Federal Sentencing Guidelines for Organizational Defendants

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RECENT DEVELOPMENTS

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I. INTRODUCTION

The first Federal Sentencing Guidelines for Organizational Defendants ("Guidelines")[1] became effective on November 1, 1991.[2] The Guidelines represent the federal government's latest action in the developing area of organizational sanctions and are the result of three years of work and several prior draft proposals by the United States Sentencing Commission.

Part II of this Recent Development examines past legal and theoretical approaches to the problem of organizational sentencing. Part III describes both the past and present efforts of the United States Sentencing Commission to promulgate sentencing guidelines for organizations. Part IV analyzes the new Guidelines in light of the statutory purposes and prevailing theories of organizational sentencing. Part V presents proposed amendments to the new Guidelines.

II. BACKGROUND

Organizations are prevalent in American society because they have the ability to mobilize vast resources in the pursuit of well-defined goals.[3] Although capable of achieving great social good, organizations also are capable of great social evils.[4] In terms of the numbers of human

1. United States Sentencing Commission, Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22762 (1991). For the official Guidelines as ultimately enacted, see United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (West, 1991). Under federal law, an "'organization' means a person other than an individual," 18 U.S.C. § 18 (1988), and "includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and nonprofit organizations." U.S.S.G. § 8A1.1 n.1 at 349 (1991).

2. Telephone interview with Mike Courlander, tbe United States Sentencing Commission's Public Information Specialist (Feb. 1992).

3. For a discussion of the vital and inevitable role of large corporations in the modern industrial economy, see Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* at 2-4 (Free Press, 1980).

4. See, for example, Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 Yale L. J. 353, 353-54 & n.1 (1979); Laureen Snider, *The Regulatory Dance: Understanding Reform Processes in Corporate Crime*, 19 Intl. J. Soc. L. 209, 209-10 (1991). See generally Clinard and Yeager, *Corporate Crime*. The national and international economic and political power of the world's largest corporations is staggering. In 1978, the two

lives and the amounts of property involved, the social harm caused by organizations greatly exceeds the harm that individuals cause.[5] In order to control the great potential of modern organizations to cause social harm, the federal government increasingly has turned to criminal sanctions.[6]

A. *Past Legal Approaches to Organizational Sanctions*

According to well-established law, organizations can be criminally liable.[7] Most organizations possess all the legal powers of an individual and likewise are capable of committing virtually any crime that an individual can commit.[8] All organizations must act through agents, and in the federal system, organizations are vicariously liable for the crimes of their agents.[9] Furthermore, the traditional purposes of criminal sanctions—deterrence, just punishment, and rehabilitation[10]—apply to organizational defendants just as they apply to individual defendants.[11] Generally, all agree that certain acts of organizations merit criminal sanctions. Considerably less agreement exists, however, as to what those sanctions should be.

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largest American corporations in terms of sales, General Motors and Exxon, "each had annual sales totaling over $60 billion, a sum that far exceed[ed] the total revenues of any state in the United States and those of most countries in the world." Id. at 1-2.

> 5. The U.S.A., the country with the highest rate of homicide in the developed world, reports 20,000 murders in an average year. By contrast, 14,000 deaths per annum are caused by industrial accidents, many of which stem from violations of safety codes; 30,000 deaths result from unsafe and usually illegal consumer products; and hundreds of thousands of cancer deaths are caused by legal and illegal environmental pollution. . . .
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> Dollar losses are also horrendous. Corporate crime costs far more than street crime—all the street crime in the U.S. in a given years [sic] is estimated to cost around $4 billion, much less than 5% of the average take from corporate crime.

Snider, Intl. J. Soc. L. at 209 (cited in note 4). See also Clinard and Yeager, *Corporate Crime* at 7-12 (cited in note 3).

6. See Note, 89 Yale L. J. at 354 & n.7 (cited in note 4).

7. See id. at 353 & nn.2-6. "The Supreme Court first recognized the criminal liability of corporations in *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909)." Id. at 353 n.2.

8. See Note, 89 Yale L. J. at 353 & nn.2-6.

9. U.S.S.G. Ch. 8, intro. comment. at 347; Note, 89 Yale L. J. at 353 n.2; Richard A. Posner, *Economic Analysis of Law* at 398 (Little, Brown & Co., 3d ed. 1986) (stating that "[i]f a crime at least ostensibly in the corporation's behalf is committed or condoned at the directorial or managerial level of the corporation, the corporation is criminally liable").

10. See Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations*, in United States Sentencing Commission, Discussion Materials on Organization Sanctions at 35 & n.149 (1988) ("*Discussion*"); Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law* § 1.5(a) at 31-36 (West, 1986).

11. 18 U.S.C. §§ 3553(a)(2), 3553(a)(7), 3553(c), 3556, 3663-64 (1988); U.S.S.G. Ch. 8, intro. comment. at 347.

1. Organizational Sanctions Prior to the Sentencing Reform Act of 1984

The criminal law, as originally designed by common-law courts and early legislatures, focused entirely on the individual.[12] The theory of punishment that permeated this system of individual sanctions was the utilitarian model associated with Jeremy Bentham.[13] Because the utilitarians viewed human beings as rational, self-interested, utility maximizers, they thought that criminal sanctions should be designed to outweigh the gains that committing a crime produced.[14] For serious offenses that the law sought to prohibit absolutely—such as murder—the only sufficient sanctions were physical restraints on life and liberty—the death penalty and imprisonment.[15] As criminal defendants began to include organizations as well as individuals, courts and legislatures simply extended the existing scheme of individual-based criminal sanctions to organizational defendants.[16]

Although grounded on the same utilitarian principles as individual sanctions, organizational sanctions necessarily took a more limited form. Because organizations had no "soul to be damned, and no body to be kicked,"[17] imprisonment and the death penalty, the cornerstones of the criminal sanctioning scheme for individuals, were inapplicable.[18] Therefore, for many years the only available organizational sanctions were monetary,[19] consisting of fines or restitution.[20]

Dissatisfaction with monetary sanctions,[21] however, caused courts, legislatures, and scholars to consider organizational probation as a supplement or alternative to fines. A federal court first upheld the propriety of probation as an organizational sanction in *United States v.*

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12. See Christopher D. Stone, *Where the Law Ends* at 1-2 (Harper & Row, 1975).

13. See id. at 9-10.

14. See id.; Parker, *Criminal Sentencing*, in *Discussion* at 35 & n.151 (cited in note 10).

15. See Stone, *Where the Law Ends* at 30-31, 36.

16. See id. at 1-2, 8-10.

17. John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 386 (1981) (quoting Edward, First Baron Thurlow, in Mervyn King, *Public Policy and the Corporation* at 1 (Wiley, 1977)).

18. See Stone, *Where the Law Ends* at 36. See also Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 Am. J. Crim. L. 1, 4 (1988) (discussing effectiveness of probation over incarceration and fines). Although revocation of the organization's charter, as in the case of corporations, presented a theoretically analogous sanction, the consequent harm to society and the ease of acquiring a new charter rendered that option impractical. See Stone, *Where the Law Ends* at 36.

19. See Stone, *Where the Law Ends* at 36; Gruner, 16 Am. J. Crim. L. at 4; Note, 89 Yale L. J. at 354 & n.10 (cited in note 4).

20. Prior to the enactment of the Sentencing Reform Act of 1984, restitution was available as a sanction only when authorized under 18 U.S.C. §§ 3663-64 (1988). See note 31 and accompanying text.

21. See notes 70-116 and accompanying text.

Atlantic Richfield Company[22] ("*ARCO*"). In *ARCO*, the Seventh Circuit held that a corporation could be sentenced to probation under the Federal Probation Act.[23] In order to impose probation under the Federal Probation Act, however, a sentencing court had to suspend the imposition or execution of any other sentence.[24] Thus, a court could not require a criminal defendant both to pay a fine and also to serve a probation term. The court-imposed conditions of probation under the Federal Probation Act included making charitable contributions,[25] performing community service,[26] or implementing various changes in internal operations designed to detect and prevent repetition of the offense of conviction.[27]

2. The Sentencing Reform Act of 1984 and Beyond

The Sentencing Reform Act of 1984 ("the Act"),[28] a title within the broader Comprehensive Crime Control Act of 1984,[29] significantly changed the use of restitution, fines, and probation as organizational sanctions. Moreover, the Act replaced the rehabilitation model of criminal sentencing with the following four sentencing goals. The sentence should: (1) "reflect the seriousness of the offense, promote respect for

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22. 465 F.2d 58, 61 (7th Cir. 1972). ARCO had been convicted repeatedly of illegally discharging oil from a dock facility into a canal. ARCO's recidivism indicated to the trial judge that the maximum statutory fine for this offense, a mere $2500, would not deter further violations. The trial judge therefore suspended the fine and imposed probation. The conditions of probation required that ARCO design and implement a plan for preventing future oil spills. If ARCO failed to comply, the court threatened to appoint a Special Probation Officer to ensure ARCO's compliance. For further analysis of the *ARCO* case, see Gruner, 16 Am. J. Crim. L. at 14-15 & n.53 (cited in note 18); Stone, *Where the Law Ends* at 184-89 (cited in note 12).

23. 465 F.2d 58. The court found that the Federal Probation Act, 18 U.S.C §§ 3651-56 (1970), repealed by Pub. L. No. 98-473, 98 Stat. 1987, amended by Pub. L. No. 99-217, 99 Stat. 1728 (1985), implied but did not provide expressly for corporate probation. *ARCO*, 465 F.2d at 61.

24. See Gruner, 16 Am. J. Crim. L. at 15 n.63.

25. See id. at 18-24. Ultimately, all four circuits to consider the issue concluded that the Federal Probation Act did not authorize probation conditions requiring charitable contributions. Id. at 18 n.82, 23-24 & nn.111-13. See *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 961-64 (3d Cir. 1984); *United States v. Missouri Valley Const. Co.*, 741 F.2d 1542, 1544-51 (8th Cir. 1984) (en banc); *United States v. Wright Contracting Co.*, 728 F.2d 648, 649-54 (4th Cir. 1984); *United States v. Prescon Corp.*, 695 F.2d 1236, 1242-44 (10th Cir. 1982).

26. Gruner, 16 Am. J. Crim. L. at 24-25. See, for example, *United States v. Yellow Freight Sys., Inc.*, 762 F.2d 737, 739 (9th Cir. 1985) (requiring corporation to loan a corporate officer to a service organization for 100 hours); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982) (requiring corporation to loan an executive to a charitable organization for one year to help develop a program for ex-offenders); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1166-67 (S.D.N.Y. 1983) (requiring bakery to donate bread to needy organizations).

27. See Gruner, 16 Am. J. Crim. L. at 25-26, 19 nn.84-87 (cited in note 18). See, for example, *ARCO*, 465 F.2d at 61; *United States v. Nu-Triumph, Inc.*, 500 F.2d 594, 596 (9th Cir. 1974) (requiring corporation to refrain from specific business activities).

28. 18 U.S.C. § 3551 (Supp. 1985).

29. Pub. L. No. 98-473, 98 Stat. 1976 (1984).

the law, and provide just punishment for the offense; (2) afford adequate deterrence to criminal conduct; (3) protect the public from further crimes of the defendant; and (4) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[30]

The Act significantly increased the availability of monetary sanctions. Under the Act, a sentencing court almost always can order an organizational defendant to pay restitution.[31] The Act also significantly increased the maximum fines that courts could impose for organizational crimes in general.[32] In addition, Congress recently has enacted several statutes raising the maximum fines for the particular crimes of money laundering,[33] major fraud,[34] and insider trading.[35]

The Act's provisions on probation[36] supplanted the Federal Probation Act and made a number of significant changes.[37] First, under the Act, probation is a separate sentence that may be imposed in addition to, rather than merely in suspension of, another sentence.[38] Thus, under the Act, a court may combine a probation sentence with any combination of fines, criminal forfeitures, notice to victims, or restitution.[39] Second, the Act specifies two mandatory conditions of probation: (1) that the defendant not commit another federal, state, or local crime during the term of probation[40] and (2) that, when the offense of conviction is a felony, the defendant pay a fine, make restitution, or perform community service.[41]

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30. 18 U.S.C. § 3553(a)(2)(A)-(D) (1988).

31. See 18 U.S.C. §§ 3556, 3563(b)(3) (1988); Gruner, 16 Am. J. Crim. L. at 37-38, 42 (cited in note 18).

32. The Act sets the maximum imposable fines for organizations equal to the greater of the following: (1) the amount specified in the law setting forth the offense; (2) the greater of twice the gross gain or loss caused hy the offense, if any person derived a pecuniary gain or any person other than the defendant suffered a pecuniary loss as a result of the offense; (3) $500,000, if the offense was a felony or a misdemeanor resulting in death; (4) $200,000, if the offense was a class A misdemeanor not resulting in death; (5) $10,000, if the offense was a class B or C misdemeanor that did not result in death or an infraction. 18 U.S.C. § 3571(c)(1)-(7), (d) (1988).

33. Money Laundering Control Act of 1986, Pub. L. No. 99-570, Subtitle H, 100 Stat. 3207-18.

34. Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4631.

35. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677.

36. 18 U.S.C. §§ 3561-66 (1988).

37. For a discussion of the implications of the Federal Sentencing Act of 1984 for organizational probation, see Gruner, 16 Am. J. Crim. L. at 31-69.

38. 18 U.S.C. § 3551(c).

39. Id.

40. 18 U.S.C. § 3563(a)(1). For a discussion of potential problems in applying this condition to corporations, see Gruner, 16 Am. J. Crim. L. at 35-36.

41. 18 U.S.C. § 3563(a)(2). For a discussion of potential problems in applying this condition to corporations, see Gruner, 16 Am. J. Crim. L. at 36-41.

Third, the Act authorizes courts to impose discretionary conditions of probation provided that: (1) they are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the four goals of sentencing;[42] and (2) they deprive defendants of liberty or property only to the extent reasonably necessary to achieve the four goals of sentencing.[43] Among those discretionary conditions of probation enumerated in the Act,[44] those most pertinent to organizations include orders of fines, restitution, notice to victims, community service, restrictions of business activities, and cooperation with the supervisory activities of probation officers.[45] Thus, as the most recent and comprehensive statutory treatment of organizational sanctions, the Act laid the legal foundation for the United States Sentencing Commission to promulgate sentencing guidelines for organizational defendants.

B. Theories of Organizational Sanctions

Although the Act specified the goals and available means of organizational sanctions, it did not specify how to most appropriately achieve those goals. Thus, in promulgating sentencing guidelines, the Sentencing Commission had considerable latitude to choose between competing theories of what types and combinations of sanctions, generally either monetary sanctions or probation, were most appropriate in view of the statutory goals of sentencing. The competing theories can be divided into two general categories—the neo-classical economics approach and the organization theory approach.

1. The Neo-Classical Economics Approach[46]

The neo-classical economics approach assumes that organizations are rational utility maximizers, or in the case of business organizations, profit maximizers.[47] Furthermore, this model tends to view organizations as unitary actors.[48] Based on these assumptions, the economist

42. 18 U.S.C. § 3563(b). For a discussion of the application of this standard to discretionary conditions of probation for corporations, see Gruner, 16 Am. J. Crim. L. at 51-55.

43. 18 U.S.C. § 3563(b). For a discussion of the application of this standard to discretionary conditions of probation for corporations, see Gruner, 16 Am. J. Crim. L. at 55-57.

44. For a discussion of the practical application of these enumerated discretionary conditions to corporations see Gruner, 16 Am. J. Crim. L. at 41-51.

45. 18 U.S.C. § 3563(b).

46. See generally Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); Posner, *Economic Analysis* at 205-12, 397-99 (cited in note 9); Coffee, 79 Mich. L. Rev. at 389-93 (cited in note 17); Parker, *Criminal Sentencing*, in *Discussion* at 33-50 (cited in note 10).

47. See Posner, *Economic Analysis* at 205-06.

48. Michael B. Metzger and Charles R. Schwenk, *Decision Making Models, Devil's Advo-*

maintains that monetary sanctions alone, if set at the right level, will deter organizational crime by causing organizations to undertake whatever internal adjustments are necessary to avoid criminal liability.[49] According to the economist, such self-regulation is more efficient than external intervention by courts or probation officers because the organizations themselves possess the necessary information and resources to make internal adjustments.[50]

Two competing views of the optimal level of monetary sanctions exist. The "classical deterrence" view is that the total monetary sanction should be set such that the expected penalty cost outweighs the expected gain from the offense.[51] Conversely, the "optimal penalty" view is that the total monetary sanction should be set such that the expected penalty cost equals the expected societal harm from the offense.[52] Thus, under both approaches, the expected gain or harm represents the actual gain or harm resulting from the offense multiplied by the probability of detection and conviction.[53] Because law enforcement resources are limited, the probability that any given organizational offender will be detected, prosecuted, and convicted always is less than one hundred percent.[54] Under the classical deterrence model, the total monetary penalty should equal the expected gain plus a small premium to ensure that the potential offender is not indifferent to violations of the law.[55] Under the optimal penalty model, however, the total monetary penalty should only equal the expected societal harm.[56] No additional premium should be added to ensure compliance with the law.

The classical deterrence model is essentially Bentham's utilitarian model.[57] Its basic rationale is that organizations will not commit crimes if they cannot expect to gain through their crimes.[58] Proponents of the optimal penalty model, however, identify two reasons why classical deterrence will inevitably overdeter or underdeter organizational crime. First, they argue that classical deterrence provides no incentives for organizations to develop and implement internal monitoring programs to

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cacy, and the Control of Corporate Crime, 28 Am. Bus. L. J. 323, 337 & n.97 (1990).

49. See Coffee, 79 Mich. L. Rev. at 394 (cited in note 17).

50. See Parker, *Criminal Sentencing*, in *Discussion* at 48-49 (cited in note 10).

51. See Posner, *Economic Analysis* at 207; Coffee, 79 Mich. L. Rev. at 389; Parker, *Criminal Sentencing*, in *Discussion* at 36 (cited in note 10).

52. See id. at 33-34.

53. See id. at 34, 36; Coffee, 79 Mich. L. Rev. at 389; Posner, *Economic Analysis* at 207.

54. See Parker, *Criminal Sentencing*, in *Discussion* at 34, 36; Coffee, 79 Mich. L. Rev. at 389; Posner, *Economic Analysis* at 207.

55. See Parker, *Criminal Sentencing*, in *Discussion* at 34, 36; Coffee, 79 Mich. L. Rev. at 389; Posner, *Economic Analysis* at 207.

56. Parker, *Criminal Sentencing*, in *Discussion* at 34.

57. See notes 13-14 and accompanying text.

58. Parker, *Criminal Sentencing*, in *Discussion* at 34.

prevent and detect organizational violations.[59] Thus, they argue that the model will underdeter unless the penalty is increased to account for these prevention costs.[60] Because classical deterrence provides no accurate and efficient means of calculating these prevention costs, however, the tendency will be to overestimate them and thereby overdeter organizational crime.[61] Second, optimal penalty proponents contend that classical deterrence makes no allowance for the possibility that the organizational offender will underestimate the probability of detection and conviction.[62] To do so, they argue, would require increasing the penalty by an arbitrary amount, again leading to overdeterrence.[63]

According to its advocates, the optimal penalty model achieves the goals of criminal sentencing more effectively and efficiently than does classical deterrence.[64] They argue that because the loss resulting from organizational crimes generally will exceed the resultant gain, the optimal penalty model provides a principled and efficient method of avoiding underdeterrence and overdeterrence.[65] Further, to the extent that the societal harm flowing from crime is an accurate measure of the severity of the offense, the optimal penalty rule strikes a balance between deterrence and just punishment by imposing penalties proportionate to the harm inflicted.[66] Finally, the optimal penalty model achieves rehabilitation and public protection by providing incentives for the organization to make the necessary internal adjustments to prevent violations of the law.[67] Optimal penalty advocates argue that if the organization nevertheless fails to undertake such internal adjustments itself, it eventually would be fined into bankruptcy. The organization then would be rehabilitated through reorganization or incapacitated through liquidation.[68] Although neo-classical economists differ as to the proper method of determining monetary sanctions, they agree on the exclusive use of monetary sanctions, and both groups oppose unduly intrusive, nonmonetary sanctions like probation.[69]

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59. Id. at 37.
60. Id.
61. Id.
62. Id.
63. Id.
64. See id. at 35-46.
65. See id. at 40-42.
66. See id. at 42-45.
67. See id. at 45-46.
68. See id. at 46.
69. See Posner, *Economic Analysis* at 398 (cited in note 9) (stating that white collar crimes can be punished exclusively hy fines and that fines are the only available sanction for corporations).

2. The Organization Theory Approach[70]

Organizational theorists argue that organizational reality does not conform to the simplistic assumptions of the economists and thus that monetary sanctions alone cannot effectively deter organizational crime. The organizational theorists' arguments against the economic models fall into three general categories: (1) arguments that fines are ineffective generally; (2) arguments that organizations are not always profit maximizers; and (3) arguments that organizations are not always rational.

a. *Arguments That Fines Generally Are Ineffective*[71]

The principle argument that fines generally are ineffective is that, although management usually is responsible for organizational crimes, fines affect management only indirectly while directly affecting several classes of "innocents"—shareholders,[72] creditors, employees, suppliers, and customers.[73] The corrective force of fines is dissipated to the extent that they "spill over" on or are "passed on" to groups powerless to avoid future violations.[74] Economists argue that this so-called "spill-over effect" is a myth.[75] According to the economists, spill-over effects will occur only to the extent that the affected group was enjoying a benefit from the organization's illegal activity, a benefit corresponding to an external cost previously imposed on the victims of crimes.[76] Rather than unjustly penalizing the "innocent," therefore, the economists believe that fines restore efficient resource allocation.[77]

A second argument that fines are ineffective, related to the spill-over argument, is that legislators will be reluctant to authorize large

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70. See generally Clinard and Yeager, *Corporate Crime* at 43-73 (cited in note 3); Stone, *Where the Law Ends* 35-57 (cited in note 12).

71. See generally Coffee, 79 Mich. L. Rev. at 388-407 (cited in note 17); Gruner, 16 Am. J. Crim. L. at 4-5 (cited in note 18); Clinard and Yeager, *Corporate Crime* at 124-26.

72. If market conditions do not allow the organization to "pass on" the burden to consumers via higher prices, shareholders will bear the main burden of fines. Moreover, the effective separation of ownership and control in today's large publicly held corporations means that the shareholders generally were not responsible for the offense. See Metzger and Schwenk, 28 Am. Bus. L. J. at 327 & nn.33-34 (cited in note 48).

73. See id. at 327; Coffee, 79 Mich. L. Rev. at 401-02. The feasibility of passing on fines to consumers is a hotly contested question. For the view that pass-ons are rarely if ever possible see Christopher Kennedy, Note, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 Cal L. Rev. 443, 443 (1985); Parker, *Criminal Sentencing*, in *Discussion* at 49-50 (cited in note 10).

74. See Metzger and Schwenk, 28 Am. Bus. L. J. at 327; Coffee, 79 Mich. L. Rev. at 401-02.

75. See Parker, *Criminal Sentencing*, in *Discussion* at 48-49; Metzger and Schwenk, 28 Am. Bus. L. J. at 328-29.

76. See Parker, *Criminal Sentencing*, in *Discussion* at 48-49; Metzger and Schwenk, 28 Am. Bus. L. J. at 328-29.

77. See Parker, *Criminal Sentencing*, in *Discussion* at 48-49; Metzger and Schwenk, 28 Am. Bus. L. J. at 328-29.

fines that may fall disproportionately on innocent groups. Further, so the argument goes, even when large fines are authorized judges and juries will nullify them by failing to impose them.[78]

A third argument is that statutory limits on maximum fines often have prevented the imposition of fines that are sufficient to deter crime.[79] Fourth, given historical fine levels, organizations with ample cash flows and assets have disregarded fines as mere costs of doing business.[80] These organizations consider these fines insignificant in comparison to the more urgent business forces driving managerial decision-making.[81]

A fifth argument is that an inherent limit on the effectiveness of fines is the wealth of the defendant.[82] When the probability of detection is so low that a fine equal to the expected gain from the offense would exceed the total wealth of the organization, a fine cannot deter commission of the offense.[83] Because organizational crimes often affect victims indirectly and because organizational crimes often require an element of intent, which often is difficult to prove in cases of regulatory offenses, the probability of detection, let alone conviction, is quite low for many organizational crimes.[84]

Sixth, under certain circumstances fines may achieve deterrence at the expense of other sentencing goals, most notably just punishment.[85] Seventh, even if fines set at the appropriate level would effectively de-

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78. See Metzger and Schwenk, 28 Am. Bus. L. J. at 330-31; Coffee, 79 Mich. L. Rev. at 405-07 (cited in note 17). Coffee states:

> Empirical studies show that the fines in the typical antitrust case seldom approach the authorized maximum. . . . [B]etween 1967 and 1970 when the maximum fine was a lowly $50,000 per count, the Justice Department recommended the imposition of the maximum fine in less than a third of the cases where it obtained convictions.

Id. at 405-06 (cited in note 17).

79. See Gruner, 16 Am. J. Crim. L. at 5 & n.6 (cited in note 18).

80. See Clinard & Yeager, *Corporate Crime* at 124-26 (cited in note 3). The largest fine resulting from the great electrical equipment price-fixing conspiracy of the 1950s, the $437,500 fine imposed on General Electric, amounted to only 0.1% of General Electric's total profit. Coffee, 79 Mich. L. Rev. at 405. A study of sentences imposed on organizational defendants in federal courts between 1984 and 1987, commissioned by the United States Sentencing Commission, found that of 825 organizations convicted of nonantitrust offenses, 48% were fined less than $5,000, 80% were fined $25,000 or less, and only two percent were fined more than $500,000. Mark A. Cohen, et al., *Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions, 1984-1987*, 10 Whittier L. Rev. 103, 107 (1988).

81. See Stone, *Where the Law Ends* at 39-46 (cited in note 12).

82. See Metzger and Schwenk, 28 Am. Bus. L. J. at 329-30 & n.46; Coffee, 79 Mich. L. Rev. at 389-93; Posner, *Economic Analysis* at 398 (cited in note 9).

83. See Metzger and Schwenk, 28 Am. Bus. L. J. at 329-30 & n.46; Coffee, 79 Mich. L. Rev. at 389-93; Posner, *Economic Analysis* at 398.

84. See Coffee, 79 Mich. L. Rev. at 392.

85. See Note, *Developments in the Law: Corporate Crime*, 92 Harv. L. Rev. 1227, 1251-52 (1979).

ter organizational crime, organizational theorists contend that the impossibility of calculating the relevant variables with mathematical precision renders optimal fines unattainable. This impossibility, they argue, causes decision makers to overestimate the optimal fine, thus causing inefficient overdeterrence.[86] Finally, organizational theorists argue that exclusive reliance on monetary sanctions creates the perception that organizational crime is permissible provided the organization is willing to pay the price.[87]

b. Arguments That Organizations Are Not Always Profit Maximizers

Whereas the neo-classical economist tends to view the organization as a black box, the organizational theorist views organizations as collections of individual agents whose goals and motivations may deviate from those of the organizational entity as a whole.[88] In the modern publicly held corporation, ownership is separated from control,[89] strategic planning is separated from operational control,[90] and most corporate functions are highly specialized, departmentalized, and therefore, separated from one another. As a result, individual actors within the organization can lose sight of the overall profit motive and focus instead on other goals. An organization's agent may violate the law, disregarding the best interests of the organization, when necessary to serve his own immediate interests.[91] Agent interests such as promotions, incentive compensation, or concealing mistakes from management may trump the interests of the organization in the agent's decisionmaking.[92] Further, the possibilities that the agent will have changed jobs by the time the violation is detected or that the violation will not be traceable to the individual agent allow the agent to reap personal gain at the organization's expense.[93]

Empirical evidence suggests that managers are more likely to

86. See John C. Coffee, Jr., Richard Gruner, and Christopher D. Stone, *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 Whittier L. Rev. 77, 79-80 (1988).

87. Id. at 82.

88. See Coffee, 79 Mich. L. Rev. at 393; Gruner, 16 Am. J. Crim. L. at 5 & n.8 (cited in note 18).

89. See Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Harcourt, Brace & World, rev. ed. 1968).

90. Metzger and Schwenk, 28 Am. Bus. L. J. at 348 (cited in note 48).

91. See id. at 339-41; Coffee, 79 Mich. L. Rev. at 393-94.

92. See Metzger and Schwenk, 28 Am. Bus. L. J. at 339-41; Coffee, 79 Mich. L. Rev. at 393-94.

93. See Metzger and Schwenk, 28 Am. Bus. L. J. at 339-41; Coffee, 79 Mich. L. Rev. at 393-94.

"satisfice" than to maximize profits.[94] That is, in the real world, managers lack perfect information and thus will accept the first solution that satisfies certain minimum criteria rather than search for the optimal solution.[95] Managers that satisfice may then pursue other discretionary goals such as innovation, growth, employee financial well-being, and organizational prestige.[96] Satisficing is most feasible for managers in large, well established firms, in less than perfectly competitive industries.[97]

c. Arguments That Organizations Are Not Always Rational

Arguments that organizations are not always rational fall into two general categories: (1) those pertaining to the behavior of individuals within organizations and (2) those pertaining to the organizational structure of organizations. Many organizations have a distinct culture. Occasionally organizations and even entire industries will exhibit cultures that are fertile for violations of the law.[98] Although such cultural predispositions may not always be irrational, two other phenomena in organizations generally are irrational. First, agents making decisions in groups may underestimate the probability of detection or be less risk averse than agents acting individually, a phenomenon known as "risky shift."[99] Second, decisionmaking groups sometimes seek consensus at the expense of critical assessments of available options, a phenomenon known as "groupthink."[100] The facts that many organizational decisions are made by groups, such as committees, and that the probability of detection generally is not empirically measurable and, therefore, is a function of the perpetrator's perceptions, suggest that these phenomena may account for violations of the law that are not in the organization's best interests.[101]

Organizational size and structure also can result in actions that are not rational in terms of the best interests of the overall organization. The highly centralized, hierarchical control structures of many large corporations inevitably suffer from internal communication problems

94. See Coffee, 79 Mich. L. Rev. at 395-96 & n.33; Metzger and Schwenk, 28 Am. Bus. L. J. at 341.

95. Coffee, 79 Mich. L. Rev. at 395-96 & n.33; Metzger and Schwenk, 28 Am. Bus. L. J. at 341.

96. Id.

97. Id.

98. See Id. at 342-44; Clinard and Yeager, *Corporate Crime* at 43-44, 58 (cited in note 3); Stone, *Where the Law Ends* at 67 (cited in note 12).

99. Metzger and Schwenk, 28 Am. Bus. L. J. at 344-45.

100. See generally Irving Janis, *Groupthink*, in Barry M. Staw, ed., *Psychological Foundations of Organizational Behavior* 406 (Scott, Foresman, 1977); Metzger and Schwenk, 28 Am. Bus. L. J. at 345; Coffee, 79 Mich. L. Rev. at 394-95.

101. Id.

and intraorganizational parochialism.[102] Empirical evidence suggests that an individual's primary loyalty within an organization is to his immediate work group, not the organization as a whole.[103]

In addition, the decentralized, multi-divisional structure of many modern public corporations creates perverse incentives for lower level management to break the law.[104] In such organizations, top management performs strategic planning, setting production and profit quotas for the various operational divisions, while lower and middle management retain almost complete control over operations.[105] This situation presents the possibility that top management, isolated from the realities of operations, will make unreasonable demands on lower and middle management that can be met only by breaking the law.[106] Furthermore, top management may prefer to remain ignorant of lower level crime, thus reaping its benefits without incurring personal liability.[107] This phenomenon may help explain why most corporate crimes are committed by lower and middle level management rather than top management.[108]

Because of the foregoing arguments, organizational theorists believe organizational fines alone are not sufficient to prevent organizational crime. One option that organizational theorists favor is imposing criminal sanctions on individual actors involved in organizational crimes.[109] They argue that targeting responsible individuals avoids the danger of spill-over effects on innocent persons and focuses the brunt of the sanction on those organizational actors who most need to be deterred.[110] Although organizational theorists believe that individuals should be sanctioned whenever possible, they maintain that sanctions must focus primarily on the organizational entity for the following reasons. First, some organizational crimes result totally from intraorganizational bureaucratic failures and are not attributable to any particular individuals.[111] Second, tracing an offense to a particular organization often is relatively easy but identifying the responsible individuals in the organization is often extremely difficult.[112] Third, if only individuals

102. Metzger and Schwenk, 28 Am. Bus. L. J. at 345-48.

103. Coffee, 79 Mich. L. Rev. at 396-97.

104. See id. at 397-99; Metzger and Schwenk, 28 Am. Bus. L. J. at 348-50.

105. See Coffee, 79 Mich. L. Rev. at 397; Metzger and Schwenk, 28 Am. Bus. L. J. at 348.

106. See Coffee, 79 Mich. L. Rev. at 398-99; Metzger and Schwenk, 28 Am. Bus. L. J. at 349-50.

107. See Coffee, 79 Mich. L. Rev. at 400.

108. See id. at 397.

109. See Metzger and Schwenk, 28 Am. Bus. L. J. at 332-35.

110. Id. at 332-33.

111. Id. at 333.

112. Id. at 333-34.

were punished, organizations could perversely encourage criminal acts in order to enjoy the benefits of the acts without bearing the liability.[113] Fourth, punishing only individuals would not correct the institutional factors contributing to violations of the law.[114] Finally, punishing both individuals and organizations provides incentives for organizations to police their own agents, thereby supplementing law enforcement efforts.[115] For these reasons, organizational theorists would extend criminal sanctions to individuals as well as organizations.

Organizational theorists also would use organizational probation to require organizations to investigate the precise causes of their crimes and to develop and implement programs to prevent and detect recurrences of those crimes. According to organization theorists, probation presents an economical means of focusing sanctions on the source of organizational crime without incurring the problems associated with large fines.[116] In the midst of these competing views of organizational behavior, the United States Sentencing Commission began its work of promulgating sentencing guidelines for organizational defendants.

III. The Work of the United States Sentencing Commission

The United States Sentencing Commission is an independent commission within the judicial branch of the United States.[117] Congress established the Commission to promulgate sentencing guidelines and policy statements for the federal criminal justice system[118] that would achieve the four goals of sentencing,[119] provide certainty and fairness in achieving those goals, avoid unwarranted sentencing disparities among defendants with similar records and convicted of similar criminal conduct,[120] and reflect advancement in the knowledge of human behavior as it relates to the criminal justice process.[121] Although not expressly charged with promulgating sentencing guidelines for organizational defendants, the Commission bases its authority to do so on the facts that: (1) Congress did not expressly deny it such authority; (2) the Act, the Commission's enabling statute, provides judicial authority and direction for the sentencing of both individuals and organizations; (3) the statutory purposes for sentencing guidelines apply to both organizations and

113. Id. at 334-35.

114. Id. at 335.

115. Id. at 335-36.

116. Coffee, Gruner, and Stone, 10 Whittier L. Rev. at 79-80 (cited in note 86).

117. 28 U.S.C. § 994(a) (1988). The United States Supreme Court upheld the constitutionality of the Sentencing Commission in *Mistretta v. United States*, 488 U.S. 361 (1989).

118. 28 U.S.C. § 994(a)(1)-(2).

119. Id. § 991(b)(1)(A).

120. Id. § 991(b)(1)(B).

121. Id. § 991(b)(1)(C).

to individuals; and (4) Congress granted the Commission broad latitude in determining how to design guidelines that best achieve those purposes.[122]

Because the Act placed a priority on the promulgation of sentencing guidelines for individuals, the Commission's initial guidelines, submitted to Congress in 1987, dealt almost exclusively with individual sentencing.[123] The only guidelines for organizational defendants included in the initial guidelines were those pertaining to antitrust offenses.[124] Thus, with the exception of these antitrust guidelines, no guidelines for organizational offenses existed until the current guidelines for organizational defendants became effective on November 1, 1991.

A. Prior Draft Proposals of Sentencing Guidelines for Organizational Defendants

Before ultimately promulgating the Guidelines, the Sentencing Commission considered a series of discussion drafts and draft proposals. In 1988, the Sentencing Commission circulated two different discussion drafts of organizational sentencing guidelines for public comment. One draft, written by the Commission's staff, embodied the "optimal penalty" variation of the economic approach to organizational sanctions. The other draft, written by three law professors, called for the extensive use of probation.

The draft developed by the Commission's staff sought to achieve the goals of sentencing by imposing sanctions designed to minimize the total costs of organizational crime. This draft, which essentially embodied the "optimal penalty" version of the economics approach,[125] set monetary penalties equal to the total loss reasonably likely to result from the offense discounted by the probability of detection plus reasonable enforcement costs.[126] The draft viewed monetary penalties as adequate[127] and authorized probation only to ensure payment of monetary penalties or performance of notice to victims. However, in extreme cases such as repeated felony violations involving senior management,

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122. Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions, Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, 101st Cong. 2d Sess. at 179-80 (1990) (testimony of Judge William W. Wilkins, Jr., Chairman United States Sentencing Commission) ("*Oversight*").

123. Id. at 181-83.

124. Id. at 182-83. Antitrust offenses account for 25% of all organizational convictions. Id. at 183.

125. See notes 52-69 and accompanying text.

126. United States Sentencing Commission, *Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations*, 10 Whittier L. Rev. 7, 9-13, 49-50 (1988).

127. Id. at 9.

the draft required that the organization develop and implement an effective program to prevent and detect the misconduct.[128]

Under this draft, all restitution, forfeitures, and fines would count toward satisfaction of the total monetary penalty.[129] Furthermore, all criminal, civil, and administrative penalties against the organization and any individuals within the organization arising from the same unlawful conduct would be coordinated so that the total sanctions did not exceed the total loss resulting from the unlawful conduct.[130] Also, this draft would not allow an organization's inability to pay to constitute grounds for reducing the minimum total monetary penalty. Thus, this draft created the possibility that some organizations might have to file for bankruptcy as a result of the sanctions imposed upon them.[131] Finally, this draft would have covered all types of organizational offenses.[132] Ultimately, the Commission rejected this draft, authored by its staff, because it was too complicated and would underpunish when there was no measurable amount of loss.[133]

The other discussion draft circulated by the Commission in 1988 dealt exclusively with proposed guidelines for probation. This draft, authored by three law school professors, viewed probation as a necessary supplement to monetary sanctions.[134] It essentially embodied the organizational theory approach.[135]

These proposed probation guidelines would have required probation for serious offenses—all felonies and those misdemeanors that threatened human health or safety or comprised a pattern of criminal behavior—when the court also found one of the following: (1) that management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or substantially contributed to the criminal behavior or delayed its detection, and that such policies or practices had not been corrected in a manner that made repetition of the same or similar behavior highly unlikely; (2) that the circumstances surrounding the offense, including the possible involvement of senior organizational officials, had not been adequately clarified, and the failure to obtain such clarification was likely to diminish respect for the law, hinder internal accountability, or otherwise be con-

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128. Id. at 13-15, 64-69.
129. Id. at 12-13, 50-55.
130. Id. at 15-16, 61-62.
131. Id. at 55-57.
132. See id. at 20-41.
133. *Oversight* at 184, 208-09 (cited in note 122) (Chairman Judge Wilkins describing the discussion draft as too complex and underpunishing serious crime when there was no measurable amount of loss).
134. Coffee, Gruner, and Stone, 10 Whittier L. Rev. at 78-79 (cited in note 86).
135. See notes 70-116 and accompanying text.

trary to the public interest; or (3) that probation was necessary to impose an order of restitution or community service or to ensure compliance with any other portion of the sentence.[136] If probation was imposed under (1) above, this draft recommended that a condition of probation require the organization, or if necessary a probation officer, to develop and implement a plan to correct the identified policies, practices, or inadequacies and to communicate the terms of the program and the conditions of probation to all relevant personnel.[137] Thus, this draft expanded the use of probation beyond that provided in the Commission staff's discussion draft.

In November of 1989, the Commission published a draft proposal for public comment in the Federal Register.[138] The proposal provided for both monetary sanctions and probation.[139] The provisions of the draft proposal covering restitution, remediation, and community service ultimately were adopted in substantially the same form in the 1991 Guidelines.[140]

This draft proposal provided two methods of determining fines. Under the first option (Option I), the court would determine a base fine equal to the greater of the pecuniary loss caused by the offense, the pecuniary gain to the defendant from the offense, or the amount contained in an offense level fine table.[141] The fine table ranged from a fine of $500 for an offense level of one to a fine of $25 million for an offense level of forty or more.[142] The court then would adjust this base fine upward or downward by specified percentages according to the presence or absence of various aggravating and mitigating factors.[143] Depending on which factors were present, the adjusted base fine could range from twenty percent of the initial base fine to 190 percent of the initial base fine.[144] The final fine range would then be from 200 to 300 percent of

136. Coffee, Gruner, and Stone, 10 Whittier L. Rev. at 82-83 (cited in note 86).

137. Id. at 91-92.

138. 54 Fed. Reg., 47056, 47056 (Nov. 8, 1989).

139. Id.

140. See id. at 47057-58; notes 176-81 and accompanying text.

141. 54 Fed. Reg. at 47058.

142. Id.

143. Id. at 47058-59. The aggravating factors included whether management was involved in the offense, whether there was a record of prior similar misconduct, whether the offense violated a judicial order or order of probation, whether management was involved in obstructing the investigation or prosecution, whether the offense involved official corruption, whether the offense targeted a vulnerable victim, whether the offense threatened a financial or consumer market, and whether the offense threatened national security. The mitigating factors included whether the organization voluntarily disclosed the offense prior to an imminent threat of government investigation, whether high-level management was reasonably ignorant of the offense, whether the offense occurred despite bona fide organizational programs and policies designed to prevent law violations, and whether the organization took substantial steps to prevent a repetition of similar offenses. Id.

144. Id.

the adjusted base fine.[145]

Under the second option (Option II), the court would determine the fine range solely by reference to an offense level fine table.[146] In this table, an offense level of one corresponded to a fine range of $250-$500, and an offense level of thirty-two or more corresponded to a fine range of $200 to $374 million.[147] This option employed the same aggravating and mitigating factors as Option I but in a slightly different manner.[148] Under Option II, the court would increase the offense level by one level for each aggravating factor and decrease the offense level by one level for each mitigating factor.[149]

Several aspects of the 1989 proposal's fine guidelines related to both fine options. The 1989 proposal contained policy statements pertaining to the determination of the fine within the fine range[150] and possible departures from the fine range.[151] It also contained a guideline permitting reductions in fines based on the defendant's inability to pay.[152] Finally, in the case of closely held organizations, it contained a guideline allowing fines assessed against the individual owners to be offset against fines assessed against the organization.[153]

The 1989 proposal required probation in the following situations: (1) when necessary as a mechanism to impose another sentence, (2) when any monetary penalty had not been paid by the time of sentencing, (3) when the organization or its high-level management had been convicted of a similar criminal offense within the previous five years and prior to the offense of conviction, (4) when the offense indicated a significant problem with the organization's policies or procedures for preventing crimes, and (5) when probation would significantly increase the likelihood of future compliance with the law.[154] The 1989 proposal also included a policy statement listing recommended conditions of probation similar to those in the 1991 Guidelines.[155]

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145. Id. at 47058.
146. Id. at 47060.
147. Id.
148. Id. at 47059-60.
149. Id.
150. Id. at 47060-61.
151. Id. at 47061-62.
152. Id. at 47061.
153. Id.
154. Id. at 47062.
155. Id. at 47062-63. The conditions recommended in the 1989 proposal differed from those ultimately included in the 1991 Guidelines in two important respects. First, the 1989 proposal recommended that when probation was imposed to ensure payment of monetary penalties, the court should include a condition prohibiting the defendant from undertaking any of a long list of activities—including paying dividends, issuing securities, merging, consolidating, reorganizing, and refinancing—without the prior approval of the court. Second, when the court imposed a probation

In November of 1990, the Sentencing Commission published a second draft proposal of organizational guidelines along with a competing proposal drafted by the Department of Justice.[156] The primary difference between the 1990 proposal and the 1989 proposal was with respect to fines. Like Option I in the 1989 proposal, the 1990 proposal required the court to determine a base fine equal to the greater of the pecuniary loss, pecuniary gain, or amount listed in an offense level fine table.[157] The 1990 proposal contained three alternative fine tables.[158] The fines in Alternative A ranged from $5,000 for an offense level of four or less to $165 million for an offense level of forty or more.[159] The fines in Alternative B ranged from $3,300 for an offense level of four or less to $60 million for an offense level of forty or more.[160] The fines in Alternative C ranged from $4,150 for an offense level of four or less to $115 million for an offense level of forty or more.[161]

Unlike the 1989 proposal, however, the 1990 proposal specified only mitigating factors.[162] The court would total the points associated with each relevant mitigating factor to determine a mitigation score.[163] The

condition requiring the defendant to develop a program to prevent and detect future law violations, the 1989 proposal recommended that such programs seek to prevent and detect misconduct similar to the offense of conviction. Id. at 47062. The 1991 Guidelines, in contrast, recommend that such programs seek to prevent and detect law violations generally. See notes 220, 223-24 and accompanying text.

156. 55 Fed. Reg. 46600, 46600 (Nov. 5, 1990). Although the Commission had hoped to submit proposed sentencing guidelines for organizational defendants to Congress by May 1, 1990, the announcement by commissioner Judge George MacKinnon on April 10 that he would not vote to submit organizational guidelines to Congress until the three vacancies on the Commission had been filled caused the Commission to delay submitting organizational guidelines until the next amendment cycle. *Oversight* at 185-86 (cited in note 122). The coincidence of Judge MacKinnon's announcement and the abrupt withdrawal by the Department of Justice of its support for the promulgation of organizational guidelines, as opposed to the mere policy statements advocated by various business interests, gave rise to speculation that the Sentencing Commission may be caving in to pro-business pressure from the Bush administration. Id. at 198. The perception that the Commission may be bowing to business interests gained strength from stories that the Commission was considering a new proposal that would result in lower fines and make probation completely discretionary rather than sometimes mandatory. See Fred Strasser, *Lighter Corporate Sentencing?* 12 Nat'l L. J. 3, 38 (Apr. 9, 1990).

157. 55 Fed. Reg. at 46603.

158. Id. at 46603-04.

159. Id. at 46603.

160. Id.

161. Id. at 46603-04.

162. See id. at 46604. Since organizational defendants have better access to information regarding their culpability than does the government, the Commission reasoned that placing the entire burden of disproving culpability upon the organizational defendant would be more efficient. See Strasser, 12 Nat'l L. J. at 38 (cited in note 156).

163. 55 Fed. Reg. at 46604. The mitigation factors and their associated values included: (1) four points when the organization disclosed its crime to law enforcement prior to any imminent threat of a government investigation; (2) three points when both prior to and after the offense the organization maintained an effective program to prevent and detect violations of law; (3) two

court would then apply minimum and maximum multipliers, corresponding to the mitigation score on a multiplier table, to the base fine to determine the fine range.[164] When no mitigation factors applied, thereby making the mitigation score zero, the minimum and maximum multipliers would be two and three, respectively.[165] When all of the mitigation factors applied, thereby making the mitigation score nine, the minimum and maximum multipliers would be 0.15 and 0.25, respectively.[166] The 1990 proposal also specified more factors to consider in determining the fine within the range[167] and more bases for departures from the fine range than did the 1989 proposal.[168]

The 1990 proposal would have required probation only when necessary to impose another sentence, to ensure payment of monetary penalties, or to ensure changes within the organization to reduce the likelihood of future criminal conduct.[169] The 1990 proposal's policy statement regarding recommended probation conditions was substantially the same as the policy statement of the 1989 proposal.[170]

The 1990 Department of Justice proposal, which the Commission published simultaneously with its own proposal, was essentially the Commission's 1989 proposal, using Option II to determine fines.[171] On May 1, 1991, the Sentencing Commission submitted the final version of its organizational guidelines to Congress.[172] These guidelines became effective on November 1, 1991.[173]

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points when despite the due diligence of the organization to detect law violations, those persons within the organization with policy-setting or legal compliance responsibilities or substantial managerial authority neither knew of the offense at the time of its occurrence nor, upon learning of its occurrence, failed to report the offense promptly to law enforcement; (4) two points when the organization cooperated fully with the government's investigation of the offense; and (5) one point when, prior to an adjudication of guilt, the organization accepted responsibility for the offense and took prompt and reasonable steps to remedy the harm caused by the offense. Id.

164. Id.

165. Id.

166. Id. The 1990 proposal also included an alternative multiplier table that differed only in that the highest possible mitigation score would be an eight, at which the minimum and maximum multipliers would be 0.35 and 0.55, respectively. Id. at 46606.

167. Id. at 46606-07.

168. Id. at 46608-09. Most of tbe aggravating factors under the 1989 proposal were bases for upward departures from the fine range under the 1990 proposal. See id.; note 142 and accompanying text.

169. 55 Fed. Reg. at 46609-10.

170. See id. at 46610. One notable difference, however, is that it omitted the recommended condition requiring court approval for dividends, securities issues, etc. See note 154 and accompanying text.

171. See 55 Fed. Reg. at 46611-15; notes 138-55 and accompanying text.

172. 56 Fed. Reg. at 22762-96.

173. See note 2 and accompanying text.

B. *The 1991 Sentencing Guidelines for Organizational Defendants*

According to the introductory comments, the Commission intended that the guidelines, together with criminal sanctions imposed on organizations' agents in their individual capacities, would provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.[174] The principal sanctions contained in the Guidelines are remediation of the harm caused by criminal conduct, fines, and probation.[175]

1. Remedying Harm From the Offense

As a general principle, the Guidelines require that an organization remedy any harm caused by its offense.[176] Moreover, resources expended in remedying harm are not to be considered punishment or deducted from fines otherwise assessed.[177] The Guidelines specify four means of remedying the harm from criminal conduct—restitution, remedial orders, community service, and orders of notice to victims. If the victims of an organization's offense are identifiable, the Guidelines require an order of restitution either as a separate sentence or as a condition of probation.[178] When restitution is unavailable or inadequate to remedy the harm, the Guidelines authorize but do not require the sentencing court to order remediation or community service as conditions of probation.[179] The Guidelines do restrict the use of orders of remediation and community service to reparation of the harm already caused by the offense or to prevention of future harm from the instant offense.[180] When some victims have not been identified, the Guidelines authorize courts to order notice to victims.[181]

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174. U.S.S.G. Ch. 8, intro. comment. at 347 (1991).

175. The guidelines apply only to organizations convicted of felonies or Class A misdemeanors. Id. § 8A1.1 at 349.

176. See id. Ch. 8, intro. comment. at 347. The sentencing court may refrain from ordering remediation only when to do so would unduly complicate or prolong the sentencing process. Id. § 8B1.1(b) at 355.

177. Id. Ch. 8, intro. comment. at 347.

178. Id. § 8B1.1(a) at 355, Ch. 8, Pt.B, intro. comment. at 355. The Guidelines require the court to order restitution if authorized under 18 U.S.C. §§ 3663-64 (1988). U.S.S.G. § 8B1.1(a)(1) at 355. If restitution would be authorized under 18 U.S.C. §§ 3663-64 but for the fact that the offense of conviction is not an offense set forth in title 18, United States Code, or 49 U.S.C. § 1472 (h), (i), (j), or (n), the Guidelines require the court to sentence the organization to probation with a condition requiring restitution. U.S.S.G. § 8B1.1(a)(2) at 355.

179. U.S.S.G. § 8B1.2 at 355-56, § 8B1.3 at 356.

180. Id. §§ 8B1.2 cmt. at 355-56, 8B1.3, comment. at 356.

181. Id. § 8B1.4 at 356-57.

2. Fines

When the court determines that the organizational defendant operated primarily for a criminal purpose or primarily by criminal means, the Guidelines require the imposition of a fine sufficient to divest the organization of all of its net assets.[182] In the case of all other organizational defendants, the Guidelines specify how the sentencing court should determine the appropriate fine for certain enumerated offenses.[183] For offenses not enumerated in the Guidelines, the court must determine the fine by applying the provisions of 18 U.S.C. Sections 3553 and 3572.[184]

For offenses covered by the Guidelines, courts are to determine a fine range based on the seriousness of the offense and the culpability of the organization.[185] Specifically, the Guidelines require that in order to determine the fine range, the court must multiply the base fine by the minimum and maximum multipliers corresponding to the organization's culpability score.[186] The base fine is the greatest of: (1) the amount indicated by the offense level fine table, (2) the pecuniary gain to the organization from the offense, or (3) the pecuniary loss caused by the offense, to the extent the loss was caused intentionally, knowingly, or recklessly.[187] The fines on the offense level fine table range from $5,000 for an offense level of six or less to $72.5 million for offense levels of thirty-eight or more.[188] The culpability score is the initial score of five adjusted upward or downward on the basis of certain specified factors.[189] Circumstances resulting in upward adjustments include involvement in or tolerance of the illegal activity by management, past misconduct similar to the instant offense, violations of judicial orders or conditions of probation resulting from the instant offense, and obstruc-

182. Id. § 8C1.1 at 357.

183. Id. § 8C2.1 at 357-58. In general, the offenses covered by the Guidelines' fine provisions include: most offenses involving property; most offenses involving public officials; some offenses against drugs; some offenses involving criminal enterprises and racketeering; offenses of fraud and deceit; offenses of insider trading; some offenses involving public safety; offenses against odometer laws and regulations; antitrust offenses; offenses involving money laundering and monetary transaction reporting; and offenses involving taxation. The offenses that the Guidelines' fine provisions generally do not cover include: offenses against the person; offenses involving individual rights; offenses involving the administration of justice; offenses involving national defense; offenses involving food, drugs, and agricultural products laws; and offenses involving the environment. Id.

184. Id. § 8C2.10 at 371.

185. Id. Ch. 8, intro. comment. at 347.

186. Id. § 8C2.7 at 368.

187. Id. § 8C2.4(a) at 360-62. When calculation of pecuniary gain or loss would unduly prolong or complicate the sentencing process, the base fine should be determined based solely on the offense level fine table. Id. § 8C2.4(c) at 360.

188. Id. § 8C2.4(d) at 360-61. The offense levels for organizations are the same as those specified for individual defendants in id. Ch. 2 at 29-234. See id. § 8C2.3 at 359.

189. Id. § 8C2.5 at 362-68.

tion of the investigation, prosecution, or sentencing of the instant offense.[190]

The amount of the upward adjustment for management involvement is a function of the level of the management involved, the pervasiveness of involvement at that level, and the size of the organization or organizational subunit involved.[191] Thus, when high-level personnel[192] participated in, condoned, or were willfully ignorant of the offense or when tolerance of the offense by substantial authority personnel[193] was pervasive, and when the organization or subunit involved consisted of at least 5,000, 1,000, or 200 employees, the required upward adjustment would be five, four, or three points, respectively.[194] When substantial authority personnel participated in, condoned, or were willfully ignorant of the offense and when the organization or unit involved consisted of at least fifty or ten employees, the required addition would be two or one points, respectively.[195] The upward adjustment for past similar misconduct is either one or two points depending primarily on whether the prior conduct occurred within ten or five years of the instant offense.[196] The upward adjustments for violations of judicial orders and conditions of probation are two and one points, respectively.[197] The upward adjustment for obstruction is three points.[198]

Circumstances that will result in downward adjustments of the culpability score include the existence of an effective program to prevent and detect violations of law[199] and self-disclosure of, cooperation in the investigation of, and acceptance of responsibility for the offense.[200] The

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190. Id.

191. Id.

192. " 'High-level personnel of the organization' means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest." Id. § 8A1.2, comment. n.3(b) at 351. "With respect to a unit with 200 or more employees, 'high-level personnel of a unit of the organization' means agents within the unit who set the policy for or control that unit." Id. § 8C2.5, comment. n.3 at 351-53.

193. " 'Substantial authority personnel' means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of the organization." Id. § 8A1.2, comment. n.3(c) at 351-53.

194. Id. § 8C2.5 at 362.

195. Id.

196. Id.

197. Id.

198. Id.

199. A prevention and detection program is not effective if personnel responsible for its administration or enforcement or if any high-level personnel participated in, condoned, or were willfully ignorant of the offense or if the organization, upon learning of the offense, unreasonably delayed reporting the offense to the proper authorities. Id.

200. Id.

downward adjustment for an effective plan is three points.[201] If the organization reports the offense to appropriate government authorities prior to the imminent threat of disclosure or government investigation and within a reasonably prompt time after learning of the offense, fully cooperates in the investigation, and clearly demonstrates recognition and affirmative acceptance of responsibility for its criminal conduct, the downward adjustment is five points.[202] If the organization merely cooperates and accepts responsibility, the downward adjustment is two points, and if the organization only accepts responsibility, the downward adjustment is one point.[203]

After adjusting the initial culpability score of five upward and downward according to the presence or absence of the above mentioned factors, the resulting culpability score determines what maximum and minimum multipliers will be applied to the base fine to determine the fine range.[204] At one extreme, a culpability score of ten or higher results in a minimum multiplier of two and a maximum multiplier of four.[205] As a result, the fine range for an offense having a base fine of $100,000 would be $200,000 to $400,000. At the other extreme, a culpability score of zero or less would result in a minimum multiplier of 0.05 and a maximum multiplier of 0.2.[206] Hence, the fine range for the same offense having a base fine of $100,000 would be $5,000 to $20,000. As this example illustrates, the culpability score can result in substantial variations in the fine range. At the middle of the culpability score continuum, a culpability score of five would result in a minimum multiplier of one and a maximum multiplier of two.[207] The rest of the culpability scores between zero and ten result in minimum multipliers evenly distributed between 0.05 and 2.0 and maximum multipliers evenly distributed between 0.2 and 4.0.[208] Since the minimum multipliers always are greater than zero, an organizational defendant cannot escape a fine altogether through downward adjustments of the culpability score.

Once the fine range is determined, the sentencing court must determine the fine amount within the range.[209] The Guidelines include a policy statement setting forth factors that the court should consider in determining the fine within the range.[210]

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201. Id.
202. Id. § 8C2.5(g)(1) at 365.
203. Id. § 8C2.5(g)(2)-(3) at 365.
204. Id. § 8C2.6 at 368.
205. Id.
206. Id.
207. Id.
208. Id.
209. Id. § 8C2.8 at 369.
210. Id. These factors include: (1) the purposes of sentencing; (2) the organization's role in

Once the court has determined the fine within the range, it must determine the final fine by adjusting the fine by any necessary disgorgement.[211] The Guidelines require that any gain to the organization from the offense that will not be paid as restitution or other remedial measure must be added to the fine as disgorgement.[212]

Fines are payable immediately unless the court finds that the organization is not a criminal purpose organization and that immediate payment would unduly burden the organization.[213] In such cases, payment shall be completed as soon as possible and in no event more than five years after assessment.[214]

The Guidelines specify certain circumstances when a fine other than that determined by the process just described should be imposed. If the Guideline fine exceeds the maximum fine authorized by statute, the statutory maximum should be the Guideline fine.[215] If the Guideline fine would impair the organization's ability to make restitution, the court should reduce the Guideline fine enough to avoid such impairment.[216] Similarly, if the organization would be unable to pay the minimum Guideline fine, the court should reduce the Guideline fine enough to avoid jeopardizing the continued viability of the organization.[217] When the organization is a closely held organization and when one or more individuals, each of whom owns at least a five percent interest in the organization, has been fined in a federal criminal proceeding for the same offense for which the organization is being sentenced, the court may offset the organization's fine by no more than the total amount of the individuals' fines multiplied by their total percentage interest in the organization.[218] The Guidelines also authorize upward and downward

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the offense; (3) collateral consequences of conviction, including civil obligations arising from the organization's conduct; (4) any nonpecuniary loss caused or threatened by the offense; (5) whether the offense involved a vulnerable victim; (6) any prior criminal records of high-level personnel who participated in, condoned, or were willfully ignorant of the instant offense; (7) any prior criminal or civil misconduct by the organization not already reflected in the culpability score; (8) any culpability score lower than zero or higher than ten; (9) partial but incomplete satisfaction of one or more of the conditions necessary for upward or downward adjustments of the culpability score; (10) any factor listed in 18 U.S.C. § 3572(a) (1988); and (11) the relative importance of any factor used to determine the fine range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score. U.S.S.G. § 8C2.8 at 369.

211. Id. § 8C2.9 at 371.
212. Id.
213. Id. § 8C3.2 at 372.
214. Id.
215. Id. § 8C3.1 at 372.
216. Id. § 8C3.3 at 373.
217. Id.
218. Id. § 8C3.4 at 373-74.

departures from the Guideline fine when other miscellaneous factors are met.[219]

3. Probation

The Guidelines require that an organization's sentence include a term of probation when: (1) necessary to ensure that the organization will remedy the harm through either restitution, remediation, or community service; (2) necessary to safeguard the organization's ability to pay monetary penalties not paid at the time of sentencing; (3) at the time of sentencing, an organization having fifty or more employees does not have an effective program to prevent and detect law violations; (4) the organization or any individual within high-level personnel that participated in the instant offense, within five years prior to sentencing, engaged in similar misconduct as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication; (5) probation is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; (6) the sentence imposed on the organization does not include a fine; or (7) probation is necessary to accomplish one of the purposes of sentencing.[220]

The Guidelines require that any sentence of probation include the mandatory condition that the organization not commit another federal, state, or local crime during the term of probation.[221] When probation is imposed for a felony, the Guidelines require as a second mandatory condition the imposition of either a fine, restitution, or community ser-

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219. Id. § 8C4 at 374-77. The decision to depart from the Guideline fine depends on the relative importance of the factor in the particular case and the extent to which the factor is not taken into account in the guideline fine. See id. § 8C4, intro. comment. at 374. Factors possibly warranting upward departures include: (1) when the act has heightened the occurrence or risk of death or bodily injury; (2) when the act has threatened national security; (3) when the act bas threatened the environment; (4) when the act has threatened a market; (5) when the act was an actual or attempted corruption of a public official in connection with the instant offense; (6) when an effective prevention and detection program resulting in a decreased culpability score was implemented in response to a court or administrative order; and (7) when the organization's culpability score is greater than ten. Factors possibly warranting downward departures include: (1) when the organization has substantially assisted authorities in the investigation or prosecution of an unrelated defendant; (2) when the organization is a public entity; (3) when the members or beneficiaries of the organization, other than shareholders of a corporation, are the direct victims of the offense; (4) when the remedial costs incurred by the organization greatly exceed the organization's gain; and (5) when no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, the organization at the time of the offense had an effective program to prevent and detect violations of law, and the base fine was determined according to pecuniary loss, the offense level fine table, or a special Chapter Two instruction. Id. § 8C4 at 374-77.

220. Id. § 8D1.1(a) at 379.

221. Id. § 8D1.3(a) at 380.

vice, or when these conditions would be plainly unreasonable, one of the conditions set forth in 18 U.S.C. § 3562(b).[222] The Guidelines authorize the court to impose additional discretionary conditions of probation provided that they are reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant and involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.[223] The discretionary probation conditions recommended by the Guidelines include orders that the organization: (1) publicize its offense in a manner specified by the court; (2) submit regular financial reports to the court or probation officer; (3) submit to and pay for a reasonable number of regular and unannounced examinations of books and records and interrogations of knowledgeable employees by probation officers or experts retained by the court; (4) notify the court or probation officer immediately of certain events affecting the organization's financial condition or prospects; (5) pay periodic payments; (6) develop and submit to the court a program to prevent and detect violations of law and a schedule for its implementation; (7) notify employees and shareholders of its offense and its program to prevent and detect future violations of law; and (8) submit periodic reports to the court or probation officer regarding the organization's progress toward the implementation of its prevention and detection plan and disclosing any criminal, civil, or administrative proceedings or formal government investigations or inquiries initiated against the organization.[224]

According to the Guidelines, the term of probation should be at least one year when the underlying offense is a felony but in no case more than five years.[225] Should an organization violate a condition of probation, the court may either extend the organization's term of probation, impose more restrictive probation conditions, or revoke probation and resentence the organization.[226]

IV. Analysis

The procession of drafts leading up to the Guidelines illustrates the fact that the final product does not adopt completely any of the theories of organizational sanctions explored in Part II but rather contains elements of all of them. The Commission essentially began with the two 1988 discussion drafts, one representing the optimal penalty version of

222. Id. § 8D1.3(b) at 380.
223. Id. § 8D1.3(c) at 380.
224. Id. § 8D1.4 at 381-82.
225. Id. § 8D1.2 at 380.
226. Id. § 8D1.5 at 382.

the economic approach and the other representing the probation oriented organizational theory approach.[227] It then adopted elements of both approaches in devising the Guidelines. This Part of the Recent Development examines the wisdom of the Commission's choices and compromises in view of the policy reasons for promulgating sentencing guidelines, the statutory goals of sentencing, and the economic and organizational theories of organizational sanctions.

A. *Why Sentencing Guidelines for Organizations?*

Congress never explicitly instructed the Commission to promulgate sentencing guidelines for organizations.[228] Indeed, the need for organizational guidelines is not readily apparent. Organizations are sentenced in federal courts so infrequently, only about 350 per year,[229] that organizational guidelines hardly seem worthwhile. Nevertheless, disparate sentences for defendants convicted of substantially the same conduct, a principle reason behind the demand for individual sentencing guidelines, also is a problem in the area of organizational sentencing.[230]

Several aspects of the Guidelines seriously compromise their ability to eliminate disparity. First, the fact that the Guidelines' fine provisions apply only to certain types of offenses[231] virtually guarantees that, at least with respect to fines, a disparity will persist for a significant portion of organizational crimes. Second, the Guidelines' fine and probation provisions both allow sentencing courts a great deal of discretion in determining fines within ranges, departing from fine ranges, and assigning conditions of probation.[232]

A more compelling reason for promulgating organizational guidelines, however, is the perception that past sentencing practices have not achieved the purposes of sentencing. Whether because of a lack of judicial familiarity with the complexities of organizational sentencing or a lack of judicial resolve to impose meaningful sentences, past organizational sentencing practices have proven inadequate.[233] But do the Guidelines correct these past failures?

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227. See notes 126-37 and accompanying text.

228. See note 122 and accompanying text.

229. 54 Fed. Reg. at 47056.

230. Cohen, et al., 10 Whittier L. Rev. at 111 (cited in note 80).

231. See notes 183-84 and accompanying text.

232. See notes 210, 219, 223-24 and accompanying text.

233. Recidivism is common among organizational defendants. Clinard and Yeager found that 42% of the 477 largest manufacturing corporations had multiple violations during the 1975-76 period. Clinard and Yeager, *Corporate Crime* at 116-19 (cited in note 3).

B. *Assessment of Guidelines Pertaining to Monetary Sanctions*

The goals of sentencing addressed by the Guidelines are primarily restitution or remediation, just punishment, deterrence, and rehabilitation.[234] Another goal of sentencing, protection of the public, is really the same as deterrence and rehabilitation in the organizational context. The Guidelines' monetary sanctions achieve each of these goals in varying degrees.

Before examining the implications of the Guidelines' monetary sanctions for just punishment, deterrence, and rehabilitation, however, an examination of the levels of monetary sanctions that the Guidelines will actually produce is necessary. The primary types of monetary sanctions under the Guidelines are restitution, remedial orders[235] and fines. The Guidelines ensure that in most cases an organization will be sentenced to pay restitution to victims or otherwise remedy the harm caused by its offense.[236] Moreover, when an organization's ability to pay monetary sanctions is in doubt, restitution is the first priority.[237] Since restitution and remediation seek to compensate the victims of an offense,[238] the Guidelines generally will require that a convicted organization pay an amount in restitution and remediation that approximates the loss from the offense.

The second type of monetary sanction is the fine. Because most organizational crimes are economic crimes or crimes against property,[239] a sentencing court usually will be able to calculate the gross gain and loss resulting from an offense. The loss generally will exceed the gain and therefore will provide the base fine.[240] Although knowing how often the fine table will provide the base fine is difficult, it most likely will do so only when calculation of gain or loss would unduly complicate or prolong sentencing.[241] While the fines in the fine table are not the most severe ones that the Commission considered, they nonetheless are significant.[242]

Regardless of how the base fines are determined, the impact of the aggravating and mitigating culpability factors often will be significant. Except when high-level management participated in, condoned, or was

234. See notes 174-75 and accompanying text.

235. Remedial orders are essentially monetary sanctions since they merely require that an organization spend money.

236. See notes 176-81 and accompanying text.

237. See note 216 and accompanying text.

238. See notes 176-81 and accompanying text.

239. See Parker, *Criminal Sentencing*, in *Discussion* at 6 (cited in note 10); Cohen, et al., 10 Whittier L. Rev. at 115 (cited in note 80).

240. United States Sentencing Commission, 10 Whittier L. Rev. at 10 (cited in note 126).

241. See Strasser, 12 Nat'l L. J. at 38 (cited in note 156); note 187 and accompanying text.

242. See notes 126, 141-53, 157, 168, 182-219 and accompanying text.

willfully ignorant of the offense, or when tolerance of the offense by substantial authority personnel was pervasive, organizations frequently will be able to substantially decrease their fines. In such cases, even if the organization had no program to prevent and detect law violations, it could reduce its culpability score to zero by disclosing the offense, cooperating in the subsequent investigation, and accepting responsibility for the offense.[243] Of course, the probability that an organization will discover an offense before the authorities begin an investigation is much lower for organizations without prevention and detection plans. With at least a minimally sufficient prevention and detection plan, an organization can take advantage of both the three point deduction in its culpability score for having a plan prior to the offense and also can increase its chances of qualifying for the five point self-disclosure deduction.[244] In any event, an organization can qualify for a two point deduction by cooperating in the investigation and accepting responsibility for the offense.[245] Thus, when the offense does not involve management and when the organization has a minimally sufficient prevention or detection plan, the organization often will qualify for the lowest fine range.

On the other hand, when the offense does involve management, the culpability score and resulting fine range likely will be high. In such cases, the existence of a prevention and detection plan will be irrelevant because it will be deemed ineffective as a mitigating factor.[246] Also, it would not increase the likelihood that management, who already know they are breaking the law, will turn themselves in. Moreover, management involvement is an aggravating factor that will increase the culpability score.[247] In addition, management involvement increases the likelihood that other aggravating factors such as past similar misconduct and obstruction of justice will be relevant. Thus, in general, when management is involved in the offense, the Guidelines' fine range will be relatively high; and when management is not involved, and particularly when the organization has a prevention and detection plan, the Guidelines' fine range will be relatively low.

Regardless of what fine ranges the Guidelines prescribe, however, two provisions of the Guidelines may help produce actual fines that are significantly below these ranges. These provisions concern fine reductions due to statutory maximums and defendants' inability to pay. When a Guideline fine exceeds the maximum fine authorized by statute, the Guideline fine is reduced to the level of the statutory maxi-

243. See note 202 and accompanying text.
244. See notes 118-203 and accompanying text.
245. See note 203 and accompanying text.
246. See note 118 and accompanying text.
247. See notes 190-95 and accompanying text.

mum.[248] Obviously, statutory maximums are a problem beyond the power of the Sentencing Commission to remedy; nevertheless, they may significantly affect the operation of the present Guidelines. The statutory maximums for organizational fines are governed by 18 U.S.C. § 3571(c). Pursuant to Section 3571(c), the maximum organizational fine most likely will be the greater of twice the gross gain or loss from the offense, or the amount specified in the law setting forth the offense.[249] When the maximum fine is set at twice the gross gain or loss from the offense, the Guideline fine range will partially or completely exceed the statutory maximum as long as the base fine is the greater of the gross gain or loss and the minimum and/or maximum multipliers exceed two. The minimum and/or maximum multipliers will exceed two whenever the culpability score exceeds the initial score of five.[250] In such a situation, therefore, the statutory maximum would diminish the operation of the aggravating culpability factors.

The second provision that will help produce lower actual fines concerns fine reductions for defendants' inability to pay. The Guidelines provide that when a fine would threaten the continued viability of an organization, the court must reduce the fine to the maximum level that the organization can withstand.[251] In view of this provision, organizations conceivably could reduce their expected fine from an offense by reducing their ability to pay a fine. To the extent that such strategic behavior occurs, the actual fines assessed under the Guidelines could be significantly lower than what the Guidelines otherwise would prescribe.

Under the Guidelines, amounts paid in restitution and remediation never are deducted from the fines assessed.[252] Thus, the total monetary sanction will equal the amount paid in restitution and remediation, an amount that approximates the loss from the offense, plus the fine. This amount generally will vary from relatively low levels—depending on ability to pay, involvement of management in the offense, and the existence of a prevention or detection plan—to an amount equal to the greater of twice the gross gain or loss from an offense or an amount specified in the statute setting forth the offense. Although not actually paid by the organization, monetary sanctions assessed against an organization's individual agents and arising out of the same offense also may be viewed as comprising part of the organization's total monetary sanction. Monetary sanctions assessed against such individuals will have some effect on the achievement of the goals of sentencing. Indeed, the

248. See note 215 and accompanying text.
249. See note 32 and accompanying text.
250. See notes 205-08 and accompanying text.
251. See note 217 and accompanying text.
252. See note 177 and accompanying text.

Guidelines themselves state that they seek to ensure organizational sentences that, in combination with individual sentences, will achieve the goals of sentencing.[253]

Having gained some insights into what the total monetary sanctions under the Guidelines generally will be, assessing the consequences of these monetary sanctions for the sentencing goals of restitution, just punishment, deterrence, and rehabilitation is possible. In general, the Guidelines will accomplish the goals of restitution and remediation.[254] Both economists and organizational theorists would agree that restitution and remediation are appropriate organizational sanctions.[255] Moreover, restitution and remediation also advance the objectives of just punishment, deterrence, and rehabilitation.

The Guidelines' progress toward the other three goals is less clear. Just punishment means that punishment should be proportional to the severity and moral blameworthiness of the crime.[256] In the organizational context, monetary sanctions that achieve both just punishment and deterrence are illusive because of the perceived incompatibility of the two goals. In other words, monetary sanctions that are large enough to deter often seem disproportional to the severity of the offense and the culpability of the offender.[257]

Ostensibly, the Guidelines achieve just punishment. Sentences of restitution and remediation are inherently just.[258] The Guidelines' fine methodology, adjusting a base fine designed to reflect the severity of the offense according to factors designed to correspond to the culpability of the organization,[259] also seems to achieve just punishment. Nevertheless, several aspects of the Guidelines suggest that its total monetary sanctions will not always constitute just punishment. The first problem concerns the Guidelines' culpability factors. Management involvement, past instances of similar misconduct, violations of judicial orders, obstruction of justice, the existence of a bona fide plan to prevent and detect violations of law, self-disclosure of offenses, cooperation with authorities, and acceptance of responsibility are all legitimate indicators of culpability.[260] The one troubling aspect of these factors is that the upward adjustment of the culpability score for management involvement varies from one to five points depending on the size of the organi-

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253. See note 174 and accompanying text.
254. See notes 176-81 and accompanying text.
255. See notes 46-116 and accompanying text.
256. See Parker, *Criminal Sentencing*, in *Discussion* at 42-45 (cited in note 10).
257. See note 85 and accompanying text.
258. See Parker, *Criminal Sentencing*, in *Discussion* at 42-45.
259. See notes 182-212 and accompanying text.
260. See note 190 and accompanying text.

zation.[261] The Sentencing Commission's justification for the use of size as a factor is that the breach of trust associated with management involvement is greater in larger organizations.[262] An organizational theorist most likely would approve of the use of organization size as a factor since organization theory argues that organization size can contribute to organizational crimes.[263] An economist, on the other hand, likely would object to the consideration of organizational size.[264]

The second aspect of the Guidelines that seemingly is contrary to the idea of just punishment is the general lack of coordination of monetary sanctions. The Guidelines do not allow monies paid in restitution and remediation to be deducted from fines.[265] Thus, after assessing a fine that ostensibly reflects the severity of the offense and the culpability of the offender, the Guidelines require additional payments of restitution and remediation. By definition, this lack of coordination of fines and restitution seems to constitute unjust punishment. The economic approach would allow amounts paid in restitution and remediation to be deducted from fines except when the additional monetary sanction was necessary to compensate for statutory limits on fines.[266] An organizational theorist, believing that monetary sanctions tend to spill over onto innocent groups, also would favor such coordination.[267] This reasoning also applies to the coordination of criminal monetary sanctions imposed on organizations with civil and administrative monetary sanctions arising from the same conduct. The Guidelines consider such collateral monetary sanctions only in determining the fine within the range.[268] To better ensure just punishment, such collateral monetary sanctions should be considered in setting the fine range initially. Finally, this reasoning suggests that monetary sanctions imposed on organizations and their individual agents should be coordinated. Although the Guidelines' introductory commentary expresses the view that organizational and individual sanctions taken together should achieve the goals of sentencing,[269] the Guidelines conspicuously never again mention sanctions imposed on individuals.

The next issue worthy of consideration is whether the total monetary sanctions under the Guidelines will deter organizational crime. In

261. See notes 194-95 and accompanying text.

262. U.S.S.G. § 8C2.5 comment. at 367 (backg'd).

263. See Clinard & Yeager, *Corporate Crime* at 126 (cited in note 3); notes 102-08 and accompanying text.

264. See notes 46-69 and accompanying text.

265. See note 177 and accompanying text.

266. See notes 46-69 and accompanying text.

267. See notes 72-77 and accompanying text.

268. See notes 209-10 and accompanying text.

269. See note 174 and accompanying text.

the organizational context, deterrence means deterring management from deliberately violating the law and ensuring that management will invest in effective internal controls to prevent violations of law. As discussed in Part II, organizational theorists hold that monetary sanctions alone can never successfully deter organizational crime.[270] An economist, however, who favors virtually exclusive reliance on monetary sanctions, would likely find that the Guidelines are able to deter in most but not all cases.

Under the economic approach, the total monetary sanction must exceed the gain or loss from the offense divided by the probability of detection.[271] If gain is used, the fine must be increased by the cost of implementing a prevention or detection plan, to achieve optimal deterrence.[272] As discussed above, when management is not involved in an offense and when the organization had an effective program to prevent and detect crime, the total monetary sanction under the Guidelines likely will be relatively small. From a deterrence standpoint, small fines in these situations are permissible since these crimes are not likely to be deterred under any circumstances. The only danger is that small fines in these situations might cause management to enforce its prevention or detection plan less vigorously than it should. When management is involved, the economic approach identifies two reasons why the Guidelines' total monetary sanction will not serve as a perfect deterrent. The first reason is that when the base fine is based on gain, the Guidelines fail to increase the fine by the cost of implementing an effective prevention and detection plan. The second reason is that the Guidelines do not explicitly take into account the probability that an organizational offender will be detected and convicted in calculating the monetary penalty. Although the probability of detection and conviction may be implicit in the Guidelines' culpability factors,[273] these rough proxies sometimes will fail. For example, when the statutory maximum fine is twice the loss from the offense, the highest possible total monetary sanction under the Guidelines would be three times the loss (restitution approximately equal to the loss plus a fine of twice the loss). Under the optimal penalty version of the economic approach, this monetary sanction would fail to deter if the probability of detection was less than one-third. Moreover, the limited applicability of the Guidelines' fine provisions, the availability of fine reductions for inability to pay, and the operation of the statutory maximums will diminish the deterrent effect of the Guidelines' monetary sanctions.

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270. See notes 70-116 and accompanying text.
271. See notes 51-56 and accompanying text.
272. See note 60 and accompanying text.
273. See notes 190-203 and accompanying text.

Finally, the Guidelines' monetary sanctions generally will not rehabilitate an offending organization. When dealing with purely monetary sanctions, rehabilitation is essentially the same as future deterrence. Under either an organizational theory or economic approach, an offense that was not deterred by a monetary sanction in the past will not be deterred by that same monetary sanction in the future.

C. Assessment of Guidelines Pertaining to Probation

Probation relates primarily to the sentencing goals of rehabilitation and just punishment. It relates to restitution or remediation only in the sense that it provides a mechanism for imposing and enforcing such sentences. It relates to deterrence only indirectly.

In general, organization theorists will approve of the Guidelines' probation provisions and will only regret that they are not more far reaching. Organization theorists believe that probation can effectively rehabilitate an organizational offender by requiring that the organization study the cause of its offense and implement a program to prevent and detect future violations of law.[274] Moreover, they believe that monetary sanctions alone cannot achieve this result.[275] In addition, organization theorists believe that probation achieves just punishment better than monetary sanctions because it focuses the penalty on the truly culpable, whereas fines can spill over onto innocent groups.

Economists, however, argue that monetary sanctions set at the right level will cause organizations to implement preventive programs, thereby eliminating the need for rehabilitation.[276] Likewise, since economists exclusively rely on monetary penalties to achieve just punishment, they would argue that probation is unnecessary to meet this goal. Except when used to impose or enforce a monetary sanction, economists hold probation unduly intrusive and inefficient.[277]

Two particular aspects of the Guidelines' probation provisions might concern an economist. First, the ability of a court to enforce its probation conditions is an inherent limit on the effectiveness of probation. To the extent that a court enforces its probation condition with monetary penalties, probation is no more effective than monetary sanctions.

Assuming that a court will be able to enforce its probation conditions by contempt or some other means, the Guidelines' probation pro-

274. See notes 134-37 and accompanying text.
275. See notes 70-116 and accompanying text.
276. See notes 46-66 and accompanying text.
277. See id.

visions present a second difficulty. The Guidelines require probation whenever, at the time of sentencing, an organization having fifty or more employees does not have an effective program to prevent and detect law violations.[278] Furthermore, the Guidelines' recommended conditions of probation would require organizations to implement programs to prevent and detect violations of law in general, not just violations similar to the offense of conviction.[279] Arguably, the operation of organizational probation should be more restrained. Indeed, the statutory requirements that conditions of probation (1) be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant and (2) involve only such deprivations of liberty or property as are reasonably necessary to achieve the purposes of sentencing may require such restraint.[280] Because a single offense does not necessarily indicate that a program to prevent and detect violations of law is really necessary, probation conditions requiring such programs should be reserved for repeat offenders. Furthermore, because a single type of offense does not necessarily indicate a need for a program aimed at preventing and detecting all types of offenses, probation conditions only should require programs aimed at preventing and detecting misconduct similar to the offense of conviction. Thus, whereas an organizational theorist would embrace and seek to expand the Guidelines' probation provisions, an economist would prefer strictly to limit their operation.

V. Proposed Amendments

In light of the preceding analysis, the Sentencing Commission should consider six amendments to the Guidelines. First, the Guidelines' fine provisions should be extended to cover all organizational offenses. Second, the Guidelines' provision allowing reduced fines for inability to pay should be eliminated. Third, the Guidelines should explicitly coordinate all monetary penalties except when necessary to compensate for the restrictions of statutory maximums on fines. Fourth, the aggravating culpability factor relating to management involvement in an offense should not vary with the size of the organization. Fifth, the Guidelines should explicitly consider the probability of detection and conviction in determining the total monetary sanction. Sixth, probation conditions requiring organizations to implement prevention and detection programs should be limited to repeat offenders and should extend only to misconduct similar to the offense of conviction.

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278. See note 220 and accompanying text.
279. See notes 223-24 and accompanying text.
280. 18 U.S.C. § 3563(b) (1988).

VI. Conclusion

Criminal sanctions are an important means of controlling organizations. The Guidelines represent a significant step toward the more effective use of criminal sanctions against organizations. Nevertheless, organizational behavior and the effect of organizational sanctions are complex phenomena. While monetary sanctions alone may not be a perfect organizational control mechanism, intrusive probation conditions supervised by overburdened federal judges have significant shortcomings as well. In view of the limits of criminal sanctions, effective control of organizations may require more direct government regulation or fundamental changes in the powers and privileges granted to organizations by the state. For now, however, the new Sentencing Guidelines for Organizations are a significant step toward improved societal control of organizational behavior.

Emmett H. Miller III