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Coordinating Sanctions for Corporate Misconduct: Civil or Criminal Punishment

David Yellen

Carl J. Mayer

COORDINATING SANCTIONS FOR CORPORATE MISCONDUCT: CIVIL OR CRIMINAL PUNISHMENT?

David Yellen*
Carl J. Mayer**

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* Assistant Professor of Law, Hofstra University School of Law. B.A. Princeton University; J.D. Cornell Law School.

** Assistant Professor of Law, Hofstra University School of Law. B.A. Princeton University; J.D. University of Chicago Law School; L.L.M. Harvard University Law School.

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I. INTRODUCTION

Perhaps never before in American law has the boundary between criminal and civil law been so blurred.[1] One reason for this fading distinction is the expanding criminalization of conduct previously dealt with by civil law.[2] Another is the proliferation of civil and administrative sanctions. Although criminal conduct always exposes the offender to potential civil liability, recently the variety and scope of the "collateral" sanctions in the government's arsenal, and the willingness of prosecutors and regulators to pursue them, have increased dramatically. The line between civil and criminal enforcement is further eroded because these collateral sanctions frequently result in penalties that appear distinctly punitive or "criminal" in nature.

Consider the example of a corporation convicted of defrauding the Defense Department. Several non-criminal consequences may follow:

(i) the corporation may be suspended from government contracting;[3]

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1. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (development over past decade has been blurring of line between civil and criminal law). This is, in effect, a return to the original conception of English law which made no clear distinction between civil and criminal law. In pre-Norman England, for example, there was no distinction between tort and crime: there was merely one unified law of "wrongs." In the Saxon period (600-1000 A.D.) punishment for killing a man was payment to the decedent's relatives (who also prosecuted the case). The action looked more like a wrongful death action than a crime.

When blood feuds — which were an early way of meting out punishment for a crime — were replaced with the "bot" system, it became more common to substitute monetary compensation for vengeance exacted by violence. This system of payments also looked civil. Eventually payment of amercements for any breach of the King's peace made the criminal law of England look very civil (and some would argue similar to our system of forfeiture today). SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 449-51 (2d ed. 1923).

Only in the 18th and 19th centuries was any attempt made to regularize and systematize the criminal law according to some moral scheme. Modern retribution and deterrence notions are derived from the natural law philosophers. By the second half of the 19th century strong distinctions between criminal and civil law had emerged. The Sherman Act, for example, led the way in "criminalizing" economic actions that had once thought to have only civil implications. Jed S. Rakoff, *Is That a Crime?*, N.Y. L.J., Nov. 14, 1989, at 3.

2. *See* Coffee, *supra* note 1, at 199; Rakoff, *supra* note 1, at 3. (discussing the artificial distinction between tort and criminal law.) There are many difficult issues surrounding the legitimate scope of the criminal law. For example, modern technology has created a host of new opportunities for creating property rights in ideas and information. That is leading legal theorists to question the extent to which the use of modern technology should be criminalized. To what extent is using a computer network or sharing data considered merely creative civil work or criminal activity? The law does not as of yet have a clear answer. *See* Steven Brull, *Computer Virus Threat Growing, Posing Tough Legal Questions*, REUTERS, Feb. 28, 1990, *available in* LEXIS, Nexis Library, Wires File (discussing need for creation of new criminal penalties for computer crimes.); Christing McGourty, *When a Hacker Cracks the Code*, DAILY TELEGRAPH, Oct. 22, 1990.

3. *See infra* part II.C.1 (discussing debarment and suspension).

(ii) the firm may be completely debarred from government contracting;[4]
(iii) False Claims Act[5] penalties, including treble damages and fines of up to $10,000 per claim, may be levied;[6]
(iv) other administrative sanctions, such as suspension or removal of corporate officers, can be imposed; and
(v) private civil suits may compound the sanction, often with punitive or multiple damages.

For corporations, the criminal penalty is often merely the visible tip of the liability iceberg. According to statistics of federal prosecutions gathered in one study, from 1984 to 1990, 624 convicted corporate defendants paid criminal fines totalling approximately $215 million, but were assessed collateral sanctions (including restitution and forfeiture) totalling more than four times that amount, or $986 million.[7] The severity of these collateral consequences has grown considerably in recent years.[8]

The boundaries, therefore, between criminal, administrative and civil law can become hazy and arbitrary. A number of proposals seek to rectify this situation. Some commentators argue that the scope of the criminal law should be limited to particularly serious misconduct, allowing civil remedies to allocate responsibility where society wishes to price rather than prohibit conduct.[9] Others urge that constitutional protections applicable to criminal prosecutions — the Fourth, Fifth, Sixth, and Eighth Amendments — be extended to civil actions that seem quasi-criminal or punitive in character.[10] Still others, accepting that legislatures are unlikely to restrict the reach of the criminal law, suggest that the sentencing process, particularly through the device of sentencing Guidelines, draw distinctions between

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4. *Id.*

5. 31 U.S.C. §§ 3729-3731 (1982 & Supp. 1990).

6. *See infra* part II.C.3 (discussing False Claims Act).

7. Mark A. Cohen, *Corporate Crime and Punishment: An Update On Sentencing Practice in the Federal Courts, 1988-90*, 71 B.U. L. REV. 247, 254-55 and tables 1 & 2 (1991). Only two cases — *Sundstrand Corp.* and *Drexel Burnham Lambert* — accounted for well over half of the amount of non-fine sanctions, and for about half of the criminal fines. Even excluding those two cases, however, the collateral sanctions still doubled the criminal fines, by a margin of about $240 million to $124 million. *Id.*

8. *Id.* According to Professor Cohen's data, the mean collateral sanction for organizations convicted between 1984-87 was $93,100. In 1988 the mean rose to $221,868 (if *Sundstrand Corp.* is included the mean rises to almost $950,000). In 1989-90 the mean collateral sanction rose to $1,556,416 ($6,930,000 including *Drexel Burnham Lambert*).

9. *See* Coffee, *supra* note 1, at 194-96, 201-10 (tort law prices, while criminal law prohibits).

10. *See, e.g.*, Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Undertaking and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L. REV. 1325, 1369-89 (1991); Note, *Civil RICO is a Misnomer: The Need for Criminal Procedural Protections under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288 (1987); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974).

"true crimes" and those offenses that may represent overextension of the criminal law.[11]

There is another way to redress the current state of confusion, also focusing on the sentencing process. This article proposes that the sentencing court attempt to identify the punitive component, if any, of a collateral sanction and offset or reduce the criminal sentence accordingly. The underlying principle is simple: no defendant should be punished twice for the same conduct. This axiom is at the heart of the Fifth Amendment's prohibition against double jeopardy.

Until recently, double jeopardy protections had little or no applicability to noncriminal proceedings.[12] This landscape was significantly altered by the Supreme Court's ruling in *United States v. Halper*[13] that the Double Jeopardy Clause places limits on the imposition of punitive collateral sanctions. *Halper*, however, is likely to leave in place many collateral sanctions that are, at least in part, punitive in intent or effect.

The sanctioning system can be unfair and verges on incoherence because of overlapping and cumulative civil and criminal punishments for the same misconduct, even beyond the precise requirements of double jeopardy. This Article concludes that punitive collateral consequences should be considered in calibrating the proper level of punishment for criminally convicted defendants, and suggests ways in which Congress, the United States Sentencing Commission,[14] and the regulatory agencies can properly coordinate these sanctions.

Part Two of this Article surveys the collateral consequences faced by a criminally convicted organization. This survey is necessarily rudimentary because records are incomplete and no systematic attempt has been made to study this phenomenon. The goal is to provide an overview of these sanctions, and to stimulate further study. Part Two also discusses the underlying causes of the rise of collateral consequences.

Part Three develops an argument for considering collateral consequences at the sentencing stage. The reasons include fundamental theories of criminal and corporate law, the Supreme Court's recent interpretation of the Double Jeopardy Clause in *Halper*, and the recent promulgation of organizational sentencing Guidelines by the United States Sentencing Commission.

Part Four suggests how the sentencing process could evaluate collateral

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11. Coffee, *supra* note 1, at 240-46.

12. *See infra* section III.C (discussing United States v. Halper, 490 U.S. 435 (1989)).

13. 490 U.S. 435 (1989).

14. The United States Sentencing Commission, established by the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-998 (1984), is an independent federal agency in the judicial branch charged with developing sentencing Guidelines for offenders convicted of federal crimes. *See infra* part III.D. (discussing Federal Sentencing Guidelines).

sanctions in a systematic fashion, and outlines some areas for further study.

This Article focuses on organizational defendants, but does not suggest that coordination of sanctions is inappropriate for individual defendants; it would be a bizarre system that applied this principle to corporations, but not to real persons. Nonetheless, this Article limits the analysis to organizations for two main reasons.[15]

First, the government is most likely to pursue collateral civil remedies against organizations. Convicted organizations are more apt than individual defendants to have assets or to continue in the business activity that led to the criminal conduct. Collateral civil remedies are most often available for white collar offenses, and a far greater percentage of organizations than individuals are convicted of such offenses.[16] Second, in large measure both criminal and civil sanctions for organizations consist of monetary and specific relief.[17] Imprisonment, the most important sanction for individuals, is not mandated for organizations.[18] Thus, "criminal and civil sanctions are closer substitutes for organizations than for individuals,"[19] simplifying the process of coordinating sanctions for organizations.[20] Ultimately, though, the principles outlined here apply equally to individual defendants.

II. THE RISE OF COLLATERAL CONSEQUENCES

Before analyzing the normative question of whether collateral sanctions should be considered in the criminal sentencing process, this section gives an overview of the collateral consequences facing convicted organizations. After illustrating how organizational defendants are treated in the federal

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15. *See, e.g.*, Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: the Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 529-33 (1988) (discussing unique justifications for coordinating civil and criminal penalties for defendant organizations.)

16. White collar crimes account for fewer than 25% of all federal prosecutions, but approximately 95% of organizational prosecutions. Parker, *supra* note 15, at 532.

17. *Id.*

18. *Cf.* United States v. Allegheny Bottling Co., 695 F. Supp. 856 (E.D. Va. 1988) *aff'd in part, rev'd in part sub nom.*, Pepsico, Inc. v. Allegheny Bottling Co., 870 F.2d 655 (4th Cir.) (court imposed sentence of imprisonment on corporation, but suspended sentence and placed corporation on probation; appellate court rules this was beyond court's power.), *cert. denied*, 110 S. Ct. 68 (1989); NORVAL MORRIS & MICHAEL H. TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 112 (1990) (suggesting for certain corporate offenders "capital punishment by enforced suspension of the corporation and the prohibition of its senior officers later engaging in any form of corporate management or directorship").

19. Parker, *supra* note 15, at 532.

20. In many cases, the coordination proposed in this article will involve offsetting part of an organization's collateral monetary sanction against the criminal fine. *See infra* notes 365-70 and accompanying text (new Sentencing Guidelines include a provision to allow offset). Although the principle of coordination should apply equally to individual defendants, it may be harder to correlate a term of imprisonment and a civil monetary penalty. For some preliminary thoughts on this subject, see *infra* notes 389-90 and accompanying text.

criminal sentencing process, it explains the rise of collateral consequences and surveys the ever-expanding panoply of those sanctions. The sections that follow will argue that to the extent these collateral penalties are punitive in nature and intent, they should be coordinated with criminal sanctions.

A. The Criminal Background

Organizations comprise a small percentage of convicted criminal defendants. For example, between 1984 and 1987, 1,283 corporations were convicted of federal crimes, an average of just over 300 per year.[21] In contrast, during 1985 alone, over 40,000 individuals were convicted of federal crimes.[22]

The principle criminal sanction for organizations is the fine.[23] Until recently, the authorized fine levels for convicted organizations were quite low. Prior to 1985, the statutory maximum varied with the type of offense, but was often set at $5,000 to $10,000.[24] The Criminal Fine Enforcement Act of 1984[25] increased the statutory maximum penalty for corporate offenders to $100,000 per misdemeanor and $500,000 per felony (or misdemeanor resulting in death),[26] but not more than twice the maximum for the most serious offense for counts arising out of the same course of conduct.[27] Alternatively, the sentencing court could fine the organization up to twice the pecuniary gain or loss.[28]

Statutory fines were boosted again with the passage of the Criminal Fine Improvements Act of 1987[29] ("CFIA"). The CFIA increased the maximum fine for misdemeanors not resulting in death to $200,000, and eliminated the provision limiting fines to twice the maximum for the most serious offense.

There is an unmistakable trend towards harsher punishment of convicted

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21. Mark A. Cohen, Chin-Chin Ho, Edward P. Jones & Laura M. Schleich, *Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions and Sanctions, 1984-1987*, 10 WHITTIER L. REV. 103, 111-12 (1988).

22. United States Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1985*, at 31 (July 1990).

23. *See* Parker, *supra* note 15, at 521-22, 528 (with respect to organizational offenses in federal courts, the major form of sentencing is the monetary fine and restitution).

24. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 103 (1983).

25. Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (1984) (codified at 18 U.S.C §§ 3611, 3621-3624, 3565; 26 U.S.C. §§ 6323, 6334 (1984)). The CFEA took effect for crimes committed after January 1, 1985.

26. 18 U.S.C. § 3571.

27. *Id.*

28. *Id.*

29. Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279 (1987).

organizations.[30] According to a recent study by a former staff member of the United States Sentencing Commission, the mean or average criminal fine for corporations convicted of federal crimes between 1984 and 1987 (excluding antitrust convictions) was $48,164.[31] The average fine imposed during 1988 more than doubled, to $98,799.[32] Preliminary data for 1989-90 suggests an even greater increase.[33]

B. The New Emphasis on Collateral Sanctions

Civil sanctions against organizations are an important part of the government's enforcement arsenal. The average collateral monetary sanction imposed on an organization far exceeds the average criminal fine, and the gap between them may be increasing.[34] These civil sanctions take a variety of forms, including monetary penalties, exclusion from participation in government programs, and suspension or debarment from government contracting. They cover a wide range of substantive areas.[35]

The government's imposition of civil sanctions has grown dramatically in recent years. For example, recoveries of civil monetary penalties under the Medicare program increased from $9.5 million in fiscal year 1986, to just under $15 million in fiscal year 1989.[36] Exclusions of health-care providers

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30. A possible explanation for this trend is that Congress has responded to popular pressure for increased penalties for organizations. Congress, in a belated attempt to stem the tide of corporate criminal activity resulting in the savings-and-loan crises, fraud at HUD, and Pentagon scandals, has passed several statutes that trigger collateral consequences for criminal offenders. The prototypical statute is the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). 12 U.S.C. § 1811 (1989) *See infra* note 150. *See also* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, 15 U.S.C.A. § 78a (West Supp. 1991) See *infra* note 224. Over the last ten years, Congress has repeatedly increased the criminal sanctions for "white-collar" offenses by organizational defendants. A major jump in penalties was enacted in 1984, when the maximum fine for many fraud offenses was raised from $5,000 to $500,000. *See* Criminal Fine Enforcement Act *supra* note 25 (improves collection and administration of criminal fines). Further penalty increases followed in 1987. *See* Criminal Fine Improvements Act *supra* note 29 (improves imposition and collection of criminal fines). *See also infra* Section IIID (suggesting changes in penalties that could result from adoption of the United States Sentencing Commission's Guidelines). Recently, the maximum penalty for criminal antitrust violations was raised tenfold, from $1 million to $10 million. Antitrust Amendment Act of 1990, Pub. L. No. 101-588, 104 Stat. 2879 (1990).

31. Cohen, *supra* note 7, at 254 (table 1).

32. *Id.*

33. Cohen, *supra* note 7, at 254 and Table 1.

34. *Id.* at Tables 1-5. Expressed as a dollar amount, this gap has grown dramatically. As a percentage it has also grown, but if the *Sundstrum* and *Drexel* cases are excluded, the gap remains essentially constant.

35. *See, e.g.*, Parker, *supra* note 15, at 530-31 (a table of federal civil remedies available for organizational offenses). *See also infra* Section III (regarding arguments for an increase in coordination of criminal and civil sanctions).

36. Dep't of Health and Human Services, *Criminal, Civil, and Administrative Actions*, 1989 INSPECTOR GEN. ANN. REP. 25. We have not been able to determine to what extent the average Civil Monetary Penalty ("CMP") may have changed during this period. However, because the total number of

from the Medicare program have jumped as well, from 344 in fiscal year 1986 to 696 in fiscal year 1989. Proposed Occupational Safety and Health Act[37] ("OSHA") penalties also have increased steadily, from just over $9 million in 1985 to over $45 million in 1988.[38] Under the civil False Claims Act,[39] government recoveries have increased from $27 million in 1985 to $257 million in 1990, an almost tenfold increase.[40] Overall, the average collateral sanction against organizations increased from $93,100 during 1984-87 to $1,556,416 in 1989-90 ($6,930,00 including the enormous penalties paid by Drexel Burnham Lambert).[41]

Two reasons explain the dramatic expansion of collateral consequences. The first is undoubtedly the rise of the administrative/regulatory state.[42] Accompanying the expansion of the federal bureaucracy — which continued unabated during the 1980's despite professed "deregulation" — was the traditional competition between agencies for prosecutorial dominance.[43]

The second factor is a recent trend toward piecemeal sanctions legislation that has multiplied penalties without sufficient concern for developing an integrated sanctioning process. One symptom of this trend is the "election-year syndrome," in which Congress enacts "omnibus" anti-crime legislation on the eve of biennial elections.[44] Another symptom is the enactment of extensive legislation to deal with immediate problems, such as money laundering or the savings-and-loan scandals, by imposing a variety of new or enhanced sanctions.[45] The result is often a proliferation of overlapping and uncoordinated sanctions. For example, depository institutions now may

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sanctions imposed increased more rapidly than the amount of CMP's, it does not seem likely that there was any significant increase, and indeed there may have been a decrease, in the average CMP during this time period. It should also be noted that the total amount of money recovered during fiscal year 1989, including criminal fines restitution, etc., in addition to CMP's was $81 million. *Id.* at i.

37. 29 U.S.C. § 651 et. seq. (1988).

38. 29 U.S.C. § 666.

39. 31 U.S.C. §§ 3729-3731.

40. *See infra* Section IIC (describing civil monetary penalties, Medicare and Medicaid sanctions, proposed civil penalties issued by OSHA during fiscal year 1985-1986 and the overlapping of civil and criminal penalties).

41. Cohen, *supra* note 7, at Tables 1, 2.

42. On the rise of the regulatory state, see generally CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 1-31 (1990); DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 148-193 (1989) (regarding contemporary business-government relations and changes in the political influence of business in the United States at the federal level); THOMAS K. MCCRAW ET AL., REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS, (Thomas K. McCraw ed., 1981) (regarding government regulation).

43. *See* Butler & Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677 (1988) (discussing the theory that agencies and bureaucracies operate so as to maximize profits and aggrandize themselves). *See also* Posner, *The Behaviour of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984).

44. *See infra* note 46 (reasons for imposing a greater variety of collateral sanctions).

45. *Id.*

face, as punishment for the same fraudulent conduct, criminal fines of up to $1 million per offense, plus civil money penalties imposed by banking agencies of up to $1 million per day, plus civil money penalties sought by the Justice Department of up to $5 million, plus imposition of receivership or conservatorship.[46]

C. *A Survey of Collateral Consequences*

This article now surveys some of the various collateral consequences an organization might encounter (excluding private litigation). This survey is necessarily incomplete and unsystematic. It is unsystematic because detailed and comprehensive records of collateral sanctions are not available. It is incomplete because the sheer range of collateral sanctions at both the state and federal level make it difficult to identify all the potential ramifications of a criminal conviction.

Nonetheless, a survey and analysis of the various consequences that could flow from criminal conviction can help delineate the boundaries between civil and criminal law. All collateral consequences differ in magnitude. Some are unique to an industry, like the exclusion of health care providers from the Medicare program, or the recently-enhanced penalties for misconduct in financial institutions.[47] Some apply more broadly, such as occupational safety or environmental penalties.[48] All collateral consequences, however, can have a major impact on an organizational defendant.

1. Debarment and Suspension

a. Background and History

Probably the most potentially debilitating collateral consequence is revocation of a corporate charter. However, this "corporate death penalty" has never been invoked, although it has been proposed as a state-imposed remedy for certain types of crimes.[49]

After charter revocation, one of the most severe sanctions is government contract debarment, imposed at either the state or federal level. Debarment

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46. There may be particular reasons for imposing a greater variety of collateral sanctions on regulated industries. For example, the government regulates the banking industry more closely than other industries in order to prevent financial catastrophe such as that witnessed during the Great Depression. *Cf. infra* section IIC4.

This does not affect the question of whether these sanctions are punitive. To the extent they are punitive, they raise *Halper* problems and should be coordinated with criminal sanctions.

47. *See infra* section IIC5.

48. *See infra* sections IIC7, IIC8.

49. *See* New York Corporate Decency Act of 1989 (proposed legislation before the New York State legislature). Early proposals for the Omnibus Crime Control Act of 1990 included a "death penalty" for banks, which would have required revocation of the charters of depository institutions convicted of money-laundering offenses. That proposal was deleted from the ultimate legislation.

and suspension are administrative sanctions that disqualify contractors from government contracting and subcontracting.[50] A company that depends on government contracts may suffer the complete loss of livelihood if suspended or debarred.[51] Suspension is a temporary measure that may not extend beyond 18 months, unless the government initiates legal proceedings against the contractor in that period.[52] Debarment excludes a contractor from government contracting for a specified period, ordinarily not to exceed three years.[53]

Suspension may occur when an agency has "adequate evidence" to suspect a contractor of wrongdoing.[54] In the case of debarment, however, the agency must determine that stated grounds in fact exist.[55] If suspension precedes debarment, an agency must consider the suspension period in determining the debarment period.[56]

Suspension, which usually lasts less than a year, usually occurs when government officials suspect some illegal activity has taken place, like receiving notice of an indictment. The government stops giving new business to the company until it determines whether the company can be trusted.[57] Once convicted, the company may be debarred.[58]

Although the authority to use administrative suspensions and debarment existed for many years, the procedures governing these actions were revised in the 1980's to make the government's actions more uniform.[59] The impetus for these revisions was a congressional investigation which found that the government's debarment and suspension regulations were often contradictory and confusing.[60]

Before the adoption of the current regulations in 1984, debarment and suspension procedures were specified in separate civil and military regula-

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50. Federal Acquisition Regulation System ("FARS"), 48 C.F.R. § 9.403 (1990).

51. Even limited suspension or debarment can seriously affect some firms. *See* Gonzalez v. Freeman, 334 F.2d 570, 578 (D.C. Cir. 1964) (asserting that directing government's power at particular contractor may cause severe economic injury); Pan Am World Airways, Inc. v. Marshall, 439 F. Supp. 487, 495 (S.D.N.Y. 1977) (noting that two contracts denied Pan Am constituted 80% of the company's government contract work and were essential to its economic vitality).

52. FARS, 48 C.F.R. § 9.407-4(a), (b).

53. *Id.* §§ 9.403, 9.406-4(a).

54. *Id.* § 9.407-2(a).

55. *Id.* § 9.406-2.

56. *Id.* §§ 9.403, 9.406-4(a).

57. *Id.*

58. *Id.*

59. *See Government-Wide Debarment and Suspension Procedures: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Government Affairs*, 97th Cong., 1st Sess. 1-3 (1981) (regarding procedures of government agencies in debarring and suspending contractors who have defrauded the government or performed poorly on federal contracts).

60. *Id.*

tions.[61] In addition, many civilian agencies had adopted their own regulations tailored to their own unique procurement needs.[62] Under these latter regulations, suspension and debarment were effective only within the agency taking the action, not throughout the government. The congressional investigation found that three problems plagued the suspension and debarment process:

(1) many agencies did not take necessary action to debar or suspend contractors they knew were fraudulent or irresponsible;
(2) agencies failed to share information; and
(3) agencies failed to honor other agencies' debarment determinations.[63]

Responding to these criticisms, government-wide regulations were implemented in 1984.[64] These regulations provide for "administrative debarment" because they are based on agency regulation rather than on statute.[65] Their principal motivation is to avoid certain financial risks, such as waste or fraud, which arise when the government contracts with an irresponsible supplier.[66]

Statutory debarment provisions have been enacted in several contexts to force government contractors to support certain national goals, such as equal employment opportunity, minimum wage standards, and environmental protection.[67] Statutory debarment, therefore, is not primarily intended to protect the federal fisc, but to punish conduct deemed undesirable by Congress.

Suspensions generally have been used when a firm or person is suspected of criminal misconduct, which might ultimately become the basis for debarment. Because a formal debarment proceeding might prejudice a pending investigation in those cases, as well as the contractor's ability to defend against a criminal charge in court, suspension serves as a temporary solution.

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61. *Id.*
62. *Id.*
63. *Id.*
64. FARS, 1248 C.F.R. subpart 9.4.
65. *Id.*
66. *Id.*
67. For example, debarment may occur because of conviction under § 113(c) (1) of the Clean Air Act, 42 U.S.C. § 7413 (c) (1) (1988 & Supp. II 1990) or § 309(c) of the Clean Water Act, 33 U.S.C. § 1319(c) (1988 & Supp. II 1990). The General Services Administration lists dozens of statutes that provide for debarment. *See* United States General Services Administration, *List of Parties Excluded From Federal Procurement or Nonprocurement Programs*, 5-9 (Oct. 10, 1990). *See, e.g.*, Multilateral Export Control Enhancement Amendments Act of 1988 § 2443 (codified as a note to 50 U.S.C. app. § 2401a (1988)); Davis Bacon Act § 3(a), 40 U.S.C. § 276a-2(a).

Criminal activity can also trigger nonprocurement debarment and suspension. Under Executive Order 12549[68] (effective October 1, 1988), corporations can be excluded from government programs other than procurement, including grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, subsidies, and insurance.[69] Nonprocurement debarment and suspension applies uniformly to all government agencies, as does administrative debarment and suspension from procurement.

The debarment and suspension regulations seek to protect government interests prospectively, and expressly disclaim any punitive intent. The regulations state that "the serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment."[70] Some commentators, though, suggest that debarment is often implemented with punitive intent,[71] and that prosecutors often regard debarment as a substitute for criminal punishment.[72] Recent legislative proposals have sought to enact mandatory debarment in some circumstances,[73] a change that would transform the debarment process into a largely punitive sanction that would directly trigger double jeopardy scrutiny.

b. Suspension

Suspension furthers the government's policy of purchasing goods and services only from responsible contractors. An agency cannot employ its suspension power until it finds "adequate evidence" of contractor impropriety or individual wrongdoing, which is imputed to the contractor.[74] Adequate evidence is defined as "information sufficient to support the reasonable be-

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68. Executive Order No. 12549, 3 C.F.R. 188 (1987).

69. *See* 53 Fed. Reg. 19161-211 (May 26, 1988) (establishing a uniform system of nonprocurement debarment and suspension); 54 Fed. Reg. 4722-34 (Jan. 30, 1989) (establishing a uniform system of nonprocurment debarment and suspension, with the intent to prevent waste, fraud and abuse in federal procurement transactions).

70. FARS, 48 C.F.R. § 9.402(b).

71. *See* Gonzalez v. Freeman, 334 F.2d at 576 (debarment not intended to punish).

72. *See* Joseph A. Calamari, *The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 NEW ENG. L. REV. 1137, 1139-40 (1982) (government-wide suspensions and debarment are punishment and administrative agencies are unauthorized to punish citizens). *Cf.* James J. Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests*, 14 PUB. CONT. L.J. 216, 222 (1984) (prosecutors often consider administrative action as adequate alternative to criminal prosecution); Donna Morris Duvall, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors*, 36 AM. U. L. REV. 693, 694 n.7 (1987).

73. *See* New York Corporate Decency Act Proposal, *supra* note 49 (mandatory disbarment of banks for money laundering).

74. FARS, 48 C.F.R. § 9.407-2(b).

lief that a particular act or omission has occurred."[75] Indictment for any one of the following offenses constitutes adequate evidence for suspension:

1) a criminal offense or fraud incident to obtaining or performing on a government contract;
2) violation of federal or state antitrust statutes arising out of the submission of offers to federal agencies;
3) white collar crimes, including embezzlement, theft, and forgery;
4) violations of the Drug-Free Workplace Act of 1988; or
5) any other offense signalling lack of business integrity.[76]

Following a determination to suspend, the agency advises the contractor of the suspension, which takes effect immediately.[77] The contractor is disqualified from contracting with the entire executive branch, not just the suspending agency.[78] Executive agencies may not renew or extend current contracts or award new contracts to that contractor unless the agency head (or designee) states, in writing, compelling reasons for so doing.[79] Suspension does not necessarily affect contracts in existence before the action.[80]

c. Debarment

The stated goal of the debarment sanction is to ensure that the government contracts only with "responsible" contractors.[81] Therefore, the debarment inquiry concerns whether the government can reasonably expect the contractor to act in a responsible manner in the future. Causes for debarment include conviction of, or civil judgment for, the same five categories of conduct relevant to suspension.[82]

A contractor can avoid debarment by showing its "present responsibility" through a demonstration "that it has taken steps to ensure that the wrongful acts will not recur."[83] This showing can involve dismissal of wrongdoers, reorganization of management, or imposition of new legal compliance

75. *Id.* §§ 9.407-2(b), 9.403.
76. *Id.* § 9.407.2 (a), (b).
77. *Id.* § 9.407-3.
78. *Id.* § 9.407-1(d).
79. *Id.*
80. *Id.*
81. *Id.* § 9.402(a).
82. *See supra* note 76 and accompanying text ((1) fraud in contracting; (2) antitrust violations relating to offers; (3) white collar crimes such as forgery or bribery; (4) violations of the Drug-Free Workplace Act; or (5) any offense indicating lack of business integrity).
83. Robinson v. Cheney, 876 F.2d 152, 160 (D.C. Cir. 1989) ("[a]ffording the contractor this opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the Government's proprietary interest and not for purpose of punishment").

procedures.[84]

d. The Enforcement Record

Although debarment and suspension are formidable threats to a convicted corporation, an important question remains: How often are debarment and suspension enforced? It is not easy to answer this question, since the government does not keep systematic records on the causes and consequences of debarment — a fact that has thwarted even investigators from the General Accounting Office ("GAO").[85]

There are two opposing views on the seriousness of debarment as a collateral consequence. The first is that debarment is a toothless tiger. This view notes that even after the "Ill Wind"[86] investigations and widespread revelations of criminal violations in defense contracting, the Department of Defense — the most active enforcer of the debarment and suspension regulations — has never debarred a major defense contractor.[87] Critics further contend that debarment is "used unfairly to punish small firms while letting industry giants off the hook."[88] The argument is that large corporations simply purge the offending employees and institute management controls, while smaller corporations get debarred.[89]

The competing view is that major corporations are not debarred or suspended because their size allows them to take the remedial steps necessary to establish their present responsibility as a contractor. When the owner of a small company has been caught cheating the government, no management controls can assure the government that the company will be a responsible contractor so long as that owner remains in control. By contrast, a larger company can dismiss the wrongdoers, impose new management systems to try to prevent the problem in the future, and carry on.

The available evidence confirms that large corporations are rarely debarred or suspended. According to the General Services Administration, only four Fortune 100 corporations in the last decade have been suspended by any government agency.[90] In the case of the Pentagon, twenty-five of the

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84. *See* 48 C.F.R. § 9.406-1(a) (provision allowing consideration of mitigating factors).

85. General Accounting Office, *Procurement: Suspension and Debarment Procedures*, GAO/NSIAD-87-37BR, Feb. 1987, at 27.

86. "Ill Wind" was a three year investigation by the Justice Department into military contracting fraud.

87. Debra Polsky, *Debarment Confounds Industry; DOD Process Criticized as Punitive Unfair and Arbitrary*, DEFENSE NEWS, June 25, 1990.

88. *Id.*

89. *Id.*

90. Response to a Freedom of Information Act Request submitted by Essential Information Inc. November 6, 1990. According to the GSA, General Electric was suspended by the Air Force for five months in 1985. Boeing Computer Services was suspended by the Interior Department for two months in 1984. Unisys was suspended by the Navy for three months in 1989. General Dynamics was sus-

100 largest military contractors have been found guilty of procurement fraud in the last seven years, but none has been debarred.[91] In the last two years, government prosecutors have secured sixteen convictions or guilty pleas involving the 100 largest contractors.[92] The largest fine was $18.3 million, assessed against the General Electric Corporation on February 2, 1990.[93] In half of these sixteen cases, the Pentagon took no action.[94] In the remaining cases, companies or their divisions were suspended for a number of months, with the longest suspension lasting over one year.[95]

This record has prompted congressional hearings on Pentagon fraud. Several pending legislative proposals would tighten debarment regulations and add additional collateral consequences to criminal convictions.[96] One proposal would debar a contractor for several years after a second fraud conviction. Another would prohibit companies from earning any profit on their government work for a defined period. A third would place contractors on probation.[97]

These recent revelations confirm, in part, earlier studies performed by GAO. These studies indicate that the Defense Department is the agency most active in debarment and suspension activity, followed by the General Services Administration ("GSA").[98] Between 1983 and 1985, for example, the number of Defense Department suspensions and debarment almost doubled from 296 to 582.[99] During the same period, GSA actions increased from 91 to 110.[100] The majority of these instances were debarment actions. In 1985, for example, the Defense Department debarred 357 contractors and suspended 225; GSA debarred 92 and suspended 18.[101]

The other four civilian agencies most active in this field — Department of Energy, NASA, Health and Human Services and Department of Transportation — took only a handful of suspension and debarment actions dur-

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pended by the Navy for two months in 1986. Another suspension involved Rockwell International for six weeks in late 1985. (response on file with the authors).

91. Richard Stevenson, *Many are Caught but Few Suffer for U.S. Military Contract Fraud*, N.Y. TIMES, Nov. 12, 1990, at A1.

92. *Id.* at B8.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at A1.

97. *Id.* at A1.

98. General Accounting Office, *Procurement: Suspension and Debarment Procedures*, GAO/NSIAD-87-37BR, Feb. 1987, at 27.

99. *Id.* This was up from 147 Defense Department suspensions and debarment in 1981. *See Defense IG Claims Progress In War Against Waste, Fraud and Abuse, 42* FED. CONT. REP. (BNA) No. 13, at 447 (Oct. 1, 1984) (describing DOD efforts to combat fraud).

100. General Accounting Office, *Procurement: Suspension and Debarment Procedures*, GAO/NSIAD-87-37BR. Feb. 1987, at 27.

101. *Id.*

ing the 1983-1985 period.[102] The relative level of activity of these different agencies reflects to some degree the procurement dollars available to each agency. In 1985, the Defense Department spent over $163 billion on contracts over $25,000.[103] GSA, by contrast, had only $1.4 billion in procurement dollars to spend.[104]

Almost all these suspension and debarment actions were based on indictments or convictions. This was the case in over 90% of the cases of debarment and suspension at the Defense Department.[105] Indeed, only the General Services Administration, according to the GAO, makes any effort to conduct independent investigations leading to debarment and suspension activity.[106]

Most of the suspended and debarred contractors appear to be individuals and small firms; few major contractors are affected. For example, the GAO found that between 1983 and 1985, companies accounted for 40% of the suspended parties.[107] Of these, in 1983 93% were small businesses, and in 1985 86% were small business.[108]

e. Analysis

Defense counsel often complain that because debarment may represent capital punishment for a corporate contractor, it upsets the balance between the prosecution and the accused. Indeed, in the largest procurement fraud penalty case on record, Sundstrand Corporation pled guilty and paid

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102. *Id.* at 27-28. DOE initiated 17 suspensions and debarments in 1983, and 3 in 1985. NASA initiated 6 suspensions and debarments in 1983 and 5 in 1985. DOT initiated 0 in 1983 and 6 in 1985. HHS initiated 1 in 1983 and 0 in 1985.

103. *Id.* at 27-29. For the other agencies, procurement dollars in transactions over $10,000 are as follows:

DOE — $13.1 billion
NASA — $7.4 billion
DOT — $1.6 billion
HHS — $1.1 billion

The level of activity also reflects the number of transactions involved. The Defense Department in 1985 engaged in over 12.3 million procurement transactions. At other agencies, procurement actions ranged only in the thousands (transactions over $10,000):

DOE — 7,606
NASA — 23,572
DOT — 5,276
GSA — 37,090
HHS — 7,913

104. *Id.*

105. *Id.* at 31.

106. *Id.*

107. General Accounting Office, *Procurement: Small Business Suspension and Debarment by the Department of Defense*, GAO/NSIAD-88-60BR, Dec. 1987, at 2.

108. *Id.*

$199 million in penalties in a deal that protected the company from long-term debarment; three individual Sundstrand employees fought the same charges at trial and were acquitted on every count.[109] Because of the threat of suspension and debarment, the argument goes, a company often cannot exercise its constitutional right to a trial.[110]

For purposes of this article, which focuses on the sanctioning process, the *administrative* debarment function does not raise difficult issues in theory. Debarment to protect the federal fisc is not intended to be primarily punitive. The inquiry into a contractor's present responsibility reinforces the conclusion that punishment is not the central goal of the process. Accordingly, the possibility of debarment is at least theoretically distinct from sentencing. That conclusion can be undermined, however, if the debarment process is not focused solely on the issue of the contractor's present responsibility. By the same token, *legislative* debarment aims to punish contractors for undesirable conduct and ordinarily is not forward-looking. Such a primarily punitive consequence triggers both double jeopardy concerns and the need to coordinate civil and criminal sanctions.[111]

2. *State and Local Debarment*

Convicted corporations also face potential state and local debarment. Thirteen states and the District of Columbia have debarment laws.[112] Many of these statutes were only recently passed. All are formulated differently and most are discretionary. In Minnesota, "a person who has been convicted of a contract crime *must* be debarred for a period of not less than one year."[113] Still, in most states debarment action is left to the discretion of government contract officials, leading to charges that these laws are not enforced.

In Florida, for example, the state debarment statute dates only from 1988.[114] Under the law, the Florida State Department of General Services is required to publish a list of companies barred from doing business with

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109. Randall Samborn, *Defense Fraud Cases Dealt A Blow*, NAT'L L.J., Oct. 29, 1990, at 12.

110. *Id.*

111. *See infra* Section IIIC (discussing double jeopardy implications).

112. CONN. GEN. STAT. § 4a-63 (1989); D.C. CODE ANN. § 1-1188.4 (1990); FLA. STAT. ch. 287.113 (1990); FLA. ADMIN. CODE ANN. r. 6c5-6.008(20)(a) (1990); ILL. REV. STAT. ch. 38, para. 33E-1-11 (1988); IND. CODE ANN. § 4-13-1-4 (Burns 1989); KY. REV. STAT. ANN. § 45A.190 (Baldwin 1988); MD. STATE FIN. & PROC. CODE ANN. § 11-204 (1989); MINN. STAT. § 161.315 (1986); 1988 N.J. Laws ch. 6, § 153; N.Y. ENVTL. CONSERV. LAW § 71-1107 (Consol. 1982); PA. STAT. ANN. tit. 73, § 1615 (1988); UTAH CODE ANN. § 63-56-48 (1990); VT. STAT. ANN. tit. 30, § 2 (1989); VA. CODE ANN. § 11-46.1, 59.1-68.7 (Michie 1990).

113. MINN. STAT. § 161.315(5) (1986) (emphasis added). The Minnesota debarment law, touted as one of the strongest, applies only to state Department of Transportation contracts.

114. Lisa Gibbs, *It's Tough to Get Tough on Corporate Miscreants*, BROWARD REV., Nov. 29, 1990, at 1.

state and local governments or their agencies because they have been convicted of defrauding the government. To date, no corporations are on the list.[115]

Several reasons are advanced to explain why state debarment provisions are not applied. First, corporations often settle claims to avoid findings of guilt, and the consent decrees are insufficient to trigger most state debarment statutes. Second, in many states, a corporation can be debarred only if a fraud or bribery conviction arises from contracts with government agencies, not if the convictions involve private entities. For example, in February 1990, two Waste Management, Inc. subsidiaries pled guilty to federal price fixing charges and paid fines of $1.5 million.[116] But the charges involved private customers, including K-Mart and Wal-Mart, not a public agency.[117] Therefore, for the purposes of most state debarment statutes, Waste Management's behavior would be exempt.[118] Third, many statutes allow the state wide latitude in deciding whether to put a company on the list. In Florida, for example, corporations can avoid the list by paying fines promptly,[119] or by cooperating with investigators and terminating the relationship with the person or affiliate responsible for the criminal activity.[120] In Florida, meeting these three conditions creates "a rebuttable presumption that it is not in the public interest to place a person or affiliate on the convicted vendor list."[121]

A final loophole in many of the state debarment statutes is that corporations can claim that a criminal misdeed was committed by a subsidiary or unit, not by the corporation as a whole. However, some state laws provide that corporations can be debarred for the crimes of subsidiaries and related businesses.

Localities also are beginning to enact their own debarment laws. The town of Palmer, Massachusetts, for example, enacted such a provision on April 9, 1990. The town by-laws now provide that:

> No contract or subcontract shall be awarded if that person or entity (a) has been convicted of bribery or attempting to bribe a public officer or employee of the Town of Palmer, the State of Massachusetts or any public entity, including [the U.S. government]; or (b) has been convicted of an agreement or collusion

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115. *See id.* (loopholes in Florida statute allow accused or convicted companies to escape disbarment). One reason that there are no corporations on the list is that the law only applies to companies convicted after July 1, 1989.

116. *Id.* at 4.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

> among bidders in restraint of freedom of competition . . . or (c) has made an admission of guilt [involving] such conduct, [including] a nolo contendere plea.[122]

Thus, local debarment statutes can be more draconian and comprehensive than state legislation.[123] More of these local debarment statutes should be expected in the future, as citizens groups have launched a campaign to pass them in localities around the country.[124]

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122. 9 TOWN OF PALMER CODE § 1(a)-(c) (Palmer, Mass. 1990).

123. The tough language of the Palmer ordinance may well be duplicated by localities around the country:

> Section 1
>
> No person or business entity shall be awarded a contract or subcontract by the Town of Palmer if that person or business entity:
>
> (a) Has been convicted of bribery or attempting to bribe a public officer or employee of the town of Palmer, the State of Massachusetts, or any other public entity, including, but not limited to the government of the United States, any state, any local government authority in the United States in that officer's or employee's capacity; or
>
> (b) Has been convicted of an agreement or collusion among bidders or prospective bidders in restraint of freedom of competition by agreement to bid a fixed price, or otherwise; or
>
> (c) Has made an admission of guilt of such conduct described in paragraphs (a) or (b) above, which is a matter of record, but has not been prosecuted for such conduct, has made an admission of guilt of such conduct which term shall be construed to include a plea of nolo contendere.
>
> Section 2
>
> A person, business entity, officer or employee of a business entity, convicted of one or more of the crimes set forth in Section 1 shall be ineligible for the awarding of a contract or subcontract by the Town of Palmer for a period of three years, following such conviction or admission in the case of an admission of guilt of such conduct, which is a matter of record, but which has not been prosecuted.
>
> Section 3
>
> For purposes of this By-law, where an official, agent or employee of a business entity has committed any offense under this By-Law, as set forth in Sections 1 or 2, on behalf of such an entity and pursuant to the direction or authorization of an official thereof (including the person committing the offense, if he is an official of the business entity), the business entity shall be chargeable with the conduct hereinabove set forth. A business entity shall be chargeable with the conduct of an affiliated entity, whether wholly owned, partially owned, or one which has common ownership or a common board of Directors. For purposes of this Section, business entities are affiliated if, directly or indirectly, one business entity controls or has the power to control another business entity, or if an individual or group of individuals controls or has the power to control both entities. Indicia of control shall include, without limitation, interlocking management or ownership, identity of interests among family members, shared organization of a business entity following the ineligibility of a business entity under this Section, using substantially the same management, ownership or principals as the ineligible entity.

Id.

124. *See Bad Boy Laws: How to Fight for Sanctions Against Corporate Criminals*, Citizens Clearinghouse for Hazardous Wastes Newsletter 6 (June 1990).

Further research is needed on how often debarment or suspension is proposed and actually implemented in the various states. Currently, this can only be accomplished by telephone surveys with state Attorneys General and by combing relevant court records.

3. *The False Claims Act*

Another significant collateral consequence is the federal False Claims Act,[125] which provides for civil penalties of up to $10,000 per false claim, plus treble damages.[126] Since the Act was significantly broadened in 1986,[127] the government is increasingly prosecuting contractors for criminal false claims and bringing civil false claims actions.

The 1986 amendments created increased collateral consequences by (1) expanding the definition of claims,[128] (2) easing the government's burden of proof from clear and convincing evidence to a preponderance of the evidence,[129] (3) relaxing the scienter standard to include reckless disregard for, or deliberate ignorance of, the truth,[130] (4) increasing the statute of limitations,[131] (5) raising the recoverable damages from double to treble,[132] and (6) raising the minimum forfeiture penalty from $2,000 to $5,000 to $10,000.[133] This last provision has an especially powerful impact because many procurement offenses, such as false labor charging or false certifications, ordinarily involve numerous discrete actions that may be separately charged. Consequently, the forfeiture penalties can mount very quickly.

Before 1986 the False Claims Act required proof that the defendant "knowingly" submitted a false claim to the government. Now the government can prove either (a) actual knowledge of falsity; (b) that the defendant acted in deliberate ignorance of the truth or falsity of the claim; or (c) that the defendant acted in reckless disregard of the truth or falsity of the claim.[134]

The statute of limitations for civil false claims was expanded from six years to either (a) six years after the false claim; or (b) three years after the date when facts material to the right of action reasonably should have

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125. 31 U.S.C. §§ 3729-3731 (1982 & Supp. 1990).

126. *Id. See also id.* § 3730(b) (providing for private damages suits by private parties injured).

127. *See* W. Bruce Shirk et al., *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts*, 37 CATH. U. L. REV. 935, 936-37 (1988) (discussing expansion of civil and criminal liability of government contractors convicted of fraud).

128. 31 U.S.C. § 3729(c).

129. *Id.* 31 U.S.C. § 3729(b).

130. *Id.*

131. *Id.* § 3729(a).

132. *Id.*

133. *Id.* § 3729(b).

134. Civil False Claims Act, 31 U.S.C. § 3729(b).

been known by the responsible federal official, but not more than 10 years after the violation, whichever is greater.[135] The government need only prove its case by a preponderance of the evidence,[136] rather than the prior standard of clear and convincing evidence.[137]

Another statute that may force collateral consequences on government contractors is the Truth in Negotiations Act ("TINA").[138] TINA requires government contractors to submit cost or pricing data and to certify that such data is accurate, complete and current as of the date that the contract and the government reach agreement on price.[139] If a contractor's submitted data is inaccurate, incomplete or outdated, the government may bring a "defective pricing" action against the contractor for a reduction in contract price equal to the amount that the contract was overpriced.[140] The purpose of the statute is to ensure that contractors do not inflate costs when negotiating contracts for which the government has few alternative sources.[141]

The government has attempted to recover under the Civil False Claims Act for "defective pricing" in violation of TINA.[142] The government's burden under the False Claims Act should not only be to prove defective pricing, but also to prove the required culpable state of mind.[143] The amended Act requires proof that the individual acted with intent to defraud, or while recklessly or deliberately ignoring the truth or falsity of the representations to the government.[144] This still leaves the question of what intent standard to apply for corporations in False Claims Act cases involving defective pricing. The prevailing standard is to attribute to the corporate entity the state of mind of its agents.[145]

In recent years, the Justice Department has become much more aggres-

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135. *Id.* § 3731(b).

136. *Id.* § 3731(c).

137. The government also added a "mini-False Claims Act" when it passed the Program Fraud Civil Remedies Act in 1986. This statute provides for administrative penalties of $5,000 per false claim, plus double damages in instances where false claims have been submitted concerning amounts under $150,000. Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3802, 3803 (Supp. IV 1986).

138. Truth in Negotiations Act, 10 U.S.C. §§ 2304, 2306, 2310, 2311 (1988).

139. *Id.* §§ 2304, 2306, 2310.

140. 48 C.F.R §§ 15.800-15.814 (1987).

141. *Id.*

142. *See, e.g.*, United States *ex rel.* Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327, 1329 (4th Cir. 1989) (affirming grant of preliminary injunction against defendant in case brought under the False Claim Act).

143. 31 U.S.C. § 3729(b).

144. 10 U.S.C. § 2304.

145. *See* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (finding that a corporation's compliance program does not immunize the corporation from liability for a willful violation of an antitrust consent decree by an employee), *cert. denied*, 110 S. Ct. 722 (1990). *See also* United States v. O'Connell, 890 F.2d 563, 568-69 (1st Cir. 1989) (holding that the corporation faces pure vicarious liability for its employee's fraud even if the employee intended only to benefit himself).

sive in bringing False Claims actions. The amount collected in judgments and settlements has grown from $27 million in 1985 to $257 million in 1990 — an increase of almost 1,000%:[146]

Table i

Amount Collected by the Justice Department in False Claims Actions.

1985	$27 million
1986	$54 million
1987	$83 million
1988	$176 million
1989	$225 million
1990	$257 million

4. Depository Institutions

a. Background

Depository institutions face a growing array of civil and administrative sanctions. Some sanctions are primarily aimed at regulating the safety and soundness of the depository institutions.[147] Others, like civil money penalties, appear to be more punitive.[148] These sanctions are administered by a variety of federal agencies, depending on the type of financial institution involved.[149] In response to the savings and loan scandal, Congress in 1989 passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989,[150] ("FIRREA") which altered the regulatory structure and revised and extended the civil and administrative sanctions available against finan-

146. *Department of Justice Obtains Civil Fraud Settlements and Judgments of $257 Million in Fiscal 1990*, Justice Dept. Press Release, Nov. 26, 1990.

147. *E.g.*, cease and desist orders, charter revocation, and temporary or permanent loss of deposit insurance.

148. Individuals affiliated with financial institutions face additional sanctions, such as suspension and removal. Conviction for offenses involving dishonesty results in automatic disqualification from a position with a depository institution. Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1818(e), (g).

149. In general, the regulatory agencies operate as follows: the Office of the Comptroller of the Currency (OCC) regulates national banks; the Board of Governors of the Federal Reserve System (the Fed) oversees state-chartered member banks, bank holding companies, foreign banks, and commercial lending companies; the Federal Deposit Insurance Corporation (FDIC) is the primary insurer of state-chartered, federally insured banks, and savings associations, and regulates federally insured banks that are not members of the Fed; the Office of Thrift Supervision (OTS) supervises savings banks and savings associations; and the National Credit Union Administration (NCUA) regulates federal, and state-chartered, federally insured credit unions. Michael P. Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*, 50 OHIO ST. L.J. 1117, 1119 (1989).

150. 12 U.S.C. § 1811 (1989).

cial institutions and institution-affiliated parties.[151]

b. Cease-and-Desist Orders

Cease-and-desist orders and agreements entered into pursuant to the cease-and-desist statute are the most commonly used administrative enforcement tools for depository institutions.[152] Their purpose is "to halt and correct unsafe or unsound banking practices"[153] by ordering a halt to legal violations and/or affirmative action to correct problems. All of the federal banking agencies have the authority to issue such orders or agreements.[154]

Generally, the appropriate agency must file a notice of charges and hold an administrative hearing before issuing an order,[155] but most institutions and individuals consent to such orders following negotiations with the agency. If there is a danger of insolvency or of material dissipation of assets or other prejudice to depositors, the agency may issue a temporary cease-and-desist order prior to a hearing.[156] Incomplete and inaccurate records may be used as the basis for a temporary order.[157]

The permissible scope of a cease-and-desist order was expanded by FIRREA. An order may now require restitution or reimbursement, indemnification, or a guarantee against loss in certain specified circumstances.[158] The order also may require the financial institution to restrict its growth, dispose of any loan or asset involved in the violation, rescind agreements or contracts, or employ qualified officers or employees.[159] Violations of a cease-and-desist order may be punished by civil money penalties of up to $1,000,000 per day.[160] Publicly traded financial institutions must disclose such orders. FIRREA also required public disclosure of all final orders,

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151. An "institution-affiliated party" is defined as a director, officer, employee, controlling stockholder of or agent for an insured depository institution; any person required to file a Federal change-in-control notice; anyone participating in the institution's affairs who is also a shareholder, joint venture partner or consultant by the bank; independent contractors; *not* bank holding companies. *Id.* § 1813(u).

152. *See, e.g.*, 1988 FDIC ANN. REP. 21 (discussing the FDIC's continued use of cease-and-desist orders as an enforcement mechanism).

153. *Id.*

154. 12 U.S.C. § 1818(b)-(d).

155. *See, e.g., id.* §§ 1786(e), 1818(b) (requiring notice and hearings for charges against credit unions and banks and savings associations).

156. *Id.* §§ 1786(b), 1818(c). The grounds for a temporary cease and desist order were expanded in FIRREA. *See* Malloy, *supra* note 149, at nn. 303-306 (discussing which financial institutions are regulated by which agencies).

157. 12 U.S.C. § 1818(c)(3).

158. These sanctions are allowable if: "(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or (ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency." *Id.* § 1818(b)(6)(A).

159. *Id.* § 1818(b)(6)(B)-(E).

160. *Id.* § 1818(i).

including cease-and-desist orders, removals and money penalties. The Omnibus Crime Control Act of 1990[161] for the first time required that all formal administrative hearings be conducted publicly.

c. Insurance Termination, Conservatorship, and Receivership

The most devastating collateral consequences that banking regulators ordinarily impose are the termination or suspension of the financial institution's insurance, conservatorship, or receivership. Denial of an application for deposit facilities and revocation of the bank's charter are available sanctions,[162] but are not generally used. The Federal Depository Insurance Corporation ("FDIC") can, after giving the banking institution notice, terminate an institution's insured status on the basis that the institution has violated the law and/or other grounds.[163] Because depositors are hurt by the termination of deposit insurance, regulators may be reluctant to take that step *solely* for such violations.

d. Civil Money Penalties

FIRREA significantly increased regulating agencies' ability to impose civil monetary penalties. The size and scope of these powers do not resemble the civil money powers previously used by banking regulators.

The federal banking agencies may now assess stiff civil money penalties against institution-related parties and depository institutions for violations of (1) any law or regulation; (2) the terms of any final order or temporary order issued pursuant to 12 U.S.C. § 1818(b), (c), (e), (g) and (s), and of any condition imposed in writing by an agency in connection with the grant of any application or other request by the institution; or (3) any written agreement between the institution and the agency.[164] Civil monetary penalties can also be levied for breaches of fiduciary duty and for unsafe or unsound practices. Institution-related parties, depository institutions, holding companies, or their subsidiaries that fail to submit or to publish in a timely manner any required report, or that submit or publish any false or misleading information, are likewise subject to civil money penalties.[165] Depository institutions face additional civil money penalties if any affiliate ref-

161. Omnibus Crime Control Act, 25 U.S.C. § 2547 (1990).

162. 12 U.S.C. § 1818(a)(2).

163. *Id.*

164. *Id.* §§ 1786(k)(2) (Supp. I 1989) (credit unions), 1818(i)(2) (Supp. I 1989) (banks and savings associations), *see id.* § 1813(q) (Supp. I 1989) (defining federal banking agency).

165. *Id.* §§ 164 (1988) (national banks), 1464(v)(4) (West Supp. 1991) (savings associations), 1467a(r) (West Supp. 1991) (savings associations); *see id.* §§ 324 (Supp. I 1989) (state banks), 1817(a)(1) (Supp. I 1989) (insured state nonmember banks), 1847(d) (Supp. I 1989) (bank holding companies).

uses to permit any examiner to conduct an examination, or refuses to provide any information required during an examination.[166]

The size of the monetary penalties available is impressive, proceeding in a three-tiered structure. The first tier provides for a civil money penalty up to $5,000 for each day that any violation of a law, regulation, order, condition imposed in writing or written agreement continues, whether intentional or not.[167]

The second tier applies to violations, unsafe or unsound practices that are recklessly engaged in, or breaches of fiduciary duty, if that conduct (1) is part of a pattern of misconduct, (2) results in more than a minimal loss to the institution, or (3) causes, or is likely to cause, pecuniary gain or other benefit to the party being assessed.[168] Second-tier penalties can reach $25,000 per day.[169]

The third tier applies to the same category of conduct as the second tier, but specifically requires that (a) such violation, practice or breach is knowingly undertaken and (b) a substantial loss to the depository institution or a substantial pecuniary gain or other benefit to the party is knowingly or recklessly caused.[170] This last tier provides for penalties against a person (other than a depository institution) of not more than $1,000,000 per day;[171] and, against a depository institution of not more than the lesser of $1,000,000 or 1% of the total assets per day.

In 1978, Congress authorized civil money penalties of up to $1,000 a day for violation of certain banking laws and cease-and-desist orders. FIRREA expanded and increased that penalty to current levels.[172] FIRREA also gave the Attorney General the power to seek such civil penalties,[173] thus subjecting depository institutions to potential civil money penalties brought by either the banking agency, or the Department of Justice, or even both.

FIRREA provides only limited guidance on determining the actual amount of a civil money penalty, simply listing several mitigating factors to be considered:

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166. *Id.* § 1467(d) (West Supp. 1991).

167. *Id.* § 164.

168. *Id.* §§ 164 (1988) (national banks), 1464(v)(4) (West Supp. 1991) (savings associations), 1467a(r) (West Supp. 1991) (savings associations), 324 (Supp. I 1989) (state banks), 1817(a)(1) (Supp. I 1989) (insured state nonmember banks), 1847(d) (Supp. I 1989) (bank holding companies).

169. *Id.*

170. *Id.* §§ 164 (1988) (national banks), 1464(v)(4) (West Supp. 1991) (savings associations), 1467a(r) (West Supp. 1991) (savings associations), 324 (Supp. I 1989) (state banks), 1817(a)(1) (Supp. I 1989) (insured state nonmember banks), 1847(d) (Supp. I 1989) (bank holding companies).

171. *Id.*

172. *Id.* § 951(b)(2).

173. *Id.* § 951(d).

(i) the size of financial resources and good faith of the insured depository institution or other person charged;
(ii) the gravity of the violation;
(iii) the history of previous violations; and
(iv) such other matters as justice may require.[174]

The Comptroller of the Currency has issued Guidelines for assessing civil money penalties, which include a weighted "matrix" of thirteen considerations, including willfulness of the conduct, any pattern or history of misconduct, the size of loss, and the payment of restitution, among others.[175]

e. Activity Levels

FIRREA requires each of seven agencies involved in enforcing banking laws to make an annual report to the Congress concerning the agency's enforcement activities.[176] Among the information required in this report is:

(1) The number of formal and informal supervisory, administrative, and civil enforcement actions completed during the previous twelve months, including actions initiated or taken with respect to memoranda of understanding, written agreements, cease-and-desist orders (including temporary orders), suspension orders, removal or prohibition orders, and civil money penalty assessments.
(2) The number of individuals and institutions against whom civil money penalties were assessed in the previous twelve months, the amount of each penalty, the total amount of all such penalties, and data on uncollected penalties.[177]

This type of information would obviously be of enormous help, but to date, not all of the agencies have submitted full reports. One agency for which there is useful data is the FDIC. There are two sources of information on FDIC enforcement activities. The 1988 Annual Report contains data on 1986-1988. In addition, beginning with the August-December 1989 period, the FDIC has made public (as required by FIRREA) all of its enforcement actions.[178] Unfortunately, neither source allows more than the most general observations. For example, although we know the number of

174. *Id.* § 1818(i)(2)(G).
175. PPM 5000-7 (Rev.), Comptroller of the Currency, Administrator of National Banks (Jan. 28, 1988).
176. 12 U.S.C. § 1833 (Supp. I 1989). The agencies required to make annual reports are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, The Office of Thrift Supervision, the National Credit Union Administration, and the Attorney General of the United States. *Id.* § 1833(b).
177. *Id.* § 1833(a).
178. *Id.* § 1833 (Supp. 1989).

civil money penalties imposed, we do not know the amounts.[179]

Table ii

FDIC Compliance and Enforcement Actions

	1990	1989	1988	1987	1986
Total Actions Initiated by FDIC	206	213	223	236	216
Termination of Insurance Orders— Orders of Correction issued			77	91	59
Cease-and-Desist Orders— Permanent orders issued	N/A	96	96	120	127
Temporary orders issued	N/A	N/A	5	3	8
Orders terminated during year	N/A	N/A	140	148	152
Orders in effect at end of year	N/A	N/A	267	295	336
Civil Money Penalties Issued	N/A	6	10	3	14

5. Medicare and Medicaid

The principal administrative sanctions available against participants in the Medicare and Medicaid programs are exclusion from the program

179. Only the most rudimentary information is available from other agencies. The following data is only for the most recent time period, so that trends cannot be shown.

A. Comptroller of the Currency:
1990 Total Formal and Informal Actions: 842
1990 Total Completed Actions: 760
Against institutions, the Comptroller assessed 28 civil money penalties (compared to 123 against individuals), for a total amount of $81,550. (Compared to $1,037,000 assessed against individuals). Office of the Comptroller of the Currency, ANN. REP. TO CONGRESS at 1.

B. National Credit Union Administration:
Had over 692 final enforcement actions in 1990 and initiated at least 33 (data is not complete). Letter from National Credit Union Administration to Vice President Dan Quayle, (Jan. 31, 1991) at 1.

C. Office of Thrift Supervision:
Total Actions Initiated by OTS: 3,636. Total Number of Actions Completed: 3,370. OTS assessed penalties against 9 institutions in 1990 (compared to 20 individuals). The institutional penalties amounted to $281,000. (compared to $41,500 for individuals). OTS Staff Report To Congress Pursuant to FIRREA § 918.

D. Federal Reserve:
Number of actions initiated: 474.
Number of actions completed: 290
The Fed assessed 20 penalties against individuals, and only one penalty against an institution. Against an institution, it assessed $5,000. Letter from Board of Governors of Federal Reserve to Speaker of the House of Representatives Thomas Foley, (Jan. 31, 1991) at 2-3.

("exclusion") and civil monetary penalties. Civil enforcement activity under these programs is administered by the Office of Inspector General ("OIG") of the Department of Health and Human Services ("HHS"). The Medicare and Medicaid Patients and Program Protection Act of 1987 ("MMPPPA")[180] significantly strengthened and expanded the Medicare and Medicaid sanctions.

a. Exclusion

Under the MMPPPA, exclusions can be either mandatory or permissive.[181] Mandatory exclusion arises if the health care provider has been convicted of a crime related to: (i) delivery of an item or service under Medicare or a state health care program; or (ii) patient abuse.[182] The Secretary of HHS also has discretion to exclude a provider based on, *inter alia*:

(i) fraud;
(ii) convictions relating to obstruction of an investigation;
(iii) convictions relating to controlled substances; and
(iv) license revocation or suspension.[183]

A mandatory exclusion must continue for at least 5 years.[184] Although the statute does not establish a minimum period for permissive exclusion, the OIG has established a similar 5-year threshold.[185]

The existing regulations direct the OIG to consider an open-ended list of aggravating and mitigating factors in setting the length of the exclusion.[186]

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180. 42 U.S.C.A. § 1320a-7 (West Supp. 1991).

181. *Id.* Regulations concerning exclusions are found at 42 C.F.R. § 1001.1-.115 (1990). In April 1990, HHS published a proposal for new regulations implementing MMPPPA. 55 Fed. Reg. 12,205 (1990) (to be codified at 42 C.F.R. pts. 1001-07) (proposed April 2, 1990). These proposed regulations have not taken effect, but will be discussed as appropriate.

182. 42 U.S.C.A. § 13201-7(a).

183. *Id.* § 1320a-7(b).

184. *Id.* § 1320a-7(c)(3)(B). The Secretary may waive a mandatory exclusion for a program-related conviction if the provider is the sole community physician or sole source of essential specialized services in a community.

185. 1989 INSPECTOR GEN. ANN. REP., *supra* note 36, at 29.

186. These factors include:

(1) the number and nature of the program violations and other related offenses;
(2) the nature and extent of any adverse impact the violations have had on beneficiaries;
(3) the amount of any damages incurred by the Medicare program;
(4) whether there are any mitigating circumstances;
(5) any other facts bearing on the nature and seriousness of the violations or related offenses; and
(6) the previous sanction record of the excluded party under the Medicare or Medicaid program.

42 C.F.R. § 1001.114(b).

The proposed regulations[187] would allow consideration of only a more limited set of factors in determining the period of exclusion.[188]

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187. *See supra* note 181.

188. 55 Fed. Reg. 12,205, 12,217 (proposed regulations to be codified in 42 C.F.R. §§ 1001.102, 1001.201).

For mandatory exclusions, the proposed regulations list aggravating factors, each of which can increase the exclusion beyond the five year minimum. The factors are:

(1) The acts resulting in the conviction, or similar acts, resulted in financial loss to Medicare and the State health care programs of $1500 or more. (The entire amount of financial loss to such programs will be considered including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made to the programs).
(2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more.
(3) The acts that resulted in the conviction or similar acts, had an adverse physical, mental or financial impact on one or more individuals.
(4) The sentence imposed by the court included incarceration.
(5) The convicted individual or entity has a prior criminal, civil or administrative sanction record.
(6) The individual or entity has at any time been overpaid a total of $1500 or more by Medicare or State health care programs as a result of improper billings.

42 C.F.R. § 1001.102(b) (proposed).

If after examining these factors, the exclusion will be longer than five years, the following mitigating factors may also be considered in determining whether the exclusion should be reduced to no less than five years:

(1) The individual or entity was convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and the State health care programs due to the acts that resulted in the conviction and similar acts, is less than $1500.
(2) The record in the criminal proceedings, including sentencing documents, demonstrates that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability.
(3) the individual's or entity's cooperation with Federal or State officials resulted in others being convicted or excluded from Medicare or any of the State health care programs.

42 C.F.R. § 1001.102(c) (proposed).

For permissive exclusions, the following aggravating factors may serve as a basis for a lengthened period of exclusion:

(i) The acts resulting in the conviction, or similar acts, resulted in financial loss of $1500 or more to a government program or to one or more other individuals or entities (the total amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made).
(ii) The acts that resulted in the conviction, or similar acts, were committed over a period of one or more years.
(iii) The acts that resulted in the conviction, or similar acts, had significant adverse physical, mental or financial impact on individuals or on Medicare or any of the State health care programs.
(iv) The sentence imposed by the court included incarceration.
(v) The convicted individual or entity has a prior criminal, civil or administrative sanction record.

b. Civil Monetary Penalties

Civil Monetary Penalties ("CMPs") are available for false or fraudulent statements pertaining to claims or services, and false information given to Medicare beneficiaries.[189] The standard is whether the provider knew or should have known that the claim or statement was false or fraudulent.[190] The CMP may be up to 2 times the amount billed plus $2,000 per incident.[191] As with exclusions, the statute and the existing and proposed regulations direct the OIG to consider a variety of aggravating and mitigating factors in setting the actual level of the CMP.[192]

c. Purposes of Sanctions

The Medicare and Medicaid sanction provisions serve a wide variety of goals, but have no clearly articulated policy justification. Despite the lack of a congressional statement of purpose, the sanctions plainly encompass goals of punishment, deterrence, protection of the Medicare program from fraud, and restitution of losses.

Mandatory Medicare and Medicaid exclusions flow solely, and automatically, from certain criminal convictions.[193] This process allows no consideration of the provider's current fitness for participation in the Medicare program. Thus, unlike administrative debarment in the procurement area,[194]

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42 C.F.R. § 1001.201(b)(2) (proposed).

The following factors are mitigators for the period of a permissive exclusion:

(i) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to a government program or to other individuals or entities due to the acts that resulted in the conviction and similar acts is less than $1500;

(ii) the record in the criminal proceedings, including sentencing documents, demonstrates that the individual had a mental, emotional or physical condition, before or during the commission of the offense, that reduced the individual's culpability;

(iii) the individual's or entity's cooperation with Federal or State officials resulted in others being convicted or excluded from Medicare or any of the State health care programs; or

(iv) alternative sources of the type of health care items or services furnished by the individual or entity are not available.

42 C.F.R. § 1001.201(b)(3).

189. 42 U.S.C. § 1320a-7a(a).

190. *Id.*

191. *Id.* (the maximum penalty increases to $15,000 per incident if false information is given to a Medicare beneficiary to induce discharge from the hospital).

192. In assessing a Civil Monetary Penalty, the Secretary is to take into account: (1) the nature of claims and the circumstances under which they were presented, (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and (3) such other matters as justice may require. *Id.* § 1320a-7a(d).

193. *Id.* § 1320a-7(a).

194. *See supra* notes 71, 81-84 and accompanying text.

mandatory exclusion seems to be designed to punish for past misconduct and deter others, rather than to ensure that current providers act responsibly.[195]

In addition, by directing the OIG to consider certain factors in setting the length of a mandatory or permissive exclusion, the existing and proposed regulations seem primarily intended to measure the severity of the offense.[196] Such a determination is consistent with a punitive and deterrent purpose, although it could also be argued that the seriousness of past conduct reflects on the provider's current fitness and the likelihood of future misconduct.

CMPs also have an arguably restitutionary purpose in allowing recovery by the government of twice the amount billed. The MMPPPA states that this portion of the penalty is "in lieu of damages sustained by the United States or a State agency because of such claim."[197] Taken as a whole, however, CMPs seem obviously aimed at punishment and deterrence. The $2,000 monetary penalty, unlike exclusion, bears no apparent relationship to the fitness of a provider for future participation in the program. In addition, the factors to be considered by the OIG in determining the amount of the CMP primarily attempt to measure the seriousness of the offense.

d. Activity Level

Since the MMPPPA was enacted, there has been a marked increase in both exclusions and civil monetary penalties. For example, recoveries of civil monetary penalties increased from $9.5 million in fiscal year 1986, to just under $15 million in fiscal year 1989.[198] Exclusions have risen as well, from 344 in fiscal year 1986 to 696 in fiscal year 1989. Preliminary data for fiscal year 1990 suggest that these high sanction levels have continued.[199] During the first half of fiscal year 1990 there were 384 exclusions and 24 CMP's totalling $6.6 million.[200]

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195. *See, e.g.*, H.R. 85, 100th Cong., 1st Sess. 5-6 (1987) (lengthy period of exclusion is intended to be a "clear and strong deterrent against the commission of criminal acts" and is "appropriate, given the seriousness of the offenses at issue").

196. *See supra* note 100 and accompanying text (discussing increases in suspensions and disbarments).

197. 42 U.S.C. § 1320a-7a(a).

198. 1989 INSPECTOR GEN. ANN. REP., *supra* note 36, at 25. We have not been able to determine to what extent the average CMP may have changed during this period. Because the total number of sanctions imposed increased more rapidly than the amount of CMPs, it does not seem likely that there was any significant increase, and indeed there may have been a decrease, in the average CMP. The total Medicare and Medicaid funds recovered during fiscal year 1989, including criminal fines, restitution, double damages, etc., in addition to CMPs was $81 million. *Id.*

199. 1990 INSPECTOR GEN. SEMIANN. REP. iv., 18 (Oct. 1, 1989 - March 31, 1990).

200. *Id.*

6. The Securities Industry

Perhaps the most intricate and imaginative series of administrative collateral consequences are imposed by the Securities and Exchange Commission (the "SEC"). This aggressive regulation reflects the New Deal origins and reformist impulses of the SEC's creators. Indeed, the SEC regulatory scheme is in effect a "federal law of corporations" that subjects corporations issuing securities to tighter control than other firms.[201]

The SEC basically has four types of remedies:

(1) civil penalties for insider trading — up to three times the profit gained or loss avoided;
(2) injunctive relief;
(3) suspension or permanent disqualification from the securities industry, not including private investor suits for recision or damages plus costs and attorney's fees; and
(4) cease-and-desist orders.[202]

Under the Investment Advisers Act of 1940[203] and the Securities Exchange Act of 1934,[204] the SEC may suspend or revoke the registration of an investment adviser or broker-dealer upon the firm's conviction of a felony arising out of its securities business.[205] The Commodities Futures Trading Commission (the "CFTC") has similar authority over commodity trading advisers and pool operators.[206] Several state "blue sky" statutes permit the denial, suspension or revocation of a broker-dealer's or investment adviser's registration based on a criminal conviction arising out of the firm's securities business.[207]

Broker-dealers and investment advisers convicted of a securities-related felony also may be disqualified from state and federal exemptions from registration for securities offerings. For example, Securities Act Rules 505 and 252, which exempt certain limited offerings[208] from registration, are

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201. *See generally* THOMAS HAZEN, THE LAW OF SECURITIES REGULATION 1-54 (2d. ed. 1990) (for basic coverage of the Securities Act).

202. 15 U.S.C.A. § 78u-3 (West Supp. 1991) (effective Oct. 15, 1990).

203. 15 U.S.C. § 80b (1988).

204. *Id.* § 77b et seq., 77j, 77k, 77m, 77o, 77s, 78a et seq. (Securities Exchange Act refers to amendments made to these sections).

205. *See id.* §§ 80b-3(a), 78o(a)(1) (under both acts, registration is in effect a prerequisite to conducting business).

206. *See* 7 U.S.C.A. § 12a(2) (West Supp. 1991) (listing reasons for which Commission may refuse to register, register conditionally or suspend registration of any person).

207. *E.g.*, Unif. Securities Act § 212(4) (1985), *reprinted in* JACK H. HALPERIN, BLUE SKY LAWS: A SATELLITE PROGRAM (Practicing Law Institute 1987). *See, e.g.*, FLA. STAT. ANN. § 517.161(6) (West 1988) (statute providing for disqualification based solely on a criminal indictment).

208. Limited offerings are offerings not made to the general public. The advantage to this exemption is that cumbersome and expensive reporting requirements do not have to be met.

not available if the issuer or underwriter has been convicted of any felony or misdemeanor arising out of securities activity in the preceding five years.[209] The Uniform Limited Offering Exemption,[210] available for adoption by states, copies this denial of exemption. Although the SEC and state authorities may waive these disqualification provisions, waiver proceedings may be lengthy and onerous conditions may be attached to any waiver.[211]

Under the Investment Company Act of 1940[212] (the "1940 Act"), any person or affiliated person[213] who is convicted of a crime involving securities transactions or arising out of conduct as a broker-dealer is disqualified from serving as an investment adviser to, or principal underwriter for, any registered investment company.[214] Consequently, a broker-dealer (or its parent or subsidiaries) convicted of a Bank Secrecy Act violation, for example, will be disqualified, absent SEC exemption, from effective participation in the investment company industry.[215]

The pendency of disqualification proceedings under section 9(a) of the 1940 Act also may obstruct the target firm's ordinary business. Such proceedings are likely to be deemed "material" information,[216] thus triggering an obligation to disclose the possible disqualification to shareholders of the investment company for which the broker-dealer is working.[217]

SEC regulations permit an exemption for ineligible persons,[218] but only after an application for exemption is published in the Federal Register giving members of the public an opportunity to request a hearing.[219] The burden of persuasion for gaining the exemption rests upon the securities firm.[220]

Finally, criminal conviction can lead to the disqualification of a securities

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209. 17 C.F.R. §§ 230.252(c)(3), 230.505(b)(2)(iii) (1991) (known as Regulation D and Regulation A, these provisions both have detailed "bad boy" clauses).

210. Unif. Securities Act § 403(b) (1985).

211. *Id.*

212. 15 U.S.C. § 80a-51.

213. An "affiliated person" of another person is a person or company which i) owns or controls five percent or more of such person; ii) is so owned or controlled by such other person, or iii) is under common control with such person. *See id.* § 80a-2(a)(3) (for specific definition).

214. *Id.* § 80a-9(a)(1) (1988).

215. *Id.*

216. Form N-1A (applicable to open-end management investment companies) and Form N-2 (applicable to closed-end investment companies) both define as "material" any proceeding "likely to have a material adverse effect upon the ability of the investment adviser or principal underwriter to perform its contract with the registrant."

217. CFTC Regulations require commodity trading advisers and pool operators to disclose to their customers any material administrative, civil, or criminal action within the past five years against either them or any broker through which they trade. 17 C.F.R. §§ 4.21(a)(13)(i), 4.31(a)(7) (1991).

218. 15 U.S.C. § 80a-9(c) (a person ineligible under subsection (a) may file an application for an exemption from such subsection).

219. *Id.*

220. *Id.*

firm from serving as a qualified professional asset manager for employee benefit plans under the Employee Retirement Income Security Act.[221] The SEC also has authority to seek civil penalties up to three times the profit gained or loss avoided by insider traders, a penalty that may be obtained over and above the disgorgement of profits that is available to the Commission in equity.[222] Individual investors may, in certain cases, seek recovery of losses in private damages actions against insider traders.[223]

Additional fines, bars, and prohibitions may be sought by the SEC under the recently passed Securities Enforcement Remedies and Penny Stock Reform Act of 1990.[224] Under this new law, the SEC can collect civil monetary penalties for a wide variety of violations. The SEC also may bring cease-and-desist actions before an administrative law judge rather than rely on injunctive proceedings brought in District Court.[225]

The SEC has brought substantial numbers of enforcement actions and has collected significant fines. In 1989 the Commission obtained court orders requiring defendants to return illicit profits amounting to $421 million either as disgorgement or restitution.[226] Disgorgement orders in insider trading cases amounted to approximately $32 million, and civil penalties under the Insider Trading Sanctions Act of 1984 totalled $29 million.[227]

7. Occupational Safety and Health Act

a. Background

The Occupational Safety and Health Act of 1970[228] (the "Act"), was designed "to assure so far as possible every working man and woman in the nation safe and healthful working conditions."[229] General responsibility for enforcing the Act is vested in the Secretary of the Department of Labor, but the Occupational Safety and Health Administration ("OSHA"), located within the Labor Department, is actually delegated responsibility for administering and enforcing the Act.[230] The Act also created the Occupational Safety and Health Review Commission ("OSHRC"), an independent body which adjudicates challenges to OSHA citations and civil penalties.[231]

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221. 29 U.S.C. § 1111(a) (1988).
222. 15 U.S.C. § 78u-1(a) (2).
223. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (private suits are permissible under § 27 of Securities Exchange Act of 1934).
224. 15 U.S.C.A. § 78a (West Supp. 1991) (short title for amendments effective October 15, 1990).
225. *Id.* §§ 78u(d)(3), 78u-3 (West Supp. 1991).
226. 55 SEC ANN. REP. 1 (1989).
227. *Id.*
228. 29 U.S.C. §§ 651-678 (1988).
229. *Id.* § 651(b).
230. *Id.* § 651(c).
231. *Id.* § 661.

OSHA is authorized to promulgate health and safety standards,[232] to conduct on-site inspections of workplaces,[233] and to issue citations carrying monetary penalties for violations.[234] An employer covered by the Act must abide by the specific safety and health standards promulgated by OSHA, and must, pursuant to the Act's "general duty clause," "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[235]

Violations of specific standards promulgated by OSHA or of the general duty clause can result in civil, and in some circumstances criminal, penalties. Violations are classified, in ascending order of seriousness, as:

(i) de minimis,
(ii) other nonserious,
(iii) serious,
(iv) repeat, and
(v) willful.[236]

The penalties that can be imposed depend on the nature of the violation.

b. Criminal Penalties

The Act contains three criminal prohibitions. An employer who commits a willful[237] violation of a specific OSHA standard, which results in the death of an employee, can be imprisoned up to six months, fined up to $10,000, or both.[238] Any person who, without proper authorization, gives advance notice of an OSHA inspection can be imprisoned up to six months, fined up to $1,000, or both.[239] Finally, anyone who makes false statements or representations in any record or report required under the Act can be imprisoned up to six months, fined up to $10,000, or both.[240]

These criminal penalties are not frequently imposed. According to a General Accounting Office study, OSHA has no investigative unit to pursue criminal investigations, and in twenty years OSHA has referred only

232. *Id.* § 655.
233. *Id.* § 657.
234. *Id.* § 658.
235. *Id.* § 654(a)(1).
236. *See generally id.* § 666 (provision setting out specific civil and criminal penalties).
237. United States v. Dye Construction Co., 510 F.2d 78, 81 n.4 (10th Cir. 1975) (citing Nabob Oil Co. v. United States, 190 F.2d 478, 479 (10th Cir.) (defining a willful violation as "deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence."), *cert. denied*, 342 U.S. 478 (1951).
238. 29 U.S.C. § 666(e). If the conviction is for a second or subsequent offense, the maximum prison term and fine are doubled. *Id.*
239. *Id.* § 666(f).
240. *Id.* § 666(g).

57 cases to the Department of Justice for possible prosecution.[241] This pattern may be changing somewhat — in Fiscal Year 1989 OSHA referred 15 cases to the Justice Department — but criminal enforcement accounts for only one-half of one percent of OSHA's enforcement effort.[242] There have been few prosecutions for employee deaths under the Act, and only one case has been officially reported.[243] Congress recently considered but did not enact legislation expanding the criminal provisions of the Act.[244]

c. *Civil Penalties*

Civil penalties may be imposed for violations of both the general duty clause and specific OSHA standards.[245] The Act's provisions for, and OSHA's approach to, civil penalties depends upon the nature of the employer's violation.

i. *Statutory Amounts*

There is no monetary penalty for de minimis violations.[246] An employer *may* receive a penalty of up to $7,000[247] for each nonserious violation.[248] The Secretary *must* impose a penalty of up to $7,000[249] for each serious violation[250] or for each violation of the Act's posting requirements, al-

241. *GAO Report Suggests Means To Strengthen OSHA Enforcement*, DAILY LAB. REP. (BNA) No. 175, at A-10 (Sept. 10, 1990).

242. *Democrats, Republicans Divided Over Bill To Toughen OSHA Criminal Sanctions*, DAILY LAB. REP. (BNA) No. 162, at A-2 (Aug. 21, 1990).

243. United States v. Dye Construction Co., 510 F.2d at 78.

244. *See Criminal Sanctions for Employee Safety Violations Remain Rare*, DAILY LAB. REP. (BNA) No. 225, at C-1 (Nov. 21, 1990) (efforts to increase federal criminal penalties failed in face of opposition from Republicans and industry groups who saw proposal as attack on innocent employers).

245. 29 U.S.C. § 666(j).

246. A de minimis violation is one where there is no proven relationship to safety or health, or "where there is a direct relationship to safety and health, but that relationship is so remote as to be nearly negligible. . . ." Clifford B. Haney & Son, Inc., 6 O.S.H.CAS. (BNA) 1335 (1978).

247. The maximum penalty was increased from $1,000 as part of the recent budget agreement. *See OSHA Urged To Use Caution in Enforcing New Civil Penalties*, DAILY LAB. REP. (BNA) No. 215, at A-6 (Nov. 6, 1990) (discussing impact of new civil penalties for OSHA violations) [hereinafter *OSHA Urged to Use Caution*].

248. Nonserious violations are defined primarily by reference to de minimis violations, on one side, and serious violations on the other. Accordingly, a nonserious violation generally is one where there is a direct and immediate relationship between the violation and safety and health, but there is no substantial likelihood of death or serious physical injury. *See, e.g.*, California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975) (when human life or limb at stake, any violation of a regulation is "serious"); Crescent Wharf and Warehouse Co., 1 O.S.H.CAS. (BNA) 1219, 1222 (1973) (serious violation when substantial probability that an accident will occur from a violative condition).

249. The maximum penalty was increased from $1,000 as part of the recent budget agreement. *See OSHA Urged to Use Caution*, *supra* note 247, at A-6.

250. The Act deems a violation as serious "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless

though even a nominal penalty of $1 will satisfy the statutory requirement. The maximum penalty for willful[251] and repeated[252] violations is $70,000,[253] and the Secretary must impose a penalty of at least $5,000[254] for each willful violation. Finally, there is a permissive penalty of up to $7,000[255] per day if an employer fails to abate a violation for which a citation has been issued within the appropriate time period.

Table iii

OSHA Civil Penalties[1]

Violation	Penalty
de Minimis	None
Other	Up to $7,000
Serious	Up to $7,000 (mandatory)
Repeated	Up to $70,000
Willful	At least $5,000, and up to $70,000
Failure to Abate Cited Violation	Up to $7,000 per day of violation

1. OSHA, 29 U.S.C. § 666(a)-(d).

ii. Standards for Assessing Amount of Penalty

The Act directs the OSHRC, in determining the amount of a civil penalty, to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."[256] In setting the amount of a proposed penalty, the Secretary takes into account these four factors and applies a point system.[257]

the employer did not and could not with the exercise of reasonable diligence, know of the violation." 29 U.S.C. § 666(k).

251. As defined in a criminal case, a willful violation is "deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." United States v. Dye Construction Co., 510 F.2d at 81.

252. A violation is repeated "if at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." Potlatch Corp., 7 O.S.H.Cas. (BNA) 1061, 1063 (1979).

253. The maximum penalty was increased from $10,000 as part of the recent budget agreement. *See OSHA Urged to Use Caution, supra* note 247, at A-6.

254. *See id.* (mandatory minimum penalty was added as part of the recent budget agreement).

255. *Id.*

256. 29 U.S.C. § 666(J).

257. *See* OSHA FIELD OPERATIONS MANUAL § XI-C-3(a)(2) (penalties assessed on basis of four factors: gravity of violation, size of business, good faith of employer, and employer's history of previous violations). *See also* A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT 5-25 (1988).

The point system takes into account such factors as the probability and seriousness of an illness or injury resulting from the violation, the number of employees exposed to the hazard, the duration of the exposure, and the employer's prior history of violations and good faith efforts to correct the current hazard.[258] Substantial increases are added for willful or repeated violations.[259]

iii. Extent of Penalties Imposed

The following table represents the proposed civil penalties issued by OSHA during fiscal years 1985-88, drawn from OSHA's 1990 Report to the President for Fiscal Year 1988. The table does not reflect changes made by the OSHRC in the proposed penalties, but does provide a picture of the amount of, and trends in, civil penalties under the Act. As the table makes clear, proposed civil penalties have increased steadily and significantly throughout this period. Notably, these increases occurred prior to legislation providing for a seven-fold increase in the maximum penalties and mandatory minimum penalties for willful violations.[260]

Table iv

Proposed OSHA Penalties

Year	Total Amount
1985	$ 9,190,039
1986	$12,461,152
1987	$24,461,152
1988	$45,004,519

8. The Environmental Protection Agency

The Environmental Protection Agency ("EPA") has a panoply of civil collateral sanctions it can bring against convicted organizations. Under various environmental statutes, the EPA is authorized not only to seek injunctive relief, but also to obtain civil penalties of $25,000 to $50,000 per day for violations of environmental statutes regulating air and water pollution, hazardous and toxic substances and pesticides.[261] The various environ-

258. OSHA FIELD OPERATIONS MANUAL § X1-C-3(c)(2).

259. *Id.* § X1-C-1.

260. The first increase in penalties since the 1971 birth of OSHA took effect March 1, 1991. *See* Marcia Coyle and Marianna Lavelle, *Higher OSHA Fines May Spell More Litigation*, NAT'L L.J., Mar. 4, 1991, at 5 (assessing impact of higher fines for OSHA violations).

261. 7 U.S.C. § 136l; 15 U.S.C. § 2615; 33 U.S.C. §§ 1319, 1415; 42 U.S.C. §§ 300j, 4910, 6928, 6973, 9609 (1982).

mental laws also authorize private enforcement suits.[262]

In addition to its authority to debar corporations under the general debarment regulation, EPA has specific statutory authority to debar corporations under the Clean Air and the Clean Water Acts.[263] The recent amendments to the Clean Air Act (the "Amendments") have vested even greater authority in the EPA to debar contractors.[264] "Both the Senate bill and the House amendments expand the scope of EPA's ability to prevent the award of federal contracts to persons convicted of criminal violations of the Act by allowing the Administrator to extend such prohibitions to other facilities owned or operated by the convicted person."[265] Since debarment now can apply to an entire corporation rather than just a subdivision, this collateral sanction is more significant.

One conclusion of this article has been that administrative and statutory debarment are often different. Administrative debarment does not primarily aim to punish corporations, but to ensure that the government is not defrauded in contracting. Statutory debarment has a more punitive intent and is designed to further the legislative goals of particular statutes. The 1990 Clean Air Act Amendments reflect this trend toward statutory debarment, since they authorize the Administrator to debar parties simply for violating permitting procedures.[266]

Even before passage of the Amendments, the EPA took enforcement action and imposed collateral sanctions on a broad front. Under the Clean Air Act's Section 306 and the Clean Water Act's Section 508, EPA debarred ten corporations in 1989.[267] These actions are automatically imposed upon criminal conviction. The EPA also has discretionary authority to debar a corporation if there are ongoing violations of statutes or if enforce-

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262. 15 U.S.C. § 2619; 33 U.S.C. § 1365; 42 U.S.C. §§ 4911, 6972.

263. 136 CONG. REC. S16952 (daily ed. Oct. 27, 1990) (conference report).

264. *Id.*

265. *Id.*

266. The Amendments add language that would debar contractors for convictions "arising under section 113(c) (2), the condition giving rise to the conviction also shall be considered to include any substantive violation of this Act associated with the violation of 113(c) (2). The Administrator may extend this prohibition to other facilities owned or operated by the convicted person." Amendments, § 705, 136 CONG. REC. H13187 (daily ed. Oct. 26, 1990).

These convictions, under § 113(c)(2) includes any person who knowingly

> makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this Act to be either filed or maintained (whether with respect to the requirement imposed by the Administrator or by a State).

Amendments, § 701, 136 CONG. REC. H13185 (daily ed. Oct. 26, 1990).

267. ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989 16 (1990).

ment actions are brought against a violator by either the federal or state government.[268] Only one such facility was so listed in 1989.[269]

Apart from debarment, EPA took other significant enforcement actions. EPA took over 4,000 administrative enforcement actions in 1989 brought under several different statutes, the highest level for the agency since 1976 when 3,600 actions were taken.[270] The EPA does not keep statistics on how many of these enforcement actions were taken as a collateral consequence of criminal sentencing.[271]

III. WHY COORDINATE CRIMINAL AND CIVIL SANCTIONS?

This Article suggests that collateral consequences are significant. That much seems undeniable, although data on the severity or frequency of enforcement of collateral consequences are incomplete.[272] More controversial is whether collateral consequences should be considered in criminal sentencing.[273]

There has always been some coordination between the government's civil and criminal enforcement activities,[274] but the relationship is not systematic

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268. *Id.*

269. *Id.* at 17.

270. *Id.* at 16 (These enforcement actions were brought under the Clean Air and Clean Water Acts and under TSCA, RCRA, FIFRA and CERCLA.).

271. *See* Marianne Lavalle, Fred Strasser, and Marcia Coyle, *Pollution Fines Are Up a Whopping 74 percent*, NAT'L L.J. May 27, 1991, at 5 (in 1990 the EPA fined pollution law violators a record $ 61.3 million — a 74% increase over the previous year).

272. *See supra* section II (the wide range of collateral sanctions and unavailability of records make it difficult to identify the consequences).

273. One appealing, but misplaced, argument against considering collateral sanctions would be that a sentencing court should not take into account an organization's collateral sanctions because judges do not typically take into account the consequences of imprisonment on an individual and his or her family (*e.g.*, loss of earnings, reputation and family instability, etc.). *See* UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL, § 5(H)(1) (1987) (such factors not ordinarily relevant in sentencing); *but see* Marc Miller and Daniel J. Freed, *Offender Characteristics and Victim Vulnerability*, 3 FED. SENT. R. 3 (1990) (arguing that Sentencing Guidelines should allow for more consideration of such factors).

This argument is misplaced because of the distinction between collateral *effects* — like the impact of imprisonment on family — and collateral sanctions — meaning a remedial or punitive action taken by the government in a setting other than the criminal case. There are collateral effects of punishing organizations, as well as individuals. Innocent parties such as employees, shareholders, and consumers may suffer. The key distinction for our purposes is that collateral sanctions are intentional actions, with punitive or remedial aims, while collateral effects are merely unintended by-products of punishment. Our point is that the government's *intentional* punitive actions should be coordinated.

274. For example, the Department of Justice states as a basic policy:

> Although on some occasions [parallel civil and administrative remedies] should be pursued in addition to criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of sanctions that could be imposed, the likelihood that an adequate sanction would in fact

and has rarely been the subject of careful study. To some extent, this inattention is understandable. Organizations have been prosecuted infrequently, and if convicted, the fines authorized and actually imposed were usually low.[275] Further, because traditionally judges have had virtually unfettered sentencing discretion,[276] it was hard to talk about a sentencing *system*, let alone suggest ways to coordinate civil and criminal sanctions.

Four related arguments militate for increased coordination of criminal and civil sanctions for organizations. *First*, such coordination is consistent with prevailing theories of criminal punishment.[277] *Second*, corporate law theory supports greater criminal and civil coordination.[278] *Third*, a recent Supreme Court decision interpreting the Double Jeopardy Clause suggests that constitutional problems can result without such coordination.[279] *Finally*, the United States Sentencing Commission's development of organizational sentencing Guidelines presents both an opportunity and a rationale for devoting greater attention to the relationship between these sanctions.[280]

A. Criminal Theory Suggests Coordination

The traditional goals of the criminal law are retribution, deterrence, incapacitation, and rehabilitation. Most criminal codes and sentencing systems[281] attempt to pursue all or several of these aims,[282] although some

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be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests.

UNITED STATES DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION pt. B, § 5, comment at 13-14 (1980). *See also* Parker, *supra* note 15, at 532-33.

275. *See supra* notes 24-29 and accompanying text (demonstrating history of leniency on this issue before recent legislative changes).

276. *See infra* notes 346-47 and accompanying text (pre-Guidelines judges had broad sentencing discretion).

277. *See infra* section IIIA (discussing that criminal theory suggests coordinating criminal and punitive collateral sanctions).

278. *See infra* section IIIB (discussing that corporate theory suggests coordination sanctions).

279. *See infra* IIIC (commenting on the effect of the Double Jeopardy Clause in *Halper*).

280. *See infra* IIID (discussing sentencing Guidelines for organizational defendants).

281. Theorists frequently draw a distinction between the general justification for the institution of criminal punishment (the purposes "of" punishment) and the goals sought to be achieved through the distribution of punishment in individual sentencing decisions (the purposes "at" sentencing). *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1-27 (1968); NORVAL MORRIS AND MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 90-91 (1990). The purposes "of" punishment help frame answers to such questions as what conduct should be criminalized, whether certain defenses (e.g., provocation) should be recognized, and whether certain categories of offenders — the insane, for example, or corporations — should be excluded from the reach of the criminal law. The purposes "at" sentencing can help determine the appropriate measure of punishment for a convicted defendant. This Article's focus is on the latter issue.

282. *See, e.g.*, MODEL PENAL CODE §1.02(1) (1985) (outlining purposes of "provisions governing the definition of offenses" and of sentencing); 18 U.S.C. 3553(a)(2) (1985) (identifying purposes judge should consider in imposing sentence).

theorists argue that because these purposes can conflict, one principle should be given primacy.[283] Organizational sentencing seems particularly to be based on retribution and deterrence.[284] Under either of these twin aims, coordination of criminal and punitive collateral sanctions is appropriate.

Deterrence is a form of consequentialism or utilitarianism. Adherents find the justification of punishment in the beneficial consequences thought to flow from such punishment.[285] Under a deterrence rationale, punishment primarily is meted out to discourage bad conduct by the defendant (specific deterrence) and by others (general deterrence). This principle alone, though, does not adequately define a system of distributing punishment. Without some limiting principle, utilitarian goals could serve to justify excessive punishment and a diminished concern for culpability.[286] Most deterrence theorists therefore accept the principle that an offender's punishment must not be disproportional to the gravity of the offense.[287]

Deterrence theories come with a variety of refinements. An important goal for Jeremy Bentham was encouraging an offender who was not com-

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283. *See, e.g.*, Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 370-73 (1989) (criticizing U.S. Sentencing Commission's failure to selecting guiding rationale in drafting Sentencing Guidelines); Paul Robinson, *Hybrid Principles For The Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 21 (1987) (criticizing previous efforts to "harmonize" diverse purposes of punishment). *But see* UNITED STATES SENTENCING GUIDELINES, § 1(A)(3) (declining to adopt single purpose of sentencing as various purposes generally produce same or similar results in most sentencing decisions).

284. Incapacitation remains an important rationale in sentencing individuals, but has little application to organizations. Organizations are not typically dangerous entities that need to be restrained; in any event, organizational sentences, primarily fines, do not incapacitate even dangerous organizations. *Cf.* United States v. Allegheny Bottling Co. 695 F. Supp. 856 (E.D. Va. 1988) (court imposed sentence of imprisonment on corporation, but suspended sentence and placed corporation on probation; appellate court ruled this was beyond court's power), *aff'd in part, rev'd in part*, Pepsico, Inc. v. Allegheny Bottling Co., 870 F.2d 655 (4th Cir. 1989), *cert. denied* , 110 S. Ct. 68 (1989); SENTENCING GUIDELINES FOR ORGANIZATIONAL DEFENDANTS, § 8(C) (1.1) (Preliminary Draft, No. 1, 1989) (organization operated primarily for criminal purpose or by criminal means should receive fine sufficient to divest it of all assets).

Rehabilitation, too, seems to have limited applicability to organizations, and has, for the most part, been abandoned as a justification of punishment. *See, e.g.*, 28 U.S.C. § 994(k) (1991) (imprisonment should not be imposed for the purpose of rehabilitating an offender). We also note that Professor Coffee's suggestion that mitigation of an organization's sentence for good faith compliance efforts should be held in abeyance during a probationary period is, in effect, a means to ensure the organization's "rehabilitation". Coffee, *supra* note 1, at 70.

See generally, Pamela H. Bucy, *Corporate Ethos: A Standard For Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1098 (1991).

285. *See generally* JEREMY BENTHAM. AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1970 (1789).

286. *See, e.g.*, Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L. FORUM 259, 261 (1990) (utilitarian theory "fails adequately to support ethical limits on the distribution of sanctions.").

287. *See, e.g.*, JOHANNES ANDENAES. PUNISHMENT AND DETERRENCE, 135-147 (1974) (general deterrence considerations are given weight as long as penalty remains proportional to the crime).

pletely deterred to choose a lesser, rather than a greater, offense.[288] He therefore sought to scale punishments to the severity of the offense. A particular version of consequentialism has become prominent in the modern era: the criminal system is a pricing system that attempts carefully to weigh the costs and benefits of different punishments. This view, associated with the law and economics school,[289] seeks to deter harmful conduct, but worries about expending more resources than are saved in the process and discouraging conduct society regards as valuable. The point at which the proper balance is struck is referred to as the "optimal" penalty.[290]

A deterrence oriented system with any of these elements should take account of punitive collateral sanctions. On any deterrence theory, overpunishment must be avoided, either for moral reasons or to properly conduct a cost/benefit analysis. Punitive collateral consequences are, by definition, part of the punishment visited upon a defendant. Ignoring them risks striking an incorrect balance between conduct and sanction.

The other dominant theory of punishment, retribution, is often referred to as just punishment or "just deserts".[291] Its purpose is retributive, so its legitimacy is not based on the results believed to flow from punishment (although adherents certainly hope that there will be beneficial consequences). Retribution in this sense means not that society seeks vengeance or revenge, but rather that punishment is based on the nature of the offense (e.g., the harm caused and the offender's fault in bringing it about).

Modern retributive theory suggests that punitive collateral consequences should be factored into the sentencing decision. Central to these theories are notions of ranking and proportionality.[292] Offenses must be ranked in terms of wrongfulness, so that punishment can be related to offense severity. The more harmful the conduct, the harsher the sentence. Proportionality reflects the moral belief that criminal acts should be punished no more

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288. BENTHAM, *supra* note 285, at 168.

289. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 163-73 (1977) (employing costly criminal sanctions is wasteful where they will not deter unlawful conduct); Becker, *Crime and Punishment: An Economic Approach*, 76 J. OF POL. ECON. 169-217 (1968). *But see* Coffee, *supra* note 1, at 44-49 (criticizing "pricing" approach to criminal law).

290. *See, e.g.*, Richard A. Posner, *Optimal Sanctions for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980) (arguing that the imposition of large fines as opposed to imprisonment is a more effective sanction); Parker, *supra* note 15, at 552-54 (describing an economic approach to optimal penalties).

291. *See, e.g.*, ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 66-76 (1976) (arguing that punishment should depend on the seriousness of defendant's crime, not the risks of future criminality); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES (1985) (same). This theory derives, initially, from Kant. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-107 (Bobbs-Merrill ed. 1965) (arguing public law mandates punishment be imposed on the ground that someone has committed a crime).

292. Professor von Hirsch has recently referred to these two principles as "ordinal" and "cardinal" proportionality. *See* von Hirsch, *supra* note 286, at 282-88.

severely than is justified by the wrongfulness of the conduct. Both of these principles are offended by ignoring punitive collateral sanctions. If punitive collateral sanctions are applied in an uncontrolled way, less serious offenses may be punished more harshly than more serious offenses, and any offense may result in disproportional punishment.

Both deterrence and retribution thus support coordinating criminal and punitive collateral sanctions. Under either theory, punishment must be set at an appropriate level. A punishment that is too lenient will neither deter future misconduct nor satisfy the law's retributive aims. Overly severe or duplicative punishment will discourage legal conduct and will inflict unjust retribution. In theory, each philosophical approach has for any offense a "right" level of sanction, or at least an appropriate range of punishment. The goal of a sentencing system — whether a Guideline system or one in which the judge exercises great discretion — is to approximate the proper sanction level in most cases. Coordinating punitive collateral sanctions furthers that aim.

Civil enforcement activities may have different goals than criminal punishment. Some civil monetary penalties are intended to reimburse the government for losses caused by the defendant, while injunctive-type relief often is intended to ensure the integrity of the industry in which the defendant operates. To the extent that the goals of civil and criminal enforcement are separate and distinct, seemingly multiple penalties have validity.

In practice, however, the line between the two types of enforcement is often blurred. Restitution orders in criminal cases can duplicate the remedial purpose of a civil sanction. Under the new Federal Sentencing Guidelines for organizational defendants,[293] criminal fines may be based on double or triple the defendant's gain or the victim's loss:[294] precisely the civil penalties often imposed. Civil monetary penalties serve both deterrent and retributive purposes, and civil remedies are on average larger than criminal fines for organizations.[295] This overlapping of sanctions has only increased as both criminal fines and civil enforcement activity have risen.

In this context, the distinction between the criminal sanction and collateral consequences becomes artificial. A sanctioning process that strictly enforces such a distinction may become incoherent. How can a sentencing court, or the Sentencing Commission, set criminal fines at the "right" levels for punishment and deterrence purposes if the defendant will face automatic civil penalties, due to the collateral estoppel effect of the criminal conviction, that are as high or higher than the fine? Consequently,

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293. *See infra* IIID.

294. *Id.*

295. *See* Cohen, *supra* note 7, at 10-14 (discussing data demonstrating that between 1984 and 1990 total sanctions for all sentenced corporations greatly exceeded criminal fines).

proper sanction levels can only be attained if the criminal sentence and the collateral sanction are imposed with reference to, and consideration of, the other.

B. Corporate Theory Invites Ordering

Corporate theory, as well as criminal theory, addresses the relevance of collateral sanctions. The law of corporations is less important to an area that is essentially criminal and constitutional in nature, but it nonetheless offers insights.

In the last decade, one theory has emerged as the dominant paradigm employed to understand and describe the corporate form. This theory is the "nexus of contracts"[296] or "contractarian" view of the corporation. This theory, derived from the work of law and economics scholars, suggests that the corporation is nothing but a bundle of freely enforced contracts that link shareholders, managers, employees, creditors and others. The very heart of the corporation is a private ordering that is demonstrated by contractual relationships freely entered into by affected parties.[297] This legal view of the corporate form is borrowed primarily from the economic work of Coase, Jensen and Meckling.[298]

According to this view, contracts outline the specific division of labor within a firm. Difficulty arises, however, in the contract entered into between shareholders and managers. Because managers, in the modern corporation, are only insignificant owners of an enterprise, they have radically different incentives than shareholders. Rather than maximize profits, these managers might want to maximize their own welfare. This gives rise to the contractual problem of agency costs: the central problem for the corporation under the contractarian view is how to reduce agency costs that are created by the delegation of shareholder power to managers.[299] If the goal of corporate law is to reduce such agency costs, the coordination of criminal and civil sanctions becomes very important. To the extent these two

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296. *See generally* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. L. Rev. 913 (1982) (describing the corporation as a legal fiction in which there is a clear distinction between ownership and management).

297. *See* Lucian A. Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1397 (1989) ("the contractual view of the corporation implies that the parties involved should be totally free to shape their contractual arrangements").

298. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 403-04 (1937) (defining a firm by describing the contractual relationship between employer and employee); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976) (describing the corporation as a "legal fiction" that acts as a nexus of contracts, and asserting that these contractual relations are the essence of the corporation).

299. *See* Melvin A. Eisenberg, *The Structure of Corporate Law*, 89 COLUM. L. REV. 1461, 1471-74 (1989) (discussing conflicts of interest between the shareholders and managers which tend to increase agency costs).

potential liabilities are coordinated, the firms' shareholders have a more informed view of what precisely are the agency costs associated with different types of managerial behavior.

Although the dominant contractualist view of corporate law suggests coordination, that does not end the inquiry. A competing theory of corporate law may not lend itself to the argument for coordinating civil and criminal sanctions. This "institutionalist" or "managerial power" theory holds that the corporate law should be about policing the power relationships between managers and shareholders. On this view, the history of corporate law has been the gradual erosion of shareholder power in favor of managerial power.[300]

The institutionalist view of corporate law theory derives from sociology and history. The notion is that organizations, particularly corporations, are the defining institutions of contemporary society and have become substitute communities and families.[301] The importance of imbuing these institutions with a moral code transcends the purposes and priorities of the criminal law. Only meaningful punishment for organizations — without consideration of collateral sanctions — can properly organize and monitor institutional cultures.

The institutionalist or managerial power view also has roots in political science. On this view, the questions of power and power relationships are as important as moral considerations. A significant literature, in both the political science and legal traditions, has suggested over the last twenty years that large organizations exert excessive power in both the economic and political sphere.[302] These organizations are not subject to the same checks and balances under which the legislative, executive and judicial branches of government operate. Therefore the law, particularly the criminal, corporate, and administrative law, can serve as the only force to equalize power relationships in a democratic polity.

On the institutionalist view of corporate law, it may be that collateral

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300. *See generally* ADOLF A. BERLE AND GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1968) (indicating trends of increasing stock ownership and increasing separation of ownership and control); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (discussing the success of Delaware's pro-management statutes in attracting businesses to incorporate in that state).

301. This view has its origins in the work of Thorstein Veblen and Max Weber. *See generally* THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (1973); THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA (1967) (discussing the rise of the corporation in modern society).

302. *See generally* CHARLES E. LINDBLOOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS (1977) (since business occupies a privileged position in society, one important function of the government is to ensure that businessmen perform their tasks); ROBERT B. REICH, TALES OF A NEW AMERICA (1987) (how free-market conservatism became the prevailing economic philosophy in the 1980's); JOHN K. GALBRAITH, THE AFFLUENT SOCIETY (1984).

sanctions should not be coordinated with criminal penalties. If the law imposes collateral sanctions on organizations, they should not be viewed as onerous, but rather as a mechanism for redistributing power. To the extent collateral sanctions cabin managerial power, they should be encouraged.

However, it is not always clear that the institutionalist view would recommend against coordinating criminal and collateral penalties. By combining collateral and civil sanctions, proponents of limiting managerial power may have a greater idea of the entire range of penalties that can limit managerial overreaching. Coordination, in effect, may lead to the use of greater, more certain, measures of legal power to countervail managerial power.

To summarize: the dominant contractualist school favors coordination. To the extent civil and criminal sanctions are intertwined, corporations have a greater ability to identify agency costs and plan for the future. The managerial power school may or may not support coordination, depending on whether the coordination leads to greater checks on managerial behavior. But consideration of collateral sanctions will benefit the institution, regardless of whether the corporation is run for shareholders, managers, or the community.

C. *The Double Jeopardy Clause Mandates Orchestration*

Constitutional doctrine, as well as criminal and corporate theory, may require the consideration of collateral sanctions in sentencing. A recent Supreme Court decision suggests the future importance of coordinating civil and criminal enforcement activity. In *United States v. Halper*,[303] the Court ruled unanimously that the Double Jeopardy Clause prohibits the imposition of a punitive civil sanction upon a defendant who has already been criminally convicted for the same conduct.[304] Although the extent of the *Halper* rule is unclear, the case requires rethinking of the relationship between criminal and civil penalties. The Court itself suggested that greater coordination between the various forms of sanctions could avoid potential constitutional infirmities in the current system.[305]

The defendant in *Halper* managed a company that provided Medicare services.[306] During 1982 and 1983, Halper caused the government to overpay the company $585, by submitting sixty-five requests for reimbursement that misidentified the service provided.[307] In 1985, Halper was convicted on

303. 490 U.S. 435 (1989).

304. *Id.* at 435-36.

305. *See supra* notes 273-84 and accompanying text (discussing the merits of a unified approach to penalties).

306. United States v. Halper, 490 U.S. at 437.

307. *Id.*

sixty-five criminal charges under the False Claims Act, and was sentenced to two years imprisonment and a $5,000 fine.[308]

The government subsequently sued Halper under the Civil False Claims Act[309] for improperly seeking Medicare reimbursement. Although its loss was only $585, the government sought the authorized statutory penalty of $2,000 per claim,[310] for a total of $130,000. The District Court granted the government's motion for summary judgment, based on the collateral estoppel effect of the criminal conviction,[311] but refused to award the full amount sought by the government.[312] The court ruled that such a large penalty, following a criminal conviction, would constitute double jeopardy because it bore no "rational relation" to the government's loss, even considering the costs of investigating and prosecuting Halper.[313] In order to avoid invalidating the statute, the court ruled that the $2,000 per claim penalty was discretionary, and awarded the government a reduced sum of $16,000.[314]

Following the government's motion for reconsideration, the court reversed itself, ruling that the $2,000 penalty was mandatory for each count.[315] The court then held the $130,000 penalty to be unconstitutional under the Double Jeopardy Clause.[316]

The Supreme Court unanimously ruled that the Double Jeopardy Clause prohibits the government from imposing a punitive civil sanction on a defendant for conduct that has already resulted in a criminal conviction.[317] According to the Court, a penalty that is so "overwhelmingly disproportionate"[318] to the harm caused by the defendant that it is not rationally related to compensating the Government, is in violation of the Double Jeopardy Clause.[319] The Court concluded that the civil penalty imposed on Halper was indeed punitive, and remanded the case for reconsideration and a determination of "the size of the civil sanction the Government may re-

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308. *Id.*

309. Pub. L. No. 97-258, 96 Stat. 877, 978-79 (1982) (current version at 31 U.S.C. §§ 3729-3731 (1988)).

310. Pub. L. No. 97-258, 96 Stat. 877, 978 (1982) (current version at 31 U.S.C. § 3729 (1988)). These penalties were subsequently increased by the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

311. *See* Emich Motor Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

312. United States v. Halper, 490 U.S. at 438.

313. *Id.* at 439.

314. *Id.* at 452.

315. United States v. Halper, 664 F. Supp. 852, 853-54 (S.D.N.Y. 1987) *vacated*, 490 U.S. 435 (1989).

316. *Id.* at 854.

317. United States v. Halper, 490 U.S. at 449.

318. *Id.*

319. *Id.*

ceive without crossing the line between remedy and punishment."[320]

Under the *Halper* approach, trial courts must look beyond the statutory label given by the legislature to determine the interests served by a "civil" penalty.[321] Courts must make "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."[322] The critical difference, according to Justice Blackman, is that legitimate civil sanctions are remedial in nature, while the traditional purposes of punishment are retribution and deterrence.[323] Therefore, "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution."[324]

Despite this striking holding, the implications of *Halper* remain unclear. The opinion itself contained some internal tension, the resolution of which will determine its ultimate impact. On the one hand, the Court suggested that a collateral sanction is invalid to the extent it is motivated, even in part, by retribution or deterrence: "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as *also* serving either retributive or deterrent purposes, is punishment as we have come to understand the term."[325]

On the other hand, the Court emphasized that it does not see *Halper* as requiring a fundamental reworking of civil enforcement mechanisms.[326] According to Justice Blackmun, a civil sanction will only violate the prohibition against double jeopardy in:

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320. *Id.* at 450.

321. The Court rejected the government's position that the Double Jeopardy Clause applies only to a second criminal proceeding. "[W]e hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 n.7. The Court distinguished Helvering v. Mitchell, 303 U.S. 391 (1938) (where defendant was acquitted of criminal charges, subsequent civil enforcement of a remedial sanction does not violate Double Jeopardy Clause), United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943) (where defendant was found guilty of criminal charges, subsequent civil liability does not violate Double Jeopardy Clause when liability roughly equals the amount of injury to plaintiffs), and Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (accepting the theory that where actual civil penalties are difficult to ascertain, statutorily fixed penalties in a subsequent civil action are valid). United States v. Halper, 490 U.S. at 441-46. *See also* Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 VA. L. REV. 1251, 1257-59 (1990) (distinguishing *Halper* from *Mitchell*, *Hess*, and *Rex Trailer*).

322. United States v. Halper, 490 U.S. at 448.

323. *Id.* Incapacitation and rehabilitation are also traditional goals of sentencing. *See supra* notes 281-87 and accompanying text (discussing retribution, deterrence, incapacitation and rehabilitation).

324. United States v. Halper, 490 U.S. at 448-49.

325. *Id.* at 449 (emphasis supplied).

326. *Id.* at 450-51

> the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: When a defendant previously has sustained a criminal penalty and the proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[327]

The Court recognized the fact that "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice."[328] The Court stated that in the typical case "fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole."[329]

It will be for the lower courts to sort out this tension within *Halper*, a process that has only just begun. For corporate defendants, a threshold question is whether organizations, particularly corporations, will receive the double jeopardy protections announced in *Halper*. The Supreme Court has held, although without explanation, that corporations are covered by the Double Jeopardy Clause.[330] However, the Court has denied corporations the Fifth Amendment privilege against self-incrimination, and has shown a recent proclivity to limit the First Amendment rights of corporations.[331]

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327. *Id.* at 449

328. *Id.*

329. *Id.*

330. United States v. Martin Linen Supply Co., 430 U.S. 564, 567 (1976). In order to obtain due process, Fifth Amendment, Double Jeopardy, and Fourth Amendment rights, organizations — principally corporations — have relied on the argument that they are "persons." *See id.* (holding respondent corporation protected by Fifth Amendment Double Jeopardy Clause); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (holding corporations are persons under the 14th Amendment); Hale v. Henkel, 201 U.S. 43, 76 (1906) (holding corporations entitled to 4th Amendment rights). *See also* Carl J. Mayer, *Personalizing The Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 661 (1990) (observing that, in recent years, every Bill of Rights guarantee requested by corporations has been granted).

331. *See* Austin v. Michigan Chamber of Commerce, 492 U.S. 936 (1990). *See also* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 588 (1991) (citing recent decisions holding corporate speech may be limited to serve a compelling state interest).

In the future, however, corporations may use the argument that they are "persons" for constitutional purposes in order to avail themselves of other constitutional protections. The Eighth Amendment's prohibition on "excessive fines" conceivably could be triggered by overlapping and cumulating civil and criminal penalties for the same conduct. *See* United States v. Regan, 726 F. Supp. 447, 459 (S.D.N.Y. 1989) (holding that the Eighth Amendment was violated by forfeiture of assets by defendants whose RICO violations were predicted entirely on federal tax fraud). *See also* United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (holding court must consider if forfeiture is so gross as to violate 8th

By using the term "small-gauge offender" in *Halper*, the Court may have signalled that it was concerned with the fact that the defendant was a single individual. This same reasoning would not apply to organizations, especially not large organizations.[332] The Court's language also intimated that instances where the collateral sanction is so disproportionate are indeed "rare."[333]

To date, most of the lower courts confronted with *Halper* challenges to either civil sanctions or criminal prosecutions[334] have rejected those challenges.[335] In several cases, however, such challenges have been upheld.[336]

Amendment). The Supreme Court expressly reserved the question whether corporations are entitled to Eighth Amendment protections in Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989). Similarly, the Due Process Clauses of the Fifth and Fourteenth Amendments have been asserted as a basis for challenging civil punitive damages. *See* Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991) (holding due process rights involved in award of punitive damages protected by procedural safeguards).

332. Some support for this interpretation is found in the only post-*Halper* opinion, to date, applied to an organization. In United States v. Valley Steel Products Co., 729 F. Supp. 1356 (Ct. Int'l Trade 1990), the court considered the question of whether the imposition by the United States government of civil fines on top of a criminal conviction for violating an anti-dumping statute would run afoul of the Double Jeopardy Clause. The corporation pleaded nolo contendere to the criminal charge, and the judge imposed a fine of $10,000 for violating the anti-dumping statute. But the government sought an additional civil recovery ranging up to $13 million because the corporation had violated a statute providing for civil liability. *Id.* at 1357. The court found no double jeopardy violation because the statute did not provide for a fixed penalty, as in *Halper*, but left the penalty to the discretion of the court, depending on the degree of culpability. *Id.* at 1359.

There is no language in the opinion suggesting that the organizational nature of the defendant was a factor. This might explain why such a large civil penalty was permitted.

333. United States v. Halper, 490 U.S. at 449.

334. *Halper* protections also apply when a civil penalty precedes a criminal conviction. *See, e.g.*, United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) (holding debarment from H.U.D. program remedial in nature); United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990) ("the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties came before or after the criminal indictment."). It would seem, then, that if a punitive collateral sanction is imposed first, a subsequent criminal prosecution would be barred.

335. *See, e.g.*, United States v. Bizzell, 921 F.2d at 267 (administrative assessment of $30,000 against defendant not "punishment" under Double Jeopardy Clause because goal of assessment was remedial); Bernstein v. Sullivan, 914 F.2d 1395, 1403 (10th Cir. 1990) (stipulated civil penalty far below the statutory maximum that might trigger *Halper*); United States v. WRW Corp., 731 F. Supp. 237, 239 (E.D. Ky. 1989) ($90,000 civil penalty for violations of mine health and safety rules "not so extreme and divorced from the United States' expenses incurred in the investigation and prosecution of the defendants' violations to constitute punishment, rather than the remedial goal of ensuring safe mining conditions and practices"); United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222, 1223 (S.D. Fla. 1989) (forfeiture of boat not second punishment); United States v. Marcus Schloss & Co., 724 F. Supp. 1123, 1128 (S.D.N.Y. 1989) (civil penalty under Insider Trading Sanctions Act of 1984 valid, despite Act's emphasis on "sanctions" and "deterrence").

336. *See, e.g.*, United States v. Sanchez, 47 CRIM. L. REP. (BNA) 1026, 1027 (S.D. Tex., Mar. 14, 1990) (barring prosecution of drug smuggler who had been fined $232,000 by Customs Service); Small v. Commonwealth, 48 CRIM. L. REP. (BNA) 1214, 1215 (Va. Ct. App., Nov. 20, 1990) (criminal contempt prosecution barred by a prior civil contempt penalty).

For example, in *United States v. Hall*,[337] the defendant first plead guilty to illegally transporting negotiable instruments, for which he received a prison sentence and a $10,000 fine.[338] The government then imposed a $1,035,000 civil monetary penalty for the same conduct.[339] The district court rejected the government's "minimal effort at establishing a rational relationship between the $1,035,000 civil penalty and the goal of making the Government whole."[340]

Halper may or may not become an important tool for defendants facing parallel civil and criminal sanctions. At least some lower courts will likely scrutinize collateral sanctions for double jeopardy violations, particularly because many collateral sanctions are, at least in part, retributive or deterrent in purpose or effect.[341] Further, current trends toward increased use of both civil and criminal sanctions may encourage courts to apply *Halper* rigorously.[342] If criminal fines increase, as is expected under the proposed corporate sentencing Guidelines, any additional civil sanctions may increasingly be regarded as punitive, therefore triggering *Halper* concerns.

Although both the language of *Halper* and the majority of post-*Halper* lower court decisions suggest that most currently imposed civil sanctions would be upheld, some lower courts can be expected to limit the government's ability to pursue both civil and criminal penalties. A reasonable response by the government would be to seek greater coordination between criminal and collateral sanctions. The *Halper* Court itself suggested that one way to avoid double jeopardy problems would be for the government to "[seek] and [obtain] both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."[343] Although such consolidated proceedings may not be the best approach, the Court's concerns further illustrate the way *Halper* requires a rethinking of the relationship between, and greater coordination among, criminal and collateral sanctions for organizations.

Halper imposes limits on the government's ability to pursue both civil and criminal sanctions. The Supreme Court's *Halper* decision should have effect even beyond judicial actions which may require the invalidation of a collateral or criminal sanction, by sending a message to policy makers. Congress, the administrative agencies, and the Sentencing Commission

337. 730 F. Supp. 646, 647 (M.D. Pa. 1990).

338. *Id.* at 647.

339. *Id.*

340. *Id.* at 655. The court indicated that the government would ordinarily be entitled to make a more detailed submission of an approximation of its costs and damages, but the court granted the defendant summary judgement on the grounds that a civil penalty violated the earlier plea agreement.

341. *See supra* section II (discussing the rise of collateral consequences).

342. *See generally* Cohen, *supra* note 7 (discussing recent trends in collateral sanctions).

343. United States v. Halper, 490 U.S. at 450.

should be more sensitive to the interests safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.[344] More closely coordinating civil and criminal sanctions would further those interests.

D. Sentencing Guidelines Prompt New Arrangements

The Federal Sentencing Guidelines for individual criminal defendants have been in effect since November 1, 1987.[345] Prior to the promulgation of the Guidelines, federal judges had broad sentencing discretion, limited only by statutory maximum and, where applicable, mandatory minimum sentences. This sentencing system resulted in a widespread perception of unwarranted sentencing disparity.[346] Concern with this disparity was the driving force behind Congress' decision to establish the United States Sentencing Commission and to charge it with drafting binding sentencing Guidelines.[347]

Initially, the Sentencing Commission ignored the issue of sentencing organizational defendants, probably because organizations make up such a small percentage of criminal defendants in federal court.[348] Recently, however, the Sentencing Commission has turned its attention to developing Guidelines for sentencing organizations. After a long, difficult process, during which it considered a number of proposals,[349] the Commission adopted

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344. *Id.* at 447.

345. For an overview of the development of the Sentencing Guidelines for individuals, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (providing background necessary to understand Guidelines and describing compromises embodied in final version of Guidelines). *See also* Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989) (exploring relationship between Federal Sentencing Guidelines and plea negotiation practices); Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367 (1989) (examining how well United States and Canadian Sentencing Commissions have applied the idea of sentencing Guidelines).

346. *See generally* ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SENTENCING OPTIONS OF FEDERAL DISTRICT JUDGES I-1 (1981); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 123-24 (1975) (presenting statistical differences in severity of sentences); Whitney N. Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.ST. B.J. 163 (1973). *But see* STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT 12 (1988) (criticizing methodology of Second Circuit Sentencing Study).

347. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 41-46, 52 (1983) (outlining disparity and uncertainty in current federal sentencing).

348. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 1A(5) (November 1, 1987) (hereinafter GUIDELINES).

349. *See* Michael K. Block, *Guest Editor's Observations*, 3 FED. SENT. R. 115 (1990) (for view that Commission's proposal Guidelines are effectively moving corporate sentencing toward a negligence standard); William. W. Wilkins, Jr., *Sentencing Guidelines for Organizational Defendants*, 3 FED. SENT. R. 118 (1990) (for discussion of fundamental principles underlying Guidelines); Jeffrey S. Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 FED. SENT. R. 133 (1990) (asserting that the 1990 draft proposals of Guidelines set penalty levels without regard to past penalty practice or

Guidelines for organizational defendants which took effect on November 1, 1991.[350]

The introduction of these Sentencing Guidelines provides both a rationale and an opportunity for more closely coordinating criminal sentencing and collateral sanctions for organizations. The rationale is supplied by the increased fine levels likely under the Guidelines and the goals underlying the new system, both of which suggest the need for coordination. An opportunity is presented because the Guidelines offer the first concrete mechanism for coordinating criminal and collateral sanctions.

Although this Article will not closely analyze the new Guidelines,[351] there are several important observations to be made concerning the relationship between collateral sanctions and criminal sentencing under the Guidelines. First, the Guidelines are likely to continue the trend, discussed above, towards harsher criminal penalties for organizations. The Guidelines initially require the sentencing court to determine a base fine.[352] This base fine is the greater of: (a) the gain to the defendant from the offense; (b) the loss to the victim from the offense; or (c) the amount taken from a fine table designed to reflect the seriousness of the offense. The judge must next calculate a fine multiplier range. The applicable multiplier range depends in turn on a "culpability score" based on a series of aggravating and mitigating factors.[353] The sentencing range is the base fine times the

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potential for a destructive effect on the economy).

350. 28 U.S.C. § 994 (1991). A question exists whether the new Guidelines will only apply to offenses committed after that date, or whether they will apply to all defendants sentenced after that date. The Sentencing Reform Act requires judges to apply the Sentencing Guidelines "that are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4) (1991). This retrospective application of the Guidelines, though, would raise serious ex post facto concerns. *See* THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE, §§ 10.1, 10.2 (1989) (discussing effective date of Guidelines).

351. For analysis and criticism of earlier versions of the proposed Guidelines, see John C. Coffee, Jr., *"Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants*, 3 FED. SENT. R. 126 (1990) (discussing Commission's use of incentives in formulating the Guidelines and whether "social engineering would work); Robert S. Mueller III, *Advantages of the Department of Justice Proposal for Sentencing Organizations*, 3 FED. SENT. R. 130 (1990) (discussing Justice Department criticism of Commission approach); Parker, *supra* note 349 (discussing 1990 draft's possible adverse effects on the economy); Jennifer H. Arlen, *Why the Commission's Proposal is Not Good Economics*, 3 FED. SENT. R. 138 (1990) (asserting that proposed sentences inconsistent with optimal deterrence); Jonathan M. Karpoff & John R. Lott, Jr., *Why the Commission's Corporate Guidelines May Create Disparity*, 3 FED. SENT. R. 140 (1990) (proposed Guidelines do not take into account role that market forces play).

352. *See* GUIDELINES § 8C2.4 (describing the method of determining the base fine for the purposes of this Guideline).

353. Aggravating factors include: involvement in or tolerance of criminal activity by high level personnel; prior criminal history within the organization; violation of a judicial order; and obstruction of justice. Mitigating factors include: implementation, prior to the offense, of an effective compliance program; self reporting of the offense; cooperation with the authorities; and acceptance of responsibility. GUIDELINES § 8C2.5.

multiplier.[354]

For example, assume that Company *A* has a base fine of $1,000,000, based on its gain from the offense. The defendant starts with a culpability score of 5, which translates to a multiplier range of between one and two times the base fine. If no aggravating or mitigating factors are present, Company *A*'s fine range is between $1,000,000 and $2,000,000. The lowest multiplier range, at a culpability score of 0 or less, is from .05 to .20 of the base fine. The highest range, at a culpability score of 10 or more, is from 2.0 to 4.0 of the base fine. Thus if Company *A* had a culpability score of 0, due to the presence of several mitigating circumstances, its fine range would be between $50,000 and $200,000; if instead, because of aggravating factors, its culpability score was 10, its fine range would be between $2,000,000 and $4,000,000. In all cases, the judge is essentially free to choose any fine within the applicable range.[355]

These Guidelines are likely to raise significantly fine levels for organizations. If no aggravating or mitigating factors are present, the multiplier range will be one to two times the gain or loss.[356] Even considering the recent increase in overall fine levels, this represents a significant increase. By way of comparison, Professor Cohen found that before the Criminal Fine Enforcement Act of 1984 ("CFEA") took effect, the mean fine multiple was .58 and the median fine multiple was .09.[357] After CFEA took effect the mean fine multiple rose to .73 and the median rose to .13.[358]

This continued increase in criminal fines for organizations may begin to implicate the Supreme Court's double jeopardy concerns in *Halper*. The more severe criminal fines become, the more courts may be likely to call into question the validity of any civil sanction imposed for the same conduct. The relationship between *Halper* and the trend towards higher criminal fines for organizations is complex. The key question under *Halper* is whether the collateral sanction furthers punitive or remedial aims. Does the size of the criminal fine affect whether a civil sanction is punitive? On one

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354. *See id.* at § 8C2.7 (for the formula used to determine the minimum and maximum Guideline fine range).

355. *Id.* § 8C2.8 lists factors the Commission recommends judges consider in determining the amount of the fine within the applicable range.

356. GUIDELINES §§ 8C2.6, 8C2.8.

357. Cohen, *supra* note 7, at 54 (table 5).

358. *Id. See* John C. Coffee, Jr., *Big Corporations, Off the Hook*, LEGAL TIMES. May 6, 1991, at 22 (arguing that because of their familiarity with the Guidelines, large corporations will be able to take advantage of most of the mitigation credits and will likely be sentenced at the lowest multiplier ranges). *But see* Andrew Frey, *Getting Down to Business on Sentencing*, LEGAL TIMES, May 20, 1991, at 21 (for the opinion that big business has reservations about the operation of the Guidelines). Even if Professor Coffee's analysis is correct, because most sentenced organizations are small, not large, corporations, *see* Cohen, *supra* note 7, at 5, the proposed Guidelines will still have a dramatic effect for most corporate defendants. Even Professor Coffee predicts that for small corporations, the proposed Guidelines "will often be bankrupting." Coffee, *Big Corporations*, LEGAL TIMES, May 6, 1991, at 26.

level, the size of the criminal fine seems irrelevant to this inquiry. The total amount of monetary sanction is not the issue;[359] rather, the issue is the nature of the civil penalty.

On the other hand, common sense suggests that a $1,000 fine will cast a smaller shadow on a subsequent collateral sanction than will a $1,000,000 fine. This is particularly true when, as under the Guidelines, the criminal fine already has a remedial, as well as a punitive, aspect. Restitution,[360] remedial orders,[361] and fine levels based on gain or loss[362] are all part of the Guidelines and tend to make any additional large collateral penalty appear punitive in nature.

Higher fines warrant more coordination with civil sanctions for reasons beyond *Halper*. Consider an organization that is convicted and fined between two and three times the gain or loss, or perhaps a larger amount from the alternative fine table. The Guidelines also require restitution as part of the sentence. Arguably, there would be far less justification for the government then to pursue civil monetary sanctions against this defendant, since the criminal fine is plainly punitive and restitution has been paid to any victim. At least, such a heavy criminal fine would call for great discretion in imposing a civil monetary sanction.

Using the Guidelines to develop more coordination between criminal and civil sanctions would also be consistent with the goals underlying those Guidelines.[363] One goal of the Guidelines is to stimulate thinking about the proper level of sanction for various forms of misconduct.[364] What better resource exists than the Sentencing Commission to consider this important subject?

Further, such an effort would be consistent with the Guidelines' overriding goal of reducing unwarranted disparity. As it stands now, a much bigger bite is taken by collateral sanctions than by criminal fines for organizations. With few standards governing the imposition of collateral sanctions, or their relationship with criminal penalties, any degree of uniformity within the Guidelines may be largely illusory.

The implementation of sentencing Guidelines presents a tremendous opportunity for increasing the coordination of criminal and civil sanctions.

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359. For example, there was no suggestion in *Halper* that a $165,000 fine in the criminal action would have been invalid.

360. *See* GUIDELINES § 8B1.1 (for the court's role in entering restitution orders).

361. *See id.* § 8B1.2 (discussing what remedial orders are required of organizations when conditions of probation are imposed).

362. *See id.* § 8C2.8(b) (stating that courts may consider pecuniary loss and gain caused by the offense to determine the culpability score).

363. *See id.* at introductory commentary (discussing the overall objectives of the Sentencing Guidelines).

364. *See id.* (discussing Guideline objectives regarding the level of sanction). *See also* 28 U.S.C. §§ 991(a)(2), 994(o), 995(a) (describing Sentencing Commission's purposes and powers).

With Guidelines, the fine a convicted organization will receive should be somewhat predictable, thus enabling civil and administrative sanctions to be structured to achieve legitimate nonpunitive goals. The Guidelines offer the possibility of rules, or at least guiding principles, to coordinate the disparate sanctions.

The Guidelines do recognize, to a limited extent, the need to coordinate sanctions when organizations are involved. The introductory commentary states that the Guidelines are designed to ensure that the criminal penalties imposed on organizations, and on the individuals acting on the organization's behalf, "*taken together*, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct."[365] The Guidelines also instruct courts, in determining the amount of the fine within the applicable Guideline range, to consider "any collateral consequences of conviction, including civil obligations arising from the organization's conduct."[366] Another section of the Guidelines directs that the court "may offset the fine imposed upon a closely-held organization" by the amount of any fines paid by the owners of the organization in a federal criminal proceeding arising out of the "same offense conduct for which the organization is being sentenced."[367]

Unfortunately, the Guidelines do not go far enough. The prior draft of organizational Guidelines contained a provision stating that:

> [i]f a punitive civil or administrative sanction, payable to the federal, or a state or local government has already been imposed upon the organization in connection with the conduct constituting the offense conduct, a downward departure from the applicable Guideline range of up to the amount of the prior punitive sanction may be warranted.[368]

This provision was dropped without explanation in the final version of the Guidelines sent to Congress. Judges may yet retain this departure authority,[369] but the Commission's statement would have been an important tool

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365. *Id.* (emphasis added).

366. *Id.* § 8C2.8(a)(3).

367. *Id.* § 8C3.4. To qualify for this offset, the individual must own at least 5% of the organization. Further, the "amount of such offset shall not exceed the amount resulting from multiplying the total fines imposed on those individuals by those individuals' total percentage interest in the organization." *Id.*

368. *Id.* § 8C5.17 (Policy Statement) (November 1990 draft).

369. The court can depart from the Guidelines if it determines that there is present in the case "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described" in the Guidelines. 18 U.S.C. § 3553(b). *See generally* HUTCHISON & YELLEN, *supra* note 350, § 5K2.0 Annotations 2-5.

in coordinating sanctions. Perhaps future versions of the Guidelines[370] will take additional steps in this direction. In the next section, we offer suggestions as to how the Guidelines could be used to implement greater coordination of sanctions.

IV. TOWARD A GLOBAL VIEW OF CRIMINAL AND CIVIL SANCTIONS

Closer coordination of criminal and collateral sanctioning of organizations is warranted by the interplay between the increasing frequency and severity of those sanctions, criminal and corporate law theory, the Supreme Court's *Halper* decision, and the new Federal Sentencing Guidelines for organizational defendants. The question remains: How should these sanctions be correlated and calibrated? One potential approach is to encourage or require the government to pursue its various remedies against a defendant in a single proceeding. This policy would enable one judge to determine all of the sanctions to be imposed upon an organization for specific misconduct at one time. It would avoid piecemeal sanctioning and allow the judge to give due consideration to the appropriate overall sanction level, taking into account the purposes of the various statutes or regulations involved. The result could be a more rational system of civil and criminal penalties. Unified proceedings would also eliminate the potential constitutional deficiencies inherent in bifurcated systems. The *Halper* Court itself suggested this approach as a way to avoid double jeopardy violations.[371]

Unfortunately, the problems associated with unified proceedings probably outweigh the potential benefits. An almost insurmountable concern is differing standards of proof. Criminal defendants can only be convicted if the government proves its case beyond a reasonable doubt,[372] while in civil actions preponderance of the evidence or clear and convincing[373] evidence standards apply. In a combined civil and criminal proceeding, the trier of fact would be asked simultaneously to judge the same body of evidence under different standards of proof. As an additional complicating factor, some evidence might be barred in the criminal action because of a Fourth

370. The Sentencing Reform Act anticipates that the Sentencing Commission will continue to refine and revise its Guidelines. The Commission is authorized to issue by May 1 of each year new Guidelines or amendments, which take effect automatically, absent legislation to the contrary, six months later. 28 U.S.C. § 994(p).

371. United States v. Halper, 490 U.S. 435, 450.

372. *See In re* Winship, 397 U.S. 358, 364 (1970) (Court held that proof beyond a reasonable doubt was the appropriate standard of proof for a juvenile charged with an act that would have constituted a crime if committed by an adult).

373. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 433 (1979) (clear and convincing standard for civil commitment to mental hospital); United States v. Salerno, 481 U.S. 739, 750 (1987) (clear and convincing standard for detention without bail).

Amendment violation, for example, but admissible in the civil action.[374] A trier of fact, judge or jury, would have difficulty applying these rules.

Unified proceedings would also raise troubling questions concerning the different scope of discovery in civil and criminal cases[375] and the potential disclosure of grand jury material.[376] Which discovery rules would apply, the liberal rules applicable to civil matters, or the more restrictive discovery available in criminal cases?[377] Further, at the time a civil proceeding is initiated, the government may legitimately be unsure whether it intends to prosecute the defendant criminally. Thus, although unified proceedings offer the clearest way to coordinate civil and criminal sanctions, this mechanism is unlikely to ameliorate the current situation.

An alternative to unified proceedings is coordination by the government of civil and criminal actions. The Justice Department and other federal agencies frequently fight over jurisdiction and fail to join criminal and civil forces.[378] Overcoming this behavior would streamline the process.[379] Another means of achieving greater civil/criminal coordination would be for Congress to end the proliferation of redundant criminal statutes designed to deter criminal conduct that has already occurred.[380]

Short of reforming the executive and legislative branches, the burden will and should fall on the courts to correlate sanctions.[381] Indeed, the criminal sentencing process is the logical point of coordination.[382] Although

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374. *See, e.g.*, United States v. Janis, 428 U.S. 433, 459-60 (1976) (evidence illegally seized by state officials admissible in federal civil tax proceeding). *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.7(d)-(e) (2d ed. 1987) (discussing admissibility of illegally seized evidence in civil and administrative actions involving the government).

375. *See* Project, *Fifth Survey of White Collar Crime*, 26 AM. CRIM. L. REV. 1217, 1218-25 (1989) (discussing the conflict between civil and criminal discovery in parallel proceedings).

376. *See id.* at 1225-30 (discussing the limits on disclosure of grand jury material).

377. Under current practice, the government already has available the means to bypass the limits on criminal discovery. By simultaneously pursuing parallel civil and criminal actions, or by first proceeding civilly, the government can obtain broad civil discovery, and then frequently share the information obtained with its criminal prosecutors. For criticism of this practice, *see* Elkan Abramowitz, *Will 'Halper' Slow the Civil-Criminal Whipsaw?*, N.Y.L.J., Nov. 6, 1989, at 3 (discussing United States v. Halper and possible relief for the "doubled-up defendant").

378. *Id.*

379. In the area of financial fraud, the federal agencies already coordinate such efforts. *See* ATTACKING FINANCIAL INSTITUTION FRAUD. A REPORT TO THE CONGRESS OF THE UNITED STATES December 31, 1990 (discussing coordination between Justice Department and other agencies in attacking saving and loan fraud).

380. *See supra* note 31.

381. Indeed, there is a powerful institutional argument for making judges the arbiters of the civil/criminal distinction at the sentencing stage. Judges have a more deliberative role, and are less prone to undue influence than the other two branches that might assess civil and criminal penalties: the executive and the legislature. *See e.g.*, Cass Sunstein, *Naked Preferences And the Constitution*, 84 COLUM. L. REV. 1689, 1697 (1984).

382. There is less opportunity for meaningful coordination in collateral actions. As noted above, at the time of a civil or administrative action, it may not be clear whether the government will prosecute

the new organizational Sentencing Guidelines partially recognize the need for a sentencing court to review collateral consequences, current procedures provide no mechanism for bringing that information before the court.

To remedy this, the presentence process should confront the collateral consequences issue. As a first step, the presentence report prepared by the assigned probation officer should include a section addressing collateral consequences. This Collateral Consequences Report (the "CCR") should identify the collateral sanctions that have been, or are likely to be, sought and imposed. Both the prosecution and defense should be required by the court to analyze collateral consequences in their sentencing memoranda. The government should state whether it intends to seek further civil penalties, to forego such civil remedies, or whether it is undecided. That information will materially affect the sentence determination and may encourage the government to coordinate civil and criminal enforcement policies. The defendant's views are equally important, because the defendant may be most able to gauge the potential liabilities.

The court can take concrete steps based on the CCR. If collateral sanctions have already been imposed, an offset may be appropriate.[383] The criminal fine could be reduced by an amount equal to the punitive component of the collateral sanction. This proposal for an offset raises two important questions. First, why is this suggestion not superfluous in light of *Halper*? In other words, if the collateral sanction is punitive, does not *Halper* completely bar a subsequent criminal prosecution? Conversely, if there has already been a criminal prosecution, is not any punitive collateral sanction completely barred? Second, how can a court determine the punitive component of the collateral sanction?

The first point can be answered rather easily. As noted above, the *Halper* Court is equivocal as to whether the Double Jeopardy Clause simply bars subsequent collateral sanctions that serve *only* punitive goals, or whether it also applies to collateral sanctions that serve *both* remedial and

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the defendant criminally. Further, coordinating sanctions requires some flexibility and discretion on the judge's part, and many collateral remedies involve a statutorily set penalty. *See, e.g.*, Civil False Claims Act, 31 U.S.C. § 3729. Thus a judge in a collateral action may not be able to take into account the existence, or probability, of a criminal sanction, unless the collateral sanction violates *Halper*.

383. *See, e.g.*, GUIDELINES § 8C3.4 (court may offset the fine imposed upon a closely-held organization by the amount of any fines paid by the owners of the organization in a federal criminal proceeding arising out of the same offense conduct for which the organization is being sentenced. *See also id.* § 8C5.17 (Policy Statement) (November 1990 draft):

> [i]f a punitive civil or administrative sanction, payable to the federal, or a state or local government has already been imposed upon the organization in connection with the conduct constituting the offense conduct, a downward departure from the applicable Guideline range of up to the amount of the prior punitive sanction may be warranted.prior punitive sanction may be warranted.

This provision was omitted from the final Guidelines submitted to Congress.

punitive aims.[384] Subsequent lower court decisions suggest support for the former interpretation.[385] Courts seem likely to permit a partially punitive collateral sanction, so long as it is not largely divorced from legitimate remedial goals. Thus it is not inconsistent for a court to say that although a collateral sanction does not implicate *Halper*, a portion of it is nonetheless essentially punitive in nature, thus entitling the defendant to an offset.

The second point is more complex and troublesome. There is little doubt that many collateral sanctions are, in reality, both remedial and punitive. Identifying the punitive component, however, is hardly susceptible to scientific precision. Nonetheless, the effort should be made. Judges should require the prosecution and defense to brief the issue. This adversarial presentation should supply the court with a variety of probative points. The court should also analyze the statute or regulation at issue, and any applicable legislative history, to determine the goals of the sanction. The judge should compare the collateral sanction imposed in the instant case with similar cases to see whether this defendant is being singled out for harsh treatment. The Sentencing Commission could lend its expertise by issuing policy statements to aid the judge in this effort.

In the end, the court should be guided, as *Halper* suggests, by a concern for "rough justice."[386] Even an approximation of the punitive component of a collateral sanction, derived from a fair and principled process, would improve on current practice. In addition to providing greater fairness to individual defendants, this scrutiny of collateral sanctions might force legislatures and administrative agencies to articulate, and courts to examine, the policies and purposes behind collateral sanctions.

A different set of implementation problems arise if the criminal conviction precedes collateral remedies. The court should first attempt to determine the likely scope of the collateral sanctions, based on the government's intentions.[387] Because an offset at this point would be highly speculative,

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384. *See supra* Section IIIC (discussing double jeopardy concerns).

385. *See, e.g.*, United States v. Bizzell, 921 F.2d at 267 (administrative assessment of $30,000 against defendant not "punishment" under Double Jeopardy Clause because goal of assessment was remedial); Bernstein v. Sullivan, 914 F.2d 1395, 1403 (10th Cir. 1990) (stipulated civil penalty far below the statutory maximum that might trigger *Halper*); United States v. WRW Corp., 731 F. Supp. 237, 239 (E.D. Ky. 1989) ($90,000 civil penalty for violations of mine health and safety rules "not so extreme and divorced from the United States' expenses incurred in the investigation and prosecution of the defendants' violations to constitute punishment, rather than the remedial goal of ensuring safe mining conditions and practices"); United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222, 1223 (S.D. Fla. 1989) (forfeiture of boat not second punishment); United States v. Marcus Schloss & Co., 724 F. Supp. 1123, 1128 (S.D.N.Y. 1989) (civil penalty under ITSA valid, despite Act's emphasis on "sanctions" and "deterrence").

386. United States v. Halper, 490 U.S. at 449.

387. We have previously noted that the government may legitimately not know, at the time a civil remedy is being pursued, whether it intends to initiate a criminal action. The converse does not seem to be true; the government should certainly be able to decide, once a criminal conviction is obtained,

the court should be permitted to consider postponing sentencing pending the resolution of the collateral actions. After liability is assessed in the collateral proceedings, the sentencing judge could be authorized to impose one global penalty. This approach would be similar to the suggestion in *Halper* that a single proceeding be employed, but would avoid many of the problems associated with different standards of proof.[388] Or, if the sentencing proceeds, judges could be authorized to reduce the amount of any subsequent collateral sanction in proportion to its punitive component. The result could be a two-tiered system of collateral penalties, with the lower level applying where the misconduct has been punished in a criminal action.

Another potentially difficult problem is how to deal with punitive nonmonetary collateral sanctions. Suppose that a Medicare provider has been suspended from the program and the judge imposing sentence in a subsequent criminal action believes that part of the suspension is punitive. Under the principles outlined here, the defendant's criminal sentence should be offset by the punitive component of the suspension. Assuming the judge can classify some portion of the suspension as punitive, how should the judge reduce the criminal fine as an offset?

A solution is suggested by the concepts of "punishment units" and "interchangability."[389] A sentencing Guidelines system could be designed to assign to the defendant's conduct a number of punishment or sanction units. The number of units "earned" would be based on the harm done, the defendant's culpability, and other relevant factors currently relied on by judges or incorporated into sentencing Guidelines. The exact penalty associated with a particular number of punishment units would be drawn from a table of equivalencies. Thus, for individual defendants, one sanction unit might be satisfied by two weeks imprisonment, a fine equal to one month's earnings, six weeks of community service, or eight weeks probation.

For organizations, the Sentencing Commission could develop such an exchange rate identifying a relationship between criminal fines and the various collateral sanctions. The criminal fine could then be offset by the number of sanction units associated with a punitive collateral sanction. For example, if an organizational defendant's criminal conduct warrants a sentence equivalent to 10 sanction units, and if a $2000 fine equals one sanc-

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whether it will seek civil penalties against the defendant.

388. Alternatively, the judge could impose sentence and suspend all or part of it pending resolution of the collateral claims. Some might contend that this delayed procedure would favor the criminal corporation, but measures could be taken to ensure that the ultimate global sanction factors in the time value of money.

389. *See generally* MORRIS AND TONRY, *supra* note 281, chapters 3, 4 (for discussion of these concepts); *See also* Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987) (discussing necessary components of a modern, principled and workable system).

tion unit, the presumptive criminal fine would be $20,000. But suppose the defendant had been suspended from government contracting for 3 months, and the court deemed that penalty to be one-third punitive. If a one-month suspension was deemed by the Commission as equivalent to one sanction unit, the criminal fine would be reduced one unit, or $2000 as an offset.[390]

Such a system could not achieve scientific certitude, but it might provide some measure of "rough justice" in equating and offsetting punitive collateral sanctions and criminal penalties. Furthermore, judges, under this scheme, would have the flexibility to deal with the hazy line that separates civil and criminal law. Absent coordination, a defendant receives the full legal and constitutional protections available under the law in a criminal matter. If the same matter is classified as civil, none of these protections apply. Allowing the judge some latitude in coordinating sanctions might diminish the injustices caused by the arbitrary nature of the line.

There is one final benefit to a CCR scheme — information. A primary conclusion of this Article is that systematic information about the impact of collateral consequences is not available. That means that the justice system is deciding how properly to punish organizations without adequate information on the sentencing process. This is akin to attempting to solve a mathematical formula with only half of the variables. The Sentencing Commission should collect and analyze the Collateral Consequences Reports, thus generating valuable data about collateral sanctions.

V. CONCLUSION

For organizations, particularly corporations, there is scant distinction between civil and criminal law. The number and variety of collateral sanctions imposed on a corporation — either before or after criminal conviction — renders incoherent the current justice system.

The sheer magnitude and assortment of these sanctions deserves further study. Some sanctions apply only to an industry (Medicaid or SEC actions) while other sanctions apply across a whole range of industries (environmental or debarment penalties). Some sanctions are meted out at the state and local level, while others are assessed by the federal government. This study only begins to analyze the potential consequences.

A coherent justice system requires that civil and criminal sanctions be considered together at the sentencing stage. Several important legal theories support this conclusion. A sound theory of criminal law, based on ei-

390. This same system could serve as the basis for coordinating criminal and collateral sanctions for individual defendants. If equivalencies are developed between imprisonment, fines, probation, or other criminal sanctions, and the frequently imposed collateral sanctions, the individual's criminal penalty could be offset by a number of sanction units equivalent to the punitive component of the collateral sanction.

ther deterrence or retribution, suggests coordination. Similarly, under any theory of corporate law, a more global approach is preferable to the current piecemeal system. Most importantly, the Supreme Court emphasized that unless criminal and civil penalties are considered together, double jeopardy problems will ensue. Finally, the new Sentencing Guidelines for organizations significantly increase the penalties proposed for corporations and replace judicial discretion with an ordered system. The promulgation of such Guidelines presents the perfect opportunity to begin coordinating criminal penalties with civil collateral consequences.

An ideal system would weave into the fabric of the justice system and the regulatory state a process for coordinating criminal and civil sanctions. The Justice Department and other federal agencies should correlate civil and criminal actions, while Congress should stop the proliferation of overlapping statutes. The locus of coordination, however, should remain the courts. In particular, judges should require a presentence Collateral Consequences Report to identify any civil sanctions that might be attendant to criminal penalties. Only these procedural reforms can provide the "rough justice" that the Supreme Court appears to require with respect to collateral sanctions.