

Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders

Lisa H. Nicholson

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jbtl>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Lisa H. Nicholson, *Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders*, 2 J. Bus. & Tech. L. 43 (2007)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol2/iss1/4>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders

I. INTRODUCTION

PRIOR TO THE SARBANES-OXLEY ACT OF 2002 ("SARBANES-OXLEY OR THE ACT"),¹ exposure to criminal liability for corporate mismanagement ran a distant second to civil liability exposure.² Allegations of nondisclosures and fraud typically were handled as civil matters, leaving the U.S. Securities and Exchange Commission ("SEC") to punish the "bad apples."³ Indeed, the SEC annually brought hundreds of civil enforcement actions against individuals and companies that engaged in insider trading or accounting fraud, or that provided false or misleading information about securities and the companies that issued the securities.⁴ Armed with an array of civil remedies, the SEC obtained numerous injunctions, as well as monetary penalties and disgorgement orders from corporate wrongdoers.⁵ Nevertheless, in the wake of the accounting scandals unearthed at many large public corporations, starting most notably with the Enron Corporation, the perception arose that the SEC was not sufficiently able to protect investors by preventing and deterring violations of the federal securities laws.⁶ To be sure, the emerging, complex, diversified

* Associate Professor of Law, University of Louisville, Louis D. Brandeis School of Law. The author thanks all who provided comments and assistance, especially Cedric M. Powell, Laura Rothstein, and her colleagues at the University of Louisville. I also wish to acknowledge William D. Martinez, Dina A. Shabayek, and Marcus Moran for their research assistance.

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

2. In the period 1992–2001, the SEC referred only 609 cases to the Justice Department for criminal prosecution. Of these cases, 187 defendants were prosecuted, 142 were found guilty, and 87 went to prison. See TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 172 (2006).

3. Jayne W. Barnard, *Rule 10b-5 and the "Unfitness" Question*, 47 ARIZ. L. REV. 9, 32–33 (2005).

4. U.S. SEC. & EXCH. COMM'N, 2005 PERFORMANCE AND ACCOUNTABILITY REPORT 7–9 (2005), available at <http://www.sec.gov/about/secpar/secpar2005.pdf>.

5. *Id.* at 47.

6. See Thad A. Davis, *A New Model of Securities Law Enforcement*, 32 CUMB. L. REV. 69, 98–99 (2001) (arguing that the SEC's "civil investigation is often duplicative of private suits and adds nothing to the attempts to maximize return of shareholders monies . . . and may merely engender delay"). Arguably, the SEC was impacted by its insufficient budgets and staffing levels in the periods preceding the accounting scandals. Its 2003 budget was \$716 million, compared to the Federal Deposit Insurance Corporation's (FDIC) budget of \$1.113 billion. 2003 SEC ANN. REP. 4, available at <http://www.sec.gov/pdf/annrep03/ar03full.pdf>; see also FRANKEL, *supra* note 2, at 181. That 2003 budget was still higher than previous levels. The SEC, for example, was asked to protect investors and oversee the capital markets with a budget of only \$356 million in fiscal year

PURPORTED OVER-CRIMINALIZATION OF CORPORATE OFFENDERS

corporate structures and innovative accounting methods may have served to shelter the corporate executives' deception during the years in question.⁷ In any event, the SEC's penalty and disgorgement rates came under fire during the congressional hearings on the scandals.⁸ It also became apparent that neither the capital markets, nor the regulatory authorities charged with market oversight could unearth the corporate frauds before great harm streamed throughout all segments of society, impacting the investing public, employees, and retirees.⁹ Moreover, it was finally acknowledged that many frauds frequently prosecuted as civil actions frequently disguised serious criminal conduct.¹⁰

Sarbanes-Oxley and its criminal measures¹¹ were enacted at least in part to aid the SEC and to fill the perceived enforcement gap. Congress, in so legislating, enlisted a criminal law behavioral model to induce law-abiding corporate behavior. That model is premised on the notion that people either (i) will comply with the

1999, \$382 million in 2000, \$427 million in 2001, and \$515 million in 2002. Moreover, monies collected by the SEC in the form of penalties and fees still are transferred to the U.S. Treasury, rather than funneled back into the agency for use in its enforcement and oversight function. U.S. SEC. & EXCH. COMM'N., *supra* note 4, at 83.

7. It is noteworthy that, according to Huron Consulting Group's *Annual Review of Financial Reporting Matters*, 330 companies restated their earnings in 2002, 270 restated their earnings in 2001, and 233 restated their earnings in 2000. Huron Consulting Group, *New Report by Huron Consulting Group Reveals Financial Restatements Increased at Record Levels in 2004*, Jan. 20, 2005, <http://huronconsultinggroup.com/print.asp?id=779>. Although these figures do not necessarily indicate wrongdoing had occurred, they do reflect that there was some misleading information in the marketplace.

8. See U.S. GEN. ACCOUNTING OFFICE, SEC ENFORCEMENT: MORE ACTIONS NEEDED TO IMPROVE OVERSIGHT OF DISGORGEMENT COLLECTIONS 2 (2002). The SEC was directed by Congress to identify better ways to facilitate injured investor compensation following the enactment of the Act's section 308(c) FAIR Fund provision. See U.S. SEC. & EXCH. COMM'N., REPORT PURSUANT TO SECTION 308(c) OF THE SARBANES-OXLEY ACT OF 2002 1 (2003), available at <http://www.sec.gov/news/studies/sox308creport.pdf>. It is worth noting that the SEC's collection rates have improved in recent years, increasing from 45% in fiscal year 2003 to 72% in fiscal year 2005. U.S. SEC. & EXCH. COMM'N., *supra* note 4, at 47.

9. For example, Enron which once had a market value of more than \$68 billion before its bankruptcy, "wiped out thousands of jobs and at least \$1 billion in retirement funds." Andrew Dunn, *Prosecutors May Seize \$62 Million in Enron Case; Lay and Skilling May Lose Assets Related to Fraud*, BUFFALO NEWS (New York), May 29, 2006, at B7.

10. See NEAL SHOVER & ANDREW HOCHSTETLER, CHOOSING WHITE COLLAR CRIME 53 (2006).

11. Sarbanes-Oxley's criminal measures are scattered over three separate titles of the Act at (i) Title VIII, the Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, 116 Stat. 800 (2002), (ii) Title IX, the White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, 116 Stat. 804 (2002), and (iii) Title XI, the Corporate Fraud Accountability Act of 2002, Pub. L. No. 107-204, 116 Stat. 807 (2002). See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.). These measures collectively expand criminal liability for corporate officers and directors, brokers, dealers, and trading advisors, among others, by creating new federal offenses; modifying existing federal fraud statutes to increase criminal penalties; and authorizing new amendments to the existing U.S. Sentencing Guidelines. See Sarbanes-Oxley §§ 801-07, 901-07, 1101-07. The creation of new federal offenses purportedly should curb abuses by corporate executives at publicly traded companies. Specifically, section 807 creates a separate and distinct federal crime for any securities fraud involving a public company. See 18 U.S.C. § 1348 (2007). Section 902 criminalizes attempts and conspiracies to commit criminal fraud offenses. See 18 U.S.C. § 1349. Section 906 provides that corporate executives who certify their companies' publicly-filed financial reports may be criminally prosecuted for those filings that are found not to be in compliance with the federal securities laws, or other statutory requirements. See 18 U.S.C. § 1350. See *infra*, for a detailed discussion of the Act's enhanced criminal penalties and the amended Guidelines.

law out of an unconscious instinct to be law-abiding, or (ii) will comply with the law after a conscious evaluation of the risks associated with disobeying the law.¹² The Act's criminal measures, which include enhanced criminal penalties¹³ that increase both the monetary fines and terms of imprisonment, are aimed at the latter premise. Indeed, the essence of the Act's criminal measures lies in the threat of punishment. The politicians' "tough talk" during discussions of the Act suggests that they intended to straddle the two dominant theories of punishment: deterrence and retribution.¹⁴

The theory of deterrence (briefly stated)¹⁵ is a utilitarian view¹⁶ that formal legal sanctions should be imposed if they will influence the conduct of potential offenders, either by instilling in the individuals an understanding of the consequences (i.e., specific deterrence), or by making "examples" of specific wrongdoers in public view to deter other individuals from deviance in the future (i.e., general deterrence).¹⁷ Deterrent-based punishments differ from the retributive theory of punishment, which focuses on having the offenders pay for breaching society's peace.¹⁸ Retributivists believe that those individuals "who commit crimes choose evil over good and that, as responsible moral agents for their acts, those offenders deserve punishment."¹⁹ Thus, when viewed through the lenses of dominant punishment

12. See Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 956 (2003).

13. The Act's criminal measures include enhanced criminal penalties for a number of existing federal crimes. These enhanced criminal penalties increase the terms of imprisonment fourfold for violations of the existing mail and wire fraud statutes, and significantly raised both the maximum fines and terms of imprisonment for violations of the Employee Retirement Income Security Act ("ERISA"). See Sarbanes-Oxley §§ 903, 904, respectively; see also 29 U.S.C. § 1131; 18 U.S.C. §§ 1341, 1343. Congress also enhanced the criminal penalties for violations of the Securities Exchange Act of 1934, by increasing the maximum term of imprisonment from 10 to 20 years, and the maximum fine from \$2,500,000 to \$25,000,000. See Sarbanes-Oxley § 1106; see also 15 U.S.C. § 78ff(a).

14. See Transcript of Conference Report on H.R. 3763, Sarbanes-Oxley Act of 2002, 148 CONG. REC. H5462-02, at H5463 (daily ed. July 25, 2002) (statement of Rep. Baker) ("Nothing perhaps made a more visual impact on American investors, shareholders, pensioners and employees than watching the news yesterday as corporate executives were handcuffed and hauled away. The people of America are not only expecting it, they are demanding it."). See also Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1 (President Bush reportedly declared at the Act's signing, "Every corporate official who has chosen to commit a crime can expect to face the consequences. No more easy money for corporate criminals, just hard time.").

15. For a more detailed analysis of the dominant theories of punishment, see *infra*.

16. According to Jeremy Bentham, utilitarians believe that the threat or imposition of punishment can reduce crime because pain and pleasure are the great springs of human action and in matters of importance everyone calculates. Jeremy Bentham, *Principles of Penal Law*, in J. BENTHAM'S WORKS 296, 402 (J. Bowring ed., 1843).

17. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1299 (2001) ("Traditional deterrence theory focuses on formal legal sanctions as the important influence on potential offender conduct . . ."); see also WAYNE R. LAFAVE, *CRIMINAL LAW* 26-28 (4th 2003); Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 416 (2003).

18. See Brown, *supra* note 17, at 1295-96; Ramirez, *supra* note 17, at 409.

19. Ramirez, *supra* note 17, at 409.

theories, Congress enacted the Act's criminal measures in the belief that prospective offenders would be deterred from wrongdoing by the prospect of the Act's enhanced criminal penalties, or that wrongdoers who fail to obey the laws would now certainly face society's retribution in the form of higher fines or lengthier prison sentences.

Some have argued that this political response to the corporate scandals (along with other measures) has resulted in an over-criminalization of corporate offenders.²⁰ As further proof of a climate of "overreaction," others point to lengthy prison sentences imposed on those Enron and WorldCom executives recently convicted of wrongdoing.²¹ I disagree with these arguments given the magnitude of those frauds, the billions of dollars of market value lost, and the continuing harmful impact on victimized investors, employees, and retirees. Arguably, Congress did not go far enough in legislating punishment for future corporate fraudsters.

This Article, however, seeks only to analyze whether this tactic—that of enacting increasingly lengthier prison sentences and higher fines alone—will have the desired effect of deterring potential offenders, and punishing wrongdoers. As will be demonstrated below, reliance on the Act's enhanced criminal penalties to deter wrongdoing may not yield the desired result in light of the many uncontrollable factors that may undermine both the imposition of lengthy sentences and higher fines, and the impact of such penalties on convicted wrongdoers.²² Moreover, reliance on a deterrent-based punishment presupposes that a potential offender will engage in the necessary cost-benefit analysis, which should lead him to forgo criminality. Unfortunately, individuals generally will differ in their tendencies to be overly optimistic about the outcome, as well as in their confidence about their skills; thereby suggesting that there can be no guarantee that the outcome of their subjective cost-benefit assessment will be to forgo criminality.²³ Finally, an almost exclusive reliance on deterrent-based punishment fails to account for those individuals who forgo so-called "rational thinking" altogether. Many of the culprits in the earlier financial scandals either were swept up in the frauds or thought that their risk-taking behavior would continue to be rewarded.²⁴

I conclude this Article by raising the question of whether society, the legislature and/or the relevant regulatory agencies should broaden their approach to bringing about compliance with the corporate and securities laws. Reliance primarily on deterrent-based punishments has not been wholly effective to deter corporate

20. See e.g., Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis 2* (Boston Univ. Sch. Of Law, Working Paper No. 03-04, 2003), available at <http://www.bu.edu/law/Faculty/papers>.

21. See e.g., Andrew Ross Sorkin, *How Long to Jail White-Collar Criminals?*, N.Y. TIMES, Sept. 16, 2005 (reporting that a UCLA law professor said that WorldCom former CEO Bernard Ebbers' sentence was "draconian," and that Otto G. Obermaier, former U.S. Attorney, stated Ebbers' 25 year sentence was "an overreaction."). These sentences, while stringent, were not imposed pursuant to the Act's enhanced criminal penalties.

22. See *infra* Part II.A.

23. See *infra* Part II.B.

24. See *infra* Part II.C.

fraudsters given a recurring cycle of corporate scandals.²⁵ Perhaps the application of other areas of knowledge such as psychology, sociology, or philosophy is needed to reach the archetypical, non-linear thinking corporate actor who may either engage in a faulty cost-benefit analysis, or fail to engage in such an analysis altogether.

In the meantime, the inclusion of an asset forfeiture sanction would help to strengthen the Act's criminal measures.²⁶ This added penalty would remove the economic incentive for the fraudulent scheme by reaching not only the ill gotten proceeds of the fraud, but also all monies or other assets traceable thereto. This sanction also punishes those individuals who either engage in a faulty cost-benefit analysis, or who fail to engage in such an analysis altogether.²⁷

II. THE QUESTIONABLE IMPACT OF SARBANES-OXLEY'S DETERRENT-BASED CRIMINAL SANCTIONS ON THE BEHAVIOR OF CORPORATE OFFICERS AND DIRECTORS

The corporate scandals at Enron Corporation, Adelphia Communications Corp., and WorldCom, Inc., to name a few, as well as the ensuing investor outrage²⁸ and faltering capital markets²⁹ led to the enactment of Sarbanes-Oxley during the summer of 2002. Congress sought "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and

25. See e.g., Jenny Anderson, *Illegal Trades on the Rise on Wall St.*, NY Times, May 12, 2007, at B1 (observing that "[o]n Wall Street, it feels like the 1980s all over again . . . [r]egulators are again knee-deep in insider trading cases . . .").

26. For a more detailed discussion of this argument, see Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 372-78 (2007).

27. See *infra* Part III.

28. See Jenny B. Davis, *The Enron Factor: Experts Say the Energy Giant's Collapse Could Trigger Changes in the Law That Make it Easier to Snare Professionals*, 88 A.B.A. J. 40, 40 (Apr. 2002). See also Alex Berenson, *The Biggest Casualty of Enron's Collapse: Confidence*, N.Y. TIMES, Feb. 10, 2002, § 4, at 1, noting:

Securities markets are all about numbers, from sales and profits to debt outstanding. If investors cannot believe the figures put out by public companies, they will be much less willing to risk their money on stocks. For two generations, a rigorous system of private disclosure and public oversight has given American investors confidence that they will not be fleeced when they buy stocks But Enron's collapse has put that hard-won confidence at risk." According the Arthur Levitt, "To restore confidence in American markets, Congress and regulators need to take specific steps to strengthen the disclosure regime"

Id.

In late July 2002, respondents to a Wall Street Journal/NBC poll reportedly were asked whether they thought most government regulations were "necessary and protect consumers or the environment" or were "unnecessary and harm the economy." Ruy Teixeira, *Is the Big-Business Era Over?; The Public Sure Thinks it Should Be*, AM. PROSPECT, Aug. 26, 2002, at 12. Fifty-two percent of the people polled believed that such regulations were necessary as compared to forty percent of the people polled in January 1995. *Id.*

29. Gretchen Morgenson, *What if Investors Won't Join the Party?*, N.Y. TIMES, June 2, 2002, §3, at 1 (reporting that a May 2002 UBS/Gallup poll indicated that "84 percent feel that [the corporate scandal] issue is punishing stock prices . . ."); Alex Berenson, *The Nation: Scream!; Hold On for a Wild Ride*, N.Y. TIMES, July 21, 2002, § 4, at 1 (noting that as of July 21, 2002, the Standard & Poor's 500 index was down almost 45 percent and the Nasdaq was off nearly 75 percent).

for other purposes.³⁰ The Act's criminal measures are meant both to deter and punish corporate fraudsters who fail to meet their disclosure obligations by exposing them to higher fines and lengthier sentences.³¹ These measures, *inter alia*, increased the maximum terms of imprisonment for certain existing federal crimes (including mail and wire fraud).³²

To ensure that the enhanced criminal penalties would be imposed, Congress also directed the U.S. Sentencing Commission to promulgate stricter sentencing guidelines "for a fraud offense that endangers the solvency or financial security of a substantial number of victims . . ." ³³ This mandate occurred prior to the Supreme Court's recent decision in *United States v. Booker* on the constitutionality of the U.S. Sentencing Guidelines, where the Court held the Guidelines to be only advisory in nature.³⁴ The result of the Court's holding is that the Act's criminal measures set forth only the maximum criminal penalties allowable by statute; their imposition is not guaranteed. All that remains of the Acts' criminal measures is the threat of "[n]o more easy money for corporate criminals, just hard time."³⁵

A. *The Misplaced Reliance on Maximum Sentences and Fines to Deter Corporate Wrongdoing*

Various factors exist to undermine both the imposition and impact of lengthy terms of imprisonment and high fines. Judges and prosecutors play an extensive

30. See the preamble to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18 U.S.C.). The resulting legislation is aimed at stamping out deceptive accounting and management practices by establishing deeper oversight, holding top executives more directly responsible for corporate public filings, and requiring more transparent corporate books and records. Richard B. Schmitt et al., *Corporate-Oversight Bill Passes, Smooths Way for New Lawsuits*, WALL ST. J., July 26, 2002, at A1.

31. Statement by President George W. Bush upon Signing H.R. 3763, WEEKLY COMP. PRES. DOC. 1286 (July 30, 2002).

32. See Sarbanes-Oxley Act § 903; see also 18 U.S.C. §§ 1341, 1343.

33. See Sarbanes-Oxley Act § 805; see also Sarbanes-Oxley Act §§ 905, 1104; U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, Existing Guideline §2B1.1(b)(2) (Dec. 20, 2002); U.S. SENTENCING COMM'N, SUPPLEMENT TO THE 2002 GUIDELINES MANUAL, §2B1.1(b)(12) (2003), available at http://www.ussc.gov/2002suppa/2b1_1.htm; Press Release, U.S. Sentencing Comm'n, Sentencing Commission Toughens Penalties for White Collar Fraudsters (Apr. 18, 2003), available at <http://www.ussc.gov/PRESS/rel0403.htm>. The amended Guidelines, which were sent to Congress in May 2003, took effect on November 1, 2003. *Id.*; U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES (2003), available at <http://www.ussc.gov/guidelin.htm>.

34. See *United States v. Booker*, 543 U.S. 220, 246 (2005). The Court in *Booker* held that the Guidelines are unconstitutional because they violate a defendant's Sixth Amendment right to be tried by a jury by giving judges the power to make factual findings that increased sentences beyond the maximum that the jury's findings alone would support. *Id.* at 232. The Court, thereafter, held that federal judges should consider the so-called "mandatory" Guidelines merely as a suggestion. *Id.* at 246. Consequently, *Booker* effectively returns total discretion on sentencing to judges.

35. Greg Hitt, *Bush Signs Sweeping Legislation Aimed at Curbing Corporate Fraud*, WALL ST. J., July 31, 2002, at A4. At the Act's signing, President George W. Bush declared, "[e]very corporate official who has chosen to commit a crime can expect to face the consequences No more easy money for corporate criminals, just hard time." *Id.*

role in determining a convicted felon's sentence. Prosecutors can manipulate the initial charges (thereby increasing or decreasing the defendant's exposure to lengthy imprisonment terms) to induce the defendant's cooperation,³⁶ and judges can impose their own views of the offender's culpability when handing out sentences.³⁷

The prosecution of Andrew S. Fastow (Enron's former Chief Financial Officer) provides a prime example of the role of prosecutors and judges in imposing sentences. Fastow was indicted on over ninety counts of, *inter alia*, fraud, money laundering, and insider trading, and faced over a hundred years in prison for his role as architect of the fraudulent accounting scheme that led to Enron's collapse.³⁸ He subsequently agreed to cooperate with federal prosecutors and plead guilty to two counts of conspiracy to commit wire fraud and securities fraud in exchange for the prosecution's recommendation that he serve the ten-year maximum sentence for his crimes.³⁹ In the end, however, the presiding judge sentenced Fastow to six years in prison—quite a reduction from his initial exposure.⁴⁰

Judge Kenneth M. Hoyt reportedly took into account Fastow's devotion to his family, his community service, and his efforts to redress his crimes at Enron when imposing Fastow's sentence.⁴¹ Judge Hoyt specifically cited the fact that Fastow had to care for his two young sons alone while his wife, Lea (a former Enron manager), served time for her role in Enron's accounting scandal. Prior to imposing the lower sentence, Judge Hoyt reportedly also said that he had to "examine the relationship between justice and mercy," and that although Fastow had "drunk the wine of greed," Fastow had also been the "subject of great persecution."⁴²

Even if the desired lengthy sentences are imposed on corporate offenders, the impact of these sentences nevertheless may not be as extreme as has been presumed. Scholars acknowledge that the punitive value of imprisonment is "front

36. Michael Higgins, *Sizing up Sentences*, A.B.A. J., Nov. 1999, at 42, 44 (stating that "[t]he guidelines give prosecutors leeway on how to charge . . . [how] to classify the amount of money at issue in a case . . . which cases to bring, and which to leave for state authorities . . . [and] when a defendant will be credited with substantial assistance for aiding a prosecution . . ."); see also Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137 (1995) (observing that prosecutors have "greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences").

37. Ramirez, *supra* note 17, at 396–98 (discussing the disparity in sentences that resulted from judges' use of "downward departures" from the proposed sentencing ranges).

38. See *Superseding Indictment*, United States v. Andrew S. Fastow, Cr. No. H-02-0665 (S.D. Tex. Apr. 30, 2003); see also Susanne Pagano, *Fastows Enter Guilty Pleas Over Roles in Enron Financial Fraud*, 36 SEC. REG. & L. REP. 123 (Jan. 19, 2004).

39. Pagano, *supra* note 38; see also Kurt Eichenwald, *Ex-Chief Financial Officer of Enron and Wife Plead Guilty*, N.Y. TIMES, Jan. 15, 2004, at C9; *Plea Agreement*, United States v. Andrew S. Fastow, Cr. No. H-02-0665 (S.D. Tex. Jan. 14, 2004).

40. Kate Murphy & Alexei Barrionuevo, *Fastow Sentenced to 6 Years*, N.Y. TIMES, Sept. 27, 2006, at C1.

41. *Id.*

42. *Id.*

PURPORTED OVER-CRIMINALIZATION OF CORPORATE OFFENDERS

loaded.”⁴³ “That is, if one is to lose his freedom he will prefer to lose it in the future, and if he must lose his freedom over a significant period of time the years closest to the present will be the most burdensome.”⁴⁴ Consequently, the marginal utility of lengthy terms of imprisonment diminishes over the time spent in prison.⁴⁵ A ten year sentence, for example, is not ten times more punitive than a one year sentence.⁴⁶ Moreover, according to a 1988 study conducted by Michael L. Benson, imprisoned corporate executives are “more adept at coping with the psychological stress of prison life.”⁴⁷ The defendant simply adjusts to his or her circumstances after the initial shock wears off.⁴⁸ Further still, white-collar criminals, when imprisoned, are likely to be treated gently by prison officials because they tend to be “model prisoners”—acting in a more pleasant and obedient manner than others.⁴⁹ As such, they tend to “end up managing the [prison’s] library, working in the [prison administrator’s] office, and providing [other skill-based] services to prison officials.”⁵⁰

Although white-collar prosecutions generate significant media attention—thereby allowing judges and prosecutors to utilize the media scrutiny to relay a message of shame to the targeted audience so as to discourage others from committing similar offenses,⁵¹—the stigma of shame (if it exists at all) eventually wears off for the offender and any corresponding reputational loss is forgotten by the public.⁵² As a case in point, Michael Milken (the former Drexel junk bond king) pleaded guilty to six felonies in 1990 and was sentenced to 10 years in prison. After serving less than two years in prison and being barred for life from the securities industry, Milken has re-emerged as a deal-maker, despite being sanctioned by the SEC again in 1998 for allegedly violating the ban.⁵³ Today, Milken also is a noted

43. See, e.g. John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 432 (1980); Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L. J. 485, 496 (1999).

44. Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable By Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975).

45. Coffee, Jr., *supra* note 43, at 431 (noting that “[i]n the case of incarceration . . . the declining marginal utility of imprisonment means that each increment of incarceration increases the perceived penalty by a less than proportionate amount”); see also A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 12 (1999) (explaining that the cost of imprisonment to the offender declines over time).

46. Coffee, Jr., *supra* note 43, at 431; Polinsky & Shavell, *supra* note 45, at 2, 12.

47. Michael L. Benson & Francis T. Cullen, *The Special Sensitivity of White-Collar Offenders to Prison: A Critique and Research Agenda*, 16 J. CRIM. JUST. 207, 211 (1988).

48. Coffee, Jr., *supra* note 43, at 432 (observing that “the psychic injury that accompanies [the] sudden powerlessness can be unacceptable . . . [and even] [i]f the initial socialization to prison is brutal and demeaning . . . human beings can adapt and endure”).

49. FRANKEL, *supra* note 2, at 173.

50. *Id.*

51. Szockyj, *supra* note 43, at 492.

52. See, e.g., Joseph Nocera, *Led into Temptation? Who Wasn’t?*, N.Y. TIMES, Sept. 3, 2005, at C1 (discussing the recovery of the reputations of convicted corporate officers Michael Milken, Martha Stewart, and Henry Blodgett).

53. See Randall Smith and Susan Pulliam, *Grubman Still Rates Himself “Buy,”* WALL ST. J. (April 2, 2003).

philanthropic whose cancer research foundation, the Prostate Cancer Foundation, has raised more than \$210 million from 1993 through 2003.⁵⁴

Moreover, effective deterrence purportedly comes from the overall criminal process itself—i.e., the charge, trial, conviction, and sentencing, with the actual term of incarceration adding proportionately little.⁵⁵ Whatever incremental deterrence that may occur will be produced before the imprisonment sanction is imposed.⁵⁶ Indeed, “[m]ost students of the criminal process locate the source of the stigma [and psychic harm] in the fact of conviction rather than the form of the sentence.”⁵⁷ Nevertheless, punishment must be imposed and incarceration remains the most preferred method.

Although the threat of higher fines and lengthier sentences may work to deter some potential wrongdoers from future unlawful acts, the prevailing crime and punishment literature casts doubt on the effectiveness of such sanctions, standing alone, for most offenders.⁵⁸ The empirical research regarding deterrence of white-collar offenders is generally inconclusive.⁵⁹ Before delving into a final critique of the Act’s enhanced criminal penalties, however, a return to a discussion of deterrent-based punishment theory is in order.

The theory of general deterrence “operates on the assumption that if society punishes offenders who violate the law, others will not violate the law because they do not wish to be punished.”⁶⁰ Deterrence consequently rests on the economic principle that individuals will engage in utility-maximizing behavior.⁶¹ Stated differently, the rational-choice model of human behavior suggests that individuals

54. See Cora Daniels, *The Man Who Changed Medicine*, FORTUNE (November 15, 2004).

55. Szocky, *supra* note 43, at 495.

56. *Id.*; see Block & Lind, *supra* note 44, at 461 n.7 (observing that “[t]his is partly because one adjusts to prison life . . .”).

57. Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 416 (1980).

58. The debates on criminal punishments generally and the relative merits of imposing fines versus incarceration as effective criminal sanctions for white collar offenders (in particular), including the impact of their respective severity, has been on-going for almost thirty years. See generally Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Coffee, Jr., *supra* note 43, at 422 (arguing the threat of incarceration typically will have a greater deterrent value than the threat of fine; more deterrence is generated by penalties focuses on an individual than on an organization; and the certainty of a sanction is more important than the severity); Posner, *supra* note 57, at 409–14 417–18 (arguing the application of the economic analysis of crime, pioneered by Gary Becker, requires that white collar criminals be punished only by monetary penalties (i.e., fines) rather than by imprisonment); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 185–93 (2004); Szocky, *supra* note 43, at 492, 495–96 (citing William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703 (1967)).

59. See Ramirez, *supra* note 17, at 414–15 (observing that the creation of an empirical study to measure the effect of deterrence or to determine optimal sanctions is near impossible because the target group — people who decide not to engage in criminal conduct — ordinarily do not announce such decisions); Coffee, Jr., *supra* note 43, at 425.

60. Ramirez, *supra* note 17, at 416.

61. See generally Coffee, Jr., *supra* note 43, at 419 (arguing that economists “have begun to analyze aspects of human behavior not characterized by market transactions. In so doing, economists have applied their central

“can perfectly process available information about alternative courses of action, and can rank possible outcomes in order of expected utility . . . [and] will choose the course of action that will maximize his personal expected utility.”⁶² Under the circumstances, a rational actor will only take on the risks that he can stand. This behavioral model, when applied to criminal law theory, suggests that individuals will make a cost-benefit assessment before acting, and in so doing will decide to forgo criminal conduct. Effective outcomes from this cost-benefit assessment require the risk of detection and apprehension, or the severity of punishment be greater than any purported benefit to be gained from the prospective illegal act.⁶³

Thus, potential offenders will typically forgo criminality only where the likelihood of apprehension is high or where they fear the prospective punishment.⁶⁴ Increasing the chances of getting caught clearly will be more effective than merely increasing the severity of the punishment imposed.⁶⁵ Unfortunately, the “detection” and “apprehension” prongs of the cost-benefit equation have been particularly devalued in recent years given the high number of the fraudulent reporting schemes that went undiscovered for years. Arguably, better detection and apprehension should now occur in light of the Sarbanes-Oxley transparency measures, and the SEC’s increased budget and staffing.⁶⁶ Until the SEC integrates its increased staff and fully engages them into its oversight mission, however, the focus must continue to be on the “punishment” prong of the cost-benefit equation. More specifically, the focus must be on its certainty.

Congress seemingly intends that the Act’s enhanced criminal penalties will strengthen the “punishment” prong of the cost-benefit equation. However, as the probability of punishment lowers, so too does the impulse to suppress wrongdoing.⁶⁷ That impulse is further weakened if the anticipated benefit of the illegal act

premise that individuals engage in utility-maximizing behavior to such diverse fields as family planning, political participation, altruism, and crime”).

62. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989); see also GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976) (observing “all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets”).

63. Moohr, *supra* note 12, at 956–57.

64. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 220 (6th ed. 2003); Daniel J. Freed, *Federal Sentencing in Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1707 (1992); Ramirez, *supra* note 17, at 414.

65. Gordon Tullock, *Does Punishment Deter Crime?* 36 PUB. INT. 103, 107–08 (1974).

66. Between fiscal year 2002 and 2004, the SEC hired more than 1,000 new employees. U.S. SEC. & EXCH. COMM’N., *supra* note 4, at 2. The SEC also met its Sarbanes-Oxley requirement to review at least once every three years the financial statements of each reporting company and investment company issuer, reviewing over 6,000 reporting companies in fiscal year 2005. *Id.* at 11. There is still a way to go. Today, the SEC has about 3,600 staffers to oversee 10,000 public companies, 6,000 broker-dealers, investment advisors with more than \$32 trillion under management, and 1,000 fund complexes. *Cox Says SEC Budget Request Allows Programs to Continue, with Stated Priorities*, SEC. L. DAILY, May 17, 2007.

67. Robinson & Darley, *supra* note 58, at 183 (citing Stephen Lande, *An Interresponse Time Analysis of Variable Ratio Punishment*, 35 J. EXPER. ANAL. BEHAV. 55 (1981)).

also is great enough to enable some actors to rationalize taking a gamble on the cost-benefit outcome. The recent series of corporate frauds seem to typify this view, where many corporate offenders presumably discounted the imposition of severe penalties in the face of an extraordinary payout. According to United States District Court Judge Barbara S. Jones Scott D. Sullivan knowingly continued to lead WorldCom's \$11 billion accounting fraud in order "to preserve his \$700,000 salary, \$10 million bonus and stock options."⁶⁸ Exposure to punishment that is certain to be imposed and that would also remove the economic incentive of the crime potentially would have changed Sullivan's cost-benefit analysis.

Unfortunately, the Act's enhanced criminal penalties do little to change the type of rationalization that Sullivan and his cohorts might have engaged. As the aforementioned discussion suggests, there are many uncertainties that impact whether any of the Act's enhanced criminal penalties will be meted out after the scandal's dust settles. To effectively combat corporate fraud, the expected penalty must be certain and must exceed the gain to the offender before he will be sufficiently deterred.⁶⁹ Congress therefore must do more to ensure that the ability to return to the lifestyle once led (purchased with funds fraudulently obtained from the corporate offenders' former corporation) will be eliminated. Even if some corporate offenders are willing to reconcile the prospect of paying a fine and spending some time behind bars for the sake of an exponential payout, the prospect of giving up one's personal freedom without any tangible benefit in the end will change the deterrent equation. Commentators agree that the certainty of sanctions is a more important deterrent.⁷⁰

B. The Impact of a Subjective Cost-Benefit Assessment

Cost-benefit analyses are subjective. People make different probability calculations; undervaluing the detection, apprehension, and severity factors. Faulty assessments cause some to break the law, where others might abstain. Risk-takers (in particular) may appreciate the liability exposure, but may not believe that their misdeeds will be discovered and prosecuted. Even more problematic, behavioral science suggests that risk seekers typically are less inclined to think about the consequences of their actions or to tailor their behavior accordingly.⁷¹ At the other end of the spectrum (and still problematic for proponents of deterrent-based punishment) lie those potential offenders who may be so confident in their abilities that they fail to appreciate the risks that may accompany their actions. Their judgment biases may depend somewhat on their self-esteem; in the sense that those with the highest levels of

68. Jennifer Bayot & Roben Farzad, *WorldCom Executive Sentenced*, N.Y. TIMES, Aug. 12, 2005, at C1.

69. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179, 184 (1879); Becker, *supra* note 53, at 183–84.

70. See Coffee Jr., *supra* note 43, at 422; Robinson & Darley, *supra* note 58, at 183.

71. *Id.* at 179.

PURPORTED OVER-CRIMINALIZATION OF CORPORATE OFFENDERS

self-esteem are the most likely to misjudge their control over future events and even their skill sets.⁷²

Corporate executives, for example, may assign any resulting success to their inherent skills, while equally assigning failure to just bad luck.⁷³ They persuade themselves that any setback at the company is temporary, so their fraudulent cover-ups need only work for a short while to be successful.⁷⁴ The public company accounting scandals revealed a corporate culture of hubris, recklessness, and unbounded competition. Many corporate executives acting in a climate of ever-rising market prices, had a sense of invincibility; they “read market delusions as proof of their own genius.”⁷⁵ Indeed, there was a tendency for the scandals’ actors to see themselves as “Masters of the Universe,” “all-knowing, type-A power mongers” who were rule averse.⁷⁶ Their arrogance informed them that concern for the rules and any sanctions resulting from noncompliance was unnecessary because they were never going to be caught.

Such overconfidence and risk taking are partner traits to success in the corporate tournament.⁷⁷ These traits can have a positive effect on the corporation where the individual’s stricter work ethic, persistence, and willingness to bear risks may lead to new and profitable ideas. Conversely, these traits may prompt persistent gambling on the cost-benefit outcome especially if the corporate actor believes that “a big win at the last minute can cancel out an existing shortfall.”⁷⁸ “Just as those with high self-esteem may overly attribute good fortune to their own skill, these corporate actors are also adept at rationalizing the bad results of their schemes as bad luck or someone else’s fault.”⁷⁹

72. Larry E. Ribstein, *Markets vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. Corp. L. 1, 20 (2002).

73. Moohr, *supra* note 12, at 958; Ribstein, *supra* note 80, at 20.

74. Ribstein, *supra* note 72, at 21 (suggesting that “[h]ypermotivated and superoptimistic insiders might be able to persuade themselves that any setbacks were temporary, so that cover-ups need only work for a little while . . .”).

75. Kurt Eichenwald, *The Enron Verdict: The Fallout; Verdict on an Era*, N.Y. TIMES, May 26, 2006, at C1.

76. See James P. Othmer, *Masters of the Universe, Unite!*, N.Y. TIMES, May 26, 2006, at A21; see also Brooke A. Masters & Carrie Johnson, *White-Collar Crime’s New Milestone*, WASH. POST, May 26, 2006, at D1 (“It’s Shakespearean. The CEOs who have gone down are people who literally lost touch with reality,” said Yale University law professor Jonathon Macey. ‘Ken Lay had so internalized the idea of an imperial CEO that he blamed everyone but himself. He could not conceptualize that he should take responsibility.’”).

77. The “tournament” refers to the promotion model whereby managerial employees are rotated throughout the organization, performing various tasks, usually in groups. Superiors choose whom to promote by means of comparison with the individual’s peers. Through numerous iterations, the competition gets tougher as it progresses because only previous winners advance. One must win all of the rounds within a corporation in order to become the CEO. “If innate talent and skill are imperfectly observable, then outcomes will provide the evidence on which higher-ups decide who wins in the various rounds.” Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 299–300 (2004).

78. *Id.* at 307.

79. *Id.* at 308.

Exposure to uncertain prison sentences alone generally will have less of a deterrent effect on these potential offenders who either will not engage in a cost-benefit assessment at all, or will engage in flawed decision-making. The tendency to be overly optimistic about the outcome, coupled with overconfidence in their skills cannot yield the rational thinking necessary to forgo criminality. Indeed, a study has shown that the cost-benefit analysis potential offenders perceive “commonly leads to a conclusion suggesting violation rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted.”⁸⁰

Accordingly, I propose that the Act’s criminal penalties also should include the asset forfeiture sanction. Adding such a provision to the criminal code for violations of the recently-enacted federal securities fraud statute would authorize the forfeiture of all assets traceable to a corporate offender’s fraudulent use of the corporation’s assets and fraudulent manipulation of the corporation’s publicly reported financial results. Specifically, I propose amending or expanding the scope of 18 U.S.C. § 982(a) to include a provision that reads:

*The court, in imposing a sentence on a person convicted of an offense in violation of section 1348 of this title, shall order that the person forfeit to the United States any property, real or personal, which constitutes or is traceable to the proceeds obtained, directly or indirectly, as a result of such violation.*⁸¹

The certain exposure to the asset forfeiture sanction expands the punishment prong of the cost-benefit equation by penalizing any actor who gambles on the outcome, or who engages in faulty assessments, or who fails to undertake the assessment altogether.

III. WHY FORFEITURE SANCTIONS SHOULD HAVE AN APPEAL

Asset forfeiture reaches the “spoils” of the wrongdoers’ illegal conduct and strikes at the heart of the criminals’ economic motive for misusing their corporate status.⁸² As such, forfeiture orders should be sought, in addition to higher fines and

80. Robinson & Darley, *supra* note 58, at 183.

81. *Cf.* 18 U.S.C. § 982(a)(2), (3) (2002). Congress also should similarly expand the scope of 18 U.S.C. § 981(a) to authorize civil asset forfeiture for violations of the securities fraud statute. The existing forfeiture statute for violations of the federal securities law limits such actions to “fraud in the sale of securities.” 18 U.S.C. § 981(a)(1)(C); § 1956(c)(7)(A); § 1961(1)(D).

82. Asset forfeiture is not the same as restitution. The forfeiture sanction increases the potential recovery from wrongdoers more than simple restitution orders because forfeiture reaches and potentially freezes more of the offender’s assets. Although the proceeds of both orders can be used to compensate victims, the restitution order is more victim-centered. The aim of restitution is to restore a victim to his or her original position prior to loss or injury. Forfeiture, in contrast, seeks to deprive the wrongdoer of the fruits of his or her illicit conduct.

lengthier prison sentences, in corporate securities fraud cases.⁸³ This sanction would result in greater deterrence because the punishment prong of the cost-benefit equation will be strengthened by the enlarged arsenal of penalties. Targeting the fruits of the wrongdoers' fraudulent scheme makes particular sense under the circumstances where even the seemingly irrational actor will acknowledge that losing not only what one might have obtained from the criminal offense, but also all assets traceable thereto is not worth the gamble.

The forfeiture sanction also serves retributive notions of punishment, which reflects the belief that punishment, in whatever form, should be imposed because it is "morally fitting that a person who does wrong should suffer in proportion to his wrongdoing."⁸⁴ Retributivists are less concerned with the punishment's deterrent effect. In their view, the purpose of punishment is to demonstrate moral blameworthiness.⁸⁵

Neither the indictments, convictions, nor sentences have greatly assuaged victimized investors. In fact, after learning of Jeffrey Skilling's indictment in 2004, one victim who lost \$1 million reportedly stated:

*I guess we're all satisfied that the wheels of justice are slowly grinding away, but every one of us lost our shirts. When all is said and done, [however,] Skilling and the rest of them are going to end up with a whole lot more money than a lot of us.*⁸⁶

Under the circumstances, corporate offenders are particularly well-suited for retributive sanctions because their wrongdoing amounts to a breach of their agreement with society to let them into its personal or financial affairs based upon the fiduciaries' projected "façade of respectability and trustworthiness . . ."⁸⁷ Their fraudulent conduct warrants retributive punishment.

Finally, asset forfeiture should have great appeal given Congress' previous application of this sanction to combat the various corporate crime waves of years past, where Congress enacted enhanced criminal penalties that also include the asset forfeiture sanction. In response to the wave of insider trading scandals that marred

83. For a more detailed discussion of the asset forfeiture sanction and how it would work in financial fraud cases, see Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321 (2007).

84. Jennifer S. Recine, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1568 (2002) (quoting JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 33 (2000)). See also WAYNE R. LAFAVE, CRIMINAL LAW 26 (3d ed. 2000) (observing that under this theory, also called revenge or retaliation, punishment is inflicted by society on criminals in order to obtain revenge "because it is only fitting and just that one who has caused harm to others should himself suffer for it"); Stephen A. Saltzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U. L. REV. 421, 430 (1991).

85. Recine, *supra* note 84, at 1568.

86. Kris Hundley, *Cuffed and on Display, Skilling Pleads Innocent*, ST. PETERSBURG TIMES, Feb. 20, 2004, at 1A.

87. Ramirez, *supra* note 17, at 410.

Wall Street during the 1980s, as well as the savings and loan debacle of the 1980s and 1990s, Congress enacted specific legislation designed to remove the economic motives of corporate insiders and bank fiduciaries who misused, or fostered the misuse of, their trusted positions for illegal gains. In addition to increasing the fines and prison terms for violations of the criminal statutes, Congress also made those ill-gotten assets involved in, or tradeable to, wrongdoing subject to both criminal and civil forfeitures actions.⁸⁸

IV. CONCLUSION

Deterrent-based punishments may yield less effective outcomes for corporate fraudsters since some actors do not engage in the requisite cost-benefit assessments before acting. Moreover, even if everyone undertook such an assessment, their subjective beliefs will vary the outcomes. The corporate offender's attitude toward risk will differ according to the type of criminal penalties that could be imposed, thereby implicating differing levels of marginal disutility. Consequently, the punishment prong must fully extinguish all benefits of the unlawful act in order to fill in the gaps that arise from a sole reliance on deterrent-based punishment. The asset forfeiture sanction effectively removes the economic motive for the criminal conduct from the potential offender's "benefits" calculation. Any purported benefit from the criminal scheme will be wiped out if the offender is caught.

The limitations of relying primarily on higher fines and lengthier sentences to deter potential wrongdoers requires consideration of a new approach to inducing compliance with the corporate and securities laws. Rather than solely resorting to criminal-law based externalities, and requiring even greater monitoring of, and reporting by, corporate fiduciaries, it is time to look to new ways to inculcate responsible and honest behavior within the corporate structure. Consideration must be given to create a system that ensures that corporate actors will be self-inclined to do the right thing. The challenge, of course, is to create a system within the corporation to ensure that fairly decent people cannot be put under economic or competitive pressure to turn away from social norms of trust and honesty.

88. See, e.g., Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at 18 U.S.C. §§ 981-982 (2007)); Insider Trading Sanctions Act (ITSA), Pub. L. No. 98-376, 98 Stat. 1264 (1984); Insider Trading and Securities Fraud Enforcement Act (ITSFEA), Pub. L. No. 100-704, 102 Stat. 4677 (1988).