

THE PUNITIVE INJUNCTION AS A SANCTION AGAINST CORPORATIONS

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Revised version of a paper presented at the Edwin Sutherland Conference on White-Collar Crime,
University of Indiana, Bloomington, Indiana, May 1990

I Corporate Crime and Sanction Design

Controversy over the nature and incidence of white collar crime has generated extensive discussion of the application of the criminal law to corporate entities. Much of the discussion has concerned the sanctions available against corporate offenders, a topic recently examined in some detail by the U.S. Sentencing Commission,¹ the Australian Law Reform Commission,² and commentators.³ Many constructive proposals for sentencing corporate offenders have emerged, and some have been implemented.⁴ In the absence of a framework of design, however, the strengths and weaknesses of

¹ United States Sentencing Commission, *Sentencing Guidelines for Organizational Defendants* (1991) ("U.S.S.C.G."); *Preliminary Draft, Sentencing Guidelines for Organizational Defendants* (1989); *Discussion Materials on Organizational Sanctions* (1988); "Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations" (1988) 10 *Whittier Law Review* 7. For commentaries see R. Gruner, "To Let the Punishment Fit the Organisation: Sanctioning Corporate Offenders through Corporate Probation" (1988) 16 *American Journal of Criminal Law* 1; J. Coffee, Jr., R. Gruner, and C.D. Stone, "Standards for Organizational Probation: A Proposal to the United States Sentencing Commission" (1988) 10 *Whittier Law Review* 77.

² Australia, Law Reform Commission, *Discussion Paper No. 30, Sentencing Penalties*, paras. 283-307 (1988).

³ See e.g., J. Coffee, Jr., "No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386; B. Fisse, "Sentencing Options against Corporations" (1990) 1 *Criminal Law Forum* 211.

⁴ Notably under the U.S. Sentencing Reform Act 1984; J. Coffee and C. Whitehead, "The Convicted Corporation: An Outline of the New Federal Remedies" in O.G. Obermaier (ed.), *Corporate Criminal Liability* (1986), 318; Gruner, "To Let the Punishment Fit the Organisation". For reviews of U.S. federal sentencing patterns see M.A. Cohen, "Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in

these proposals are not always evident. The purpose of this paper is to suggest an initial framework for the design of sanctions against corporations and thereby to construct a new sanction, the punitive injunction. The punitive injunction is related to the equitable remedy of injunction but is specially adapted for use in corporate criminal law.

This enterprise reflects Edwin Sutherland's concern about the differential implementation of the criminal law against corporate offenders.⁵ The fine is the predominant form of sentence now used and yet the financial impact of a fine is more readily achievable by means of civil monetary penalties. Unless more potent sanctions are available the problem of differential implementation is likely to remain. In pursuing that theme, account is taken of a number of Sutherland's insights, including the difficulty of allocating individual and corporate responsibility for corporate offenses, and the civil-dominated relationship between civil and criminal methods of social control. The concept of the punitive injunction thereby emerges. It will be recollected that Sutherland criticised the injunction for unduly "civilising" the social control of corporate behavior.⁶ Yet the injunction is not necessarily merely a civil instrument of control but could be used to achieve punitive as well as remedial impacts. Given this potential, the punitive injunction might well help to reduce the differential implementation of the criminal law.

Relatively little has been written about the design of sanctions against corporations.⁷ There have been many useful theoretical and empirical inquiries into corporate crime causation and corporate crime control yet these explorations have not been concerned directly with the architecture of sanctions. Consider, for instance, the illuminating essay by John Braithwaite and Gilbert Geis, "On Theory and Action for Corporate Crime Control",⁸ which focusses on developing a deterrent strategy against corporate crime rather than on designing sanctions to give effect to the strategy. The same is true of economic models for "optimal" or "efficient" sanctioning, although these seek to simplify the

the Federal Courts, 1984-1987" (1989) 26 *American Criminal Law Review* 605; M.A. Cohen, C. Ho, E.D. Jones and L.M. Schleich, "Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 1984-1987" (1988) 10 *Whittier Law Review* 103.

⁵ E.H. Sutherland, *White Collar Crime: The Uncut Version* (1983).

⁶ Sutherland, *White Collar Crime*, 53-54.

⁷ Or, indeed, about sanctions generally; see further R. Arens and H.D. Laswell, *In Defense of Public Order: The Emerging Field of Sanction Law* (1961).

⁸ J. Braithwaite and G. Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime and Delinquency* 292.

task of implementation by postulating a single-minded regime of fines.⁹ Mention may also be made of another line of analysis, namely decisionmaking models of corporate criminal conduct.¹⁰ This approach usefully models the persons and processes within organizations against which sanctions might be aimed but there is more to the design of sanctions than the element of targeting.

It is difficult to know where to begin in trying to construct a framework for the design of corporate sanctions. One might conceivably advance some grand theory of corporate crime control, boil up the implications, and crystallize a set of design criteria. Another possible course would be to abandon the exercise entirely, on the basis that progress is most likely to be made through an evolutionary process in which the sanctions now in use are gradually modified in light of experience. The approach adopted here is neither grand nor evolutionary but represents a modest attempt at rethinking.

The framework offered seeks to reflect the features that conceivably make a sanction "effective" against corporations. This exercise does not start or finish in either the world of economic efficiency or the underworld of politics but is informed by the literature on corporate crime. The most fundamental element of an "effective" sanction against corporations is the ability to reflect the aims of corporate criminal law. Those aims, as reflected in the U.S. Code,¹¹ are retribution, deterrence, protection of the public, rehabilitation, and restitution. The last three of these aims can be achieved by means of civil remedies that piggy-back on the criminal process. Retribution and deterrence, however, raise the more complicated question of what is needed of sanctions fit for the task of punishing corporate entities. The view taken here is that the relationship between ends and means implies that a retributive or deterrent sanction against corporations requires at least the following three capacities:

- (1) power to punish as well as to remedy;
- (2) ability to produce sanctioning impacts consistent with the nature of corporate behavior;
- and
- (3) compatibility with the conception of corporations as responsible, blameworthy entities.

Account must also be taken of constraints upon the pursuit of the ends of corporate criminal law by any given form of sanction. Many constraints affect the design of sanctions against corporations.

⁹ See e.g., K. Elzinga and W. Breit *The Antitrust Penalties* (1976); R. Posner, "An Economic Theory of the Criminal Law" (1985) 85 *Columbia Law Review* 1193.

¹⁰ S. Kriesberg, "Decisionmaking Models and the Control of Corporate Crime" (1976) 85 *Yale Law Journal* 1091.

¹¹ U.S.C. s. 3553(a)(2).

Expressed in terms of the capacities that a corporate sanction ideally should have, the more important constraints seem to be these:

- (1) minimisation of unwanted spillover and side effects;
- (2) flexible application to diverse kinds of organization;
- (3) consistent impact; and
- (4) resistance to evasive tactics.

The first step taken below is to conduct an analysis of the extent to which the purported ends of the U.S. Code and the U.S. Sentencing Commission's *Sentencing Guidelines for Organizational Defendants* are reflected by the means provided at the level of sanctions. Secondly, an alternative ends-means relationship is advanced in which the centerpiece is the punitive injunction. Thirdly, we examine the significance of the above-mentioned constraints and indicate how the punitive injunction conceivably might reshape our understandings of them.

The impression should not be given that corporate criminal liability is of predominant importance in the prevention of corporate crime. The criminal law, in relation to organizations as well as in relation to human beings, is a blunt weapon of social control and is best used where civil sanctions or remedies are insufficient.¹² Furthermore, obedience to law within companies depends not so much on punishment or the deterrent threat of the criminal law as on the routine impact of organizational controls.¹³ This is reflected within many corporations by the development of compliance systems designed to minimise the risk of liability.¹⁴ The main function of corporate criminal liability is thus to complement less drastic and more expeditious avenues of crime-prevention. The hypothesis is

¹² See especially J. Braithwaite, *To Punish or Persuade* (1985); P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986); K. Hawkins, *Environment and Enforcement* (1984); G. Richardson, A. Ogus, and P. Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (1982); A. Freiberg, "'Civilising' Crime: Parallel Proceedings and the Civil Remedies Function of the Commonwealth Director of Prosecutions" (1988) 21 *Australia and New Zealand Journal of Criminology* 129.

¹³ Stone, C.D., *Where the Law Ends* (1975).

¹⁴ See J. Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems" in B. Fisse and P.A. French (eds.), *Corrigible Corporations and Unruly Law* (1985), ch. 3; A. Hopkins, *The Impact of Prosecutions under the Trade Practices Act*; J.A. Sigler and J.E. Murphy, *Interactive Corporate Compliance* (1988); B. Fisse, "Corporate Compliance Programmes: The Trade Practices Act and Beyond" (1989) 17 *Australian Business Law Review* 380.

that the shadow of criminal liability will stiffen the resolve of corporations to co-operate with enforcement agencies and to develop effective internal controls.¹⁵

II The Ends and Means of Corporate Criminal Sanctioning: the U.S. Code and the Sentencing Commission Guidelines

It is a truism that ends generate means and, conversely, that means generate ends.¹⁶ Yet, in the development of corporate sanctions, insufficient attention has been paid to the implications that the aims of corporate criminal law hold for sanction design. This can be seen by examining the U.S. Code provisions on sentencing, and the U.S. Sentencing Commission's *Sentencing Guidelines for Organizational Defendants* (1991).

A. Power to punish as well as to remedy

A feature of the criminal law as a means of social control in the context of individuals is the use of severe forms of punishment, most notably jail, in a setting pervaded by the stigmatic power of trial and conviction. The U.S. Code, in response to changed social perceptions of the gravity of corporate crime, provided for the punitive use of probationary conditions against corporate offenders. The Sentencing Commission's *Guidelines* are structured so as to make fines the dominant sanction and probation the exception. Neither approach adequately reflects the apparent aims of corporate criminal law.

Consider the aims of just punishment and adequate deterrence, as set out in s. 3553(a)(2) of the U.S. Code. In the context of individual liability for the most serious range of cases, the aims of just punishment and adequate deterrence are implemented primarily by means of the sanction of imprisonment; probation, fines, notice to victims, and restitution play a secondary role. In the context of corporate liability for the most serious range of offenses, however, just punishment¹⁷ and adequate deterrence are implemented by means of probation, fines, notice to victims and restitution; no provision is made for a corporate sanction of comparable stigmatic power and punitive severity to

¹⁵ See further J. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement" (1984) 18 *Law & Society Review* 179.

¹⁶ But the exact interdependence is rarely made clear. See further P. Streeten, "Introduction" in G. Myrdal, *Value in Social Theory* (1958), ix at xxi-xxv.

¹⁷ As regards the application of retributive theories of punishment to corporate crime, see K. Schlegel, *Just Deserts for Corporate Criminals* (1990); J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

imprisonment. Bans on business activities were incorporated as an analogue to imprisonment in an earlier version of the legislation but this approach was abandoned on the ground that bans would have intolerable ripple effects on innocent parties.¹⁸ To the extent that sanctioning effects of comparable severity to imprisonment are required, the only course open under the U.S. Code is to use probationary conditions for achieving punitive impacts. Thus, community service may be imposed as a discretionary condition of probation in relation to any offense, or as a mandatory condition where the offense is a felony.¹⁹

The main deficiency of the U.S. Code is that the aims of just punishment and adequate deterrence are severely compromised. Instead of going back to underlying purposes and trying to devise sanctions plainly reflecting the aims of punishment and deterrence, the architects have relied upon probation, a customary means of disposition of offenders. Probation has traditionally been regarded as a soft option and, although the courts have the power under the U.S. Code to impose punitive conditions, it is much more likely that the emphasis will be remedial rather than punitive, with priority given to prevention and correction rather than punishment or deterrence. Even if the courts were in fact to use probation for punitive purposes, the label given to the sanction - probation - lacks the punitive connotations immediately associated with jail.²⁰

Secondly, the effect of relegating the punishment of corporations to the field of probation is to impose questionable restrictive conditions. Imposing non-monetary punishment via probation requires the use of discretionary conditions except where community service is ordered as a mandatory condition of probation in relation to a felony.²¹ Where discretionary conditions are used they must be "reasonably related" to the nature of the offense and the background of the defendant, and to the purposes of sentencing.²² Moreover, deprivation of liberty or property under a discretionary condition must be "reasonably necessary" for the purposes of sentencing. These requirements warrant comparison with the position in relation to imprisonment and community service for a felony. Imprisonment "is not an appropriate means of promoting correction and rehabilitation"²³ but may be imposed as a matter of just punishment or adequate deterrence without

¹⁸ S. Rep. No. 225, 98th Cong., 1st Sess. 97 (1983).

¹⁹ U.S.C. s. 3563(a)(2)(b)(13).

²⁰ Compare Coffee and Whitehead, "The Convicted Corporation: An Outline of the New Federal Remedies" at 327-328.

²¹ U.S.C. s. 3563(a)(2).

²² Section 3563(b).

²³ Section 3582(a).

any showing of reasonable necessity. Community service for a felony may be ordered as a mandatory condition of probation unless there are "extraordinary circumstances" that would make such a condition "plainly unreasonable".²⁴ The U.S. Code thus cramps the use of punishment against corporations, even for the most serious offenses. In contrast, assume an ends-means structure parallel to that applicable to individual offenders. Under this structure there would be a corporate analogue of imprisonment, say "NIC" (Nasty Interventionist Control). Unlike probation, NIC would be limited to achieving deterrence and retribution. Unlike probation, NIC would be a discrete and standard punitive form of sentence applicable to serious offenses.

The Sentencing Commission's *Guidelines* to some extent recognise the punitive capacity of probation but unduly constrict or inhibit its use. This is partly because of the way that sentencing options are structured and partly because of the nature of the probationary conditions that are recommended.

The sentencing options are structured under the *Guidelines* so as to make probation an exceptional form of sentence. Part A re-structures the sentencing options against corporations in such a way as to focus upon restitution first, fines second, and probation third. By contrast, the U.S. Code puts probation ahead of fines in the list of authorised sentences. Under Part B of the *Guidelines* community service is converted into a surrogate for restitution,²⁵ whereas under the U.S. Code community service has a punitive as well as remedial role. Part C regulates the punitive application of fines in considerable detail and relies on a scheme of aggravating and mitigating factors that has no counterpart in the context of probation. The U.S. Code, in comparison, gives no such pride of place to fines. Part D of the *Guidelines* does state that probation is to be used where necessary to accomplish the purposes of sentencing set out in the U.S. Code,²⁶ and those purposes include deterrence and retribution. However, fines provide the central means for achieving retribution and deterrence. The application instructions under s. 8A1.2 require that fines be considered before consideration is given to the possibility of probation; this is so whatever the level of seriousness of the offense. Moreover, it is unclear from the *Guidelines* when the use of probation is to be regarded as necessary for the punitive purposes of deterrence or retribution. In the absence of explicit guidance on this question the courts almost certainly would continue to rely on fines as the paradigm sanction against corporate offenders, for serious as well as less serious offenses. Here it should be remembered that the *Guidelines* advance a new regime of fines that would substantially increase the amounts of the fines typically imposed on corporate offenders. The implication conveyed is that fines assessed under this regime offer a potent and effective regime of punishment and that probation

²⁴ U.S.C. s. 3563(a)(2).

²⁵ U.S.S.C.G. s. 8B1.3.

²⁶ U.S.S.C.G. s. 8D1.1(a)(8).

is relevant not so much as an alternative form of punishment but more as a fall-back remedy for cases where an offender is unable to pay a fine of the appropriate amount.

The effect of the slant toward fines under the *Guidelines* is to skew the aims of corporate criminal law. As explained below, fines are poorly equipped to reflect the seriousness of serious offenses, and hence the effect of the Sentencing Commission's Guidelines is to depreciate the aim of just punishment. The aim of adequate deterrence is also compromised, for the same reason.

A major limitation of fines, judged from the standpoint of deterrence and retribution, is that they convey the impression that permission to commit a crime may be bought for a price. This is the antithesis of the traditional conception of the criminal law as a prohibitory mechanism of social control. Punishment in the criminal law is not merely a form of penalty or tax. In Feinberg's words,²⁷

punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority . . . or of those 'in whose name' the punishment is inflicted.

Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.

To this it should be added that the focus of condemnation is the unwantedness of the harm caused, coupled with the blameworthiness of the actor in causing that harm.

The paradigm element of unwantedness in criminally-proscribed harm is apparent from the way that offenses typically are regarded. Offenses are not merely commodities to be bought or sold but socially unwanted invasions of protected interests. Those invasions are unwanted even if we know that, in the event of being harmed, we will receive full compensation. Thus, no amount of money can make up for harm of the kind often caused by pollution or occupational health and safety offenses. If a serious offense is punished merely by means of a fine the connotation is not so much disapproval as crime for sale. Accordingly, one reason for imposing criminal liability in such a case is to subject the defendant and the offending conduct to emphatic public disapproval. As John Coffee, Jr. has explained:

A world of difference does and should exist between taxing a disfavored behavior and criminalizing it. We tax cigarettes, but outlaw drugs. Both are disincentives, but the criminal sanction carries a unique moral stigma. That stigma should not be overused, but, when properly used, it is society's most powerful force for influencing behavior and defining its operative moral code. ...

²⁷ J. Feinberg, *Doing and Deserving* (1970), 98.

The message needs to be clearly communicated that there is no price that, when paid, entitles you to engage in the prohibited behavior.²⁸

Another limitation of the pricing approach adopted by the Sentencing Commission's *Guidelines* is that it tends to undermine the aim of general deterrence. As Coffee has argued:²⁹

From a general deterrent perspective, the problem with "pricing" the criminal behavior is that the "price" is set in terms of the *mean* defendant's incentives (that is, the expected cost must equal the expected gain from the offense, after discounting that gain by the likelihood of apprehension). Even if we assume that it were possible to determine the precise expected gain and the precise probability of apprehension for that *mean* offender, a "price" so determined would deter only that average offender (and also those offenders who perceived even less gain or a greater likelihood of apprehension). What happens to the offender who either perceives a greater expected gain or who estimates the odds of apprehension (accurately or inaccurately) as being more favorable to it? In short, if in real life there is a dispersion of potential offenders (some optimistic, some pessimistic; some more skilled at crime than others; some more risk averse than others), a pricing system that focuses only on the average offender will by definition under-deter the above-average offender. Similarly, it will not deter the less risk averse or the more optimistic offender. The point here is that, even within the four corners of deterrence theory, there is a need to employ substantial penalties that exceed the expected level necessary to deter the average potential offender.

The *Guidelines* also constrict or inhibit the punitive capacity of probation because insufficient guidance is given in the probationary conditions that are set out. It is provided, as a recommended condition of probation, that the court may order the organization to publicise, at its own expense and in the format and media specified by the court, the nature of the punishment imposed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent similar offenses.³⁰ Yet there is no indication as to how probation should be used as a means of punishment outside the context of adverse publicity. Detailed guidelines are advanced for the use of probation as a remedial means of reinforcing restitutionary orders or fines, and as a preventive or rehabilitative remedy.³¹ These guidelines encourage and help to channel a variety of interventions, including mandatory compliance programs and monitoring procedures. However, no reference is made to the

²⁸ Statement to U.S. Sentencing Commission Hearing, New York, 11 Oct. 1988.

²⁹ *Ibid.*

³⁰ U.S.S.C.G. s. 8D1.4(a).

³¹ U.S.S.C.G. s. 8D1.4(b)(c).

punitive use of such modes of intervention.³² Unless the courts depart from the recommended conditions, which is unlikely, probation would be a remedial means of intervention. Given that probation can be used punitively to generate adverse publicity under s. 8D1.4(a), this seems a lopsided and incomplete approach.

B. Ability to produce sanctioning impacts consistent with the nature of corporate behavior

The aims of just punishment and adequate deterrence are unlikely to be achieved by sanctions that are out of touch with the nature of corporate behavior. Perceptions of the nature of corporate behavior vary widely but both the U.S. Code and the Sentencing Commission's *Guidelines* take insufficient account of orthodox conceptions of how corporations act. This can be seen from Simeon Kriesberg's instructive modelling of corporate decisionmaking and their implications for the control of corporate crime.³³

Kriesberg's analysis, which is based substantially on Graham Allison's *Essence of Decision: Explaining the Cuban Missile Crisis* (1971), specifies three models of corporate decisionmaking. Model I, the Rational Actor Model, postulates a unitary, rational decisionmaking process derived from neoclassical economic theories of the firm; this is a model of rational value maximisation.³⁴ Model II, the Organisational Process Model, describes the corporation as "a constellation of loosely allied decisionmaking units (e.g., a marketing group, a manufacturing division, a research and development staff), each with primary responsibility for a narrow range of problems, the resolution of which is governed by standard operating procedures, established by written or customary organisational rules".³⁵ Model III, the Bureaucratic Politics Model, views corporate decisionmaking not in terms of rational process or set procedures, but rather as "a bargaining game involving a hierarchy of players and a maze of formal and informal channels through which decisions are shaped

³² It may also be noted that the remedial interventions set out in s. 8D1.4(c) do not apply where probation is used as a means of deterrence or retribution under s. 8D1.1(a)(8). It is difficult to understand why this should be so.

³³ Kriesberg, "Decisionmaking Models and the Control of Corporate Crime".

³⁴ The rational actor model is one of limited explanatory power. See J. Byrne and S. Hoffman, "Efficient Corporate Harm" in Fisse and French (eds.), *Corrigible Corporations and Unruly Law*, ch. 6; G. Morgan, *Images of Organization* (1986).

³⁵ For an empirical examination of the relevance of standard operating procedures as a factor in the deterrence of corporate crime see A. Hopkins, *The Impact of Prosecutions under the Trade Practices Act* (1978).

and implemented".³⁶ These three models have varying implications for the design of corporate and individual criminal sanctions.

Model I implies that sanctions imposed upon the decisionmaking unit, the corporate entity, are relevant and efficacious if they relate to the particular values (such as profit, prestige, and stability) which rational corporate actors seek to maximise. Model II suggests that liability should be imposed upon the individual personnel in a position to enact and supervise standard operating procedures. Under this Model, however, the decisionmaker is neither a corporation nor an individual, and the effects of sanctioning the corporation or certain members of its subunits are uncertain. What is clear is the need for a sanction geared to rectifying crime-conducive operating procedures. Model III, the Bureaucratic Politics Model, strongly implies the need for sanctions against individual participants in key decisionmaking, with sanctions against the corporate entity providing only a secondary constraint.

Both the U.S. Code and Sentencing Commission's *Guidelines* are consistent with Model I (the Rational Actor Model) but vary in the weight they attach to the different values that rational corporate actors seek to maximise. The U.S. Code does not accord priority to the fine but authorises extensive use of probation, if necessary in a punitive mode. The impact of probation is not merely financial but relates to organizational power and reputation. The values of the rational corporate actor on which the U.S. Code impinge are thus not confined to money but co-extend to organizational power and prestige. By contrast, the Sentencing Commission's *Guidelines* accord more priority to fines as the instrument of punishment. The Sentencing Commission's *Guidelines* seem to concentrate on money as the value of concern to the rational corporate actor.

The money-centered vision of the rational corporate actor under the Sentencing Commission's *Guidelines* is problematic. In bureaucratic practice, if not in classical economic theory, corporations are nests of non-monetary as well as monetary goals. Managerial motivation, like human motivation in general, extends far beyond satisfaction of monetary want. The more important non-financial considerations, as specified by Robert Gordon, are sevenfold: the urge for power, the desire for prestige, the creative urge, the need to identify with a group, the desire for security, the urge for adventure, and the desire to serve others.³⁷

This is not to deny that survival in the corporate sector ultimately depends on profitability. Nor is it denied that emphasis on profits has been accentuated within many companies by the pressure to maximise their wealth in order to minimise the chance of becoming an attractive takeover target.

³⁶ Kriesberg, "Decisionmaking Models and the Control of Corporate Crime" at 1103. See further P.F. Rudge, *Order and Disorder in Organizations* (1990).

³⁷ *Business Leadership in the Large Corporation* (1945), 305.

Non-financial values are nonetheless sufficiently important to warrant the use of sanctions that impinge upon them. As John Kenneth Galbraith has said, "[i]n the American business code nothing is so iniquitous as government interference in the *internal* affairs of the corporation."³⁸ It may also be argued that, even if profit were the sole pre-occupation of corporate decision-making, the law should change the playing field, for two main reasons. Sanctions that have non-financial impacts are distinct from matters of financial routine and hence more likely to command attention. Moreover, non-financial sanctions introduce different forms of risk into decision-making and hence play upon the fear of uncertainty that pervades business.

Model II, the Organisational Process Model, offers further perspectives on the relationships between sanctions and organizational behavior under the U.S. Code and the Sentencing Commission's *Guidelines*. The U.S. Code provisions on corporate probation speak much of peculiarly human factors (e.g., alcohol dependency) and do not spell out probationary conditions specifically oriented to organizational processes. Defective operating procedures leading to an offense could be made the subject of probationary intervention under the catch-all clause that a defendant may be required to "satisfy such other conditions as the court may impose".³⁹ However, in the absence of guidance, it is likely that the courts will usually impose prosaic non-interventionist conditions, such as a condition that the defendant not re-offend, or that the defendant make restitution to victims. Section 3572(a)(7) of the U.S. Code requires a court assessing a fine for an offense to consider any measure taken by an organizational defendant "to prevent a recurrence of such an offense" but this provision relates to mitigation of sentence and does not require an organizational defendant to rectify defective operating procedures that led to prosecution and conviction.

The Sentencing Commission's *Guidelines*, unlike the U.S. Code, explicitly set out probationary conditions that govern intervention in organizational processes. Mention has already been made of s. 8D1.4(a), under which a corporate offender can be required to publicise the details of its offense and the steps to be taken against repetition. In a defined range of cases, including those where it is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct, the following probationary conditions may be imposed under s. 8D1.4(c):

- (1) The organization shall develop and submit to the court a program to prevent and detect violations of law, including a schedule for implementation.
- (2) Upon approval by the court of a program to prevent and detect violations of law, the organization shall notify its employees and shareholders of its criminal behavior and its program to prevent and detect violations of law. Such notice shall be in a form prescribed by the court.

³⁸ *The New Industrial State* (1967), 77.

³⁹ U.S.C. s. 3563(b)(21).

- (3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program to prevent and detect violations of law. Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.
- (4) In order to monitor whether the organization is following the program to prevent and detect violations of law, the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Admirable as the guidance provided by these recommended conditions is, they come into play only in the limited range of cases where probation is authorized under the *Guidelines*. As discussed earlier, the *Guidelines* are structured so that the main emphasis is on fines, with probation a supplementary option for an exceptional range of cases where the new regime of higher fines is inadequate.⁴⁰ The fact that an organization has committed a serious offense, or an extremely serious offense, does not in itself enable the use of probation, even to the limited extent of requiring an offender to provide an assurance that any defective internal controls have been corrected. This approach is odd. The fact that an organization has committed a serious offense almost invariably suggests that something has gone astray with its internal control procedures. Major frauds, egregious pollution offenses, or flagrant breaches of occupational health and safety laws are rarely the product of one or two isolated individuals but typically surface from bureaucratic mires and underlying failures of organizational control.⁴¹ If so, one would have thought that the task of sentencing, at least for serious offenses, should routinely be directed at ensuring that any defects in internal controls have been rectified. Moreover, the more serious the offense the greater the need to guard against repetition and the stronger the justification for intervention in corporate internal affairs. In failing to reflect these considerations the *Guidelines* may be charged with lack of realism.

Another deficiency of the *Guidelines* on probationary intervention in organizational processes is the apparent assumption that interventions in organizational processes should be remedial, not

⁴⁰ U.S.S.C.G. s. 8A1.2.

⁴¹ See further Stone, *Where the Law Ends*; D. Vaughan, "Autonomy, Interdependence, and Social Control: NASA and the Space Shuttle *Challenger*" (1990) 35 *Administrative Science Quarterly* 225; L.W. Sherman, *Scandal and Reform: Controlling Police Corruption* (1978).

punitive.⁴² The interventions set out under s. 8D1.4(c) do not contemplate the use of probation as a form of punishment but as a preventive remedy comparable to an injunction for institutional reform of the kind often found in civil rights litigation. However, there is no reason to suppose that remedial and punitive interventions in organizational processes are mutually exclusive. It is a simple truth that any given intervention in the internal control processes of an organization can be pitched at either a remedial level (that which is commensurate with the degree of intervention appropriate for an injunctive remedy against repetition of the offense) or a punitive level (that which is commensurate with the degree of supra-remedial punitive intervention warranted by the gravity of the offense and the blameworthiness of the offender). Thus, remedial monitoring of steps taken to guard against repetition of an offense may warrant 100 hours of time on the part of managers and 10 hours by an external scrutineer, whereas punitive as well as remedial monitoring of the same steps against repetition of the offense may warrant 200 hours of time on the part of managers and 20 hours by an external scrutineer. It may be added that such a conception hardly violates s. 3563 of the U.S. Code. That provision requires that probationary conditions be justified by the nature of the offense, the characteristics of the offender, and the need to effect the purposes of sentencing. There is no limitation that probation be circumscribed by the remedial boundary that applies to civil injunctive relief.

We turn next to Kriesberg's Model III, the Bureaucratic Politics Model, which suggests the importance of sanctions designed to subject bureaucratic politicians to individual accountability. Perhaps individual criminal law might be relied on to produce individual accountability in accordance with the Model. However, many obstacles lie in the way of successfully prosecuting more than a small number of the personnel involved in corporate offenses. This is borne out by the findings of a U.S. Sentencing Commission study of the relative incidence of prosecutions against corporations and individual defendants; in 49% of 1122 cases involving organisational convictions there was no individual co-defendant, and in 24% of the cases there was a single individual co-defendant.⁴³ Figures such as these impel consideration of the possibility of achieving individual

⁴² Compare O. Fiss, "The Supreme Court 1978 Term - Foreword: The Forms of Justice" (1979) 93 *Harvard Law Review* 1 at 22-23 (organizationally caused harms warrant remedial structural interventions, not punishment). See also O. Fiss, "The Awkwardness of the Criminal Law" (1989) 11 *Human Rights Quarterly* 1.

⁴³ Cohen, Ho, Jones and Schleich, "Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 1984-1987" (in 49% of 1122 cases involving organisational convictions there was no individual co-defendant, and in 24% of the cases there was a single individual co-defendant).

accountability by means of the internal discipline systems of organizational defendants.⁴⁴ By using corporate liability as a lever for activating internal discipline it is conceivable that a much higher level of individual accountability could be attained. As the Law Reform Commission of Canada has explained, corporate liability is potentially an efficient dispenser of individual accountability.⁴⁵

In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.

This possibility is not squarely addressed by the U.S. Code or the Sentencing Commission's *Guidelines*.

The U.S. Code provisions on probation are individualistic in wording and do not take adequate account of the nature of corporate behavior. The result is failure to say anything about the potential use of probation as a means of stimulating individual accountability through the internal discipline systems of organizational defendants. By contrast, a court assessing a fine against a corporation is required to have regard to any discipline taken against "any officer, director, employee, or agent of the organization responsible for the offense".⁴⁶ This method of achieving individual accountability via internal disciplinary systems is oblique and ineffectual. It is not clear what weight is to be given to the absence of disciplinary action. More importantly, individual accountability through internal disciplinary action is merely a factor in mitigation of a fine; there is no insistence that a corporate offender impose individual accountability within the organization.

The Sentencing Commission's *Guidelines* faintly reflect the potential of internal discipline systems for delivering individual accountability. As under the U.S. Code, internal disciplinary action is a mitigating factor in assessing a fine. The scheme under the *Guidelines* is that an "effective program to prevent and detect violations of law" reduces the culpability score by 3 points on a scale that

⁴⁴ See further B. Fisse and J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 468.

⁴⁵ Canada, Law Reform Commission, *Working Paper No. 16, Criminal Responsibility for Group Action* (1976) at 31.

⁴⁶ U.S.C. s. 3572(a)(7).

begins at 5 points within a range of 0-10 points.⁴⁷ Adequate internal disciplinary action is one of seven conditions required by the definition of an effective program to prevent and detect violations of law.⁴⁸ The discount offered for internal discipline is thus low, especially in cases where a corporation has undertaken a comprehensive and costly program that removes the need for the state to intervene against individual culprits. The incentive offered to corporations to activate their internal discipline systems compares unfavorably with the U.S. Code, which allows a greater reduction in fine where a corporate defendant has conducted an exemplary internal disciplinary program.

More importantly, the *Guidelines* do not deploy corporate probation so as to ensure that individual accountability is achieved by a corporate offender through its internal disciplinary system. The conditions of probation specified under the *Guidelines* include the preparation of a compliance plan for avoiding a recurrence of the criminal behavior for which it was convicted.⁴⁹ However, it is not at all clear whether the compliance plan should include an internal disciplinary program. This opaqueness is as surprising as it is uninformative. Individual accountability has been highly valued as a means of social control ever since Western civilization and yet fails to rate even a mention in what purports to be a blueprint for corporate probation.

Mention should also be made of s. 8C4.1 of the *Guidelines*, which provides for a departure downwards from the fine guideline range where the organization has provided substantial assistance in the investigation or prosecution of an individual not directly affiliated with the defendant organization. The effect of this provision is preposterous: assistance with the investigation or prosecution of one individual who is an outsider warrants a departure from the guidelines whereas no allowance whatsoever is made for a sustained effective campaign of internal discipline against all the insiders responsible for the offense. At this point the *Guidelines* not only fail to relate corporate sentencing to the nature of corporate behavior; they collapse, by force of ridicule.

C. Compatibility with the conception of corporations as responsible, blameworthy entities

A basic postulate of retribution and deterrence in the context of individual offenders is that the person punished be a responsible, blameworthy agent. Opinions differ as to whether the same postulate applies to corporate offenders. According to some, a corporation is an inanimate object or legal artifact that cannot manifest a guilty mind. According to others, however, a corporation is a responsible and blameworthy entity capable of manifesting distinctively corporate forms of

⁴⁷ U.S.S.C.G. s. 8C2.5.

⁴⁸ U.S.S.C.G. s. 8A1.2 (Application Note 3(k)).

⁴⁹ U.S.S.C.G. s. 8D1.4(c)(1).

intentionality or negligence.⁵⁰ Indeed, in some respects corporations may be better endowed than individuals as responsible agents. Thus, corporations typically have a number of advantages when it comes to rational decisionmaking, including access to a bank of intelligence and the resources to acquire a superior knowledge of legal and other obligations. The point of the discussion below is not to re-examine the status of corporate entities but to show how the design of sanctions against corporations is fundamentally affected by the designer's conception of corporate responsibility and blameworthiness.

If one takes the view that corporations are merely useful machines or vehicles for maximising the interests of individuals it is difficult to see the point of trying to create a corporate sanction of comparable potency to imprisonment. From this angle, the task of design is not to create a sanction capable of reflecting the seriousness of the offense and the blameworthiness of the offender. Instead, the task is to adjust the throttle on the corporate engine so as to produce greater or lesser resources for distribution to the persons using the machine to maximise their own interests.

Corporate throttle-adjustment appears to be an animating conception underlying the Sentencing Commission's *Guidelines*. The prime instrument of punishment is the fine, a sanction that lends itself to adjustments of the amount of corporate resources available for exaction and re-distribution. Moreover, the calculus supplied for making adjustments to the flow of corporate resources is more concerned with internalising the costs of corporate harm-causing than with corporate blameworthiness. Consider especially s. 8C2.5(f). If a corporate offender had in place an "effective program to prevent and detect violations of law" then the culpability score for assessing fines is reduced by 3 points on a scale that starts at 5 within a 0-10 range. From the standpoint of blameworthiness it is difficult to see why a corporate defendant should be held liable for an offense that occurs notwithstanding the exercise of all due diligence. At most, the punishment should be nominal, which is not to deny the liability of the defendant to pay restitution or to take remedial measures against repetition. Under the Sentencing Commission's *Guidelines*, however, due diligence is rewarded merely by reduction in fine. Perhaps this makes sense if criminal liability is transformed into an economic regime of accountability for costs where the prime factors are objective losses and gains, not blameworthiness. If criminal liability is transformed in this way, however, it is difficult to see why the criminal justice system should be used to achieve the required economic

⁵⁰ Fisse and Braithwaite, "The Allocation of Responsibility for Corporate Crime:

Individualism, Collectivism and Accountability". See also B. Fisse, "Corporate Criminal Responsibility" (1991) 15 *Criminal Law Journal* 166; S. Field and N. Jorg, "Corporate Liability and Manslaughter" [1991] *Criminal Law Review* 156; A.K. Cohen, "Criminal Actors: Natural Persons and Collectivities" in School of Justice Studies, Arizona State University, *New Directions in the Study of Justice, Law, and Social Control* (1990), ch. 5; P.A. French, *Collective and Corporate Responsibility* (1984).

equilibrium. An economic regime of accountability for costs requires no more than the use of civil process, a point evident from the many regulatory contexts in which civil monetary penalties are used. Indeed, to use the criminal process in order to impose merely a system of economic penalties or civil remedies would be inefficient in the extreme.

The U.S. Code approach to sanctions against organizational defendants does not treat corporations merely as economic machines but is consistent with the conception that corporations are responsible, blameworthy entities. This may not seem so at first glance. Under U.S. federal common law, organizational defendants charged with an offense are vicariously liable for the conduct of their employees and it is not a defense that the corporation, viewed as a corporation, took all reasonable care to avoid committing the offense. It may therefore be argued that, since the basis of liability is the same as under a regime of civil monetary penalties, corporations are being treated as machines rather than as responsible persons. However, under the U.S. Code provisions on sentencing, blameworthiness, or the absence of blameworthiness, is relevant when assessing sentence: a court that failed to take blameworthiness into account would not have sufficient regard to the need for the sentence imposed to provide just punishment and to afford adequate deterrence.⁵¹ Moreover, the absence of blameworthiness may be given greater weight than under the Sentencing Commission's *Guidelines*. Consider the situation where the offense amounts to say an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense. The absence of blameworthiness could be taken much more fully into account under the U.S. Code, to the extent of imposing a nominal fine, or perhaps even no fine at all.

It is also instructive to compare the U.S. Code and the Sentencing Commission's *Guidelines* in relation to reactive corporate fault⁵² as a factor in sentencing. Reactive fault is fault in failing to respond satisfactorily to the commission of the external elements of an offense, as where no action is taken to rectify unsafe procedures after becoming aware of an unjustified violation of some prohibition. Corporate blameworthiness often depends not so much on a corporation's behavior at the time of committing the external elements of an offense as on the adequacy or otherwise of a corporation's response to having committed those external elements. Communal attitudes of resentment intensify if corporations fail to react diligently where their activities have led to unjustified harm-causing or risk-taking;⁵³ it is highly provocative for a company to remain inactive

⁵¹ U.S.C. s. 3553(a)(2)(A)(B).

⁵² See further B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141 at 1183-1213.

⁵³ B. Fisse and J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983), 270-271.

despite having been put on notice that responsive action is required.⁵⁴ Moreover, the concept of reactive corporate fault grows directly out of the extensive reliance placed on civil modes of enforcement in corporate regulation. A perception prevalent among enforcement agencies is that enforcement depends primarily on civil measures and that criminal prosecutions are needed mainly where a company has inexcusably failed to comply with warnings, enforcement notices or other civil measures.

Under the U.S. Code the way is open for a court to give substantial weight to the absence of reactive fault. Assume that a corporate defendant, in response to having committed the external elements of an offense, fully co-operates with the authorities, comprehensively revises its compliance procedures, and conducts an extensive program of internal discipline. In such a case it is difficult to see the justification for more than a light sentence. Under the Sentencing Commission's *Guidelines*, however, the factor of reactive fault is not accorded any prominence, but is merely one among seven elements that constitute effective compliance effort as one factor on the culpability scale for computing fines.⁵⁵ Moreover, even if all seven elements required for an effective compliance effort are present, the result is merely a reduction in fine. By contrast, under the U.S. Code a defendant can redeem itself to the extent of earning discharge without sentence. The conception of corporate responsibility that underlies the *Guidelines* is thus curious and appears to have little to do with any discernible concept of corporate blameworthiness.

III An Alternative Approach: The Punitive Injunction as a Means of Reflecting the Aims of Corporate Criminal Law

The possibility of devising more effective sanctions against corporations has often prompted the idea of using bans on business and other counterparts to imprisonment.⁵⁶ Sanctions of this kind, although adopted from time to time, have unacceptably drastic effects on innocent parties. A more promising idea is the punitive injunction, a variant of the civil mandatory injunction. A punitive injunction conceivably could be used not only to require a corporate defendant to revamp its internal controls but also to do so in a way that directly reflects the aims of corporate criminal law.

⁵⁴ The phenomenon of management by exception (most corporate affairs are treated as routine matters for inferiors unless a significant problem arises) is a feature of organisational life; see L.R. Bittel, *Management by Exception* (1964); H. Mintzberg, *The Structuring of Organizations* (1979), ch. 21.

⁵⁵ U.S.S.C.G. s. 8A1.2 (Application Note 3(k)).

⁵⁶ S. Rep. No. 225, 98th Cong., 1st Sess. 97 (1983); H.R. Rep. No. 101-446, 101st Cong., 2d Sess. (1990).

A. The punitive injunction, alias NIC

We are accustomed to thinking of injunctions as remedies. The injunction developed as an equitable remedy and the idea of using it as a means of punishment has been anathema to equity lawyers. Whether or not the scope of equitable relief varies according to the length of the Chancellor's foot,⁵⁷ there is an entrenched principle that it is inequitable to use injunctions for punitive purposes. As far as the criminal law is concerned, however, this principle is of no obvious relevance. Indeed, the aims of retribution and deterrence suggest that, for serious offenses, the punitive injunction may be a paradigm sanction against organizational offenders.

Retributive punishment, as classically interpreted, stems from justice as fairness. When one moral agent breaks the law while all other moral agents bear the burdens of self-restraint, fairness requires the imposition of an off-setting burden on the law breaker.⁵⁸ This off-setting burden is punishment. If corporations are treated as moral agents, and are taken to bear the burden of self-restraint in complying with the law, then this form of retribution applies to corporate persons. The advantage that needs to be off-set includes in part the element of wrongful choice in committing an offense. If that advantage is to be off-set through punishment, the form of punishment must annul the wrongful choice or, as John Finnis has described it, the "excessive freedom in choosing".⁵⁹ In the case of a corporate defendant, punishment aimed at annulling the wrongful exercise of corporate choice must somehow impinge on the decisionmaking processes involved in that wrongful choice. This implies the need for a sanction that attacks the decisionmaking processes that led to the commission of the offense, and drives home the point that a wrongful choice was made.

Retribution aside, the aim of deterring corporate crime impels a focus on corporate decisionmaking processes. In corporations of any size, compliance with the law is not simply a matter of individual choice but depends on organizational policies and operating procedures:⁶⁰

When an individual criminal is punished or threatened with punishment for a street crime, the goal of the punishment or threat is to inhibit rather than to catalyze. The

⁵⁷ Compare *Gee v. Pritchard* (1818) 2 Swanston 414, per Eldon L.C.: "Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot."

⁵⁸ See further V. Falls, "Retribution, Reciprocity, and Respect for Persons" (1987) 6 *Law and Philosophy* 25; J. Finnis, "The Restoration of Retribution" (1972) 32 *Analysis* 131.

⁵⁹ "The Restoration of Retribution" at 132.

⁶⁰ Fisse, "Reconstructing Corporate Criminal Law" at 1160.

message conveyed is "refrain from committing that offense",⁶¹ rather than "refrain from committing that offense and take such steps to improve your physiological and psychological capacity for self-control as are necessary to guard against repetition". By contrast, when a corporate offender is punished or threatened with punishment, the message is catalytic as well as inhibitory. The message conveyed, for corporate offenses of commission as well as for those of omission, is "refrain from committing that offense and take such steps as are necessary organisationally to guard against repetition".

Put another way, organizations cannot exert self-control merely by self-denial. Self-denial must be embodied in corporate policy and backed by appropriate disciplinary measures and organisational procedures. Accordingly, the hypothesis of corporate deterrence requires corporations to do more than merely exercise inhibition and self-restraint; they are expected to institute effective crime prevention policies, disciplinary controls and compliance procedures.

The need for a sanction capable of affecting corporate decisionmaking processes immediately suggests the relevance of an injunction requiring organizational offenders to modify their policies and procedures in response to the criminal conduct that occurred. The use of injunctions in this way is far from uncommon. Mandatory injunctions have often been used in the context of civil rights litigation to require education boards, prisons, and other institutions to modify their conduct so as to comply with the Constitution.⁶² The mandatory injunction has also been invoked frequently by the Securities and Exchange Commission as a weapon against corporate malpractice.⁶³ In light of this experience, it is odd that the criminal law has been slow to develop an equivalent approach. As Coffee has pointed out, "It is a curious paradox that the civil law is better equipped at present than the criminal law to authorize [disciplinary or structural] interventions."⁶⁴ An attempt has been made under the U.S. Code to resolve this paradox by authorising the use of probation against corporate offenders, but since corporate probation has yet to be used anywhere near as forcefully as institutional reform injunctions, the paradox survives. Looking ahead, the paradox might well be resolved by creating a criminal form of injunction - the punitive injunction - based on an explicit link between punishment and forceful intervention in organizational decisionmaking processes.

If this direction is to be taken in practice we probably need to break away from the remedial connotations of probation and develop a distinctively punitive form of interventionist sanction. It is

⁶¹ See F. Zimring and G. Hawkins, *Deterrence: The Legal Threat in Crime Control* (1974), 75.

⁶² See O. Fiss, *The Civil Rights Injunction* (1978).

⁶³ See J. Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 *Virginia Law Review* 1099.

⁶⁴ Coffee, "No Soul to Damn: No Body to Kick" at 459.

therefore envisaged that the U.S. Code be amended so as to make punitive injunctions an authorised sentence against organizational offenders, and listed ahead of fines and probation in s. 3551(c). A new subchapter would be added to deal specifically with punitive injunctions. That subchapter would set out principles for the application of punitive injunctions, and would make provision for injunctive conditions, quantification and maximum amount of sentence, pre-sentence preparation of a compliance plan, costs of monitoring compliance, modification of conditions, and consequences of non-compliance. The statutory framework proposed is thus familiar. The central issues that require elaboration are first, the principles governing the application of punitive injunctions, secondly, the punitive nature of the injunctive conditions that could be imposed, and third, quantification of sentence.

Three main principles would govern the application of punitive injunctions under the scheme proposed. The first is that punitive injunctions are a suitable form of sentence for Class A and Class B felonies, and for misdemeanors resulting in a foreseeable and substantial risk of death or serious bodily harm, unless there are extraordinary circumstances that make the imposition of a punitive injunction plainly unreasonable.⁶⁵ Secondly, the punitive injunction is the form of sentence to be used where punitive intervention in the organizational processes of a defendant is needed. Where no more than remedial intervention is warranted, the appropriate sentence is probation. Moreover, unlike the position under the U.S. Code, probation would be confined to remedial interventions. For the sake of convenience, remedial as well as punitive interventions could be ordered in a punitive injunction but, in order to allow quantification of the sentence and to avoid confusion, the terms of the injunction should indicate the punitive component. Thirdly, a punitive injunction is inappropriate where the defendant can show that reasonable precautions were taken to prevent the commission of the offense and have since been taken to prevent recurrence. The concept of "reasonable precautions" relates to two main areas of corporate conduct:

- (1) the compliance policies and procedures in place in the organization, the efforts made by management to enforce them, and the extent to which those policies and procedures are modified in light of the experience of having committed the offense; and
- (2) the internal disciplinary action taken and the promotion of individual criminal liability by making the results of internal disciplinary investigations available for use in the investigation or prosecution of the individuals responsible for the offense.

The first principle above is intended to signal to the courts the role of the punitive injunction as a standard form of sentence to be used where an organizational defendant has committed a serious offense and is at fault. As in the case of imprisonment, there is no pre-condition that the court must find that a punitive injunction is reasonably related to the nature of the offense or reasonably

⁶⁵ Cf. U.S.C. s. 3563(a)(2).

necessary for the purposes of sentencing.⁶⁶ The second principle indicates the distinctively punitive status of punitive injunctions, and the exclusively remedial role of probation. The third principle expressly makes allowance for cases where the defendant has taken reasonable precautions before and after the offense, and restricts the application of punitive injunctions to cases where the defendant is blameworthy.⁶⁷ This principle is structured so as to provide an incentive to defendants to take compliance precautions against committing an offense and, in the event of an offense being committed, to take disciplinary action, to assist the authorities in their investigation of individual personnel implicated in the offense, and to modify compliance precautions in light of any deficiencies apparent from the background to the offense.

The punitive dimension of punitive injunctions is more central. The animating idea is to intervene in the organizational processes of a corporate offender in some punitively demanding way that reflects the aims of corporate criminal law. The most obvious organizational processes worth subjecting to punitive intervention are policies and procedures relating to internal discipline and compliance with the law. Instead of requiring a corporate offender merely to take reasonable precautions by way of internal discipline or compliance programming it is possible to punish a defendant by requiring extra steps to be taken. In more concrete terms, it could well be a mandatory condition of a punitive injunction that the defendant undertake a program with three punitive essences:⁶⁸ first, a task force involving a range of senior and middle managers; secondly, an intensive internal disciplinary program; and thirdly, a comprehensive and rigorous review and revision of accountability mechanisms and compliance precautions relating to type of offense for which the defendant has been convicted. A less demanding mandatory condition would be appropriate in cases where a defendant has reacted to the commission of an offense by taken reasonable steps by way of internal discipline or in respect of internal compliance controls but not in relation to both. For that situation the mandatory condition of a punitive injunction could be that the defendant deploy a task force to conduct an intensive internal disciplinary program if reasonable

⁶⁶ Cf. U.S.C. s. 3563(b).

⁶⁷ It may be argued that punitive injunctions are inappropriate if reasonable precautions have been taken after the commission of the offense to guard against repetition. The view taken here is that where the defendant was at fault in not preventing a serious offense the gravity of that conduct may well warrant a punitive injunction. The terms of the punitive injunction would take account of the reasonable steps taken since the commission of the offense and require the defendant to go further, as by improving the corporation's internal disciplinary code or by enhancing the reformatory steps already taken.

⁶⁸ There are other possibilities, including insistence on facilitation of restitution in ways that would not be required as a matter of remedy.

steps have not been taken in that area, or a rigorous compliance review and revision program if reasonable precautions have not been taken in relation to the defendant's compliance system.

The use of a corporate task force for dealing with crises is not uncommon, one example being the 30-strong task force deployed by Ford in response to the emissions-testing fraud that occurred in 1971-1972.⁶⁹ The far more typical response to corporate offenses, however, is to downplay them and to leave their resolution to routine legal procedures. The punitive injunction offers a method for elevating serious offenses on the corporate agenda and for insisting that management respond to them as a matter of gravity and high priority. This approach is punitive in that it goes beyond what has been required of corporations under civil injunctions aimed at preventing repetition of offenses. There is also a conscience-arousing thrust that transcends the usual limits of civil injunctive relief; to force a task force to react in a considered way to the commission of an offense is to agitate the nerves of corporate governance. In order to achieve these intended punitive effects it would be necessary to provide that the task force include representatives from senior and middle management as well as from subordinate ranks;⁷⁰ not to ensure involvement by senior and middle management would allow too ready an opportunity to enlist tools or scapegoats. It would also be desirable to specify the minimum and maximum numerical strength of the task force, as by dividing the quantum of the punitive injunction imposed by upper and lower limit factors.

The second punitive element suggested is that the task force be required to undertake an intensive internal disciplinary program. The punitive factor here lies in the depth of the internal disciplinary action required; the aim is to go beyond the limits of comparable civil injunctions that have mandated internal disciplinary action.⁷¹ Another punitive depth factor is the likelihood of intensive disciplinary inquiries generating evidence of offenses by individual personnel and thereby increasing the risk of criminal prosecution. Plainly enough, legislative guidance would be needed as to what is meant by punitive depth of inquiry. The concept could be elaborated in terms of the need to provide a full account of the role in the offense of personnel or classes of personnel specified by the court, supported by detailed sworn statements. Another relevant parameter is the level of protection afforded to personnel who are subject to the internal disciplinary process. What might be done is to insist on a report that sets out any statement that the person disciplined wishes to make in response to the investigation and disciplinary outcome. This type of protection goes beyond what is customarily expected in the context of civil injunctions mandating internal disciplinary inquiries.

⁶⁹ See Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 60.

⁷⁰ Provision would also need to be made for the employment of independent contractors where necessary for the success of the undertaking.

⁷¹ See e.g., Insider Trading and Securities Fraud Enforcement Act of 1988 (1988) 1304 CCH Federal Securities Law Reports 1, esp. at 20-22.

The occasion to impose punishment on a corporate offender creates the opportunity to demand an uncustomary yet prudent safeguard against the risk of employees being victimised or scapegoated.⁷²

The third punitive element advanced is the requirement that the task force comprehensively and rigorously review and revise accountability mechanisms and compliance precautions related to the type of offense subject to sentence. Again, the punitive stratagem is to go beyond the remedial limits of intrusions into organizational processes. The punitive component is partly the extent and the rigour with which a corporate offender is obliged to review its accountability and compliance controls. Another punitive factor is the pressure placed on the defendant to come up with better solutions; the sanction is intended to spur the defendant to innovate. In implementing these ideas, legislative guidance might usefully be given as to the considerations that are usually relevant when assessing the worth of accountability procedures and compliance programs. There is now a wealth of experience in this area, with many leading models. A well known instance from the early 1980s is the exemplary work of Allied in revising its compliance systems after the Kepone disaster.⁷³ More recently, in the field of money-laundering and cash transactions reporting, the Bank of Boston has devised compliance controls that have set a standard for other financial institutions, in the U.S.A. and abroad.⁷⁴ At the same time, there is no shortage of room for innovation and change. A prime example is the problem of devising internal disciplinary codes that protect the interests of employees without bogging corporations down in a legalistic swamp of rules and regulations; extremes are apparent in the corporate world today, ranging from the absence of internal disciplinary codes to unimaginative clones of the criminal justice system.⁷⁵ It is of course impossible to legislate the exact form of organizational revision required. The approach contemplated is that a corporate offender would be asked to prepare a pre-sentence plan setting out the nature and goals of what it proposes to do by way of review and organisational revision.⁷⁶ Where necessary, modifications could be made by the court imposing sentence.

⁷² As to the rights of individuals within organizations see further M.D. Bayles, *Procedural Justice* (1990); A.F. Westin and S. Salisbury (eds.), *Individual Rights in the Corporation* (1980).

⁷³ See Fisse and Braithwaite, *The Impact of Publicity on Corporate offenders* (1983), ch. 6.

⁷⁴ See further B. Fisse, "Controlling Liability under the Money Trail Legislation" in B. Fisse, D. Fraser, and G. Coss (eds.), *The Money Trail: Cash Transactions Reporting, Money Laundering, and Confiscation of Proceeds of Crime* (1992, forthcoming).

⁷⁵ See further Bayles, *Procedural Justice*; Westin and Salisbury (eds.), *Individual Rights in the Corporation*.

⁷⁶ As under U.S.S.C.G. s. 8D1.4(c)(1). See further Gruner, "To Let the Punishment Fit the Organization" at 82-85.

Sentences in most systems of criminal justice are usually quantified with a view to consistent application and fair notice of the level of punishment imposed or threatened.⁷⁷ How might punitive injunctions be quantified? In theory, punitive injunctions could be quantified in terms of monetary cost, excluding the cost of remedial action required under the injunction or otherwise reasonably expected in relation to disciplinary action and compliance controls. Maximum or guideline range amounts for various offense levels might then be specified accordingly.⁷⁸ In practice, however, the financial costing would be complex and, in any event, inexact. Another possible approach would be to use task force time as a surrogate measure. The terms of a punitive injunction would spell out the hours to be expended by the task force in complying with the punitive component of the injunction. Maximum or guideline range amounts for different offense levels could then also be expressed in terms of time. Approximate as a time-based method of quantification is, it would be less complicated to apply than a costing formula.

B. Potential advantages of the punitive injunction as a means of reflecting the aims of corporate criminal law

The punitive injunction is derived specifically from the aims of deterrence and retribution and therefore reflects those aims. This gearing of means to ends results in an approach that is responsive to the previously identified weaknesses of the U.S. Code and the Sentencing Commission's *Guidelines*. The potential advantages may be summarised as follows.

(1) Power to punish as well as to remedy

An initial advantage of the punitive injunction lies in its punitive as distinct from remedial power.

(a) The punitive injunction is a discrete and severe sanction for use where punitive as opposed to merely remedial interventions in organizational processes are warranted by the gravity of an offense. Unlike the U.S. Code, the punitive potential of intervention in organizational processes is not blurred by using probation, which traditionally has been a remedial form of disposition. Moreover, unlike the Sentencing Commission's *Guidelines*, which seem preoccupied with the remedial capacity of probation, the punitive injunction is dedicated to intervening in organizational processes in such a way as to combine punishment with remedy.

⁷⁷ The punitive mode of probation under the U.S.C. stands out as an exception.

⁷⁸ This paper does not address the difficulties that arise in applying retributive principles of proportionality, as to which see Schlegel, *Just Deserts for Corporate Criminals*, chs. 8-9.

(b) The punishment of corporations for serious offenses is not cramped by a requirement that there must be a finding in each particular case that the sanction is "reasonably related" to the aims of relationship" or is "reasonably necessary". The punitive injunction, unlike probation under the U.S. Code or Sentencing Commission's *Guidelines*, is a standard form of severe sanction that applies to serious offenses in a manner parallel to the standard use of imprisonment for serious offenses in the context of individual criminal liability.

(c) A hierarchy of sentencing options wherein the punitive injunction is available as the most severe option would plainly manifest the unwanted nature of serious corporate crime. Unlike a regime of fines of the kind proposed in the Sentencing Commission's *Guidelines*, the message conveyed would be that serious offenses do not reduce merely to financial expenses of business but are prohibited and punishable by forcible intervention in corporate choice.

(d) The punitive injunction is the antithesis of a pricing approach to the control of corporate crime. Unlike the Sentencing Commission's *Guidelines* approach to fines, the emphasis is prohibitory and does not depend on what it will cost an average offender to offend. The point of the punitive injunction is to impress on organizations that crime is not worth the risk regardless of whether the organization is risk-preferring rather than average in its management of risk, or risk-underestimating rather than average in its calculation of risk.

(2) Ability to produce sanctioning impacts consistent with the nature of corporate behavior

The punitive injunction is a multi-impact sanction consistent with various models of corporate decision-making.

(a) From the standpoint of the Rational Actor Model of corporate decisionmaking,⁷⁹ the values affected by a punitive injunction are mainly threefold: money (financial cost of compliance with the injunction), power (detraction from managerial autonomy), and prestige (reputational loss from degradation of status as a self-determining agent). Allowance is thus made for the range of values typically influential within business as well as governmental corporations. In the context of corporations driven by a single-minded obsession with money, the punitive injunction allows the law to re-concentrate the corporate mind, as by requiring representatives from all levels of management to serve on a task force for the review and revision of compliance procedures. The Sentencing Commission's *Guidelines*, in stark contrast, depend primarily on fines and hence are locked into monetary disincentives.

⁷⁹ Kriesberg, "Decisionmaking Models and the Control of Corporate Crime".

(b) The punitive injunction insists on the rectification of crime-conducive organizational processes and therefore mirrors the Organizational Process Model of corporate decisionmaking.⁸⁰ In contrast, the U.S. Code is more oblique: probation might be used to require defective operating procedures to be rectified but no express guidance is given; steps to improve organizational processes are relevant in mitigation of sentence but this an incentive, not a directive. In further contrast, the Sentencing Commission's *Guidelines* rely mainly on fines to bring about the revision of crime-conducive organizational processes; fines leave the task of organizational revision to the discretion of the offender.

(c) A feature of the punitive injunction is the use it makes of corporate liability as a lever for attaining individual accountability. Unlike fines or monetary penalties, the punitive injunction promotes individual accountability in a variety of specific ways: by requiring the collection of evidence with a view to prosecution of suspects; by demanding disciplinary action against those who have violated internal rules; and by pin-pointing those who are responsible for complying with the terms of the injunction. In contrast, the U.S. Code and the Sentencing Commission's *Guidelines* neglect the importance of individual accountability as a means of social control and do not adequately address the possibility of using the internal justice systems of organizations to promote accountability. Much faith is placed in fines to bring about individual accountability, especially under the Sentencing Commission's *Guidelines*, but the payment of a fine hardly ensures that such a result will occur.

⁸⁰ Ibid.

(3) Compatibility with the conception of corporations as responsible, blameworthy entities

The punitive injunction gives expression to the view that blameworthiness is a central factor when assessing the seriousness of corporate offenses and in determining the type of sentence to be imposed.

(a) Under the legislative scheme proposed above, a punitive injunction may not be imposed if the defendant shows that it has taken reasonable precautions to prevent the commission of the offense in the first place, and reasonable precautions to prevent a recurrence. Corporate blameworthiness is thus expressly recognised as a critical factor. There is no parallel under the U.S. Code; the degree of blameworthiness of an organizational defendant may be taken into account when assessing sentence but the weight to be given to this factor is obscure. The Sentencing Commission's *Guidelines* do deal explicitly with the factor of corporate precautions but the weight attributed is so low as to amount to a rejection of the fundamental postulate of the criminal law that persons subject to liability are to be treated as blameworthy, responsible entities; the corporation is treated more as a financial engine the throttle of which is to be regulated by imposing fines of calibrated amount.

(b) The concept of reactive corporate fault is recognised and embodied in the scheme for punitive injunctions that has been advanced. This concept could be recognised and applied under the U.S. Code but no clear guidance is given. The Sentencing Commission's *Guidelines* embody the concept but, because of the devaluation of the significance of blameworthiness in the sentencing of organizational defendants, give it insufficient weight.

IV Constraints

As we have tried to show, fertile ideas about means may usefully be generated by looking at ends. Account must also be taken of constraints.⁸¹ Sanctions against corporations are highly problematical in this regard. Corporations have widespread and pervasive impacts on employees, consumers, suppliers, neighbourhood, and society generally; care must therefore be taken not to let loose sanctions that will have unacceptable spillover and other side effects. There is also the spectacular diversity of corporate organizations, a factor that haunts any attempt to come up with workable ideas for sanctions. Another major concern is the risk of evasive counter-tactics; the corporation has acquired a devilish reputation for subterfuge, cover-up and other misguided feats of ingenuity.

⁸¹ As regards the logic of goals and constraints see S. Eilon, "Goals and Constraints in Decisionmaking (1972) 23 *Operational Research Quarterly* 3.

These and other constraints⁸² may lead one to accept or reject a given form of sanction even if that sanction might otherwise seem promising as a means of punishing organizational defendants. What do they reveal about the punitive injunction? Are they such as to lead one to modify means to the extent of rejecting the punitive injunction altogether? Alternatively, what modifications should be made to the basic design of the punitive injunction proposed earlier?

A. Rethinking constraints

The orthodox assumption about the possibility of devising a corporate sanction comparable in severity and punitive expression to imprisonment is that the more punitive the sanction the less the chance of satisfying the constraints mentioned above. This assumption underlies the rejection under the Sentencing Reform Act of 1984 of the idea of punishing corporate offenders by means of bans on business.⁸³ However, it is questionable whether that orthodoxy is well-founded.

Considering the following hypotheses, which are intended to clear the mind of conventional preconceptions:

- (1) the more punitive and intrusive the capability of a corporate sanction the more the control over the risk of unacceptable spillovers and unwanted side-effects;
- (2) the more punitive and intrusive the capability of a corporate sanction the more suited its application to diverse kinds of organization;
- (3) the more punitive and intrusive the capability of a corporate sanction the greater the prospect of achieving a consistent impact; and
- (4) the more punitive and intrusive the capability of a corporate sanction the greater the capacity to control or discourage evasive tactics.

At first glance these hypotheses may seem heretical or possibly even absurd. Reactions of such a kind, however, owe more to old ways of thinking about corporate sanctions than to an open-minded exploration of ends, means, and constraints. As we have seen, rethinking the relationship between

⁸² Other constraints include: (1) management of uncertainty; (2) using rewards and other positive sanctioning effects; (3) minimisation of costs of administration; (4) compatibility with civil measures of regulation; (5) constitutional limitations, including the prohibition against cruel and unusual punishment; and (6) protection of the interests of personnel subjected to internal discipline. These are not addressed in the present paper, which is more an introduction to the potential of the punitive injunction than an attempt to provide a comprehensive blueprint.

⁸³ S. Rep. No. 225, 98th Cong., 1st Sess. 97 (1983). But see H.R. Rep. No. 101-446, 101st Cong., 2d Sess. (1990) (proposal for corporate capital punishment of corporations convicted of money laundering offences).

the ends and means of corporate criminal law generates the concept of the punitive injunction. In turn, that concept invites reconsideration of the relevant constraints and what they mean for responsive sanction design. Just as constraints may influence our decisions about means and ends, the ends-means relationship may also affect our assessment of constraints.

B. Constraints and the punitive injunction

In this section we indicate how the concept of the punitive injunction affects certain major and well-known constraints upon the design or application of sanctions against corporations.

(1) Unacceptable spillovers and unwanted side-effects

A feature of the punitive injunction is its ability to focus on the internal control systems of organizational defendants, thereby going to the innermost point of sensitivity. The impact of punishment is directed at a key region within the corporation rather than at the blank exterior of the corporate mass. This means that the impact of a punitive injunction falls primarily on management: the sanction requires a managerial task force to undertake a program of internal discipline or organizational reform, an impact that must be borne by the task force. Moreover, significant non-financial costs are imposed and, unlike fines against corporations, these non-financial costs cannot be deflected to shareholders, consumers and others in the way that fines can be passed on. To this extent the spillover effects can be minimised.

The more fundamental point, however, is that the punitive injunction re-orientates our thinking about unwanted spillovers and side effects. Non-insistence on individual accountability is an unwanted side effect of reliance on financial sanctions against corporations. Worse, it is a side-effect that undermines the postulate, long espoused in Western societies, that individual accountability is essential to the maintenance of social control. The punitive injunction addresses this problem by expressly requiring internal disciplinary action together with assistance in gathering evidence of individual criminal liability. The more extensive the involvement of personnel in an offense the broader and more penetrating the insistence on accountability under a suitably crafted punitive injunction. Hence the hypothesis that the more punitive and intrusive the capability of a corporate sanction the more the control over the risk of unacceptable spillovers and unwanted side-effects.

It may be nonetheless be objected that the punitive injunction would eliminate one kind of spillover at the expense of creating another, namely the costs resulting from a regime of official intervention in the internal affairs of corporations. However, there need not be any unacceptable level of costly supervision and monitoring. It is a mistake to think in terms of the bogie of nationalisation of private enterprise that is the bane of all Right-thinking entrepreneurs. The sentencing criteria that govern the use of punitive injunctions could and should maximise freedom of enterprise in compliance systems. One possibility would be to stipulate in the empowering legislation that,

wherever practicable, corporate defendants be given the opportunity to indicate before sentence what disciplinary and other steps they propose to take in response to their conviction. Another safeguard is a pyramid of enforcement⁸⁴ under which punitive injunctions are reserved for the worst cases and where liability is structured so that corporations have the choice of complying with the law or suffering a progressive and rapid escalation of remedies and punishments until they do comply. Such an approach means that corporations which persistently fail to comply may ultimately have to bear heavy costs of external intervention but that is a fate they are free to avoid inflicting upon themselves.

(2) Organizational diversity

The punitive injunction relates to managerial processes and thereby focusses on a feature of organizational life that is common to all forms of organization. Governmental instrumentalities, partnerships, large corporations, small family companies and trade unions are all governed by some managerial system and hence the capability of the punitive injunction to deliver much the same kind and degree of punitive impact whatever the type of organization.⁸⁵

One consequential advantage of the punitive injunction is its ability to punish organizations that have insufficient liquidity or future earning capacity to pay a fine of the amount needed to reflect the seriousness of the offense. This "deterrence trap"⁸⁶ can be skirted by exposing the organization to intrusive controls that require no financial outlay and yet which achieve a punitive impact by cutting back the autonomy and freedom of the offender.

The punitive injunction is also responsive to the difficulties posed by governmental instrumentalities that commit serious offenses.⁸⁷ Imposing fines on such organizations is often problematic, partly because they are not profit-making businesses, and partly because to impose a fine may simply mean that the burden will be transmitted to taxpayers or ratepayers. The punitive injunction, unlike the fine, does not presuppose that the organization will be profit-oriented. Furthermore, the mode of

⁸⁴ See Braithwaite, *To Punish or Persuade*, 142.

⁸⁵ It may not always be appropriate to administer exactly the same kind of impact. The various precepts of responsibility adopted internally within organizations may require punitive injunctions to be shaped in accordance with the particular kind of responsibility that makes sense within the organization. See further J. Braithwaite and B. Fisse, "Varieties of Responsibility and Organizational Crime" (1985) 7 *Law & Policy* 315.

⁸⁶ Coffee, "'No Soul to Damn: No Body to Kick'", at 389-393.

⁸⁷ See generally P.N. Grabosky, *Wayward Governance* (1989).

punishment is not infliction of a monetary liability but detraction from autonomy, which is an impact borne primarily by managers rather than by taxpayers or other bystanders.

The prime talent of the punitive injunction, however, is its ability to deal with recalcitrant or egregious offenders. Fines and probation may make little or no impact on the worst kinds of corporate offenders and hence the need for a sanction with more teeth. The advantage of the punitive injunction is that the level of punitive impact can be adjusted from a relatively low level up to whatever level is commensurate with the gravity of the offense and the blameworthiness of the offender. Thus, for an offender that has persistently failed to comply with anti-pollution requirements, particularly stringent monitoring and supervisory precautions can be imposed. One possibility would be to insist on the appointment of a vigilance committee, with outside representation, and to require that committee to submit regular assurances to the court that the conditions that led to the offense have been rectified. In the event of further repetition of the offense, it may well be necessary to impose a punitive injunction that subjects the corporation to a period of official management, the replacement of all existing management, and ongoing supervision by a vigilance committee. In other words, the degree of punitive intervention can be escalated according to whatever the level of intransigence displayed by the particular organization. It is in this way, above all, that the punitive injunction bears out the hypothesis that the more punitive and intrusive the capability of a sanction the more suited its application to diverse kinds of organization.

(3) Consistent impact

A reputed advantage of fines is that they can be assessed on a calibrated and consistent scale.⁸⁸ The apparent consistency, however, is more formal than real. Actual consistency seems more attainable by means of the punitive injunction.

There is a critical difference between the formal court-ordered amount of punishment and the actual impact upon the particular offender.⁸⁹ Any sanction can be quantified in some way that allows formal court-ordered consistency of measurement, as is apparent from the time-based quantification of punitive injunctions discussed earlier.⁹⁰ The real problem is achieving consistency of actual impact. The actual impact of the same level and kind of punishment may vary tremendously from

⁸⁸ The issue of consistency in sentencing is complex and no attempt is made here to discuss the various conceivable orderings of underlying goals and constraints. See further A. Blumstein, "The Search for the Elusive Common 'Principle'" (1987) 82 *Northwestern University Law Review* 43.

⁸⁹ Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 310-312.

⁹⁰ Section III(A). See further Gruner, "To Let the Punishment Fit the Organization" at 60-63.

offender to offender and the variation may be out of the effective control of the court.⁹¹ Thus a seemingly high fine of \$1 million for misleading advertising may in fact be minor for the offender if it is able to pass on the costs to consumers. It is thus a mistake to suppose that, because fines can be assessed on a neat scale, real consistency is thereby attained.

If we seek real consistency in the impact of sanctions against organizations for what kind of impact should we look? Assuming that civil restitutionary remedies can be used to provide redress for harms occasioned by corporate offenses,⁹² then the main impact that should be sought is effective crime-preventive management within organizations. Is that impact likely to be achieved consistently by use of fines? It is difficult to accept that fines are capable of delivering the consistency desired. First, fines have an indirect impact on management: they do not require institutional reform or indeed anything more than the writing of a cheque. Secondly, even at the level of financial impact, the effect of a fine often depends on such vicissitudes as parent-subsidiary funding structures, current profitability of the firm, expected future profitability, access to loans, interest rates, and monopolistic ability to pass on fines. Thirdly, the calculus of fines depends on allowance being made for the risk of detection and conviction and in practice it is difficult or impossible to assess this risk accurately.⁹³

In contrast, the punitive injunction is a sanction dedicated to achieving effective crime-preventive management.⁹⁴ A court can insist that adequate internal controls are in place within a defendant's organization and reinforce that insistence and can do in a punitive way that provides additional assurance of compliance with the expected standard of managerial control. Thus, a manufacturer that repeatedly violated occupational health and safety requirements might be required to introduce additional means of internal supervision to the standard enforceable by means of a civil injunction or probationary order. The punitive dimension could be an insistence by the court that the changes be made within a tight time-frame, involve top management, and be subject to ongoing monitoring by a special vigilance committee or auditor.

⁹¹ For an interesting empirical study see American Bar Association, *Collateral Consequences of Convictions of Organizations* (1991).

⁹² See U.S.S.C.G. s. 8A1.2. This is not to deny that monetary redress cannot make up for many offenses, especially offenses against the person.

⁹³ Coffee, Statement to U.S. Sentencing Commission Hearing, New York, 11 Oct. 1988.

⁹⁴ This is not to deny the uncertainty that surrounds attempts to control corporate behavior. For useful studies of the complexities and risks that can arise see Sherman, *Scandal and Reform*; D. Vaughan, *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct* (1983); Vaughan, "Autonomy, Interdependence, and Social Control: NASA and the Space Shuttle *Challenger*".

The punitive element in punitive injunctions is thus a means of reinforcing the standards of compliance reasonably expected of organizations in the relevant field of endeavor. The more recalcitrant the offender then the greater the justification for resort to punitive reinforcement of the standard of care and the higher the chance of ensuring that the standard is attained.

(4) Corporate evasion

An acid test of any sanction against corporations is its resistance to evasive counter-tactics. Corporations are notorious for manipulating the law to their own advantage and there is reason to suppose that any sanction deployed against them will be tested to the limit.

A number of steps can be taken to minimise the risk. The first is provide an array of sanctions, including the punitive injunction, that offer a powerful disincentive against corporate non-compliance. It is then not in the rational self-interest of corporations to feign compliance or otherwise try to evade the law because the risks on the downside can be raised progressively to an intolerable level. This strategy is supported by several game theoretic analyses of corporate regulation. John Scholz has argued that the optimal strategy across a range of plausible pay-offs in the regulatory game is "tit-for-tat", with punishment being held back so long as the corporation cooperates with the enforcement agency in working toward compliance.⁹⁵ John Braithwaite has advanced this analysis in terms of what he describes as an enforcement pyramid - a set of enforcement options specified by the enforcement agency in ascending order of escalation.⁹⁶ The options in the enforcement pyramid range from informal advice and warnings at the base of the pyramid to criminal liability with severe sanctions at the apex. More recently, Ian Ayres and Braithwaite have argued that the taller the enforcement pyramid, the more the levels of possible escalation and the greater the pressure that can be exerted to motivate "voluntary" compliance at the base of the pyramid.⁹⁷ Assuming that corporations are rational actors, and provided that the punitive injunction is part of a pyramid of enforcement, then the dice are loaded against corporate evasion.

A second safeguard is to designate individual representatives of the company as parties responsible for complying with the terms of the punitive injunction. The aim is to make it quite clear that heads will roll in the event of non-compliance, and to facilitate prosecution where individual criminal liability is warranted. This technique is often used in injunctions obtained by U.S. enforcement

⁹⁵ J. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement" (1984) 18 *Law & Society Review* 179.

⁹⁶ *To Punish or Persuade*, 142.

⁹⁷ "Convergence in Models of Regulatory Compliance" (forthcoming).

agencies. It is consistent with the empirical research that has confirmed the importance of the attitude of top management toward compliance efforts.⁹⁸ It is also in line with the self-regulatory practice of using a managerial task force to deal with a crisis, one example being the 30-strong task force deployed by Ford in response to the emissions-testing fraud that occurred in 1971-1972.⁹⁹

A third safeguard is to equip courts with the power to insist upon monitoring and supervisory controls where necessary to deal with untrustworthy defendants. There are various possibilities, ranging from internal monitoring committees,¹⁰⁰ to receivership, with the costs in all cases to be met by the corporation. The underlying strategy is to exploit the spirit of voluntary cooperation within corporations but to escalate the degree of intervention in the manner required to deal with any given level or type of intransigence. Thus, the more the intransigence the greater the degree of interference and the higher the consequential cost of compliance to the corporation.

These safeguards revolve around the punitive injunction, which provides a potent weapon for thwarting corporate attempts to evade their compliance responsibilities. Bearing this in mind, there is some validity in the hypothesis that the more punitive and intrusive the capability of a corporate sanction the greater the capacity to control or discourage evasive tactics.

⁹⁸ M. Clinard, *Corporate Ethics and Crime: The Role of Middle Management* (1983); J. Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems" in Fisse and French (eds.), *Corrigible Corporations and Unruly Law*, ch 3.

⁹⁹ See Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, ch 4.

¹⁰⁰ See e.g., *United States v Western Electric Company*, Civil Action No. 82-0192 (U.S. Dist Ct., D.C., Consent order); *Corporate Crime Reporter*, Oct. 29, 1990, 8 (independent safety adviser appointed to monitor safety at Mobil Oil's Torrance refinery).

V Conclusion

Edwin Sutherland's main aspiration - reducing the differential implementation of the criminal law - could well be pursued by re-equipping our corporate criminal law with a new sanction -the punitive injunction.¹⁰¹ This idea is ironical because it was the injunction which Sutherland himself was at pains to criticise as an unduly civil means of social control. Vivid as Sutherland's sociological imagination was, it was not matched by a creative sense of how the law might usefully be reconstructed to accord with his vision. Nor did he anticipate the key role later played by the injunction in the institutional reforms brought about by the civil rights movement.¹⁰²

Looking ahead, the question is whether the injunction will be adapted and armed for use as a criminal sanction against corporate offenders. The prognosis offered here is that Sutherland's work will lead to such a development and that the punitive injunction will become a living tribute to his achievement.

¹⁰¹ This is not to suggest that all the eggs of sanctioning should be put in this basket. There needs to be an array of sentencing options, including probation, adverse publicity, community service, and fines. See further Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 313-314.

¹⁰² See Fiss, *The Civil Rights Injunction*.

