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Cornell Law Review

January, 2004

89 Cornell L. Rev. 310

LENGTH: 22136 words**ARTICLE:** REFORMING CORPORATIONS THROUGH THREATS OF FEDERAL PROSECUTION**NAME:** John S. Baker, Jr.+**BIO:** + Dale E. Bennett Professor of Law, Paul M. Hebert Law Center, Louisiana State University.**SUMMARY:**

... Many corporate and criminal defense lawyers object to the attorney reporting provisions in the 2003 Sarbanes-Oxley Act, the moneylaundering provisions of the USA PATRIOT Act, and the U.S. Department of Justice's revised guidelines for the prosecution of corporations, as well as the Justice Department's push for even longer sentences for financial crimes. ... Despite its breadth, federal criminal law does not address corporate reform. ... Unlike the Defense Department's original view that private companies engaged in self-policing were doing so voluntarily, the federal government approach is typified by the unfounded HHS assertion that self-policing in the form of a "compliance program" is a "legal duty. ... Corporate self-policing or compliance plans have become pervasive since the 1991 adoption of the guidelines for sentencing of organizations. ... What is truly "novel" is that in the name of moral and ethical reform and rehabilitation, the Sentencing Commission has, without clear statutory authority, arrogated the power to regulate corporate governance. ... The claim that fines do not adequately deter corporate crime has been utilized to justify the use of novel forms of sentencing to reform corporations. ... Professor Sutherland's influence is clearly evident in the substance and practice of federal criminal law. ... Although the INS fiasco may not have merited indictment of the agency, how likely is it that the Justice Department will ever indict a federal agency? The Department's prosecution guidelines apply to government entities, and the Department would not have far to look to find an accounting scandal worth investigating. ...

HIGHLIGHT: Criminal prosecution is a spur for institutional reform.

- Hon. Michael Chertoff, Assistant Attorney General
Criminal Division, U.S. Department of Justice n1

TEXT:

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Introduction

Many corporate and criminal defense lawyers object to the attorney reporting provisions in the 2003 Sarbanes-Oxley Act, n2 the money- [*311] laundering provisions of the USA PATRIOT Act, n3 and the U.S. Department of Justice's revised guidelines for the prosecution of corporations, n4 as well as the Justice Department's push for even longer sentences for financial crimes. n5 Commentators have characterized the combination of these efforts as "anti-business" and "anti-corporate." n6 Yet the premise that underlies these reform efforts is that the federal government should transform corporations into "good citizens." n7 Virtually no one representing corporate America has questioned that premise. Understandably, corporations are reluctant to declare that they do not want to be "good citizens." Nevertheless,

it is imperative to question the authority of the federal government - through the U.S. Sentencing Commission, the Justice Department, and other federal agencies, individually and collectively - to reform corporations.

Assuming *arguendo* that corporations need reforming, this task is a matter of corporate governance, an area that state corporate law controls. Unlike civil law, all federal criminal law is statutory, n8 and unlike state courts, federal courts cannot exercise common law criminal jurisdiction. n9 Congress must base federal criminal laws on one or more of its enumerated powers. n10 Congress has used the Commerce Clause n11 to vastly increase the number of federal crimes. n12 As the Supreme [*312] Court has recently stressed, merely invoking interstate commerce is not necessarily constitutionally sufficient to justify every federal crime. n13 Otherwise, the federal government would be exercising a general police power, which the Constitution withholds. n14

Despite its breadth, federal criminal law does not address corporate reform. So how has federal law enforcement gotten into the business of corporate governance? Federal prosecutors might deny that they are involved in corporate governance and assert that they are reforming only those corporations that have committed crimes. Premitting the problem that corporate guilt is entirely fictional, n15 the first point one must consider is the fact that the Justice Department prosecutes very few of the many federal crimes committed. n16 Given the enormous number of federal crimes and the limited number of federal judges, the Justice Department can bring only a relatively small number of criminal cases. n17 So the Department is highly selective. The Department therefore emphasizes certain priorities, which for a long time have included "white-collar" crime. In choosing whether to prosecute particular corporations, prosecutors exercise a great deal of discretion, n18 and they consider, among other factors, the effect prosecutions will have on other corporations. n19

Second, even though federal criminal laws do not address corporate reform, Congress's delegation of power in criminal matters, as in other matters, has allowed executive and independent agencies to implement policies that Congress might never approve if it actually voted [*313] on them. Congress's habit of drafting broad statutes, leaving much interpretation to the Justice Department and federal courts, has given federal criminal law an uncertain and expansive character. n20 Most importantly, the Supreme Court's decision in *Mistretta v. United States*, n21 rejecting separation-of-powers challenges to Congress's creation of the Sentencing Commission within the judicial branch and the conferral on it of legislative authority over sentencing, n22 made it possible to reform "corporate culture" through actual and threatened prosecution.

This Article proceeds, in Part I, to discuss the role that corporate "self-policing" plays in the Justice Department's guidelines for prosecution. Although self-policing was initially a voluntary movement among certain industries that worked closely with federal agencies, the Justice Department has increasingly been forcing corporations to self-police through the threat of federal prosecution. Part I.A discusses the "carrot and stick" approach toward inducing self-policing in the Federal Sentencing Guidelines for Organizations, and Part I.B addresses the Justice Department's self-reporting expectations.

This Article then addresses, in Part II, the manner in which government prosecution of so-called "white collar crime" n23 creates stigma and presumptions of guilt among alleged corporate criminals. Indeed, as Part II.B discusses, the wars on terrorism and organized crime may implicitly place corporate criminals in the same category as mobsters and terrorists.

I

Self-Policing: From Private, Voluntary Guidelines to Criminally Enforceable Minimum Standards

Corporate self-policing began voluntarily in the private sector. n24 The U.S. Sentencing Commission then incorporated the idea into the federal sentencing guidelines for organizations. n25 Self-policing became [*314] a tool that some administrative agencies used as part of programs of leniency. Finally, it has become virtually mandatory as far as the Justice Department and some other federal agencies are concerned. n26 Over the course of almost two decades, self-policing through compliance programs has been reshaping the private sector. By using the broad term "wrongdoing," n27 which can cover noncriminal conduct such as the failure to "meet[] industry standards and best practices," n28 the Justice Department has expanded its mission beyond criminal law enforcement to "enable[] the government to ... be a force for positive change of corporate culture." n29

Initially, self-policing or compliance programs were voluntarily adopted in industries closely tied to the federal government. For example, after a bribing scandal in the defense industry, n30 seventeen defense contractors came together in 1986 to create a document called "The Defense Industry Initiative on Business Ethics and Conduct" (DII).

n31 This self-policing initiative was an outgrowth of recommendations of the Packard Commission (chaired by the founder of Hewlett-Packard Corporation and then Deputy Secretary of Defense David Packard) that called for the defense industry to adopt codes of conduct, ethics training, and compliance-related procedures. n32 When the U.S. Department of Defense later began its own voluntary disclosure program, the Department acknowledged that the program was voluntary. n33

[*315] Since then, government agencies, rather than individuals in the private sector, have driven such programs and have applied these programs to groups beyond those, like defense contractors, who sell directly to the government. For instance, as the Medicare program has expanded, the U.S. Department of Health and Human Services (HHS) has become the largest "purchaser" of health care. n34 The federal government does not purchase health care directly the way it purchases aircraft; rather, it reimburses health care recipients in a manner similar (for present purposes) to an insurance company. n35 In terms of fraud and abuse, however, HHS operates as if there is no difference. Unlike the Defense Department's original view that private companies engaged in self-policing were doing so voluntarily, the federal government approach is typified by the unfounded HHS assertion that self-policing in the form of a "compliance program" is a "legal duty." n36 To assist federal agencies in fighting "fraud and abuse," Congress created inspectors general that audit compliance with agencies' rules. n37 Thus, federal agencies' auditing powers, which are legitimate to oversee spending within federal agencies and by nonprofit grantees on federally funded projects, have extended into the private sector of for-profit businesses and professions that sell to or receive reimbursement from the federal government.

As states learned long ago, the federal government uses its ability to make grants under its spending power to change the recipient's behavior. n38 Even when this is not the original intent, most grants eventually do have this effect. Defense contractors, which depend heavily on the Defense Department, are unavoidably and voluntarily subject to their powerful purchaser. n39 Indeed, the nature of that relationship is what gave rise to the pejorative term, "the military industrial [*316] complex." Health care, however, is an entirely different industry. Until relatively recently, it has not been an "industry" at all, but a widely dispersed collection of doctors, hospitals, and other agencies. n40 As Medicare spending has grown, however, health care has been consolidating into an "industry" of fewer and larger providers under the pressures of federal spending and regulation. n41 Thus, even though health care differs fundamentally from the defense industry, federal purchasing power explains how federal agencies are able to reshape certain industries within the private sector.

Most of the private sector is not directly dependent on government spending. Nevertheless, the Justice Department and other federal agencies are attempting to make virtually all corporations, as "good citizens," adopt corporate compliance programs. The "incentive" for doing so is the not-so-subtle threat of federal prosecution. Thus, federal agencies have assumed unto themselves the power to regulate much of corporate and professional America that neither sells to nor receives reimbursement from the federal government.

A.

"Carrots and Sticks" in the Federal Sentencing Guidelines for Organizations

Corporate self-policing or compliance plans have become pervasive since the 1991 adoption of the guidelines for sentencing of organizations. n42 The Sentencing Guidelines have spawned a "compliance" industry of lawyers, accountants, consultants, and corporate vice presidents, who draft codes of corporate conduct and provide employee training in both the codes and appropriate practices - which, in turn, they audit for compliance. n43 When violations occur, theoretically the system of compliance should detect them and the corporation should "voluntarily" disclose the wrongdoing to federal law enforcement. Although the Sentencing Guidelines do not offer much guidance, the voluntarily adopted codes of conduct are supposed to be "effective [*317] programs," n44 which seems to imply that their operation will result in voluntary disclosure of wrongdoing.

According to the Sentencing Commission, the Guidelines adopt a "carrot and stick" approach. n45 The "carrot" of a potentially lesser sentence upon future conviction is supposedly the incentive for a corporation to adopt a code of conduct and voluntarily disclose wrongdoing. n46 If a convicted corporation has not pursued these incentives, the "stick" will be the imposition of higher penalties. n47

The so-called "carrot and stick" approach never had much carrot to it, however. If a company adopted a compliance program and self-reported violations, it received no guarantee of leniency. n48 On the other hand, the failure to pursue

the carrot "voluntarily" virtually guaranteed being hit with the stick in the event of a corporate conviction. n49 As the Senior Attorney at what was then Bell Atlantic put it:

We've all heard the sentencing guidelines described as using the carrot and stick. The idea is to reward good acts and to punish the bad. But, in fact, we may be somewhat off the mark. Companies today that take aggressive ethics and compliance steps run high risks of being beaten with their own acts, beaten with the carrots that were supposed to lure them to do good things. Moreover, what is offered as a reward may not really be a carrot. Instead of offering real incentives, for the most part we are only shortening the stick that will be used against companies. n50

In terms of sentencing, the so-called incentives are burdens on corporations without corresponding benefits. The benefit, as the Sentencing Commission sees it, is that self-policing assists corporations to become "good citizens." n51 However desirable this goal may be, it is quite possible to be less than a good citizen without committing a crime. Many individuals are less than "good citizens" by society's standards because they do not vote, volunteer for military service, or otherwise [*318] act with civic virtue. Unlike in other countries, n52 however, these omissions indicative of poor citizenship have not been treated as criminal in the United States.

Corporations, of course, cannot vote or volunteer for the military; so should they be treated differently? Indeed, corporations can do none of the actions required of a virtuous citizen because, as abstract entities, they lack the mind and will necessary to make the voluntary choices which distinguish virtue from vice and criminal conduct from noncriminal conduct. For that reason, corporations could not be guilty of crimes at common law. n53 When the Supreme Court departed from the common law rule in *New York Central & Hudson River Railroad Co. v. United States*, n54 it upheld a misdemeanor conviction of a corporation and allowed punishment by a fine, which was long assumed to be the only way courts could punish a corporation. n55

One premise of *New York Central* was that the law should not treat corporations differently from individuals. n56 Thus, because corporations cannot be arrested or jailed, the Court thought that the judiciary should at least be able to fine corporations for public wrongs. n57 The Sentencing Commission, however, was not satisfied that fines, regardless of how they were calibrated, were adequate. n58 Apparently assuming that much more undetected corporate misconduct was occurring, it wanted something more than "fines for the unlucky corporations that were caught." n59 The Commission desired to change "corporate culture" generally, n60 both for the convicted and the nonconvicted. Its approach was quite compatible with (although not necessarily based on) the assumption, discussed below, n61 that all corporations are presumably guilty of criminal conduct.

[*319] The so-called "carrot" approach turned the organizational guidelines into an aspirational and admittedly experimental n62 exercise in "integrity" education for corporations. n63 As a private undertaking by corporations themselves, an "integrity" approach to corporate management has many benefits. n64 As a matter of punishment, after a corporation has been convicted or pled guilty, developing an "integrity" plan may well be a legitimate condition of probation. But how is it legitimate for the guidelines to tell corporations, before there is any indication of wrongdoing on their part, that they will be punished more severely if they do not adopt a corporate "integrity" program?

Corporations should not be "subject to harsher treatment" than others, at least according to Justice Department guidelines. n65 Certainly, all persons are equally responsible for their own conduct and therefore are expected to "police" themselves. Indeed, the mark of a self-governing republic is that citizens govern themselves. Nevertheless, except for juveniles whom the state can convict for "status offenses" n66 (such as truancy, which applies to offenders because of their status as juveniles), individuals are free to act as they choose as long as they do not violate a clear criminal prohibition. Accordingly, vagrancy laws that do not clearly define what is criminally proscribed are unconstitutionally vague because such laws do not provide adequate [*320] notice to affected persons and because their uncertainty leaves too much discretion to government law enforcement. n67 The organizational guidelines, however, allow for increased punishment for failing to take "good citizen" actions n68 - actions that the government does not require of individuals and that are not clearly defined.

While individuals are only required to comply with the law, corporations must adopt "an integrity strategy [that] is broader, deeper, and more demanding than a legal compliance initiative." n69 Not only does the Justice Department hold corporations to a different standard, but the Department has failed to define the requirements for being a "good citizen," which raises serious notice problems. n70 How does a corporation satisfy a standard that is qualitative? The guidelines conflate prescription with proscription. Reasonable persons can disagree about matters of prescription, such as an exhortation to be a "good" person or a "good" citizen. In a country that values liberty, it is problematic to expect much agreement among citizens who have different views of what it means to be "good." It is, therefore, all the more

important that there be clear notice of proscribed conduct; criminal prohibitions serve this purpose. n71 Although some of these statutes may assume underlying moral norms, n72 they do not prescribe virtuous conduct. The guidelines' mixture of prescriptive and proscriptive puts law-abiding corporations at risk. As the President of the National Center for Preventative Law, which has been offering corporate compliance training since 1985, told the Commission: "The U.S. [*321] Sentencing Commission's guidelines have taken the style of the common law of negligence and engrafted it on top of the liability of the criminal process. In fact, it's a misfit." n73

If a corporation does in fact implement an effective compliance program, the corporation is probably not even negligent, much less guilty of crime. Under such circumstances, as the recently resigned Deputy Attorney General Larry Thompson wrote while working as a defense attorney, "the organization is in effect blameless." n74 When an individual is blameless, it is unethical to prosecute him; apparently a different standard applies to "blameless" corporations. Even according to Senator Edward Kennedy, who pushed for organizational sentencing, the government should guarantee that a corporation will not be indicted where it has in good faith instituted a compliance program. n75 With such a program in place, any violations of the law by a corporation, as Thompson argued in his prior role, n76 constitute no more than negligence. Despite such obvious considerations of fairness, corporations remain at the mercy of sentencing judges and prosecutors who decide whether the programs are "effective."

So how does a corporation determine whether it has an "effective" compliance program without simply hoping that a prosecutor or sentencing judge will believe it does? If indicted, a corporation can put its case to a jury by arguing that it had a compliance policy in place and that the employee who violated the law acted contrarily to that policy. n77 Not wishing to risk leaving their fate to a jury, many corporations have created a new position of "ethics and compliance officer." n78 Still, by what standard does such an officer determine whether a corporation's policies will prevent it from being indicted? Apparently, this is an uncertain and evolving standard. n79 Thus, the [*322] standard may or may not now include the "ethics" of a corporation, a term mentioned nowhere in the guidelines. An ethics requirement may well be read in. Consider what Sentencing Commission Chair Judge Diana E. Murphy has written on the relationship between ethics and effectiveness:

Although the term "ethics" does not occur anywhere within the organizational guidelines, opinions differ regarding whether ethical considerations always have been an implicit component of effective compliance programs, or whether ethics should now explicitly be incorporated into the compliance program criteria in the organizational guidelines. Dr. Stephen Cohen of the University of New South Wales calls ethics the next step: "We are now at a point where a further step is recognised for compliance; and that step is 'ethics'. This is now clearly part of the brief of compliance departments. And, as with the earlier evolution, the inclusion of ethics requires articulation and then expertise."

... .

Compliance is more than looking to the letter of the law: "It is a management function that calls for skill and diligence in managing the ways in which a business conducts its daily affairs." It should incorporate "policy development, communications, ... [assessment of] vulnerabilities," as well as the success of ethics programs... .

It is questionable whether a compliance program can be truly effective if it does not have an ethics component. n80

It is generally accepted that using criminal law to bring about moral reform or rehabilitation among individuals has been a failure. n81 There is, however, absolutely no basis at all for attempting to achieve moral reform or rehabilitation of a corporation. A corporation cannot "sin" and has "no soul to damn," and it operates through any number of individuals, which makes any attempt at reform or rehabilitation of the individuals involved even more problematic. n82 Truly, the attempt to reform (before indictment) or rehabilitate (after conviction) corporations is "A Novel Sentencing Approach." n83 This "novel" approach is particularly dubious given that the legislation creating the Sentencing Commission and delegating the task of developing sentencing guidelines discounts the role of rehabilitation in favor of just punishment, deterrence, and incapacitation. n84 What is truly "novel" is [*323] that in the name of moral and ethical reform and rehabilitation, the Sentencing Commission has, without clear statutory authority, arrogated the power to regulate corporate governance. The message that the guidelines send to all corporate officers and directors amounts to a mandate that they govern their corporations in a manner that is acceptable to prosecutors and juries; otherwise judges will be required to "rehabilitate" convicted corporations. n85

What gives the Sentencing Commission authority to treat corporations so differently from individuals? Again, setting aside the questionable moral legitimacy of prosecuting corporations, n86 the fact that corporations cannot be jailed means that some differences in punishment are necessary. The unprecedented federal intrusion into the regulation

of corporate governance, however, is constitutionally questionable. n87 At the very least, there should be plain statutory authority for such an intrusion. Initially, the Sentencing Commission was unclear as to its authority over organizational sentencing. n88 As important as this question was the fact that "the Commission never formally [*324] determined that its enabling statute required the promulgation of organizational sentencing guidelines, [although] certain individual Commissioners clearly held this view." n89 The Commission's decision to promulgate these guidelines was apparently based on the notion that it should rectify an inequality in sentencing among corporate defendants and between white-collar and non-white-collar defendants. n90 But by the time the Commission adopted the guidelines, it seemed to have forgotten that principle of equality in treatment. This shift in posture may be attributable to changes in the Commission's membership and, therefore, in its overall philosophy. n91 Senator Ted Kennedy also apparently exercised considerable influence over both the issue of the Commission's authority to develop any organizational guidelines and its attitude towards the seriousness of the white-collar crime problem. n92

Undue influence by prominent members of Congress over administrative agencies that they oversee may be an unavoidable consequence of the so-called "delegation doctrine." n93 This same kind of political influence, however, over an entity located within the Judicial Branch - which is where Congress placed the Sentencing Commission n94 - should be a matter of great concern. As for administrative agencies, even Justice Scalia recognizes that "unconstitutional delegation... [*325] is not ... readily enforceable by the courts." n95 The Sentencing Commission, however, is not an administrative agency; it conducts some information gathering, n96 but otherwise it is solely legislative. n97 As the majority in *Mistretta* acknowledged, the Commission is "a peculiar institution," n98 whose existence as an independent agency within the Judicial Branch raises some concern about separation of powers. n99 In the majority's view, however,

the "practical consequences" of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts. n100

Once again, however, Justice Scalia has proven to be quite prescient. He charged that the Sentencing Commission represents a more serious violation of separation of powers even than the Independent Counsel statute approved by the Court in *Morrison v. Olson*. n101 He was the lone dissenter in both *Mistretta* and *Morrison*. Years later, when Congress finally decided in 2000 not to renew the Independent Counsel statute, many hailed Justice Scalia for accurately identifying the dangerousness of that statute. n102 More recently, federal judges have also complained about congressional and executive intrusion into the judicial function of sentencing. n103 Although Congress has [*326] the power to legislate very detailed sentencing provisions which would micro-manage judges, the constitutionally designed process of bicameralism and presentment make it difficult for Congress to enact controversial legislation without significant compromise. The Sentencing Commission can "legislate" more easily, with Congress intervening when, for example, it adds mandatory minimum sentences. Justice Scalia's point in both *Morrison* and *Mistretta* was that a "flexible" approach to the Constitution's design for separation of powers necessarily produces the very kind of political abuses of power the Framers sought to minimize. n104

B. Codes of Conduct: From Carrot to Stick

Since the creation of the organizational sentencing guidelines in 1991, the Justice Department has come to view self-reporting as virtually mandatory. n105 The Department's position on the sentencing guidelines reflects this view, in that the Department "recommends an additional two-level enhancement when a company does not self-report in a timely way following discovery of criminal behavior." n106

Both before and after the Commission adopted the organizational guidelines in 1991, different federal agencies experimented with programs which offered leniency for companies that voluntarily reported criminal violations. n107 Then in 1999, a Justice Department [*327] memorandum, "Bringing Criminal Charges Against Corporations" (known as the "Holder Memorandum," after then Deputy Attorney General Eric Holder), stated that compliance programs and corporation cooperation are factors that federal prosecutors should consider when deciding whether or not to indict a corporation. n108 This memorandum apparently reflected the policy shift of the Clinton Justice Department in the direction of regulating entire industries by the threat of prosecution, rather than simply punishing those proven to have committed criminal acts. n109 However, criminal prosecutions did not decrease even as regulation through the threat of prosecution increased. n110

When the Bush Administration commenced in 2001, many assumed that it would adopt different policies regarding prosecuting corporations. Eric Holder's replacement, Deputy Attorney General Larry D. Thompson, while a defense

attorney, had written an article that was critical of federal corporate prosecutions. n111 Following the collapse of Enron and WorldCom, however, Thompson not only ratified [*328] but expanded the policies of the Clinton Justice Department with respect to corporate prosecutions. n112

Under the Bush Administration, federal agencies now view codes of conduct, compliance programs, and self-reporting as legal duties. According to the Inspector General of HHS, self-reporting is "an ethical and legal duty." n113 Self-reporting, however, extends beyond criminal conduct to "immediate notification to governmental authorities prior to, or simultaneous with, commencing an internal investigation... [for any] clear violation of administrative, civil or criminal laws." n114

In Deputy Attorney General Thompson's revised guidelines, prosecutors are to consider whether a corporation, while purporting to cooperate, has engaged in conduct that impedes an investigation - whether or not the corporation's actions rise to the level of criminal obstruction. n115 A corporation "impedes the investigation," for example, when it fails to promptly disclose illegal conduct known to the corporation. n116 Even though the memorandum states that such nondisclosure need not amount to obstruction of justice, the Justice Department would punish the corporation as if it were. As previously noted, the Justice Department recommended a two-level enhancement for failure to report, which is equal to the enhancement for obstruction of justice. n117

Both the Justice Department and HHS respectively take the view that disclosure must be "prompt[]" n118 or "immediate." n119 In doing so, these departments impose a more rapid response than the Securities and Exchange Committee (SEC) required in the "Final" Sarbanes-Oxley Rules on "Standards of Professional Conduct" for Attorneys. n120 Given [*329] the reasons for the SEC's new rules and the process by which the SEC adopted them, it would seem that its rules for public corporations set a very high standard. The SEC's new rules require an attorney for a public corporation to advise a client's general counsel or CEO n121 about "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." n122 The Justice Department apparently wanted the SEC rules to require corporations to report "immediately" when they come into possession of information about corporate misconduct. n123 The SEC, on the other hand, "explicitly recognizes that a 'reasonable investigation' should precede the attorney's advice." n124

Even though the SEC has just recently issued these new requirements and they apply only to public corporations, the Justice Department has for some time taken a more aggressive approach to virtually all corporations it investigates. According to a letter from the American Counsel Association to the Clinton Justice Department in May 2000: "It is the regular practice of U.S. Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with prosecutor's investigation." n125 Supposedly, the Bush Justice Department, per the Thompson Memorandum, does not make waiver of the attorney-client privilege the norm. n126 Yet, given the increase in corporate criminal investigations since the Enron collapse, n127 it is difficult to imagine that federal prosecutors have become more restrained. On the contrary, prosecutors who have the authority and often the tendency to "push the envelope" are even more likely to do so in the current climate. Despite the Justice Department's guidelines, "individual federal prosecutors have tremendous authority as to the initiation and conduct of grand jury and other criminal investigations of alleged wrongdoing on the part of business organizations," n128 as Deputy Attorney General Thompson once wrote.

[*330] Under the Thompson Memorandum, in order to avoid waiver of attorney-client privilege, the "DOJ sometimes offers corporations the opportunity to avoid waiver outright, or limit it substantially, by allowing the corporation to disclose through its employees rather than through its attorneys." n129 Despite its benefits, this process raises tricky problems for the attorneys, the corporation, and the employees involved. n130 "Most significantly, the DOJ clarification fails to address the concern of cooperating corporations that disclosure of attorney-client privilege or protected work product will be a waiver of such protections as to third parties and expose the corporation to civil lawsuits." n131

Under Supreme Court decisions, the protection of the Fifth Amendment's privilege against self-incrimination, as applied to corporate document production, has steadily eroded. n132 Given the importance [*331] of documents in corporate prosecutions, prosecutors either attempt to seize them through subpoenas or warrants, or they can simply press corporations to turn them over "voluntarily." Without significant protection for corporations under the Fifth Amendment, the Justice Department has been able to push aggressively for self-reporting and codes of conduct through tactics that threaten the constitutional privilege. n133 Although they have no assurance of any benefit for compliance plans, corporations must nevertheless do much more than not violate criminal laws because that is what federal agencies

demand. As stated above, according to the Inspector General of HHS, affected corporations should provide for "immediate notification to governmental authorities prior to, or simultaneous with, commencing an internal investigation ... [for any] clear violation of administrative, civil, or criminal laws." n134 The Justice Department's corporate prosecution guidelines use the term "misconduct" to include conduct that is not necessarily criminal, but nevertheless is not considered to be that of a "good citizen." n135 Thus, under the guise of proscriptive criminal law enforcement, Justice Department policy is creating comprehensive regulation - a regime of prescription.

The SEC does not have comprehensive regulatory authority even over public corporations; yet while it does not actually compel public corporations to adopt codes of conduct, it has made failure to do so very difficult for them. n136 Corporations are creatures of the states, [*332] and state law provides the requirements for corporate organization. n137 Federal law forms a fragmented overlay with particular legislation passed under one or more of Congress's enumerated powers. The securities laws, as administered by the SEC, are the most comprehensive of the federal laws affecting public corporations. n138 Since 1996, the federal securities laws, which apply to public companies, have largely preempted state securities laws. n139 Despite the broad powers [*333] conferred on the SEC, the federal securities laws establish a "conceptual line excluding the Commission from corporate governance." n140 The federal government does not dictate forms of organization, because there is no general federal incorporation law - although some have advocated such a law. n141 While there is no applicable federal statute which directly provides for reform of nonpublic corporate organizations, federal sentencing guidelines, agency guidelines, and recent Justice Department guidelines for prosecution are, in the aggregate, a powerful instrument by which to "reform" corporate governance.

The claim that fines do not adequately deter corporate crime has been utilized to justify the use of novel forms of sentencing to reform corporations. n142 Of course, the notion that corporate crime "deterrence" is possible assumes that a corporation is capable of committing a crime, that is, capable of forming mens rea. Given that a corporate mens rea is entirely fictional, n143 the term "deterrence" used in this context [*334] does not involve motivating the response of an intelligent being. Deterrence in the context of so-called corporate crime more closely resembles Pavlovian obedience training. The process does not involve the rational premise of classic deterrence theory; n144 it is simply corporate regulation. Prosecutors are involved in corporate-wide behavior modification on the unproven assumption that this will prevent crime. This approach does not concern prohibition of wrongful acts; it prescribes doing "good."

Prior to the Sentencing Guidelines, fines were the basic means of punishing corporations. n145 For those who wanted to stigmatize corporations, however, fines were inadequate. n146 For those who simply wanted to deter corporate misconduct, the effectiveness of fines was and is a matter of debate. n147 For corporations, fines that did not carry much stigma appeared, at most, to be as burdensome as civil fines. n148 Thus, prior to 1991, business organizations had little more incentive to contest a criminal prosecution than a governmental civil action. It did not matter much whether the proceeding against a corporation was for a regulatory offense or for a true crime, because the sanction was more or less the same. With the sentencing guidelines for organizations, the Sentencing Commission attempted to make sentencing more substantial. n149 There was insufficient debate about attempting [*335] to impose a criminal, i.e., moral, stigma on corporations; it was simply assumed that such punishment was justified. n150

Although the Sentencing Guidelines and Justice Department policies have significantly changed the regulation of corporations, the congressional legislation responding to the current corporate scandals may not be as significant as some claim. But the substantial increase in resources will likely provide strong enforcement. n151 Like the post-Watergate reforms, the current reforms are likely misdirected. n152 The most famous piece of so-called reform legislation from that era was the Ethics in Government Law, with its ill-conceived Independent Counsel statute. n153 The legislative reaction to Watergate was also aimed at reforming future lawyers by injecting ethics into the law school curriculum and continuing legal education. n154 Thirty years later, those reforms have not done much to refurbish the reputation of the legal profession with the general public. For example, many law firms connected with Enron have come under scrutiny in the related bankruptcy litigation because of their involvement in Enron's finances. n155 The new SEC attorney reporting requirements, n156 which [*336] diminish the self-regulating tradition of the legal profession, n157 assume that "lawyer ethics" have failed. The current corporate reforms, however, like the post-Watergate reforms, are unlikely to affect ethics in any significant manner.

Legal ethics scholars debate whether the approach to ethics should be integrity-based or rule-oriented. n158 The Sentencing Commission opted for the "integrity based" approach. n159 Certainly rules, without integrity, do not amount to ethical conduct. n160 Congress, however, can only legislate rules or delegate rule-making. It cannot legislate integrity. All too often, rules are adopted to satisfy the appearance of "doing something." n161

Corporate consultants will naturally advise their clients that "effective compliance programs, and their related controls, are the number one tools that companies have at their disposal to ensure that the potential for violations of law are minimized and ethical behavior is instilled within the business organization." n162 If this were so, however, Enron should have been the very model of an ethical company. "After all, Enron Corp. had a compliance plan ... that was regarded as state-of-the-art." n163 Even before the Enron era, an attorney's failure to recommend a compliance plan might have constituted malpractice. n164 While there may be good reasons, including cost, why a corporation should not adopt such a program, n165 post-Enron pressures to adopt compliance programs are powerful.

[*337]

II

Stigmatizing and Prosecuting in Order to Control Corporations

Federal criminal law has significant practical and political advantages over direct attempts to legislate new corporate regulation. Corporations are loathe to criticize federal criminal laws; and even if they did lobby against such legislation, their normal allies would be unavailable. Republicans supposedly favor business and, therefore, generally oppose corporate regulation. n166 But if legislators add a criminal penalty to any business regulation under the guise of the "War on Crime," most congressional Republicans will vote for it. n167 Opposing business regulation may generate campaign contributions, but opposing crime produces the votes. Of course, when the two conflict, convicting "criminals" naturally comes first. Never mind that Congress's commitment to creating more federal crime has meant that more citizens are federal criminals. n168 Thus, after years of complaining about what they labeled "outrageous" product liability litigation, Republicans in the House of Representatives, in response to the Ford-Firestone fiasco, led the effort in 2000 to pass legislation that turned product liability into a federal crime. n169

Targeting corporations for prosecution might arguably be justified if in fact such a policy had any real relationship to crime levels, but economic crime has in fact declined since 1994. n170 The public, however, has a different impression due to the collapses of Enron and WorldCom, and the sensational publicity which presumed guilt [*338] before anyone provided the proof. n171 Driven by "published opinion," the Bush Administration reacted with a flurry of indictments. Prosecutors obtained more than 250 corporate fraud convictions or guilty pleas in the course of a year. n172 Almost all of those convictions would have resulted from guilty pleas. n173 As the trial of Arthur Andersen indicates, however, "white-collar" guilty pleas are suspect. The government's star witness, auditor David Duncan, testified that he did not think he had done anything criminal at the time of the relevant actions. n174 Later, after considering the government's offer of leniency in return for his testimony, he changed his mind. n175 Without agreeing to admit his guilt, he would not have been allowed to plead guilty. n176 In the absence of other well-publicized trials, it is difficult to know how many guilty pleas reflect actual guilt as opposed to perjured pleas proffered to lessen the time, expense, and anxiety of the ordeal. But we do know that the last media-driven frenzy over corporate crime - the savings and loan collapses of the early 1990s - greatly exaggerated corporate culpability. Although crimes did occur, most of the institutions that failed did so because the commercial real estate market collapsed. n177 As later reported, the crash was inevitable after Congress changed the law to allow thrifts to invest in commercial real estate. n178

Since the collapse of Enron and WorldCom, the Republican-controlled Congress and Justice Department have reacted with ill-conceived legislation and scatter-shot prosecutions out of fear of political [*339] fallout. In doing so, the political branches are marching to the drumbeat of the media. The reporting, by and large, seems to accept the anti-corporate ideological premises discussed below, n179 which underlie the movement to stigmatize corporations as criminals. That is not to say that members of Congress or the Justice Department necessarily share those same ideological premises. Rather, they are driven predominantly by the fear of losing power. n180 The motivations of prosecutors are more varied, as described by Deputy Attorney General Thompson before he assumed that position:

Obviously, prosecutors are like the rest of us and are imbued with all the human frailties we possess. Some people, for many reasons, believe that large, high profile business organizations are too powerful economically. Other people possess a healthy dose of ambition which is a positive trait in most instances but which can lead to bad judgments in others. n181

Whatever the individual motivations, the dynamics of process propel Congress to give more power to federal prosecutors who, as a group, do not fail to use it.

A. Wealth and Corporations: A Constant Source of Controversy

Political struggle over corporations represents a recurring theme in American life. At the time of our Founding and for several decades thereafter, corporations were quasi-public entities that "functioned very much like arms of government, usually serving some specific public end." n182 The opposition to the first and second national banks involved more than opposition to federal power as such; the opponents criticized the monopoly status of these quasi-public entities. n183 The quasi-public role of corporations was consistent with the mercantilist view of trade, which prevailed before Adam Smith's views took hold. n184 Adam Smith and Thomas Jefferson both opposed corporations because their quasi-public nature produced special privileges [*340] and monopolies. n185 Later, Jacksonian Democrats promoted privatization and democratization by enacting general incorporation laws. n186

When private corporations after the Civil War became more powerful than the states that chartered them, states attempted to control them through the use of criminal penalties. n187 In part, corporations grew more powerful because the Supreme Court afforded corporations certain advantages and freed them from various state restrictions. n188 But the states still had their criminal powers. Although states could not jail a corporation, they could damage its reputation with a criminal conviction and penalize it with a fine.

A comparison of pre-Jacksonian corporations as quasi-public entities with the "good citizen" view underlying current federal efforts to reform corporations reveals interesting similarities. Scholar Jamil Zainaldin describes the basis for earlier quasi-public corporations as follows:

In return for limited grants of immunity, monopoly, and privilege to corporate bodies, the state retained the authority to structure individual charters in the public's interest... . State governments stipulated that corporation officers must submit annual accounting reports; and lawmakers reserved the power to amend, renew, alter, or withdraw the charter. Lawmakers also placed strict limits on what corporations could and could not do. "All corporate acts which the legislature has not authorized remain prohibited," and officials and courts were to construe their charters with a "narrow, jealous eye." Further, states regulated the internal management of corporate bodies: the coercive powers of officers, stockholders' meetings, voting, stock prices, and stock issuance. States might even direct how funds were to be invested. n189

Unlike the nineteenth century approach, the current agent of change has not been state government, but the federal government. Without a general federal law on incorporation, however, the tool of federal power is criminal law. The growth of federal criminal law, often identified as resulting from the Civil War, has had a tortuous history involving confusion between the federal government's broad power to regulate commerce and its criminal police power, which is not a general power, but rather depends on the enumerated powers. n190 [*341] The regulatory and the police powers came together in, and expanded from, *Champion v. Ames (Lottery Case)* n191 in 1903. n192 Six years later in *New York Central & Hudson River Railroad Co. v. United States*, n193 the Supreme Court departed from the common law view to permit prosecutions of corporations. n194 Taken together, these decisions established the basis for the federal government's regulation and criminal punishment of corporations. Due to the constitutional structure of federalism and the continuing influence of mens rea in criminal law, n195 it was many decades before the full potential of exerting regulatory control over private corporations would be realized under the rubric of "white-collar crime."

B. Invention of the Term "White-Collar Crime"

The terms "white-collar crime" and its offshoot, "organized crime," reflect an attempt to change the basic understanding of the definition of a crime. The inventor of the term "white-collar crime," Professor Edwin Sutherland, strongly disagreed with the most basic substantive and procedural principles of criminal law. In his landmark book, *White Collar Crime*, n196 first published in 1949, Professor Sutherland objected to the requirement of mens rea and the presumption of innocence. n197 He argued that the "rules of criminal intent and presumption of innocence ... are not required in all prosecution in criminal courts and the number of exceptions authorized by statutes is increasing." n198 If nothing else, this attack on the foundational principle [*342] of the presumption of innocence should have discredited what followed from that premise.

1. A Presumption of Guilt

Professor Sutherland made the amazing claim that corporations were routinely determined to be guilty of crimes without the presumption of innocence. n199 He was referring, however, to civil and regulatory cases, not criminal cases. n200 Thus, Sutherland labeled all types of business conduct as criminal without proof of any crime occurring,

because he thought proof of corporate culpability unimportant. He justified this mislabeling, despite the lack of criminal procedure protection, by noting that the powerful receive better treatment in the legal system. n201 As Sutherland stated:

The thesis of this book, stated positively, is that persons of the upper socioeconomic class engage in much criminal behavior; that this criminal behavior differs from the criminal behavior of the lower socioeconomic class principally in the administrative procedures which are used in dealing with the offenders; and that variations in administrative procedures are not significant from the point of view of causation of crime. n202

... .

Many of the defendants in usual criminal cases, being in relative poverty, do not get good defense and consequently secure little benefit from these rules; on the other hand, the commissions come close to observing these rules of proof and evidence although they are not required to do so. n203

Professor Sutherland was intent on providing a basis for facilitating more convictions of executives and corporations by reconceptualizing crime through the term "white-collar crime." Thus, he supported a Federal Trade Commission determination that a corporation's violation of a regulation is a "white-collar crime." n204 Professor Sutherland equated "adverse decisions" by regulatory agencies with criminal convictions. n205 As to those involved in business, Professor Sutherland in effect reversed the presumption of innocence to one of guilt, to facilitate establishing their criminal liability. n206 Accordingly, he defined white-collar crime "as a crime committed by a person of [*343] respectability and high social status in the course of his occupation." n207 In doing so, he drained the word "crime" of its meaning.

Professor Sutherland made distinctions not on the basis of the crime but according to the status of the accused. n208 As some of his supporters stated:

The term white-collar crime served to focus attention on the social position of the perpetrators and added a bite to commentaries about the illegal acts of businessmen, professionals, and politicians that is notably absent in the blander designations, such as "occupational crime" and "economic crime," that sometimes are employed to refer to the same kinds of lawbreaking n209

They also noted that Professor Sutherland was "intent upon ... pressing a political viewpoint ..." n210 Moreover, he did so in a "tone ... reminiscent of the preaching of outraged biblical prophets." n211

Professor Sutherland's influence is clearly evident in the substance and practice of federal criminal law. Many federal offenses prosecuted under the label of "white-collar crime" are regulatory or public welfare offenses, rather than true crimes. n212 The principal architect of the organizational guidelines cites Professor Sutherland's "social science research," among that of others, to explain the need for the guidelines, namely the "evidence of preferential treatment for white collar offenders." n213

2. Stigma Without Sin

Anyone convinced that another person or class of persons is guilty of crime tends to become impatient with legal niceties. Professor Sutherland and those who assume the guilt of corporations believe that the ordinary protections of the law need not apply to those involved in business. n214 But when others even imply such a pre-judgment about any other group, including terrorists, civil libertarians cry "tyranny." Yet, a civil libertarian outcry in defense of corporate defendants is most unlikely. Concluding that those engaged in business do not deserve the presumption of innocence, Professor Sutherland dispenses with the essential (and often most difficult to prove) element [*344] of crime: a guilty mind. n215 Although it is unconstitutional to eliminate the presumption of innocence, n216 one can circumvent this by eliminating the troublesome part of the proof: the mental element requirement.

Professor Sutherland dismissed the most fundamental principles of criminal law in pursuing his belief that criminal convictions unfairly stigmatize the poor, while regulatory offenses do not stigmatize the rich and powerful enough. n217 Claiming the criminal law should treat the two classes more equally, he wrote:

Seventy five percent of the persons committed to state prisons are probably not, aside from their unesteemed cultural attainments, "criminals in the usual sense of the word." It may be excellent policy to eliminate the stigma of crime from violations of law by both the upper and the lower classes, but we are not here concerned with policy. n218

Professor Sutherland was unable to eliminate the stigma of crime, although dispensing with the mens rea requirement should theoretically achieve this goal. Admittedly, the term that he coined, "white-collar crime," has ensured that, in the quest for greater egalitarianism, the stigma of crime has been applied to much of corporate America. But before society stigmatizes and punishes a criminal defendant, the rule of law requires that reliable procedures determine the defendant's culpability. Although Marxist academics might wish it were so, it is not a crime to be wealthy or powerful.

By eliminating the culpability requirement, Professor Sutherland was able to facilitate the application of stigma to crime. n219 His book charges that the "70 corporations [discussed in his book] committed crimes according to 779 adverse decisions [although] the criminality of their behavior was ... blurred and concealed by special procedures." n220 The complexity of business transactions may make it more difficult to prove criminal activity. It is equally possible, however, that in a particular case no criminal conduct occurred. Without requiring proof beyond a reasonable doubt of a clearly stated mens rea, there is no basis for distinguishing guilty from innocent actions. When prosecutors indict corporations or their executives for federal crimes, the absence of a need to prove or the ease of proving mens rea results in convictions where actual innocence has been "blurred and concealed." n221

[*345] Traditionally, the stigma of crime attaches only to individuals proven to have been "morally culpable" by virtue of having acted with a guilty state of mind. n222 In Professor Sutherland's view, the traditional rule is wrong. Rather, culpability involves an externalized standard of whether a defendant's acts violated the "moral sentiments" of the people. n223 Of course, as the Supreme Court has forcefully stated, the most basic "moral sentiment" is that society not stigmatize persons as criminals unless they have a guilty mind.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," ... n224

Professor Sutherland and his successors greatly expanded the scope of crime by shifting the focus to corporations and individuals in the upper socioeconomic classes. n225 A lawyer-sociologist critic of Sutherland's work, Paul W. Tappan, long-ago noted that Professor Sutherland's definition of crime departed from the legal definition. n226 Professor Tappan charged that this development was a "seductive movement to revolutionize the concepts of crime and [the] criminal..." n227 According to him, Professor Sutherland's "white-collar crime" includes "a boor, a sinner, a moral leper or the devil incarnate but he does not become a criminal through sociological name-calling." n228 The term "white-collar crime" later expanded to include such an array of crime that it has become too amorphous for analysis. n229 Some sociologists, however, found even Sutherland's very loose definition "too restrictive" and "have dropped the class of the offender as a [*346] relevant element." n230 Thus, "white-collar" crime has become a division of organizational crime. n231

The movement by the Justice Department to force corporations to waive their privilege of self-incrimination is quite consistent with Professor Sutherland's thesis that "white-collar" criminals are not entitled to the same constitutional protections afforded other defendants because their financial resources allow them to abuse criminal procedures. Thus, the Justice Department recently reflected that very attitude when requesting that the Sentencing Commission disallow departures from the sentencing guidelines for "white collar criminal defendants, who typically have sophisticated counsel." n232

Compared to his protege Donald Cressey, Professor Sutherland might seem to have been a cheerleader for corporate America. Although mentored by a protege of socialist Thorstein Veblen, n233 Professor Sutherland "fundamentally was an advocate of free enterprise," albeit a highly regulated form thereof. n234 At the conclusion of his book, he said that the upper class commit many crimes, but he could not say whether "the upper class is more criminal or less criminal than the lower class, for the evidence is not sufficiently precise to justify comparisons and common standards and definitions are not available." n235 Despite this lack of evidence, Cressey has repeatedly preached to college students through his standard college text in Criminology that "the people of the business world are probably more criminalistic than the people of the slums." n236

Cressey was instrumental in the creation of the "enterprise" concept, which is at the core of the Racketeer Influenced Corrupt Organizations Act (RICO). n237 Supposedly designed to target "organized crime," prosecutors have used this statute to indict all kinds of corporations, and private parties have used it to sue most major corporations [*347] as well as the Catholic Church. n238 All have been labeled "organized criminals." n239

C. White-Collar Crime, Organized Crime, and Terrorism: What Is the Difference?

However loosely organized, terrorists fall into the category of "organized crime," alongside corporations that commit criminal acts. Since the back-to-back collapses in 2001 of the World Trade Center towers (through the acts of terrorists) and of Enron (through the acts of corporate executives), the new "wars" on terrorism and corporate corruption have dovetailed and simulated the old war on organized crime. The Justice Department, led by organized-crime prosecutors, n240 has become an extension of the Defense Department in the "war on terrorism," as the USA PATRIOT Act provides a new role for law enforcement in fighting terrorism. n241 The boundaries between war and law enforcement are now very blurry.

In these new wars, libertarians have attempted to push a judicial model further into the theater of war, n242 and statisticians have been consolidating federal law enforcement powers under the cover of war. n243 Whether intentionally or not, the Justice Department has enhanced its "war on terrorism" with its war on corporate corruption. While civil liberties activists protested the wide-scale roundups of Arab aliens and the shutdown of Arab organizations, the Justice Department displayed [*348] its bona fides by rounding up corporate executives and shutting down a prominent symbol of American capitalism - Arthur Andersen. n244

1. Threatening Legitimate Businesses as Mobsters and Terrorists

The "perp walks" of CEOs being led off in handcuffs were scripted to "send a message" that "white-collar criminals" would be treated severely. n245 Ordinarily, nonviolent criminals are not led off in handcuffs. n246 Corporate executives were being treated like mobsters, if not terrorists, though. n247 The "war" against corporate crime came at the same time that the chief of the Justice Department's Criminal Division, a former organized crime prosecutor, was also directing the Justice Department's "war on terrorism." n248 While civil libertarians have protested the Justice Department's treatment of suspected terrorists, little if any concern has been publicly expressed about possible abuses of the civil liberties of corporations and their executives.

Policies adopted by the U.S. Department of the Treasury for financial institutions certainly suggest a willingness on the part of some federal officials to treat even legitimate businesses as if they were terrorists. The following statement by the Treasury Department's General Counsel demonstrates that the Department has used anti-terrorist tactics quite ruthlessly, even against businesses known to be innocent.

Let me first tell you about that Executive Order, because it's important you get the perspective of where the PATRIOT Act falls in. It is not our only tool. It would be a fool's errand to think it was.

The Executive Order that we wrote is global in scope. It specifically targets financiers of terror. It uses an operative phrase, which is an invention of my own, which is it reaches not only people knowingly associated with it but anyone otherwise associated with the act of transmission. That was written deliberately so that there was no mens rea, that there was no scienter, that it was strict liability.

What we wanted to do is try to create a code of conduct here and abroad so that you are strictly liable for what happens in your institution. We understand it was unprecedented. We understand it's bold. But it's worked; I can tell you it's worked. I know how it's worked.

[*349] I know that when we suspected that transactions have gone through institutions abroad or through intermediaries abroad, like lawyers, we've gone to them, sometimes directly, sometimes through intermediaries, and sometimes through their host governments. We've told them we don't believe you know this. We believe you're too casual about things. We don't think your financial controls are good, so we're not going to do anything. We want you to be our partner. So share your books and records with us.

We didn't have to complete the rest of that paragraph, because they know the Order. If they decline to give us the books and records and decline to be our partners, we would name not only their institution under the Executive Order that is freezing the assets and prohibiting all trade with that institution, but we would freeze the assets and prohibit trade with the fiduciaries in charge of those institutions.

Now in this respect the Executive Order is a powerful tool. It's better in form of threat than actual execution. I can't tell you how we'd do in a court of law if somebody challenged it. But anyway it's an extraordinary power under national security measures, and the President enjoys an awful lot of leeway with such circumstances. n249

The Treasury Department deliberately used strict liability to coerce codes of conduct and self-reporting from corporations: hardly "voluntary" compliance. Plans have also been announced to extend money-laundering rules to smaller businesses, such as car dealerships and travel agencies. n250

2. Stigmatizing Produces Pleas

Even without the labels "mobster," "terrorist," or "white-collar criminal," crime can stir strong emotions. Victims of crime often want revenge. In criminal trials, legitimate sympathies emerge from testimony, credibility, and character of the witnesses. n251 In close cases, sympathy for a victim can influence a jury towards conviction, n252 while sympathy towards a defendant can produce a conviction for a lesser crime or even an acquittal. n253 At some point, sympathetic bias becomes [*350] prejudice. n254 Although the dividing line may be difficult to discern in practice, adhering to the rule of law requires purging criminal trials of prejudice, for or against a defendant, based on race, religion, gender, or any extraneous emotion. n255

Corporations neither deserve nor attract our sympathy. Sympathy involves the capacity for sharing or understanding the feelings or interests of others. Modern corporations are abstract, impersonal, utilitarian entities lacking emotions and a personal story, and as such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecution. Whatever sympathy corporations incur is the result of shared feelings and interests among the human beings involved in the corporation. Sympathy (or antipathy) may result from relationships between and among the various groups of persons associated with corporations: customers, employees, managers, officers, directors, and shareholders. In the conduct of those relationships, individuals sometimes commit crimes for which, as individuals, they can and should be prosecuted.

When a corporation is criminally prosecuted, it can expect little sympathy because it will be judged by persons who cannot sympathize with a thing - a nonhuman, artificial "person." In the public mind, corporations are valuable insofar as they provide employment, produce goods and services, and provide returns to shareholders. When they fail to do any of these activities, they are "bad" because they have lost some or all of their utility. Since public corporations lost a great deal of or all of their inflated values, many stockholders have become quite angry. Where executives took actions on behalf of corporations that appeared to be "very bad," even though not criminal, prosecutors have an advantage in obtaining guilty pleas because those involved know the jurors will be sympathizing with workers and stockholders.

Once the media personalizes terrorists, mobsters, and even serial killers as "individuals," - as it inevitably does after they are caught n256 - [*351] these defendants generate more sympathy than do corporations and their executives. The greater an individual's crime, the more fascinated the media becomes with that defendant, as reflected in the media's efforts to explain what motivates particularly heinous crimes, n257 such as the Washington, D.C.-area sniper killings. n258 This media obsession might suggest, therefore, that individual corporate executives whom the government indicts would fare at least as well as terrorists and serial killers. They do not, however, because their luxurious lifestyles make it easy to caricature them as greedy people who achieved their elite status through wrongdoing rather than hard work. The public reacts differently to indicted corporate executives than it does to indicted actors and sports stars who also live lives of luxury. n259 The vast difference between lifestyles of celebrities and the general public does not prevent the public from identifying with the celebrities. Indeed, celebrities have gained their wealth and elite status through their public approval, as their fans demonstrate by feeling a friendship with and desiring to be like their idols. Although stars are different, they are still "like us."

Corporations and their executives are easily demonized. This antipathy allows federal prosecutors to proceed without much public scrutiny of the charges. Federal judges can normally be relied on to restrain the actions of overzealous prosecutors, n260 but too many federal judges allow overzealous interpretations of federal criminal [*352] law. n261 While previously a defense attorney, Deputy Attorney General Thompson wrote "Although many white collar violations involve clearly recognizable false statements and fraud, other white collar investigations often involve more ambiguous conduct." n262 Faced with uncertain constructions of federal statutes n263 and unfriendly juries, corporate defendants feel a great deal of pressure to plead guilty, regardless of the merits of the case. n264

Governments normally punish only the guilty. It is "normal" both in the statistical and the moral sense of the term. Thus, it is disturbing news every time DNA evidence establishes that the state convicted an innocent person. Wrongful convictions, however numerous, are not normal, because they violate a fundamental norm that criminal law should differentiate guilt from innocence. Thus, each story about a wrongfully convicted individual raises concern about possible, unknown victims of injustice. When the media publicizes these cases, concern also arises that procedures

intended to protect the innocent have failed. If the number of wrongfully convicted persons ever achieves statistical significance, what would control our judgment: the statistical norm or the moral norm?

The American public would never knowingly condone convicting the innocent. When influenced by media coverage and opinion, however, the public can assume away the issue of guilt or innocence. Thus, prejudice created by pretrial publicity can prevent a fair trial for a defendant in a particular community. n265 In a nationwide media market, prejudicial publicity that demonizes corporations can affect every case and drive corporate defendants to plead guilty.

[*353] Whatever theory or approach one adopts to justify corporate criminal liability, one cannot escape from the reality that corporations are being punished without regard for culpability. To say that a corporation is "at fault" for the acts or omissions of its officers, directors, or employees dispenses with mens rea. n266 Mens rea is not just any fault, but moral fault. n267 Whatever mens rea an officer, director, or employee had is particular to that person. In contrast, whether based on so-called necessity or an anthropomorphic theory of the corporation, the mens rea of the corporation is a fiction. n268

3. What About Prosecuting and Reforming Government Agencies?

While the Justice Department has been busy reforming corporate America, it has not been able to keep its own house in order and has failed to apply the same stringent standards to government agencies. In March 2002, at the time the Justice Department was prosecuting Arthur Andersen, the Immigration and Naturalization Service (INS), which was then still within the Justice Department, had just approved student visas for two of the deceased September 11th hijackers. n269 An angry President Bush said that Attorney General John Ashcroft "got the message" that the INS should "reform as quickly as possible." n270 So did the Justice Department have a "compliance program"? Like other federal agencies, the Department has an Inspector General, whose duties include auditing financial matters and investigating performance. n271 It seems that the Department did not have what it would classify as an "effective" compliance program.

The Justice Department originally opposed the Inspector General legislation as an unconstitutional infringement of the President's power. n272 Specifically, the Department emphasized the President's authority to direct the executive branch. n273 Since accepting the inspector general model the Justice Department has applied it to corporations. That is to say, the notion that an agency inspector general is "independent" from the agency and able to report to Congress and the Justice Department was suggested early in the development of the organizational guidelines as the model for the compliance programs [*354] and self-reporting "encouraged" by the guidelines. n274 With Sarbanes-Oxley's "up-the-ladder" reporting requirements, n275 government regulators have pushed corporations much closer to the inspector-general model, which, the Justice Department once argued, undermines executive authority.

Although the INS fiasco may not have merited indictment of the agency, how likely is it that the Justice Department will ever indict a federal agency? The Department's prosecution guidelines apply to government entities, n276 and the Department would not have far to look to find an accounting scandal worth investigating. The D.C. Circuit Court of Appeals ruled in the Indian Trust Fund case that the U.S. Department of the Interior breached its fiduciary duties in failing properly to account for monies owed to American Indians over the course of many years. n277 Given that the Justice Department represents the Interior Department, it is unlikely that the Justice Department will indict its own client. Moreover, there has been little embarrassing media coverage over this scandal to rival coverage of Enron and move the Justice Department toward a criminal investigation.

Conclusion

The federal government insists on compliance standards for corporations but does not hold itself to similar standards. The reporting obligations imposed by Sarbanes-Oxley on inside and outside counsel, the demands by the Justice Department and other federal agencies that corporations waive their privilege against self-incrimination and self-report criminal violation, and the de facto requirement of codes of corporate conduct - originally voluntary standards - are being imposed on the private sector in the name of reform. These requirements reflect the long-discredited view that state-chartered corporations are quasi-public, not private. Even after Sarbanes-Oxley, "public corporations" are still state-chartered entities. n278 Making private sector corporations more like federal agencies will certainly do nothing to improve them.

Ironically, the current Republican administration and Congress have strongly opposed the litigiousness of the large plaintiffs' firms. n279 [*355] Besides the large jury awards, they object to the use of litigation as a means to achieve structural changes in corporate America. n280 The Justice Department likewise objects to the actions of the federal

district judge in Cobell as an improper exercise in structural change. n281 The Justice Department and other federal agencies, however, are pursuing just that strategy vis-a-vis corporations. CEOs who worry about plaintiffs' lawyers should realize that, at worst, plaintiffs will bankrupt their companies. By contrast, a federal raid can drive down the stock price of a public company, a federal indictment can bankrupt a company, and a federal conviction can put the CEO in jail.

FOOTNOTES:

n1. Michael Chertoff, Remarks at the 17th Annual National Institute on White Collar Crime 2003 (Mar. 6, 2003), quoted in John Gibeaut, *Junior G-Men*, 89 A.B.A. J., June 2003, at 46, 48.

n2. See Ira H. Raphaelson et al., *Legislate in Haste, Repent and Probe at Leisure*, Nat'l L.J., Mar. 10, 2003, at A27 (discussing dilemmas posed by attorney reporting and other provisions of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), and the SEC rulemaking that followed).

n3. See *id.* at A28; Gibeaut, *supra* note 1, at 48.

n4. See Alan Vinegrad, *Government Likely to Go After Corporations*, Nat'l L.J., Mar. 10, 2003, at A28; Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, U.S. Attorneys 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf (providing the Justice Department's principles of federal prosecution of business organizations) [hereinafter *Thompson Memorandum*]

n5. See Kirby D. Behre & A. Jeff Ifrah, *Courts Not Soft on Fraud, Theft Crimes*, Nat'l L.J., Mar. 10, 2003, at A27 (citing Letter from Justice Department, to Diana E. Murphy, chairwoman, U.S. Sentencing Commission (Oct. 1, 2002) (advocating that the guidelines make "prison time ... the rule, not the exception, for those who violate the law in the course of doing business")); Sue Reisinger, *Government Seeks Tougher Sentences*, Nat'l L.J., Mar. 10, 2003, at A20.

n6. See Raphaelson et al., *supra* note 2, at A28.

n7. See generally U.S. Sentencing Comm'n, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation: Proceedings of the Second Symposium on Crime and Punishment in the United States (1995)* (addressing organizational sentencing guidelines' "carrot and stick" incentives and other changes that encourage businesses to develop strong compliance programs and crime-controlling measures) [hereinafter *The Good Citizen Corporation*].

n8. See *Whalen v. United States*, 445 U.S. 684, 689 (1980) (holding that power to define crimes and punishments "resides wholly with the Congress").

n9. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

n10. See, e.g., *Romero v. United States*, 883 F. Supp. 1076, 1081 (W.D. La. 1994) ("[A] Congressional enactment is constitutionally proper only if it is enacted pursuant to an enumerated power granted Congress in the Constitution.").

n11. See U.S. Const. art. I, 8, cl. 3.

n12. See Task Force on Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass'n, *The Federalization of Criminal Law* 10 n.11 (1998) [hereinafter *Federalization of Criminal Law*].

Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies. While a figure of "approximately 3,000 federal crimes" is frequently cited, that helpful estimate is now surely outdated by the large number of new federal crimes enacted in the 16 years or so intervening since its estimation. Especially considering both statutory and administrative regulations, the present number of federal crimes is unquestionably larger.

Id.

n13. See *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995).

n14. See *Romero*, 883 F. Supp. at 1081.

n15. See John S. Baker Jr., *Corporations Aren't Criminals*, *Wall St. J.*, Apr. 22, 2002, at A18.

n16. See *Federalization of Criminal Law*, supra note 12, at 19-20.

n17. See *id.* at 35-39.

n18. See Thompson Memorandum, supra note 4, at 4 ("In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of Federal criminal law.").

n19. See *id.* at 1.

Prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale.

Id.

n20. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 761 (1999) ("Congress has eschewed legislative specificity... [and] transferred a considerable degree of lawmaking authority to the other branches of government.")

n21. 488 U.S. 361 (1989).

n22. See *id.* at 384-85. The Court also rejected a constitutional challenge based on excessive delegation. See *id.* at 378-79.

n23. See text accompanying notes 212, 228-31 (challenging the validity of the term "white collar crime").

n24. See Hon. Eleanor Hill, Coordinating Enforcement Under the Defense Department's Voluntary Disclosure Program, in *The Good Citizen Corporation*, *supra* note 7, at 267, 269; Alan R. Yuspeh, The Defense Industry Initiative (DII): Lessons Learned (Sept. 7, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 83.

n25. See Win Swenson, The Organizational Guidelines' "Carrot and Stick" Philosophy, and Their Focus on "Effective" Compliance (Sept. 7, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 29.

n26. See Thompson Memorandum, *supra* note 4, at 1. Thompson refers to the advance of the Corporate Fraud Task Force's "mission" and its revision of principles for federal prosecution of business organizations. Further, he mentions the voluntary disclosure programs of the SEC and the EPA. *Id.* at 5.

n27. See *id.* at 1.

n28. *Id.* at 15. The Justice Department discussed such forms of wrongdoing in the context of corporate rehabilitation:

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices.

Id.

n29. *Id.* at 1.

n30. See Andy Pasztor, Lockheed Martin Settles Influence Case, *Wall St. J.*, Dec. 26, 1996, at 10.

n31. See Yuspeh, *supra* note 24, at 83-87.

n32. See *id.* at 83.

n33. See *id.* at 84; see also Joseph F. Savage, Jr. & Stephanie R. Pratt, An Offer You Can't Refuse?, *Bus. Crimes Bull.*, June 2003, at 1, 6 ("The [Defense Department] expressly stated that the purpose of its voluntary disclosure policy was 'to encourage voluntary disclosure without legally or contractually mandating [it].'" (emphasis added) (third alteration in original) (quoting Letter from William H. Taft, IV, Deputy Secretary of Defense (Aug. 10, 1987))).

n34. See Maxwell J. Mehlman, *Health Care Cost Containment and Medical Technology: A Critique of Waste Theory*, 36 Case W. Res. L. Rev. 778, 817 & n.165 (1986).

n35. See, e.g., Randall G. Holcombe, *Public Finance: Government Revenues and Expenditures in the United States Economy 394-95* (forthcoming 2005), at <http://garnet.acns.fsu.edu/%7Eholcombe/chap21.PDF> (discussing the federally-funded Medicare and Medicaid programs).

n36. See Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399, 58,400 (Oct. 30, 1998). ("The [Office of Inspector General] believes that ... [corporations] have an ethical and legal duty ... [that] includes an obligation to take measures, such as instituting a compliance program, to detect and prevent fraudulent, abusive, and wasteful activities.").

n37. See Inspector General Act of 1978 2, 5 U.S.C. app. 3 2 (2000).

n38. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that "incident to [its spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives'" (citations omitted)).

n39. See Marina Lao, *Mergers in a Declining Defense Industry: Should the Merger Guidelines Be Reassessed?*, 28 Conn. L. Rev. 347, 387-88 (1996) (discussing relationship between the Defense Department and its exclusive suppliers).

n40. See generally Martin Gaynor & Deborah Haas-Wilson, *Changes, Consolidation and Competition in Health Care Markets*, J. Econ. Persp., Winter 1999, at 141 (1999) (discussing the transformation of U.S. health care).

n41. *Id.*

n42. *Amendments to Sentencing Guidelines for United States Courts*, 56 Fed. Reg. 22,762, 22,786-97 (May 16, 1991).

n43. See, e.g., Edward A. Dauer, *The NCPL Commission on Corporate Compliance Guidelines* (Sept. 7, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 195 (describing how the National Center for Preventive Law, which offers training in corporate compliance systems and consists of "private lawyers, general counsel of corporations, some legal educators, public interest organizations, and a variety of other people, including some non-lawyers," became far more active after the Sentencing Commission released its organization guidelines in 1991).

n44. See U.S. Sentencing Guidelines Manual 8C2.5(f) (2002).

n45. See Swenson, *supra* note 25, at 29.

n46. See id. at 33.

n47. See id.

n48. The organizational guidelines provide for reduction of culpability for organizations that maintain compliance programs or self-report violations, but it is ultimately up to the court to determine whether programs are effective or whether self-reporting occurred "within a reasonably prompt time" or was "fully" cooperative. See U.S. Sentencing Guidelines Manual 5C2.5(f), (g).

n49. See Joseph E. Murphy, *Beating Them With Carrots and Feeding Them Sticks* (Sept. 8, 1995), in *The Good Citizen Corporation*, supra note 7, at 391.

n50. Id.

n51. See L. Russell Burrell, *How the Organizational Guidelines Work: An Overview* (Sept. 7, 1995), in *The Good Citizen Corporation*, supra note 7, at 9 ("The Sentencing Commission believes that an organization that has developed and has maintained an effective compliance program ... is a good corporate citizen... . There are a number of benefits to being a good corporate citizen.").

n52. See, e.g., International Institute for Democracy and Electoral Assistance, *Compulsory Voting*, at http://www.idea.int/vt/analysis/Compulsory_Voting.cfm (last visited Oct. 26, 2003) (discussing the punishment, both criminal and civil, of failure to vote).

n53. Wayne R. LaFare, *Criminal Law 701-02* (4th ed. 2003).

n54. 212 U.S. 481 (1909).

n55. See id. at 494-95.

n56. See id. at 496-97.

n57. See id. at 495. The Court quoted favorably from *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445, 446 (Mass. 1899), stating: "A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong." Id. at 492. The New York Central Court went on to state, "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine" Id. at 495.

n58. See Swenson, supra note 25, at 32-33. The Commission explicitly stated its desire for punishment more stringent than "fines for the unlucky corporations that were caught." Id. at 32.

n59. Id.

n60. See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 710-11 (2002).

n61. See *infra* Part II.B.1.

n62. See Mary E. Didier, *Introduction: Reading Compliance Criteria into the Guidelines: Integrity-Centered vs. Law-Centered Programs* (Sept. 7, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 219 ("The definition of an effective compliance program should be viewed as somewhat 'elastic' - in other words, able to accommodate a range of compliance approaches with the ultimate focus of the definition being to encourage companies to devise programs that actually work.").

n63. Professor [Lynn Sharp] Paine describes the legal compliance model as being lawyer-driven, unduly focused on the narrow objective of avoiding criminal violations, and too reliant on threats and punishments to achieve its law-related objective. This model contrasts with an integrity-based approach to ethics management which, she states, combines a concern for the law with an emphasis on managerial responsibility for ethical behavior... . If, as Professor Paine argues, the integrity-based approach is more effective in bringing about lawful conduct, there is every reason to believe that the guidelines would embrace such an approach.

Id. at 220.

n64. See generally Lynn Sharp Paine, *Managing for Organizational Integrity*, *Harv. Bus. Rev.*, Mar.-Apr. 1994, at 106, 111-17 (discussing how ethical guidelines help corporations achieve customer satisfaction and avoid legal problems).

n65. Under the "General Principle" heading, both the Thompson Memorandum, *supra* note 4, at 1, and its predecessor, Memorandum from Eric Holder, Jr., Deputy Attorney General, to Heads of Department Components and All United States Attorneys (June 16, 1999), <http://www.usdoj.gov/04foia/readingrooms/6161999.htm> and <http://www.usdoj.gov/04foia/readingrooms/6161999a.htm> [hereinafter Holder Memorandum], begin with the statement: "Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment."

n66. See *Black's Law Dictionary* 1110 (7th ed. 1999) (defining status offense as "[a] minor's violation of the juvenile code by doing some act that would not be considered illegal if an adult did it ...").

n67. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (finding a vagrancy ordinance void for vagueness because it "failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," (citation omitted) and it "encouraged arbitrary and erratic arrests and convictions," *id.* at 156).

n68. See Swenson, *supra* note 25, at 33.

Mandatory guidelines can create incentives - Finally, the Commission recognized that because guideline penalties are essentially mandatory and therefore predictable, penalties tied to how well a corporate defendant had undertaken specified crime-controlling actions would create incentives for companies to take those actions. With a guideline system, corporate managers would know - unlike the situation in the pre-guideline era - that

their "good citizen" actions would make a difference in terms of the company's exposure to penalties. Good citizen actions, low penalties. Failure to take such actions, high penalties - "carrot and stick."

Id.

n69. Paine, *supra* note 64, at 111.

n70. See Dauer, *supra* note 43, at 197 ("A government is ... supposed to hold people liable for acts only when it warns them, with specificity, in advance... . It doesn't pass constitutional muster if it's not quite specific enough to tell you what it is you're supposed to do or refrain from doing.").

n71. Cf. 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* 2.3, at 126-35 (1986) (discussing the void-for-vagueness doctrine).

n72. This depends on whether the prohibition applies to what has been traditionally referred to as a *malum in se* or *malum prohibitum* offense. See Jerome Hall, *General Principles of Criminal Law* 338 & n.50 (2d ed. 1960).

n73. Dauer, *supra* note 43, at 195, 197.

n74. Larry D. Thompson, *Fairness in White Collar Crime Cases: Prosecutors Should Faithfully Follow the Principles of Federal Prosecution*, *Legal Background*, June 19, 1992, at 2, available at www.lexis.com, News Library, Washington Legal Foundation File (last visited Oct. 26, 2003) [hereinafter *Fairness*].

n75. See Sen. Edward M. Kennedy, *Keynote Address* (Sept. 7, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 120 ("In effect, the guidelines make a basic promise to companies: 'Act as good citizens and your penalty exposure will be reduced.' But that promise is false if companies face non-guideline penalties that take no account of these 'good citizenship' efforts.").

n76. See *Fairness*, *supra* note 74, at 2.

n77. See *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.").

n78. See Murphy, *supra* note 60, at 710 ("The organizational guidelines have been credited with helping to create an entirely new job description: the Ethics and Compliance Officer. Such officers develop and manage an organization's ethics and compliance programs.").

n79. See Dauer, *supra* note 43, at 196.

n80. Murphy, *supra* note 60, at 714-16 (alteration in original) (footnotes omitted) (emphasis added).

n81. See James Q. Wilson, *Thinking About Crime* 169 (1975).

n82. 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, 397-99 (1981).

n83. See Murphy, *supra* note 60, at 702.

n84. See Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 *Wash. U. L.Q.* 205, 207 (1993); see also 18 U.S.C. 3582(a) (2000) ("Imprisonment is not an appropriate means of promoting correction and rehabilitation."). The Chair of the Sentencing Commission justifies the organizational guidelines as follows:

The guidelines for individuals, according to some commentators, focus on punishment and incapacitation... . Conversely, the organizational guidelines focus on providing restitution and an appropriate fine range for the offender organization through far reaching probation provisions. Perhaps more importantly, however, these guidelines are geared toward deterrence, and they provide sentencing benefits for organizations that have an "effective program to prevent and detect violations of law."

Murphy, *supra* note 60, at 702-03 (footnotes omitted) (quoting U.S. Sentencing Guidelines Manual 8A1.2, cmt. n.3(k) (2001)).

n85. See Murphy, *supra* note 60, at 703.

The organizational guidelines give organizations an incentive to have in place an effective compliance program. They not only encourage corporations to exemplify "good corporate citizenship," but also provide a means to "rehabilitate" corporations that have engaged in criminal conduct by requiring them, as a term of probation, to institute and maintain effective compliance programs.

Id. (footnotes omitted) (quoting Swenson, *supra* note 25, at 34-35).

n86. See Baker, *supra* note 15, at A18.

n87. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421-22 (1819), the Supreme Court upheld Congress's creation of a corporation, namely, the Bank of the United States, as an exercise of implied powers from several enumerated powers, as well as from the Necessary and Proper Clause. Nevertheless, the creation of private corporations remains a matter of state law. See also *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *United States v. Lopez*, 514 U.S. 549, 559-63 (1995) (holding that the Commerce Clause does not grant Congress authority to enact a criminal statute regulating guns in local school zones without a showing that such guns affect interstate commerce or a jurisdictional provision limiting the statute's application to those cases that affect interstate commerce).

n88. See Nagel & Swenson, *supra* note 84, at 212 ("The Commission understood Congress[s] principal concern in establishing the Commission: unfettered judicial sentencing discretion fostered unwarranted disparity and discrimination, and other unsatisfactory results in the sentencing of individuals." (footnote omitted)).

n89. *Id.* at 213.

n90. See *id.* at 215-17.

n91. See *id.* at 229.

n92. On the question of the Commission's authority to issue the organizational guidelines, an article written (in their private capacities) by a member of the Commission, Professor Ilene Nagel, and the Commission's Deputy General Counsel and Legislative Counsel, Winthrop Swenson, cites a question posed by Senator Kennedy in hearings held long after passage of the legislation (without mentioning any other member of Congress) to support the statement that "repeated formal and informal requests from members of the Senate and House Judiciary Committees regarding the Commission's progress on, and proposals for, organizational sanctions patently contradicted the contention that Congress intended organizations convicted of federal crimes to be exempt from its scheme for sentencing reform." *Id.* at 216 & n.52. The authors also refer to Senator Kennedy, and no other member of Congress, to support the statement that the Commission "also recognized that some members of Congress, and a majority of the public, perceived an unwarranted disparity in the severity of sentences meted out to white collar offenders when compared to the severity of sentences meted out to non-white collar offenders." *Id.* at 215 & n.50. As the keynote speaker at the Commission Conference on the "Good Citizen" Corporation, Senator Kennedy characterized the compliance programs as "so significant" in dealing with corporate crime at the level of "the culture and policies of a company." Kennedy, *supra* note 75, at 119.

n93. See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *Tex. L. Rev.* 1443, 1515-16 (discussing disproportionate influence of certain members of Congress over agencies during agencies' implementation of statutes).

n94. See *Mistretta v. United States*, 488 U.S. 361, 384-85 (1989) ("Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an 'independent' body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines.").

n95. *Id.* at 415 (Scalia, J., dissenting).

n96. See Nagel & Swenson, *supra* note 84, at 207.

n97. See *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting). Justice Scalia noted: "The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law." *Id.* at 420 (Scalia, J., dissenting).

n98. *Id.* at 384.

n99. See *id.*

n100. *Id.* at 393 (emphasis added).

n101. See *id.* at 424 (Scalia, J., dissenting) (citing *Morrison v. Olson*, 487 U.S. 654, 688-91 (1988)). Scalia was the lone dissenter in both *Mistretta* and *Morrison*.

n102. See, e.g., Richard Reeves, Let Us Praise Scalia and Condemn Starr, *Buff. News*, Aug. 14, 1998, at B3 ("[Justice Scalia] was the only one who truly understood the dangers of the independent counsel law when it was found to be constitutional in 1988."); James Toedtman, Independent Counsel Law: Democrats 'Eating Humble Pie Now,' *Seattle Times*, July 24, 1998, at A2 ("[Ten years ago, Justice Scalia] was fighting a losing battle against the law creating the independent counsel. A decade later, Scalia's spirited attack on the creation of an independent counsel is favored reading for defenders of embattled President Clinton.").

n103. See, e.g., *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring).

Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guidelines sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency... . They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate... . And there is evidence that they encourage subterfuge, leading to more frequent downward departures (on a random basis), thereby making them a comparatively ineffective means of guaranteeing tough sentences.

Id. (citations omitted).

n104. See *Mistretta*, 488 U.S. at 426-27 (Scalia, J., dissenting) (stating that treating separation of powers as no more than a generalized prescription violates the Founders' intent and will have disastrous consequences).

n105. See *Savage & Pratt*, *supra* note 33, at 1 ("The government's expectations have evolved from a policy of encouraging self-disclosure to one that independently punishes failure to self-disclose.").

n106. *Id.* at 6 (quoting Public Hearing Before the Ad Hoc Advisory Group on Organizational Sentencing Guidelines to the U.S. Sentencing Commission 20 (Nov. 14, 2002) (testimony of U.S. Department of Justice), http://www.uscc.gov/corp/ph11_02/PLENARY2.pdf).

n107. See, e.g., Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,706 (Dec. 22, 1995) ("The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law."); Revision of the NRC Enforcement Policy, 60 Fed. Reg. 34,381, 34,393-94 (June 30, 1995) (reducing civil penalties and possibly eliminating enforcement actions for self-reported crimes); Department of Justice, Corporate Leniency Policy (1993), <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm> (stating Justice Department policy that leniency "will be granted to a corporation reporting illegal activity before an investigation has begun" under certain conditions); *In re Gutfreund*, Exchange Act Release No. 31,554, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 85,067, at 83,606 (Dec. 3, 1992) ("The supervisory obligations imposed by the federal securities laws require a vigorous response even to indications of wrongdoing."); Inspector General, U.S. Department of Defense, Document No. IGDPH 5505.50 The Department of Defense Voluntary Disclosure Program (1990), <http://www.dodig.osd.mil/AIM/alsd/ERR/IGPH550550.pdf> (stating that Defense Department "encourages contractors to adopt a policy of voluntarily disclosing potential civil or criminal fraud matters"). Incentives for self-reporting began in the mid-1970s with programs initiated by the Securities and Exchange Commission and

the Antitrust Division of the Justice Department. See Savage & Pratt, *supra* note 33, at 5. The Defense Department followed with its "Voluntary Disclosure Program" in 1986. See *id.*

n108. See Holder Memorandum, *supra* note 65.

n109. See Robert S. Litt, *The Experience and Views of the Enforcement Community* (Sept. 8, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 303.

In recent years, the Department of Justice has come to focus more and more on the importance of prevention and compliance, as opposed to enforcement and punishment, as a means of effective law enforcement. If you want to police an entire industry's practices, you frequently have to enlist the industry itself in helping you. And so we are looking for ways to encourage corporate self-policing. By this, I mean requiring or inducing corporate management to take more responsibility itself for preventing and detecting employee misconduct. This includes implementing comprehensive and effective compliance programs to prevent corporate crimes, and it also includes voluntarily disclosing criminal activity to the government when the company discovers it.

Id.

n110. Indeed, federal convictions of organizations have remained fairly steady since the Justice Department released the Holder Memorandum, *supra* note 65. See U.S. Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics 92 (2001)* (reporting 238 prosecutions of organizations resulting in fines or restitution or both); U.S. Sentencing Comm'n, *2000 Sourcebook of Federal Sentencing Statistics 92 (2000)* (reporting 296 prosecutions of organizations resulting in fines or restitution or both); U.S. Sentencing Comm'n, *1999 Sourcebook of Federal Sentencing Statistics 92 (1999)* (reporting 255 prosecutions of organizations resulting in fines or restitution or both).

n111. See *Fairness*, *supra* note 74, at 2.

n112. See generally *Thompson Memorandum*, *supra* note 4 ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation.").

n113. See *Publication of the OIG's Provider Self-Disclosure Protocol*, 63 Fed. Reg. 58,399, 58,400 (Dep't of Health & Human Servs. Oct. 30, 1998). In 1998, the Inspector General for HHS issued a voluntary disclosure program entitled "Provider Self-Disclosure Protocol," which states that "the OIG believes [corporations] have an ethical and legal duty ... [which] includes an obligation to take measures, such as instituting a compliance program, to detect and prevent fraudulent, abusive and wasteful activities." *Id.*

n114. *OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, 68 Fed. Reg. 23,731, 23,743 (May 5, 2003) (emphasis added).

n115. See *Thompson Memorandum*, *supra* note 4, at 8.

n116. See *id.*

n117. See *Savage & Pratt*, *supra* note 33, at 6.

n118. See Thompson Memorandum, *supra* note 4, at 8 (stating that prosecutors should consider a corporation's "failure to promptly disclose illegal conduct known to the corporation").

n119. See *supra* text accompanying note 114.

n120. See 15 U.S.C. 7245 (2000); 17 C.F.R. 205(b)(1) (2000) (stating that attorneys who become aware of material violations must report such violations to issuer's chief legal officer "forthwith").

n121. See 17 C.F.R. 205.3(b)(1).

n122. *Id.* 205.2(e).

n123. See Howard W. Goldstein, They're Here! Sort of ... "Final" Sarbanes-Oxley Rules on Standards of Professional Conduct for Attorneys, *Bus. Crimes Bull.*, Feb. 2003, at 1, 4.

n124. *Id.* (quoting 17 C.F.R. 205.2(b)(3)(i)).

n125. Letter from the American Corporate Counsel Association to the U.S. Department of Justice (May 12, 2000), <http://www.acca.com/public/accapolicy/holder.html>.

n126. See Thompson Memorandum, *supra* note 4, at 7.

n127. See Press Release, White House, President's Corporate Fraud Task Force Compiles Strong Record (July 22, 2003), <http://www.whitehouse.gov/news/2003/07/20030722.html> (describing increase in federal prosecutions).

n128. Fairness, *supra* note 74, at 1.

n129. Gregory J. Wallace, Holder Memorandum Revisited: DOJ Offers Clarification of Corporate Waiver, *Bus. Crimes Bull.*, Jan. 2003, at 7.

n130. See *id.* at 7-8.

Thus, it would appear sufficient for the corporation's attorneys to notify the government attorneys of the general nature of the wrongdoing that has come to their attention and disclose "exactly what happened and who did it" by making employee-witnesses available for interviews without waiving any privileges. Further, the DOJ has formally stated that, where attorney-related information must be disclosed to meet the "exactly what happened and who did it" standard, such disclosures should usually be limited to work-product protected materials. In most cases, this should mean disclosure of interview notes or memoranda but not legal research or analysis nor any conclusions that an attorney might reach regarding the legality of the conduct at issue.

On the negative side, the DOJ's clarification offers no assistance to companies whose employees or ex-employees were interviewed by the corporation's attorneys but who refuse to be interviewed by prosecutors or who assert their Fifth Amendment privilege in response to grand jury subpoenas. In those circumstances, the company can earn credit for cooperation only by disclosing, for example, its attorneys' notes or memoranda of the employee interviews. Such disclosure may waive attorney-client or work product protections.

Indeed, corporations may be whipsawed by two conflicting requirements for leniency credit: responding with appropriate disciplinary measures to employee wrongdoing and providing sufficient information to prosecutors to meet the "exactly what happened and who did it" standard. Once a corporation learns of an employee's culpable wrongdoing, then it often has no choice but to discipline the offending employee by termination or suspension. If that happens, of course, the likelihood that the employee will appear voluntarily at the U.S. Attorney's Office to assist the corporation in obtaining leniency diminishes substantially. Instead, the employee is likely to retain an attorney and commence an often lengthy and unpredictable process of plea bargaining, which leaves the company with no disclosure recourse except to share attorney notes or memoranda with the prosecutors.

Id.

n131. Id. at 8.

n132. See Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell - New Protection for Private Papers?*, 29 Am. J. Crim. L. 123, 133-39 (2002); see also *United States v. Hubbell*, 530 U.S. 27, 49-50 (2000) (Thomas, J., concurring) ("[The act-of-production] doctrine may be inconsistent with the original meaning of the Fifth Amendment's Self-Incrimination Clause... . The key word at issue in this case is "witness." The Court's opinion, relying on prior cases, essentially defines "witness" as a person who provides testimony, and thus restricts the Fifth Amendment's [protection] to only those communications 'that are "testimonial" in character.'" (quoting *Hubbell*, 530 U.S. at 34).

n133. See David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 157 (2000) ("In this relationship between the government and company counsel, ... the government reaps the fruits of interviews while minimizing the risk that the employees will seek to obtain separate counsel who might otherwise have advised them to assert the Fifth Amendment.").

n134. *OIG Compliance Program Guidelines for Pharmaceutical Manufacturers*, 68 Fed. Reg. 23,731, 23,743 (May 5, 2003).

n135. See Thompson Memorandum, *supra* note 4, at 8 (stating that corporate compliance programs should "detect misconduct and ... ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules" (emphasis added)).

n136. See 2 Thomas Lee Hazen, *The Law of Securities Regulation* 9.7[2], at 23-24 (4th ed. Supp. 2003):

Section 406 of the Sarbanes-Oxley Act directed the SEC to develop rules requiring disclosures relating to public companies' codes of ethics. Neither the statute nor the SEC rules expressly mandate that a public company has a code of ethics but the disclosure requirements clearly provide a strong incentive since companies that do not adopt a code of ethics will have to make that disclosure and will appear out of line with the companies that have adopted such a code. As such this is an indirect intervention in corporate governance rather than mandating any particular structure.

In adopting the code of ethics disclosure requirements the SEC requires companies to disclose whether they have adopted a corporate "code of ethics" that covers the conduct of the company's principal executive and senior financial officers. If the company has not a code of ethics, it must explain why it has not done so. It is very likely that this will have the effect of shaming companies into adopting a code of ethics. If a company has adopted a code of ethics it must make the code available to the public. In addition, the company must make disclosure when it amends its code of ethics or when it grants specific waivers from the code's requirements.

In order to qualify as a "code of ethics" the code must include "written standards that are reasonably designed to deter wrongdoing." In addition, the code of ethics must be designed to promote honest and ethical conduct. Honest and ethical conduct includes how the company handles actual and apparent conflicts of interest between personal and professional relationships. The code of ethics must also be designed to promote full, fair, accurate, and timely disclosures in the company's SEC filings as well as in the company's public communications generally. The code of ethics must be designed to promote compliance with laws, rules, and regulations applicable to the company's business. The code of ethics must identify appropriate reporting procedures within the organization with respect to code violations. In particular, the code must identify "appropriate person or persons" to whom reports of violations should be made. It is also essential that the a code of ethics adequately provides a system of accountability to assure compliance with the code's substantive provisions. As noted above, the company is not required to have a code of ethics with each of these attributes. However, the New York Stock Exchange and NASDAQ Stock Market have both proposed rules that would require listed companies to have these codes of ethics. In any event, if a public company either has no code of ethics or has one that lacks any of these components, then the Item 406 of Regulation S-K company must disclose that it does not have a code of ethics.

Id.

n137. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." (internal quotation marks omitted) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975))).

n138. See *Hazen*, *supra* note 136, at 2-3, 11-13.

n139. See 1 *id.* 8.1[3], at 747.

In 1996, Congress significantly limited the role of state law in securities regulation. By enacting the National Securities Markets Improvement Act of 1996, Congress reversed the pattern established under the first sixty-three years of federal securities regulation which embodied concurrent state and federal regulation. The 1996 amendments explicitly preempted state law in many areas of securities regulation. Particularly affected are the registration and reporting requirements applicable to securities transactions.

Id.

n140. *Bus. Roundtable v. Sec. & Exch. Comm'n*, 905 F.2d 406, 413 (D.C. Cir. 1990).

n141. See, e.g., Ralph Nader et al., *Taming the Giant Corporation* 8 (1976) ("Through a federal charter instrument new rights and remedies can be accorded affected citizens by making the large corporate structure more anticipatory, self-correcting, and sensitive to public needs.").

n142. See Murphy, *supra* note 60, at 701 (citing *United States v. Mo. Valley Constr. Co.*, 741 F.2d 1542, 1551 (8th Cir. 1984) (Heaney, J., concurring and dissenting) ("The present practice of punishing corporate crime with fines paid to the United States Treasury has done little to deter corporate crime.")).

n143. See Jerome Hall, *Law, Social Science and Criminal Theory* 278-79 (1982).

By reference to a descriptive definition of "criminal law," a corporation cannot commit a crime. If "corporation" is a fiction mens rea is irrelevant. That it is some sort of human organ or group personality, as Gierke and Maitland held, or that the "internal processes" of a corporate organization are equivalent to the mens rea of human beings is not very persuasive. Judges in countries where the fiction theory prevails have accepted these or similar theses as the ground of imposing punitive sanctions on corporations. Thus, Lord Denning said that "a company has a brain and a nerve center... . It also has hands ... directors and managers[,] ... [which] represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company...." But some years later Lord Reid said, "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these." All of which would seem to imply that a corporation cannot commit a crime. But, Lord Reid continued, "[a human being, presumably a manager or other executive] is acting as the company and his mind, which directs his acts, is the mind of the company." Surely, there is something amiss here in the nature of a non sequitur? Instead of indulgence in metaphor the realistic conclusion might have been - a corporation cannot commit a crime but it is defensible, perhaps useful, to subject a corporation to punitive sanctions in certain cases. This would not have confused thinking about criminal law and it would have focused attention on the pertinent question - the use of penal sanctions for damage or injuries that are not criminal.

Id. (alterations added and in original) (footnotes omitted).

n144. See *id.* at 256 ("The theory of deterrence rests on the premise of rational utility, i.e., that prospective offenders will weigh the evil of the sanction against the gain of the imagined crime.").

n145. See Murphy, *supra* note 60, at 701 n.16 (citing S. Rep. No. 98-225, at 104 (1983)).

n146. See *id.* at 701 (citing *Mo. Valley Constr. Co.*, 741 F.2d at 1551 (Heaney, J., concurring and dissenting) ("Once the payment is made ... the public promptly forgets the transgression, and the corporation continues on its way, with its reputation only slightly tarnished")).

n147. See *id.*

n148. See *id.*

n149. See David N. Yellen, *Other Coordination Issues and Proposals* (Sept. 8, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 291.

The main [purposes of criminal punishment] that are applicable to organizations are deterrence and retribution. Deterrence obviously plays a major role in punishing corporate misconduct. We punish companies so they won't do it again and so other companies will learn the lessons and they won't do the same kind of things.

Retribution ought to, in theory at least, have a much lesser role in sanctioning organizational misconduct. A company is not a person. As Professor Coffee from Columbia [Law School] wrote a long time ago, citing an old case, it doesn't have a body to be kicked or a soul to be damned, so why do we think about punishing organizations for punishment's sake?

But I think clearly in modern times, with the attention that has been paid to corporate misconduct, people think about a need to punish companies that have done wrong, whether it is Exxon with the oil spill or lots of other situations as well.

Id.

n150. See Nagel & Swenson, *supra* note 84, at 214-15. In describing the work of the Sentencing Commission on the organizational guidelines, the authors note that "the relevant literature clearly illustrated a lack of consensus among academics regarding corporate sentencing." *Id.* at 214 (emphasis added). Next, they mention the Commission's research concerning the disparity of sentencing among corporations. *Id.* at 214-15. Then, in support of sentencing corporations, they invoke public opinion about white collar crime generally, which does not distinguish between individuals and organizations. Thus they say the Commission "also recognized that some members of Congress, and a majority of the public, perceived an unwarranted disparity in the severity of sentences meted out to white collar offenders when compared to the severity of sentences meted out to non-white collar offenders." *Id.* at 215 (emphases added). The discussion by two persons who themselves worked on the organizational guidelines reflects that, apart from practical difficulties, appropriateness of imposing a moral stigma on an abstract entity was not an issue seriously considered by the Commission.

n151. See Joseph F. Savage, Jr. & Stephanie R. Pratt, *Sarbanes-Oxley: New Ways to Solve Old Crimes*, *Bus. Crimes Bull.*, Dec. 2002, at 1 (minimizing the significance of the new crimes and enhanced penalties, but stating that "two of [Sarbanes-Oxley's] features may yield significant changes: the increased enforcement resources and significant new tools designed to develop witnesses, informants and other evidence for regulators and prosecutors").

n152. Other commentators have compared corporate crime to Watergate. In the mid-1970s, Ralph Nader spoke of the then current "corporate crime wave," as a "corporate Watergate," which required federal reform of corporations. See Nader, *supra* note 141, at 30.

n153. 28 U.S.C. 591-599 (2000); see also *supra* text accompanying note 102 (discussing Justice Scalia's criticism of the Independent Counsel Statute).

n154. See Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 *Hastings L.J.* 673, 673 (2000).

n155. See Gary Young, *50 Law Firms Subpoenaed in Enron Bankruptcy*, *Nat'l L.J.*, Mar. 10, 2003, at A26.

n156. See *supra* text accompanying notes 1-22.

n157. See Stephanie R.E. Patterson, *Section 307 of the Sarbanes-Oxley Act: Eroding the Legal Profession's System of Self-Governance?*, 7 *N.C. Banking Inst.* 155, 175 (2003) ("Given the current political and social climate resulting from multiple corporate scandals and the legal profession's failure to provide adequate safeguards, guidance, and means of reporting client wrongdoing, the legal profession could be in danger of losing its privilege of self-regulation.").

n158. See, e.g., Paine, *supra* note 64, at 106-07 (discussing advantages of an integrity-based approach over an approach based merely on avoiding illegal activity).

n159. See Didier, *supra* note 62, at 220.

n160. See *id.* at 109-10.

n161. See, e.g., Thompson Memorandum, *supra* note 4, at 10 ("Prosecutors should ... attempt to determine whether a corporation's compliance program is merely a 'paper program' or whether it was designed and implemented in an effective manner.").

n162. Bert F. Lacativo, Proactive Fraud Prevention: Creating Ethics and Compliance Programs That Work with Sarbanes-Oxley, *Bus. Crimes Bull.*, July 2003, at 3, 8.

n163. Gibeaut, *supra* note 1, at 50.

n164. See Richard S. Gruner, Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform, 36 *Ariz. L. Rev.* 407, 432 n.176 (1994) ("Corporate counsel's failure to advise corporate clients about compliance programs may amount to professional malpractice.").

n165. See Murphy, *supra* note 49, at 393 ("The guidelines talk about effective programs to prevent violations. They say they are offering carrots. But are the carrots really bait for a trap?").

n166. See The American Dream: Prosperity With a Purpose, in Republican Nat'l Comm., Republican Platform 2000 (2000), at <http://www.rnc.org/GOPInfo/Platform/2000platform2.htm> ("Inspired by Presidents Reagan and Bush, Republicans hammered into place the framework for today's prosperity and surpluses. We cut tax rates, simplified the tax code, deregulated industries, and opened world markets to American enterprise.").

n167. See Renewing Family and Community, in Republican Nat'l Comm., *supra* note 166, at <http://www.rnc.org/GOPInfo/Platform/2000platform4.htm>. The Committee asserts:

While we support community policing and other proven initiatives against crime, we strongly oppose any erosion of that responsibility by the federal government. Our Republican governors, legislators, and local leaders have taken a zero tolerance approach to crime that has led to the lowest crime and murder rates in a generation.

Id.

n168. See Federalization of Criminal Law, *supra* note 12, at 10 ("It is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades.").

n169. See Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000 5(b), 49 U.S.C. 30170(a)(1) (2000); see also H.R. Rep. No. 106-954, at 6-7 (2000) (describing the history of the Ford-Firestone litigation and its result in the TREAD Act).

n170. See Behre & Ifrah, *supra* note 5, at A29.

n171. See U.S. Sentencing Comm'n, 2000 Sourcebook of Federal Sentencing Statistics 92 (2000); U.S. Sentencing Comm'n, 1999 Sourcebook of Federal Sentencing Statistics 92 (1999); U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics 92 (1998); U.S. Sentencing Comm'n, 1997 Sourcebook of Federal Sentencing Statistics 95 (1997); U.S. Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics 69 (1996). Critics of corporations have claimed, at least since the term "white-collar crime" was coined, that corporate crime has been rampant. See Nader, *supra* note 141, at 30-32. According to Sentencing Commission statistics however, the number of federal cases against corporations - as measured by sentences - has been in the range of 200 to 300. See *supra* note 110.

n172. See Press Release, White House, President's Corporate Fraud Task Force Compiles Strong Record (July 22, 2003), <http://www.whitehouse.gov/news/releases/2003/07/20030722.html>.

n173. See Jed Rakoff et al., *Corporate Sentencing Guidelines: Compliance and Mitigation* 3 (1993).

n174. See Brenda Sapino Jeffreys, *Andersen's Lawyer Paints Duncan as Pressured to Plead*, *Tex. Law.*, May 20, 2002, at 1.

n175. See *id.*

n176. See *id.*

n177. See Raphaelson et al., *supra* note 2. As later reported, the crash was inevitable after Congress changed the law to allow thrifts to invest in commercial real estate. See Nat'l Comm'n on Fin. Inst. Reform, Recovery, & Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform* 8 (1993).

n178. See Nat'l Comm'n for Fin. Inst. Reform, Recovery, & Enforcement, *supra* note 177, at 7.

n179. See *infra* text accompanying notes 180-84.

n180. See generally Brian T. FitzPatrick, *Congressional Re-election Through Symbolic Politics: The Enhanced Banking Crime Penalties*, 32 *Am. Crim. L. Rev.* 1 (1994) (arguing that congressional crackdowns on white-collar criminals are often the result of a desire to appear tough on crime during election periods).

n181. *Fairness*, *supra* note 74, at 3.

n182. Jamil Zainaldin, *Law in Antebellum Society: Legal Change and Economic Expansion* 43 (1983).

n183. *Id.* at 47.

n184. *Id.* at 43-44.

n185. See Adam Smith, *The Wealth of Nations* 700 (Edwin Cannan ed., 1937) ("[Joint stock companies] very seldom succeeded without an exclusive privilege; and frequently have not succeeded with one. Without an exclusive privilege they have commonly mismanaged the trade. With an exclusive privilege they have both mismanaged and confined it."); Gordon S. Wood, *The Radicalism of the American Revolution* 320 (1992).

n186. Zainaldin, *supra* note 182, at 47.

n187. *Id.*

n188. See Carl Brent Swisher, *American Constitutional Development* 208-29 (1943).

n189. Zainaldin, *supra* note 182, at 44-45 (emphasis added).

n190. See generally John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary Or Proper?*, 16 *Rutgers L. Rev.* 495, 513-31 (1985) (analyzing the interactions between the commerce and criminal police powers).

n191. 188 U.S. 321 (1903).

n192. See Baker, *supra* note 190, at 521-31; see also *Lottery Case*, 188 U.S. at 362 (holding that Congress's power to regulate interstate commerce "may sometimes be exerted with the effect of excluding particular articles from such commerce").

n193. 212 U.S. 481 (1909).

n194. See *id.* at 494-95.

n195. Although the Supreme Court allowed the prosecution of corporations long ago, it is understandable that relatively few such prosecutions occurred. Corporations were not subject to criminal prosecution under common law. See Zainaldin, *supra* note 182, at 50-51. As nonhuman persons, they were incapable of possessing mens rea, the essential element of a guilty mind for all common law crimes. See LaFave & Scott, *supra* note 71, 3.4(a), at 297. In order to prosecute corporations as criminals, it was necessary either to eliminate formally the mens rea requirement, or to permit proving it fictionally by imputing the mens rea of some individual to the corporation. Still, as long as public support was lacking, prosecution of what has since been labeled "white-collar crime" was not very likely. See Marshall B. Clinard & Peter C. Yeager, *Corporate Crime* 200 (1980) ("Major public concern about the lack of corporate social responsibility first appeared prior to World War I, largely as a result of the disclosures by the muckrakers ...").

n196. Edwin H. Sutherland, *White Collar Crime: The Uncut Version* (1983).

n197. See *id.* at 52-53.

n198. Id.

n199. See id. at 53.

n200. See id. at 45.

n201. See id. at 6.

n202. Id. at 7.

n203. Id. at 53.

n204. See id. at 49.

n205. See id. at 49-50.

n206. See id. at 56-57.

n207. Id. at 7.

n208. See id. at 265 n.7 ("The term 'white collar' is used here to refer principally to business managers and executives, in the sense in which it was used by a president of General Motors who wrote 'An Autobiography of a White Collar Worker.'").

n209. Gilbert Geis & Colin Goff, Introduction to Sutherland, *supra* note 196, at xviii.

n210. Id.

n211. Id.

n212. See Julie R. O'Sullivan, *Federal White Collar Crime* 54 (2001).

n213. Nagel & Swenson, *supra* note 84, at 216 & n.51. Co-author Winthrop M. Swenson "was responsible for the staff group that developed the basis for the organizational guidelines." Swenson, *supra* note 25, at 29.

n214. See Sutherland, *supra* note 196, at 60.

n215. See LaFave & Scott, *supra* note 71, 3.4(a), at 297.

n216. *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979).

n217. See Sutherland, *supra* note 196, at 6.

n218. *Id.* at 55.

n219. See *id.* at 54-55, 60.

n220. *Id.* at 53 (emphasis added).

n221. *Id.*

n222. See LaFave & Scott, *supra* note 71, 3.4(a), at 297.

n223. See Sutherland, *supra* note 196, at 55.

n224. *Morissette v. United States*, 342 U.S. 246, 250-51 (1952).

n225. Hall, *supra* note 72, at 278-83.

n226. See Paul W. Tappan, *Who Is the Criminal?*, 12 *Am. Soc. Rev.* 96, 98-99 (1947) ("Apparently the criminal may be law obedient but greedy; the specific quality of his crimes is far from clear.").

n227. *Id.* at 98. In his foreword to the 1961 edition of Professor Sutherland's book *White Collar Crime*, Professor Donald R. Cressey commented that the book "clearly was not an attempt to extend the concept, 'crime,' despite the beliefs of some reviewers." Edwin H. Sutherland, *White Collar Crime* iv (2d ed. 1961). He characterized the criticism of Tappan and another critic as "extraneous." *Id.* Professor Jerome Hall, however, has written that "Tappan's attack was devastating." Hall, *supra* note 143, at 276.

n228. Tappan, *supra* note 226, at 100.

n229. See Hall, *supra* note 143, at 275.

n230. Clinard & Yeager, *supra* note 195, at 18.

n231. See *id.* at 17.

n232. Letter from Eric H. Jaso, Counselor to the Assistant Attorney General, Criminal Division, DOJ, to the Honorable Diana E. Murphy, Chair, United States Sentencing Commission (Oct. 1, 2002), at http://www.usdoj.gov/dag/cftf/sentencing_guidelines.htm (emphasis added).

n233. See Geis & Goff, *supra* note 209, at xxv.

n234. *Id.* at xvi.

n235. Sutherland, *supra* note 196, at 264 (emphasis added).

n236. Edwin H. Sutherland & Donald R. Cressey, *Criminology* 51 (10th ed. 1978); Edwin H. Sutherland et al., *Criminology* 66 (11th ed. 1992) (emphasis added).

n237. 18 U.S.C. 1961-1968 (2000).

n238. See Nicholas R. Mancini, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 *Roger Williams U. L. Rev.* 193, 195-96 (2002) (discussing application of RICO to Catholic Church and other corporations).

n239. See *id.* at 232-33.

n240. See Tony Locy & Kevin Johnson, *Legal 'Gladiator' Wants Justice Swift and Sure*, *USA Today*, Aug. 14, 2002, at 4A.

n241. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 201-225, 115 Stat. 272, 278-96 (2001).

n242. See William Zolla II, *The War at Home: Rising Tensions Between Our Civil Liberties and Our National Security*, *CBA Record*, Feb./Mar. 2003, at 32 ("Civil libertarians and their allies believe that unless the Government is constrained by the commands of the Constitution, particularly in times of domestic unrest, the civil liberties of all Americans will ultimately be diminished." (emphasis added)).

n243. See John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 *Am. U. L. Rev.* 1081, 1083 (2002) ("Under the guise of stopping terrorism, law enforcement officials and government leaders have now been given the right to conduct searches of homes and offices without prior notice, use roving wiretaps to listen in on telephone conversations, and monitor computers and e-mail messages, even to the degree of eavesdropping on attorney/client conversations.").

n244. See Press Release, White House, President's Corporate Fraud Task Force Compiles Strong Record (July 22, 2003), http://www.whitehouse.gov/news/releases/2003/07/20_030722.html (describing increase in federal prosecutions).

n245. See Benjamin Weiser, Same Walk, Nicer Shoes: Parading of Executives in Custody Fuels New Debate, *N.Y. Times*, Nov. 26, 2002, at B1 ("Officials have said that highly public arrests can serve as a deterrent to other executives, and send a message that the government is serious about combating corporate crime.").

n246. See Edward Iwata, Prosecutors Give CEOs the Mobster Treatment, *USA Today*, Oct. 4, 2002, at 1B.

n247. *Id.*

n248. See *Locy & Johnson*, *supra* note 240, at 4A.

n249. Excerpted from remarks by General Counsel Aufhauser at the Federalist Society's National Lawyers Convention, Nov. 15, 2002 (unpublished transcript, on file with author) (emphasis added).

n250. See Edward Iwata, Businesses Fear Red Tape, Cost of Patriot Act, *USA Today*, Apr. 10, 2003, at B2.

n251. See Robert P. Burns, *A Theory of the Trial* 146, 153 (1999).

n252. Scott E. Sundby, The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims, 88 *Cornell L. Rev.* 343, 349-58 (2003) (presenting data which suggests that victim characteristics have significant effect on jury deliberations).

n253. See generally John Clark, The Social Psychology of Jury Nullification, 24 *L. & Psychol. Rev.* 39, 48-52 (2000) (identifying extra-legal factors that foster juror sympathy and thus contribute to acquittals).

n254. See *Fed. R. Evid.* 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). See generally *Thirty-second Annual Review of Criminal Procedure: Influences on the Jury*, 91 *Geo. L. J.* 513 (2003) (discussing various types of juror influences and the point at which the impact of each exceeds harmless error).

n255. See *Model Code of Judicial Conduct Canon 3B(5), (6)* (2002) (obligating the trial judge to refrain and to require the lawyers to refrain from manifesting bias or prejudice based on race, sex, religion, etc.).

n256. For examples of such in-depth profiles, see *Case Closed: Infamous Criminals: Al Capone*, at www.bbc.co.uk/crime/caseclosed/alcapone.shtml (last visited on Oct. 27, 2003); *Court TV's Crime Library: Criminal Minds and Methods: Attack!*, at www.crimelibrary.com/bundy/attack.htm (last visited on Oct. 27, 2003) (profiling serial killer Ted Bundy); *The Execution of Timothy McVeigh*, at www.cnn.com/specials/2001/okc (last visited on Oct. 27, 2003).

n257. See *id.*

n258. See, e.g., Michael E. Ruane & Sari Horwitz, *Struggling For a Direct Connection*, Wash. Post, Oct. 6, 2003, at A1 (exploring the snipers' attempts to contact the media and publicize their demands and reasons for the killings).

n259. Compare, e.g., Tim Dahlberg, *Kobe Leads in Court of Public Opinion* (Aug. 6, 2003), <http://www.msnbc.com/news/949356.asp>, and Rob Reynolds, 'What a Farce': Simpson Trial Draws Jeers 'Round the World (Oct. 3, 1995), <http://www.cnn.com/US/OJ/verdict/world/>, with Julia Hood, 'No Comment' Won't Cut It, PR Week, Aug. 5, 2002, at 3 (finding that "65% of American's believe Enron executives did something illegal").

n260. See Model Rules of Prof'l Conduct Canon 3B(6) (2003):

A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3(B)(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

This provision

gives judges the duty [] to prevent attorneys from engaging in improper tactics that will prejudice the jury during the course of the judicial proceedings. The judge's duty to "require" means that the judge must exercise "reasonable direction and control over the conduct of those persons subject to the judge's direction and control."

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 60-8, 832 (2d ed. 2002) (footnote omitted).

n261. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 662-68 (1997) (discussing federal courts' broad interpretation of jurisdictional elements of federal criminal law).

n262. Fairness, *supra* note 74, at 3.

n263. See O'Sullivan, *supra* note 212, at 53.

Part of the ambiguity is founded upon the fact that a seemingly endless variety of terms have been used to describe the guilty mind necessary to prove an offense. Federal statutes, for example, provide for more than 100 types of mens rea. Even those terms most frequently used in federal legislation - "knowing" and "willful" - do not have one invariable meaning. Particularly with respect to judicial interpretation of the term "willful," the precise requirements of these terms depend to some extent on the statutory context in which they are employed. Another layer of difficulty is attributable to the fact that Congress may impose one mens rea requirement upon certain elements of the offense and a different level of mens rea, or no mens rea at all, with respect to other elements.

Id. (footnotes omitted).

n264. See *supra* text accompanying notes 170-73.

n265. See Brian V. Breheny & Elizabeth M. Kelly, *Maintaining Impartiality: Does Media Coverage of Trials Need to be Curtailed?*, 10 St. John's J. Legal Comment. 371, 377-80 (1995) (discussing cases involving Sixth Amendment challenges based on unfair trials because of media coverage).

n266. See *supra* note 143.

n267. See *supra* note 195.

n268. See *supra* text accompanying note 195.

n269. See Laura Sullivan, *President Says He's Outraged over INS Letters for Hijackers*, Balt. Sun, Mar. 14, 2002, at 3A.

n270. *Id.*

n271. See Inspector General Act of 1978 4(a), 5 U.S.C. app. 4(a) (2000).

n272. See Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 60 (1983).

n273. See *id.*

n274. See Ronald Goldstock, *Making Compliance Credible: The Independent Private Sector Inspector General (IPSIG) Approach* (Sept. 7, 1995), in *The Good Citizen Corporation*, *supra* note 7, at 221.

n275. See Raphaelson et al., *supra* note 2.

n276. See Thompson Memorandum, *supra* note 4, at 1 n.1.

n277. See *Cobell v. Norton*, 240 F.3d 1081, 1102-04 (D.C. Cir. 2001).

n278. See *supra* note 87 and text accompanying note 141.

n279. See Daniel Eisenberg & Maggie Sieger, *The Doctor Won't See You Now*, Time, June 9, 2003, at 46, 46 ("President Bush and other Republicans ... endorse [tort reform] legislation, and the House of Representatives has passed a bill along those lines.").

n280. See Cobell, 240 F.3d at 1101.

n281. See *id.*

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