crime. The primary focus of corporate fines is on pricing criminal activity at a level that will either cause corporate managers and employees to forgo such conduct or create large charges for com-

Reforms increasing outside monitoring of corporate employee behaviors related to law compliance may be necessary to balance strong internal pressures to attain profit-oriented performance goals. Continuous monitoring of such conduct can help insure that reforms adopted after an offense are maintained throughout a significant term of probation, rather than being ignored once the heightened attention associated with a criminal prosecution is no longer focused on a firm. Probation arrangements involving monitoring of legally risky corporate conduct may raise the perceived likelihood of crime detection in the minds of corporate employees and produce a rise in expected fines and deterrents concerning subsequent offenses. Finally, probation restraints may be an efficient means to allocate limited government enforcement resources since they focus law enforcement expenditures on a few firms self-identified as risk preferring through their offenses.

Mandated probation reforms raise certain risks. Even with the aid of outside experts, sentencing courts may fail to define corporate conduct standards that compel firms to adopt behaviors likely to promote law compliance. Probation monitoring may be insufficient to detect deviations from required conduct. While reforms mandated under probation terms may achieve some improvement in corporate law compliance, the court and law enforcement resources expended to achieve this result might be better utilized elsewhere. Corporate probation conditions may restrict both legitimate and illegitimate business activities, producing spillover damage in weakened corporate competitiveness, business fail-

pleted crimes so as to disadvantage firms committing offenses relative to competitors who act legally. By contrast, internal reforms imposed through probation requirements represent a measure of focused government control over narrow aspects of corporate conduct. Even if one assumes a preference for market mechanisms over government controls where these are both effective, there may be a variety of reasons in a given case to believe that deterrent fines and market mechanisms may be insufficient to prevent future crimes. First, likely detection rates may be small, making expected costs of criminal activity too small to trigger market discipline either inside or outside a firm. Second, even if an average firm might be deterred by the threat of market discipline associated with a given level of fines, the manager of a particular firm may be risk-preferring, meaning that market pressures will not have their desired crime prevention effect and therefore, direct restraints should be used as a substitute. Third, the source of some corporate crimes may be low-level employees whose conduct may not be directly affected by market pressures imposed on their firms and who will need direct compulsion and monitoring to change their behavior to prevent future crimes. Fourth, where market forces alone are insufficient to deter corporate crimes, monitoring and disclosure requirements imposed through probation terms may enhance market mechanisms both by insuring that fines are more accurately focused to reach a higher percentage of all organizational offenders and by raising the apparent price of each offense through elevating detection rates and expected fines.

ures, and associated disruption to shareholders, employees, customers, suppliers, and surrounding communities.

While these risks are real, they should be taken as dangers to avoid in formulating and administering corporate probation terms rather than as reasons to forego corporate probation altogether. Given its many potential advantages as discussed above, corporate probation is too valuable to be ignored as a sentencing alternative. To reduce risks of harmful constraints on legitimate corporate activities, sentencing courts need to impose corporate probation terms in ways that maximize opportunities for corporate personnel to participate in shaping and enforcing mandated reforms. In addition, sentencing courts need to minimize the impact of their own limited managerial expertise by relying on appointed experts, compensated by the probationer, to evaluate probation restrictions and monitor probation compliance.

b. When Reforms Should be Required

A corporate probation sentence is required under the Guidelines in several circumstances where the nature of an offense or the history of the offender indicates an unusual likelihood of further offenses. Circumstances triggering mandatory probation include:

- (1) The failure of an organization having fifty or more employees to adopt prior to sentencing an effective program to prevent and detect violations of law;¹⁸⁷
- (2) Similar misconduct by corporate employees or agents within the five years prior to sentencing that resulted in an adjudication of corporate criminal liability;¹⁸⁸
- (3) Similar misconduct by high-level personnel in the organization, or the unit of the organization within which the instant offense was committed, during the five years prior to sentencing that resulted in an adjudication of individual criminal liability;¹⁸⁹ and
- (4) Circumstances indicating that probation requirements are necessary to assure changes within the organization to reduce the likeli-

187. U.S.S.G., *supra* note 1, § 8D1.1(a)(3); *see also id.* § 8A1.2 (comment. (n.3(k))) (describing the minimum features of effective law compliance programs); Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 WASH. U. L.Q. 375 (1993).

188. U.S.S.G., *supra* note 1, § 8D1.1(a)(4).

189. *Id.* § 8D1.1(a)(5).

hood of future criminal conduct.¹⁹⁰

If a sentencing court finds one or more of these features present, the court can require the offender to adopt and maintain a program to detect and prevent future violations of law.¹⁹¹ An acceptable program should be reasonably calculated to prevent criminal conduct in the organization.¹⁹² Before requiring reforms in business practices, a sentencing court should first allow managers of the convicted firm to propose new law compliance practices and a schedule of implementation. This will help insure that the practices under consideration promote law compliance in ways that are consistent with the firm's broader business activities. If firm managers refuse to propose compliance reforms, a sentencing court should appoint an outside expert to study the circumstances surrounding the corporation's offense and formulate suggested reforms. Based on either an offender's proposal or that of an outside expert, a sentencing court can require an organizational offender to make specific improvements in its law compliance programs and related business practices.

A sentencing court also can require a convicted firm to comply with reasonable investigative measures designed to determine the corporation's compliance with probation terms and its continuation of mandated reforms. The Sentencing Guidelines recommend two types of probation terms to implement corporate probation monitoring. The first involves periodic reports prepared by the probationer's personnel, at intervals and in forms specified by the court, describing the probationer's progress under its law compliance program.¹⁹³ Reports also can be required on criminal prosecutions, civil litigation, or administrative proceedings commenced against the organization and investigations or formal inquiries by government authorities.¹⁹⁴

A second method of probation monitoring addressed in the Sentencing Guidelines involves the investigation of a probationer's status by a probation officer. Such an investigation can include records inspections and the interrogation of knowledgeable individuals by a probation officer or

190. *Id.* § 8D1.1(a)(6). While the Guidelines do not indicate the types of circumstances covered by this provision, the absence of corporate self-studies concerning the causes of a corporate offense or a lack of follow-through on the results of such studies would be logical grounds for determining that changes will not occur absent court compulsion.

191. U.S.S.G., *supra* note 1, § 8D1.4(c).

192. *Id.* § 8D1.4 (comment.).

193. *Id.* § 8D1.4(c)(3).

194. *Id.*

an expert appointed by the court to undertake these tasks. A corporate probationer can be required to submit to a reasonable number of regular or unannounced examinations of its books or records to ascertain probation compliance.¹⁹⁵ Knowledgeable individuals within the probationer's organization can be required to provide information to probation officers or court-appointed experts, but the Guidelines do not specify whether the interrogation of such individuals can be compelled on an unannounced basis or whether a party under interrogation has a right to have an additional corporate representative present.¹⁹⁶

c. Types of Required Reforms

The Guidelines do not specify the types of corporate conduct requirements that sentencing courts should impose under probation terms other than to suggest that these restrictions should be aimed at preventing future criminal conduct. Two types of conduct restrictions can further this goal. The first entails the adoption of a general law compliance program where one is absent at the time of sentencing. The second involves the requirement or preclusion of specific business activities or reporting practices that will help promote greater law compliance in the area of the firm's offense.

1) Compliance Programs

The minimum features of effective compliance programs are described in the new Guidelines.¹⁹⁷ These standards should aid sentencing courts in determining the sufficiency of compliance programs in place at the time of sentencing.¹⁹⁸ These same compliance program standards provide a blueprint for proposals by managers of corporate offenders and outside experts concerning new compliance measures to be required under probation terms. In defining standards for compliance programs, the Sentencing Commission considered an effective program to be one that responds to, and takes reasonable steps to prevent, those offenses that are foreseeable in a given firm. The range of offenses that should be

195. *Id.* § 8D1.4(c)(4).

196. *Id.*

197. *Id.* § 8A1.2 (comment. (n.3(k))).

198. When those programs are inadequate and a convicted organization has 50 or more employees, a court must sentence the firm to probation. U.S.S.G., *supra* note 1, § 8D1.1(a)(3). While it is not required in all cases, a firm placed on probation for this reason will usually be required to adopt an adequate compliance program or make improvements in its existing program to make it effective. See U.S.S.G., *supra* note 1, § 8D1.4(c).

the target of preventive efforts depends on factors such as the likelihood that certain offenses will occur because of the nature of the business and the prior history of offenses or misconduct within the organization.¹⁹⁹ The nature of a reasonable response to the offense threats facing a firm will depend on factors like the size of the firm,²⁰⁰ the dictates of industry practice, and the requirements of applicable governmental regulations concerning compliance programs.²⁰¹

Beyond these general rules, the Guidelines offer two types of standards for assessing compliance programs. The first group of standards relate to the offense currently under sentencing. The characteristics of the instant offense may indicate that the offender's law compliance programs were ineffective. For example, if the instant offense involved an individual within high-level personnel of the organization, an individual within high-level personnel of a unit of the organization having 200 or more employees, or an individual responsible for the administration or enforcement of the company's law compliance program, the program is conclusively presumed to have been ineffective.²⁰² Participation in the offense by an individual with substantial managerial authority creates a rebuttable presumption that the organization did not have an effective compliance program.²⁰³ A law compliance program also is conclusively presumed inadequate if, after becoming aware of the offense, organization personnel unreasonably delayed reporting it to appropriate governmental authorities.²⁰⁴

A second set of standards in the Sentencing Guidelines describe necessary features of adequate law compliance programs.²⁰⁵ These features, which a sentencing court should require in any compliance program mandated under probation terms, include:

199. *Id.* § 8A1.2 (comment. (n.3(k)(ii)(iii))).

200. Larger organizations should generally have more formal compliance programs than smaller firms, including written conduct standards and procedures for regulated or legally constrained operations. U.S.S.G., *supra* note 1, § 8A1.2 (comment. (n.3(k)(i))).

201. While not determinative by itself, an organization's failure to incorporate and follow applicable industry practice or to meet the requirements of any applicable governmental regulations weighs against a finding that the company maintained an effective program to prevent and detect violations of law. U.S.S.G., *supra* note 1, § 8A1.2 (comment. (n.3(k)(7))).

202. *Id.* § 8C2.5(f).

203. *Id.*

204. *Id.*

205. *See id.* § 8A1.2 (comment. (n.3(k))).

a) Compliance Standards

The organization must establish law compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct in organizational activities.

b) High-Level Responsibility

Specific individuals within high-level personnel of the organization must be assigned overall responsibility to oversee compliance with such standards and procedures.

c) Responsible Authority Delegation

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

d) Communicating Standards

The organization must take effective steps to communicate and explain its compliance standards and procedures to all its employees and other agents. Standards can be communicated to affected parties by requiring participation in compliance training programs, by distributing publications that explain law compliance requirements, or by similar notification measures.

e) Monitoring and Auditing

The organization must take reasonable steps to measure compliance with its standards—e.g., by adopting monitoring and auditing systems designed to detect criminal conduct by its employees and agents and by instituting and publicizing a reporting system whereby employees or agents can inform corporate managers of criminal conduct by others without fear of retribution.

f) Disciplinary Enforcement

The organization must consistently enforce its law compliance standards through appropriate disciplinary mechanisms, including discipline of individuals responsible for management's failure to detect an offense in a timely fashion.

g) *Offense Responses*

After a firm detects an offense, it must take all reasonable steps to respond to the offense and to prevent further similar crimes, including modifying its law compliance programs to better detect and avoid similar misconduct.

2) *Business Practice Reforms*

In addition to requiring a corporate offender to operate an effective law compliance program, a sentencing court can restrict specific business practices of the offender to help insure that repeat offenses do not occur. Although a sentencing court cannot completely exclude a convicted firm from a line of business,²⁰⁶ it can require a corporate offender to conduct specific business activities in a restricted fashion. A corporate probationer can be required to engage in particular business activities only to a stated degree or under specified circumstances.²⁰⁷ Business practice restrictions should be aimed at compelling changes that will prevent the continuation or repetition of particular abusive practices. For example, "an organization convicted of executing a fraudulent scheme might be directed to operate that part of the business in a manner that was not fraudulent."²⁰⁸

The types of probation restraints that are appropriate in a given case obviously will depend on the nature of the offense under sentencing and the circumstances that prompted it. However, conduct restraints drawn from three sources will provide convicted corporations, court-appointed experts, and sentencing courts with some valuable suggestions regarding potential probation terms.

206. Congress rejected proposed language in the Sentencing Reform Act of 1984 that would have authorized sentencing courts to bar a convicted organization from engaging in a particular occupation, business, or profession. It removed this provision from the final bill, in part because of complaints by business leaders that sentencing courts might use this authority to put legitimate enterprises out of business following a regulatory offense. See S. REP. NO. 225, *supra* note 9, at 69, 96-97.

Even though they cannot be excluded from a particular line of business under probation terms, organizations operated primarily for illegal purposes or primarily by criminal means can be driven from all further business operations. Such organizations—dubbed "criminal purpose organizations" in the Sentencing Guidelines—are subjected to draconian penalties aimed at putting the organizations out of business. See UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 5 (1991). The fines for these organizations are set at amounts sufficient to divest them of all their net assets. See U.S.S.G., *supra* note 1, § 8C1.1.

207. See 18 U.S.C. § 3563(b)(6).

208. S. REP. NO. 225, *supra* note 9, at 96.

The first and most useful source will be the practices of similar firms. Business practices already used by other firms to combat the type of illegal conduct observed in the offending firm ought to be considered as candidates for probation requirements. Of course, the similarity of the settings in which these practices are used to the offender's circumstances, along with the degree of success they have achieved in assuring law compliance, ought to be considered by a sentencing court before imposing practices as probation requirements. Because they reflect the inventiveness and business experience of others (as well as, perhaps, a greater willingness to try law compliance measures than is present in the defendant organization), law compliance techniques of other firms described in trade or legal journals or ascertainable from other sources ought to be candidates for probation requirements.

A second source of possible probation restrictions lies in the experience of the convicted firm itself. The offense under sentencing is one instructive bit of corporate experience, since it may reveal defects in corporate policies or practices that need repair to help avoid repeat offenses or to make later offenses more easily detected. Therefore, a full understanding of the offense under sentencing, its sources, the internal procedures that might have prevented it, and the detection methods that might have revealed it earlier should be considered by a sentencing court in identifying desirable probation constraints. However, studies should not be limited to the offense under sentencing. Rather, corporate managers or outside experts should be required to assess whether other corporate indicators like civil claims, complaints, or aborted transactions suggest patterns of legally risky behavior like that reflected in the firm's offense. These additional forms of past corporate behavior can be further indicators of law compliance disfunction, suggesting the need for alternative practices to prevent the repetition of revealed abuses. If firm managers have not responded to these indicators as of sentencing, courts should compel them to do so by appointing outside experts to propose appropriate new constraints and by requiring compliance with those constraints as corporate probation conditions.

General corporate management principles are a third source of information on desirable corporate probation constraints.²⁰⁹ By treating illegal behavior of the sort present in the firm's offense as a type of corporate

209. For a more detailed discussion of the role general management principles can play in the development of corporate probation terms, see Gruner, *supra* note 120, at 85-105.

activity that should be discouraged or prevented by management processes, established management principles can identify corporate probation terms that will help prevent further instances of such behavior.²¹⁰ In general, these principles suggest means to reduce the likelihood that individual corporate employees will undertake illegal conduct by restricting their discretion to select such conduct or by shaping their situational incentives to discourage such choices.²¹¹ Changes to further these ends can be made in corporate organizational, motivational, informational, personnel selection, performance monitoring, and control practices.²¹² If court-appointed experts, managers of the corporate probationer, or government attorneys can articulate why, in terms of established management principles, specific corporate changes will be reasonably calculated to prevent and detect further offenses,²¹³ sentencing courts should rely on those principles and impose the indicated reforms.

d. A Strategy for Reform Requirements

Corporate probation and other sanctions authorized under the Sentencing Guidelines can create a range of incentives encouraging managers to respond to corporate crimes. To maximize the beneficial effect of probation sentences, sentencing courts need to match the form of probation sentences to the cooperativeness of managers of convicted firms in undertaking post-offense reforms.

The overall probation sentencing strategy which sentencing courts should use in formulating probation requirements is a "tit-for-tat" enforcement pattern.²¹⁴ Under this strategy, the extent and detail of court control over a corporate probationer should vary in an inverse relationship to the extent of voluntary efforts by corporate managers to formulate and institute post-offense reforms. That is, a sentencing court should

210. Management actions that further a particular corporate goal like law compliance can only be specified in terms of relative merit. No single, best selection exists, but techniques that tend to promote the desired end better than others can be identified. See, e.g., JAY GALBRAITH, ORGANIZATION DESIGN 55 (1977); JAY W. LORSCH & PAUL R. LAWRENCE, STUDIES IN ORGANIZATION DESIGN 1 (1970).

211. Cf. OLIVER E. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR 174-75 (1970) (interpreting corporate organizational structures in terms of their impact in modifying situational incentives and discretionary opportunities of corporate employees).

212. See Gruner, *supra* note 120, at 85-105.

213. See U.S.S.G., *supra* note 1, § 8D1.4 (comment.).

214. See JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY 119-148 (1985); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 35-53 (1992).

cooperate with firm managers to the extent that managers pursue internal reforms voluntarily following an offense. However, when managers resist reform efforts, sentencing courts should impose detailed, demanding, and heavily monitored probation terms. By shifting enforcement strategies in parallel with corporate cooperativeness, a sentencing court can insure that firm managers with varying attitudes about the desirability of voluntary corporate changes have meaningful incentives to pursue and maintain commitments to post-offense reforms.

A range of specific probation enforcement strategies can be pursued within the “tit-for-tat” framework. At one extreme lies voluntary adoption of compliance plans and other reform measures by the corporate offender prior to sentencing. The Sentencing Guidelines encourage this process strongly, if indirectly. The Guidelines make the threat of court-ordered probation and reforms manifest to corporate managers once a corporate conviction appears likely. However, the Guidelines give corporate managers an opportunity to act to improve their firm’s position by providing that post-offense responses should be considered in setting fines and probation terms and by specifying that key determinations like the sufficiency of corporate law compliance systems are to be made as of the point of sentencing rather than the time an offense was committed. If managers adopt substantial compliance programs voluntarily following an offense, their efforts can avoid corporate probation entirely.

1) *Voluntary Compliance*

In probation sentencing, a court can cooperate with corporate managers by granting relatively unrestrictive probation terms. For their part, managers of a corporate offender can cooperate in achieving federal sentencing goals by formulating and implementing substantial corporate reforms prior to sentencing. This will require substantial self-studies to identify sources of corporate offenses, further analyses of reform alternatives and their probable effectiveness, and implementation of the reforms identified as probably most effective. If managers undertake such a response to corporate crime prior to sentencing, their firm deserves light probation restrictions or no probation at all.²¹⁵

215. If such reform efforts are underway, but uncompleted at sentencing, a sentencing court can impose demanding probation terms while indicating to the managers of the sentenced corporation that they should continue to develop their own probation proposals for submission to the court in a motion seeking altered probation terms or a dismissal of probation altogether in light of the organization’s reforms.

In comparison with external enforcement through probation terms or other mechanisms, internal development and implementation of post-offense reforms through voluntary management efforts will be preferable for several reasons. First, firm managers will typically have much easier access to the information needed to carry out desirable reforms following a corporate offense.²¹⁶ Second, firms will often have superior financial resources to support the studies necessary to formulate reform measures and to conduct further, ongoing monitoring of compliance with those measures. Finally, and perhaps most importantly, firms will have a greater capacity to sanction employees deviating from revised law compliance standards and practices. The sanctions available to firms, including salary, demotion, termination, and penalties, will often achieve greater deterrence than public enforcement of similar reforms.

Yet, even when their organizations have voluntarily adopted substantial law compliance reforms, firm managers must still feel that they have something to lose from poor law compliance.²¹⁷ One way to enhance this motivation is for sentencing courts to impose criminal offense reporting requirements on convicted firms. Any pattern of similar offenses reported by a corporate probationer should trigger a thorough judicial review of the adequacy of the firm's ongoing compliance efforts.

2) *Enforced Self-Regulation*

If firm managers hesitate to respond to a corporate offense, some suspicion about the depth of management's commitment to law compliance is justified, and a sentencing court should adopt a less cooperative probation approach. Where managers of a corporate offender have not voluntarily examined the need for post-offense reforms, a sentencing court should consider a probation strategy involving enforced self-regulation of law compliance standards.²¹⁸ Under this arrangement, managers of a

216. The informational advantages held by firm managers over sentencing courts and appointed experts acting under court appointments include greater accumulated background knowledge about firm activities, broader knowledge of corporate information sources, better ability to interpret investigative results, and stronger sanctions available to compel disclosure or collection of additional relevant information from corporate employees.

217. The likelihood that illegal conduct will be detected by public authorities will significantly affect managers' assessments of crime risks. In some settings, such as small firms with frequent public contracts or firms in heavily regulated and inspected industries, illegal conduct may be likely to be detected and deterred accordingly. More substantial detection problems are likely to arise in large corporate organizations operating in unregulated fields and in substantial resolution from public scrutiny.

218. The notion of enforced self-regulation was first proposed as a strategy for regulatory re-

corporate offender would be given the opportunity to propose standards for restricting corporate conduct to avoid further crimes like the offense under sentencing. These standards would be reviewed for adequacy by prosecutors, court-appointed experts and the sentencing court and then modified to the extent necessary to insure a reasonable probability of subsequent law compliance. Compliance with the resulting standards would then be made a condition of the corporation's probation.

Further probation terms would require the probationer to adopt internal corporate mechanisms for enforcing compliance with probation restrictions. These enforcement arrangements might include the creation of a probation compliance staff within the corporate offender, the specification of its duties and arrangements to isolate it from line-management control, and the requirement of external reporting on compliance monitoring activities undertaken by the internal staff and their results.

These internal enforcement efforts could be coupled with probation terms aiding external probation monitoring by probation officers or regulatory officials.²¹⁹ This external monitoring would be aimed at detecting gross abuses of the probationer's internal compliance systems. Appropriate external monitoring activities would include: (1) assessments of whether company standards are sufficient to insure compliance with applicable laws, (2) analyses to determine if company compliance officials are free to identify compliance problems without pressure from performance-oriented corporate managers to downplay those problems, (3) analyses of types of monitoring undertaken by internal compliance monitors, (4) spot inspections to check that compliance personnel are detecting and remedying violations of probation terms and other legal requirements, and (5) investigations and reports to the sentencing court when a firm fails to comply with probation terms.

By adopting this probation strategy, sentencing courts will oversee systems of privately developed and publicly ratified standards for insuring compliance with underlying criminal law requirements. Probation conditions developed in this manner will restate criminal law demands in terms particularized and strengthened for convicted firms. These probation standards will serve as both targets for corporate action and measures of corporate law compliance success. Particularized probation

form. See AYRES & BRAITHWAITE, *supra* note 214, at 101-32. John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1467 (1982).

219. See BRAITHWAITE, *supra* note 214, at 126.

terms will make later assessments of many probation violations simpler than related analyses of criminal violations.

Under a system of “tit-for-tat” enforcement, corporate probation sanctions should be tailored to rely on reform efforts by corporate managers to the extent that cooperation is shown in return. Giving corporate managers the opportunity to shape compliance standards to minimize disruption of legitimate business activities will motivate them to actively participate in constructing probation terms and enforcing those terms as internal corporate standards. Of course, where internal enforcement efforts falter during a term of probation, a sentencing court can again adopt a “tit-for-tat” enforcement philosophy and either impose more demanding probation terms or resentence the firm to a harsher fine.

Reliance on enforced self-regulation as a probation strategy has many advantages over pure external enforcement of probation restrictions. It allows probation constraints to be carefully matched to a particular firm’s operations and law compliance problems. At the same time, it should help minimize the administrative burdens of compliance measures on firm managers and coordinate compliance methods with other firm activities. Because company personnel will undertake most compliance enforcement and monitoring activities, this approach will force corporate probationers to bear most probation enforcement costs. Furthermore, corporate managers will have a stake in making a self-enforcement system work effectively because the failure of this process will place their firm at risk of resentencing and the imposition of harsher probation terms or fines. With this motivation, corporate managers will tend to apply internal corporate sanctions and investigative capabilities to insure compliance with probation terms.

3) *Mandated Restrictions with Enforcement Discretion*

As a more onerous form of corporate probation, sentencing courts can mandate probation restrictions developed for resistant firms by outside experts. If a corporate probationer violates externally developed probation standards, a sentencing court will have the discretion to specify a wide range of sanctions. The threat that a court will impose severe sanctions on a firm that makes little effort to comply with probation terms will motivate firm managers to seek methods to comply with mandated restrictions. Hence, at a less substantial level of firm cooperation, mandated probation restrictions coupled with discretionary choices about sanctions for violations constitute another valuable “tit-for-tat” variant.

Because externally imposed probation terms will often not be supported by internal corporate enforcement mechanisms, extensive external disclosures and studies will be needed to effectively monitor compliance with such terms. To the extent that external compliance monitors have substantial enforcement discretion, they also may be targets of co-option. Mechanisms like peer review of monitoring efforts or monitoring assignment rotations may be necessary to insure accurate evaluations of probation violations. While enforcement processes external to corporate probationers will typically be more expensive to maintain than internal enforcement arrangements, probationers can be forced to pay the costs of external probation monitoring by appointed experts. Even if the government bears some incremental costs from imposing externally monitored corporate probation arrangements, a viable threat of externally developed and enforced probation schemes should be maintained to encourage firm managers to make good faith efforts to propose probation terms when they have the opportunity to do so and thereby avoid externally imposed probation arrangements.

4) Mandated Restrictions with Defined or Presumed Sanctions

At an even higher level of compulsion, particularly recalcitrant firms can be subjected to externally developed probation terms coupled with pre-selected sanctions for failures to comply with particular probation conditions. A similar approach would entail probation terms tied to sanctions that the sentencing court will impose following a probation violation unless the firm presents compelling proof as to why those penalties are inappropriate.

The advantage of these arrangements lies in matching harsh mandatory sanctions with particularly serious probation violations. Serious probation violations would include violations in a pattern that reflects weak law compliance monitoring or enforcement efforts by corporate managers or a single violation reflecting a flagrant disregard of important probation restrictions. By promising harsh sanctions for probation violations like these, sentencing courts will provide clear warning of serious consequences for these violations and create corresponding deterrents. Even managers who are otherwise resistant or oblivious to probation requirements may respond to clear statements of draconian consequences for specific probation misconduct.

Threatened sanctions will often need to involve very serious consequences to have this effect. The Sentencing Guidelines provide a good

example of the type of strong sanction that sentencing courts can specify as a consequence of serious probation violations.²²⁰ The Guidelines recognize that “[i]n the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.”²²¹ Because the appointment of a master or a trustee would directly displace the powers of corporate managers,²²² the possibility of such an appointment will be a powerful and meaningful threat to corporate leaders and encourage them to take substantial efforts to avoid its realization.²²³

2. *Probation Sentences Expanding Offense Disclosures*

Corporate probation terms can indirectly further post-offense reforms in convicted firms by aiding governance and other private monitoring and discipline processes. If the circumstances surrounding an offense, including the possible involvement of senior officials, have not been adequately clarified, probation terms can require critical evaluations of the offense and disclosures of the results to further private accountability of the firm or its managers.²²⁴ Sentencing courts can direct agents of the corporation or outside experts such as special counsel to undertake studies of offenses for this purpose. The required product of these studies should be a report that sets forth a factual account of the criminal behavior underlying a corporate offense, the involvement of corporate personnel in the offense, and an evaluation of existing and potential control systems to prevent similar offenses in the future. When completed, such a report would be filed with the sentencing court for use by shareholders in holding corporate officials accountable for their actions and by em-

220. A sentencing court might wish to frame a designated sanction in presumptive rather than guaranteed terms to signal corporate managers that it is willing to adopt a lesser sanction for good cause, thereby giving probationers an incentive to make improvements following a probation violation.

221. U.S.S.G., *supra* note 1, § 8D1.5 (comment.).

222. While it was “not the intent of the Committee [reporting the Act] that the courts manage organizations as a part of probation supervision,” S. REP. NO. 225, *supra* note 9, at 99, the legislative history does refer to probation arrangements entailing “effective supervision of a convicted . . . union, . . . or brokerage house,” *id.* at 131, which could be undertaken by probation officers “from the requisite profession.” *Id.* For example, auditors, accountants, lawyers, engineers, or experienced executives in the field could serve as probation officers.

223. *Cf.* JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 77 (1967) (noting corporate managers’ strong aversion to outside interference with their control over corporate affairs).

224. *Cf.* John C. Coffee, Jr. et al., *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 WHITTIER L. REV. 77, 83, 85-86, 92 (1988) (advocating similar probation sentences).

ployees, customers, suppliers, or others wishing to redefine their dealings with the firm in light of its illegal conduct.

The goal of this form of probation sentencing would be to implement in a sentencing context a parallel to the Securities and Exchange Commission's practice of requiring an internal investigation and report on securities law violations as part of case settlements under consent decrees.²²⁵ There, as here, the objective is to enhance corporate governance and accountability processes to the benefit of both shareholders and the public. Internal accountability generally cannot be restored unless the corporate offender's board of directors and its shareholders have an adequate understanding of the corporate conduct leading to a conviction. Probation terms of the sort described here will help insure that they have an independent source of information not limited by the unenthusiasm or active discouragement of offense studies and revelations by corporate managers.

Mandated offense studies and disclosures are particularly important to counteract "an unfortunate plea bargaining dynamic" which tends to conceal the substance of corporate offenses.²²⁶ Often, when a firm and its top corporate officials are both prosecuted, the firm will agree to plead guilty in exchange for an agreement by prosecutors to drop charges against the individual officers. The corporation's plea may reveal little about the circumstances of an offense or about the identity of those within the corporate organization who were primarily responsible. To the extent that one important goal of federal sentencing is "to promote respect for the law,"²²⁷ sentencing courts should not permit the plea bargaining process to become a barrier to public understanding of the culpability of individuals responsible for corporate crimes. Sentencing courts can avoid this result by accepting corporate plea bargains, but insuring through probation sentences that the circumstances of an offense are thoroughly investigated and revealed.

3. *Adverse Publicity*

The Sentencing Guidelines support the imposition of probation terms obligating a convicted organization to pay for adverse publicity concerning its conviction. A sentencing court may

225. See, e.g., John C. Coffee, Jr., *Beyond the Shut-eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1271-72 (1977).

226. Coffee, et al., *supra* note 224, at 85.

227. 18 U.S.C. § 3553(a)(2)(A).

order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.²²⁸

Adverse publicity sanctions have been advocated as a response to corporate crime for some years. In the early 1970s, the National Commission on Reform of the Federal Criminal Laws (the "Brown Commission") considered proposals to authorize adverse publicity sanctions for corporate offenders. An early draft of the proposed federal criminal code would have authorized sentencing courts to require convicted firms to "give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media or otherwise."²²⁹ However, the Brown Commission's final proposals included only a victim notice provision.²³⁰ The Brown Commission rejected adverse publicity "as inappropriate with respect either to organizations or to individuals, despite its possible deterrent effect, since it came too close to the adoption of a policy approving social ridicule as a sanction."²³¹ Congress did not act on the Brown Commission's proposals, but it did later provide for victim-notice sanctions involving limited offense publicity aimed at promoting victim compensation. Congress again considered broader adverse publicity sanctions, but rejected them as beyond the compensatory goals of victim notices.²³²

In authorizing adverse publicity under the new Guidelines, the Sentencing Commission apparently believed that federal courts possess the authority to impose adverse publicity sanctions under Congress' broad grant of power to develop and impose creative probation terms that fur-

228. U.S.S.G., *supra* note 1, § 8D1.4(a). See generally Andrew Cowan, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992).

229. NATIONAL COMM'N REFORM OF THE FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE 32 (1970).

230. Congress eventually addressed victim notice sanctions in the Sentencing Reform Act of 1984. See 18 U.S.C. §§ 3553(d), 3555.

231. FINAL REPORT, *supra* note 64, § 3007, at 276 (1971) (comment). But see Cowan, *supra* note 228, at 2411-12 (arguing that ethical limitations on the use of public ridicule as a criminal sanction should not be applied to artificial entities like corporations because they lack the human capacity to be humiliated).

232. See S. REP. NO. 225, *supra* note 9, at 84-85 (noting that Congress did not intend the Sentencing Reform Act's victim notice provisions to authorize "corrective advertising" or to subject a defendant to public derision).

ther the general goals of federal sentencing.²³³ The Commission recommended adverse publicity as a corporate sanction not only to expand the punitive options of sentencing courts, but also to increase corporate deterrents by playing upon managerial concerns about firm reputations.²³⁴

Corporate adverse publicity sanctions can serve a number of federal sentencing goals.²³⁵ Such sanctions allow greater variation in criminal deterrents and punishments than fines alone by adding reputational impact as a further sentencing dimension. In addition, adverse publicity may be the only means of punishment for financially weak firms. Adverse publicity lowering corporate prestige may have a negative impact on corporate managers and employees and, unlike economic sanctions, cannot wholly be passed on to consumers or shareholders. Adverse publicity often indirectly furthers the general deterrence and educational goals of the criminal law by communicating details of crimes and related punishments to potential offenders. Such publicity may also increase individual accountability for corporate misconduct by identifying persons within firms who are responsible for corporate crimes and raising the likelihood of civil damage claims and internal discipline affecting those individuals. Adverse publicity may assist potential crime victims in protecting themselves by informing them about a firm's past misconduct. Finally, adverse publicity attaches a degree of reputational stigma to all members of a corporate organization and may therefore appropriately impose penalties at the organizational level in cases where a sentencing court cannot determine the individual responsible for an offense or where a court can identify a few responsible individuals, but other unidentified managers or employees share responsibility for the illegal conduct.

To a certain degree, corporate harm flowing from adverse publicity may translate directly into lost revenues and corresponding financial losses. When this occurs, adverse publicity is merely an indirect means of imposing the equivalent of a fine. The amount of the economic harm suffered due to adverse publicity will depend on the attitudes and conduct of persons receiving the adverse publicity. This means that the public may serve a role in scaling the scope of corporate sanctions since the

233. See 18 U.S.C. § 3563(b).

234. See Wilkins, *supra* note 16, at 120 (1990).

235. For detailed analyses of the advantages of adverse publicity sanctions for corporate offenders, see MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* 319-22 (1980); BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 285-314 (1983); Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, *supra* note 151, at 107.

degree of economic penalties flowing from adverse publicity will correspond roughly to public perceptions of the severity of various crimes. More likely, however, public reactions to adverse publicity will vary for reasons other than assessments of crime severity, meaning that adverse publicity will produce a pattern of economic impacts that are haphazard and less desirable than directly imposed fines.

Because of the uncertain economic impacts that may follow,²³⁶ the use of adverse publicity solely to impose corporate financial hardship probably should be avoided. Courts should reserve adverse publicity for circumstances where it will achieve more than just a reduction in corporate business activities and corresponding financial losses.

One such circumstance may be where adverse publicity will “achieve deterrence by inducing loss of prestige or respect, provided that ‘prestige’ and ‘respect’ are not merely qualities which reflect financial standing.”²³⁷ To the extent that corporate reputations do not directly translate into corporate financial success, reputational impact offers a different dimension of punishment.²³⁸ The difficulty that remains lies in identifying types of reputational impact that will be onerous to corporate personnel, yet not immediately detrimental to corporate finances. One possible candidate is publicity that affects the willingness of highly qualified parties to work at the convicted firm. To the extent that such publicity succeeds, it may have little immediate impact on firm finances, but will affect the self-image and morale of employees. It also will affect the future well-being of the firm, which may cause firm managers to perceive the threat of such publicity differently than fines.

Another type of adverse publicity with an impact beyond fines would

236. Adverse publicity mandated by sentencing courts may fail to produce desirable economic results for a number of reasons. First, a court overseeing adverse publicity may prove to be a poor propagandist and authorize publicity that does not produce the public reaction furthering sentencing goals. Second, mandated publicity may be drowned out in the flood of information reaching the public, causing the required publicity to be overlooked. Third, the corporation may be able to dilute the reputational impact of mandated publicity by countervailing positive publicity. Fourth, the corporate stigma from publicity about some highly technical regulatory crimes may be slight. Fifth, it may be difficult to stigmatize a corporate defendant in a way that affects subsequent consumer behaviors because, in many fields, the consumer cares about the merit of a product not its supplier. See *Coffee*, *supra* note 126, at 425-28. Cf. *FISSE & BRAITHWAITE*, *supra* note 235, at 289-312 (recognizing the potential significance of many of these problems, but arguing that they can be overcome through careful use of adverse publicity sanctions).

237. *Fisse*, *supra* note 151, at 118.

238. Mass media publicity about illegal conduct represents the most feared consequence of corporate criminal convictions and sanctions according to both executives and law enforcement officials. See *CLINARD & YEAGER*, *supra* note 235, at 318 (1980).

be focused disclosures aimed not at diminishing future corporate business activities, but rather at reshaping their content. If the nature of a corporate offense is disclosed to persons contemplating future dealings with the offending firm, they will have an opportunity to include monitoring or performance checks in those dealings to protect themselves from repeat offenses by the corporation. Thus, for example, if a firm is convicted of undertaking a certain type of fraud against a limited set of customers, adverse publicity aimed at reaching the firm's other customers might allow the unharmed customers to restructure their contracts and behavior toward the convicted firm to diminish risks of similar frauds.²³⁹

A third context in which adverse publicity may be useful involves using the public reputation of a firm to insure the implementation and continuation of post-offense reforms. Requiring a firm to publish periodic reports on specific aspects of its probation conduct will give managers strong incentives to shape that conduct to support favorable descriptions before the public. For example, if a firm is required to publish monthly reports on pollution discharges at company facilities along with commentary on how those discharges compare with legal requirements and past pollution levels at the same facilities, managers will not only have strong incentives to make improvements, but they will have continuing motivations not to revert back to old ways. Of course, adverse publicity sanctions structured this way would need to be coupled with probation monitoring to insure that descriptions of corporate conduct in published reports were accurate. Provided that this outside check on accurate reporting is implemented, it is unlikely that corporate managers will risk probation sanctions, resentencing of their firms and heightened reputation losses by fraudulently manipulating a mandated pattern of corporate advertising.

4. *Punitive Probation Sentences*

Another variety of corporate probation sentence involves probation terms and requirements imposed to punish managers and employees of the corporate offender and also, through the example of the offender's

239. In similar administrative settings, the Food and Drug Administration and the Federal Trade Commission have compelled corrective advertising to overcome consumer fraud. See FISSE & BRAITHWAITE, *supra* note 235, at 286-87; Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477 (1971). For example, in ITT Continental Baking Co., 79 F.T.C. 248 (1971), the makers of Profile bread, having deceptively advertised the dietetic benefits of their product, were required to state in 25% of their advertising that "Profile is not effective for weight reduction."

undesirable treatment, to increase general deterrents toward similar illegal conduct by other firms.

In contrast to individual probation, which was almost exclusively a means to reduce individual punishment, corporate probation terms imposed under the Federal Probation Act were sometimes used to increase corporate punishment over levels that they could be imposed through fines alone. Corporate probation terms inflicted punishment by requiring firms to undertake actions that were onerous to firm managers and employees or which subjected the firm to public shame.²⁴⁰ For example, one court required a firm to reassign several senior corporate officers to work for service organizations as a form of "corporate penance."²⁴¹ Besides their punitive effect, these probation terms served to rehabilitate offending firms by insuring that employees contemplated the seriousness of their firm's offense while undertaking the onerous acts required.²⁴² Punitive probation terms also helped firms avoid the potentially devastating impact of large fines that might otherwise have been imposed.

As this Article noted in connection with punitive community service orders, the Sentencing Guidelines provide little support for purely punitive probation sentences,²⁴³ stressing instead the need to impose corporate punishment through corporate fines. However, when fines otherwise recommended under the Guidelines are withheld due to a convicted firm's inability to pay them,²⁴⁴ a sentencing court should consider imposing substitute punishments under probation terms. The onerous activities required should not be so costly that they threaten the firm's viability,²⁴⁵ yet they should be significant enough to be remembered by corporate personnel as a reminder of the seriousness of their firm's criminal conduct. Furthermore, the participation of top corporate leaders might be compelled to insure that this reminder lodges at the top of the organization. While the requirement of service by unconvicted executives or managers may raise due process concerns, such a requirement

240. Cf. Fisse, *supra* note 117, at 1007 (explaining that corporate probation conditions can impose appropriate punishment by "inflicting loss of autonomy, and possibly loss of prestige as well").

241. *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 214 (D. Md. 1983), *rev'd on other grounds*, 728 F.2d 648 (4th Cir. 1984).

242. See, e.g., *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1167 (S.D.N.Y. 1983).

243. Cf. S. REP. NO. 225, *supra* note 9, at 96 (indicating that operational restrictions on convicted parties were "not [to] be used as a means of punishing the convicted person").

244. Sentencing courts must reduce corporate fines from normal recommended levels when the imposition of the full recommended fine would substantially jeopardize the continued viability of a corporation. See U.S.S.G., *supra* note 1, § 8C3.3.

245. Cf. *id.* (imposing similar limits on the financial impacts of corporate fines).

probably constitutes an acceptable burden under due process standards where the affected party had some involvement in the corporate offense under sentencing or where the burden of punitive probation requirements is a fair complement to the party's high corporate position and associated public trust and responsibility.²⁴⁶

IV. CONCLUSION

Rather than serving as a mere supplement to corporate fines, innovative corporate sentences will increasingly be primary objectives of corporate criminal prosecutions. Two recent trends in corporate criminal law may produce a shift in favor of remedial and reform sentences over punitive fines. First, public attention to corporate misconduct has produced growing pressure for harsh criminal sanctions applicable to ever broader ranges of corporate crime.²⁴⁷ Recent statutes have responded to these pressures by dramatically increasing maximum corporate fines for most federal offenses.²⁴⁸ This has been coupled with a renewed interest in criminally prosecuting corporations during the last two decades.²⁴⁹

Second, even as threatened criminal penalties have risen, the rationale for imposing any corporate criminal liability under federal law has increasingly been questioned. Federal standards which hold firms criminally liable for employee crimes without a separate showing of corporate

246. See Gruner, *supra* note 120, at 69-71.

247. One commentator has questioned whether public outrage over corporate crime has produced a form of institutional hatred toward corporations that may interfere with clear thinking about corporate crime. According to Professor Albert W. Alschuler:

In 1991, the penal philosophy of many Americans is simple: "We like to snarl." We resent crime, and in our rush to express our indignation, we may truly personify and hate the corporation. We may hate the mahogany paneling, the Lear jet, the smokestack, the glass tower, and *all* of the people inside. They—the mahogany and all of them—are responsible for the oil spill, the price-fixing and the illegal campaign contributions. To superstitious people, villains need not breathe; they may include Exxon and the phone company.

The corporation thus becomes for some of us, not Frankpledge, but deodand. Just as primitive people hated and punished the wheel of a cart that had run someone over, or the horse that had thrown its rider, or the sword that a murderer had used, some of us truly manage to hate the corporate entity.

Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312 (1991).

248. See United States Sentencing Comm., *Notice of Proposed Additions to Sentencing Guidelines*, 54 Fed. Reg. 47,056 to 47,057 (1989).

The most important enactment raising corporate fines was the Criminal Fines Enforcement Act, Pub. L. No. 98-596, 98 Stat. 3134, *reprinted in* 1984 U.S.C.A.N. 5433 (authorizing corporate fines of up to \$500,000 and higher fines of up to twice the offender's gain or victim's loss where pecuniary gain or loss can be established).

249. KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* § 1:01, at 3 (2d ed. 1991).

fault have been challenged as inconsistent with traditional criminal culpability requirements. To reinject culpability measures into federal corporate criminal law, numerous commentators have argued in favor of organizational culpability proof as a prerequisite to corporate criminal liability²⁵⁰ or due diligence defenses permitting firms to avoid liability based on their lack of organizational culpability.²⁵¹ While none of these proposals has been adopted, the heightened criminal penalties available under the Sentencing Guidelines seem likely to accelerate this trend towards reexamining the fault bases of corporate criminal liability under federal law.

Amidst these conflicting trends—one tending to make corporate criminal liability more of a deterrent threat and the other, if successful, likely to reduce this threat—innovative corporate sentences represent a relatively uncontroversial dimension of federal criminal law.

Whatever beliefs one has about the need for corporate blameworthiness as a basis for corporate criminal liability, these concerns seem less serious in connection with prosecutions aimed at remedial and preventive goals. Regardless of the degree of managerial fault involved in the crimes, crimes undertaken for corporate benefit by employees and other corporate agents often produce corporate gains, particularly when those crimes go undetected and unpunished. Given their receipt of benefits from corporate offenses, corporate organizations can fairly be called upon to reduce offense injuries and pay associated remedial costs even in the absence of managerial fault. Furthermore, a restitution rule internalizing these costs to offending firms will encourage appropriate levels of preventive behavior, much like compensatory liability in tort.

Even if the affected interests of corporate shareholders are considered, a clear basis for corporate restitution sentences is present. Assuming that corporate organizational fault is irrelevant, crimes by corporate agents raise a conflict between the interests of two innocent groups: crime vic-

250. *E.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121-64 (1991); Harvey L. Pitt & Karl A. Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U. L. REV. 447, 449-53 (1991); Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1306-11 (1990).

251. *E.g.*, Developments in the Law, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1257 (1979) (proposing a criminal defense allowing a corporation subjected to liability under respondeat superior principles to “rebut [the] presumption of liability by proving by a preponderance of the evidence that it, as an organization, exercised due diligence to prevent the crime”).

tims and corporate shareholders. As between these two groups, it is appropriate to require shareholders to bear crime losses since they will usually be in a better position to control or influence the commission of crimes by corporate employees or agents. Corporate restitution and other remedial sentences achieve this result.

Shifting to preventive sanctions, federal criminal liability for corporate offenders has long been premised on the notion that firms have duties to monitor and prevent criminal behavior by their agents. When preventive systems are inadequate—and many corporate crimes suggest that they are—the preventive goals of corporate criminal law dictate that mandatory improvements in corporate practices are fair and valuable responses to corporate neglect in failing to prevent offenses.

Thus, under several notions of corporate responsibility for employee and agent offenses, remedial and preventive sentences stand on firm ground. The novelty of innovative corporate sentences authorized under the new Sentencing Guidelines may delay the widespread use of these sentences. But the ability of innovative sentences to address goals of sentencing not served by other sanctions suggests that corporate sentences beyond fines will have important roles in future corporate sentencing. The Sentencing Guidelines open the door for new ranges of organizational sentences unlike individual sanctions that have come before. As such, they are part of a growing body of distinctly organizational criminal standards suitable for a society dominated by organizational conduct and plagued by related corporate crime.