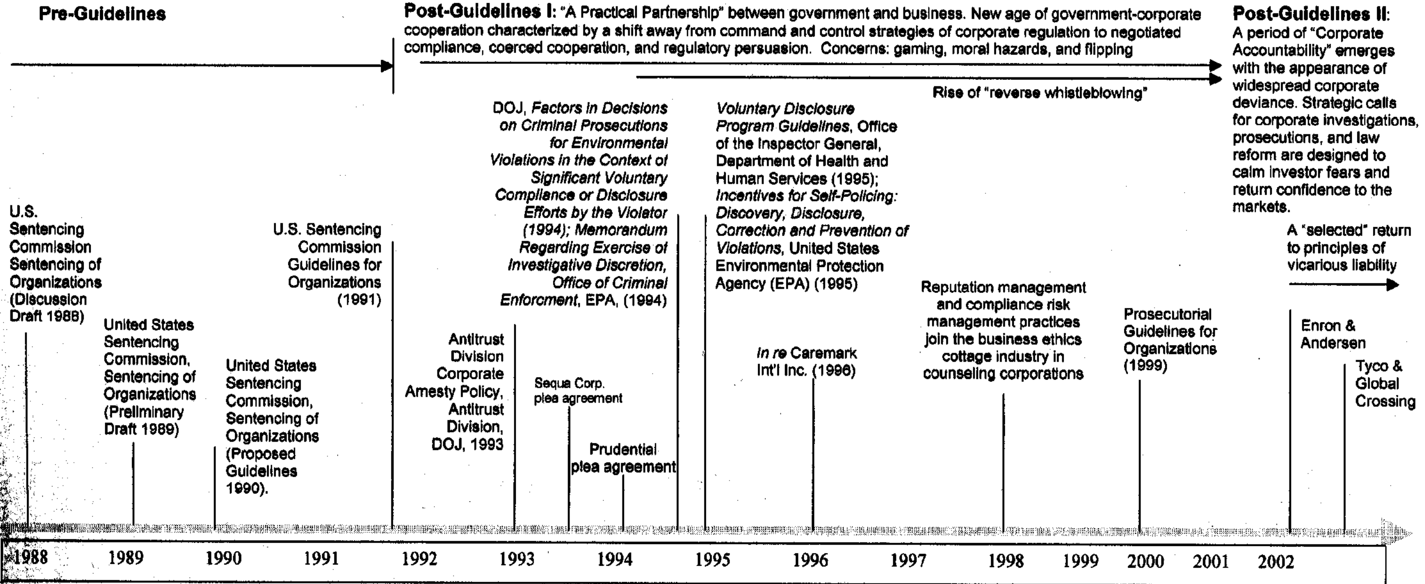
Figura 1

The Development of the Corporate Criminal Law
Pre-Guidelines-present



Debate over optimal penalty theory and the possible role, in any, of mitigating circumstances in the drafts of Sentencing Guidelines for Organizations. Heavy lobbying from industry groups and big business to include some recognition of organizational due diligence. →

In this phase of "post-Guidelines" cases, corporate compliance for large, decentralized multinationals is bought and sold as cost-effective risk management in a marketplace of experts from "business integrity" consulting, insurance, and accounting firms. Evidence of organizational due diligence may forestall an investigation, minimize the chance of a criminal indictment, and possibly lead to a grant of governmental amnesty. →

Prosecutors are increasingly likely to decline cases involving organizations with compliance programs modeled after the Guidelines' prescriptive steps. This is especially true in complex white-collar and corporate crime cases (e.g., antitrust and securities fraud) that require significant investigative and prosecutorial resources. Declinations reward firms for their proactive and reactive efforts, focus scarce resources on the most abusive firms, and identify organizations that will not benefit from the Guidelines' mitigation credit. →

The Prosecutorial and Sentencing Guidelines provide reciprocal promises—organizational cooperation and acceptance of responsibility in exchange for mitigation, exculpation, or absolution. This new age of corporate criminal liability is →

Symbolic prosecutions follow in the wake of Enron and Anderson. Prosecutions follow the strictures of existing law—reliance on vicarious liability.

Figura 2

The Five Phases of the Corporate Criminal Law 1850-present

PHASE ONE
Concerns with importance and meaning of corporate personhood

PHASE TWO
The Rise and immediate fall of vicarious liability: Strategic risk shifting by employers and employees

PHASE THREE
New era of regulatory law

PHASE FOUR
Post Guidelines Partnership

PHASE FIVE
Selective use of existing law

Without a soul, corporations cannot have a "wicked" intent. Only human beings can be charged with perjury, treason, and violent crimes. Most crimes go beyond the purposes and powers of a corporation. Corporations, however, may be charged with nonfeasance and some affirmative acts. *State v. Morris & Essex Railroad (1852); Commonwealth v. Proprietors of New Bedford Bridge* (1854)

The emergence of large scale multidivisional organizations, the move from horizontal to vertical integration, the separation of corporate ownership and control, and the rising prominence of railroad conglomerates in interstate commerce led Congress and then federal courts to implement the power of the criminal law as a regulatory weapon.

Corporations increasingly subjected to criminal liability for types of nuisances

Sherman Act

The nonfeasance - misfeasance distinction is abandoned for reasons of practicality. Immunizing corporations from the criminal law would deprive the law of a powerful form of social control

Corporate criminal liability extended to crimes of intent

New York Central & Hudson River Railroad v. U.S. (1909)

The emergence of a due diligence defense (*John Gund Brewing Co. v. U.S.* (1913))

Securities Act of 1933 and Securities Exchange Act of 1934

Model Penal Code provisions on corporate criminal liability

Standard Oil Company of Texas v. U.S. (1962)

"Golden Age" of white collar crime prosecution

U.S. v. Hilton Hotels Corp. (1973)

U.S. v. Bank of New England (1987)

Sentencing Guidelines for Organizations (1991)

In re Caremark Int'l Inc. (1996)

Prosecutorial Guidelines for Organizations (1999)

Reliance on vicarious liability in a select number of high profile prosecutions

Andersen Conviction/ Enron

Tyco/ Global Crossing

1850 | 1860 | 1870 | 1880 | 1890 | 1900 | 1910 | 1920 | 1930 | 1940 | 1950 | 1960 | 1970 | 1980 | 1990 | 2000 | 2002

Between 1850 and 1910, courts acceded to the realities of rising monopolistic powers and rapid market integration by expanding the fiction of corporate criminal liability. Criminal liability, as well as the rise of civil liability regimes, provided needed relief from the risks associated with the rise of the modern corporation. →

By the culmination of the first merger wave, which ended in 1904, traditionally centralized functions in many large corporations had become increasingly decentralized. Departments, managerial oversight, as well as employee functions and roles, were highly specialized. With decentralization, specialization, and an increasing organizational complexity came concerns over loss of corporate control across the managerial hierarchy →

Of central concern was the increasing separation in status and role of shareholders and management. Managers with an insignificant ownership interest assumed prominent decision-making roles as shareholders forfeited active control over corporate operations. →

Increased power given to OSHA, EPA, and other federal agencies with the passage of a host of regulatory statutes →

Post-Guidelines enforcement and prosecution determined by compliance with Guidelines and regulatory statements. Liability is →

Symbolic prosecutions follow in the wake of Enron and Anderson. Prosecutions follow the strictures of existing law—reliance on vicarious liability.