1992

Culpability and the Sentencing of Corporations

William S. Laufer

Legal Studies and Business Ethics, Wharton School, University of Pennsylvania, lauferw@wharton.upenn.edu

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 Neb. L. Rev. (1992)

Available at: <https://digitalcommons.unl.edu/nlr/vol71/iss4/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Culpability and the Sentencing of Corporations

TABLE OF CONTENTS

I. Introduction	1049
II. Corporate Criminal Liability	1053
A. Federal Corporate Criminal Liability	1055
B. State Corporate Criminal Liability	1057
III. Pre-conviction Culpability	1059
A. Culpability under State Law	1060
B. Culpability under Federal Law	1063
1. Willfulness	1066
2. Inadequate Statutory Law	1073
IV. Post-conviction Culpability	1077
V. Guidelines and Culpability	1078
A. Proposed Guidelines	1078
B. Final Proposals	1082
C. Guidelines and Federal Statutory Law	1084
VI. Genuine Corporate Culpability	1085
VII. Conclusion	1090
VIII. Appendix	1092

I. INTRODUCTION

In the fifty years since Edwin Sutherland coined the term "white collar crime" there has been periodic interest in the subject of corporate criminality.¹ The most recent period of interest emerged in 1980

* Assistant Professor, Legal Studies, The Wharton School, University of Pennsylvania; B.A., Johns Hopkins University; J.D., Northeastern University; Ph.D., Rutgers University.

My appreciation to Kip Schlegel for his important contribution to sections IV and V of this manuscript. Thomas W. Dunfee, Andrew von Hirsch, and D. Bruce Johnsen made helpful comments on earlier drafts of this article.

1. MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* (1980); MARSHALL B. CLINARD ET AL., *ILLEGAL CORPORATE BEHAVIOR* (1979); DONALD R. CRESSEY, *CRIMINAL ORGANIZATION: ITS ELEMENTARY FORMS* (1972); M. DAVID ERMANN & RICHARD L. LUNDMAN, *CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* (1982);

with ground-breaking scholarship examining the law violations of the largest corporations in the United States.² Within the last five years, research has focused on sentencing. Even though there have been relatively few empirical studies of the sentencing of corporations, as compared with the sentencing of individuals, there is no shortage of serious discussion regarding corporate sanctions.³ Legal scholars, economists, and sociologists have engaged in a lengthy debate over proposals for organizational sanctions issued by the United States Sentencing Commission ("Sentencing Commission").⁴

Gilbert Geis, *White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961*, in CRIMINAL BEHAVIOR SYSTEMS, A TYPOLOGY 139 (Marshall B. Clinard & Richard Quinney eds., 1967); SUSAN P. SHAPIRO, WAYWARD CAPITALISTS: TARGET OF THE SECURITIES AND EXCHANGE COMMISSION (1984); Edwin H. Sutherland, *Crime of Corporations*, in THE SUTHERLAND PAPERS 78 (Albert K. Cohen et al. eds., 1956); EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949); Marshall B. Clinard, *Criminological Theories of Violations of Wartime Regulations*, 11 AM. SOC. REV. 258 (1946); Robert E. Lane, *Why Businessmen Violate the Law*, 44 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 151 (1953); Edwin H. Sutherland, *Is 'White Collar Crime' Crime?* 10 AM. SOC. REV. 132 (1945); Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

2. See CLINARD & YEAGER, *supra* note 1; see also MARSHALL B. CLINARD ET AL., *supra* note 1. For a general discussion of the nature corporate crime research, see Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, in 1 ADVANCES IN CRIMINOLOGICAL THEORY 31 (William S. Laufer & Freda Adler eds., 1988); and John Braithwaite & Brent Fisse, *The Plausibility of Corporate Crime Research*, in 2 ADVANCES IN CRIMINOLOGICAL THEORY 21 (William S. Laufer & Freda Adler eds., 1990).
3. Three reasons may be offered for the dearth of empirical work: (1) there is a conspicuous absence of theories of corporate crime causation—theories that might promote both a qualitative and quantitative body of literature, (2) until the United States Sentencing Commission initiated its surveys on organizational sanctions, data on corporate prosecutions and convictions were difficult, if not impossible, to obtain, and (3) convictions of corporations under state or federal law are infrequent events, as compared with convictions of individuals. Clinard and Yeager comment on the lack of scholarship in writing: "Only recently has corporate crime begun seriously to concern the public, government agencies, and scholars. . . . Public concern of course influences both legislatures and law enforcement agencies and affects research trends in law, sociology, and particularly, criminology. Accordingly, textbooks purporting to analyze social problems have, with few exceptions, focused on more conventional crimes." CLINARD & YEAGER, *supra* note 1, at 12-13 (citation omitted); cf. Mark A. Cohen, *Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts 1984-1987*, 26 AM. CRIM. L. REV. 605 (1989); Mark A. Cohen et al., *Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 1984-1987*, 10 WHITTIER L. REV. 103 (1988).
4. An extensive literature has developed tracking the progress of the United States Sentencing Commission and its draft proposals. The most recent collection of articles appeared in a symposium issue of the Boston University Law Review entitled *Sentencing the Corporation*. See, e.g., Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991);

The early Sentencing Commission proposals rested on a weak foundation, it is argued, because they treated sentencing as a single, largely isolated phenomenon independent of the basic premises of the substantive criminal law.⁵ Such treatment neglected the existence of a direct relation between the assessment of culpability and the deservedness of punishment.⁶ This neglect may be attributed in part to the confusion and controversy that surrounds criminal liability of corporate offenders appearing in the form of "non-human" persons.⁷ More likely, it resulted from a steadfast commitment to an intellectual para-

Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247 (1991); Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315 (1991); Stephen A. Saltzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U. L. REV. 421 (1991). For references to earlier work, see KIP SCHLEGEL, *JUST DESERTS FOR CORPORATE CRIMINALS* (1990).

5. See *infra* notes 54-102 and accompanying text.

6. Throughout this paper I will use the term culpability to reflect the notion of blameworthiness. As discussed in Parts I to III, culpability or blameworthiness is raised as an issue both prior to and after conviction. Prior to conviction, culpability is raised in relation to liability. After conviction, culpability is raised in relation to severity of sentence. See, e.g., HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 76, 436-38 (1979) ("The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct . . . Punishment that fits the crime is punishment in proportion to the culpability of the criminal conduct and it is what the perpetrator deserves for his crime."); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 317 (1960) ("[P]unishment implies the criminal's moral culpability and is apt (fitting, correct) in light of that."); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 80 (1976) ("Here there is one well-established principle: that prohibited behavior causing (or risking) the same harm varies in seriousness depending on whether it is intentional, reckless, negligent, or punishable regardless of the actor's intent . . .").

7. Following *New York Central and Hudson River Railroad v. United States*, 212 U.S. 481 (1909), there has been considerable debate over the logic and wisdom of imputing mens rea to corporate entities. See R.A. DUFF, *INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (1990); PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984); Virginia Held, *Corporations, Persons and Responsibility*, in SHAME, RESPONSIBILITY AND THE CORPORATION 159 (Hugh Curtler ed., 1986); Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927); James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976); Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979); Michael Keeley, *Organizations as Non-persons*, 15 J. VALUE INQUIRY 149 (1981); Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928); Larry May, *Vicarious Agency and Corporate Responsibility*, 43 PHIL. STUD. 69 (1983); Michael McDonald, *The Personless Paradigm*, 37 U. TORONTO L.J. 212 (1987); Gerhard O.W. Mueller, *Mens Rea and the Corporation—A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21 (1957); Comment, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979); Note, *Corporate Criminal Liability*, 68 NW. U. L. REV. 870 (1973); Note, *Criminal Liability of Corporations*, 14 COLUM. L. REV. 241 (1914).

digm that does not require an assessment of culpability in relation to harm at the time of sentencing. Notably, the debate that accompanied the deliberations of the Sentencing Commission over organizational sanctions was grounded in differences over ideology. Economists, who proposed economic models derived from theories of deterrence, searched for efficiency in optimal penalties. Others, including interest groups in the business community, fought hard for a more eclectic consideration of harm, culpability, and mitigation in fashioning organizational sanctions.⁸

The last effort by the Sentencing Commission, codified in law on November 1, 1991,⁹ did a masterful job in addressing culpability in relation to corporate sanctions.¹⁰ What is left, however, is a less than adequate corporate criminal law. The assessment of culpability in relation to liability remains couched in a poorly drafted and presented federal criminal law. The federal criminal law relies upon obscure and antiquated culpability provisions. Differing interpretations of culpability provisions in both individual and corporate prosecutions are nearly impossible to reconcile. These problems, as well as others, contribute to the commonly-held view that the federal criminal law is no more than a "hodgepodge of conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of the criminal law as a whole."¹¹

8. This debate resulted in three draft proposals from the Sentencing Commission, and numerous conferences and public forums. For a detailed description of the Sentencing Commission's work, see UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS (1991). For additional commentary, see Block, *supra* note 4; Macey, *supra* note 4, at 316-17 ("Notably, the Sentencing Commission's proposal for organizational sanctions was wholly devoid of empirical or theoretical foundation. Its proposals were politically oriented, rather than policy oriented. Indeed, if nothing else, the process of establishing sentencing guidelines has made it clear that the work of the Sentencing Commission has entered the realm of special-interest politics."); Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513 (1989); Jeffrey S. Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 FED. SENTENCING REP. 133 (1990); and Cohen, *The New Corporate Sentencing Guidelines: The Beginning or the End of the Controversy?* 1 (1991)(unpublished manuscript, on file with the NEBRASKA LAW REVIEW)("A large part of the disagreement over corporate sentencing appears to be grounded in ideological differences").

9. 18 U.S.C. app. §§ 8A1.1-8E1.3 (1992).

10. See *infra* notes 129-34 and accompanying text.

11. S. REP. NO. 605, 95th Cong., 1st Sess. 3 (1977)(Senate Report for S. 1437, the Criminal Justice Code Reform Act of 1977). If this assessment appears overly critical, consider the remarks of former Attorney General Richard Thornburgh who only recently called for a recodification of the federal criminal code:

Our federal criminal laws are presently scattered among 50 titles of the United States Code, containing over 23,000 pages of text. They cannot be understood without review of case decisions encompassed in 2300

It would be unfair to place the burden of federal criminal law reform upon the Sentencing Commission. But it is equally true that any genuine effort to consider culpability in relation to sentence severity, no matter how successful, would be frustrated by the obfuscation of existing federal statutory law.¹² The current fascination with organizational sentencing has completely overlooked the fact that the substantive law upon which the new sentencing guidelines are based is wholly inadequate. This article argues that Congress' failure to make meaningful statutory reforms to the United States Code over the last twenty years has compromised the value of the recently enacted sentencing guidelines for organizations. In passing the Sentencing Reform Act of 1984 ("SRA"), which gave rise to these new guidelines, Congress proceeded as if there were no logical connection between the substantive law and the law of sentencing.¹³ So the question remains: If the SRA was enacted in order to achieve honesty, uniformity, and proportionality in sentencing, can this be achieved given the current state of federal law?

Part I of this Article reviews general principles of corporate liability. Part II examines pre-conviction assessment of culpability. Part III considers post-conviction assessment of culpability. Part IV discusses sentencing in relation to culpability. Part V briefly contrasts proposals for determining genuine corporate intent with culpability provisions found in extant law.

II. CORPORATE CRIMINAL LIABILITY

Corporate criminal law requires both a basis of liability and an at-

volumes, containing over 3,000,000 pages. They are contaminated, if you will, by the inclusion of over 1700 essentially regulatory violations The traditionally recognized forms of wrongdoing are lost among multiple and confused citations.

Richard Thornburgh, Address to the Conference of the Society for the Reform of the Criminal Law, in *FED. NEWS SERVICE*, January 22, 1990.

12. See *infra* notes 90-102 and accompanying text.

13. The Sentencing Reform Act of 1984 (SRA) found in Title II of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3553, was passed by Congress to structure the discretion of federal judges and, thus, diminish unwarranted sentencing disparity. The SRA led to: (1) the dismantling of the United States Parole Commission, (2) the development of determinate rather than indeterminate sentencing in federal courts, (3) sentence review by U.S. Courts of Appeal, and (4) the establishment of the United States Sentencing Commission. For a recent criticism of the effects of the SRA, see Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681 (1992).

The SRA was designed by Congress to promote fairness in sentencing. Fairness was to be achieved by moving toward some very admirable goals: (1) honesty in sentencing, (2) uniformity in sentencing, and (3) proportionality in sentencing. UNITED STATES SENTENCING COMMISSION, *GUIDELINES MANUAL* 2-4 (1990).

tribution of culpability. Liability becomes a threshold issue—"should the act in question be subjected to criminal punishment?"¹⁴ In federal courts, liability rules for corporations are derived from agency principles, and have evolved in case law.¹⁵ This may be contrasted with liability rules for state law violations which generally follow the provisions in the Model Penal Code ("MPC").¹⁶ Of course, both state

14. VON HIRSCH, *supra* note 6, at 80 ("Culpability, it should be noted, affects both questions of liability ('Should the person be punished at all?') and questions of allocation ('How severely should he be punished?'). Liability is a threshold question: Whether the behavior involved sufficient culpability to be punishable at all."); see also Stanislaw Frankowski, *Mens Rea and Punishment in England: In Search of Interdependence of the Two Basic Components of Criminal Liability (A Historical Perspective)*, 63 U. DET. L. REV. 393 (1986).
15. See, e.g., *New York Cent. and Hudson River R.R. v. United States*, 212 U.S. 481 (1909); *United States v. Illinois Cent. R.R.*, 303 U.S. 239 (1938); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984)(upholding corporation's conviction for employee's filing of false Medicare claims); *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976)(knowledge of supervisory employee is knowledge of the corporation); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963)(conviction of corporate motor carrier upheld for employee's falsification of logs); *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962)("The corporations can be found guilty, therefore, only if the evidence shows that each, acting through its human agents, deliberately did these acts, that is, with the corporation "knowing" that they were being done."); *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950 (9th Cir. 1959)(conviction of corporation for employees' conversion and stealing of property); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958)(corporations can be found guilty for "knowing and willful" violations of federal statutes through the doctrine of respondeat superior); cf. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1368 (D.C. Cir. 1975)("Individuals or corporations used without their knowledge or consent by others in the commission of offenses may not possess the requisite criminal intent to be guilty of an offense." (citation omitted)); *United States v. Gibson Products Co.*, 426 F. Supp. 768 (S.D. Texas 1976)(corporation's conviction for employee's false entries upheld under theory of respondeat superior); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Vir. 1974)("A corporation can only act through its employees and, consequently, the acts of its employees, within the scope of their employment, constitute the acts of the corporation."); *United States v. Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975)(conviction of corporation for acts of bribery by its president); *United States v. Thompson-Powell Drilling Co.*, 196 F. Supp. 571 (N.D. Texas 1961)(corporation found liable for employees' violation of the Hot Oil Act, 15 U.S.C. § 715).
16. MODEL PENAL CODE § 2.07(1)(Proposed Official Draft 1962) sets forth the liability rules:

- (1) A corporation may be convicted of the commission of an offense if:
 - (a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
 - (b) the offense consists of an omission to discharge a specific duty of af-

and federal law provide for the imputation or attribution of liability of agents and employees to corporate entities.¹⁷

A. Federal Corporate Criminal Liability

Courts interpreting federal statutory law find corporations criminally liable for the conduct of employees acting within the scope of employment or with apparent authority, and with an intent to benefit the corporation.¹⁸ Under the doctrine of respondeat superior corporations are viewed as principals. Officers, directors, and all employees—whether managers or subordinates—are considered agents of the corporation.¹⁹ Thus, criminal liability extends to the corporation for criminal acts committed by: (1) officers and directors,²⁰ (2) managers and supervisors,²¹ (3) subordinate employees,²² and (4) independent

firmative performance imposed on corporations by law; or (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

Id.

For an interpretation of these rules, see Mueller, *supra* note 7; and Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594 (1963), and see also Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 Rutgers L.J. 593 (1988), in a special issue of the Rutgers Law Journal devoted to the 25th Anniversary of the Model Penal Code.

17. For a thorough review of both state and federal imputation cases, see KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (1984).
18. The term "scope of employment" includes "acts on the corporation's behalf in performance of the agent's general line of work." *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985); *cf.* *United States v. Gold*, 743 F.2d 800, 823 (upholding the following jury instruction: "Whether the agents' acts or omissions were committed within the scope of their employment is a question of fact. To be acting within his employment, the agent first must have intended that his act would have produced some benefit to the corporation or some benefit to himself and the corporation second."). The requirement of "intent to benefit the corporation" has been considered a critical factor in "equating the agent's action with that of the corporation." *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962); *see also* BRICKEY, *supra* note 16, at §§ 3:01-3:08.
19. The unqualified application of the doctrine of respondeat superior ("let the master answer") to corporations has spurred some debate. Critics argue that it is unfair to hold officers, directors, and high managerial agents liable for the acts of low level employees. *See, e.g.*, Mueller, *supra* note 7; Comment, *supra* note 7.
20. *See, e.g.*, *United States v. Empire Packing Co.*, 174 F.2d 16 (7th Cir. 1949), *cert. denied*, 337 U.S. 959 (1949); *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963). For a discussion of the these different levels of liability, see Elkins, *supra* note 7.
21. *See* C.I.T. Corp. v. *United States*, 150 F.2d 85 (9th Cir. 1945); *United States v. American Radiation & Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970).
22. *See* *United States v. Uniroyal, Inc.*, 300 F. Supp. 84 (S.D.N.Y. 1969). The rationale for holding subordinates liable as stated in *United States v. E. Brooke Matlack, Inc.*, 149 F. Supp. 814 (D. Md. 1957) is that:

While the primary responsibility for conducting the operations of the

contractors.²³

A recent statement of the general rule of corporate criminal liability under federal law is found in *United States v. Basic Construction Co.*,²⁴ in which the Fourth Circuit Court of Appeals affirmed a conviction under section 1 of the Sherman Act²⁵ for bid rigging in state road-paving contracts. At trial, Basic Construction Company argued that the bid rigging activities were performed by low-level employees without the knowledge of high-level officials, and that the Company had a strict policy against such practices. In a per curiam opinion, the Court ruled that "a corporation may be held criminally responsible for anti-trust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation even if . . . such acts were against corporate policy or express instructions."²⁶

More elaborate rules for the federal courts, however, have been proposed. Liability rules were first discussed at length by the National Commission on Reform of Federal Criminal Laws ("Brown Commission") over twenty years ago.²⁷ The Brown Commission re-

corporation lay with its principal officers, it was their duty in delegating authority to lesser agents to take effective measures to supervise and assure performance of the affirmative duty imposed upon the corporation. Thus the corporation cannot avoid responsibility by merely saying that a subordinate agent neglected his duty.

Id. at 820.

23. See *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008 (7th Cir. 1947).
24. *United States v. Basic Const. Co.*, 711 F.2d 570 (4th Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); see also *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960). In *Continental Baking*, the Sixth Circuit Court of Appeals stated that:

There is an officer or agent of a corporation with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the corporate principal's business. Under such circumstances, the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have "authorized" the criminal act.

Continental Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960).

25. 15 U.S.C. § 1 (1992).
26. *United States v. Basic Const. Co.*, 711 F.2d 570, 573 (4th Cir. 1983). This statement of law has been interpreted broadly to include all federal criminal law violations. For example, in *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985), the Court held: "We believe that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws." *Id.* at 407, n.5. See also *Old Monastery Co. v. United States*, 147 F.2d 905 (4th Cir. 1945); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970).
27. The Honorable Edmund G. Brown, Chairman of the National Commission on Re-

commended corporate liability for any offense committed by an agent who was authorized, commanded, or requested to act by: (1) the board of directors, (2) an executive officer, (3) a person who controls the organization or is responsible for policy formation, or (4) a person otherwise considered responsible under a statute.²⁸ According to the Brown Commission, a successful effort to codify liability rules would have the effect of addressing two critical problems: (1) the existing uncertainty regarding the extent of liability for acts committed by agents of the corporation, and (2) the "inappropriateness" of extant rules of accountability.²⁹

A number of versions of these liability rules appeared in draft proposals for the revision of the Federal Criminal Code during the late 1970s and early 1980s. In the last proposal, found in the Criminal Code Reform Act of 1981, organizations would be liable for the acts of any agent that: (a) occur in the performance of their duties, (b) are intended to benefit the organization, and (c) are ratified or adopted by the organization. Alternatively, liability may be found where there is a failure on the part of the organization to discharge a specific duty imposed by law.³⁰

B. State Corporate Criminal Liability

It is worthwhile, for purposes of comparison, to examine analogous state liability rules. The codification of the MPC by the American Law Institute in 1962 ushered in a new era in uniform liability for state corporate criminal law violations.³¹ The MPC identifies three

form of Federal Criminal Laws, submitted a final report to the President and Congress on January 7, 1971. In this report, the Brown Commission described the many features of the proposed criminal code, including the fact that:

Unlike existing Title 18, the [proposed] Code is comprehensive. It brings together all federal felonies, many of which are presently found outside Title 18; it codifies common defenses, which presently are left to conflicting common law decisions by the courts; it establishes standard principles of criminal liability and standard meanings for terms employed in the definitions of offenses and defenses.

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, at xii (Final Report 1971).

28. NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, 1 WORKING PAPERS 214 (1970).

29. *Id.* at 163.

30. S. 1630, 97th Cong., 2d Sess. § 402 (1982). This section superseded the liability rules found in S. 1722, 96th Cong., 1st Sess. (1979). Congress never passed S. 1722 due, in part, to insufficient time. Subsequently, according to Norman Abrams, "The steam went out of the effort to adopt a comprehensive criminal code revision and Congress began again to consider crime bills that treat substantive criminal law issues piecemeal." NORMAN ABRAMS, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 67 (1986).

31. See MODEL PENAL CODE, § 2.07(1) (Proposed Official Draft 1962). For a discussion of the efforts to change state penal codes, see Robert G. Lawson, *Kentucky Penal*

distinct forms of liability, *i.e.*, regulatory offenses, failures to discharge duties imposed by law, and penal law violations. First, corporations are liable for minor, regulatory offenses where a clear legislative purpose to impose liability is present, and the agent's actions were on behalf of the corporation and within the scope of his authority.³² The basis of liability here is vicarious, found in the doctrine of respondeat superior. Notably, the use of a due diligence defense limits the reach of this liability rule by allowing a corporation to escape conviction if it can establish that a responsible supervisory officer used due diligence to prevent the offense. Second, a corporation is liable where the offense is based on a failure to discharge a specific duty of performance imposed by law.³³ Finally, corporations are liable for all penal law violations, with few exceptions, where the "offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment".³⁴ This final category, which has been the subject of much deliberation and debate, does not adopt the broad respondeat superior approach of section 207(1)(a) and confines liability to a narrow class of criminal acts—those concerning high managerial agents whose acts reflect the policy of the corporate body.³⁵ Some states' legislatures have found section 207(1)(c) too restrictive and, thus, have proceeded cautiously in adopting this section. Most states, however, have used section 207(1)(c) as a rough guide for drafting less restrictive provisions.³⁶

Code: The Culpable Mental States and Related Matters, 61 KY. L.J. 657 (1973); Note, *The Mens Rea Provisions of the Proposed Ohio Criminal Code—The Continuing Uncertainty*, 33 OHIO ST. L.J. 354 (1972); Note, *The Proposed Tennessee Criminal Code—General Interpretive Provisions and Culpability*, 41 TENN. L. REV. 131 (1973).

32. MODEL PENAL CODE § 2.07(1)(a)(Proposed Official Draft 1962).

33. MODEL PENAL CODE § 207(1)(b)(Proposed Official Draft 1962).

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

35. This is in sharp contrast to federal liability rules. *Cf.* *United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir. 1983); *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946).

36. For example, according to Brickey,

[T]o the extent that section 2.07 has served as a model rule of corporate liability for crime, its role has been closer to that of rough theoretical model than that of model law. In its first twenty-five years, section 2.07 has succeeded in providing an organizing principle around which many state laws have been modeled, but it has yet to achieve the goal of bringing order and rationality to this unruly branch of the law.

Brickey, *supra* note 16, at 632. A host of state cases discuss corporate liability issues. Consider, for example, *Commonwealth v. Penn Valley Resorts, Inc.*, 494 A.2d 1139 (Pa. Super. 1985)(involuntary manslaughter); *State v. Christy Pontiac-GMC, Inc.*, 354 N.W.2d 17 (Minn. 1984)(theft and forgery); *State v. Chapman Dodge Center, Inc.*, 428 So. 2d 413 (La. 1983)(theft); *Granite Constr. Co. v. Superior Court*, 197 Cal. Rptr. 3 (Ct. App. 1983)(manslaughter); *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Crim. App. 1983)(manslaughter); *State v. Shepherd*

III. PRE-CONVICTION CULPABILITY

An assessment of an agent's or corporation's culpability serves two distinct functions. First, it satisfies one of a number of elements necessary to establish liability, i.e., the mental element, and, thus, provides a basis for criminal punishment. After all, it is axiomatic that theories of criminal punishment require the finding of mens rea.³⁷ Thus, the prosecution must establish a requisite mental state in order to satisfy its burden of proving each and every material element of an offense.³⁸ As Professor H. L. A. Hart noted, the central question of culpability prior to conviction is: "Can this man be convicted of this crime?"³⁹ Thus, the pre-conviction use of culpability is typically more restricted, limited to finding willfulness or knowledge on the part of an actor in the federal courts, or purpose, knowledge, recklessness, or negligence in state courts.⁴⁰ A second brand of culpability is considered after conviction at which point the concern is with the allocation of punishment.⁴¹ Here the question is: "How severely is the accused to be punished?"⁴² The post-conviction assessment of culpability reflects an interest in assessing the interaction between blameworthiness and harm, in addition to the actor's intent. As will become evident, a host of other factors may be considered in assessing blameworthiness at sentencing.

Constr. Co., 281 S.E.2d 151 (Ga. 1981)(restraint of trade); *People v. Warner Lambert Co.*, 51 N.Y.2d 295 (1980)(manslaughter); *Commonwealth v. McIlwain Sch. Bus Lines, Inc.*, 423 A.2d 413 (Pa. 1980)(homicide by vehicle); *Commonwealth v. J.P. Mascaro and Sons, Inc.*, 402 A.2d 1050 (Pa. 1979)(theft by deception, deceptive business practices, and unsworn falsification to authorities); *People v. Ebasco Services, Inc.*, 354 N.Y.S.2d 807 (1974)(negligent homicide); *State v. Adjustment Dept. Credit Bureau, Inc.*, 483 P.2d 687 (Idaho 1971)(extortion); and *State v. Pacific Powder Co.*, 360 P.2d 530 (Oregon 1961)(involuntary manslaughter).

37. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 114 (1988)("All civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of frame of mind or will."). For a recent review of different conceptualizations of mens rea, see Stephen J. Morse, *The "Guilty Mind": Mens Rea, in THE HANDBOOK OF PSYCHOLOGY AND LAW* 207 (D.K. Kagehiro & W.S. Laufer eds. 1992).
38. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); see Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107. For an interesting revisionist perspective on mens rea in relation to due process, see Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966).
39. HART, *supra* note 37, at 114.
40. See *infra* notes 43-102 and accompanying text.
41. See *infra* notes 103-109 and accompanying text.
42. HART, *supra* note 37, at 115.

State law culpability provisions are elaborate and generally well-conceived—much more so than federal provisions. Thus, after briefly considering the many advances made in state culpability provisions with the passage of the MPC, the discussion will focus on the pre- and post-conviction usages of culpability in federal law.

A. Culpability under State Law

It is the presence or absence of *mens rea*, an evil intent or guilty state of mind, that provides a natural division between blameworthy and non-blameworthy acts, between crimes and accidental acts.⁴³ In assessing culpability prior to conviction, the focus is squarely on establishing a material mental state, required under a particular statute, which reflects a criminal intent.

Prior to the codification of the MPC, state legislatures had little guidance in crafting uniform criminal statutes that consistently defined mental states. In fact, a host of mental states with varied meanings were found in state codes, including fault provisions that are quite difficult to interpret, *e.g.*, "unlawfully," "maliciously," "fraudulently," and "designedly."⁴⁴ Courts, for example, were forced to decipher the meaning of "heedlessly," "wickedly," "wantonly," and "wrongfully."⁴⁵

43. *See, e.g.*, JOEL P. BISHOP, 1 BISHOP ON CRIMINAL LAW 192-93 (9th ed. 1923) ("There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness It is therefore a principle of our legal system . . . that the essence of an offence is the wrongful intent, without which it cannot exist." (citations omitted)); HALL, *supra* note 6, at 243 ("Even apart from the enormous extent of tort law devoted to negligence and strict liability, it follows that *moral culpability is not essential in tort law—immoral conduct is simply one of various ways by which individuals suffer economic damage.*"); Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043 (1958); Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); *see also* Morse, *supra* note 37.

For a fascinating discussion of the crime/tort distinction, see Coffee, *supra* note 4.

44. For a review of the development of culpability in state law, consider Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 578-79 (1988) ("The disorder of the American criminal law concerning culpable mental states assured the drafters of the Model Penal Code of a daunting task. It also assured the drafters of at least some degree of success; there was virtually no chance that their product would be worse than that produced over the centuries by a succession of judges and legislators."); and Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

45. These *mens rea* requirements come from Alabama's pre-MPC criminal laws. *See* English v. Jacobs, 82 So. 2d 542 (Ala. 1955); Padgett v. State, 56 So. 2d 116 (Ala. App. 1952); Martin v. State, 25 So. 255 (Ala. 1898); Burton v. State, 107 Ala. 108 (1894). Lawson observed that: "Without question the most significant single accomplishment of the entire code is the clarification that has been provided the doctrine of *mens rea*. The confusion which previously existed in this area of the law is not totally describable." Lawson, *supra* note 31, at 658 (citation omitted).

With the MPC, four culpable mental states were selected that represent a continuum or hierarchy of culpability—ranging from conduct that is purposeful, or consciously designed to bring about a certain result, to negligent conduct where the actor should have known of a substantial risk of injury. Thus, liability under the MPC requires that one act purposely (“with a conscious object to engage in conduct”), knowingly (“aware that it is practically certain that his conduct will cause a result”), recklessly (“consciously disregards a substantial and unjustifiable risk”), or negligently (“should be aware of a substantial and unjustifiable risk”) with respect to a material element of an offense.⁴⁶

The MPC also brought with it a critical advance in the interpretation of offense descriptions. Prior to the MPC, in some states, proof of one culpable mental state was required for each offense or class of offenses. For example, there were statutes for which knowledge alone was required for a particular offense description, and there were classes of offenses characterized simply as requiring a “general intent.” This “offense analysis” was replaced in the MPC with the recognition that offense descriptions may necessitate separate proof of a culpable state of mind for the conduct, result, or circumstance elements of an offense.⁴⁷ The analysis of the elements of offense descrip-

Lawson noted 10 pre-MPC mens rea terms for crimes against property in Kentucky (willful; wanton; reckless; negligence; unlawfully; forcibly; willfully and maliciously; intent; willfully, knowingly and maliciously; and knowingly) and six for crimes against property (willfully and maliciously; willfully, intentionally, or maliciously; unlawfully; feloniously; willfully and knowingly; willfully and fraudulently). *Id.* at 658-59.

46. See Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

47. The MPC defines these four states of mind as follows:

(2)(a) A person acts *purposely* with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) A person acts *knowingly* with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) A person acts *recklessly* with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) A person acts *negligently* . . . when he should be aware of a sub-

tions ensures clarity and consistency. Most important, element analysis recognizes complex factual situations requiring more than one mental state. Grouping the act, circumstance, and results elements runs the risk of obscuring critically important state of mind distinctions. As Professor Sayre noted over fifty years ago, "A mens rea does not mean a single precise state of mind which must be proved as a prerequisite for all criminality. Mens rea, chameleon-like, takes on different colors in different surroundings."⁴⁸

The codification of four culpable mental states added significant rationality and fairness to state penal law. It has been observed that the MPC gives "fair warning of what will constitute a crime, limits governmental discretion in determining whether a particular individual has violated the criminal law, and provides the distinctions among degrees of harm and degrees of culpability that create the foundation of a fair sentencing system."⁴⁹

Indeed, even though the focus here is on establishing liability through proof of a mental state, culpable mental states also provide an initial basis for the determination of a sentence. This may be seen in one of two ways. First, sentencing judges under most state statutes use the grade or degree of an offense in order to calculate a propor-

stantial and unjustifiable risk that a material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(a)-(d) (Proposed Official Draft 1962).

For a discussion of the importance of element analysis, see Robinson & Grall, *supra* note 44, at 683 ("The majority of American jurisdictions have adopted criminal codes that incorporate this Model Penal Code innovation by requiring courts to apply an element analysis to each offense and theory of liability." (citation omitted)); and Gainer, *supra* note 44, at 588 ("Perhaps the greatest potential value of the overall analytical approach employed by the Code lies in its restrained application to the drafting of the penal offenses themselves. The possibility of a superior structure is suggested. If a building block technique can so simplify the law with regard to mental elements through recasting them better to accord with distinctions among acts, circumstances, and results, and through re-examining the continued utility of traditional offense categories."). See also Sayre, *supra* note 43; Francis B. Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399 (Roscoe Pound ed., 1934).

48. Francis B. Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 402 (Roscoe Pound ed., 1934); see also Robinson & Grall, *supra* note 44, at 687 ("The Model Penal Code's move towards 'element analysis' continued this refinement process by adding to the specific mental state concept detailed definitions of the required culpable states of mind. In addition, the concept of a different mens rea for each offense acquired a larger, more precise meaning. Under the Code, a culpable state of mind requirement may exist for 'each material element' of an offense. Further, the culpability requirement may be different for different elements of the same offense." (citation omitted)).
49. Robinson & Grall, *supra* note 44, at 689 (citations omitted).

tional sentence.⁵⁰ As Professor Ashworth has noted, "Much of the doctrine of the criminal law concerns—implicitly and even expressly in places—the different levels of seriousness of crimes. Different maximum penalties may be assigned to offences which turn on the distinction between intention and recklessness . . ."⁵¹ Thus, in states that have adopted the MPC in whole or in part, offenses may be hierarchically graded by culpable mental states. For example, in many jurisdictions the types and degrees of criminal homicide are organized by hierarchical mental states.⁵² Second, judges often use culpable mental states as a threshold showing of blameworthiness. It is simply the most logical starting point for a more detailed pre-sentence assessment of culpability.⁵³

B. Culpability under Federal Law

The contrast between state and federal law in regard to culpability provisions is dramatic. The failure of Congress to incorporate uniform and hierarchical culpable mental states in the Federal Criminal Code, as well as a host of federal criminal laws is more than remarkable.⁵⁴

50. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 1252 (West 1991); N.J. STAT. ANN. § 2C:44-1 (West 1992). See Robinson & Grall, *supra* note 44, who make the connection between degrees of harm, degrees of culpability, and sentencing guidelines.

51. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 14 (1991).

52. See, e.g., N.J. STAT. ANN. § 2c:11-2 to -6 (West 1992); 18 PA. CONST. STAT. ANN. § 2501-06 (1992).

53. See DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE COLLAR OFFENDERS IN THE FEDERAL COURTS (1991).

54. Every year, approximately 50% of all convictions of corporations in federal district courts are for violations of non-Title 18 federal statutes. During the period January 1, 1989 to June 30, 1990, for example, the distribution of convictions by U.S. Code Title was as follows:

<i>Title</i>	<i>Number</i>	<i>Percent</i>
7	2	0.4%
8	2	0.4%
12	1	0.2%
15	85	19.1%
16	5	1.1%
18	227	51.0%
19	6	1.3%
20	1	0.2%
21	33	7.4%
22	1	0.2%
26	23	5.2%
29	4	0.9%
30	1	0.2%
31	6	1.3%
33	15	3.4%
42	23	5.2%
43	1	0.2%
47	1	0.2%

Federal criminal law relating to culpability has been described as "hopelessly confused," "bewildering," and "elusive."⁵⁵ Clearly, the effort to reform the Federal Criminal Code has held out the greatest hope.⁵⁶ The Brown Commission criticized the "confused and inconsis-

49	2	0.4%
50	6	1.3%
Total	445*	99.0%

*One missing case

UNITED STATES SENTENCING COMMISSION, ORGANIZATIONS SENTENCED IN FEDERAL CRIMINAL COURTS 1989-90, (1991).

55. See SENATE COMM. ON THE JUDICIARY, 96th CONG., 2d SESS., REPORT ON CRIMINAL CODE REFORM ACT OF 1979, 59 (1980) ("Present Federal criminal law is composed of a bewildering array of terms used to describe the mental elements of an offense. . . . Not surprisingly, the proliferation of these terms has left the criminal justice system with confusing and even conflicting laws. Justice Jackson characterized the mental element concepts in Federal law as being 'elusive' because of the 'variety, disparity and confusion' of judicial definitions." (footnotes omitted)).
56. The debate over the possible reform of the Federal Criminal Code has persisted for over twenty years. See, e.g., *Reform of the Federal Criminal Laws, Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st-94th Cong., (1971-1975); Edward M. Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451 (1979); John L. McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663; Paul F. Rothstein, *Federal Criminal Code Revision: Some Problems With Culpability Provisions*, 15 CRIM. L. BULL. 157 (1979).

This debate continues with a recent report of the Federal Courts Study Committee unanimously recommending that: "Congress should enact a comprehensive recodification of the federal criminal laws and should create a code revision commission to expedite the process." FEDERAL COURTS STUDY COMM., 100TH CONG., 2D SESS., REPORT OF THE FEDERAL COURTS STUDY COMM. 106 (1990).

Recently, Senator Howell Heflin proposed the creation of the National Commission on Federal Criminal Law Reform as part of the Federal Courts Study Committee Implementation Act of 1991 (S. 1569). The Commission would consider, along with a series of proposed reforms, mens rea requirements in criminal statutes. See 137 CONG. REC. S11,062 (1991) (daily ed. July 26, 1991) (Statement of Sen. Heflin). The proposal met with mixed reviews. In testimony given before the Senate Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, by Paul Maloney, Deputy Assistant Attorney General, Criminal Division, Department of Justice, on October 17, 1991, the proposal was called "ill-advised." According to Maloney:

Although the Department of Justice has long supported the concept of comprehensive federal criminal code reform, we do not favor the enactment of the proposal in Title II. . . . The nearly decade-long period since the abandonment of the criminal code reform effort has been a time of unprecedented legislative activity in the area of federal criminal law, and one that has resulted in the attainment of some of the goals of the reform bills. Comprehensive laws affecting the federal criminal justice system have been enacted by Congress in 1984, 1986, 1988, and 1990, and this year Congress is again considering, at the President's request, another important bill addressed primarily to violent crime. The 1984 Act was especially important, since it embodied the sentencing and bail reforms that had been included in prior Senate criminal code reform bills, as well as other substantial changes, such as a limitation of the insanity

tent ad hoc approach" to culpability in the federal courts and called for a "new departure."⁵⁷ The need for this new departure was made clear by the Brown Commission's identification of seventy-eight different mens rea terms and combinations of terms in the Federal Criminal Code. As the Appendix suggests, there was no new departure. There are currently one hundred and one culpable mental state terms and combinations of terms in Title 18.⁵⁸ This is a significant increase over the already unmanageable number of terms and combinations of terms found by the Brown Commission in 1970. Moreover, the inventory of Title 18 terms in Appendix A fails to consider the culpability provisions in criminal statutes found outside of the Federal Criminal Code.⁵⁹

Mens rea terms found in the Federal Criminal Code are left undefined, and no federal statute existed at the time of the Brown Commission, or exists now, providing rules of construction for requisite states of mind and their many combinations. This results in two significant problems with the construction of mens rea requirements: interpreta-

defense. Other reforms in recent years have included new offenses aimed at drug trafficking and money laundering, and the enactment of statutes permitting both civil and criminal forfeiture for a wide panoply of federal crimes.

Given the extent to which federal criminal laws have undergone revision over the last ten years—a degree of legal revolution, as it were, far greater than has been experienced in the entire previous history of the nation—we believe this is not the time for another comprehensive overhaul.

(Statement of Paul Maloney, Department of Justice, concerning the Implementation of Federal Courts Study Committee Recommendations, S.1569, at 6).

On the other hand, support was voiced by J. Vincent April II, who testified: "It is an inevitable reality that any body of statutory criminal law which is regularly revisited for purposes of modification, deletion, and addition, will eventually require a comprehensive revamping to guarantee a consistent and uniform relationship between various criminal offenses which make up the body of that law." (Statement of J. Vincent April II, concerning the Implementation of Federal Courts Study Committee Recommendations, S.1569, at 3).

57. See SENATE COMM. ON THE JUDICIARY, *supra* note 55, at 60. For an excellent discussion of culpable mental states in federal statutory law, see *United States v. Bailey*, 444 U.S. 394 (1980). This opinion is remarkable for its consideration of mens rea in federal law, and for its cautions against an overly critical approach to the limitations of federal statutory law. In analyzing the culpability requirements for 18 U.S.C. § 751(a), Justice Rehnquist cautioned that "[t]his system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions, either traditional or novel, that Congress neither stated nor implied when it made the conduct criminal." *Id.* at 406-07.

58. 18 U.S.C. §§ 1-2711 (1992).

59. See UNITED STATES SENTENCING COMMISSION, *supra* note 54. With a significant number of corporate convictions obtained for non-Title 18 offenses, it is necessary to consider whether or not similar state of mind problems exist in these regulatory and non-regulatory statutes. See, e.g., George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U.L. REV. 389 (1980).

tive variations and redundant combinations. The former may be seen in differing interpretations by courts of identical mens rea requirements within a particular statute, as well as across statutes. The latter is evident in statutes that combine mens rea terms that possibly have the same meaning, *e.g.*, willfully and knowingly.⁶⁰

Federal courts are left to interpret one hundred and one mental state combinations using prior case law, legislative history, and intuition as a guide.⁶¹ Meaningful interpretation is further limited by problems of generality, vagueness, and ambiguity in federal statutory law.⁶² Moreover, as shall be seen below, "willfulness"—perhaps the most obscure of all mens rea requirements—is less than ideal for such an *ad hoc* approach to determining culpability.⁶³ Willfulness is currently used in twenty-three different combinations in the Federal Criminal Code, *e.g.*, "willfully and corruptly," "falsely and willfully," and "willfully and unlawfully." A more detailed consideration of the use of this term in the United States Code will reveal its limitations.

60. See *infra* notes 80-89 and accompanying text.

61. The process of choosing a mens rea requirement for a particular statute is equally obscure. Consider the history of the bank bribery provisions found in 18 U.S.C. § 215. These provisions originated in the 1984 Comprehensive Crime Control Act, 18 U.S.C. § 1107, and, for a period of two years, failed to have a mens rea requirement, *e.g.*, a corrupt intention. The result was that normal banking and business activities often were prohibited under the statute. For example, in its strict liability form, the statute prohibited a bank official from seeking anything of value for another in connection with bank business. It also prohibited anyone from giving anything of value to a bank official in connection with bank business. In order to cure this defect, considerable debate took place over the selection of an appropriate mental state. This debate ended with the choice of the term "corruptly," which allegedly conveys the meaning of corrupt intention. This choice was made with the knowledge that the term was both unclear and offered little guidance to those governed by the Act in the financial industry. For debate over the Bank Bribery Amendments, see 132 CONG. REC. 943 (1986); 131 CONG. REC. 9274 (1985); 131 CONG. REC. 2591 (1985); and 131 CONG. REC. 7081 (1985).

62. For a discussion of these problems in relation to 18 U.S.C. § 207, see Matthew T. Fricker & Kelly Gilchrist, Comment, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 809-812 (1990). These problems are not typical of all statutes. See, *e.g.*, P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 98 (1991) ("Because statute law is a better source of rules than case-law, and because many rules are susceptible of highly formal treatment, this also tends to make statute law a more formal kind of law. Case law can be extremely *ad hoc*—simply a method of deciding disputes without providing much, if any guidance for the future. Indeed, in some cases the courts appear exclusively concerned with the past, with clearing up a mess after the fact. The usual statute is not like this at all: it is prospective, and operates through rules, many of which are hard and fast rules.").

63. For an excellent treatment of willfulness in federal law, see Kenneth R. Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123, 125-128 (1980).

1. *Willfulness*

The first statutory codification of a willful state of mind has been traced to England and the Uniformity of Service Act of 1548.⁶⁴ Since the creation of that act, the term "willful" has served in English statutory law, and subsequently in American law, as an elastic proxy for a host of mental states ranging from "malicious" to "not accidental." In fact, the term is so elastic that its meaning in any particular statute is said to depend, at least in part, on a judge's view of mens rea generally.⁶⁵ More likely, its meaning is tied to the subject matter of the statute.⁶⁶ After *United States v. Murdock*,⁶⁷ there has been an evolving consensus that the meaning of a willful state of mind can be determined only through an examination of the context in which it is used. In *Murdock*, Justice Roberts acknowledged that the term willful should reflect an intentional, knowing, and voluntary state of mind. He noted as well that, depending on the statute, courts have used the term to reflect acts done with a bad purpose, without excuse, stubbornly, obstinately, perversely, and with a careless disregard.⁶⁸ A resolution of this inconsistency is achieved by courts accepting a contextual approach to the interpretation of mens rea requirements in federal statutory law. Such an approach allows courts to develop statute-specific interpretations of mens rea terms. This may be contrasted with Justice Marshall's recent call for a plain language approach that would require uniform interpretations of identical mens rea terms across statutes.⁶⁹ The architects of the MPC choose a variation of the

64. J. LL. J. EDWARDS, MENS REA IN STATUTORY OFFENCES 30 (1955).

65. *Id.* at 31.

66. See, e.g., *United States v. Murdock*, 290 U.S. 389, 395 (1933) ("Aid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used . . ."); *Spies v. United States*, 317 U.S. 492, 497 (1943) ("[W]illful, as we have said, is a word of many meanings, its construction often being influenced by its context.").

67. *United States v. Murdock*, 290 U.S. 389 (1933).

68. This characterization comes directly from *Murdock*, where the Court defined "willful":

The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely. . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act.

United States v. Murdock, 290 U.S. 389, 394-95 (1933).

69. This distinction was made clear in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), where the Court defined a willful violation of the Fair Labor Standards Act to include an employer's knowledge or "reckless disregard for the matter of whether its conduct was prohibited by the statute . . ." *Id.* at 133. This definition was borrowed from an earlier decision, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-130 (1985), where Justice Powell interpreted the willfulness pro-

plain language approach, but could not do so with the term willful. Quite simply, the term willful was "unusually ambiguous standing alone."⁷⁰ Instead, a provision was added to the MPC that substituted the mental state of knowledge for all statutory references to willful states.⁷¹

The contextual approach to the determination of a willful mental state has resulted in a significant number of differing judicial interpretations under Title 18 and other federal statutory laws.⁷² With regard

vision of the Age Discrimination in Employment Act of 1967. Justice Marshall's dissent in *McLaughlin* illustrates the contrasting approaches:

The Court today imports into a limitations provision of the Fair Labor Standards Act (FLSA) the "knowing or reckless" definition of "willful" that we previously adopted in construing a liquidated damages provision of the Age Discrimination in Employment Act of 1967. . . . In doing so, the Court departs from our traditional contextual approach to the definition of the term "willful" The Court's apparent abandonment of this approach in favor of a nonexistent "plain language" definition of "willful" . . . is unprecedented and unwise.

McLaughlin v. Richland Shoe Co., 486 U.S. 128, 135-37 (1988)(Marshall, J., dissenting)(citations omitted).

70. MODEL PENAL CODE § 2.02(8) note on term willful (Proposed Official Draft 1962). Along the same lines, in the American Law Institute Proceedings, an exchange between the Reporter and Judge Learned Hand was recorded:

JUDGE HAND: Do you use . . . [willfully] throughout? How often do you use it? It's a very dreadful word.

MR. WECHSLER: We will never use it in the Code, but we are superimposing this on offenses outside the Code. It was for that purpose that I thought that this was useful. I would never use it.

JUDGE HAND: Maybe it is useful. It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, "wilful" would lead all the rest in spite of its being at the end of the alphabet.

MR. WECHSLER: I agree with you Judge Hand, and I promise you unequivocally that the word will never be used in the definition of any offense in the Code. But because it is such a dreadful word and so common in the regulatory statutes, it seemed to me useful to superimpose some norm of meaning on it. . . .

A.L.I. PROC. 160 (1955).

71. MODEL PENAL CODE § 2.02(8)(Proposed Official Draft 1962). The provision reads: "*Requirement of Wilfulness Satisfied by Acting Knowingly*. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."
72. See, e.g., Feinberg, *supra* note 63, at 127. Feinberg's review of federal decisions reveals seven definitional variations of the term willful: (1) knowledge of illegality, or an intent to further an objective known to be illegal; (2) recklessness as to legality; (3) negligence as to legality; (4) immoral objective, or knowledge immorality—such as bad purpose, evil intent, and conscious wrongdoing; (5) intent to defraud or injure; (6) intent or knowledge with respect to ordinary elements of the offense; and (7) recklessness with respect to ordinary elements of the offense. *Id.* Even a cursory analysis of these mental states reveals a full range of culpability (excluding negligence)—from intention or purpose, to recklessness. Commentators have overlooked the fact that the obscure nature of wilfulness

to the latter, willfulness under the Fair Labor Standards Act is knowing or reckless conduct, or conduct that is "not merely negligent."⁷³ The requirement of proving willfulness under the Age Discrimination in Employment Act is satisfied by establishing knowledge of the statute or a reckless disregard of it.⁷⁴ Under the Securities and Exchange Act of 1934, courts have found willful action to be deliberate and intentional.⁷⁵ Willful infringement of Federal copyright laws requires purposive action.⁷⁶ The Currency and Foreign Transactions Reporting Act has a willfulness requirement that is satisfied by both a knowing failure to obey the law, and a specific intent to disobey the law.⁷⁷ Most recently, the United States Supreme Court has ruled that willfulness under criminal tax law requires an intentional and voluntary violation of a known duty.⁷⁸

The existence of differing interpretations of willfulness across different regulatory statutes is problematic, and is made more so by differences between judicial decisions regarding definitions and interpretations of a single mental state within a particular statute. This is true for those statutes providing a basis for the prosecution of corporations found inside and outside the Federal Criminal Code.⁷⁹

is only furthered by the nature of the corporate form. Courts appear unsure as to whether willfulness is established by direct reference to employee acts (or omissions) or proof of willful corporate behavior which is essentially independent of employee behavior, *e.g.*, an entity's reaction or lack of reaction to the discovery of illegal behavior. *See, e.g.*, *United States Bank of New England*, 821 F.2d 844 (1st Cir. 1987)(direct evidence of bank employees state of mind used to establish willfulness); *United States v. Sawyer*, 337 F. Supp. 29 (D. Minn. 1971)(willfulness established by proof of a corporation's plain indifference to the requirements of the statute); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Vir. 1974)(evidence of a "hands off" attitude by the corporation toward compliance with the regulation constitutes willfulness).

73. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

74. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-28 (1985).

75. *United States v. Dixon*, 536 F.2d 1388, 1396-98 (2d Cir. 1976).

76. *See, e.g.*, *United States v. Heilman*, 614 F.2d 1133, 1137 (7th Cir. 1980)(the court followed a two-part test for willfulness which includes acting with the purpose of depriving the victim of an interest protected by a copyright); *see also* *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977); *United States v. Cross*, 816 F.2d 297 (7th Cir. 1987).

77. *United States v. Sans*, 731 F.2d 1521, 1530 (1984).

78. *Cheek v. United States*, 111 S. Ct. 604 (1991). Justice White announced that: "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 610. Justice Scalia concurred in the judgment of the court but disagreed with the definition of willfulness. "I find it impossible to understand how one can derive from the lonesome word 'willfully' the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (*i.e.*, the legal nonexistence) of a textual prohibition does not." *Id.* at 614. (Scalia, J., concurring).

79. Within the Federal Criminal Code, consider the differing interpretations of the

To make matters even more obscure, judges who face questions relating to the distinctions between "willful" and "knowing" states of mind often refer back to Justice Butler's attempt to distinguish these two seemingly different culpable mental states: "'Wilfully' means something not expressed by 'knowingly,' else both would not be used conjunctively"⁸⁰ However, the effort to distinguish the requirement of willfulness from other mens rea requirements may be no more than a semantic one. As one commentator has observed, supporting a "decision as an interpretation of statutory 'willfulness' rather than of intention . . . [is] a distinction without a difference."⁸¹ In fact, the most reasonable view is that willfulness is no more than a term of art which may encompass all culpable mental states that exceed negligence.⁸² In this sense, it resembles the common law conceptualization of general intent.⁸³

In part because of its broad reach, the unsparing use of willfulness by Congress has had a truncating effect on the presence of different

mens rea requirement for the mail fraud statute, 18 U.S.C. § 1341, found in *United States v. Gordon*, 780 F.2d 1165 (5th Cir. 1986)(specific intent must be established); *United States v. Dick*, 744 F.2d 546 (7th Cir. 1984)(reckless disregard is sufficient); *United States v. Glick*, 710 F.2d 639 (10th Cir. 1983)(deliberate ignorance is sufficient); and *United States v. Massa*, 740 F.2d 629 (8th Cir. 1984)(willful blindness is sufficient). Outside the Federal Criminal Code, consider the differing mens rea interpretations under the anti-fraud provisions of § 17 of the Securities Act of 1933, 15 U.S.C. §§ 77q, 77x, found in *Elbel v. United States*, 364 F.2d 127 (10th Cir. 1966), *cert. denied*, 385 U.S. 939 (1966)(willful intent judged according to a reckless indifference test); *United States v. Amik*, 439 F.2d 351 (7th Cir. 1971), *cert. denied*, 403 U.S. 918 (1971)(reckless misinterpretation is sufficient); *United States v. Brown*, 578 F.2d 1280 (9th Cir. 1978)(specific intent is required); and *United States v. Vandersee*, 279 F.2d 176 (3rd Cir. 1960)(fraudulent intent is required). For a discussion of scienter under the Securities Exchange Act of 1934, see Craig L. Griffin, *Corporate Scienter Under the Securities Exchange Act of 1934*, 34 B.Y.U. L. REV. 1227 (1989).

80. *St. Louis & S.F.R. Co. v. United States*, 169 F. 69, 71 (8th Cir. 1909).

81. GLANVILLE L. WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 39 (1965).

82. As was noted by the National Commission on the Reform of the Federal Criminal Law,

There may be no word in the Federal criminal lexicon which has caused as much confusion as the word "willfully" (or "willful"). In ordinary speech, the word probably connotes something between purpose and malice, and also something of obstinacy. Despite the confusion that the word has engendered, it has an accepted place in Federal criminal law and can be eliminated only with difficulty. The next best thing to eliminating it entirely is to attempt to give it a clear, fixed meaning. This has been done by providing that a person engages in conduct "willfully" if he engages in it "intentionally," "knowingly," or "recklessly." So confined, the word offers a useful means of referring to the more serious degrees of culpability. None of its connotations have significance for the criminal law.

NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, *supra* note 27, at 128 (citation omitted).

83. See HALL, *supra* note 6, at 143.

mens rea terms in federal statutes. The full range of culpable mental states in the MPC hierarchy is absent, for example, from the Federal Criminal Code. Consider the use of recklessness, or the conscious disregard of a substantial and unjustifiable risk. It is identified in only seven provisions of the Code.⁸⁴ Over time, however, courts have ruled that the mens rea requirements of an additional twelve statutes, which most often require willful and knowing acts, may be satisfied by a reckless state of mind.⁸⁵

84. The term reckless appears in the following provisions of the Federal Criminal Code: 18 U.S.C. § 33 (1991) ("Destruction of motor vehicles or motor vehicle facilities. Whoever willfully, with intent to endanger the safety of any person on board or anyone who he believes will board the same, or with a reckless disregard for the safety of human life . . ."); 18 U.S.C. § 35(b)(1991) ("Imparting or conveying false information. . . (b) Whoever willfully and maliciously, or with reckless disregard for the safety of human life . . ."); 18 U.S.C. § 831(b)(1)(B)(i)(II)(1991) ("Prohibited transactions involving nuclear materials. . . [The punishment for an offense is imprisonment if] the offender, under circumstances manifesting extreme indifference to the life of an individual, knowingly engages in any conduct and thereby recklessly causes the death of or serious bodily injury to any person . . ."); 18 U.S.C. § 922 (1991) ("Unlawful acts. . . (2)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm at a place that the person knows is a school zone."); 18 U.S.C. § 1365(a)(1991) "Tampering with consumer products. (a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce . . ."); 18 U.S.C. § 1861 (1991) ("Deception of prospective purchasers. Whoever . . . in reckless disregard of the truth, falsely represents to any such person that any tract of land shown to him is public land of the United States subject to sale, settlement, or entry, or that it is of a particular surveyed description, thereby deceiving the person to whom such representation is made . . ."); 18 U.S.C. § 1864(a)(1991) ("Hazardous or injurious devices on Federal lands. (a) Whoever— . . . (3) with reckless disregard to the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, uses a hazardous or injurious device on Federal land, . . . shall be punished . . .").

85. The following judicial decisions have held that recklessness is sufficient to satisfy a mens rea requirement other than recklessness in particular provisions of the Federal Criminal Code: *United States v. Thomas*, 610 F.2d 1166 (3rd Cir. 1979) (holding that reckless disregard sufficient to satisfy intent element under 18 U.S.C. § 656 (1991) ("Theft, embezzlement or misapplication by bank officer or employee")); *United States v. Felice*, 481 F. Supp. 79 (N.D. Ohio 1978) (holding that reckless disregard is sufficient to find intent to defraud under 18 U.S.C. § 664) ("Theft or embezzlement from employee benefit plan"); *Zimmerman v. United States*, 1 F.2d 712, (6th Cir. 1924) (holding that recklessness may justify inference of intent under 18 U.S.C. § 755 (1991) ("Permitting an officer to escape")); *United States v. Evans*, 559 F.2d 244 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (holding that proof of specific intent may be made by showing of reckless disregard under 18 U.S.C. § 1001 (1991) ("Statements or entries generally")); *United States v. Bernstein*, 533 F.2d 775 (2nd Cir. 1976) (holding that recklessness satisfies knowledge element of 18 U.S.C. § 1010 (1991) ("Department of Housing

The problem of truncation by a broad interpretation of willfulness may help explain the absence of references to reckless states of mind in Title 18. It cannot, however, assist in explaining the conspicuous absence of references to negligent mental states. There are four explicit statutory provisions requiring proof of a negligent mental state in the entire Federal Criminal Code.⁸⁶ Only two statutes allow for a

and Urban Development and Federal Housing Administration Transactions”)); *United States v. Tolchow*, 532 F.2d 853 (2nd Cir. 1976)(holding that reckless disregard may satisfy the knowledge requirement of 18 U.S.C. § 1027 (1991)(“False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974”)); *United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966)(holding that gross negligence may be established by proof of reckless disregard for human life under 18 U.S.C. § 1112 (1991)(“Man-slaughter”)); *United States v. Farris*, 614 F.2d 634 (9th Cir. 1979)(holding that reckless disregard satisfies requirements of 18 U.S.C. § 1341 (1991)(“Frauds and Swindles”)); *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986)(holding that reckless indifference to truth or falsity is sufficient under 18 U.S.C. § 1341 (1991)(“Frauds and Swindles”)); *United States v. Armstrong*, 654 F.2d 1328, (9th Cir. 1981)(holding that reckless disregard of truth about fraudulent nature of activities satisfies 18 U.S.C. § 1343 (1991)(“Fraud by wire, radio, or television”)); *United States v. Gullett*, 713 F.2d 1203 (6th Cir. 1983)(holding that reckless disregard for truth is sufficient under 18 U.S.C. § 2314 (1991)(“Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting”)); *United States v. Jacobs*, 475 F.2d 270 (2nd Cir. 1973)(holding that reckless disregard of whether bills were stolen may satisfy 18 U.S.C. § 2315 (1991)(“Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps”)); *Farroni v. Farroni*, 862 F.2d 109 (6th Cir. 1988)(holding that willful action may be proved by evidence of reckless disregard of known legal duty under 18 U.S.C. § 2511 (1991)(“Interception and disclosure of wire, oral, or electronic communications prohibited”)).

86. The following statutes contain explicit reference to negligent states of mind: 18 U.S.C. § 492 (1991) (“Forfeiture of counterfeit paraphernalia. Whenever . . . any person interested in any article, device, or other thing, or material or apparatus seized under this section files with the Secretary of the Treasury, before the disposition thereof, a petition for the remission or mitigation of such forfeiture, the Secretary of the Treasury, if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of such forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just.”); 18 U.S.C. § 755 (1991)(“Officer permitting escape. Whoever . . . negligently suffers [a prisoner in his custody] to escape, . . . shall be fined not more than \$ 500 or imprisoned not more than one year, or both.”); 18 U.S.C. § 793(f)(1991)(“Gathering, transmitting, or losing defense information. . . . Whoever . . . having . . . control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, . . . [s]hall be fined not more than \$ 10,000 or imprisoned not more than ten years, or both.”); 18 U.S.C. § 1115 (1991)(“Misconduct or neglect of ship officers. Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is

substitution of negligence with other mens rea requirements.⁸⁷

It is certainly true that the inclusion of negligence in penal statutes has been hotly debated for many years.⁸⁸ However, the relative absence of recklessness in combination with the near complete absence of negligence results in a body of federal criminal law that is insufficiently inclusive. The full range of culpability provisions found in state law, for example, is missing. And the problem of inclusivity and truncated mens rea requirements is made even more serious by the haphazard collection of mens rea terms.⁸⁹

2. Inadequate Statutory Law

The most promising solution to this ad hoc, intuitive approach to culpability, according to the Brown Commission is to adopt the MPC's

destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined . . . or imprisoned . . .").

87. The following decisions allow negligence to satisfy other mens rea requirements found in particular provisions of the Federal Criminal Code: *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966) (holding that proof of negligence is sufficient to satisfy 18 U.S.C. § 650 (1991) ("Depositories failing to safeguard deposits")); *United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966) (holding that gross negligence supports a conviction for involuntary manslaughter under 18 U.S.C. § 1112 (1991) ("Manslaughter")).

88. See James B. Brady, *Punishment for Negligence: A Reply to Professor Hall*, 22 BUFF. L. REV. 107 (1972); Robert P. Fine & Gary M. Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 BUFF. L. REV. 749 (1967); Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

89. The Brown Commission was extremely critical of the culpability requirements in the Federal Criminal Code.

Unsurprisingly, the courts have been unable to find substantive correlates for all these varied descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.

NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, *supra* note 28, at 120.

Professor Rothstein has written that:

There is no question that the federal criminal law badly needs codification. It is currently scattered in conflicting measures spread through most of the fifty titles and a dozen or so of the volumes of the U.S. Code, and an estimated 50,000 viable decisions. Often quite a few of the provisions relate to the same conduct. The statutes were enacted piecemeal over two hundred years, with little regard for one another or consistency between them, and with little modernization to meet changing conditions. They were separate and unrelated responses to the particular problems and moral notions of the day and its Congress.

Rothstein, *supra* note 56, at 157.

hierarchical state of mind organization, along with provisions that would require element analysis of culpable mental states and corresponding offense elements. Thus, four mental states would be analyzed in relation to the elements of conduct, existing circumstances, and result.⁹⁰ This solution would yield significant rewards for courts interpreting the intent of Congress in passing certain legislation. There is no doubt that explicit liability rules and clearly defined culpable mental states would go a long way in providing certainty, predictability, and structure to such reasoning.

The absence of rules guiding liability and culpability is both unfortunate and conspicuous. Drafters of the proposed Code worked for well over a decade to provide liability rules and culpability reformulations.⁹¹ Certainly, the analogous MPC reformulation produced clarity and promoted fairness. Thus, it is fair to ask: What is it that makes Congress willing to settle for less in the federal criminal law? Or, more specifically, why is the focus in the area of federal law reform on the creation of new offenses and the standardization of sanctions? Why is there more concern with culpability in relation to sentence severity, than culpability in relation to liability?

Answers to the first two questions seem straightforward. Congress passed comprehensive legislation affecting the federal criminal law in 1984, 1986, 1988, and 1990. Therefore, it appears as if there has been a significant evolution in the substance of federal criminal law. Proponents of this view argue that now is simply not the time to engage in comprehensive criminal law reform. Such an effort, it is argued, would entail significant costs in terms of a major "retooling of the system." Jury instructions and indictment forms would have to be changed. Practitioners would have to learn the new law. A new body of law

90. The Brown Commission alleged that:

The Federal Criminal Code, as reported, discards the confused and inconsistent *ad hoc* approach to culpability that now characterizes Federal criminal law. Instead it reduces the number of terms used to describe the requisite mental state to four: *intentional, knowing, reckless, or negligent*. All other statutory formulations within title 18, United States Code, are eliminated. The four degrees of culpability that are retained express the significant distinctions in defining offenses. . . . By classifying the offense elements into three types, *viz.*, the nature of conduct, the circumstances surrounding the conduct and the results of the conduct, and by considering the state of mind required in relation to each component offense element, the Code avoids confusing proof required with respect to each element. Although many offenses prescribe the same state of mind for each type of element, some do not. Clear analysis therefore requires that the question of the kind of culpability required to establish the commission of an offense be considered separately with respect to each of the elements of the offense.

SENATE COMM. ON THE JUDICIARY, *supra* note 55, at 60-61.

91. See Rothstein, *supra* note 56.

would have to evolve in order to interpret the statutory changes.⁹² Perhaps a more satisfactory answer is that the legislative revision that has taken place, in such areas as bail reform, violent crime, drug offenses, and sentencing reform, reflects a particular political agenda—one that would not be served by a focus on the notion of culpability.⁹³

The answer to the last question appears a bit less transparent. A glimpse of the truth, though, may be gleaned from two caveats noted in Justice Rehnquist's opinion in *United States v. Bailey*.⁹⁴ After extolling the virtues of the MPC's approach to culpability and the move toward element analysis, he cautioned:

First . . . courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates. . . . Second, while the suggested element-by-element analysis is a useful tool for making sense of an otherwise opaque con-

92. See *supra* note 56.

93. See, e.g., Robert Drinan et al., *The Federal Criminal Code: The Houses are Divided*, 18 AM. CRIM. L. REV. 509, 531 (1981) (arguing that the hurdles inhibiting the passage of comprehensive reform of federal criminal laws are neither technical nor philosophical—they are political in nature); Barbara A. Stolz, *Interest Groups and Criminal Law: The Case of Federal Criminal Code Revision*, 30 CRIME & DELINQ. 91 (1984); see also Feinberg, *supra* note 63, at 124. ("In particular, there has been surprisingly little discussion of the proposed definitions of states of mind and the rules governing proof of culpability. This is probably due to the technical complexities of the subject and the relatively non-controversial nature of the particular provisions. There is an obvious reluctance to debate culpability concepts in the new code when more visible and exciting issues, such as sentencing reform, new rules governing corporate liability, and the appropriate scope of federal inchoate offenses, continue to occupy public attention." (citation omitted)). It is somewhat ironic that the Sentencing Reform Act of 1984, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976, 1987-2040 (codified as amended in scattered sections of 26 U.S.C.), which gave rise to the Sentencing Commission, has its roots in the effort to reform and recodify the federal criminal law.

It is also revealing to examine the evolution of proposed federal criminal laws following the Criminal Code Reform Acts of 1979 and 1981. Such an examination uncovers the dual focus on crime control and sentencing to the exclusion of any effort at recodification. See, e.g., Sentencing Reform Act of 1983, Pub. L. No. 99-646, §§ 4, 5, 6, 27, 29(a), 100 Stat. 3592, 3597, 3600 (codified in scattered sections of 28 U.S.C.); Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; Comprehensive Crime Control Act of 1984, Pub. L. Nos. 98-473, -596, 98 Stat. 1976, 3140; Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592, Pub. L. No. 100-185, 101 Stat. 1279, Pub. L. No. 100-690, 102 Stat. 4395; Criminal Justice Act Revision of 1986, Pub. L. No. 99-651, 100 Stat. 3642; Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279; The Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, 102 Stat. 4395; Pollution Prosecution Act of 1990, Pub. L. No. 101-593, 104 Stat. 2962; Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, 104 Stat. 4859; Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, Pub. L. No. 102-190, 105 Stat. 1488.

94. *United States v. Bailey*, 444 U.S. 394 (1980).

cept, it is not the only principle to be considered. The administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors. This system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions, either traditional or novel, that Congress neither stated nor implied when it made the conduct criminal.⁹⁵

Thus, the simple answer is that distinctions in culpable mental states must give way to revelations of legislative intent. Such a view trivializes the problem with interpreting Congressional intent.⁹⁶ Moreover, because there is so little evidence of legislative intent, it suggests that the idea of culpability in relation to liability is not too important. Of course, the weakness of this view is made clear by the connectedness of culpability assessments. As has been noted, culpability assessments at both the pre- and post-conviction stage are often inextricably intertwined.⁹⁷ A clear and concise set of liability rules and culpability standards would be of little value without a sentencing scheme that considers the blameworthiness of the defendant. Likewise, a well-crafted set of sentencing guidelines that considers blameworthiness is far less valuable where the assessment of culpability in relation to liability is obscure.⁹⁸

The absence of needed reforms is also conspicuous because the Sentencing Commission's last-minute effort to consider an assessment of culpability produced greater clarity for federal judges assessing blameworthiness after conviction, than the Federal Criminal Code does prior to conviction.⁹⁹ As shall be discussed later, the Sentencing Commission was more explicit than Congress has been in identifying and defining culpable mental states for the purpose of assessing blameworthiness, even in the absence of statutory law that requires the same for the purpose of conviction.

The risks associated with a poorly articulated federal statutory law

95. *Id.* at 406-07.

96. *See, e.g.,* ATIYAH & SUMMERS, *supra* note 62, at 110. ("As is well known, a wide range of sources may be consulted by American courts in their search for legislative intent. These include Congressional (or state legislative) debates; reports of committees; statements of those sponsoring the legislation; comments and view of legislators, officials, and other parties at legislative hearings; and other similar material. Much of this material is not only unhelpful in ascertaining 'legislative intention' but deliberately distorting—such as speeches inserted in the *Congressional Record*, but never actually delivered, or statements made with the deliberate aim of influencing judicial interpretation, even though they did not represent the general view in the Congress." (citations omitted)).

97. *See supra* notes 50-53 and accompanying text.

98. Herbert L. Packer states the argument in terms of fairness: "And whatever fairness may be thought to mean on the procedural side, its simplest (if most neglected) meaning is that no one should be subjected to punishment without having an opportunity to litigate the issue of his culpability." HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 69 (1968).

99. *See infra* note 137.

are twofold. First, the confusion that surrounds culpability assessment—within and across statutes—may make liability judgments suspect. Lack of definitions and guidance concerning construction of seemingly redundant terms remains an ongoing and significant problem.¹⁰⁰ This problem is compounded by the absence of a hierarchy of culpable mental states and distinct material elements in offense descriptions which allow for something more than a mere offense analysis. It is further complicated by the complex nature of the corporate form. The well-accepted legal fiction of imputing the culpability of an agent to an entity is stretched to its logical limit where there is no overriding consensus as to what that culpability consists of. Commentators have argued that state criminal law, before the MPC, was often confused and arbitrary.¹⁰¹ Current federal law is certainly no better.

A second concern relates to the connection between pre- and post-conviction assessments of culpability. As discussed above, ascribing culpability is a central feature of finding liability. Even though it is narrowly focused, the ascription does provide a threshold measure of blameworthiness that reflects on the deservedness of a sanction. Indeed, it is this connection between pre-conviction ascription of culpability and post-conviction decisionmaking with regard to proportional sanctions that makes a remedy for inadequate statutory law all the more important. Obscure culpability requirements compromise the more general assessment of blameworthiness that takes place after conviction in accordance with sentencing guidelines.¹⁰²

IV. POST-CONVICTION CULPABILITY

Principles of commensurate desert acknowledge the critical role of culpability and harm in sentencing. Punishment, it is alleged, ascribes or imparts blame. Thus, the extent of a sanction carries with it a message concerning the degree of blameworthiness and seriousness of an offense.¹⁰³ Judgments of seriousness may be based upon the na-

100. It may be argued that this is more of a theoretical than practical problem. In other words, federal prosecutors and judges concern themselves, more generally, with finding "scienter" or a "general intent" even when an element of a statute specifies a particular culpable mental state. Accordingly, an actor's intention may be inferred from the very act of fraud, for example, without the necessity of providing any separate proof of a mental state. Such a view is unsatisfactory for a number of reasons. First, transforming specific mens rea requirements into a general requirement for finding scienter alters the meaning of the statute. Second, such a practice may result in a lack of notice concerning the ingredients of an offense.

101. See Robinson & Grall, *supra* note 44.

102. See *infra* notes 135-37 and accompanying text.

103. Cardinal proportionality requires that "the overall level of the penalty scale, both maximum punishment and actual sentence ranges, should not be disproportionate to the magnitude of the offending behaviour . . . [T]his concept of proportion-

ture of the injury (harm), the intensity of the harm, the proximity of the harm, and the degree of culpability.¹⁰⁴

Culpability, harm, and seriousness form the basis of what has been called a "normative lens" through which judges view criminal cases.¹⁰⁵ Interestingly, such a lens permits judgments that transcend the strictures of the written law. Thus, judges often look beyond statutes and codes in order to conceptualize harm and culpability. In an examination of the sentencing practices of federal district court judges, it was observed that "the conventional elements of criminal intent that are essential to establishing grounds for conviction in a criminal case are often the starting point for a judge's consideration of blameworthiness. But this consideration usually reaches beyond the starting point to include a broader moral sphere."¹⁰⁶ What is encompassed by the broad moral sphere of culpability? In federal practice, generally, the early history of a defendant, details regarding a defendant's role in an offense, a defendant's motive, and, of course, the defendant's mental state are all important considerations bearing on a post-conviction assessment of culpability.¹⁰⁷

This broad moral sphere is grounded not only in judicial practice but is also explicitly found in law. In capital sentencing, for example, the United States Supreme Court recently held that a jury may hear victim impact evidence.¹⁰⁸ Victim impact statements reflect an offender's culpability. To deprive a jury of such evidence would unreasonably restrict relevant information bearing on culpability. In the past, the Supreme Court has given judges close to free reign in conducting broad and nearly unlimited inquiries on blameworthiness. The constitutional limit is with evidence that may unduly prejudice a defendant.¹⁰⁹ Given these boundaries, it seems only logical that the Sentencing Commission would place significant weight on an organization's culpability in crafting appropriate guidelines. The wisdom of this intuition is considered below.

V. GUIDELINES AND CULPABILITY

A. Proposed Guidelines

The United States Sentencing Commission was established by the

ality involves preserving a correspondence between the relative seriousness of the crime and relative severity of the sentence." ASHWORTH, *supra* note 51, at 15.

104. *Id.* at 37.

105. WEISBURD ET AL., *supra* note 53.

106. STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 20 (1988).

107. *Id.* at 93-123.

108. Payne v. Tennessee, 111 S. Ct. 2597 (1991).

109. See, e.g., Williams v. New York, 337 U.S. 241 (1949); United States v. Tucker, 404 U.S. 443 (1972).

Sentencing Reform Act of 1984 in order to create sentencing policies and practices for the federal courts.¹¹⁰ The Sentencing Commission took its mandate from Congress in 1985 to create guidelines for organizational sanctions. Three proposals¹¹¹ predated the issuance of final guidelines.¹¹² In the first two proposals, little concern was expressed for either pre- or post-conviction assessments of culpability.

Though the Sentencing Commission's mandate called for an untenable integration of "just punishment, deterrence, public protection and rehabilitation," the underlying theoretical position taken in the first two proposals reflected an economic model of deterrence best represented by the writings of Gary Becker.¹¹³ The central tenet of this model is that punishment represents disincentives to engage in crime, or, viewed differently, incentives to engage in compliance, by altering the means by which offenders calculate the gains of crime and the costs of punishment. Simply put, because corporations are affected largely by monetary concerns, sanctions such as fines, restitution and forfeitures are most appropriate, and the policy undergirding their distribution is determined by reference to the monetary loss caused by the offense, the likelihood of apprehension, and the enforcement costs that result in investigation, prosecution and punishment.¹¹⁴

This model has been subject to numerous criticisms that shall not be explored here, *e.g.*, difficulty in determining harm, questions regarding the calculations performed by the multiplier, and the role of offender characteristics.¹¹⁵ What is open to discussion here is the tenuous relationship of this early approach of the Sentencing Commission to the substantive criminal law, principally as it concerns both pre- and post-conviction assessments of culpability.

110. 18 U.S.C. §§ 3551-80 (1991); 28 U.S.C. §§ 991-98 (1991).

111. UNITED STATES SENTENCING COMMISSION, SENTENCING OF ORGANIZATIONS (Discussion Draft 1988); UNITED STATES SENTENCING COMMISSION, SENTENCING OF ORGANIZATIONS (Preliminary Draft 1989); UNITED STATES SENTENCING COMMISSION, SENTENCING OF ORGANIZATIONS (Proposed Guidelines 1990).

112. For a recent discussion of the sequence and spirit of these proposals, see Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315 (1991).

113. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); M.K. Block & J.M. Heineke, *A Labor Theoretic Analysis of the Criminal Choice*, 65 AM. ECON. REV. 314 (1975); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); see also Parker, *supra* note 8. For a summary of the philosophical bases for imposing sanctions, as specified by Congress, see 28 U.S.C. § 991(b)(1)(A)(1991).

114. Block, *supra* note 4; see also Parker, *supra* note 8, at 517 ("My analysis concludes that monetary sanctions are by far the most desirable form of sentence for organizational offenders in general, because a monetary penalty both minimizes the societal losses resulting from the sanctioning process and affects most directly the monetary incentives that drive organizational behavior.").

115. See UNITED STATES SENTENCING COMMISSION, *supra* note 8, at 9-15.

Essentially, the early work of the Sentencing Commission ignored the relationship between sentencing aims and the larger aims of the substantive criminal law. To the extent that such aims were considered, they were reduced to the single, general claim that the fundamental aim of the criminal law is to prevent harm. Such a view is correct, of course, from a minimalist perspective, yet the pursuit of that general aim is clearly imbedded in important collateral notions as well, which are represented most clearly by culpability requirements. The criminal sanction is a stigmatizing instrument, functioning as a condemnatory response to an actor's culpability and the harm done. The convention that society has chosen to reflect that condemnation takes the form of adverse economic consequences or deprivations of liberty. Out of fairness, the criminal law affords a host of procedural safeguards to those not responsible for, and thus not worthy of, blame. Of course, this view of the criminal law is a moral interpretation, and those taking this position point out that it is the moral connotation given to blameworthiness that distinguishes criminal liability and punishment from liability under administrative regulations and corresponding civil sanctions.¹¹⁶

The Sentencing Commission initially failed to address the fact that culpability is essential for purposes of crime control.¹¹⁷ It is unreasonable to expect to control crime when criminal sanctions are not commensurate with culpability. Punishment will lose much of its deterrent value if the entity receiving or threatened with punishment is incapable of controlling present or future conduct.¹¹⁸

In considering organizational sanctions, little attention was paid by the Sentencing Commission to the moral connotations represented in the intent requirements found in the criminal law. That blame, in general, can be imposed only when the actor is "responsible" for its actions, and that the extent of culpability must affect the degree to which an actor may be held blameworthy went largely unaddressed in the first two proposals. It is worthwhile examining each one of these concerns in more detail.

The stated objective of punishment under the economic approach is to provide corporations with realistic and compelling disincentives to engage in crime.¹¹⁹ By confronting the corporation with an effec-

116. See *supra* note 43.

117. ASHWORTH, *supra* note 51, at 12-16.

118. See HART, *supra* note 37, at 133-34 ("[M]any writers, including Professor Glanville Williams, have shared an assumption that to be a deterrent the threat of punishment must be capable of entering into the deliberations of the criminal as a guide at the moment when he contemplates his crime.").

119. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 397 (3d ed. 1986) ("An important question about the social responsibility of corporations is whether the corporation should always obey the law or just do so when the expected punishment costs outweigh the expected benefits of violation. If the expected punish-

tive response to non-compliance, the entity will take the desired steps to ensure that its employees comply with the law. At least three alternative paths are available to achieve this aim. The state may impose monetary sanctions directly on the corporation, it may adopt a series of incapacitative sanctions that allow for intervention in the management and operations of the corporation, or it may encourage self-enforcement through the creation and maintenance of compliance programs, ethics training programs, and other more informal means of self-policing.¹²⁰ The Sentencing Commission's early work followed the first path. The rationale for monetary sanctions may be derived from the economic model of deterrence. First, since corporations operate largely to produce profit, sanctions that are not directly relevant to that goal are incidental. For costs to be weighed against benefits, the unit of analysis for both must be equal. Such a position devalues any alternative goal that may be operating; e.g., power, prestige, corporate social responsibility; or maintains that such alternative goals are means to the larger goal of profit. The converse of this latter point is that any non-monetary sanctions, such as community service and probation, found in subsequent Sentencing Commission proposals, work only by their impact in economic terms.¹²¹ Adverse publicity sanctions, for example, contain meaning only by virtue of the reduced profitability rising from the abandonment by customers and suppliers.¹²²

Second, the economic model of deterrence generally employs some determination of illegal gain in order to produce either incentives or disincentives. Yet, the gains derived through corporate crime are not necessarily equivalent to the harms typically produced. Corporate crimes may result in little distinguishable gain and significant social costs. Reliance on gain alone, therefore, cannot be reconciled with the criminal law doctrine that the punishment imposed be proportionate to the harm caused or risked by the offense.¹²³ To the extent that the Sentencing Commission considered this point, the model undergirding

ment costs are set at the efficient level, the question answers itself; the corporation will violate the law only when it is efficient to do so."').

120. See John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

121. See, e.g., Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. CRIM. L. REV. 1 (1988); Christopher Kennedy, Comment, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 CAL. L. REV. 443 (1985); Fred L. Rush, *Corporate Probation: Invasive Techniques for Restructuring Institutional Behavior*, 21 SUFFOLK U. L. REV. 33 (1986).

122. See, e.g., JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989); BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* (1983); Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107 (1971).

123. Cf. Block, *supra* note 4.

the first set of guidelines substitutes social loss for corporate gain. Given this proposition, it may be argued that monetary sanctions are the only penalties that may reflect offense harm.

The ultimate impact of non-monetary sanctions cannot be controlled in a fashion that does not risk over-deterrence. Because it is difficult to assess how much intervention is necessary to force the corporation to discontinue its illegal activity, the likely result, so the logic goes, is that the intervention may exceed what is actually required within the organizational structure. Finally, since punishment entails costs to the government, monetary sanctions appear to present fewer burdens in administration than do non-monetary sanctions, which the courts are ill-equipped to provide.

What is striking about this early approach is the lack of any meaningful connection to the concept of corporate culpability. That the Sentencing Commission initially adopted a "black box" approach to corporate control through sanctions is not overstated. The first proposal noted the relevance of this concern by commenting that the goals of the corporation may not necessarily be the same as the goals of individuals acting at various levels within the corporate bureaucracy. Yet, the response offered suggested an unwillingness to delve into the mire of corporate accountability.

The Sentencing Commission's early failure to give credence to the moral connotations implied by the culpability requirements of substantive criminal law is best demonstrated by their unwillingness to adequately address the role that culpability plays in determining the seriousness of corporate offenses. Clearly, as has been noted,¹²⁴ the severity of punishment is a function of the seriousness of the offense. Yet, the Sentencing Commission was single-minded in its definition of offense seriousness, initially limiting discussion to social loss as it is defined through property loss, *e.g.*, placing the focus on the estimated monetary value of human life as determined in safety regulations. Subsequently, the Commission appeared to enlarge its conception of loss to include: (a) losses to direct victims, (b) enforcement costs, and (c) social losses, *e.g.*, loss of market efficiency.¹²⁵ Still, the idea of culpability was secondary and almost incidental. Loss was said to include the notion of culpability.¹²⁶

B. Final Proposals

Fortunately, the third set of proposed guidelines attempted to capture the moral sphere of culpability. In these guidelines, the Sentencing Commission required judges to consider four mitigating factors

124. See *supra* notes 103-09 and accompanying text.

125. Parker, *supra* note 8, at 577.

126. *Id.* at 565.

that reflected culpability. Evidence of such factors, in the form of a mitigation score, would have reduced the multiplier.¹²⁷ Courts would consider the following questions: (a) Did the offense occur without the knowledge of any person who exercised control over the organization? (b) Did the offense occur despite a meaningful compliance program? (c) Did the organization voluntarily and promptly report the offense? and (d) After discovering the offense, did the organization take reasonable steps to remedy the harm, discipline those responsible, and prevent a reoccurrence? In addition to these mitigating circumstances, courts would be required to consider, among other things, the "nature and circumstances of the offense and history and characteristics of the defendants."¹²⁸

This "carrot and stick" proposal was widely criticized. Part of the criticism was based on concerns over the mitigation score. Would large publicly-held corporations fare better than small privately-held firms? Would reduced penalties for compliance programs or monitoring lead to cosmetic programs and lax regulatory oversight? Significant criticism resulted in a new and final proposal.¹²⁹

The final proposal took some additional steps. The Sentencing Commission agreed that fines should reflect the seriousness of an offense, as well as the culpability of the offending corporation. The former would be determined by the pre-tax gain to the corporation, amount of loss caused by the corporation, and a pre-defined ranking of offense seriousness. The latter would be approximated by a culpability score calculated on the basis of an organization's: (a) involvement in or tolerance of criminal activity (scaled according to the size of the organization and highest level of corporate knowledge), (b) prior history, (c) record of violations of orders, (d) attempts to obstruct justice, (e) maintenance of an effective compliance program, and (f) willingness to self-report, cooperate, and accept responsibility.¹³⁰

The Sentencing Commission decided that organizations are more culpable when a "high-level" employee "participated in, condoned, or was wilfully ignorant of the offense."¹³¹ Here "condone" means knowledge of and a failure to prevent or terminate an offense. Willful ignorance approximates the mental state of recklessness insofar as it concerns a conscious disregard of a substantial and unjustifiable risk.

127. UNITED STATES SENTENCING COMMISSION, SENTENCING OF ORGANIZATIONS § 8C2.1(d)(Tent. Draft 1990).

128. *Id.* § 8C2.2.

129. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL 3 (1991). For a critical review of the 1990 Draft, see John C. Coffee, "Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants, 3 FED. SENTENCING REP. 126 (1990).

130. 18 U.S.C. app. § 8C2.5 (b)-(g)(1992).

131. 18 U.S.C. app. § 8C2.5(b)(1)(A)(i)(1992).

Alternatively, organizations are more culpable where "tolerance of the offense by substantial authority personnel was pervasive throughout the organization."¹³² In this provision, tolerance appears as a reasonable proxy for negligence, *i.e.*, a high managerial agent should have known of a substantial and unjustifiable risk.

Thus, in these two provisions, the Commission has astutely and creatively provided judges with a culpability assessment that hierarchically grades blameworthiness by proxies for knowledge, recklessness, and negligence.¹³³ The Commission also provided five appropriate post-conviction culpability measures, ranging from an assessment of prior history, which considers the number of previous adjudications, to the maintenance of an effective compliance program. Thus, the guidelines cover an organization's action prior to the offense, during the offense, and after the offense. This is notable as it is a rare but certainly welcomed acknowledgement of differences in individual versus organizational culpability.¹³⁴

C. Guidelines and Federal Statutory Law

In evaluating the success of the sentencing guidelines it is critical to consider their relation to federal statutory law. Once again, it is worthwhile considering the assessment of culpability, both before and after conviction: To what extent are these new guidelines limited by extant law? To what extent could the guidelines address or remedy the weakness in federal statutory law?

The significant assessment of culpability in the new guidelines provided a remedy for the post-conviction culpability assessment. As of their codification in 1991, federal district court judges are able to assess culpability in relation to the deservedness of sanctions by a threshold measure of hierarchical mental states *and* by five more broad indices of blameworthiness, all of which acknowledge the complexity of organizational life and serve as proxies for corporate culpability. This is a significant advance over the state of the law prior to the passage of the guidelines. Notably, the sentencing guidelines for individuals, passed in 1987, provided similar benefit. For a series of offenses where no grade of culpability existed, a template of culpability was imposed.¹³⁵ For example, involuntary manslaughter, which under 18 U.S.C. § 1112 requires a mental state of "without due cau-

132. 18 U.S.C. app. § 8C2.5 (b)(1)(A)(ii)(1992).

133. UNITED STATES SENTENCING COMMISSION, *supra* note 129, at 71.

134. Cf. Leonard Orland, *Corporate Punishment by the U.S. Sentencing Commission*, 4 FED. SENTENCING REP. 50 (1991) (Orland criticizes the Sentencing Commission's conception of corporate culpability, finding it to be based upon assumptions that run counter to organizational theory).

135. See, e.g., UNITED STATES SENTENCING COMMISSION, *supra* note 13, at §§ 2A1, 2A6.1, 2F.1(4), 2H3.1, 2K1.4(b)(1), 251.1(b)(1).

tion," has been transformed in the sentencing guidelines to ten points if the conduct was criminally "negligent," or fourteen points if the conduct was "reckless."¹³⁶ The Sentencing Commission has provided needed clarification for judges.

The culpability assessment that the guidelines did not address, and could not address, was culpability in relation to liability. Providing clarification concerning mens rea requirements at the time of sentencing does nothing to address the limitations of federal statutory law described in section II. As has been argued, the reliance on willfulness and obscure combinations of mens rea terms, the absence of hierarchical mental states, and the failure to consider material elements of offenses, make the finding of corporate criminal liability vulnerable to significant discretion and disparity in federal statutory law.

Additionally, such vulnerability calls into question the seriousness of proposals that search for genuine corporate intent. Commentators who suggest the importance of determining corporate culpability, rather than individual mens rea which is imputed to an entity, may have underestimated how far the federal statutory law has strayed into obscurity. In Section V, several proposals for genuine corporate culpability are contrasted with culpability provisions found in federal statutory law.

VI. GENUINE CORPORATE CULPABILITY

The evolution of corporate criminal law scholarship demonstrates a trend toward thinking about the behavior of organizations in the context of organizational theory.¹³⁷ Commentators have argued that it is possible to identify culpability from specific corporate action, as opposed to individual action.¹³⁸ The MPC and federal statutory law rely significantly upon a model of "managerial mens rea," i.e., where

136. *Id.* at § 2A1.4.

137. See, e.g., Barry B. Baysinger, *Organizational Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 341 (1991); Michael B. Metzger, *Organizations and the Law*, 25 AM. BUS. L. REV. 407 (1987); Laura S. Schrager & James F. Short, *Toward a Sociology of Organizational Crime*, 25 SOC. PROBS. 407 (1978); Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377 (1982).

138. For a discussion of the different forms of corporate culpability, see Brent Fisse, *Reconstruction Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1186-1192 (1983). In this article, Fisse finds the managerial (mental state of manager is imputed to entity), composite (mens rea of employees grouped and then imputed), and strategic (mens rea found in organizational policy) forms of mens rea to be inadequate. Instead, he proposes reactive corporate fault, where the court would assess culpability on the basis of a corporation's attempt to employ preventive or corrective measures upon commission of an offense. *Id.* at 1195-97.

the mental state of an agent is simply imputed to the entity.¹³⁹

In a recent article, Professor Foerschler argues that the imputation of intent from the employees within the corporation to the corporate entity fails to properly consider the organizational basis for corporate action.¹⁴⁰ Drawing from the work of Dan-Cohen,¹⁴¹ she notes that corporate criminal liability can be effective only when based on an understanding of the decisionmaking process within corporations. Organizational theory informs us that corporate actions are not simply the product of individual choice, but the melding of individual decisions set within an organizational structure and embedded in an organizational culture. The author reviews two models of organizational decisionmaking:¹⁴² the Organizational Process Model, represented by the writings of Simon,¹⁴³ and Bureaucratic Politics Model, found in the work of Cyert and March.¹⁴⁴

Drawing on scattered principles from these models, as well as from a model of analysis based on segregational intent,¹⁴⁵ Foerschler offers a framework for imputing corporate intent based on three criteria: (1) did a corporate practice or policy violate the law,¹⁴⁶ or (2) was it reasonably foreseeable that a corporate practice or policy would result in

139. See *supra* notes 42-99 and accompanying text.

140. Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1288 (1990).

141. See MEIR DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986); see also Richard B. Stewart, *Organizational Jurisprudence*, 101 HARV. L. REV. 371 (1987).

142. Foerschler, *supra* note 140, at 1298-1302.

143. See JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1958).

144. See RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963); see also GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

145. Foerschler, *supra* note 140, at 1303. This analysis is based on the notion of "segregational intent" as discussed by the Supreme Court and set forth in *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). The concept of institutional intent was applied by the Sixth Circuit Court of Appeals in its finding that the school board's policies served no legitimate educational objectives. *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 184-86 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

146. Foerschler, *supra* note 140, at 1307. This first criterion addresses whether the policy itself violates the law. She notes,

To determine what qualifies as a corporate practice or policy, the law should turn to the organization theory models of decisionmaking explained above in Section II(B). Both the BP [Bureaucratic Politics] and OP [Organizational Process] models should be incorporated into the concept of a corporate practice or procedure because, depending on the facts of the case, one theory may be more appropriate than the other. This choice will be left to the prosecutor's discretion.

Id. The court should examine either or both the bargaining process (through memoranda and minutes of meetings in which policies were set) that ultimately produce the corporate practices and policies, (as suggested by the BP model) and/or the standard operating procedures used by the organization or organizational units (as suggested by the OP model) to determine this point. In addition, the

a corporate agent's violation of the law,¹⁴⁷ or (3) did the corporation adopt a corporate agent's violation of the law?¹⁴⁸ Such a framework shifts the focus away from individuals within the corporation and toward the corporate structure as a means of locating corporate intent.

A system of liability that reflects genuine corporate fault is one that places less emphasis on the particular hierarchical position of the actors involved and more attention on the corporation's practices, procedures, and policies. Professor French has crafted perhaps the most articulate argument in support of corporate intentionality and it is this approach that serves as a philosophical basis for Professor Fisse's conceptualization of strategic mens rea, *i.e.*, where culpability is assessed with reference to corporate policy.¹⁴⁹ According to French, the components of the corporation's internal decision structure (CID structure), consisting of the corporation's flowchart and procedural and recognition rules, make up the elements that define corporate intention. Whether or not the action is legal or illegal, the corporation establishes certain goals and objectives for the purpose of carrying forth the action or intention. Following this reasoning, a corporation may be held responsible when the act reflects a corporate decision and not simply the decisions of particular individuals within the corporation.¹⁵⁰

court should also examine the level at which the task or action in question took place.

147. This second test "responds to those instances in which the corporate practice or policy does not explicitly violate the law but is designed so as to instigate violation." *Id.* at 1308-09. Criminal liability attaches only when there is clear evidence of an industry awareness of illegal activity and evidence that the corporation's policies and practices, such as an employee incentive system, could reasonably be foreseen as leading to the commission of the crime. *Id.* at 1309-10.
148. This final test "is intended to attribute intent to a corporation not for instigating violation of a law, but for acquiescing in an agent's violation of the law." *Id.* at 1310. When a corporation knowingly allows and acquiesces to criminal behavior by its employees, it can be said to "adopt a policy" in favor of criminal activity.
149. Fisse, *supra* note 138, at 1190-92; see PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984).
150. FRENCH, *supra* note 143, at 44. French writes,

[w]hen the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.

Id. Larry May proposes an impressive variation of the French proposal with the following model rules for corporate vicarious negligence:

A corporation is vicariously negligent for the harmful acts of one of its members if: a) *causal factor*—the member of the corporation was enabled or facilitated in his or her harmful conduct by the general grant of authority given to him or her by a corporate decision; and b) *fault factor*—appropriate members of the corporation failed to take preventive measures to thwart the potential harm by those who could harm due to the above general part of authority, even though: 1. the appropriate

Most recently, Professor Bucy has proposed an extension of this work by providing a corporate criminal liability standard that requires proof of an ethos or personality that encouraged the commission of the criminal act.¹⁵¹ Under this ethos standard, courts that grapple with cases that raise issues of corporate liability and culpability would consider the organization's: (a) hierarchy, *e.g.*, the board of director's role, (b) goals and practices, *e.g.*, whether goals are lawful, (c) reaction to current and prior offenses, *e.g.*, whether current or past offenses are recklessly tolerated, (d) existing compliance programs, *e.g.*, whether internal audits are performed, and (e) compensation and indemnification schemes, *e.g.* whether unlawful awards are bestowed.¹⁵² Such a consideration would reveal the corporate personality, and the extent to which it encouraged or facilitated criminal conduct. Criminal liability attaches and corporate intention is found in an organization that perpetuates an ethos favorable to law violation.¹⁵³

The search for genuine corporate culpability by French, Fisse, Braithwaite and other scholars reflects an interest in fairly and accurately capturing the intentionality of an entity. Most of the calls for genuine corporate culpability acknowledge the difference between human and entity intentionality, and allow for the unique characteristics of non-human persons by considering the complexity of organizational life.¹⁵⁴ When set against the confusion created by the ill-defined and obscure culpability provisions described earlier, even a cursory consideration of these proposals reveal the woeful inadequacy of existing federal statutory law.

These proposals also point to the inadequacy of those attempts by some federal courts to use existing culpability provisions in order to approximate genuine corporate intention. Beginning in 1951 with *In-*

members could have taken such precautions, and 2. these appropriate members could reasonably have predicted that the harm would occur.

LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 85 (1987)(emphasis added).

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

152. *Id.* at 1129-46.

153. As Bucy notes: "If this examination shows that a corporation whose employees violated the law perpetuated an ethos that encouraged this violation, the corporation is criminally liable for the acts of its agents." *Id.* at 1183.

154. Proposals for genuine corporate culpability find their source in discussions of the moral responsibility of collectives. See, *e.g.*, THOMAS DONALDSON, *CORPORATIONS AND MORALITY* (1982); JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970); David Copp, *Collective Actions and Secondary Actions*, 16 AM. PHIL. Q. 177 (1979); Peter A. French, *Types of Collectivities and Blame*, 56 THE PERSONALIST 160 (1975); Kenneth E. Goodpaster, *The Concept of Corporate Responsibility*, 2 J. OF BUS. ETHICS 1 (1983); Keeley, *supra* note 7; May, *supra* note 7; Jerry Surber, *Individual and Corporate Responsibility: Two Alternative Approaches*, 2 BUS. & PROF. ETHICS J. 67 (1983).

land Freight Lines v. United States,¹⁵⁵ a handful of courts have deciphered an aggregate, collective, or composite mens rea from the knowledge of more than one agent or employee.¹⁵⁶ The rationale for a collective intention is straightforward. Corporate knowledge is compartmentalized—found with employees in various divisions, branches, or subsidiaries. A composite of this knowledge, it is argued, reflects true corporate knowledge. After all, corporations are thought to have notice, either actual or constructive, of the collective knowledge of all employees.¹⁵⁷

As commentators have suggested, however, there is no reason to believe that the imputation of aggregated mental states to an entity achieves genuine corporate culpability.¹⁵⁸ This is so even when the finding of composite mens rea reveals the sum of all employee intentions.¹⁵⁹ Quite simply, courts that use aggregated mental states in or-

155. *Inland Freight Lines v. United States*, 191 F.2d 313 (10th Cir. 1951). In this appeal from a conviction of a common carrier under the Interstate Commerce Act, the court ruled that knowledge of different material facts by different corporate agents could be grouped and then imputed to the corporation. Thus, corporate knowledge and wilfulness may be based upon inferences "drawn from a combination of acts, conduct, and circumstances." *Id.* at 315.

156. Commentators have been less than kind with the idea of a collective or composite mens rea. Fisse, for example, calls it a "mechanical concept of mental state that fails to reflect true corporate fault." Fisse, *supra* note 138, at 1189-90. May concludes that composite mens rea is inadequate to explain purposive group action because it fails to consider group structure. MAY, *supra* note 150, at 66. Finally, Bucy labels the fiction a "desperate, but disingenuous, application of the respondent superior or MPC standards." Bucy, *supra* note 151, at 1157.

157. *United States Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987) ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation."); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D.Va. 1974) ("[T]he corporation is considered to have acquired the collective knowledge of its employees . . ."); *United States v. Sawyer Transport*, 337 F. Supp. 29, 31 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972) (knowledge of employees may be joined and imputed to the corporation). For a recent reference to collective knowledge, see *United States v. LBS Bank-New York*, 757 F. Supp. 496, 501 (E.D. Pa. 1990) (knowledge from different employees can be joined in order to establish corporate knowledge, but specific intent cannot be so aggregated); *Camacho v. Bowling*, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983) ("Other organizations, such as private corporations or partnerships, are held to have constructive notice of the collective knowledge of all the employees and departments within the organization."); and *People v. American Medical Centers*, 324 N.W.2d 782, 793 (Mich. App. 1982) ("The combined knowledge of those employees may be imputed to the corporation to find it liable for fraudulent acts.").

158. See *supra* note 156.

159. Composite mens rea cannot exist unless at least one employee (but more likely two employees) have some material knowledge. Consider Judge Mukasey's decision in *First Equity Corp. v. Standard & Poor's Corp.*, 690 F. Supp. 256 (S.D.N.Y. 1988) which stated:

While it is not disputed that a corporation may be charged with the col-

der to establish corporate knowledge most often stop short of discussing corporate knowledge as independent of employee knowledge.¹⁶⁰ The corporation's knowledge is "constructive" or "acquired," rather than actual or real. Indeed, genuine corporate culpability should not be wholly contingent or dependent upon principles of vicarious agency.¹⁶¹ Finally, it is worth noting the striking resemblance of the new organizational guidelines with models of genuine corporate culpability. Both move away from notions of agency and the imputation of intention, to various measures of entity intentionality, *e.g.*, aspects of reactive corporate fault. Their similarity makes it easy to forget that the former relate culpability to sentence severity, while the latter concern culpability in relation to liability. This fact might suggest that the law of sentencing is only as strong as the substantive law that serves as its foundation.

VII. CONCLUSION

In urging Congress to resume the task of recodifying the federal criminal law, the Federal Courts Study Committee observed that some of the recent criticisms of the sentencing guidelines may reflect the "arbitrary structure of the federal criminal laws, a structure [that] is made transparent by the guidelines."¹⁶² A more reasonable interpretation is that the sentencing guidelines, at least with respect to organizations, highlight the inadequacy of the federal criminal law. The guidelines confirm the feasibility of assessing organizational culpability—but they look strange when compared with current substantive law. On the one hand, the federal law determines culpability in relation to liability by the identification of one or more of over one hundred mental states. On the other hand, the federal law determines culpability in relation to sentence severity through an elaborate examination of an organization's actions prior to the offense, during the offense, and after the offense.

The development of sentencing guidelines for organizations has

lective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual.

Id. at 260; *cf.* Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1248-49 (1978).

160. *Cf.* United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987). Foerschler has argued to the contrary and that the collective knowledge cases, like *Bank of New England*, "virtually eliminate the distinction between individual and institutional intent." Foerschler, *supra* note 134, at 1306.

161. *Cf.* May, *supra* note 7.

162. FEDERAL COURTS STUDY COMM., *supra* note 56, at 23.

confirmed, as well, that order may not be brought to an otherwise disordered body of law through sentencing reform alone. The SRA, with its lofty goals of honesty, uniformity, and proportionality in sentencing, is compromised if issues relating to culpability and liability remain unresolved. After all, what does proportionality mean? What good is uniformity and honesty at time of sentencing when both may be missing in the determination of liability? These questions mirror the Federal Courts Study Committee conclusion, that the "lack of a rational criminal code has also hampered the development of a rational sentencing system."¹⁶³

163. *Id.* at 106.

VIII. APPENDIX

	Title 18 1970	Sections 1992
willful	542	542
willfully	2	2
willfully refuses or neglects		2076
willfully and corruptly	2271	1917
willfully or maliciously	1362	1362
willfully and maliciously	35	35
willfully and maliciously . . . with the intent		1991
willfully and unlawfully	2071	2071
willfully and knowingly		1752
willfully and knowingly . . . [with] knowledge or reason to believe . . .	954	954
willfully . . . with intent to . . .	32	32
corruptly	201	201
corruptly . . . with intent to . . .	201	201
maliciously	549	549
maliciously . . ., with an intent unlawfully to	1659	1659
maliciously . . . knowing		844
willfully, deliberate, malicious, and premeditated	1111	1111
from a premeditated design unlawfully and maliciously to . . .	1111	1111
without malice . . . voluntary [manslaughter]	1112	1112
without malice . . . involuntary . . . without due caution and circumspection [manslaughter]	1112	1112
voluntarily	755	755
unlawfully	1427	1427
unlawfully and willfully	664	664
unlawfully or . . . wantonly		1853
improperly	1703	1703
feloniously	1506	1506
wantonly	1852	1852
wrongfully		654
falsely	185	485
falsely . . . for the purpose of		709
falsely and willfully	911	911
fraudulently	331	331
with the specific intent to destroy	1091	
with intent to defraud	472	471
with intent to defraud . . . or to deceive	1006	1006
fraudulently . . . knowing . . .	331	331

	Title 18 1970	Sections 1992
with intent to defraud, knowingly _____	658	658
with intent to defraud, knowing _____	483	483
with fraudulent intent . . . knowing . . . _____	506	506
with intent to defraud, falsely _____	482	478
fraudulently or knowingly _____	545	545
with intent to deceive or mislead _____	703	703
for the fraudulent purpose of . . . _____	706	706
with intent to defraud . . . for the purpose of _____	707	707
falsely or fraudulently . . . for the purpose of _____	917	917
through the fault or . . . with a fraudulent intent _____	332	332
fraudulently or wrongfully _____	1017	1017
for any purpose _____	371	371
for any purpose not prescribed by law _____	653	653
with any intent . . . that . . . _____	964	964
with unlawful or fraudulent intent _____	2314	2314
with intent wrongfully _____		1851
for the purpose _____		47
with the purpose of fraudulently . . . _____	500	500
with intent to . . . _____	114	513
with intent that . . . _____	794	373
with the intent that . . . _____	473	473
intentionally or maliciously _____	1367	
with the intention of . . . _____	663	663
with intent unlawfully _____		1426
intending to . . . _____	1343	1343
intentionally _____		247
for the purpose of . . . _____	288	288
with intent or reason to believe that . . . _____	794	794
knows, or reasonable grounds to believe or suspect _____		568
knowingly _____	43	46
knowing or intentional _____		403
knowingly and willfully _____	288	288
knowingly or willfully _____	550	550
knowingly and unlawfully _____	1857	1424
knowingly and fraudulently _____	152	152
knowingly and falsely _____	289	289
knowingly and with intent to defraud _____	479	479
knowingly and willfully, with intent to defraud _____	545	545
knowingly and with fraudulent intent _____	2318	
knowingly, willfully and corruptly _____	1158	1158

	Title 18 1970	Sections 1992
knowingly and, with a design to . . . _____	1657	1657
knowingly, willfully, or wantonly _____		2152
knowingly . . . , for the purpose of . . . _____	877	713
knowingly . . . , with the intent _____		207
knowing . . . _____	287	287
knowing or having reason to know or intending _____		231
with knowledge that . . . _____	224	224
having knowledge of . . . _____	4	4
knowing that . . . _____	3	3
with knowledge or reason to believe that . . . _____	491	491
without reasonable cause to believe . . . _____	542	542
neglect _____	1115	1115
with the knowledge or intent _____		1588
negligently _____		755
negligence, or inattention to . . . duties _____	1115	1115
through gross negligence _____	793	793
willfully neglects _____	1421	1421
by willful breach of duty _____	2196	2196
by will breach of duty or by neglect of duty _____	2196	2196
recklessly _____		831
conscious or reckless risk _____		1031
with reckless disregard for the risk _____		1365
in reckless disregard of the truth _____		1861
with reckless disregard for the safety of human life [] _____	35	33
otherwise than in the proper discharge of his official duties _____	205	205
without willful negligence or without any intention . . . to violate the law [forfeiture provision] _____	492	492