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UNITED STATES SENTENCING COMMISSION

DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS

JULY 1988

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U.S. Department of Justice
National Institute of Justice

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July 1988

LETTER FROM THE COMMISSION

This volume contains discussion materials that are being distributed by the Commission to encourage public analysis and comment on the development of sentencing standards for organizations convicted of federal crimes. In addition to inviting analysis of the discussion materials, as well as the subjects and issues outlined in the statement attached to this letter, the Commission encourages interested persons to comment on any other matter relating to organizational sanctions.

The Commission's consideration of sentencing guidelines and policy statements for organizations is at an early stage. The Commission has not discussed in detail or agreed upon any particular approach, including those suggested by some of the accompanying materials. The Commission believes that these materials will provide a vehicle for stimulating the broadest possible range of public input.

The Commission plans to hold public hearings on organizational sanctions in New York City on October 11, 1988, and in Los Angeles on November 15, 1988. We encourage interested persons both to provide written comments in advance of the hearings and to participate in the hearings.

From its inception, the Commission's work has benefitted greatly from extensive public comment. We appreciate those past contributions and look forward to a continuation of that tradition as the Commission moves ahead with its deliberations on the important subject of organizational sanctions.

William W. Wilkins, Jr.
Chairman

General Statement of Subjects and Issues for Public Comment Regarding Organizational Sanctions

The Commission invites public comment on all subjects and issues raised in the context of organizational sanctions, or presented by the discussion materials in this volume. Although some of the following materials embody particular approaches, the Commission has not approved or adopted those approaches and is publishing the materials as a vehicle for public comment. The Commission encourages the broadest range of public comment on the subjects and issues involved, including comments suggesting additional or alternative approaches that the Commission should consider. For example, the discussion draft in Part I proposes an approach to organizational sentencing that focuses on the losses caused by offenses as opposed to alternative measures such as the gain derived by the offender. The Commission has not adopted a loss-based approach, and encourages public comment on the appropriate uses of gain in establishing sentencing standards for organizations, including: (a) comments suggesting alternative approaches that would use gain (i) as the primary or exclusive basis for penalties, (ii) as a proxy for losses where losses are difficult to measure, (iii) as the preferred measure where loss is less than gain, (iv) for certain classes of offenses, or (v) for some other purposes; and (b) under all of the suggested alternatives, comments specifying or discussing the formulation of rules for measuring gain in the circumstances where the use of gain is suggested. In addition, the Commission specifically invites public comment on the following subjects and issues:

1. The discussion draft in Part I is in the form of a separate chapter governing the sentencing of organizations. The Commission invites comment on whether a different format would be appropriate, such as the inclusion of guidelines for organizations within one or more portions of the existing guidelines.

2. The discussion draft in Part I excludes coverage of antitrust offenses by organizations, for which guideline fines are established by §2R1.1 of the existing guidelines. The Commission invites comment on: (a) whether the existing guideline for antitrust offenses by organizations should be integrated into the proposed new Chapter 8; and (b) if so, whether substantive changes to the existing antitrust guideline would be desirable.

3. The discussion draft in Part I uses a combination of detailed guidelines and more general policy statements. The Commission invites comment on whether particular provisions should be dealt with by guidelines or policy statements and on whether the entire subject of sentencing organizations should be covered by policy statements rather than guidelines.

4. The discussion draft in Part I includes detailed and sometimes highly technical commentary addressing considerations underlying the formulation of particular rules for measuring loss. The Commission invites comment on whether this type of approach to commentary is preferable to more general commentary.

5. The discussion draft in Part I provides for a determination of an offense multiple based on the difficulty of detecting and prosecuting the offense, under a proposed guideline structure that: (a) specifies predetermined adjustment amounts for characteristics materially increasing or decreasing the detectability of the offense, acceptance of responsibility, and voluntary reporting of the offense; and (b) considers only criminal penalties in determining the guideline offense multiple, leaving the coordination of collateral civil penalties to policy statements. The Commission invites comment on this proposed structure and suggested alternatives, and specifically: (a) whether a structure involving a "multiple" should be used at

all, and if so, what factors should be taken into consideration in setting the multiple; (b) if a multiple is used, whether the court should have more latitude than proposed by the draft in determining either or both of the size of the adjustment and the absolute level of the multiple; (c) if a multiple is used, whether the guidelines should specify a "total" multiple that could be more directly related to the probability of detection and conviction, with collateral civil penalties subtracted within the guideline structure for determining the offense multiple; and (d) if a multiple is used, whether civil penalties should be disregarded in determining the criminal penalties.

6. The Commission invites comment on the general issues of whether and how to coordinate (a) criminal and civil sanctions, and (b) individual and organizational sanctions. With respect to the coordination of individual and organizational sanctions, the Commission specifically invites comment on whether guidelines should provide differing coordination rules for distinct categories of organizational offenders, such as publicly-held versus closely-held corporations.

7. The discussion draft in Part I emphasizes the application of sanctions to business firms operated for profit. The Commission invites comment on: (a) whether the standards contained in the draft also are appropriate for sentencing organizations that are not operated for profit; (b) the terms or substance of any differing sentencing standards, or modifications that would be appropriate for organizations that are not operated for profit; and (c) whether further distinctions in sentencing standards should be made among types of organizations.

8. The discussion draft in Part I emphasizes monetary sanctions as the primary form of sentence for organizations, but also proposes the imposition of organizational probation (i) to enforce monetary sanctions, and (ii) to supplement monetary sanctions in limited circumstances. The draft proposal on organizational probation in Part II suggests a different approach. The Commission invites comment on: (a) the merits of these or other approaches; and (b) the general subject of the use of probation in sentencing organizations, particularly with respect to (i) the types of organizational offenses and offenders that should be subject to probation, (ii) the types of probation conditions that should be used, and (iii) the purposes for which probation should be used.

9. The discussion draft in Part I uses minimum loss amounts greater than $500 for the following types of offenses: government fraud offenses involving product substitution or affecting a contract award; environmental offenses; and food, drug, and agricultural offenses. In those instances, the minimum losses are based upon either the levels of loss observed or the fines imposed under past sentencing practice during the 1984-1987 period. For other offenses, the minimum loss amount is set at $500 for administrative convenience. The Commission invites comment on: (a) to what extent, if any, minimum loss amounts should be incorporated; and (b) what bases and methods should be used to set the minimum loss amounts.

10. The discussion draft in Part I provides for base offense "multiples" of 2.0 and 2.5, depending upon the type of offense and whether identifiable private victims were affected by the offense, and permits possible multiples ranging from 1.0 to 3.5, depending upon applicable adjustments, within the guideline structure. These multiples appear consistent with estimates of the average ratio of total monetary sanctions to loss as revealed in data available to the Commission regarding past sentencing practice during the 1984-1987 period. The Commission invites comment on: (a) whether multiple levels should be based on past sentencing practice, and (b) if not, what analytical or statistical methods should be used to establish the multiple levels.

11. The Commission invites comment on the general issue whether organizational sanction levels should be based on past sentencing practice.

12. The Commission contemplates that the sentencing guidelines for organizations, like those for individuals, will be refined over time on the basis of further research and experience. The Commission invites comment on how the process of refinement should be structured.

Written comments would be most helpful if received by October 1, 1988. Please send comments to:

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Organizational Sanctions Comment

For further information contact Paul K. Martin, Communications Director for the Commission, at (202) 662-8800.

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United States Sentencing Commission

Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations:

Proposed Chapter Eight for the Guidelines Manual

July 1988

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CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

PART A - GENERAL PRINCIPLES

1. THE BASIC APPROACH TO SENTENCING ORGANIZATIONS

In general, the Comprehensive Crime Control Act of 1984 sets the same broad objectives for sentencing organizations as for sentencing individuals. However, there are differences between individuals and organizations--in terms of available sentencing options, the standards of criminal liability, and the importance of collateral remedies outside the criminal justice system--that call for a distinct approach to sentencing organizations.

First, organizations can not be imprisoned. Sentencing standards for organizations must be structured around the five available sentencing options for organizations: three types of monetary sanctions--restitution, fines, and forfeitures; and two types of non-monetary sanctions--notice to victims and probation. With few exceptions, organizational defendants in the federal courts are business corporations, which are motivated primarily by monetary profit and loss. Monetary sanctions have the most direct impact on a business firm's fundamental interest. Even where non-monetary sanctions are imposed, their ultimate impact will be largely monetary in any event, because financial results are the measure of a business organization's value and effectiveness.

Second, organizations can act only through agents. Under federal law, organizations generally are held to a strict standard of vicarious criminal liability for offenses committed by their agents. Therefore, principles for organizational sentencing should provide an appropriate incentive for the organization to control its agents. At the same time, the individual agent remains criminally responsible for his or her own offense. Most federal prosecutions of organizations involve individual co-defendants who are agents and, in many cases, owners of the organizational offender. Consequently, sentencing principles for organizations should encourage effective coordination between organizational and individual sentencing.

Third, for many if not most offenses committed by organizations, criminal prosecution is only one aspect of federal law enforcement. Generally, criminal offenses committed by organizations also are subject to punitive and compensatory remedies through administrative or civil enforcement proceedings brought by federal agencies, and to compensatory and punitive damages in private litigation. These civil sanctions can complement or partially substitute for criminal sentences. Compensatory damages, civil penalties, and civil forfeitures can substitute for criminal restitution, fines, and forfeitures; and civil injunctions or administrative orders can substitute for criminal probation or notice to victims. Enforcement agencies in fact do coordinate among the parallel enforcement systems, in order to achieve an appropriate overall sanction in the most effective manner. Criminal sentencing standards for organizations should recognize and promote that goal.

Given the distinctive features of organizational criminal liability and the available sanctions, the approach followed in this draft emphasizes restitution, forfeitures, and monetary fines as appropriate and adequate sanctions in the majority of cases, combined with probation and notice to victims where necessary to achieve an adequate total sentence, and coordinated with civil and administrative remedies. The draft guidelines and policy statements seek to rationalize the determination of the monetary sanctions by reference to sentencing factors concerning the loss caused by the offense, the detectability of the offense, and the enforcement costs incurred in the investigation, prosecution, and punishment of the offender.

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By basing the punishment on a combination of loss and enforcement considerations, this approach seeks to provide organizations with measured incentives for assuring their compliance with federal law, in a manner that is both proportionate to the harmful potential of offenses and conducive to the objective of crime control.

2. PRINCIPLES FOR DETERMINING AN ORGANIZATION'S SENTENCE

The draft sentencing guidelines and policy statements embody three basic principles: (a) a total monetary sanction is determined by multiplying the loss caused by the offense times a "multiple" representing the difficulty of detecting and punishing the offender, and adding enforcement costs; (b) non-monetary sanctions are added as necessary to reinforce the monetary sanctions; and (c) criminal and civil sanctions are coordinated.

a. Monetary Sanctions

The draft sentencing guidelines and policy statements for organizations rely primarily on the monetary sanctions for both the compensatory purpose of restitution to victims and the punitive purposes of deterrence, just punishment, and crime control. The total monetary sanction--for both compensatory and punitive purposes--is determined from three major factors based on the organization's offense conduct: (1) the "offense loss," based on the total harm (and risk of harm in some instances) caused by the offense; multiplied by (2) the "offense multiple," based on the difficulty of detecting and punishing the offender; plus (3) enforcement costs. The resulting "total monetary sanction" is then distributed among the sentencing options of restitution, forfeitures, and fines.

(1) Offense Loss

The "offense loss" includes both the losses to immediate victims and the more general societal losses from organizational offenses, translated to the monetary terms necessary to compute a monetary sanction. For most organizational offenses, the major part of the translation is direct, because the offenses primarily cause economic or monetary losses.

The focus on "offense loss," rather than some other measure such as offender's gain, rests on the rationale that organizational punishment is most appropriately based on the losses created by criminal conduct--to both immediate victims and society as a whole--that the criminal law seeks to prevent. An offender's gain may be a very poor measure of those harmful effects. Some offenses may produce a very small gain and a much larger loss, and nearly all offenses produce less gain than loss. Therefore, a penalty system based primarily on gain often will fail to provide the appropriate incentives for compliance, particularly for organizations that must expend resources to control their agents, and ultimately may produce penalties that are disproportionate to the harmful potential of offenses. The offense loss measures society's interest in controlling the criminal conduct, which is prohibited not because it might confer a gain on the offender, but rather because of its harmful effects on others.

Similarly, the draft guidelines reject the use of an organization's size or financial performance as a principal measure of penalties. The size of an organization may affect the scope of criminal activity and thereby the amount of offense loss, and size or financial resources may affect an organization's ability to pay a loss-based penalty. However, large organizational size alone does not necessarily render an offense more harmful in terms of loss or detectability, and is neither prohibited nor disfavored by the law in general. As with gain, penalties based primarily on size would distort the central focus of the criminal law on harmful effects.

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The offense loss guidelines provide rules for the court's evaluation of both "base" loss in all instances of the offense and specific characteristics that may affect loss in some cases. These rules do not require absolute precision, and are satisfied by reasonable estimates based on the information available to the court at the time of sentencing. Losses that actually occurred, were intended and reasonably probable, or were imminently threatened by inchoate offenses, are all included in the loss determination. Generally, other risks of harm are considered by the guidelines only when their expected value is significant, considering the probability of the injurious event and the magnitude of the potential harm. In addition, minimum guideline loss amounts are set at relatively higher levels for offenses presenting an inherent risk of harm.

The offense loss guidelines are structured to reflect the interests protected by different types of criminal prohibitions.

For offenses involving deceptive or involuntary transfers of property or other economic values, such as fraud and theft, the size of the transfer is the principal component of loss. Specific loss characteristics distinguish cases in which the unlawful transaction is costly for victims to replace with a legitimate transaction.

Offenses involving governmental functions involve one or both of two different interests: proprietary interests of the government or private beneficiaries of government programs; and interference with governmental functions as such. Where only the proprietary interests are involved, as in many cases of program fraud, these offenses are treated much like private property crimes. In some instances--such as procurement fraud by product substitution--both interests may be invaded by the same offense. Accordingly, the base loss for that offense includes both the value of the property transfer and the cost of correcting or avoiding disruption to government operations, with a relatively higher minimum loss amount; and specific provisions recognize the interests in protecting the safety of personnel and the effectiveness of critical national defense or security operations. Finally, crimes such as regulatory reporting offenses primarily involve the government's interest in carrying out the regulatory program affected, and the loss rule is framed accordingly.

Loss guidelines for environmental and food and drug offenses involve statutes designed to prevent harms or risks of harm to health and safety that often are diffuse and difficult to identify to specific victims. For this type of offense, the guidelines specify higher minimum loss amounts designed to recognize the risks inherent in this type of criminal conduct, and use loss rules based on the reasonable costs of eliminating the risks created by the offense plus property or economic damage. Where the personal safety of identifiable victims is threatened, there is provision for a further increase to reflect the expected loss resulting from such risks.

(2) Offense Multiple

The second major factor, the "offense multiple," is determined by the difficulty of detecting and prosecuting the offense, including the offenders' conduct in concealing the offense or impeding enforcement. The multiple is designed to insure that the total monetary sanction is set at a punitive level that will serve the sentencing purposes of deterrence and just punishment. For both purposes, offenders should not be encouraged to gamble on the possibility that they might escape punishment at the expense of their victims, and society at large. Offenders should face an expected sanction that reflects the difficulty of enforcement.

The offense multiple guidelines specify different base multiples for two types of offenses, with the higher multiple provided for offenses typically creating diffuse effects that private

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victims are less likely to perceive and report to enforcement authorities. The base multiple is subject to an increase or decrease for specific offense characteristics materially affecting detectability, and to decreases for acceptance of responsibility or voluntary reporting of the offense. As with the rules for loss, these rules do not contemplate scientific precision, but may be based on a reasonable judgment by the court of the relative difficulty of detecting and prosecuting the offense, as evaluated under the guideline structure.

(3) Enforcement Costs

The third major factor in determining monetary sanctions is an estimate of the reasonable expenses of investigating and prosecuting of the offense, and carrying out the monetary sanctions. Enforcement costs represent an additional societal loss caused by the offense, for which the offender should be held accountable.

(4) The Total Monetary Sanction

The offense loss multiplied by the offense multiple, plus enforcement costs, equals the total monetary sanction for an organizational offense. That total sanction is then distributed among the sentencing options of restitution, forfeitures, and fines.

First, an order of restitution to victims is required in all cases where restitution is feasible and does not duplicate an available civil or administrative remedy providing compensation to victims. The primacy of compensation to victims in all cases carries out the statutory direction that federal courts consider "the need to provide restitution to any victims of the offense" as a factor in sentencing all federal offenders. 18 U.S.C. §3553(a)(7).

Second, forfeitures are to be imposed as required by law. Criminal forfeitures are authorized by statute only for a limited number of offenses, primarily offenses involving racketeering, continuing criminal drug enterprises, sexual exploitation of minors, and money laundering. Where available, forfeitures can be an effective means of imposing monetary sanctions. However, because forfeitures are not uniformly available for offenses by organizations, their application is coordinated within the framework of a total monetary sanction determined by the offense conduct factors.

Third, the remainder of the total monetary sanction, after deducting victims' compensation and criminal forfeitures, is the midpoint of the guideline fine range. Within that range, the court may select a fine based on all pertinent sentencing factors. The court's discretion is supplemented by policy statements regarding general rules for departures, the need to consider the passage of time between the crime and its punishment, and several aspects of coordinating the criminal fine with collateral penalties, including sanctions imposed upon the organization through civil or administrative procedures, penalties imposed against the agents of the organization who were responsible for the organization's offense, and penalties imposed against other joint offenders. The intent of the policy statements on collateral penalties is to promote the objective of an appropriate total penalty where multiple sanctions for the same conduct are available.

b. Non-Monetary Sanctions: Notice to Victims and Probation

For most organizational offenses, the combination of restitution, forfeitures, and fines will provide an adequate total sanction. However, in some cases the monetary sanctions should be supplemented by one or both of the two non-monetary sentencing options available for organizations under federal law: (1) notice to victims, which can facilitate compensation; and

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(2) organizational probation, which can be used to carry out or reinforce the compensatory and deterrent effects of other sanctions.

In order to be used effectively, and with the minimum adverse effect on legitimate economic activity, the non-monetary sanctions should be focused on well-defined objectives. As a general rule, the non-monetary sanctions should be applied only in situations where the monetary sanctions are insufficient to achieve their intended compensatory or deterrent effects.

In the case of notice to victims, Congress has provided a narrow statutory focus. The authorizing statutes limit the sentence to "an offense involving fraud or other intentionally deceptive practices," 18 U.S.C. § 3555; require that the court "consider the cost involved in giving the notice as it relates to the loss caused by the offense," id.; limit the total cost of notice imposed on a defendant to $20,000, id.; and require special presentence procedures, 18 U.S.C. § 3553(d). The legislative history emphasizes the compensatory purpose of notice to victims, stating that the sentence was not intended for such purposes as "corrective advertising" or "to subject a defendant to public derision," S. Rep. No. 98-225, at 85.

Within the statutory constraints, the draft guidelines require notice to victims where the notice appears capable of facilitating compensation to victims that have not been identified or compensated by other means. In essence, notice to victims augments the monetary sanction of restitution.

The second non-monetary option of organizational probation also requires a careful consideration of potential benefits and costs. In the organizational context, probation is a more costly and intrusive alternative to monetary sanctions. As with notice to victims, the authorizing statutes and legislative history direct organizational probation toward limited objectives, primarily (1) supporting monetary sanctions, and (2) preventing repetition of criminal activities. See generally S. Rep. No. 98-225, at 68-69, 95-99.

The draft guidelines implement these considerations by focusing organizational probation on three basic applications: (1) to enforce restitution, notice to victims, forfeitures, and installment fines; (2) to support the deterrent effect of fines, by requiring financial supervision of an organization that is unable to pay the full amount of an appropriate fine; and (3) to address situations in which the organization or its management has a history of serious crimes, and supervision is likely to be useful in preventing future offenses, either by facilitating detection and prosecution or through compliance measures instituted by the organization. All three applications derive from the principle of using the non-monetary sentence of probation to reinforce the intended effects of the monetary sanctions. The first two applications are limited by relatively objective factors, but the third application is more subjective and must be approached with caution. This type of "preventive" probation is reserved for offenses involving serious social harm, relevant criminal history, and the involvement of the organization's senior management. It should not be invoked simply because an offense is difficult for the organization itself to detect or control. The application of such a sentence requires a determination by the court that the preventive benefits of the sentence outweigh the obvious costs of judicial oversight of private business operations.

c. **Coordination of Collateral Sanctions**

The third basic principle of organizational sentencing is that the several criminal sanctions and civil remedies typically available for the same organizational offense should be coordinated to produce the appropriate total sanction in the most effective manner. There are two aspects to this task: first, adjusting the organization's sentence to reflect the punishments

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imposed on the individual agents responsible for the organization's offense; and second, coordinating the organization's criminal sentence with the sanctions imposed by parallel enforcement activities.

Organizational and individual sentencing cannot be considered to be totally independent, because organizations act through individual agents, and in many instances are controlled by one or a few individuals. Where organizational defendants are insubstantial "shell" companies used as a vehicle by individual offenders, punishment of the responsible individuals may be the only effective sanction available. On the other hand, where the organization is substantial, an appropriate total monetary sanction will provide the organization with the most desirable incentives to control its individual agents. The draft guidelines and policy statements reflect these objectives by including managerial behavior in the factors that may increase or decrease the offense multiple, and providing a policy statement of considerations affecting the coordination of sentencing as between the organization and its agents.

The second aspect of coordination--as among collateral criminal, civil, and administrative sanctions for the same conduct--is oriented toward the objectives of: (1) ensuring that the total sanction for an offense is determined by its harmful potential, and not by the mere accumulation of parallel remedies for the same conduct; and (2) encouraging the use of the most effective and least costly remedies available. Accordingly, as recommended by the legislative history to the Comprehensive Crime Control Act, the draft includes "considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available," S. Rep. No. 98-225, at 166, as well as provisions coordinating multiple criminal sanctions for the same offense. Where compensation to victims has been provided by available administrative or civil remedies, the criminal sentence of restitution is unnecessary. The total monetary sanction coordinates restitution, criminal forfeitures, and fines, so that, for example, the availability of forfeitures usually will not affect the total sanction, but may be a more effective means of imposing a portion of the sanction. In addition, the draft includes policy statements of considerations relevant to the coordination of criminal fines with collateral civil penalties or disabilities imposed on the organizational defendant for the same conduct, and for sanctions imposed on jointly offending organizations or individuals. Organizational probation is added to the total sentence only where other available sentences and remedies are insufficient for compensatory or deterrent purposes, or where there appears to be good cause for either monitoring the organization's activities or requiring specific compliance measures.

The intended effect of the coordination provisions is to direct the overall enforcement effort toward the most appropriate and efficient mix of sanctions. In the organizational context, without the imprisonment option, civil or administrative remedies of sufficient magnitude can substitute for criminal sanctions, and generally are less costly and difficult for enforcement authorities to obtain. Punitive civil penalties equivalent to fines are available in many cases, and administrative or civil injunctive relief under the oversight of a regulatory or enforcement agency often will obviate any need to consider probation.

3. THE SCOPE AND STRUCTURE OF CHAPTER EIGHT

This chapter prescribes guidelines governing the sentencing of a defendant that is an "organization," which is defined in 18 U.S.C. § 18 to mean any legal person other than an individual. The guidelines in this chapter apply to all federal offenses by organizations, except for antitrust offenses, as to which the existing guideline in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) controls over the provisions of this chapter.

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Parts B-D of this chapter are to be applied in sequence to determine an organization's sentence. The organizational defendant's offense conduct is evaluated under Part B in terms of the three factors of loss, the multiple, and enforcement costs that determine the total monetary sanction, which is applied to the monetary sentencing options under Part C. Restitution is provided where feasible, and the remainder imposed in forfeitures and fines. The court then applies the guidelines in Part D governing non-monetary sentencing options, which depend partially on the monetary sanctions imposed and partially on other factors, such as the organization's criminal history.

With certain obvious modifications for the organizational context--such as the fact that organizations are not subject to imprisonment or supervised release--and with due regard for the principles of organizational sentencing stated in this Chapter, the basic principles stated in Chapter One also are applicable to organizational sentencing, as are the provisions in Chapter Five, Part K (Departures), Chapter Six (Sentencing Procedures and Plea Agreements), and Chapter Seven (Violations of Probation and Supervised Release).

PART B - OFFENSE CONDUCT

Introductory Commentary

This Part contains guidelines for evaluating the organization's offense conduct in terms of three basic factors: (1) the offense loss, (2) the offense multiple, and (3) enforcement costs. The evaluations of those factors determine the organization's total monetary sanction under the rules stated in Part C (Monetary Sanctions).

1. GENERAL RULES FOR EVALUATING OFFENSE CONDUCT

§8B1.1. General Application Instructions

(a) Determine the offense loss as follows:

(1) Select the applicable guideline section in Subpart 2 (Offense Loss) under the rules stated in subsection (a) of §1B1.2 (Applicable Guidelines). Refer to the "organizations" column in the statutory index (Appendix A) to assist in this determination.

(2) Determine the offense loss under the applicable guideline section, based on the factors stated in subsection (a) of §1B1.3 (Relevant Conduct), with the following additions:

(A) subsection (a)(2) of §1B1.3 (Relevant Conduct) shall be deemed applicable to all offenses by organizations;

(B) except as otherwise expressly provided in the applicable guideline section, consider both losses that actually occurred and losses that were (a) intended and probable consequences of the offense, or (b) reasonably certain to occur, but for the fact that the offense was not completed because of circumstances beyond the defendant's control; and

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(C) if there are multiple counts of conviction, consider the conduct under all counts together.

(3) Estimate loss to the nearest $1,000.

(b) Determine the offense multiple from Subpart 3 (Offense Multiple), based on the factors stated in subsection (a)(2) above.

(c) Determine enforcement costs from Subpart 4 (Enforcement Costs), based on the factors stated in subsection (a)(2) above.

(d) Refer to Part C (Monetary Sanctions) to determine the monetary sanctions and consider whether departures are warranted.

Commentary

Subsection (a) sets forth the basic rules for determining the loss attributable to an organization's offense. Subsection (a)(1) incorporates the rules stated in §1B1.2 (Applicable Guidelines) for selecting loss guidelines. Subsection (a)(2) adapts the standards of §1B1.3 (Relevant Conduct) to the sentencing of organizations, and includes rules for handling inchoate offenses and multiple counts of conviction. The rules stated are based on the same principles now used in the existing guidelines.

Subsection (a)(2)(A) adopts the rule that offense loss for all organizational offenses is to be determined on the basis of "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," which is stated in subsection (a)(2) of §1B1.3 (Relevant Conduct) for offenses that would be grouped under subsection (d) of §3D1.2 (Groups of Closely-Related Counts). Like the offenses that are grouped under §3D1.2(d), all organizational offenses are evaluated on the same basis of aggregate loss, and therefore it is appropriate to consider the entire course of conduct. See the Background Commentary to §1B1.3 (Relevant Conduct).

Subsection (a)(2)(B) applies the Commission's policy regarding inchoate offenses and harms (see Chapter Two, Part X, Subpart 1 (Conspiracies, Attempts, Solicitations)) to organizational offenses generally, and thereby eliminates the necessity of separate guidelines for the inchoate offenses and references to inchoate harms in specific offense guidelines. The general rule is subject to an exception where a specific guideline expressly directs the court to consider only actual loss.

Subsection (a)(3)(C) applies the count-grouping standards of §3D1.2(d) to all organizational offenses. Because all organizational offenses are evaluated in the same terms of dollar loss, there is no need to distinguish among types of offenses for grouping purposes, and all counts can be aggregated for loss determination. Although all loss therefore is aggregated, different guideline sections may be applied to different aspects of the loss, so long as the same element of loss is not counted twice.

The basic standard for relevant conduct holds each offender responsible both for its own conduct and for "acts and omissions . . . aided and abetted by the defendant or for which the defendant would be otherwise accountable" (subsection (a)(1) of §1B1.3 (Relevant Conduct)). As applied to employees or other agents of the organization, this rule is appropriate in all organizational cases. However, in some cases involving joint offenders other than employees or

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agents--such as independent organizations or individuals--the broad rule may overstate the organization's actual contribution to offense loss and overall role in the offense, particularly when the organization is not the major actor in the offense. In such a situation, the court should consider a downward adjustment of the organization's fine based upon the amount of the offense loss that is attributable to the other participants in the offense (see §8C5.7 (Consideration of Penalties Against Joint Offenders)). Appropriate bases for determining the amount of such an adjustment are supplied by analogy to: (1) the existing guideline for antitrust offenses, which attributes only such loss as was caused by each particular defendant as a means of accounting for relative roles in the offense (see Application Note 1 to §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors)); (2) the permissible apportionment of loss in determining a restitution award (see §8C2.3 (Restitution by Joint Offenders)); or (3) the prevailing practice in civil law of apportioning liability among joint tortfeasors on the basis of their relative contribution to the injury. Aside from antitrust offenses, however, prosecutions against multiple independent offenders for organizational offenses are relatively infrequent in the federal courts. In the ordinary case of an offense by a single organization and its agents, such an allocation need only be considered in coordinating the organization's sentence with the penalties imposed upon its agents (see §8C5.6 (Consideration of Penalties Against Organizational Agents)).

Subsection (a)(3) states the general rule that offense losses computed under the guidelines will be rounded to the nearest $1,000. Even when expressed to the nearest $1,000, losses nonetheless will be reasonable estimates by the court, which do not require scientific precision or expert testimony. Although the guidelines for monetary sanctions of necessity involve dollar amounts, it is not intended that organizational sentencing procedures be equivalent to a civil damages trial. Like all other criminal sentencing factors, offense loss may be based on any reliable information. See generally 18 U.S.C. § 3661; Fed. R. Crim. P. 32. Furthermore, loss estimates necessarily will vary in precision with the circumstances of the particular case. For example, the loss caused by a single instance of fraud against one identified victim usually can be determined more precisely than a widespread fraud practiced over a long period of time against many victims, some of whom may not be specifically identifiable. The convicted defendant should not benefit from the uncertainties of estimation caused by its own offense, and reasonable estimates are a sufficient basis for guideline sentences.

Subsections (b) and (c) adopt the same relevant conduct factors stated in subsection (a)(2) for determining the offense multiple and enforcement costs.

Subsection (d) refers to Part C (Monetary Sanctions) for determining the monetary sanctions and considering whether departures are warranted. The consideration of departures from the offense conduct guidelines should be deferred until after the guideline fine range has been determined. See Part C, Subpart 5 (Departures and Adjustments to Fines).

2. OFFENSE LOSS

§8B2.1. Private Fraud

(a) Base Loss: the difference between the value paid and the value received by victims, but in no event less than $500.

(b) Specific Loss Characteristic

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(1) If expenses were incurred in making substitute transactions, or in handling or disposing of items delivered, increase the loss by the amount of such expenses.

Commentary

Guideline Coverage: "Private Fraud" includes offenses involving fraud or deceit, in which the victims are private parties. Government Fraud is covered by a separate guideline. Private Fraud includes frauds against consumers, businesses, or investors, fraudulent solicitation of donative transactions, odometer violations, and certain offenses involving commercial bribery, kickbacks, commercial infringements, and counterfeit goods.

Statutory Provisions: 7 U.S.C. § 620(c); 15 U.S.C. §§ 77q, 77x, 78dd-1, 78dd-2, 754(b), 1984, 1986, 1988(b), 1990; 18 U.S.C. §§ 152, 542, 545, 658, 842(j), 1001, 1004-1006, 1010-1030, 1341-1344, 1954, 2314, 2315; 19 U.S.C. § 1304; 21 U.S.C. §§ 331, 461, 610, 611, 676; 29 U.S.C. § 186(a), 501; 30 U.S.C. § 820(h); 49 U.S.C. §§ 121, 11915; 49 U.S.C. App. § 121.

Application Notes:

1. The base loss determination includes an estimate of losses to all victims of the offense. It is not necessary that all victims be identified individually, but only that the loss be reasonably estimated. For example, in a case of large-scale odometer tampering, it may not be possible to identify the ultimate buyers of all vehicles. In that instance, a reasonable estimate of the average per-vehicle loss, times the estimated number of vehicles affected, is sufficient if more detailed information is not readily available.

2. "Value paid" ordinarily is the amount of cash paid or other consideration provided by victims, or if the transaction was not completed, the amount intended to be provided by victims. "Value received" refers to the worth of the products, services, or investments to the victims as actually received, or if the transaction was not completed, as intended by the offender. The basic measure of "value received" is the amount that victims would have paid, if the fraudulent representations had not been made. Ordinarily, that value can be determined by reference to the market price for the item actually received, in the absence of fraud. In many cases, "value received" will be zero, as in schemes where victims receive essentially nothing in exchange for their money.

3. Some offenses may involve both "intermediate" victims (such as a commercial distributor who was sold a defective or unsuitable product) as well as "ultimate" victims (consumers who purchased the product from that distributor). In such situations, the loss generally should be determined at the level of the ultimate victim only. In that manner, the full loss will be considered, without double-counting the losses incurred by the intermediate and ultimate victims, which overlap to some extent. In unusual circumstances where the ultimate victim's loss does not reflect business interruption losses to the intermediary, an upward departure may be warranted on the basis of consequential loss. See Application Note 8, below.

4. In the case of defrauded sellers, "value paid" is the worth (in the absence of the fraud) of the property sold by victims, and the "value received" is the cash or other consideration received by victims in the fraudulent transaction.

5. The particular type of transaction involved should be considered in applying the base loss rule. For example, in a case of fraud affecting publicly-traded securities, the difference

between value paid and value received can be determined by reference to the change in market price attributable to public revelation of the fraud, controlling for other factors such as general movement in the market or independent developments affecting the particular security. Alternatively, the base loss in a securities or other investment fraud case could be derived by comparing the actual with the fraudulently misrepresented return on investment. Under either alternative, the court should select a valuation date at a reasonable time after revelation of the fraud that would afford victims the opportunity to mitigate their loss by either disposing of the investment (for defrauded buyers) or reinvesting (for defrauded sellers). Changes in value after that time are not fairly attributable to the fraud.

6. Subsection (b)(1) provides for increases to loss where either or both of two types of expenses have been incurred: costs of making substitute transactions; and costs of handling or disposing of items delivered. The first type of cost occurs where, after the fraud has been revealed, legitimate substitute transactions have been or are virtually certain to be made. The amount of such costs would depend on the time and out-of-pocket expenses incurred by victims in seeking out and making the substitute transaction, and are likely to vary with the price and sophistication of the particular product or service involved. For example, consumers typically will incur higher transaction costs in purchasing an automobile as opposed to a portable radio. In general, the more fungible the product, the less significant the transaction costs in proportion to purchase price, because substitute transactions will be easier to make. Substitute transaction costs do not include the substitute purchase price, because that element of loss is reflected in the base loss rule. The second type of cost recognized by subsection (b)(1) typically will be present where the fraudulent transaction involves a tangible item that must be returned, discarded, or otherwise dealt with by victims. For example, in a case of commercial fraud involving the delivery of unsuitable goods, the victim may incur such "incidental" expenses in storing the goods, shipping them back to the seller, or simply disposing of them.

7. Where substitute transactions are not practical, in the sense that a legitimate replacement for the fraudulent transaction cannot be obtained, the court may wish to consider whether an upward departure is warranted, on the basis of victims' lost "expectancy" in the transaction. Such situations will be rare in fraud cases: they almost never occur in investment or commercial transactions, and usually are presented only in a case where a consumer fraud involved a unique item such as a specific parcel of land or highly specialized goods or services for which the marketplace provides no close substitute. In these instances, there may be a social loss of consumer welfare that is not included in the base loss rule, and also not captured in the specific loss characteristic for substitute transaction costs. Where an upward departure is warranted on this basis, the additional loss may be estimated by the victim's wasted transaction costs incurred in the original, fraudulent transaction, rather than a substitute transaction. However, caution must be exercised so as not to ratify unreasonable subjective expectations of victims. The mere absence of a substitute does not warrant a departure, particularly where the fraud objectively was obvious or immaterial in the circumstances, as in a case involving a wholly non-existent product, service, or charitable cause. Examples of candidates for the departure would include cases where a unique opportunity was lost because of the passage of time, such as fraud involving vacation travel services, where victims had could not substitute because the vacation period had elapsed, or fraudulent medical services that were found out too late for a legitimate cure to be applied. A departure on this basis is not warranted when substitute transactions are feasible, in the sense that comparable goods or services are available on the market, whether or not priced comparably to the amount paid by victims in the fraudulent transaction. In all situations, the substitute transaction costs are the preferred measure, so as to provide victims with appropriate incentives to mitigate loss and protect themselves against fraud in the first instance.

8. This guideline does not include a specific loss characteristic for consequential lost profits, personal injury, or property damage, primarily because such losses do not regularly occur in private fraud cases. Where significant consequential loss occurs that was both objectively foreseeable by the offender and objectively unavoidable by the victim, an upward departure may be warranted. In considering such a departure, the court should be sensitive to the danger of double-counting the losses already reflected in the "value received" component of the base loss rule. The departure usually will be warranted only in cases of business interruption losses caused by commercial fraud, which should be evaluated consistently with the general commercial law standard for recognizing consequential damages for lost profits in commercial transactions, i.e., "loss resulting from the general or particular requirements and needs which the [offending] seller . . . had reason to know and which could not be prevented by cover or otherwise," U.C.C. § 2-715(2)(a). The term "cover" refers to a substitute transaction. Outside of the commercial context, proximate consequential losses rarely occur in fraud cases. Generally speaking, investments by definition are fungible transactions, because their purpose is to earn a monetary return at a given level of risk. Therefore, the failure to achieve the return expected will almost never be proximately connected with consequential losses. The guideline also does not reflect consequential property loss or damage, or personal injury or death, resulting from consumer fraud. In the unusual cases where such results occur, and are proximately caused by the fraudulent conduct, an upward departure may be warranted, if in fact another loss guideline is not more appropriate. Ordinarily, offenses involving health or safety risks are covered by another loss guideline, such as §8B2.6 (Food, Drug, and Agricultural Offenses).

9. This guideline does not reflect another type of broader economic loss that may occur in extraordinary cases of widespread or unusual frauds that are so significant in relation to the market or economic activity involved as to induce market participants other than immediate victims to expend materially greater resources to protect themselves from the type of fraud involved. This effect may be reflected in a widespread loss of confidence in the market or economic activity affected, and can influence legitimate sellers (who must spend more to convince buyers that their products or services are not fraudulent) as well as buyers (who must spend more to verify the legitimacy of the sellers with whom they deal). In the extraordinary case presenting a significant effect of this type, an upward departure may be warranted.

10. This guideline also may be applicable to certain commercial infringement offenses (generally covered by §8B2.4 (Theft, Commercial Infringement, Embezzlement, Receipt of Stolen Property, and Property Destruction)), in which buyers actually were deceived by an infringing or counterfeit product. In some cases, both guidelines would apply to different aspects of offense loss, as where the legitimate supplier of the item in question lost profits in addition to the losses incurred by deceived victims. (See §8B2.4(c) and its Commentary, Application Notes 5 & 6).

Background: The base offense loss is determined by the dollar value of the fraudulent transfer, as measured by the "out-of-pocket" loss to victims. This entire transfer payment is both a private and societal loss, because it represents the amount of resources unproductively diverted over time to criminal activity and private protection against fraud.

The specific loss characteristic in subsection (b)(1) is intended to reflect the additional loss to the economy that may result when fraudulent transactions interfere with the process of welfare-enhancing exchange. The preferred measure of that loss is the additional transaction costs incurred in replacing the fraudulent transaction with a legitimate substitute transaction, plus any expenses of handling or disposing of fraudulently delivered items. Where victims can substitute, the fraud does not have the undesirable effect of permanently diverting transactions

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away from legitimate suppliers. Additional transaction costs alone are sufficient, because victims will regain any lost surplus in the marketplace.

Where substitute transactions are unavailable, a possible proxy for lost surplus is the transaction costs wasted in the fraudulent transaction, which is less preferable because it is difficult to separate "wasted" costs from normal and desirable expenditures in seeking out legitimate transactions. But in highly unusual cases of very specialized or unique goods or services, consideration of victims' original transaction costs may be an appropriate basis for departure. Nonetheless, unreasonable expectations should not be recognized in offense loss, because they do not represent a true loss in economic welfare.

The further characteristics of increased defensive costs to other market participants, and consequential property damage, personal injury, or death, are not reflected in the guideline because they do occur with any frequency. While some particularly notorious, unprecedented, or widespread frauds may have a systemic effect on market participants, it is very rare for a single fraud case to have an appreciable effect of this type. Consequential personal injury and property losses are excluded both because they are unusual, and because, even where they occur, they are unlikely to be proximately caused by the fraudulent behavior. However, in some instances of commercial fraud, lost profits caused by business interruption may warrant an upward departure.

The use of commercial bribery, kickbacks, or other corrupt methods to facilitate private fraud does not by itself require different rules of offense loss because these methods simply produce a sharing of gains between joint offenders (the principal offender and the corrupt employee). As a practical matter, corruption of the victim's employee may facilitate larger frauds, but that difference will be reflected in the guideline's loss rules. In addition, the presence of such factors is likely to justify higher offense multiple, by making the offense more difficult to detect. See Subpart 3 (Offense Multiple).

§8B2.2. Government Fraud

(a) Base Loss:

(1) For product substitution offenses: (A) the difference in value to the government between the product specified and the product delivered, plus (B) the government's costs of making substitute transactions and handling or disposing of the product delivered, plus (C) the government's cost of rectifying the actual or potential disruption to government operations caused by the product substitution; but in no event less than $10,000.

(2) For fraud affecting a contract award: (A) the administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus (B) the government's increased cost to procure the product or service involved; but in no event less than $5,000.

(3) For overcharging offenses: the amount of the overcharge, but in no event less than $500.

(4) For offenses involving diversion of government program payments: the value of the monetary benefits or burdens diverted from intended recipients or uses, but in no event less than $500.

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(b) Specific Departure Considerations (Policy Statement)

(1) If a product substitution offense resulted in a foreseeable and substantial risk of serious damage to the national defense or security interests of the United States, an upward departure of up to $4,000,000 is warranted. The amount of such a departure shall be determined by the magnitude of the potential damage, as discounted by probability that such damage actually would occur. See §8C5.1 (Departures in General).

(2) If a product substitution offense resulted in a foreseeable and substantial risk of serious bodily injury or death, an upward departure is warranted. The amount of such a departure shall be determined by the expected loss produced by the risk. See §8C5.2 (Departures for Expected Loss from Risks of Death or Bodily Injury).

Commentary

Guideline Coverage: "Government Fraud" includes offenses involving fraud or deceit in connection with government program or procurement activities, in which the governmental victim is an agency of the United States Government, or a State or local government. This category includes product substitution, overcharges, "fast pay" fraud, false claims, and other similarly deceptive practices, unlawful diversion of government program benefits or burdens, and related offenses involving bribery or corruption of government employees.

Statutory Provisions: 7 U.S.C. § 2024; 15 U.S.C. § 714m; 18 U.S.C. §§ 201, 203, 209, 285-291, 495, 658, 1001-1008, 1010-1014, 1016-1022, 1025-1030, 1341-1343, 2314, 2315; 20 U.S.C. § 1097(a); 38 U.S.C. § 3502(b); 41 U.S.C. § 51; 42 U.S.C. §§ 408, 1307(a), 1320, 1760g; 49 U.S.C. § 121, 1472(b); 50 U.S.C. App. § 2073.

Application Notes:

1. The base loss rules distinguish four different types of government fraud offenses. "Product substitution" offenses are those involving a supplier's provision of a product, service, or system that does not comply with government specifications. "Fraud affecting a contract award" refers to offenses involving the corruption or subversion of a government procurement action, or other noncompliance with provisions regarding the government contract award process. "Overcharging offenses" are those involving the fraudulent inducement of payments to which a supplier is not lawfully entitled, except for antitrust offenses, which are covered by a separate guideline in §2R1.1 (Bid-Rigging, Price-Fixing, or Market-Allocation Agreements Among Competitors). "Diversion of government program payments" refers to offenses, other than overcharges, involving diversion of government program benefits or burdens from intended recipients or uses. Although the federal government ordinarily is the victim (either directly or through an intermediate contractor), the guideline also may be applied to government fraud offenses involving state or local governments. Offenses affecting foreign governments, or quasi-public institutions other than federally controlled entities acting in a governmental capacity, are to be evaluated under the private fraud guideline or the theft guideline, as applicable.

2. The base loss rule for product substitution offenses has three components: (1) the lost value to the government, which is analogous to the base loss rules for the private fraud and theft offenses; plus (2) costs of substitute transactions and incidental handling of the

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product delivered, which is analogous to the specific offense characteristic for private fraud; plus (3) the cost to the government of rectifying the actual or potential disruption caused by the product substitution. Because product substitution offenses often involve specialized products or applications for which there is no equivalent in private markets, it is appropriate in such cases to consider the government's particularized needs in evaluating lost value. However, for offenses involving commodities or services for which there is a substantial private market, the difference between the government contract price for the specified product and the private market price for the substituted product will be an appropriate measure of this component. The second and third components of base loss recognize that product substitution offenses often involve significant costs in correcting or averting consequential disruption of governmental functions, which at times may far exceed the value of the product involved. For example, a defense contractor's product substitution may involve a relatively inexpensive part of a larger weapons system. If the defective part poses a substantial risk that the weapons system will fail to operate, then the Department of Defense may incur significant expenses in locating and identifying potentially defective items in its inventory, removing parts already installed, testing the suspect parts, and obtaining substitute parts (including the government's administrative cost of a new procurement action). An estimate of these consequential expenses is included in base offense loss, except to the extent that expenses such as repair or replacement in fact substitute for or provide a measure of the lost value itself. Because the affected agency does not receive the monetary criminal sanction directly, its decision to take corrective actions should be based on a neutral and reasonable balancing of costs and benefits. However, where it clearly appears that the corrective measures are unjustified by the degree of potential disruption created by the product substitution, a downward departure may be warranted.

3. The base loss rule for fraud affecting a contract award includes two components: (1) additional transaction costs of repeating or correcting that portion of the contract award process affected by the fraud; plus (2) the government's additional procurement costs for obtaining the product or service involved. In many cases, only the first component may be substantial, because the corrected procurement process may result in an equal or lower acquisition cost. This first component includes additional costs to both the government and "other participants," which refers to the competing suppliers, who also may have wasted their expenses of preparing and presenting bids or proposals as a result of the fraud. The second component of base offense loss is most likely to be substantial where the delay occasioned by the need to correct or repeat the procurement action has been accompanied by a general change in economic conditions--such as the increase in the price of necessary inputs--that results in increased procurement cost to the government. However, any increased substitute procurement cost should be adjusted for quality differences between the originally specified and substitute product.

4. The base loss for overcharging offenses is simply the amount of the overcharge. However, in more sophisticated instances of overcharging offenses, estimating that amount may require examination of effects across multiple contracts. For example, some overcharging offenses may involve a shifting of costs as between two "cost plus" contracts, one experiencing a concealed cost overrun and another in which costs are lower than expected but fraudulently overstated. In such a case, the "overcharge" would include both the additional consideration received on the first contract resulting from the fraudulent understatement of true costs, which may trigger an "incentive payment" rewarding the apparent low-cost performance, and the additional consideration (if any) received under the second contract because of the fraudulent overstatement of costs. In each case, the sentencing court should evaluate the ramifications of the offense conduct in light of the particular supplier's contractual arrangements with the government.

5. The base loss for diversion of government program payments is the monetary value of program benefits or burdens diverted by the fraud. Examples of "program benefits or burdens diverted" would include program payments fraudulently obtained by ineligible persons, or the difference between the legally required and actual wages paid in Davis-Bacon Act violations. The particular objectives of the government program affected should be considered in evaluating the loss. For example, in an offense involving a merchant's unlawful acceptance of food stamps for non-approved items, the amount of the benefit diverted is not the full face value of the stamps, but the average discount from face value at which the stamps were provided to program beneficiaries. Similarly, in an offense involving the unlawful diversion of government payments intended for minority firms under a set-aside program, the loss would be the lost profits to minority firms that were excluded, not the full amount of the payment, because the government in any event received the goods or services for which it paid.

6. The minimum loss amounts are set at higher levels for product substitution and contract award offenses to reflect the inherent risks of disruption to governmental functions presented by these offenses.

7. Subsection (b) provides for potential adjustments in cases where a product substitution offense results in "a foreseeable and substantial risk" of either (1) serious damage to national defense or security interests, or (2) serious bodily injury or death. The threshold requirement of "a foreseeable and substantial risk" contemplates objective tests of both foreseeability and substantiality, and is intended to exclude cases of remote, speculative, or minimal risks. The adjustments are limited to product substitution offenses, in which they may occur with some frequency. In the highly unusual cases where another type of offense appears to present either of the situations contemplated by subsection (b), a departure may be warranted. However, overcharging offenses by definition only involve the government's proprietary interest in controlling monetary acquisition costs, and program payment diversions involve only a similar proprietary interest in distributing monetary benefits and burdens, both of which ordinarily would not implicate the interests reflected in subsection (b).

8. Subsection (b)(1) provides a guided basis for an upward departure for offenses resulting in a foreseeable and substantial risk of "serious damage to the national defense or security interests of the United States," which refers only to situations in which the offense posed a direct and substantial danger that a significant aspect of national defense or security would be compromised in matters directly affecting military readiness or security, such as key weapons, communications, or information systems, or national intelligence capabilities. The determination whether such a departure is warranted should be made after considering whether the costs of rectification included in the base loss rule are sufficient to reflect transitory risks that have been removed by the corrective measures. If the risk is substantially eliminated by the corrective measures, then the base loss rule is likely to reflect the expected loss caused by the offense. However, if rectification measures are not feasible, the base loss rule will not reflect the risk of damage to national defense or security interests. The appropriate amount of this adjustment is to be based on the magnitude and probability of the potential injury. The maximum recommended amount of $4 million contemplates only threatened as opposed to actual injuries. In cases where a product substitution offense actually resulted in tangible damage to national defense or security, a larger upward departure may be warranted.

9. Subsection (b)(2) provides a guided basis for an upward departure for a product substitution offense resulting in a foreseeable and substantial risk of serious bodily injury or death. Such situations usually arise in connection with procurement for governmental operations, but also can occur in cases involving providers of goods or services to government programs, as where a government health program provider does not merely fail to deliver, or

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overcharge for its product, but substitutes inferior goods or services that threaten injury to program beneficiaries. In either procurement or program cases, the amount of an upward departure should be determined under the policy stated in 8C5.2 (Departures for Expected Loss from Risks of Death or Bodily Injury).

10. "Serious bodily injury" is used in subsection (b)(2) to include either "permanent or life-threatening bodily injury" or "serious bodily injury," as defined in Application Notes 1(h) and 1(j) of the Commentary to §1B1.1 (Application Instructions).

Background: The structure of this guideline differs from the private fraud offenses in recognizing that certain types of government procurement fraud offenses frequently result in significant additional transaction costs and consequential losses, because they routinely involve specialized goods and non-market transactions. In those situations in which the government is acquiring fungible commodities with no specialized governmental use, or in which the offense is simply a fraudulent overcharge, the loss determined under this section will be equivalent to the loss from private fraud. Similarly, the guideline treats the unlawful diversion of government program benefits and burdens in a manner equivalent to a theft of property rights or a fraudulent transfer.

The guided departures specified by subsection (b) recognize the additional expected loss that may be created by risks of personal injury or serious damage to national defense or security interests. The threshold requirement of "a forseeable and substantial risk," and the $4 million limit for hazards to national defense or security interests, are suggested by the proposed Major Fraud Act of 1988, H.R. 3911, now pending in the Congress, which would authorize criminal fines of up to $10 million per count for "major" procurement frauds against the United States, defined by both the dollar values involved and the existence of risks of personal injury. The $4 million loss maximum is comparable to the $10 million fine proposed by the Act, because loss departures are multiplied by the offense multiple, which in the case of government procurement frauds usually will have a base value of 2.5. See §§8B3.1 (Determining the Offense Multiple), 8C5.1 (Departures in General).

Additional characteristics of government fraud offenses, including bribery or corruption of government officials, and the intent to evade or defeat procurement or program requirements, are considered in determining the offense multiple. See Subpart 3 (Offense Multiple). As with the private fraud offenses, the corruption of government employees does not by itself require different loss rules, because it is simply a means to the organizational offender's objective of defrauding the government. Any benefit obtained by the organization paying the bribe or gratuity will be reflected in the base loss as determined under this section, which at a minimum would be equal to the amount of the bribe even if no other loss were present. The additional interest of the government in maintaining the honesty and loyalty of its agents will be vindicated by individual prosecution of the government employees who received bribes or illegal gratuities, or otherwise participated in the fraud. However, the use of corrupt methods also may produce a higher monetary sanction by increasing the difficulty of detection and thereby raising the offense multiple.

§8B2.3. Tax Offenses

(a) Base Loss: the tax loss as defined in the applicable offense guideline in Chapter Two, Part T; but in no event less than $500.

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Commentary

Guideline Coverage: "Tax Offenses" means offenses involving an actual or probable loss of tax revenue to the government or fraud or false statements in connection with tax reporting.

Statutory Provisions: 18 U.S.C. §§ 541-545, 1001, 1027, 1341; 26 U.S.C. §§ 5762, 7201-7207.

Application Notes:

1. The estimate of base loss under this guideline is made under the rules applicable to determining "tax loss" under Chapter Two, Part T (Offenses Involving Taxation). Instead of translating the tax loss into offense levels under the tax table used in Chapter Two, here the tax loss is used directly as an estimate of offense loss.

2. "Tax loss," as defined in Part T of Chapter Two, includes interest through the date of the charging indictment or information. Therefore, the adjustment to loss reflecting the "time value" of loss, under §8C5.3 (Consideration of the Passage of Time Between the Offense and Charging), is not applicable to tax offenses.

Background: The guideline for tax offense loss is based on the government's interest in obtaining tax revenues, which is treated much like a private property right. Other factors distinguishing tax offenses are considering in determining the offense multiple. See Subpart 3 (Offense Multiple).

§8B2.4. Theft, Commercial Infringement, Embezzlement, Receipt of Stolen Property, and Property Destruction

(a) Base Loss: the value of services, goods, and property taken, destroyed, or received by the offender, but in no event less than $500.

(b) Specific Loss Characteristic

(1) If expenses were incurred in recovering, repairing, replacing, handling, or disposing of the property involved, increase the loss by the amount of such expenses.

(c) Note: If the offense involved commercial infringement that actually deceived buyers as to the nature or quality of the infringing items, refer to §8B2.1 (Private Fraud) to determine the additional loss attributable to such deception.

Commentary

Guideline Coverage: This category includes property offenses not covered by the foregoing guidelines, in which the principal harm is a taking or destruction of property by non-violent means, and includes: larceny, embezzlement, and other forms of theft; receipt of stolen property; and destruction of property (not involving arson or other violent means). In addition, the guideline covers "commercial infringement" offenses, such as criminal infringement of copyright or trademark, trafficking in counterfeit goods or services, or the unlawful importation or other diversion of products in violation of the federal Food, Drug, and Cosmetic Act.

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Statutory Provisions: *7 U.S.C. § 2024; 15 U.S.C. § 714m; 16 U.S.C. § 551; 17 U.S.C. § 506(a); 18 U.S.C. §§ 641, 661, 1361, 1703, 1707, 1852, 2312-2321, 2511; 21 U.S.C. §§ 331, 610, 675; 42 U.S.C.§ 1760g; 43 U.S.C. § 1733g; 47 U.S.C. §§ 223(b)(1), 302(a).*

Application Notes:

1. See the Commentary to §8B2.1 (Private Fraud), which is similar to this section.

2. This guideline applies to offenses where either government agencies or private parties are victims, unless the loss guideline for government fraud (§8B2.2) is more appropriate.

3. This guideline applies to a wide variety of offenses involving the taking or destruction of tangible or intangible property interests, including the category of "commercial infringement" cases, which essentially involve a theft or misappropriation of intellectual property or exclusive marketing rights.

4. The base loss rule refers to the value of the property to the true owner. If the offense involved damage to tangible property, the cost of repair may be used as a proxy for lost value, so long as the repair costs do not exceed the property's undamaged value, and do not double-count for the specific loss characteristic for recovery or replacement expenses.

5. The application of this guideline to commercial infringement offenses (such as trademark or copyright infringement, trafficking in counterfeit goods, or interference with exclusive marketing rights) involves the evaluation of an intangible property right. The value of such property subsists in the profits that accrue to the owner from its exclusive use of the trademark, copyright, or other exclusive marketing rights. Therefore, in such offenses "the value of . . . property taken," as used in the base loss rule, refers to the lost profits resulting from infringement of the owner's right to exclude others. Ordinarily, commercial infringement offenses are detected and prosecuted with the assistance of the legitimate suppliers, i.e., the owner of the trademark or copyright infringed or the manufacturer of the products unlawfully imported or diverted, who will provide estimates of their lost profits. If that information is unavailable, the lost profits can be estimated in two components: (1) the lost value to the legitimate supplier on its own sales of the item infringed; plus (2) the lost value resulting from the offender's sales of the infringing or counterfeit items. The first component is estimated by (a) determining the difference in the legitimate supplier's selling prices as between different time periods or geographic regions, where one period or region is unaffected by the infringement, and (b) multiplying that price difference by the legitimate supplier's actual unit sales in the period and region that was affected by the infringement. The second component is estimated by (a) determining the legitimate supplier's profit margin in the period or region unaffected by the infringement, and (b) multiplying that margin by the owner's lost unit sales resulting from the infringement. Of course, this estimate would have to be adjusted to account for other factors adversely affecting the legitimate supplier's price, profit margin, or unit sales, such as changes in the supply or demand conditions in its industry, or general economic trends. An alternative estimate of the base loss may be available where the legitimate supplier has licensed others to use its exclusive rights. In those instances, the entire base loss can be estimated by multiplying the offender's unit sales times the per-unit royalty or license fee that would have been paid had the offender been licensed.

6. The note in subsection (c) recognizes that commercial infringement offenses may create additional loss where buyers actually are deceived by the infringing item. In such cases, that additional loss should be determined under the guideline for private fraud (§8B2.1). However, in considering this element of loss, the court should be sensitive to the fact that

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commercial infringement offenses sometimes do not deceive buyers, and that buyers may purchase infringing items with full knowledge that they are not authentic. Absent other indications of actual deception, a substantial disparity between the selling prices or physical characteristics of authentic and infringing items usually indicates that potential buyers of the authentic item are not deceived.

7. As applied to commercial infringement offenses, this guideline does not consider future losses of profits or business reputation resulting from buyers' attribution of an inferior quality infringing item to the legitimate supplier, or a decline in demand for the authentic item resulting from the presence of infringing items on the market. In unusual cases producing a significant effect of this type, an upward departure may be warranted.

8. The commercial infringement cases covered by this guideline include "product diversion" offenses sometimes prosecuted as violations of the federal Food, Drug, and Cosmetic Act. These cases usually do not involve inherent safety risks, but are purely economic offenses against U.S. suppliers' prerogatives to sell at lower prices: (1) in foreign markets, and be protected against repatriation of the foreign-sold products, which usually are identical to the domestically distributed products; or (2) to certain customers, and be protected against those customers' resale to others. In most cases, the "diverted" products are physically identical to the authentic item. However, in cases where the diverted product has been physically adulterated or mislabeled in a manner presenting a significant risk to safety, the guideline in §8B2.6 (Food, Drug, and Agricultural Offenses) is more appropriate.

Background: This guideline evaluates non-violent property crimes in a manner similar to private frauds. Commercial infringement offenses essentially involve a theft of an intangible property right, and therefore are treated like other forms of theft.

§8B2.5. Environmental Offenses

(a) Base Loss: the reasonable costs of clean-up, plus the diminution in private and public property value caused by the offense and not rectified by the clean-up, but in no event less than:

(1) $10,000, if the offense involved an intentional or knowing discharge into the environment of a substantial quantity of hazardous or toxic substances or pesticides; or
(2) $5,000, for any other environmental offense.

(b) Cross-Reference

(1) If the offense involved a recordkeeping or reporting violation that neither resulted nor was likely to result in any substantive harm to the environment or significant risk to human health or safety, refer instead to §8B2.7 (Regulatory Reporting Offenses).

(c) Specific Departure Consideration (Policy Statement)

(1) If the offense resulted in a foreseeable and substantial risk of serious bodily injury or death, an upward departure is warranted. The amount of such a departure shall be determined by the expected loss produced by the

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risk. See §8C5.2 (Departures for Expected Loss from Risks of Death or Bodily Injury).

Commentary

Guideline Coverage: "Environmental Offenses" includes offenses involving the mishandling or unlawful discharge, release, or emission into the environment of a hazardous or toxic substance, pesticide, or other environmental pollutant, but does not include simple recordkeeping or reporting offenses.

Statutory Provisions: 7 U.S.C. §§ 136j-136l; 15 U.S.C. §§ 2614, 2615; 18 U.S.C. § 1001; 33 U.S.C. §§ 403, 406, 407, 411, 441, 1311, 1317, 1319, 1321; 42 U.S.C. §§ 6928, 7413, 9603; 49 U.S.C. App. § 1809(b).

Application Notes:

1. The base loss rule involves determinations similar to those required under the Comprehensive Environmental Response, Compensation and Liability Act. "Clean-up," as used in the rule, also includes other measures required to ameliorate substantial risks of harm to the environment or to human health or safety, such as neutralization, containment, replacement of water supplies, or the like. This aspect of the base loss includes only such costs as are "reasonable," in the sense that ameliorative measures are cost-justified in terms of the expected value of the risks. The second component of base loss usually can be estimated by changes in market prices of real property located in proximity to the site of the offense. The court should distinguish carefully between permanent property value reductions and transitory effects, which reflect little or no true loss.

2. The alternative minimum loss amounts are based upon the inherent risks associated with environmental offenses. The categories of offenses are similar to those used in Part Q of Chapter Two. See the Commentary to §§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), 2Q1.3 (Mishandling of Other Environmental Pollutants). "Substantial quantity," as used in subsection (a)(1), refers to an amount of material, considering its nature, that presents a significant hazard to the environment or to human health or safety.

3. The specific departure consideration in subsection (c) is appropriate only for cases presenting specifically identifiable dangers. The inherent risks created by environmental offenses are reflected in the base loss rule. The threshold determination under subsection (c) is governed by the same definitions and application principles as the comparable adjustment for government fraud (see §8B2.2(b)(2)) and its Commentary, Application Notes 7, 9-10), and is evaluated after considering the risk-reduction effects of the ameliorative measures included in the base loss rule. The court should not consider minimal or speculative risks.

4. The guideline does not consider residual environmental injuries or hazards, other than hazards to human health or safety, that cannot be rectified by clean-up or a comparable ameliorative measure and that are not reflected in lost property value. If significant effects of that type are involved, an upward departure may be warranted. Such a case may occur, for example, where a continuous discharge over an extended period of time has resulted in substantial degradation in environmental quality that is not feasible to rectify. However, unless the offense substantially injures an unowned natural environment, or has a very diffuse impact (such as air quality degradation over a wide area), this type of effect is likely to be reflected in the base loss component of diminished property values.

Background: This guideline sets relatively high minimum loss amounts designed to reflect the risks inherent in different categories of environmental offenses, as alternatives to a base loss rule that focuses on the costs of eliminating residual risks to the environment or human health or safety through clean-up or other ameliorative measures, plus any residual property damage. In cases where clean-up is not cost-justified, the residual harm is likely to be small. In unusual cases where such unrectified residual harm is large, an upward departure may be warranted.

§8B2.6. Food, Drug, and Agricultural Offenses

(a) Base Loss: (1) the reasonable costs of ameliorating any substantial risk of bodily injury or injury to public health or safety caused by the offense, plus (2) the net selling price of any contaminated or otherwise dangerous product that actually was sold; but in no event less than $2,000.

(b) Cross-References

(1) If the offense involved product diversion or mislabeling resulting in fraud or commercial infringement, refer instead to §§8B2.1 (Private Fraud) or 8B2.4 (Theft, Commercial Infringement, Embezzlement, Receipt of Stolen Property, and Property Destruction), as appropriate.

(2) If the offense involved a recordkeeping or reporting violation that neither resulted nor was likely to result in any substantive harm to health or safety, refer instead to §8B2.7 (Regulatory Reporting Offenses).

(c) Specific Departure Consideration (Policy Statement)

(1) If the offense resulted in a foreseeable and substantial risk of serious bodily injury or death, an upward departure is warranted. The amount of such a departure shall be determined by the expected loss produced by the risk. See §8C5.5 (Departures for Expected Loss from Risks of Death or Bodily Injury)

Commentary

Guideline Coverage: "Food, Drug, and Agricultural Offenses" include offenses involving violations of statutes and regulations dealing with any food, drug, biologic, medical device, cosmetic, or agricultural product, other than simple recordkeeping or reporting offenses, or offenses essentially involving private fraud or commercial infringement.

Statutory Provisions: 7 U.S.C. § 608c; 18 U.S.C. 1001; 21 U.S.C. §§ 111, 120, 122, 331, 333, 610-611.

Application Notes:

1. Corrective measures for these offenses include product recalls and plant clean-up or modifications.

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2. The minimum loss is set to reflect the inherent risks presented by the type of offense covered by this guideline. Offenses that do not involve a contaminated or dangerous product, and do not otherwise present a substantial safety risk, should be treated as fraud or property offenses.

3. The base loss rule has two components: (1) the reasonable costs of ameliorative measures, which is determined on the same basis as "clean-up" costs for environmental offenses (see Application Note 1 in the Commentary to §8B2.5 (Environmental Offenses)); and (2) the selling price of products sold ("net" of any salvage value, as, for example, where food unfit for human consumption lawfully can be used for animal feed), which measures an economic loss. Where a product recall has occurred, both components are likely to be included in the total cost of recall, because the seller ordinarily will be required to refund the purchase price, or the difference between the full purchase price and salvage value, in addition to bearing the expenses of the recall itself. However, if the product has been used, consumed, or destroyed by the buyer, its full selling price nonetheless is included in the base loss. If the product has been resold by the immediate buyer, then the base loss should include the selling price to the ultimate buyer, which may be estimated as the full retail price where the product in question has been distributed to consumers.

4. The specific departure consideration in subsection (c) is similar to the corresponding provisions for environmental offenses and government fraud. See Application Note 3 in the Commentary to §8B2.5 (Environmental Offenses) and Application Notes 7, 9-10 in the Commentary to §8B2.2 (Government Fraud). However, the potential risks from food and drug offenses, which usually focus on a given number of products with a known distribution pattern, are likely to be far less diffuse, more limited in duration, and more specifically identifiable than in the case of environmental offenses. Moreover, probabilities of injury usually are fairly well known, either from the Food and Drug Administration or the offender's own records.

Background: This guideline follows the same basic structure as the guideline for environmental offense loss. As compared with environmental cases, food, drug, and agricultural offenses typically have a less diffuse impact on health and safety, and the risks are easier to eliminate or control.

§8B2.7. Regulatory Reporting Offenses

(a) Base Loss: the reasonable administrative cost to the regulatory agency caused by the offense, but in no event less than $500.

(b) Cross-Reference

(1) If the offense causes, contributes to, or conceals a substantive offense, refer instead to the guideline applicable to the substantive offense.

Commentary

Guideline Coverage: "Regulatory Reporting Offense" includes simple recordkeeping or reporting offenses that neither result nor are likely to result in any substantive harm. This category also includes refusals to grant access to government inspectors when required by law.

Statutory Provisions: *18 U.S.C. §§ 551, 992(m), 1001; 21 U.S.C. §331, 642; 26 U.S.C. § 5861(d); 29 U.S.C. §§ 211(c), 1027; 31 U.S.C. §§ 1058, 1081, 1101, 5313, 5316, 5322; 49 U.S.C. §§ 322, 522, 1021, 11909.*

Application Notes:

1. "Administrative cost to the regulatory agency" includes, in addition to other costs to the agency caused by the offense, the expenses of any civil proceedings necessary to secure compliance, if not recovered in the course of such proceedings.

2. The base loss rule's limitation to "reasonable" administrative costs is intended to exclude costs that the court finds to be excessive in relation to the nature of the violation, and is similar to the comparable limitation on criminal enforcement costs. See the Commentary to §8B4.1 (Determining Enforcement Costs).

3. The cross-reference contained in subsection (b) makes it unnecessary to consider the substantive aspects of the regulatory program when evaluating simple recordkeeping and reporting offenses, except insofar as the regulatory context assists in evaluating the effect of the offense on the agency's cost of carrying out the program objectives.

Background: The basic interest invaded by regulatory reporting offenses is the government's interest in achieving the regulatory objectives of the program affected. Accordingly, this guideline determines the loss from regulatory reporting offenses by their impact on the costs, in terms of government resources expended, of achieving the objective of the regulation violated.

This section follows the Commission's general approach to regulatory offenses (see Chapter 1, Part A.4(f)), and differs in structure from the existing guidelines primarily by consolidating all reporting and recordkeeping offenses in a single guideline.

Other characteristics of regulatory reporting offenses, such as the offender's intent to defeat government enforcement activities, are considered in determining the offense multiple. See Subpart 3 (Offense Multiple).

§8B2.8. Other Organizational Offenses

(a) If no specific loss guideline applies to the organization's offense, apply the most analogous loss guideline.

(b) If no sufficiently analogous guideline exists, determine the offense loss in accordance with the policy statements in Part A.2 of this Chapter.

Commentary

Subsection (a) follows the approach of §2X5.1 (Other Offenses).

The offense loss guidelines cover the basic types of organizational offenses, and therefore should provide a sufficiently analogous guideline in most instances. Where they do not, the court is to apply the general principles of organizational sentencing stated at the beginning of this Chapter.

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3. OFFENSE MULTIPLE

§8B3.1. Determining the Offense Multiple

(a) Base Multiple:

(1) For private fraud offenses and property offenses substantially affecting identifiable private victims: 2.0

(2) For all other offenses: 2.5

(b) Adjustment for Offense Characteristics Affecting Detectability. If the characteristics identified under §8B3.2 (Offense Characteristics Affecting Detectability), taken together, had a material effect on the overall difficulty of detecting and prosecuting the offense, then:

(1) if such characteristics materially increased the difficulty of detecting and prosecuting the offense, increase the multiple by 1.0; or

(2) if such characteristics materially decreased the difficulty of detecting and prosecuting the offense, decrease the multiple by .5.

(c) Adjustments for Acceptance of Responsibility or Voluntary Reporting.

(1) If the organization clearly demonstrates a recognition and affirmative acceptance of responsibility for the offense of conviction, decrease the multiple by 20%, but in no event may the resulting multiple be less than 1.25; or

(2) If the organization voluntarily reported the instant offense conduct to government authorities prior to the commencement of an investigation, and

reasonably cooperated in subsequent phases of the investigation, decrease the multiple to 1.0.

Commentary

Application Notes:

1. Subsection (a) establishes two possible base multiples of 2.0 or 2.5, depending upon the type of offense involved.

2. Subsection (a)(1) establishes a base multiple of 2.0 for private fraud offenses and property offenses "substantially affecting identifiable private victims," which refers to situations where private victims are readily able to perceive that the loss was incurred.

3. For offenses not covered by subsection (a)(1), the base multiple is 2.5. This category would include most instances of government fraud and regulatory reporting offenses, the offenses covered by §§8B2.5 (Environmental Offenses) and 8B2.6 (Food, Drug, and Agricultural Offenses), and property offenses involving government property.

4. Subsection (b) is to be applied by first determining whether one or more of the detectability characteristics set forth in §8B3.2 are present, and then determining whether all such factors as are present, taken together, have a material effect on the overall difficulty detecting and prosecuting the offense. "Material effect" means that the instant offense is substantially more or less difficult to detect and prosecute than it would have been if the identified factors were not present. If no substantial effect is found, then no adjustment is to be made. If a material effect exists, then subsection (b) specifies the adjustment. In an unusual case where the detectability factors had an extreme effect in one direction or the other, a departure may be warranted. See §8C5.4 (Departures for Extreme Cases of Detectability Factors).

5. Subsection (c) provides for two downward adjustments to the multiple for either acceptance of responsibility or voluntary reporting of the offense. The applicability of subsection (c)(1) is equivalent to the comparable adjustment provided in §3E1.1 (Acceptance of Responsibility). The adjustment provided by subsection (c)(2) is applicable only where the reporting: (1) occurred prior to the opening of a government investigation, whether or not the organization was aware of the investigation; and (2) was the official act of the organization itself, as opposed to "whistle-blowing" by an agent of the organization. This adjustment also requires "reasonable" cooperation by the organization in the subsequent investigation, which ordinarily would include acceptance of responsibility but is not intended to require that the organization surrender its constitutional rights, or pressure its agents to do so.

Background: The basic concept of the multiple is to reflect the chances against an offender being detected and punished.

This guideline section structures the determination of the multiple on the basis of factors affecting the difficulty of detecting and prosecuting the offense, at three levels: (1) the general type of offense, which determines the base multiple; (2) specific offense characteristics affecting detectability; and (3) the organization's post-offense conduct in accepting responsibility or voluntarily reporting the offense. The resulting range of possible multiples, depending upon the combination of factors, is from 1.0 to 3.5.

The two possible "base" multiple values prescribed by subsection (a) reflect the judgment that general types of offenses vary in their inherent detectability, depending primarily upon the nature of the offense's effects on victims. The "base" multiple values distinguish private fraud, and property offenses substantially affecting specific private victims, from relatively less detectable offenses having more diffuse effects on the general public, such as government fraud offenses and safety offenses. In offenses primarily affecting public interests, the absence of a private victim is likely to render the offense more difficult to detect, because the effects of the offense are not felt directly by private victims who can perceive and report the loss.

Subsection (b) directs the court to the specific characteristics set forth in §8B3.2 that may produce an increase or decrease in the difficulty of detection and prosecution in a particular case. The determination whether such characteristics as are present had a material effect should be made by considering the difference in dectectability of the instant offense caused by the presence of those characteristics.

The adjustments provided by subsection (c) involve two applications where the organization's post-offense conduct ordinarily has a substantial effect in decreasing the difficulty of detection and prosecution. The adjustment provided by subsection (c)(1) is based upon the same considerations, and is comparable in magnitude, to the analogous adjustment for individuals in §3E1.1 (Acceptance of Responsibility). The subsection (c)(2) adjustment is an

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extension of that concept as specifically applied to organizations, which may be subject to vicarious liability for offenses by agents that were not condoned by the policy of the organization and were unknown to the organization's governing body. Organizations therefore should be encouraged to report such offenses to the government. When they do so, the adjustment decreases the multiple to a level reflecting the consideration that voluntary reporting and subsequent cooperation will render the successful detection and prosecution of the offense a near-certainty.

The outer boundaries of possible multiples under this section should be adequate for the vast majority of the organizational offenses covered by this chapter, particularly when considered in light of the collateral civil penalties available for most offenses by organizations. However, upward or downward departures may be warranted in extreme cases. See §8C5.4 (Departures for Extreme Cases of Detectability Characteristics).

The lower boundary of 1 essentially is a logical limitation, because a multiple of 1 implies a virtual certainty of detection. However, in some situations, the interest in coordinating the monetary criminal sanction with available civil penalties may warrant a downward departure that in effect results in a multiple of less than 1, and possibly 0 in an extreme case. See §8C5.5 (Consideration of Collateral Civil Penalties).

§8B3.2. Offense Characteristics Affecting Detectability

(a) Detectability Characteristics Tending to Increase the Multiple:

(1) the active participation in or knowing encouragement of the offense by the organization's senior management;

(2) the corruption, bribery, or complicity of a public official, or an employee, agent, or other person (including the defendant) occupying a position of trust with respect to principal victims of the offense;

(3) the commission of the offense through anonymous or disguised transactions, or false identification or impersonation, or unusually sophisticated means;

(4) active efforts to conceal the nature or subject matter of the offense or its consequences from enforcement authorities or others who might be expected to detect and report the offense;

(5) active efforts to impede or obstruct the administration of justice during the investigation or prosecution of the offense; and

(6) other relevant conduct that the court finds to have significantly reduced the probability that the offense would be detected and prosecuted.

(b) Detectability Characteristics Tending to Decrease the Multiple:

(1) reasonable, good faith efforts by the organization's management to prevent an occurrence of the type of offense involved;

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(2) the commission of the offense by open and obvious conduct that was not concealed or misrepresented;

(3) widespread or obvious effects or results that victims or others were easily able to perceive and report; and

(4) other relevant conduct that the court finds to have significantly raised the probability that the offense would be detected and prosecuted.

Commentary

This section provides specific guidance for the court's determination whether an adjustment for offense characteristics affecting detectability is appropriate under subsection (b) of §8B3.1 (Determining the Offense Multiple).

Subsections (a) and (b) specify the detectability characteristics that the court is to consider. The presence of such characteristics does not necessarily require an adjustment to the multiple, but only that the court make determinations of whether and to what extent the factors present do affect the overall difficulty of detecting and prosecuting the offense. Those characteristics should be evaluated in the context of the particular offense, including a comparison of the considerations underlying the base multiple for the type of offense involved. For example, environmental offenses and food, drug, and agricultural offenses have a relatively higher base multiple because of their ordinarily diffuse or imperceptible effects that are not readily perceived by victims. Where such an offense has obvious effects that victims were easily able to perceive and report, the characteristic in subsection (b)(3) may indicate a downward adjustment.

"Senior management," as used in subsection (a)(1), refers to one or more persons who would satisfy the Model Penal Code's definition of "high managerial agent," to mean "an officer of a corporation or an unincorporated partnership, or, in the case of a partnership, a partner, or any other agent having duties of such responsibility that this conduct may fairly be assumed to represent the policy of the corporation or association." Model Penal Code §2.07(3)(c). Except for minor violations, strict liability offenses, and omissions to perform specific duties imposed by law, the Model Penal Code requires that "the offense was authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent" before a corporation may be convicted of the offense. Id. §2.07(1)(c). Federal law generally imposes a more expansive standard of corporate liability for the acts of any agent. Where a federal offense in fact involves senior management participation, that characteristic may affect detectability.

Particularly in assessing the effect of the factors tending to increase the difficulty of detection, the court should bear in mind that setting the multiple involves a probabilistic estimate. The multiple is an indicator of the offender's prospective chances against being detected and punished. The fact that the offender obviously was detected and convicted, and now is presented for sentencing, does not mean that the multiple should be low. If the offender attempted to conceal the offense, an increase in the multiple should be considered if the concealment substantially increased the offender's prospect of escaping punishing, notwithstanding that the concealment ultimately was unsuccessful. Major objectives of the multiple are to deter potential offenders from committing an offense, and, if they do commit an offense, to deter them from efforts to conceal the offense or obstruct enforcement. On the

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other hand, where the conduct or circumstances indicate that the offense is substantially easier to detect, a decrease in the multiple is required.

The court is permitted to consider all appropriate indicia of the effects that the specific factors have on increasing or decreasing the difficulty of detection, including the views of regulatory or enforcement agencies and the effect of the offender's activities on the costs, length, or difficulty of the investigation and prosecution. It is not intended that the determination embody scientific precision or require expert testimony, but rather, like the determination of loss, be based on the reasoned judgment of the sentencing court, in light of the information available for sentencing.

§8B3.3. Differing Multiples for Separable Portions of the Offense Loss

If only a portion of the offense loss is affected by one or more of the provisions set forth in §§8B3.1 and 8B3.2, determine the multiple separately for that portion, and apply subsection (b) of §8C1.1 (Determining the Total Monetary Sanction) when computing the total monetary sanction.

Commentary

This section provides a rule for handling cases in which applicable guideline multiple provisions affect only a portion of the offense loss. Such situations are most likely to be presented in the relatively infrequent case where the offense conduct includes two or more entirely unrelated episodes or events. In such a situation, the loss can be separated and different multiples applied to the separate portions of loss, with the results aggregated in computing the total monetary sanction under §8C1.1 (Determining the Total Monetary Sanction).

4. ENFORCEMENT COSTS

§8B4.1. Determining Enforcement Costs

The court shall determine the reasonable amount of the estimated costs of prosecuting the organization's offense, plus the estimated prospective costs of enforcing the monetary sanctions to be imposed.

Commentary

Enforcement costs represent an additional societal loss caused by a criminal offense, for which the offender should be held accountable. This section directs the court to estimate the reasonable costs incurred in prosecuting the instant offense, plus the anticipated costs of carrying out monetary sanctions. The resulting estimate is then used in determining the total monetary sanction under Part C (Monetary Sanctions). There is long-standing statutory authority for the imposition of prosecution costs in addition to other sanctions, 28 U.S.C. § 1918(b).

The court's estimate of enforcement costs is limited by the requirement of reasonableness. If the actual enforcement costs objectively appear to be excessive in relation to the offense

loss or the difficulties of investigation and prosecution, the court should limit its estimate to an amount that would be reasonable in light of those factors. The inclusion of enforcement costs in the sanction is not intended to encourage increased spending or a shift in priorities by enforcement authorities simply to raise the final penalty, but rather is designed to compensate for public expenditures that otherwise are justified by the nature of the offense conduct itself.

PART C - MONETARY SANCTIONS

Introductory Commentary

This Part contains guidelines for determining the organization's total monetary sanction as the product of the offense loss and multiple, plus enforcement costs, and implementing that sanction through the sentencing options of restitution, forfeitures, and fines.

Restitution serves the sentencing purpose of compensation to victims. The guidelines require restitution or an equivalent remedy in every case where feasible.

Forfeitures are applicable only to certain offenses, and are regulated by existing statutory provisions.

Fines provide the major punitive component of the organization's criminal sentence in the vast majority of cases where forfeitures are inapplicable. Fines are determined by subtracting the amounts of restitution and forfeitures imposed or expected from the total monetary sanction, with the remainder providing the midpoint of a guideline fine range, within which the court may select a fine that reflects any additional sentencing factors appearing in the particular case.

1. THE TOTAL MONETARY SANCTION AND SPECIAL ASSESSMENTS

§8C1.1. Determining the Total Monetary Sanction

(a) An organization's total monetary sanction is equal to (1) the offense loss, as determined under Part B.2 (Offense Loss), multiplied by (2) the offense multiple, as determined under Part B.3 (Offense Multiple), plus (3) enforcement costs, as determined under Part B.4 (Enforcement Costs).

(b) If more than one offense multiple has been applied to separate portions of the offense loss, in accordance with §8B3.3 (Differing Multiples for Separable Portions of the Offense Loss), then steps (1) and (2) of subsection (a) of this section shall be applied by separately multiplying each portion of the offense loss by its corresponding multiple, and aggregating those separate amounts.

Commentary

This section carries out the basic principle that an organization's total monetary sanction is equal to the product of the offense loss and multiple, plus enforcement costs, and recognizes

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the occasional variation for cases where separate portions of the offense loss are subject to different multiples under §8B3.3.

After determination under this section, the total monetary sanction is allocated among the sentencing options of restitution, forfeitures, and fines, in that order. However, the amounts of those sentences, as determined under the rules stated in Subparts 2, 3, and 4, respectively, will not necessarily add back together to equal the "total monetary sanction," because the guideline fine also depends upon other factors, including: (1) the amounts of restitution "equivalents" imposed through civil or administrative proceedings, community service, or other forms of compensation; (2) a requirement that the guideline fine range midpoint be at least $1,000; and (3) the rules establishing the maximum and minimum points for the guideline fine range. See §8C4.1 (Determining the Guideline Fine Range). Restitution and forfeitures are determined independently under Subparts 2 and 3. Under Subpart 4, the sum of restitution and forfeitures, plus any restitution "equivalents," is subtracted from the total monetary sanction to establish the midpoint of the guideline fine range, subject to the constraint that the midpoint may not be less than $1,000. The minimum and maximum points of the guideline fine range are set at the greater of $1,000 or 20% below and above the range midpoint. Therefore, the aggregate sum of the monetary sentences actually imposed could be either greater or less than the "total monetary sanction" under this section, depending upon the particular circumstances of the case.

§8C1.2. Special Assessments

Special assessments shall be imposed on an organizational defendant in the amount prescribed by statute, in addition to any other sentence imposed.

Commentary

Under 18 U.S.C. § 3013, special assessments are required to be imposed in amounts prescribed by the statute, in addition to any other sentence imposed. Accordingly, this section excludes special assessments from the total monetary sanction determined under the guidelines.

2. RESTITUTION

§8C2.1. Compensation to Victims

The court shall assure that full restitution or an equivalent compensatory remedy is provided to victims. This may be accomplished by:

(a) determining that restitution or other compensation to victims already has been made;

(b) entering a restitution order or imposing a sentence of probation including the condition that restitution be made;

(c) determining that available civil or administrative remedies are equivalent to restitution; or

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(d) determining that restitution or compensation is inappropriate because there are no identifiable victims.

Commentary

Remedies or other compensation to victims that may be considered to be in lieu of restitution include civil actions for damages by victims, community service aimed at corrective measures (see §8D2.5 (Community Service)), corrective administrative remedies such as a "clean-up" orders for an environmental violations or product recalls for food and drug violations, and refunds or product repairs or replacements in private or government fraud cases, where there are no other identifiable effects on victims. In some instances, the substitute may be only partial. A product recall may come only after some victims have been injured; in that case, full restitution requires both compensation to the injured victims and the completion of the corrective action.

In situations involving an administrative remedy, the court should solicit and consider the appropriate agency's views as to whether the remedy provides full compensation and whether probation is necessary to carry out or enforce the administrative remedy.

Under subsection (c), the determination whether "available civil or administrative remedies are equivalent to restitution" ordinarily would consider only those remedies that are reasonably certain to provide compensation to victims. If there is any substantial doubt about compensation by other means, the court should order restitution, which by statute would be set off against a later recovery of compensatory damages in a civil proceeding, see 18 U.S.C. § 3663(e)(2). The determination of equivalence also should consider whether the alternative compensation would be materially more burdensome or costly for victims to obtain than restitution under the criminal system, or would be delayed inordinately beyond the time that criminal restitution would be received.

§8C2.2. Implementation of Restitution

Unless the court determines that restitution is unnecessary pursuant to subsections (a), (c), or (d) of §8C2.1 (Compensation to Victims), the following rules shall apply:

(a) The court shall enter a restitution order pursuant to 18 U.S.C. §§ 3663-3664 whenever authorized. If restitution is not to be made within 30 days after sentencing, the organization also shall be sentenced to probation upon condition of satisfactory compliance with the terms of the court's order of restitution. See §8D2.1 (Use of Probation In General).

(b) If a restitution order would be authorized pursuant to 18 U.S.C. §§ 3663-3664 but for the fact that the offense of conviction was not an offense under Title 18 or 49 U.S.C. § 902(h), (i), (j), or (n), the organization shall be sentenced to probation upon condition of making restitution.

(c) Whenever restitution is to be ordered, the amount, recipients, and other terms of the restitution order or condition shall be determined in accordance with 18 U.S.C. § 3663(b), (c), and (e).

Commentary

The provisions of 18 U.S.C. §§ 3663-3664 permit a sentence of restitution for convictions under Title 18 or under 49 U.S.C. § 1472(h), (i), (j), or (n), unless "the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order under this section outweighs the need to provide restitution to any victims," 18 U.S.C. § 3663(d).

This guideline section establishes the rule that restitution be ordered in all cases where permissible under §3663, unless there is another equivalent remedy available. In addition, the guideline extends the general rule of restitution to non-Title 18 offenses, as a condition of a sentence of probation, to be determined under standards equivalent to those embodied in 18 U.S.C. §§ 3663-3664. Under those standards, restitution in certain cases may be awarded to a third party who already has provided compensation to the victim, see 18 U.S.C. § 3663(e)(1).

§8C2.3. Restitution by Joint Offenders (Policy Statement)

When restitution is ordered for an offense committed by more than one offender, the responsibility for making restitution ordinarily should be joint and several among all offenders. However, the court should allocate the obligation to make payment of restitution, or reduce the amount of an organizational defendant's obligation to make payment of restitution, in cases where such an order would apportion restitution payments in accordance with the offenders' relative contributions to the offense loss while assuring substantially full restitution to victims.

Commentary

Under case law applying the restitution statutes, the court has discretion to determine whether the obligation to make restitution should be apportioned among joint offenders. This section states the policy that such apportionment should be made on the basis of relative contributions to offense loss, unless some of the joint offenders are not subject to an order of restitution or an equivalent liability for compensation, as where the joint offenders are insolvent or beyond the jurisdiction of U.S. courts. Where some of the offenders can not be reached, their contribution to offense loss should be re-allocated to the remaining offenders in proportion to relative contributions to offense loss as among the group that is subject to restitution or an equivalent remedy.

3. FORFEITURES

§8C3.1 Order of Criminal Forfeiture

Criminal forfeiture shall be imposed as required by statute.

Commentary

Criminal forfeiture is required by 18 U.S.C. § 3554 for convictions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and the continuing criminal

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enterprise provisions of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 848, 853. In addition, criminal forfeitures are provided for convictions of certain offenses involving money laundering and sexual exploitation of minors, see 18 U.S.C. §§ 982, 2253. There also is a "special forfeiture" authorized under 18 U.S.C. §§ 3681-3682 of proceeds from the depiction of the crime in a book, movie, or other medium.

This section does not affect the operation of any of the statutory forfeiture provisions, but simply recognizes that forfeiture orders will be required in certain cases. The amounts of such forfeitures are used in determining the guideline fine range under Subpart 4 (Fines).

4. FINES

§8C4.1. Determining the Guideline Fine Range

(a) Subtract the total amounts of (1) restitution or other compensation to victims made, ordered, or expected from the organization, plus (2) criminal forfeitures imposed, from the total monetary sanction determined under §8C1.1 (Determining the Total Monetary Sanction). If the resulting amount is less than $1,000, increase to $1,000.

(b) If the amount determined under subsection (a) is --

(1) less than $5,000, then the guideline fine range is from $1,000 less to $1,000 more than the amount determined under subsection (a); or

(2) $5,000 or more, then the guideline fine range is from 80% to 120% of the amount determined under subsection (a).

(c) Notwithstanding subsection (b):

(1) if the maximum fine authorized by statute for all counts of conviction combined is less than the minimum of the guideline fine range established by subsection (b), then such statutory maximum shall be the guideline sentence; and

(2) if the minimum fine required by statute for all counts of conviction combined is greater than the maximum of the guideline fine range established by subsection (b), then such statutory minimum shall be guideline sentence.

Commentary

Under subsection (a), the midpoint of the guideline fine range is determined by subtracting restitution (or its equivalent) and forfeitures from the total monetary sanction. The subtraction for restitution is not limited to the amount of a restitution order, but also includes amounts already received by victims or expected through equivalent civil or administrative remedies, contractual obligations, corrective measures (see §8D2.5 (Community Service)), or otherwise. Given the standard of equivalency required before a restitution order may be denied (see the Commentary to §8C2.1 (Compensation to Victims)), this determination

will not involve the court in undue speculation regarding collateral or future events. If full compensation appears assured but its amount cannot be estimated, one "multiple" of the offense loss should be subtracted from the total monetary sanction. However, the subtraction should be made only in cases where some type of compensatory or restorative measure in fact will be required from the offender itself. There should not be a deduction where the offense has no identifiable victims (see §8C2.1(d)) and no corrective measures such as "clean up" or the like will be taken by the offender, as opposed to a third party or government agency.

Subsection (b) establishes the guideline fine range as 20% above or below the midpoint supplied by subsection (a), subject to the exception for amounts of less than $5,000.

Subsection (c) provides rules for reconciling the guideline fine range with applicable statutory maximums or minimums.

§8C4.2. Imposition and Payment of the Fine

(a) The court shall impose a fine within the guideline fine range, after considering such factors as are required or permitted by law, including the policy statements set forth in §§8C5.3 (Consideration of the Passage of Time Between the Offense Loss and Charging), 8C5.5 (Consideration of Collateral Civil Penalties and Disabilities), 8C5.6 (Consideration of Penalties Against Organizational Agents), and 8C5.7 (Consideration of Penalties Against Joint Offenders).

(b) The fine shall be imposed for immediate payment whenever the organization is able, and otherwise under an installment schedule calling for full payment at the earliest possible date, or under such other arrangement as is ordered by the court in accordance with §8C4.3 (Inability to Pay).

Commentary

Within the guideline fine range, the court may select a fine based upon such sentencing factors appearing in the case as are required or permitted by law. See 18 U.S.C. §§ 3553(a), 3572. Of course, most of these factors are considered explicitly or implicitly in determining the guideline fine range, but the court may decide to place greater or lesser stress on certain factors in the circumstances of the particular case. In addition, subsection (a) directs attention to the policy statements in Subpart 5 (Departures and Adjustments to Fines) regarding factors that are not included in the determination of the guideline fine range.

Subsection (b) requires the fine selected to be imposed for immediate payment, unless the organization financially is unable to pay immediately. In that case, an installment schedule may be considered. If the organization appears unable or unlikely to pay the fine within any permissible installment schedule, the court should refer to §8C4.3 (Inability to Pay) for a determination of other sentencing options. Whenever an installment payment schedule is adopted, the organization also will be subject to a sentence of probation under §8D2.1 (Imposition of Probation).

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§8C4.3 **Inability to Pay**

(a) The amount of the fine shall not be decreased below the guideline fine minimum merely because of the organization's inability to pay the fine. However, current inability to pay is a reason to adopt an installment payment schedule, or to accept equity or debt obligations in lieu of all or a portion of a fine, provided the organization consents.

(b) The court shall avoid imposing a fine in a manner that would force termination of the organization's legitimate business operations and liquidation of the organization's assets, unless (1) the organization has no value as a going concern or (2) all or substantially all of the organization's value as a going concern is attributable to criminal activities.

Commentary

This section applies where the organization is unable to pay the minimum guideline fine. The guidelines consider and reject the idea that an organization's inability to pay is an appropriate basis for imposing a fine that is below the guideline minimum. Even where the inability to pay is genuine, sentence reductions for this factor would produce unfavorable incentives for organizations and their controlling individuals, and generally undermine the deterrent effects of organizational sanctions. Moreover, reduction of a fine for the organization's inability to pay is neither the only nor, in most circumstances, the most desirable disposition of the case. This section directs the court to the other options available, both within the criminal process and through the federal bankruptcy system. Legitimate business values can be preserved without compromising the effectiveness of criminal punishment.

Subsection (a) states the general rule that fines should not be reduced below the guideline minimum merely because of inability to pay, and recognizes the alternatives of an installment payment schedule imposed by the court, or a non-cash fine agreed to by the organization, which is similar in effect to a financial rearrangement of the organization. In considering the non-cash alternative, the court should not accept non-marketable instruments and should assure that the market value of any securities accepted is the full cash equivalent of the fine, particularly considering any dilution or other financial effects resulting from the issuance of such securities. The court should avoid a situation in which the United States Government is left with equity or debt investments in a private firm, and should encourage the organization to involve a financial intermediary or private investor in any arrangement of this type, so that the Government receives the full cash equivalent of the fine. In certain instances, applicable state law may preclude or limit the applicability of the non-cash option.

Subsection (b) states a rule of preference against fining mechanisms that would force the liquidation of a business having a legitimate going concern value. However, reorganization through the bankruptcy courts is an option that the court should consider even for legitimate businesses, because the bankruptcy system is far better equipped than the criminal system to reorganize or rehabilitate business organizations.

In some instances, reorganization under Chapter 11 of the Bankruptcy Code of an organization that is unable to pay the fine may be desirable. Absent consent from the adversely affected parties, arrangements must be made in bankruptcy to satisfy debts to creditors, including employees, in full before a fine or penalty is paid, and fines and penalties must be satisfied before the shareholders may retain any equity. See 11 U.S.C. §§ 724(a), 726,

1129. During reorganization, the organization may continue to operate as a going concern, thus protecting employees and preventing a loss of goodwill or going-concern value; management, however, may be replaced. Furthermore, the Bankruptcy Court is best situated to supervise a corporate restructuring. As one of the organization's creditors, the United States Government, through the Department of Justice, can take a role in the reorganization process.

Title 11 provides for the discharge of fines imposed on an organization that reorganizes pursuant to Chapter 11. See 11 U.S.C. § 1141. However, it is unclear whether this provision for discharge may be superseded by 18 U.S.C. § 3613 in some or all circumstances. If discharge is not allowed, liquidation under Chapter 7 could be forced, thus limiting the desirability of this option where the liquidation would result in a loss of legitimate going concern value as opposed to the sale of operating business units.

The guidelines also provide the further option of a sentence to probation under conditions of financial supervision, which is required unless the organization is to enter the bankruptcy system. See §8D2.1(a) (Imposition of Probation). While less desirable than bankruptcy reorganization (because necessitating ongoing judicial supervision of a business enterprise), a sentence to the maximum term of probation under the stringent conditions specified in the probation guidelines still is preferable, from the perspectives of both deterrence and just punishment, to a reduction of the fine. If upon the successful completion of the full probation term the organization remains a viable and legitimate enterprise, the court then might wish to consider a modification or remission of the unpaid portion of the fine under 18 U.S.C. § 3573.

5. DEPARTURES AND ADJUSTMENTS TO FINES

§8C5.1. Departures In General (Policy Statement)

(a) Departures should be considered as an increase or decrease in the organization's fine, after the guideline fine range has been determined.

(b) In determining the amount of a departure from the guideline fine --

(1) Departures from the guidelines in Part B.2 (Offense Loss) should be multiplied by the guideline offense multiple determined under Part B.3 (Offense Multiple).

(2) Departures from the guidelines in Part B.3 (Offense Multiple) should be multiplied by the guideline offense loss determined under Part B.2 (Offense Loss).

(3) Departures from the guidelines in Part B.4 (Enforcement Costs) should be directly added to or subtracted from the guideline fine.

Commentary

This section provides guidance for determining the appropriate amount of a departure, if one otherwise is warranted.

§8B5.2. Departures for Expected Loss from Risks of Death or Bodily Injury (Policy Statement)

If an offense resulted in a foreseeable and substantial risk of serious bodily injury or death, the court shall determine whether an upward departure from an offense loss guideline is warranted on the basis of the amount of expected loss produced by the risk.

Commentary

This section provides a guided basis for upward departures from the loss guidelines when an offense results in a forseeable and substantial risk of serious bodily injury or death, as recognized by references to this section from the loss guidelines for government fraud (§8B2.2(b)(2)), environmental offenses (§8B2.5(c)), and food, drug, and agricultural offenses (§8B2.6(c)). The basic standard for considering such risks is "expected loss," which evaluates potential loss in terms of both magnitude and probability.

In considering an upward departure for risks of injury or death, the court should first determine whether the expected loss crosses a threshold of significance, both absolutely and in relation to losses already recognized by the applicable loss guideline. Obviously, criminal sentencing decisions should not rest on speculative risks or "worst case scenarios" as if they were likely to occur. Rather, the risk should be objectively foreseeable, and objectively substantial in terms of increased expected loss, before even warranting consideration. Moreover, the significance of the risk is likely to vary with the context of the offense and the components of the offense loss rule. For example, the minimum loss amounts for environmental offenses have been established at relatively high levels to reflect the inherent risks of that type of offense. Therefore, the offense in question would have to present a level of expected loss materially higher than the normal offense of its type before it would warrant a departure.

Both in considering the threshold question, and in evaluating the loss if a departure is warranted, the court should determine the "expected loss," which is an estimated amount equal to: (1) the number of individuals that would be affected, if the injury or death actually occurred; multiplied by (2) the loss that would result if the injury or death actually occurred (discounted to present value if the injury or death would occur at a future time); multiplied by (3) the probability (between 0 and 1) that the injury or death actually would occur. If some of the individuals threatened would be subject to differing levels of risk in terms of the severity, time, or probability of injury, the expected loss should be estimated separately for each such class of person.

In determining the number of individuals affected and the nature of the threatened injury, the court should recognize that a probabilistic assessment is involved. For example, if statistical data showed that a product sold to 10 million people contained a defect that would cause 30 injuries, the number of individuals affected would be only 30, not 10 million.

The element of "the loss that would result" if the injury actually occurred requires some type of monetary estimate for the injury, which is comparable to the determinations made by administrative agencies in establishing safety regulations. See C. Gillette & T. Hopkins, Federal Agency Valuations of Human Life: A Report to the Administrative Conference of the United States (April 1988). Although estimates of injury costs are subject to wide variation, the very low probabilities often associated with the injurious event will render those variations relatively unimportant to the overall expected loss. For example, if a risk might produce between

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$500,000 and $1,000,000 in injury but had only a 1 in 1,000 chance of occurring, the variation in expected loss would be between $500 and $1,000. If the injury would not occur until six years in the future, and an appropriate "societal" discount rate were 12%, then the present expected loss would vary from $250 to $500, which might add nothing to the loss estimate under the guidelines, which is rounded to the nearest $1,000.

§8C5.3. Consideration of the Passage of Time Between the Offense Loss and Charging (Policy Statement)

For offenses other than tax offenses, the court should consider an increase in the organization's fine to reflect the passage time between the date of the offense loss and the date of charging.

Commentary

This section reflects the principle that the passage of time between the offense loss and charging may result in an inadequate monetary sanction through the lost "time value" of money, particularly when a substantial period of time has elapsed.

Under the rules stated in Part B (Offense Conduct), the offense loss does not include interest from the date of the loss to the date of charging, except for the tax offense loss guideline (§8B2.3), which adopts the same "tax loss," including interest, used in Part T of Chapter Two. The exclusion of interest factors from the other offense loss guidelines in this Chapter is based entirely on considerations of administrative convenience in applying the guidelines. In cases where the exclusion of interest factors has a significant effect on the guideline fine range, an upward departure would be warranted.

The amount of the departure should be based on the concept of bringing past losses forward to present value, and then applying the offense multiple, so as to prevent a diminution of the monetary sanction by the mere passage of time between the offense loss and its detection, as approximated by the date of charging. In applying an interest factor, the focus should be on societal loss rather than the offender's gain. The proper interest rate is not based on what the offender earned with its ill-gotten gains, but on the loss of value to victims and society at large. An appropriate source for "societal" interest factors would include the effective rate on U.S. Treasury bills, which is used by the statutory provision for interest on criminal fines, see 18 U.S.C. § 3612(f). In setting beginning dates for applying the interest factors, the court should make reasonable estimates of the time that the losses were incurred, if more precise information is not readily available. In some instances, some or all of the loss may have been incurred after the offense conduct itself. For example, a government fraud affecting a contract award may affect the government's procurement costs in a future procurement action. (See subsection (a)(2) of §8B2.2 (Government Fraud), and its Commentary, Application Note 3). In that case, the interest factor should be applied to that component as of the time of the loss rather than the time of the offense.

§8C5.4. Departure for Extreme Cases of Detectability Characteristics (Policy Statement)

In a case where detectability characteristics either increased or decreased the overall difficulty of detecting and prosecuting the offense to a degree not considered in

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§8B2.1 (Determining the Offense Multiple), a departure from the guideline offense multiple may be warranted.

Commentary

The offense multiple guidelines allow for possible multiples of 1.5 to 3.5 on the basis of offense conduct (excluding acceptance of responsibility and voluntary reporting). In an unusual case where the offense conduct rendered the probability that the offender would be detected and convicted quite remote, the multiple should be increased. Similarly, where the offense conduct rendered the offense very likely to be detected and prosecuted, the multiple should be decreased. If the adjustments for acceptance of responsibility or voluntary reporting are not applicable, but the offense conduct was such as to make detection and conviction a virtual certainty, the multiple should be 1, before considering collateral penalties, which may indicate a multiple of less than one. See the following §§8C5.5-8C5.7.

§8C5.5. Consideration of Collateral Civil Penalties and Disabilities (Policy Statement)

The court should consider an increase or decrease in the organization's fine to reflect either or both of two factors regarding collateral civil penalties or disabilities imposed as a result of the organization's offense: (1) unusual circumstances affecting the availability or imposition of civil penalties or disabilities; or (2) a disproportion between the detectability of the offense and the combined effect of criminal sanctions and civil penalties or disabilities.

Commentary

This section reflects the principle that the total penalty for an offense should be the result of the offense conduct factors of loss, the multiple, and enforcement costs, rather than mere accumulation of collateral penalties for the same conduct.

The principal basis for an adjustment under this section is a comparison between the detectability of the offense and the total sanction, expressed as the number of "multiples" of the loss, that has been imposed through the combined effect of criminal and civil penalties and disabilities, including: civil forfeitures, suspension or debarment from government contracting or other business, the organization's loss of business reputation as a collateral effect of conviction, and administrative penalties.

The multiples specified in Part B (Offense Conduct) are "criminal" multiples only, and assume a standard level of penalties imposed by other means. Where in fact the results of collateral penalties and disabilities are significantly higher or lower than is ordinarily the case, the court should consider a departure from the guideline fine range to compensate for such effects.

More generally, the court should consider whether the total penalty, including the standard collateral penalties, is appropriate in light of the overall detectability of the instant offense. For example, if a government fraud was fully and voluntarily reported, and the offender fully cooperated in the investigation and prosecution of the offense, but nonetheless was debarred from government contracting for several years and paid treble damages plus civil

penalties equal to another multiple of the loss under the Civil False Claims Act, a large criminal fine on top of the other remedies plainly would be inappropriate.

§8C5.6. **Consideration of Penalties Against Organizational Agents (Policy Statement)**

(a) The court should consider a decrease in the organization's fine to reflect criminal or civil penalties incurred by the individuals responsible for the organization's participation in the offense.

(b) The amount of the decrease should be at least equal to punitive monetary penalties incurred by such individuals, and may also reflect the imprisonment of responsible agents, but should not exceed such individuals' relative contribution to offense loss.

Commentary

The amount of an adjustment under this section at least should be commensurate with the monetary penalty incurred by the responsible individuals, but should not include uncollectible amounts.

A decrease for imprisonment is particularly appropriate where it appears that the organization itself was unable to prevent the offense by its agents, despite a good faith effort to do so. The amount of such a decrease may be estimated by the lost value to the organization of the agent's services, or on any other reasonable basis.

§8C5.7. **Consideration of Penalties Against Joint Offenders (Policy Statement)**

The court should consider a decrease in the organization's fine to reflect any disproportion between the offense loss attributable to independent joint offenders and the penalties actually imposed upon such offenders.

Commentary

This section recognizes the need to consider the total penalties imposed upon all offenders in relation to the total offense conduct.

Under the rules stated in Part B (Offense Conduct) and this Part, the entire loss resulting from an offense is attributed to the particular defendant before the court for sentencing, even if there are other offenders who are more directly responsible for all or part of the loss. As applied to an organization and its own employees and agents, this rule is appropriate, particularly when subject to later adjustments for penalties actually imposed on the agents (see the preceding §8C5.6 (Consideration of Penalties Against Organizational Agents)). However, where there are independent joint offenders, the full attribution of loss to the organization may be disproportionate to its actual contribution to offense loss, result in excessive overall penalties if the joint offenders also are punished, or both.

In these circumstances, the court should consider a downward adjustment to from the organization's fine, based on the relative portions of loss that actually were caused, or most

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directly caused, by the organization (including its agents) and the independent joint offenders. The amount of the adjustment should be assessed by first determining the amount of offense loss that is attributable to the independent joint offenders, and then multiplying by the guideline multiple. Any such adjustment should be tempered, however, by consideration of which offenders actually were subject to punishment. If all offenders are brought to justice, the apportionment of loss will result in each offender bearing its proper share of responsibility. However, where some offenders cannot be sanctioned appropriately, because they are unable to pay, are beyond the jurisdiction of the U.S. courts, or for some other reason (not including a plea agreement or similar arrangement), the total sanction may be insufficient. In that situation, unpunished loss should be re-allocated among the offenders that are subject to punishment.

PART D - NOTICE TO VICTIMS AND PROBATION

1. NOTICE TO VICTIMS

§8D1.1. Order of Notice to Victims

(a) For offenses involving fraud or other intentionally deceptive practices, the court shall order the organization to give notice to victims in the circumstances and manner authorized by 18 U.S.C. §§ 3553(d) and 3555, if the offense appears to have affected identifiable victims that previously have not been identified or compensated.

(b) The notice shall be made in a manner reasonably calculated to provide actual notice to victims and the opportunity for such victims to seek compensation for their losses.

(c) If notice is ordered, the organization shall be sentenced to a term of probation for purposes of carrying out the court's order of notice and facilitating restitution to victims of the offense under a compensation formula to be established by the court. See §8D2.1 (Imposition of Probation).

Commentary

This section makes an order of notice to victims a mandatory sentence for all cases in which notice to victims is authorized by statute and can achieve the purpose of facilitating compensation to victims.

The order of notice to victims is a new type of sentence established by the Comprehensive Crime Control Act of 1984 and authorized only for "a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices," 18 U.S.C. § 3555. The provision was intended to "facilitate any private actions that may be warranted for recovery of losses," S. Rep. No. 98-225, at 83, and also alert victims to the possible advisability of other corrective action on their part, such as seeking proper medical attention when they have been provided with fraudulent health care services, see id. at 84. The purpose of this sentence therefore is to facilitate compensation and not to impose a sanction of

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"publicity" as such. The statute does not contemplate the use of notice to victims for punitive purposes.

2. PROBATION

§8D2.1. Imposition of Probation

An organization may be sentenced to probation only in the circumstances and upon the conditions specified below:

(a) If the organization is sentenced to make restitution, to pay a fine, or to satisfy an order of criminal forfeiture, and if full payment of the restitution or fine or full satisfaction of the forfeiture is not to be completed within 30 days after sentencing, or if a sentence of probation is necessary to impose restitution, then the organization shall be sentenced to probation upon conditions that the organization pay all restitution and fines, and satisfy all forfeitures, on the schedule, terms, and conditions ordered. If the organization appears unable to pay the full amount of its fine, then the organization's sentence to probation also shall include the conditions set forth in §8D2.2(b), unless the organization is to be reorganized or liquidated under the Bankruptcy Code.

(b) If notice to victims is ordered, the organization shall be sentenced to probation upon the conditions that the organization (1) comply with the terms of the court's order of notice to victims; (2) make restitution to victims of the offense identified through the notice procedure, under a compensation formula established by the court; and (3) report regularly to the court or its probation officer on the progress of the organization's compliance with the notice and compensation requirements.

(c) If (1) the instant offense was a felony, (2) the senior management of the organization participated in or encouraged the offense, (3) the organization or its senior management has a criminal history of one or more felony convictions of the same or similar type as the instant offense, and (4) the court determines that (A) the organization is unlikely to avoid a recurrence of the criminal behavior despite the imposition of a fine, and (B) probation is likely to prevent a recurrence of the criminal behavior in a cost-justified manner, then the organization shall be sentenced to probation upon the conditions set forth in §8D2.2(c), unless the court finds that available civil or administrative procedures will produce substantially equivalent conditions.

Commentary

This section authorizes a sentence to probation for organizations only (1) where necessary to carry out another sanction or deal with an organization's inability to pay a fine, or (2) where supervisory probation might be justified, on the basis of criminal history, as a means of preventing future offenses, either by increasing the detectability of further offenses or by requiring the implementation of internal compliance measures.

Subsection (a) requires a sentence to probation whenever: (1) a monetary sanction has or will remain unpaid for more than 30 days after sentencing; or (2) a sentence to probation is necessary to impose restitution (see §8C2.2(b) (Implementation of Restitution)). In addition, where the organization appears unable to pay the full amount of its fine, the sentence to probation must include the conditions set forth in §8D2.2(b), unless the organization already has entered or imminently is to enter the bankruptcy system. In this context, "appears unable to pay" means that the organization contends that it lacks sufficient funds to pay the fine, has failed to submit a satisfactory installment payment plan, or has failed to make one or more payments when due (unless there is an excusing event that is unrelated to the organization's solvency or reliability in making payments).

Subsection (b) requires a sentence to probation where notice to victims has been ordered (see §8D1.1(c) (Notice to Victims)), in order to carry out the terms of the order and achieve the ultimate purpose of compensation to victims.

Subsection (c) authorizes a sentence to probation if an instant felony offense involved the organization's senior management, the organization or its senior management has a criminal history of similar offenses, and the court determines that probation is necessary to prevent similar offenses in the future, and justified by its costs. In balancing the costs and benefits of probation, the court should consider both the direct costs to the organization and the government as well as the societal costs imposed by governmental intervention into private economic activity. Unless those costs are outweighed by the expected future loss that is likely to be prevented, probation is not justified on this ground. In addition, subsection (c) provides for deference to civil or administrative procedures that will achieve a substantially equivalent effect.

In assessing the prospects for "preventive" probation under subsection (c), the court also should consider the statutory limitations on organizational probation. In addition to requiring that all conditions of probation "involve only such deprivations of liberty or property as are reasonably necessary for the purposes [of sentencing]," 18 U.S.C. § 3563(b), the statute precludes the use of probation to prohibit organizations--as distinguished from individuals--from engaging in a particular occupation, business, or profession, see 18 U.S.C. § 3563(b)(6), except in the "rare case in which an organization operates in a generally illegal manner," S. Rep No. 98-225, at 69. Even lesser restrictions on business activities are oriented toward preventing "the continuation or repetition of illegal activities," id. at 96, and legislative history generally rejects the idea "that the courts manage organizations as a part of probation supervision," id. at 99.

The court should also consider, even in cases involving serious violations, that other options are available both to restrain the organization and to deal with the responsible individuals. For "the unusual case in which a business enterprise consistently operates outside the law," S. Rep. No. 98-225, at 97, several additional sanctions may also be available to incapacitate the illegal enterprise and punish its management. The forfeiture and dissolution provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, or the continuing criminal enterprise provisions of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 848, 853, are available to interdict illegal operations and separate the offending management from organizational resources. Furthermore, the organization is unlikely to be able to pay an appropriate fine, and therefore will be subject to reorganization or liquidation through the bankruptcy system, which is better equipped than the criminal probation system to restructure or dissolve a business firm while protecting creditors, employees, and consumers. Finally, in such situations, "occurring most frequently in cases where a business exists only as a front for those individuals who use it for their own

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fraudulent purposes," S. Rep. No. 98-225, at 69, individual sentencing plays a critical role, and in appropriate cases may include, in addition to fines and imprisonment, conditions of probation or supervised release that prohibit or restrict the individual defendants' affiliation with the organization (see Chapter 5, § 5F5.5 (Occupational Restrictions)).

§8D2.2. **Conditions of Probation**

(a) Any sentence of probation also shall include the condition that the organization not commit another Federal, State, or local crime during the term of probation.

(b) When a sentence of probation is imposed and the organization appears unable to pay the full amount of its fine, then the following conditions shall be applied:

(1) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, reporting on the organization's financial condition and results of business operations and accounting for the disposition of all funds received.

(2) The organization shall submit to a reasonable number of regular or unannounced examinations of its books and records by the probation officer or auditors engaged by the court, and pay the reasonable cost of such examinations.

(3) The organization shall be prohibited from engaging in any of the following transactions or activities without prior notice to and approval by the court: (A) paying dividends or making any other distribution to its equity holders; (B) issuing new debt or equity securities or commercial paper, or otherwise obtaining substantial new financing outside the ordinary course of business; or (C) entering into any merger, consolidation, sale of substantially all assets, reorganization, refinancing, dissolution, liquidation, bankruptcy, or other major transaction. In addition, all employment compensation or other payments or property transfers by the organization to any equity holder, director, officer, or managing agent shall be subject to prior review and approval by the court.

(4) The organization shall be required to notify the court or probation officer immediately upon learning of any (A) material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by government authorities regarding the organization.

(5) The organization shall be required to make periodic payments to the court, for application to the unpaid amount of the organization's fine, restitution obligation, or other monetary sanctions imposed, in such amounts as are specified by the court.

(c) When a sentence of probation is imposed under §8D2.1(c), then the following conditions shall be applied:

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(1) If deemed necessary by the court to avoid a repetition of the organization's criminal behavior in the instant offense, by facilitating detection of a further offense or correcting a serious deficiency in the organization's internal control procedures, the organization shall be required to develop and submit for approval by the court a plan for avoiding a recurrence of the type of felony offense or offenses of which it was convicted in the instant case or appearing in criminal history of the organization or its senior management. The court shall approve any plan that appears reasonably calculated to avoid such a recurrence. The organization shall not be required to terminate, restrict, or unduly burden any lawful business operation, nor to adopt any compliance measure unless such a measure is reasonably related to the circumstances of the organization's offenses of conviction, and reasonably necessary to avoid a likelihood that there will be a recurrence of the type of felony offense of which the organization was convicted in the instant case. If so ordered by the court, the organization shall distribute copies of an approved plan of operation to employees, equity holders, and creditors of the organization.

(2) The organization shall be required to make periodic reports to the court or probation officer, at intervals specified by the court, regarding the organization's progress in (A) implementing any plan required and approved by the court under subsection (c)(1), and (B) avoiding the commission of further criminal offenses. Such reports should be in a form to be prescribed by the court, but (i) should disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigations or formal inquiries by government authorities, of which the organization learned since its last report, (ii) shall not require disclosure of any trade secrets or other confidential business information, including future business plans, and (iii) shall not be unduly or unreasonably burdensome to the organization or its legitimate business activities.

§8D2.3. <u>Terms of Probation</u>

(a) When a sentence to probation is imposed to enforce payment of a fine or restitution, to impose restitution, or to carry out an order of notice to victims, the term shall be sufficient to enforce payment or completion of the notice, but not longer than five years.

(b) When a sentence to probation includes the conditions prescribed by §8D2.2(b), and the organization appears unable to pay the full amount of the monetary sanctions imposed, the term shall be the maximum authorized by law.

(c) When a sentence to probation is imposed under §8D2.1(c), the term is:

(1) if the organization is convicted of a Class A, B, or C felony, five years; and

(2) in any other case, three years.

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(d) If a sentence to probation is imposed on the basis of a felony conviction, the minimum term is one year.

§8D2.4. **Early Termination of Probation**

The court may order early termination of probation and discharge the defendant at any time after the minimum term required by law, if the circumstances requiring probation no longer exist and are not likely to recur.

§8D2.5 **Community Service** (Policy Statement)

An organization should not be ordered to perform community service unless the organization is uniquely situated to repair harm caused by the offense, or it is essential to repair the harm immediately. Community service should be limited to taking such corrective measures. The cost of performing community service shall be deducted from the organization's total monetary sanction as the equivalent of monetary restitution.

Commentary

An organization can only perform community service by paying its employees or others to do so. Thus, the effect of community service on an organization is equivalent to an indirect monetary sanction, and therefore is less desirable than direct monetary sanctions such as fines or restitution. In some instances, however, the convicted organization may possess unique knowledge or skills that place it in the best position to repair damage caused by the offense. Where that is the case, community service directed at repairing damage caused by the offense may provide the quickest and most efficient means of preventing further harm, and could obviate the need for other sanctions such as an order of notice to victims, an order of restitution, or other compensatory or corrective remedies. In essence, community service is an in-kind substitute for the compensatory sanction of restitution.

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1/ Refer to the statute for the underlying or object offense.
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United States Sentencing Commission

Draft Proposal on Standards for Organizational Probation

- by -

Professors John C. Coffee, Jr., Richard Gruner, and Christopher Stone

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June 30, 1988

Standards for Organizational Probation
Prepared for the United States Sentencing Commission

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2. ORGANIZATIONAL PROBATION

Introduction

a. Background. With the Sentencing Reform Act of 1984, a sentence to probation is now an available sanction that the sentencing court can impose on a convicted organization, either independently of any other sanction or in addition to the maximum sentence otherwise imposable. See 18 U.S. §3551(c). Probation is authorized unless the crime is a Class A or Class B felony or "is an offense for which probation has been expressly precluded" (18 U.S.C. §3561(a)). Under prior federal law, organizational probation was occasionally imposed, but had to be implemented through the suspension of another sentence, thereby precluding the court from imposing both probation and the maximum sentence. Relatively few cases had considered the scope of the court's authority in imposing this sentence, and considerable uncertainty existed. Compare United States v. Atlantic Richfield Company, 465 F.2d 58 (7th Cir. 1972); United States v. Mitsubishi Intern. Corp., 677 F.2d 785 (9th Cir. 1982). For an overview of the prior case law, see Gruner, Let the Punishment Fit the Organization: Sanctioning Corporate Offenders through Corporate Probation, 16 Am. J. Crim. L. ____ (1988). Under prior case law, defendants were generally viewed as having the power to reject probation and elect to have the maximum sentence imposed. United States v. Mitsubishi, supra, at 788-89. Possibly as a result, only sporadic use appears to have been made of organizational probation. U.S. Sentencing Commission data show some 44 sentences of probation between January 1, 1984 and February 28, 1985

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(out of 242 corporations convicted in federal courts during this period); typically, the sentence to probation was imposed only to enforce a fine or order of restitution.

The potential utility of the sanction exceeds the limited use to which it has been put to date. A four year survey conducted by the U.S. Sentencing Commission covering the years 1984 to 1987 shows that on average 305 organizations are convicted a year, roughly 70-75% of which convictions are for fraud, antitrust, or property crimes, with another 20-25% involving regulatory offenses. Roughly 13% of these convicted organizations were large, publicly held corporations or the subsidiaries thereof, and the rest were almost exclusively closely-held corporations. Although this data indicates that organizational offenders are under 1% of the total number of offenders facing sentencing in federal court, it also shows that the problem of organizational sentencing arises with sufficient frequency to justify guidelines, particularly because most district court judges will have had little experience with this type of sentencing. The limited use made of probation in the past may reflect the courts' lack of familiarity with its availability or rationale in this context. Judicial education may then need to precede greater use.

b. Rationale. The question thus framed is when and why should organizational probation be used. These guidelines answer that, although organizational probation is authorized as an independent sanction, it should properly be viewed as a supplementary sanction, one that can sometimes add necessary preventive restraints to the deterrent threat of financial sanctions. Thus, it will generally not be a lesser

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alternative to some other sanction, but rather a means of cumulating sanctions in order to minimize the prospect of a repetition of the same or similar criminal behavior. Although primary reliance should be placed on financial sanctions -- e.g., fines and restitution -- to deter organizational misconduct, there are important reasons why financial sanctions, standing alone, may not be sufficient and may need to be supplemented in some cases by the use of additional preventive restraints imposed as probation conditions under a sentence to probation.

First, placing exclusive reliance on fines to deter serious instances of criminal behavior tends to exaggerate the state of existing knowledge about deterrence. To be sure, in economic theory, deterrence can be achieved by raising the expected penalty so that it exceeds the expected gain from the misbehavior (after discounting both by the probability of detection and conviction). Yet, even if one accepts this theory without reservation (and most criminologists do not), it is unlikely that this approach can be reliably implemented today or in the foreseeable future, because we simply lack the ability to estimate accurately the critical variables that this approach depends upon -- namely, the likelihood of apprehension and conviction that the offender faced (or, more accurately, that the offender perceived) and the expected gain or loss from the crime (which may be greater or lesser than the actual gain or loss). Even if loose "ballpark" estimates can be made of the overall risk of apprehension for particular crimes, such knowledge can be very misleading when applied to a specific case, both because individual defendants may vary

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greatly in terms of their level of skill and sophistication (or in terms of their own self-estimates of their likelihood for success, which is the critical variable) and because past data may not prove predictive for the future, as new and more ingenious frauds are invented.

Even if one could determine the precise expected penalty cost that would deter the organization as an entity, there is no assurance that its agents would be similarly deterred. Individuals within an organization are subject to different pressures and incentives and for personal reasons may cause their organization to act illegally, even when it is not in the organization's rational interest (narrowly conceived) to do so. As a result, to cause the organization to invest in monitoring controls to detect and prevent its agents from acting illegally, it is logically necessary to overdeter it by not only canceling the expected gain, but also creating an expected loss that justifies investment in monitoring controls[1] -- unless other means

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[1] Merely removing the expected gain does not of itself give the organization an adequate incentive to invest in monitoring expenditures to prevent its employees and agents from acting illegally. To illustrate, assume in a given case that the expected gain is $1,000,000, and the likelihood of apprehension for the corporation is 10%. In theory, it would take a fine of $10,000,000 here to deter the organization, but even this punitive a fine will not necessarily deter the individual actor who may face a much lower risk of apprehension. If we assume that individual actors within the organization are often harder to detect and convict than the organization, it follows that they may not be deterred when the organization is. Assume further that a $200,000 investment in monitoring controls would prevent employee misconduct that could create liability for the corporation. Given the 10% likelihood of corporate apprehension, it should in theory take an increase of $2,000,000 in the fine to justify this investment. An order of probation might impose adequate internal controls much more cheaply without the need for extraordinarily severe financial penalties.

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(such as the use of probation conditions) can be employed to assure the court that adequate monitoring controls have been installed. In this light, a sentence to probation can be means by which society economizes on the costs of punishment.

More generally, preventive probation conditions are a safeguard against the danger that excessive reliance on the logic of general deterrence may lead us systematically either to "underdeter" or "overdeter" organizations with threatened fines. For example, under §8B3.1, which addresses fines, the presumptive "offense multiple" is set at 2, unless a higher or lower multiple is specially justified. Thus, if the actual risk of apprehension is less than fifty percent (as it may be for many hard-to-detect offenses), financial penalties based on such a multiple should systematically underdeter, because they do not adequately compensate for the lower than estimated detection risk. Conversely, if individual sentencing judges seek to utilize higher multiples (up to the permitted ceiling of 5) because they underestimate the likelihood of apprehension and conviction, they may err in the opposite direction and impose unnecessarily severe penalties. In this light, imposing preventive probation conditions can be viewed as a means of de-emphasizing the importance of those variables that we cannot reliably estimate, such as the apprehension risk.

From a policy perspective, the critical issue surrounding the use of probation for organizational offenders is the cost of such a strategy in relation to its benefits. If a sentence of probation were conceived of as granting the sentencing court a broad charter to intervene in internal corporate decision-making, the costs of such an

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approach might be high, as a danger of bureaucratic interference would arise that could chill economic efficiency. Still, Congress addressed these concerns in the statute and provided in §3563(b) that all conditions of probation "involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing"; in addition, §3563(b) specifies that probation conditions not preclude the organization from engaging in any legitimate occupation, business or profession. In compliance with these directions, these guidelines take a narrow view of the court's role in setting probation conditions. No authority is granted the court to interfere in, or supervise, areas of legitimate business discretion. The central aim of these guidelines is to improve the corporation's own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior. Voluntary compliance is encouraged, and it is anticipated that the corporation will normally take a leading role in proposing the probation conditions and internal controls that should be imposed. See §8D2.5.

For the most part, the types of internal controls that might be imposed under a sentence to probation are not novel and have well established precedents, both in the standard practices of the Securities and Exchange Commission, which more than a decade ago pioneered the development of improved monitoring and auditing controls through consent decrees and injunctions,[2] and in earlier practices of

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[2] Consistent with the SEC's approach on internal controls, no attempt has been made in these guidelines to mandate any particular system of internal controls. Rather, as the SEC has observed, "[t]he test is whether a system, taken as a whole, meets the statute's specified objectives. 'Reasonableness', a familiar legal concept,

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federal courts in fashioning injunctive remedies, which sometimes have involved monitoring corporate conduct through judicially appointed overseers.[3] In principle, there is no reason why a sentencing court, following a criminal conviction based upon proof beyond a reasonable doubt, should have less flexibility in the preventive restraints that it can impose than another federal court, which may grant an injunction in a civil action brought by an administrative agency based only upon a preponderance of the evidence and without any showing that criminal conduct has occurred. Moreover, the bar generally has not opposed, and has in many cases adopted, the SEC's standard consent decree conditions. Today, in the wake of a major corporate scandal, the corporation's board will usually conduct a detailed internal investigation, typically involving the use of outside special counsel, and resulting in a lengthy self-study and improved internal controls.[4] Federal law also requires most publicly held corporations to maintain an adequate system of internal accounting controls.[5] In this light,

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depends on an evaluation of the facts and circumstances." SEC Exch. Act. Rel. No. 34-17500 (1981).

[3] This tradition traces back at least to Georgia v. Tennessee Copper Co., 206 US. 230 (1907), which upheld injunctive relief involving the appointment of a monitor to prevent further criminal conduct by the defendant corporation. See also Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975); Pennsylvania v. Porter, 659 F.2d 309 (3rd Cir. 1981).

[4] For recent cases, see In re E.F. Hutton Banking Practices Litigation, 634 F.Supp. 265 (S.D.N.Y. 1986) (noting study conducted by former Attorney General Griffin Bell following Hutton's conviction); Allison v. General Motors Corp., 604 F.Supp. 1106 (D.C. Del. 1985).

[5] Section 13(b)(2) of the Securities Exchange Act of 1934, added by the Foreign Corrupt Practices Act of 1977, requires all "reporting" corporations to "devise and maintain a system of internal accounting controls sufficient to provide" certain specified assurances.

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corporate probation represents not a new departure, but a codification of existing practices and requirements, coupled with a clearer judicial role to ensure the integrity of the process.

A final reason for authorizing corporate probation involves public confidence in our system of criminal justice. In the public's eye, a precisely calibrated system of fines may be perceived as amounting to a tariff system that permits corporations and other business entities to engage in criminal behavior so long as they are prepared to pay the specified tax. Ultimately, the aim of the criminal law (and of Congress) is to prevent the prohibited behavior, not simply raise the cost of engaging in it. Thus, while it is defensible to structure a system of penalties so that the fine approximates either the expected benefit or the expected social loss, it is particularly important in such instances to communicate clearly that this effort to price the crime does not legitimize it. Organizational probation, as a supplementary sentence, makes clear that there is no price that, when paid, entitles the organization to engage in the misbehavior.

§ 8D2.1 Imposition to a Term of Probation

(a) In addition to any other sentence imposed by the court, an organization should be sentenced to probation, subject to the restrictions in subsection (b) below, when

(i) the offense was either

(A) a felony, or

(B) a misdemeanor that (1) resulted in a loss of human life, (2) otherwise threatened the health or

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safety of any individual, or (3) was part of a pattern of criminal behavior involving at least one other criminal conviction within the five years immediately preceding the date of the instant conviction; and

(ii) the court finds that

(A) management policies or practices of the organization, including any inadequacies in its internal controls, encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, and such policies or practices have not been corrected in a manner that makes repetition of the same or similar criminal behavior highly unlikely; or

(B) the circumstances surrounding the offense, including the possible involvement of senior organizational officials, have not been adequately clarified, and the failure to obtain such clarification is likely to diminish respect for the law, hinder internal accountability, or otherwise be contrary to the public interest; or

(C) the organization would not otherwise be required to make restitution to any person or persons injured as a proximate result of its criminal behavior, and any complication or prolongation of the sentencing process resulting from awarding such restitution as a condition of probation is outweighed by the need for

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restitution of such victim or victims; or

(D) the organization is able to provide essential community service or interim relief for the benefit of the victims of its crime, or to repair or restore specific harms or injuries, provided that in all cases hereunder the court first finds that an order of restitution is either not feasible or not otherwise an adequate substitute; or

(E) the organization is sentenced to pay a fine, make restitution, satisfy an order of criminal forfeiture, comply with an order of notice, or perform community service, and either it is unable to perform or make full payment thereof, as required, or such payment or performance is to be delayed in whole or part for a period extending more than 30 days from the date of sentencing.

(b) A sentence of probation may not be imposed in the event:

(i) the offense of conviction precludes probation as a sentence;

(ii) the offense of conviction is an infraction.

Commentary

Rather than make probation a mandatory sentence for all felonies and serious misdemeanors, this section authorizes a sentence to probation only in five circumstances:

First, where management policies, practices or inadequate controls bear a causal responsibility for the criminal behavior,

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subparagraph (A) of §8D2.1(a)(ii) instructs the court to impose a sentence to probation, unless the court finds that these deficiencies were subsequently corrected so as to minimize the risk of recidivism. In making both of these determinations, it is assumed that the court will consider, and may rely upon, information and evaluations contained in the presentence report prepared by the probation officer, who may be specially appointed by the court under §8D2.5. However, the organization, itself, will have the opportunity to comment on this report and may seek to convince the court that any problems or deficiencies noted in it have been corrected so as to obviate the need for a sentence to probation. See §8D2.6. Thus, this section creates an incentive for voluntary compliance.

The following examples illustrate circumstances in which the conditions specified in subparagraph (A) might require the preparation of such a compliance plan:

Illustration One. XYZ Corp. is convicted under the Foreign Corrupt Practices Act, after having made cash payments to political officials and purchasers' representatives in several foreign countries. At trial, it is proven that a $10 million slush fund had been established, which had never come to the attention of the corporation's audit committee, although it was known to certain of its accountants.

Illustration Two. B. Corp. and several of its executives are convicted of having sold colored water as apple juice over a five year period. Midway during the period, senior corporate executives learned of this illegal practice and consulted the corporation's lawyers as to whether it must be halted; however, no report or other communication

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about this on-going problem ever reached the board of directors or its audit committee.

Illustration Three. ABC Corp., a brokerage firm, is convicted of 500 counts of mail fraud for systematically defrauding its commercial banks through a standard procedure of making overdrafts on its accounts. Over fifty of the firm's local branch offices are found to have participated in this program of overdrafting.

Illustration Four. On three occasions within the last five years, Widget Corp. has been found to have leaked a toxic mercury substance into local waterways and to have contaminated local drinking water. Two of these prior instances resulted in civil penalties, and the third and most recent instance led to a criminal conviction on a misdemeanor conviction.

The foregoing examples are only illustrative and not exclusive, but they show factors -- repetition, involvement of senior management, a systematic practice, persistent information blockage within the organization, or dysfunctional internal controls -- that should be addressed at sentencing and that may justify use of a sentence to probation. Essentially, this same view that preventive restraints constitute legitimate probation conditions has been endorsed by the American Bar Association in its Standards for Criminal Justice. See ABA, Standards Relating to Sentencing Alternatives and Procedures, 18 ABA Standards for Criminal Justice §2.8(a)(v)(A) (recommending as a precondition for the imposition of a sentence to probation that the court find that the underlying criminal behavior have been "facilitated

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by inadequate internal accounting or monitoring controls or ... that a clear and present danger exists to the public health or safety"). Where the corporation is publicly held and has an independent board, the focus of probation conditions should be on the re-establishment of internal accountability. Where this is not the case and the corporation is controlled by persons who may benefit from the crime, more interventionist strategies may sometimes be appropriate, involving special recordkeeping procedures that the probation officer will supervise and reports from designated officials or employees. See §8D2.4(b)(1).

Subparagraph (B) of §8D2.1(a)(ii) establishes the triggering conditions for a probation condition that essentially codifies the SEC's established practice of requiring an internal investigation and report. The premise here is that adequate internal accountability normally cannot be restored unless and until the board of directors (or, if there is not a disinterested board, the shareholders) has an adequate understanding of the events resulting in the conviction. In addition, subparagraph (B) is also a response to an unfortunate plea bargaining dynamic that often results when corporations are prosecuted. Recurrently, the charges are dropped against individual officials at the same time as the corporation pleads guilty in exchange. In such instances, the corporation's plea of guilty may establish very little factually about the nature of the criminal conduct. Indeed, the contrast is striking between a plea of guilty in an individual case, where Rule 11 of the Federal Rules of Criminal Procedure requires the

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court to ascertain that the defendant's plea is knowing and voluntary -- a process that as a practical matter requires the court to review the factual elements of the indictment[6] -- and a corporate prosecution where the corporation's plea of guilty (or nolo contendere) communicates very little information about what actually happened. Although the permissibility of plea bargaining is not here questioned, §3553(a)(2) states that a purpose of sentencing is "to promote respect for the law," and this obligation implies that the court should not permit the sentencing process to serve as a shield by which the involvement of culpable individuals can be effectively screened from public view.

When the court finds that the circumstances specified in subparagraph (B) of §8D2.1(a)(ii) are present, it should require an investigation under §8D2.4(b)(2). It should be emphasized, however, that the purpose of the investigation is to restore internal accountability and maintain respect for the law, not to gather evidence for further criminal proceedings against individual officials. As noted in §8D2.4(b)(2), no individual should be required to waive the privilege against self-incrimination; nor should the organization or any individual be required to waive the attorney/client privilege. The court may also substitute a generic disclosure of the broad outlines of the conduct for a specific factual disclosure if it finds that

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6 See Henderson v. Morgan. 426 U.S. 637 (1976) (failure to ascertain that defendant understood elements of the crime and acknowledged committing them prevented court from accurately determining whether the plea was voluntary).

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"unjustified" injury to any individual or the organization would otherwise result. See §8D2.4(b)(2).

Subparagraph (C) of §8D2.1(a)(ii) authorizes the use of probation as a means to provide restitution where an independent sentence of restitution could not be imposed, because §3663 ("Order of restitution") authorizes restitution only for offenses under Title 18 and one other statute. The legislative history of the Comprehensive Crime Control Act of 1984 expressly indicates that restitution may be imposed as a condition of probation where it could not be ordered as an independent sentence. Senate Report No. 98-225 states that the Act "carries forward the current law provision permitting imposition of a condition that the defendant be required to make restitution to a victim. The court could in an appropriate case order restitution not covered by paragraph [§3563](b)(3) (and section 3556) under the general provisions of subsection [§3563](b)(20). In a case involving bodily injury, for example, restitution as a condition of probation need not necessarily be limited to medical expenses." (at pp. 95-96).

Section 3663(d) requires a sentencing court to order restitution by the defendant, unless the complication or prolongation of the sentencing process resulting from the fashioning of such an order outweighs the need to provide restitution to any victims. This same standard should govern when restitution is awarded as a condition of probation, and the last clause of subparagraph (C) adopts essentially this formulation. However, when the court determines that

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the victim's need for restitution does outweigh these considerations of delay, it is not limited by the standards of §3663 and may, for example, order restitution of non-medical expenses. See S. Report No. 98-225 at 9596.

Subparagraph (D) of §8D2.1(a)(ii) specifies the circumstances in which an order of community service is deemed justified. Section 3563(b)(13) provides that the court may require as a condition of probation that the defendant "work in community service as directed by the court," and the Senate Report indicates that "[t]his condition might prove especially useful in a case in which the imposition of a fine or restitution is not appropriate, either because of the defendant's inability to pay or because the victims cannot be readily identified or the actual amount of the injury is slight." See S. Rep. No. 98.225 at p. 98. No indication exists that Congress intended this condition to apply only to individuals, and prior case law had also upheld the imposition of a community service probation condition on a convicted corporation. See United States v. Danilow Pastry Co., Inc., 563 F. Supp. 1159, 1164 n. 11 (S.D.N.Y. 1983). An illustrative case where an order of community service might be appropriate would be one involving environmental damage, resulting from an oil spill caused by illegal activity. In such a case, much of the harm or injury might not occur to identifiable individuals (or might occur to wildlife), and thus an order of restitution would be either infeasible or not an adequate substitute for an order of community service requiring the offender to restore the damage.

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Under §8D2.4(b)(5) when probation is imposed to facilitate an order of community service, the cost to the organization from such an order should not be disproportionate to the maximum fine imposable. However, this cost need not be subtracted from the fine actually imposed (whether or not such fine is the maximum fine allowable). This rule is necessary to provide some outer limit on the court's authority and is also consistent with the prevailing law that probation conditions need only be reasonably related to the crime and the purposes of sentencing. See §3563(b) (requiring that probation conditions involving deprivations of property be "reasonably necessary for the purposes" of sentencing). The purposes of sentencing include the imposition of "just punishment for the offense" (see §3553(a)(2)(A)), which concept certainly includes making victims whole.

Subparagraph (E) of §8D2.1(a)(ii) recognizes that a sentence to probation is a useful and appropriate mechanism by which to enforce orders to pay a fine, restitution, or perform acts having financial or other costs. For the corresponding probation conditions, see §8D2.4(b)(4). See also §8D2.7 on enforcement.

§8D2.2 Term of Probation

(a) When a sentence to probation is imposed, the term of probation shall be:

(1) in the case of a felony, at least one year, but in no event more than five years;

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(2) in any other case, no more than three years; provided, however, that the term of probation should not extend beyond the court's immediate objective in imposing a term of probation, unless a longer term is required by law.

(b) After considering the factors set forth in §3553(a) and the recommendations, if any, of the probation officer, and after giving notice and an opportunity to respond to the government, the court may order early termination of probation and discharge the organization, if it finds that (i) no condition of probation has been violated, and (ii) the circumstances requiring probation no longer exist and are not likely to recur; provided, however, that, in case of a felony, any such termination and discharge shall not take place prior to the completion of at least one year of probation.

(c) The court may, after a hearing, extend a term of probation, if less than the maximum term was previously imposed, or modify or enlarge the conditions of probation, at any time prior to the expiration or termination of the term of probation, as provided in 18 U.S.C. §3564, if it finds that a condition of probation was violated or if it acquires new information not in its possession at the time of the last sentencing hearing that indicates the need for such an extension in light of the purposes of sentencing.

Commentary

When the court imposes a sentence to probation in order to facilitate an order of restitution or community service or to ensure payment of a deferred fine, the term need not exceed the period

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necessary to determine and award restitution, perform the required community service, or pay the deferred fine -- unless the crime is a felony. In the case of a felony, 18 U.S.C. §3561(b) requires a minimum term of one year (and also specifies a maximum term of five years). In a case where any required restitution or fine is paid shortly after sentencing, the organization will thus remain subject to §3563(a)'s mandatory condition that it not commit another crime during the remainder of the mandatory one year term of probation. If it violates this condition, additional preventive conditions may be imposed, the term of probation may be extended, or probation may be revoked and a higher fine imposed (if the maximum fine was not originally imposed).

Subsection (b) of §8D2.2 tracks the language of 18 U.S.C. §3564(c), including its minimum one year term. Where the conditions specified in subsection (b) are satisfied, it may be assumed that the interests of justice warrant termination. Extension of a term of probation is authorized by §3564(d), and modification of the conditions of a sentence to probation by §3563(c). See also Rule 32.1 of the Federal Rules of Criminal Procedure.

§ 8D2.3 Conditions of Probation

(a) Any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation; provided, however, that if another crime occurs within a different and unrelated unit of the organization, the court should revoke probation only if it finds that the new violation

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evidences a pattern of violations or otherwise indicates that the organization has not attempted diligently and in good faith to comply with the conditions of probation.

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing, (2) do not require the defendant to refrain from engaging in any lawful occupation, business, or profession (18 U.S.C. §3563(b)(6)), and (3) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing, including the need to secure the defendant's obligation to pay any deferred portion of a fine or order of restitution. Recommended conditions are set forth in §8D2.4 below.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or an order of community service.

(d) If the court is apprised of the existence of victims of the defendant's criminal conduct who would be eligible to receive restitution if a sentence of probation were imposed and the court declines to impose such a sentence or to make restitution a condition thereof, the court shall state its reasons on the record for declining to do so.

Commentary

Subsection (a) is derived from §3563(a)(1), which provides

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that it is a mandatory condition of probation that the defendant not commit "another federal, state or local crime during the term of probation." This mandatory language is not, however, sensitive to the unique status of the large publicly held corporation, particularly the conglomerate, which may operate through numerous and unrelated subsidiaries. The fact that such a firm commits one violation in a banking subsidiary and another in a construction subsidiary, several years apart, may not necessarily signify anything more than that it controls several billion dollars in assets and operates on a sizable scale. Hence, §8D2.3(a)'s final clause reminds the court that revocation of probation is discretionary. See Rule 32.1 of the Federal Rules of Criminal Procedure and §3564(a)(1). Of course, even when the court does not revoke probation, it may extend its term or modify its conditions in light of the new violation or other information. See §§ 3563(c) and 3564(d).

Subsection (b) essentially tracks the language of §3563(b), including the implicit restraint set forth in § 3563(b)(6), applicable only to organizations, that the court not prevent an organization "from engaging in a specified occupation, business, or profession..."

Subsection (c) is mandated by §3563(a)(2). Subsection (d) parallels the requirement in §3663(a)(2), which specifies that if the court does not order restitution. or orders only partial restitution, it "shall state on the record the reasons therefore." Consistency requires that a similar obligation to state reasons be recognized when

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restitution is imposed only as a condition of probation, which alternative method is necessary when the crime of conviction does not fall within those referred to in §3663(a)(1).

§ 8D2.4 Recommended Conditions of Probation (Policy Statement)

(a) The following "standard" conditions are generally recommended:

(1) the organization shall answer in writing truthfully, completely, and promptly all requests for information, financial data, or reports on business operations made by the court or the probation officer and shall use its best efforts to cause its officers, employees, and agents to execute and deliver such written assurances and certifications, which may be required to be sworn under oath, as the court or the probation officer shall direct; provided, however, that no individual should be required to sacrifice the privilege against self-incrimination, and neither the organization nor any individual should be required to produce materials protected by the attorney-client privilege or to provide information that the court finds not to be related to any probation condition or sentencing purpose;

(2) the defendant shall provide the probation officer, or the agents thereof, with immediate access to the defendant's offices, facilities, and other properties, shall promptly submit for examination any books or records, and

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shall provide such further written assurances, in each case as the court or probation officer deems necessary to monitor compliance with any probation condition;

(3) the defendant shall notify the probation officer promptly of the filing of any indictment or information charging it, or a subsidiary, with criminal conduct, whether in local, state, or federal court, and of any conviction on, or plea entered with respect to, such charge or charges.

(b) The following "special" conditions of probation are recommended in particular cases, as described below:

(1) Compliance Plan. If the court finds pursuant to §8D2.1(a)(ii)(A) that management policies or practices encouraged, facilitated, or otherwise substantially contributed to the criminal behavior or delayed its detection, the court should require (A) the filing by defendant or, if necessary, the probation officer of a compliance plan, satisfactory to the court, detailing the specific procedures that will be implemented to correct such policies, practices, or inadequacies at or prior to the date of sentencing, and (B) the communication of the terms of such plan and the conditions of probation to relevant personnel. Compliance with such plan should, itself, be a condition of probation. Such plan may require:

(A) the conduct of a special audit or other internal investigation or inspections, which may be required periodically during the term of probation;

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(B) the appointment of independent counsel or the use, if available, of a special committee of independent directors;

(C) the hiring and use of special consultants;

(D) the adoption of new or revised information gathering procedures and the preservation and centralization of such records or of any other information gathered by the organization;

(E) the designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offense;

(F) the revision or adoption of formal corporate policies, including those expressed in employee manuals and other written procedures, including notification procedures for the reporting of specific transactions or events to specified personnel with the organization, including the board of directors.

(2) Internal Investigation. If, pursuant to § 8D2.1(a)(ii)(B), the court finds that clarification of the circumstances of the crime, including the possible involvement of any officers or agents of the organization, is appropriate, the court should require the preparation of a special study, to be conducted, as the court shall direct, either by agents of the corporation approved by the court or by special counsel appointed by the court, which report shall set forth a factual account of the criminal behavior, the

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involvement of corporate personnel therein, and an evaluation of existing and possible internal control systems. When completed, such report shall be filed with the court as a public document, except to the extent that the court permits the substitution of a factual summary therefore in order not to expose the corporation or others to unjustified injury;

(3) Restitution. If the court finds, whether pursuant to §8D2.1(a)(ii)(C), or otherwise, that victims of the crime should receive restitution, it should specify procedures for the conduct of a restitution hearing, including, when permitted under 18 U.S.C. §3555, procedures for the giving of an order of notice to victims, and should require the organization to make restitution in compliance therewith and provide the court with detailed reports as to all claims made upon the organization for restitution or damages with respect to the criminal behavior and all payments made by it or on its behalf.

(4) Security Provisions. If the organization is unable to pay (or otherwise satisfy) immediately any fine, order of restitution, order of notice, or criminal forfeiture imposed by the court, the organization may be prohibited from engaging in any of the following transactions or activities without prior notice to, and approval by, the court: (A) paying dividends or making any other distribution to its equity holders; (B) issuing new debt or equity securities or commercial paper, or otherwise obtaining substantial new

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financing outside the ordinary course of business; or (C) entering into any merger, consolidation, sale of substantial assets, reorganization, refinancing, dissolution, liquidation, bankruptcy, or other major transaction. In addition, all employment compensation or other payments or property transfers by the organization to any equity holder, director, officer, subsidiary affiliated corporation, or managing agent may be made subject to prior review and approval by the court.

(5) Community Services. If the court finds, pursuant to §8D2.1(a)(ii)(D), that the organization is able to provide essential community service or interim relief, or to repair or restore specific harms or injuries, for which an order of restitution is either not feasible or not an adequate substitute, the court should specify the specific services that the organization is to provide and require performance of such services for the benefit of its victims as a condition of probation; provided, however, that the costs of such services should not be disproportionate to the maximum fine imposable for the offense.

(6) Expenses. The defendant shall pay the reasonable fees and expenses of any special counsel or probation officer, and any agents thereof, appointed by the court pursuant to §8D2.5 and any other expenses incident to preparation of the reports described in special probation conditions (3), (4) and (5) above.

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(c) Preventive probation conditions (i) should be imposed only to reduce the likelihood of future criminal violations similar or related to the instant offense, (ii) should be limited in their scope to those portions of the organization's operations or management involved in the offense or responsible for its detection, and (iii) should principally seek either to increase the probability of detection of future criminal behavior or the monitoring capacity of internal organizational organs. Conditions of the following type are not authorized for an organization and shall be considered inconsistent with 18 U.S.C. §3563(b):

(1) Conditions requiring the dismissal or demotion of organizational personnel or infringing on the shareholders' right to elect directors;

(2) Conditions that unduly burden or constrain the legitimate financial, investment, or business discretion of organizational officials, such as by restricting the opening, closing or relocation of plants, the hiring or dismissal of employees, changes in products, or other business operations;

(3) Conditions that impose unreasonable costs or delay on the organization in relation to the potential social harm from the offense; and

(4) Conditions that require the making of charitable or other financial contributions to any person or organization that is not a victim of the crime entitled to receive restitution or community service.

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Commentary

The "standard" conditions set forth in subsection (a) of §8D2.4 parallel those typically required of individual probationers, with necessary adjustments. Although it might be constitutionally permissible to require the organization to waive the attorney-client privilege, §8D2.4(a)(1) does not permit such a compelled waiver in the belief that this might expose the organization to increased civil litigation, because the waiver could create rights in third parties. The corporation (and other business entities) has no constitutional right against self-incrimination.

The "special" conditions of probation set forth in subsection (b) of §8D2.4 directly correspond to the triggering criteria for the imposition of a sentence to probation set forth in §8D2.1. Several different limitations are set forth in §8D2.4. First, when a compliance plan is ordered, a specific plan must be approved by the court under §8D2.4(b)(1). This requirement responds to the concerns expressed in United States v. Atlantic Richfield, 465 F.2d 58 (7th Cir. 1972), where the sentencing court had instead ordered the defendant to "set up a program within forty-five (45) days to handle oil spillage into the soil and/or stream." Id. at 61 and n.1. The lack of specificity of such an order was found objectionable by the appellate court, because it left the defendant with an inadequate basis for knowing whether it had complied with the probation conditions.

Before determining whether to order an internal investigation under §8D2.4(b)(2), the court should first review the presentence

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report. If adequate clarification is obtained in that document and such information has been presented to the board, a special probation condition ordering an internal investigation should be ordered only if necessary to maintain "respect for the law" under §8D2.1(a)(ii)(B). This approach also creates a positive incentive for early disclosure to the probation officer, because the presentence report is a confidential document. See §8D2.6(b).

Subparagraph (b)(6) of §8D2.4 requires the defendant to pay the reasonable expenses of probation. Courts have approved the fairness of a rule requiring probationers to repay costs of their prosecution or state-provided defense. See, e.g., Fuller v. Oregon, 417 U.S. 40 (1974); 79 A.L.R. 3d 1025 (1977); Comment, Charging Costs of Prosecution to the Defendant, 59 Geo. L.J. 991 (1971).

Subsection (c) of §8D2.4 specifies certain impermissible conditions. Under subparagraph (c)(1), the court may neither require the dismissal of a senior officer or the election of new directors; these choices properly belong to the shareholders, and any contrary rule would visit a penalty on persons who had not been convicted of any crime. Under 18 U.S.C. §3563(b)(7), a probation condition may require the probationer to refrain from "associating unnecessarily with specified persons." In the case of organizations, the provision should be read narrowly and applied only to convicted individual felons. Thus, if a corporate president were convicted and resigned from office, it would be permissible to bar the corporation from hiring him in any

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capacity for the term of probation.

Under §8D2.4(c)(4), charitable contributions may not be ordered as a condition of probation. Although a few courts have done so, (see, e.g., United States v. Mitsubishi Intern. Corp., 677 F.2d 785 (9th Cir. 1982), most have disapproved. Courts are not well positioned to act as foundations, and judges may also have strong preferences for local charities that can sway their judgment. To be sure, organizations can still make charitable contributions, and this may sometimes cause the court to reduce the fine imposed, but the adoption of guidelines for fines should reduce the use of this technique for evasion.

Subparagraph (c)(2) of §8D2.4(c) essentially fleshes out the restriction implicit in §3563(b)(6), which authorizes only an individual to be restrained from "engaging in a specified occupation, business or profession...." As explained in Senate Report No. 98-225, because of "business concerns [about] ... inappropriate use [of this condition] to put a legitimate enterprise out of business, that part of the provision has been modified to relate only to individual offenders. This deletion should not be construed to preclude the imposition of appropriate conditions designed to stop the continuation of a fraudulent business in the unusual case in which a business enterprise consistently operates outside the law." (id. at 97). The Senate Report also notes the propriety of a probation condition directed at requiring an organization convicted of executing a fraudulent scheme "to operate

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that part of the business in a manner that was not fraudulent." (id. at 96). In this light, the watershed between permissible and impermissible conditions appears to be that preventive probation conditions are not precluded by §3653(b)(6), so long as they are specific and reasonable, while prophylactic or punitive restrictions are improper if they bar the organization from participating in legitimate business activities, markets, or lines of commerce.

§ 8D2.5 Special Probation Officers

(a) An organization sentenced to probation shall be monitored by a probation officer during the term imposed to the degree specified by the sentencing court.

(b) The sentencing court may appoint one or more qualified persons to serve, with or without compensation, as special probation officers to oversee an organizational probationer. A person shall be qualified to serve as a probation officer for an organizational probationer if the person has sufficient training or experience to effectively monitor the conformity of the organization's conduct to its terms of probation.

(c) A probation officer appointed to monitor an organizational probationer should:

(1) inform officers of the organization as to the probation conditions specified by the sentencing court, and provide them with a written statement clearly setting forth all such conditions;

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(2) keep informed concerning the organization's conduct, condition, and compliance with the conditions of probation, including the payment of a fine or restitution, and report thereon, as necessary or appropriate, to the sentencing court;

(3) review and comment on, as appropriate, any reports prepared by the organization for transmittal to the sentencing court in connection with its probation sentence;

(4) perform any other duty that the sentencing court may designate.

Commentary

This section describes the qualifications and duties of persons appointed to serve as probation officers for organizational probationers. These duties include the monitoring of the organization's compliance with its terms of probation, but do not extend to monitoring or control over other aspects of organizational activities. The monitoring powers of probation officers for organizational probationers are constrained by the term of probation; such officers do not have the power to indirectly modify terms of probation specified by the court through excessive monitoring.

Because of the diversity of organizations potentially sentenced to probation and the wide range of probation conditions that

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may be involved, it will typically be the case that a special probation officer will be required for each organizational probationer. Persons qualified to serve in this capacity may have diverse backgrounds and training; indeed, in order to assemble the proper expertise to properly monitor organizational compliance with probation terms it may be necessary to appoint a panel of probation officers for a single probationer. For example, an organization convicted of pollution offenses might have its probation overseen by a panel composed of a lawyer, an environmental expert, and an industrial engineer. Insofar as law compliance will be the focus of most probation terms, special counsel will often be appropriate probation officers for organizational offenders, acting either alone or in conjunction with other specialists.

Some of the duties of a probation officer overseeing an organizational probationer are specified in the guidelines, with allowance for further duties specified by the sentencing court. The enumerated duties require that the probation officer maintain surveillance of only those organizational operations related to the instant offense. Direct management of organizations by probation officers or monitoring of organization activities that are irrelevant to the offense leading to probation are not authorized.

In performing the specified duties, a probation officer may seek the aid of agents acting on his or her behalf. Thus, for example, a probation officer wishing to confirm the chemical analysis of samples

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of plant discharge might engage a chemical testing laboratory to provide expert chemical analyses. The reasonable costs of such studies, as well as the fees of the probation officers themselves, will normally be imposed on the defendant organization as a condition of its probation. See §8D2.4(b)(6)

§ 8D2.6. Procedures (Policy Statement)

(a) Preparation of Report. The probation officer or other person appointed by the court to prepare the presentence report (the "Preparer") on a convicted organization should include in such report (the "Report") recommendations regarding he desirability of a sentence to probation and any particular terms of probation believed appropriate.

(b) Preparation of Compliance Plan. If the Preparer proposes a requirement of a Compliance Plan, as described in §8D2.4(b)(1), the Preparer should normally provide the organization with an opportunity to propose its own Compliance Plan for inclusion in the Report. Such a proposed Compliance Plan should conform to the following procedures:

(1) Proposed Compliance Plan. The organization's proposed Compliance Plan should set forth the names of the organizational officers responsible for its preparation and describe the investigation and other procedures employed in its development.

(2) Proposed Compliance Plan, Undertakings. The proposed Compliance Plan should be signed by the chief executive,

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the chief legal officer, and the appropriate vice-president of the organization, who should undertake to disseminate the terms of the Compliance Plan and the court's sentence to all organizational members whose conduct is to be affected thereby. A certified copy of the minutes of the board of directors of the company, indicating that they have been informed of the proposed Compliance Plan, should be filed along with it.

(3) Proposed Compliance Plan, Objections by Preparer. Informal Conference. If the Preparer objects in any respect to the organization's proposed Compliance Plan, the Preparer should attempt to resolve differences with the organization informally, making due allowance for the presumed expertise of the organization in establishing internal management procedures.

(c) Filing of Report. The Preparer should file its final Report with the Court and with both parties, and, at the discretion of the sentencing court, with agencies having a legitimate interest in the information contained therein. Such disclosure should be made sufficiently prior to the imposition of sentence to afford a reasonable opportunity to prepare responses and to comment thereon, and in no case less than 10 days before sentencing, as required by 18 U.S.C. §3552(d). No portion of the Report shall otherwise be made available to the public. On filing of the Report, either party may file with the court, on notice to their adversary, objections to the Report, and a motion

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for a Hearing thereon.

(d) Pre-Sentence Hearing. If objections have been filed and motion for a hearing made, or of its own motion, the Court, on notice to all parties and to any appropriate agencies, should hold a hearing at which parties should be entitled to call witnesses and present evidence to the same extent as in a hearing for a civil injunction. After considering the recommendations in the Report, the court should adopt such probationary conditions, if any, as appear by a preponderance of the evidence to be reasonably related to the goals of criminal sentencing.

Commentary

This section describes a recommended procedure for the assessment of the desirability of probation in organizational sentencing, and for the development of related probation terms. In each instance where an organization is sentenced and a presentence report is prepared, this section recommends that the report address the desirability of a probation sentence in light of the prerequisites for such a sentence under §8D2.1. The preparer of the presentence report may be either a probation officer (including a special probation officer appointed as described in §8D2.5) or another expert appointed by the court to prepare the presentence report in accordance with 18 U.S.C. §3552.

If the Preparer determines that any of the criteria for probation specified in §8D2.1 are met, the Preparer should so notify

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the defendant and should prepare a corresponding recommendation regarding particular probation terms as part of the presentence report. Where the probation recommendation involves a Compliance Plan, the defendant organization should be given an opportunity to prepare a proposed Compliance Plan as described in §8D2.6(b). The Preparer may incorporate all or part of any proposed Compliance Plan in the presentence report, as well as comments on any portions not so incorporated. The Preparer may also consider and recommend further Compliance Plan provisions; however, the Preparer should give due weight to the organizational expertise of officers of the defendant in evaluating both the costs and benefits of additional Compliance Plan terms. Some regulatory negotiation over terms of the Compliance Plan is contemplated by this section. Of course, in the absence of cooperative participation by the defendant organization when it is given the opportunity to develop a proposed Compliance Plan, the Preparer should, itself, develop such a plan, calling on the advice of organization specialists or other experts as needed.

Disclosure of the Report to both parties is authorized under this section in accordance with 18 U.S.C. §3552. Further disclosures to interested agencies are provided for at the discretion of the court. This procedure will allow agencies having continuing regulatory responsibilities concerning a convicted organization an opportunity to comment to the court, the prosecution, or the probation officer on the terms of probation and to assess how those terms pertain to the agency's subsequent regulatory activities.

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§8D2.7 Enforcement (Policy Statement)

(a) If an organization violates a condition of probation at any time prior to the expiration or termination of its probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure and after considering the factors set forth in 18 U.S.C. §3553(a) to the extent that they are applicable --

(1) continue the organization on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available at the time of sentencing.

(b) The court should exercise all other authority provided it by law to require compliance with the conditions of probation, including its authority to hold in contempt any person who willfully violates any undertaking or other representation provided by such person to the court or any person who prevents, obstructs, impedes or interferes with the due performance of any probation condition or who intentionally hinders or delays the communication of any probation violation to the court or the probation officer through threats, harassment, or misleading conduct.

Commentary

This section clarifies the sanctions available for violations of organizational probation terms and for related misconduct by organization members or other related parties. Where a probation

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violation is established through a hearing meeting the requirements of Federal Rule of Criminal Procedure 32.1, a sentencing court may either impose new, more stringent terms of probation or resentence the organizational defendant to any harsher sentence that would have been available at the original time of sentencing. This latter approach preserves the option of imposing a maximum fine, an option that courts formerly achieved by suspending the imposition of a sentence during probation under prior law.

If a probation violation is present, the choice between a new probation sentence or some other sentence should be based on the court's assessments of whether the goals of probation sentencing as specified in these guidelines might still be achieved through more stringent and extensive probation restrictions on the defendant organization. The organization's role in disclosing the violation, remedying any associated harm to others, and in adopting internal reforms independent of court compulsion should be weighed by the sentencing court in considering continued probation. Where the good faith of the organization's management towards probation compliance is in doubt, either a substantial revision of its probation terms or a complete revocation of probation and resentencing to a maximum fine would be warranted.

Because the Sentencing Reform Act of 1984 does not authorize the use of the contempt power to enforce probation conditions, a potential enforcement problem exists if the organization is prepared to

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openly resist the probation conditions and accept the maximum fine. Although this problem deserves legislative attention, it should also be noted that the Sentencing Reform Act does not limit the existing contempt powers of the court. By definition, a sentence of probation is an order of the court, and under 18 U.S.C. §1509, any person who, "by threats or force, willfully prevents, obstructs, impedes or interferes with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States" commits a crime; such conduct also may be enjoined under §1509. In addition, 18 U.S.C. §1512(b) covers not only force and intimidation directed at any other person (including organizational personnel seeking to comply with a probation condition or report its violation), but also "misleading conduct toward another person, with intent to ... hinder, delay or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of ... a violation of conditions of probation...;" the term "law enforcement officer" includes both employees of the United States Probation Service and private persons acting in that capacity. See 18 U.S.C. §1515(4). Section 1512 also reaches misleading conduct intended "to cause or induce any person to withhold a record, document, or other object, from an official proceeding." Finally, under 18 U.S.C. §1514, the sentencing court, upon application by the attorney for the government, may issue a temporary restraining order prohibiting harassment of any witness or victim, and §1514(c) defines the term "harassment" broadly to include "a course of conduct directed at a specific person that ... causes

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substantial emotional distress in such person; and serves no legitimate purpose." Threatened reprisals, including demotions or dismissals, would seem to satisfy this standard if they lack a legitimate basis.

Because one of the terms of a sentence to probation will require that all probation conditions be broadly disseminated to corporate officials and employees (see §§8D2.5(c)(1) and 8D2.6(c)(2)), these criminal provisions become applicable and provide ample authority to deal with conduct that attempts to hide or conceal information about a probation violation; moreover, the existence of these criminal provisions should be prominently noted in the document summarizing the probation conditions that is disseminated.

Finally, the court's contempt power clearly reaches any willful breach of any undertaking or representation made by an organizational official to the court. Thus, any undertakings delivered by corporate officials at the time the sentence to probation is imposed can be punished by contempt penalties if subsequently these undertakings are willfully breached. See §8D2.6(c)(2) and §8D2.4(a)(1) (requiring organization to "use best efforts" to provide written assurances and undertakings by officers). For example, if a corporate president undertakes in writing at the time sentence to probation is imposed to inform the court of any probation violation that becomes known to him, a willful failure to do so could trigger such a penalty. Accordingly, the enforcement problem caused by the absence of contempt or other penalties in the statute can be substantially rectified by use

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of model form undertakings, which would be delivered by senior organizational personnel at the time sentence to probation is imposed.

Report to the U.S. Sentencing Commission

On Sentencing of Organizations in the Federal Courts, 1984-1987

PRELIMINARY DRAFT

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I. Introduction

This report summarizes data collected by the U.S. Sentencing Commission on criminal prosecutions and sentencings of organizations in the federal courts during the four year period from January 1, 1984 through December 31, 1987. Section II describes the data sources and methods of collection employed. Section III provides a summary description of organizational prosecutions and sentencings during the 1984-1987 period. Section IV provides a more detailed analysis of offender and offense characteristics for a sample of convicted organizational defendants. Section V provides a brief conclusion, highlighting the preliminary nature of this report and topics for further study.

Throughout the report, an attempt has been made to link the presentation and discussion of data to the U.S. Sentencing Commission's draft guidelines on organizational sanctions. Many of the tables reflect crime categories as defined in the draft guidelines. However, it also should be noted that this has been an iterative process. During the process of preparing the draft guidelines, the Commission staff often took account of this ongoing research project in order to determine (1) which offenses are most often prosecuted in the federal courts, and (2) which offense characteristics are generally observable. Information on offense types assisted drafters in establishing guideline categories. Information on offense characteristics facilitated the drafting of guidelines that could be applied to most cases encountered within each crime category.

II. Background on Data Sources

This report is based on four basic sources of data: (1) the "Masterfile" maintained by the Administrative Office of the U.S. Courts, which includes data on all criminal cases and defendants commenced and terminated in the United States District Courts, excluding petty offense cases disposed of by United States Magistrates; (2) the Administrative Office's Federal Probation Sentencing and Supervision Information System ("FPSSIS"), which includes data on criminal defendants referred to Probation Offices; (3) Presentence Investigation Reports (PSI's), which are prepared by probation officers prior to sentencing; and (4) other court records including charging documents (indictment, information, or complaint), docket sheets, judgment and commitment orders, and cash ledgers.

The major data collection difficulty encountered was the separation of "organizations" from the total population of defendants, which was not coded definitively in either the Masterfile or FPSSIS. Ultimately, this task was completed by a combination of computer searching and a manual review of the

complete list of over 220,000 defendants whose prosecutions were completed during 1984-1987. From that overall total, the researchers compiled a list of 1,659 organizational defendants which then was used to collect data from all sources.

The Masterfile and FPSSIS data contain only basic information on organizational defendants and offenses. These data bases include information about the statutory offenses of prosecution and conviction, dates of filing, conviction and sentencing, and certain sentencing information, such as fine amounts and probation terms. However, there is little offense- or offender-specific information in these data sources. On the other hand, if a PSI has been prepared, it generally contains substantial information concerning the nature of the offense, monetary losses, victims, culpability, and financial status of the offender. Therefore, the Masterfile and FPSSIS data provided only a "core" of data, which was supplemented by data manually retrieved from PSI's, charging documents, and court records.

Given the unavailability of reliable earlier data through FPSSIS, the beginning date of the study period was set at January 1, 1984. In order to assure relatively complete data, the ending date of the study period was set at December 31, 1987.

The study population was further defined to include only: (1) defendants "terminated"--the Administrative Office's term for a final disposition by dismissal, acquittal, or sentencing--during the study period; plus (2) any co-defendants in the same case (under the same docket number), whenever they were terminated, so long as at least one organizational defendant was terminated within the study period. Thus, the data do not include cases or defendants for which prosecution was commenced or pending during the study period, if the case did not include at least one organizational defendant "terminated" within the period.

III. General Description of Criminal Cases Against Organizations

This section provides a general description of the total group of 1,659 organizational defendants terminated during the 1984-1987 period, in terms of (A) the numbers and types of offenses and offenders; (B) monetary sanctions, and (C) non-monetary sanctions.

A. Distribution of Offenses and Offenders

1. Offense Types[1]. Table 1 presents the distribution of convictions for all organizational defendants by offense types corresponding to the offense loss categories contained in the draft guidelines. The draft guideline categories cover about 76% of organizational defendant convictions, and antitrust convictions comprise the remaining 24%. This table also shows the percentage of prosecutions that result in conviction. Of the 1,659 organizational defendants prosecuted, 1,283 (77%) were convicted.

2. Multiple Defendants. Although there were 1,283 organizational defendants convicted, there were somewhat fewer separate cases involving convicted organizations - 1,122. Thus, some cases involve multiple organizational offenders. As shown in Table 2, only about 8% of the 1,122 cases involve multiple organizational defendants. Antitrust cases are much more likely to involve multiple corporate defendants, with about 24% of these cases involving more than one corporate defendant. If antitrust cases are excluded from Table 2, the incidence of multiple organizational defendants is less than 5%.

Table 3 shows the distribution of "individual" co-defendants[2] by guideline category for the 1,122 cases involving organizational convictions. Overall, nearly half (49%) of the cases involve no individual co-defendant, 24% a single individual co-defendant, and 27% multiple individual co-defendants.

3. Distribution by Circuit. Table 4 shows the geographic distribution of organizational defendants by circuit for the period 1984-1987 and compares it to the distribution of all defendants for the Administrative Office's "Court Year" (CY) 1987 (July 1, 1986-June 30, 1987).

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[1]In some instances, the staff could not identify the nature of offense based on currently available information. These offenses are categorized as "unidentified" in Tables 1-3 and 6. A review of the available information indicates that these offenses would fall within one of the first seven categories, and are heavily concentrated in the fraud and other property crime categories. The staff is continuing to collect and analyze additional court records on these offenses, and expects that they will be categorized definitively in the final version of this paper.

[2] "Individual" co-defendants refers to cases in which one or more individuals (natural persons) were named as defendants under the same docket number as an organization.

4. Size Distribution. Since court records do not routinely contain information about a corporate defendant's size, the staff examined whether the name of each prosecuted corporation in the sample was in Standard and Poor's 1987 Register of Corporations, which attempts to include all corporations with $1 million or more in annual sales and 50 or more employees. About 10% (169) of the 1,659 firms were listed. Of those firms, 41 (2.5% of the total) had stock that was traded either over the counter or on an organized exchange.

B. Monetary Sanctions[3]

Table 5 shows the distribution of fine amounts for convicted organizational defendants. About 48% of all defendants are fined less than $5,000, and just under 80% are fined $25,000 or less. Less than 2% received fines in excess of $500,000.

Table 6 computes the mean fine and restitution for each offense type. Overall, the mean fine is $48,000 and ranges from $4,000 (Obstruction of Mails) to $166,250 (Drug). Overall, the mean restitution is $217,724, and ranges from $1,251 (Regulatory Reporting) to $375,671 (Private Fraud). These means are not directly comparable across offense types because they do not control for differences in average magnitude of offense types.

C. Nonmonetary Sanctions

In addition to fines and restitution, courts may impose nonmonetary sanctions, generally in the form of probation or community service. Table 7 shows that fines are relatively frequently used (89% of defendants were sentenced to pay fines). By comparison, other sanctions are relatively rarely imposed on corporate offenders. Ten percent of defendants are ordered to make restitution, and 2% are ordered to pay enforcement costs.

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[3] As discussed in Section II, Masterfile and FPSSIS data do not contain enough information to fully analyze organizational sentencing practices. Thus, the Commission staff is collecting and coding information from actual court records, including judgment and commitment orders and cash ledgers. However, to date these records have been received on only 825 of the total of 974 organizations convicted of non-antitrust offenses. Sections III. B and C in this preliminary draft are limited to the available data. Results pertaining to the remaining 149 convicted organizations will be included in the final version of this report. Also, antitrust cases are excluded from the analysis in these sections because there is an existing guideline for antitrust offenses by organizations.

Nonmonetary sanctions alone are used in less than 10% of convictions. Even when combined with other sanctions, community service is used in only 2% of convictions.

In many cases, probation for corporate offenders is meant simply to extend the period of time within which the defendant may make payments to satisfy the fine or restitution. In addition, the terms of probation often specify that the firm shall comply with existing laws and regulations. In the case of environmental crimes, probation sometimes is used to ensure that cleanup will take place and that the firm will take the necessary steps to prevent an illegal discharge in the future.

IV. Analysis of Presentence Investigations

This section analyzes Presentence Investigation reports (PSI's) for organizations convicted of federal offenses (excluding antitrust)[4] during the time period 1984-1987. As discussed in Section II, the PSI contains information concerning both the offense and the offender that is not available elsewhere. However, PSI's are not prepared for all corporate offenders. Thus, any analysis of PSI's necessarily must be based on a sample of corporate offenders. The sample used for this report contained PSI's on 288 corporate offenders, representing approximately 30% of all convicted defendants, and approximately 80% of all convicted defendants for which a PSI was prepared, in the group of 974 organizations convicted of non-antitrust offenses. Although this sample is not totally representative of the entire population of corporate offenders, it is large enough so that it encompasses virtually all types of offenses that normally appear in the federal system.

Given the factors associated with the preparation of a PSI, it is not always possible to generalize from the PSI sample to the entire population of corporate defendants. Certain types of cases are more (or less) likely to have PSI's prepared. PSI's are more likely to be prepared where a sentence to probation is involved,[5] and less likely to be prepared in cases involving

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[4] As in Section III. B and C, antitrust cases are excluded from this analysis because the currently proposed guidelines for organizations do not cover antitrust offenses, which are governed by existing guidelines §2R1.1(c).

[5] For convicted organizations generally, the incidence of probation sentences is 18%. (See Table 7). Among the group covered by PSI's, this figure rises to approximately 30%.

either very small or large fine amounts.[6] In addition, certain offense types are slightly overrepresented or underrepresented in the PSI group.[7]

A. Total Monetary Sanctions

Table 8 displays the average monetary sanction in this sample for each of the guideline categories. Only 7 of the 288 cases involved multiple guideline categories in the same case. Overall, the average fine was $48,404. Restitution averaged $37,132. Thus, the average court-imposed monetary sanction in the criminal system was $85,536. However, the total monetary sanction for a corporate offender might include other payments in addition to court-imposed criminal sanctions, such as civil penalties, voluntary restitution, and private civil awards or settlements.

Data on sanctions outside the criminal system are only sporadically included in the PSI. In many cases, the PSI only refers to ongoing negotiations or civil actions that are pending. Although one can anticipate some type of collateral sanction, it is impossible to estimate this amount from the data on hand. Thus, the average "other" monetary sanction reported in Table 8 of $55,085 probably underestimates the true size of this component of total monetary sanction. Although Table 8 refers to the average "total monetary sanction" as being $140,621, the reader must bear in mind that the sanction being reported here is: (1) the court-imposed criminal sanction, plus (2) any collateral sanctions already imposed or about to be imposed at the time of sentencing and noted by the probation officer in the PSI.

B. Loss Multiples under Current Practice

Out of the 288 cases in this sample, monetary losses could be calculated in about 62% (178 cases). The calculation of losses was done on the basis of the "offense loss" as defined in

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[6] In general, 37% of convicted organizational defendants receive PSI's, but this figure drops below 25% in cases of very small fines (less than $1,000) and very large fines (greater than $500,000).

[7] Among the seven principal types of non-antitrust offenses, the overall PSI preparation rate of 37% is matched by private and public fraud. Tax (52%), environmental (50%) and food, drug, and agriculture (50%) have slightly higher rates, and property (30%) and regulatory reporting (27%) have slightly lower rates.

the draft guidelines.[8] Although no estimates were available in the remaining 38% of cases, in many instances that is simply because the probation officer is not currently obliged to provide this type of information. Reasonable estimates of monetary losses probably can be made in most of these cases.

One way to compare more directly the average sanctions for each guideline category is to examine the ratio of sanctions to monetary losses imposed on society by the offender. This ratio is often termed the "multiple," since it measures the "cost" to the offender for each dollar of harm imposed. Thus, for example, if the crime involved an overcharge on a government contract of $10,000, and the sanction involved full restitution and a $20,000 fine, the "fine multiple" would be 2. Since the total sanction in this example is $30,000, the "total sanction multiple" is 3.

Table 9 compares the estimated multiples by guideline category for those offenses where estimates of losses are available and where the firm can afford to compensate for the harm imposed (i.e., the firm can afford to pay a multiple of at least 1). This reduces the sample of firms for which loss estimates are available from 178 to 122. Because the sample of cases that meet this criteria is relatively small and because there is such wide variation among the multiples imposed within a guideline category, it is difficult to make statistically valid generalizations concerning differences across categories.[9]

Although there are only four cases in the sample, it does appear that environmental crimes have significantly higher penalties. Losses in these cases are based on the cost of cleanup. The higher multiple in environmental cases may be an attempt to account for the inherent risk associated with such crimes as well as the difficulty in detecting many of these violations.

Based on Table 9, the average monetary sanction for firms that can afford to compensate is 1.7 times the harm they impose.[10] Moreover, the average fine is just equal to the harm.

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[8] Distinguishing between the loss narrowly associated with the "charge" offense of conviction and the broader "real" offense conduct affects the loss estimate in less than 10% of these cases.

[9] For example, although it appears that government fraud cases generally have a higher multiple, this hypothesis fails to pass a statistical test of significance.

[10] For 88% of the 122 defendants, the sanction was imposed on the basis of a plea of guilty or nolo contendere. Therefore, the overall multiple of 1.7 reflects any "plea

However, the median total sanction "multiple" and median fine "multiple" are considerably lower than the averages in both instances.

As shown in Tables 10 and 11, the difference between the mean and median multiples can be attributed to the fact that most of the crimes involving small dollar losses (under $100,000) have multiples near or exceeding one, whereas most of the offenses involving larger dollar losses have considerably lower multiples. In general, the higher the loss, the lower the multiple. This is true even when isolating firms that can afford to compensate for the loss.

There are several possible reasons why multiples might be lower as the loss increases. First, larger losses are easier to detect. Second, larger losses are more likely to be associated with collateral civil suits. Third, at relatively low levels of loss, the courts may be applying a "minimum" fine or loss.[11]

C. Sentencing Patterns

Although the analysis of the sample of corporate defendants did not uncover strong systematic patterns of sentencing behavior, two general comments can be made. First, the most obvious pattern is the large amount of disparity in the system. There are many instances where virtually identical crimes and losses result in different sanctions, both absolutely and in terms of the calculated sanction/loss and fine/loss multiples.

For example, the sample contained two similar cases of odometer tampering with very different sentencing outcomes. In one case, the total sanction was over three times the loss, as the firm was ordered to pay full restitution and given a fine over twice the loss. In the other case, the firm was fined about 1/3 the loss and no restitution was ordered. A second example of disparity concerns two virtually identical instances of mislabeling beef. In one case, the fine was 2 1/2 times the

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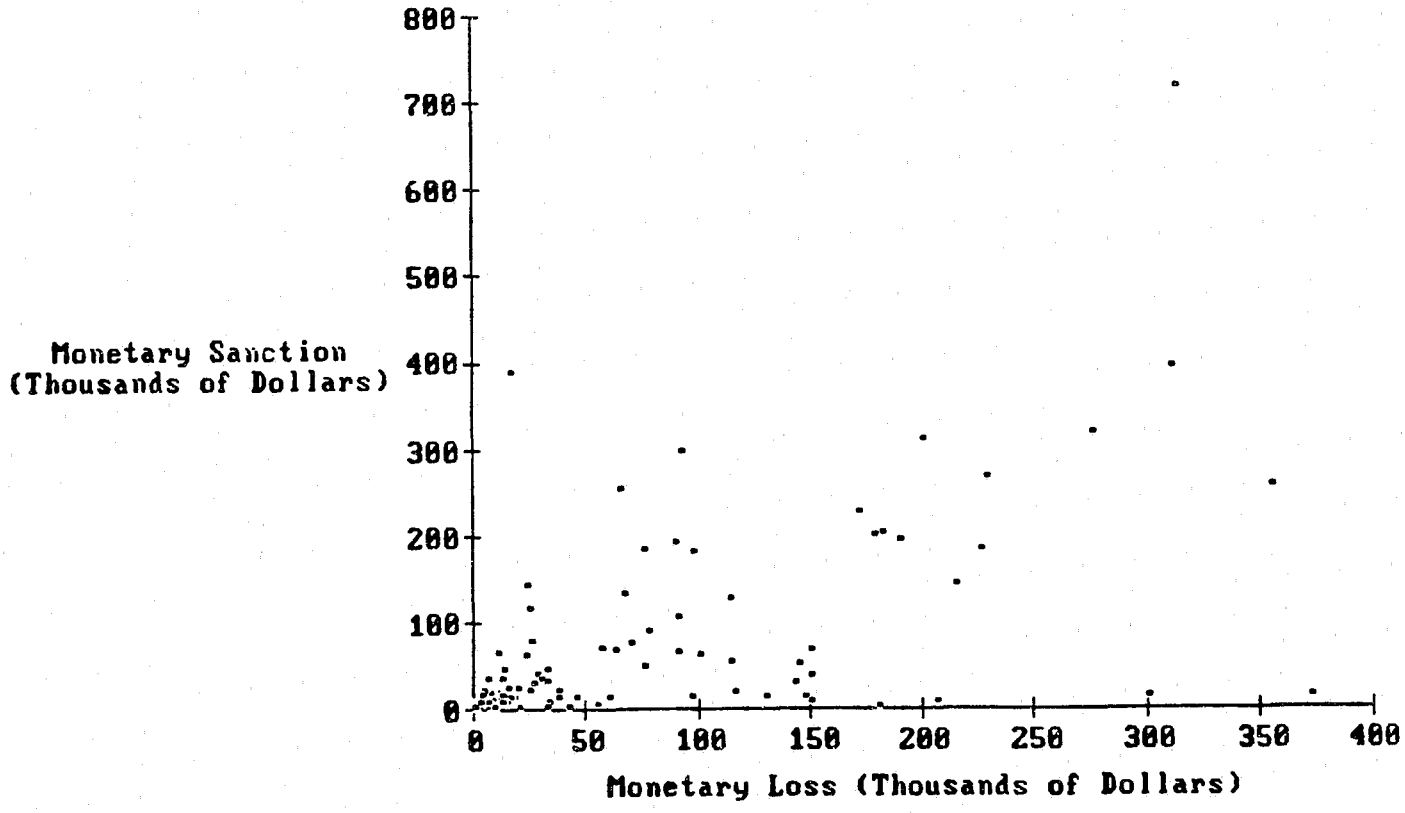
bargain" discount that may be present.

[11] Two examples of this factor were provided by cases of overcharging for meat purchased by the government. In both cases, the overcharges were less than $500; yet one firm was fined $2,500 and the other $5,000, resulting in multiples of around 14. If these two outliers were excluded from Table 10, the overall mean multiple would decrease from 1.03 to 0.81. In Table 11, which displays the distribution for total sanction multiples by loss category, excluding these outliers reduces the mean multiple from 1.72 to 1.33, while the median remains nearly the same at 1.03.

loss; in the other it was only 4% of the loss. Solvency did not appear to be an issue in any of these cases.

Second, despite the cases cited above, it is clear that generally, the higher the loss, the higher the sanction. As shown in Figure 1, although a linear relationship is evident, there is also a high degree of variance.

Figure 1
Monetary Sanction by Monetary Loss
(Sample of 122 Firms that can Compensate for Loss)



V. Conclusion

This preliminary study reports some of the basic facts regarding organizational prosecutions and sentencings in the federal courts. The total volume of organizational prosecutions is relatively small -- less than 1% of all federal criminal prosecutions. Of the 1,283 convicted organizations, at least two-thirds are convicted of antitrust, fraud, tax, or other property offenses. Outside of the antitrust context, prosecutions against multiple organizational defendants are infrequent (less than 5% of cases), but individual co-defendants are involved in approximately 50% of cases. The convicted firms tend to be small and closely-held: only about 10% crossed the threshold of $1 million in sales and 50 employees; less than 3% had traded stock.

The vastly predominant form of sanction is a fine, which is imposed in 89% of sentencings. A fine and probation are combined in 11% of sentencings, and probation alone is used in only 7% of sentencings. Community service is involved in 2% of sentencings. Restitution currently is ordered in 10% of sentencings.

A more detailed examination of presentence reports for 288 non-antitrust convictions shows that the overall mean ratio of monetary sanctions to loss is 1.7, with a median of approximately 1.0, and some variation across offense types. Although monetary sanctions are related significantly to loss, there is a high degree of variance, and few other indications of strong systematic patterns in past sentencing practice. There are instances of sentencing disparity that are not explained by solvency constraints.

The conclusions stated here are still tentative and preliminary, as the study is ongoing and further data are being collected, coded, and analyzed. So far as we are aware, this study is the first systematic attempt to describe criminal prosecutions and sentencings of organizations in the federal system. The results suggest the desirability of further data collection and analysis, particularly including a more comprehensive examination of non-criminal remedies and more detailed information on offense characteristics and sentencing factors.

VI. Tables

Table 1
Organizational Defendants: Nature of Offense
and Rate of Conviction

Nature of Offense	Convictions by Offense -%-	(Convictions)	Conviction Rate -%-	(Prosecutions)
1. Private Fraud	12.1	(155)	96.3	(161)
2. Government Fraud	18.5	(237)	93.3	(254)
3. Tax	6.0	(77)	96.3	(80)
4. Property	4.7	(60)	82.2	(73)
5. Environmental	4.4	(57)	87.7	(65)
6. Food, Drug, and Agriculture	3.0	(39)	92.9	(42)
7. Regulatory Reporting	5.2	(67)	89.3	(75)
Unidentified (see fn.1)	9.8	(125)	36.7 */	(341)
Subtotal	63.7	(817)	74.9	(1,091)
8. Other	12.2	(157)	75.8	(207)
Conservation & Wildlife	1.9	(24)	82.8	(29)
Administration of Justice	0.8	(10)	47.6	(21)
Motor Carrier Act	3.0	(39)	92.9	(42)
Mine Safety	0.6	(8)	88.9	(9)
Drug	0.4	(5)	22.7	(22)
Export Control	2.3	(29)	87.9	(33)
Immigration	0.3	(4)	100.0	(4)
Obscenity	0.5	(6)	85.7	(7)
Election Law	0.1	(2)	100.0	(2)
Radio Reception	0.0	(0)	0.0	(1)
Gambling	0.8	(11)	78.6	(14)
Obstruction of Mails	0.1	(1)	100.0	(1)
Miscellaneous	1.4	(18)	81.8	(22)
Subtotal	75.9	(974)	75.0	(1,298)
Antitrust	24.1	(309)	85.6	(361)
TOTAL	100.0	(1,283)	77.3	(1,659)

Note: Conviction rate overrepresents dismissals and acquittals in currently "unidentified" category.

Table 2
Convicted Organizations: Frequency of Cases
Involving Multiple Organizational Defendants

Nature of Offense	Cases		
	Multiple Organ. Defendant -%-	(Number)	Total
1. Private Fraud	7.8	(11)	141
2. Government Fraud	2.2	(5)	229
3. Tax	13.3	(8)	60
4. Property	7.3	(4)	55
5. Environmental	5.6	(3)	54
6. Food, Drug, and Agriculture	2.6	(1)	38
7. Regulatory Reporting	1.5	(1)	66
Unidentified (see fn.1)	1.6	(2)	123
Subtotal	4.6	(35)	766
8. Other	4.7	(7)	148
Conservation & Wildlife	9.5	(2)	21
Administration of Justice	11.1	(1)	9
Motor Carrier Act	2.6	(1)	38
Mine Safety	0.0	(0)	8
Drug	0.0	(0)	5
Export Control	3.6	(1)	28
Immigration	0.0	(0)	4
Obscenity	20.0	(1)	5
Election Laws	0.0	(0)	2
Gambling	11.1	(1)	9
Obstruction of Mails	0.0	(0)	1
Miscellaneous	0.0	(0)	18
Subtotal	4.6	(42)	914
Antitrust	23.6	(49)	208
TOTAL	8.1	(91)	1,122

Table 3
Convicted Organizations: Frequency of Cases
Involving Individual Co-Defendants

Nature of Offense	Cases: Individual Co-Defendants: None (Percent)	Single (Percent)	Multiple (Percent)	Total
1. Private Fraud	50.4	18.4	31.2	141
2. Government Fraud	38.4	28.8	32.8	229
3. Tax	45.0	21.7	33.3	60
4. Property	40.0	20.0	40.0	55
5. Environmental	55.6	20.4	24.0	54
6. Food, Drug, and Agriculture	28.9	42.2	28.9	38
7. Regulatory Reporting	62.1	16.7	21.2	66
Unidentified (see fn.1)	45.5	28.5	26.0	123
Subtotal	45.1	24.8	30.1	766
8. Other	64.2	13.5	22.3	148
Conservation & Wildlife	57.1	9.6	33.3	21
Administration of Justice	22.2	44.5	33.3	9
Motor Carrier Act	94.7	0.0	5.3	38
Mine Safety	25.0	0.0	75.0	8
Drug	40.0	20.0	40.0	5
Export Control	57.2	21.4	21.4	28
Immigration	50.0	50.0	0.0	4
Obscenity	60.0	0.0	40.0	5
Election Laws	50.0	50.0	0.0	2
Gambling	22.2	33.3	44.5	9
Obstruction of Mails	100.0	0.0	0.0	1
Miscellaneous	89.0	5.5	5.5	18
Subtotal	48.1	23.0	28.9	914
Antitrust	51.4	27.4	21.2	208
TOTAL	48.8	23.8	27.4	1,122

Table 4
Organizational Defendants: The Circuit in Which the Defendant is Prosecuted
(Dispositions)

	Prosecutions			
	Organizations (1984-1987)		All Defendants (CY 87)	
Circuit	Number	Percent	Number	Percent
DC	15	0.9	623	1.1
1	73	4.4	1,693	3.1
2	177	10.6	3,538	6.5
3	244	14.7	2,728	5.0
4	177	10.7	7,523	13.9
5	143	8.6	6,478	12.0
6	192	11.6	4,416	8.2
7	47	2.8	2,534	4.7
8	112	6.8	2,882	5.3
9	221	13.3	10,540	19.5
10	78	4.7	3,036	5.6
11	180	10.8	8,177	15.1
TOTAL	1,659	100.0	54,168	100.0

Note: Information on disposition of all defendants for CY 87 from Annual Report of the Director of the Administrative Office of the United States Courts, 1987, pp.294-300.

Table 5
Convicted Organizations: Distribution by Amount of Fine
(Excludes Antitrust Offenses)

	Organizational Defendants		
Nature of Fine	Number	Percent	Cum. %
No Fine	81	9.8	9.8
$1 To $1000	110	13.3	23.1
$1,001-$5,000	205	24.9	48.0
$5,001-$10,000	160	19.4	67.4
$10,001-$25,000	100	12.1	79.5
$25,001-$50,000	63	7.7	87.2
$50,001-$100,000	51	6.2	93.4
$100,001-$500,000	44	5.3	98.7
Over $500,000	11	1.3	100.0
OVERALL	825	100.0	-

Table 6
Convicted Organizations: Mean Fine
and Restitution by Nature of Offense
(Excludes Antitrust Offenses)

Nature of Offense	Defendants Percent	(Number)	Mean ($)	Median ($)
FINE				
1. Private Fraud	17	(139)	59,072	7,500
2. Government Fraud	27	(222)	66,357	10,000
3. Tax	8	(70)	17,036	10,000
4. Property	6	(48)	32,018	10,000
5. Environmental	6	(47)	49,799	10,000
6. Food, Drug, & Agriculture	4	(33)	9,800	2,000
7. Regulatory Reporting	7	(57)	64,413	5,000
Unidentified (see fn.1)	10	(83)	22,762	10,000
Subtotal	85	(699)	48,493	8,000
8. Other	15	(126)	56,998	4,939
Conservation & Wildlife	2	(18)	6,917	2,500
Administration of Justice	1	(9)	128,333	20,000
Motor Carrier Act	4	(38)	7,174	2,500
Mine Safety	<1	(2)	35,000	35,000
Drug	<1	(4)	166,250	102,500
Export Control	3	(22)	109,955	20,000
Immigration	<1	(4)	90,750	4,500
Obscenity	<1	(6)	58,667	40,000
Election Law	<1	(2)	62,500	62,500
Gambling	<1	(7)	5,571	2,000
Obstruction of Mails	<1	(1)	4,000	4,000
Miscellaneous	2	(13)	8,854	3,100
TOTAL	100	(825)	48,000	7,500
RESTITUTION				
1. Private Fraud	19	(15)	375,671	31,468
2. Government Fraud	57	(45)	226,710	39,000
3. Tax	1	(1)	124,000	124,000
4. Property	11	(9)	43,593	28,741
7. Regulatory Reporting	1	(1)	1,251	1,251
9. Unidentified	11	(9)	142,336	63,500
TOTAL	100	(80)	217,724	31,468

Table 7
Convicted Organizations: Frequency of Fine, Restitution, and Other Sanctions
(Excludes Antitrust Offenses)

Nature of Sanction	Defendants Percent	(Number)
FINE		
Fine Only	78	(646)
Fine as a condition of Probation	11	(92)
No Fine	11	(87)
RESTITUTION	10	(80)
OTHER		
Probation Only (No Fine)	7	(57)
Community Service	2	(17)
Enforcement Costs Imposed	2	(15)

Note: This table is based on 825 convictions.

Table 8
Average Monetary Sanction by Offense Type
(Sample of 288 Firms with PSI's)

Nature of Offense	Number of Firms	Fine	Restitution	Other Monetary*	Total
Private Fraud	50	$50,273	$76,021	$75,016	$201,310
Government Fraud	101	33,550	55,760	84,642	173,952
Tax Offenses	23	14,143	-	90,823	104,966
Property Offenses	15	29,731	6,242	178	36,151
Environmental Offenses	29	46,795	29,310	20,946	97,051
Food & Drug Offenses	14	12,679	-	-	12,679
Other Offenses**	56	102,362	5,671	15,460	123,493
OVERALL	288	$48,404	$37,132	$55,085	$140,621

Note: Regulatory reporting violations are included in the related substantive offense category.

* Includes voluntary restitution, civil penalties and other payments reported in the PSI.

** Includes 7 cases of multiple offenses that fall into two of the above categories. The remaining cases can be classified as follows:

Export Controls	11
Currency Reporting	13
Protected Wildlife	5
Worker Safety	7
Payments to Foreign Officials	2
Miscellaneous	11

Table 9
Comparison of Multiples by Guideline Category
(Sample of 122 Firms that can Afford to Compensate)

Guideline Category	Number of Firms	Total Sanction/Loss		Fine/Loss	
		Mean	Median	Mean	Median
Private Fraud	26	1.10	0.71	0.86	0.27
Government Fraud	58	1.84	1.10	1.14	0.18
Tax Offenses	14	1.32	0.45	1.08	0.10
Property Offenses	7	1.16	1.00	0.38	0.36
Environmental	4	3.70	3.83	2.70	2.83
Other	13	2.60	0.68	0.65	0.18
OVERALL	122	1.72	1.04	1.03	0.20

Table 10
Distribution of Fine Multiples by Loss Category
(Sample of 122 Firms that can Afford to Compensate)

Range of Losses	# of Cases	Mean	Median	Fraction of Cases Below 0.5	Fraction of Cases Below 1.0
< $10,000	30	2.41	1.17	0.37	0.47
$10,001 - 50,000	30	0.96	0.38	0.57	0.80
$50,001 - 100,000	21	0.81	0.18	0.62	0.76
$100,001 - 250,000	21	0.19	0.07	0.90	0.95
$250,001 - 500,000	6	0.07	0.03	1.00	1.00
$500,001 - 1,000,000	9	0.20	0.05	0.89	0.89
> $1,000,000	5	0.14	0.04	1.00	1.00
Overall	122	1.03	0.20	0.64	0.76

Table 11
Distribution of Total Sanction Multiples by Loss Category
(Sample of 122 Firms that can Afford to Compensate)

Range of Losses	# of Cases	Mean	Median	Fraction of Cases Below 0.5	Fraction of Cases Below 1.0
< $10,000	30	2.85	2.14	0.20	0.23
$10,001 - 50,000	30	2.19	1.05	0.27	0.47
$50,001 - 100,000	21	1.30	1.04	0.29	0.43
$100,001 - 250,000	21	0.61	0.44	0.52	0.62
$250,001 - 500,000	6	0.91	0.93	0.33	0.50
$500,001 - 1,000,000	9	0.82	1.00	0.33	0.44
> $1,000,000	5	1.10	1.03	0.20	0.20
Overall	122	1.72	1.04	0.30	0.41

United States Sentencing Commission

Staff Working Paper

CRIMINAL SENTENCING POLICY FOR ORGANIZATIONS

- by -

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May 1988

*Deputy Chief Counsel, U.S. Sentencing Commission. The views expressed in this paper are solely those of the author and do not represent the policy or views of the Sentencing Commission or of any Commissioner. The author wishes to acknowledge the legal research assistance of Peggy Abbruzzese, Joseph Corradino, Deborah DePaoli, Kenneth Moyer, and Michael Zoeller, the data collection and analysis for Part I by Edward D. Jones III, and the comments on previous drafts by David Anderson, Michael Block, Mark Cohen, and Thomas Ulen.

Author's Abstract

Recent U.S. legislation has called for the reform of the criminal sentencing process at the federal level, to be carried out largely through determinate sentencing guidelines and policy statements promulgated by a permanent and independent sentencing commission. The newly-created U.S. Sentencing Commission already has promulgated initial sentencing standards for individual defendants (natural persons), and now is turning to the subject of "organizational" defendants, predominantly business corporations.

This paper, written by a member of the U.S. Sentencing Commission's staff, considers the problem of formulating determinate sentencing standards for organizations. Part I of the paper reviews the characteristics of organizational offenders and offenses prosecuted in the U.S. federal courts (pages 3-15) and the provisions of the recent reform legislation as it bears on the Sentencing Commission's consideration of organizational penalties (pages 15-32). The major findings are that organizational offenders in the U.S. federal system are predominantly business corporations charged with property or regulatory crimes, and criminally penalized primarily by monetary sanctions, within an overall enforcement system that relies heavily on civil and administrative procedures to complement criminal prosecutions.

The remaining parts of the paper (pages 33-66) state and develop an approach to organizational sentencing that draws upon the theory of harm-based "optimal" penalties developed in the "law-and-economics" literature, as applied to the characteristics of organizational offenders in the U.S. federal system and considered in light of the Sentencing Commission's mandate to develop determinate sentencing standards. The basic thesis, developed in Part II (pages 33-50), is that a focus on harm, coupled with a recognition that both crimes <u>and</u> punishments can be harmful, provides the basis for a practical organizational sentencing policy that promotes the traditional purposes of criminal punishment, the general aim of the criminal law to prevent harm, and the rationalization of the sentencing process sought by the reform legislation. The conventional "purposes" of criminal punishment are examined critically and reconciled within a harm-based penalty structure, which also is shown to be consistent with the harm-prevention aim of the substantive law. The harm-based approach, as applied to business corporations operating in a competitive economy, also strongly favors a monetary form of organizational sanction.

Parts III (pages 51-61) and IV (pages 62-65) address some of the more practical problems of developing and implementing organizational sentencing guidelines under the "optimal" penalty theory of harm-based punishments. Part V (page 66) restates the basic conclusions that harm-based monetary penalties are superior to alternative penalty measures based on gain or organizational size, and to non-monetary penalty forms such as direct governmental intervention through organizational probation; and that conventional interpretations of punishment "purposes" are unsatisfactory for criminal sentencing policy because they fail to recognize systematically that punishment has costs as well as benefits.

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CRIMINAL SENTENCING POLICY FOR ORGANIZATIONS

Introduction

The United States Sentencing Commission was created by the Sentencing Reform Act of 1984[1] to rationalize the federal criminal sentencing process by establishing guidelines and policy statements to govern the criminal punishment of convicted offenders in the federal courts.[2] In 1987, the Commission promulgated its initial set of guidelines and policy statements,[3] which were derived primarily from empirical studies of imprisonment sentences imposed under prior sentencing practice,[4] as "the first step in an evolutionary process"[5] toward a developed federal law of criminal sentencing.

With the single exception of fines for antitrust offenses,[6] the initial sentencing guidelines apply only to defendants who are natural persons. The Commission now is addressing the development of sentencing guidelines and policy statements for artificial persons, i.e., organizations.

The reform of organizational sentencing presents distinctive problems. Organizations can not be imprisoned. They are legal abstractions that act only through agents. Organizational behavior, by definition, involves the coordination and control of multiple individuals' conduct. Some, none, or all of the organization's agents also may be subject to punishment for the organization's crime. Especially under federal law, the organization itself has far greater exposure to vicarious criminal liability than any individual. Organizations have different interests and objectives from individuals in general, and often from their own agents. In current practice, organizations are infrequently prosecuted in the federal criminal justice system, and more often are sanctioned through civil and administrative enforcement.[7] In both criminal and civil enforcement, the predominant form of organizational penalty is monetary--a criminal fine or civil penalty. But until relatively recently, permissible monetary fines for most federal offenses by organizations were limited by low statutory maxima,[8] and were scaled inconsistently in

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[1]Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§211-239, 98 Stat. 1837, 1976, 1987-2040 (October 12, 1984), codified at 18 U.S.C. Chapters 227, 229, 231, & 232 and 28 U.S.C. Chapter 58.

[2]See 28 U.S.C. §991(b) (Supp. V 1987).

[3]U.S. Sentencing Commission, Sentencing Guidelines and Policy Statements (April 13, 1987) (incorporating technical, clarifying, and conforming amendments submitted to Congress May 1, 1987), reprinted in 52 Fed. Reg. 18,046-18,138 (May 13, 1987: Part II) [hereinafter cited as "Initial Guidelines"].

[4]See generally Initial Guidelines, Chapter 1, 52 Fed. Reg. at 18,047-53; U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, Chapters 3 & 4 (June 18, 1987) [hereinafter cited as "Sentencing Commission Report on the Initial Guidelines"].

[5]Initial Guidelines, at 1.4, 52 Fed. Reg. at 18,049.

[6]Initial Guidelines §2R1.1(c), 52 Fed. Reg. at 18,082.

[7]See Part I, §A.5, below.

[8]The Sentencing Reform Act was the first federal legislation to establish general fine maxima for all criminal offenses, see 18 U.S.C. § 3571(b), which were set at much higher levels than those generally authorized by prior law, see S. Rep. No. 98-225, 98th Cong., 1st Sess. 105-06 (1983). The Act also established a separate and higher schedule of fine maxima for organizations. 18 U.S.C. § 3571(c).

relation to the losses caused by organizational offenses.[9] By restructuring and raising nearly all fine limits dramatically, the Sentencing Reform Act reflects a judgment that fine levels under prior practice may not be an appropriate basis for sentencing reform.

The imprisonment level structure of the existing guidelines for individuals obviously is inappropriate for organizations, which are subject neither to imprisonment nor to any closely analogous sanction. Moreover, given the relatively small number of organizational prosecutions and the recent revisions to statutory fine authority, a predominately empirical approach relying on past practice is unlikely to provide an adequate and consistent basis for organizational sentencing reform. The development of an organizational sentencing policy will require both empirical analysis and consideration of principled approaches to the application of sanctions to organizational conduct.

In this paper, I present an approach to organizational sentencing that draws upon the theory of harm-based optimal penalties developed in the "law-and-economics" literature over the past twenty years.[10] My aim is not to argue that an "economic" approach to criminal punishment is always "right," while all other possible approaches are always "wrong." Rather, my objective is to show that relatively simple principles drawn from the "economic" theory provide a sound basis for a realistic and effective organizational sentencing policy that furthers the traditional purposes of criminal punishment, the rationalization of the federal criminal sentencing system sought by the Sentencing Reform Act, and the general aims of the criminal law.

The discussion proceeds in four principal parts. Part I sets the context for organizational sentencing policy at the federal level, by: (a) reviewing the basic facts regarding organizational offenders in the federal courts, who are predominantly business corporations charged with property or regulatory crimes and convicted under a standard of vicarious liability for the acts of their agents; and (b) analyzing the Commission's role in the federal sentencing process under the Sentencing Reform Act, which focuses on the creation of determinate sentencing rules to operate within the existing system of criminal prohibitions and enforcement activities. The next three parts of the paper then address the formulation of an optimal penalty policy for organizations, in progressively more detail.

Part II considers the basic optimal penalty theory, and its general implications for the purposes of criminal punishment and the appropriate forms of sanction for organizational crimes. The theory advances the analysis of criminal punishment by recognizing that both criminal behavior itself and efforts to prevent, detect, and punish crime are costly to society. The "optimal" penalty for crime is

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The effective date of the Sentencing Reform Act was deferred from its enactment in October 1984 until the implementation of the initial guidelines on November 1, 1987. Sentencing Reform Act, Pub. L. 98-473, Title II, Chapter II, §235, as amended. For the interim period, Congress enacted the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (October 30, 1984), codified at 18 U.S.C. former §§ 3621-3624, which applied similar fine revisions to offenses committed between January 1, 1985 and October 31, 1987.

[9]See Part I, §§A.4 and B.3, below.

[10]This literature usually is dated from Gary Becker's 1968 article, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968). Specific sources are cited throughout the paper, and a selective bibliography is collected in Appendix A. Brief introductions to the literature are provided by A. M. Polinsky, Introduction to Law and Economics, ch. 10 (1983) and R. Posner, Economic Analysis of Law § 7.2 (3d ed. 1986). For a recent and more detailed introductory treatment, see R. Cooter and T. Ulen, Law and Economics, ch. 11 § IV and ch. 12 §§ II and III (1988).

one that minimizes these total costs of crime and punishment. In its simplest form, the theory specifies an optimal penalty equal to the total external harm or loss caused by an offense (including enforcement costs), divided by the probability that the offense would be detected and punished. As applied in the organizational sentencing context, this simple penalty rule effectively addresses the problem of providing the organization with measured incentives to control its own agents, and produces penalties that are consistent with the sentencing objectives of deterrence, proportionality, public protection, and restitution to victims, because the penalty is based on precisely the same fundamental aim as the substantive criminal law--to protect society from the harmful effects of criminal behavior. Furthermore, the optimal penalty theory identifies monetary sanctions as the most desirable form of sentence for organizational offenders in general, because a monetary penalty both minimizes the societal losses resulting from the sanctioning process and most directly affects the monetary incentives that drive organizational behavior.

Part III provides a more detailed analysis of optimal penalties as a practical sentencing policy, by examining the assumptions and constituents of the simple penalty rule of loss times a "multiple" representing the chances against detection and punishment,[11] including some problems of measuring and applying those two factors, and the limitations on the use of monetary penalties created by non-monetary harms and organizational insolvency. Part IV describes a framework for translating an optimal penalty policy into organizational sentencing guidelines and policy statements.

My general conclusions (Part V) are that optimal monetary penalties provide a theoretically superior and practically feasible goal for an organizational sentencing system, primarily because they are congruent with the harm-prevention aim of the criminal law in general, and simply extend that aim to the process of punishment. The standard justifications for criminal punishment are inadequate to define a system of penalties, because they fail to recognize that both crime <u>and</u> punishment are costly. The synthesis of a penalty system requires a balancing of the benefits and costs of punishment. Optimal monetary penalties can provide that balance for organizational sentencing, with a simple penalty rule that harnesses private incentives to achieve crime control while avoiding destructive governmental interference with lawful and productive private activity.

I. <u>The Context of Organizational Sentencing</u>

This Part reviews the background to the problem of organizational sentencing at the federal level, in two sections addressing: (a) the basic features of organizational crimes prosecuted in the federal system; and (b) the Sentencing Commission's role in establishing criminal sentencing standards for the federal courts.

As used here, "organizational" crime refers to criminal offenses for which artificial legal persons are liable, and is distinguished from "organized" crime, which refers to offenses by criminal groups of individuals. Although there can be some overlap--as where a legal organization exists only as a "front" for wholly criminal activities by a group of individuals--organizational crime generally is distinguished by the separate legal existence and independent criminal liability of the legitimate "organization." Federal criminal law defines "organization" to mean "a person other than an individual,"[12] and therefore includes only artificial persons whose legal existence is recognized by federal law, such as "corporations,

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[11]The "multiple" is simply the reciprocal of the probability of punishment, so that, for example, a probability of .25 (25 percent) translates to a "multiple" of 4 (1 divided by .25). Because the probability is always equal to or less than one, its reciprocal is always one or greater, and hence the term "multiple."

[12]18 U.S.C. § 18 (Supp. V 1987), as added by §38(a) of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592, 3599 (November 10, 1986).

companies, associations, firms, partnerships, societies, and joint stock companies."[13] Thus, "organizational" crime and sentencing, by definition, involves an abstract offender whose existence is recognized by law for the pursuit of legitimate objectives.

The problem of organizational sentencing largely is characterized by the abstract and instrumental nature of the organizational offender, which can act only through individual agents and does not exist as an end in itself, but only as a means for accomplishing some other social objective. In these respects, organizations differ fundamentally from individuals, with several important implications for criminal sentencing policy.

First, organizational crime almost invariably presents a principal-agent problem of internal organizational control. The sanction should provide an appropriate incentive for the abstract "principal" to control its real agents, whose motivations may differ from the organization's.

Second, an organization's individual agents also may be liable to punishment for the same crime, and often are prosecuted together with the organization. Therefore, an "organizational" sentencing situation frequently will involve the simultaneous selection of penalties for both the individual agents and the organization.

Third, the specification of organizational penalties should take account of the basic nature of organizations as abstract instrumentalities for achieving generally lawful and socially beneficial objectives. As legal abstractions, organizations do not have the same interests as individuals, and therefore can not be expected to respond in the same way to actual or threatened penalties. Furthermore, because organizations are mere instrumentalities, the effects of organizational sanctions should be considered in light of society's interests in organizations' legitimate objectives, in order to assure that the sanction--actual or threatened--is not more harmful to society than the crime itself.

These general issues are more specifically focused by a review of the current law and practice of organizational prosecution in the federal courts (§A), and an analysis of the Sentencing Reform Act's mandate to the Sentencing Commission (§B).

A. Organizational Offenses in the Federal Courts

Although both organizational crime and the more general topic of "white collar" crime have received extensive attention in the legal and sociological literature,[14] there appear to be no

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[13] 1 U.S.C. § 1 (1982) (definition of "person" or "whoever" as used in federal statutes). Therefore, as under federal law generally, see Fed. R. Civ. P. 17(b), entities such as partnerships and unincorporated associations that may lack legal capacity under state law nonetheless are subject to federal prosecution as "organizations." United States v. A & P Trucking Co., 358 U.S. 121 (1958) (partnership criminally liable); Gulf Coast Shrimpers & Oystermans Association v. United States, 236 F.2d 658 (5th Cir.), cert. denied, 352 U.S. 927 (1956) (labor organization); United States v. Montana State Food Distributors Association, 271 F. Supp. 403, 405 (D. Mont. 1967) (non-profit orgnization). In theory, governmental organizations also could be criminally liable, but there are no reported cases of prosecution.

[14] The field was first identified by the sociologist Edwin Sutherland, who coined the term "white collar crime" and published the classic study, E. H. Sutherland, White Collar Crime (1949). Since the 1970's, there has been an outpouring of theoretical and empirical writing on the subject. See, e.g., C. Stone, Where the Law Ends (1975); Subcommittee on Crime, House Judiciary Comm., 95th Cong., 2d Sess., White Collar Crime: The Problem and the Federal Response (Comm. Print 1978); M. Clinard, Illegal

comprehensive empirical studies of criminal prosecutions against organizations in either federal or state courts.[15] Therefore, in addition to its research on organizational liability and sentencing standards, the Sentencing Commission's staff has collected and analyzed data drawn from federal court records of organizational prosecutions concluded during the 4-year period between January 1, 1984 and December 31, 1987.[16] While the study is continuing and final results will be published at a later date, the preliminary findings reported here are sufficient to indicate the general features of organizational offenses and sentencing in the federal courts.

Perhaps the most striking fact emerging from the data is the small volume of organizational prosecutions in relation to the overall work of the federal criminal justice system. During the 4-year study period, only 1,569 organizational defendants were identified out of a total of approximately 220,000 criminal defendants in the United States District Courts.[17] Thus, organizations account for less than 1% of federal criminal terminations--an annual average of approximately 400 organizations out of 55,000 defendants. Approximately 78% of the organizational dispositions were convictions,[18] resulting in 1,221 convicted organizations, an annual average of 305. At that rate, each of the 532 active federal district court judges in 1987 on average would have occasion to sentence one organization every 21 months, as compared with approximately 145 individual defendants during the same period.

In addition to their relatively small volume, organizational offenses in the federal courts display five basic features:

(1) The offenders are almost exclusively business corporations, as distinguished from other types of organizations. Very few of the offenders are large or well-known firms.

(2) Business corporations, unlike most individual defendants, are convicted in the federal courts under a standard of vicarious criminal liability for the acts of their agents. The federal standard is more expansive than the prevailing state law rule, which requires the involvement of a "superior agent" to show corporate mens rea. Nonetheless, about half of federal criminal prosecutions

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Corporate Behavior (1979); G. Geis & E. Stotland (eds.), White-Collar Crime: Theory and Research (1980); M. Clinard & P. Yeager, Corporate Crime (1980); M. D. Ermann & R. Lundman (eds.), Corporate and Governmental Deviance (1982); P. Wickman & T. Dailey (eds.), White-Collar and Economic Crime (1982).

[15]The most thorough existing study of corporations is M. Clinard, Illegal Corporate Behavior (1979), based on 1975-1976 data regarding federal law enforcement actions against 582 of the largest U.S. corporations and their large subsidiaries. Aside from focusing only on large corporations, the Clinard study did not distinguish criminal from civil or administrative enforcement, and did not purport to be comprehensive even for the sample studied.

[16]For a full description of the methodology and preliminary results of the Commission staff's study, see Appendix B to this paper.

[17]See Admin. Office of the U.S. Courts, 1984-1987 Annual Reports of the Director, Appendix Tables D-4 & D-5. These figures exclude approximately 320,000 additional defendants charged with petty offenses and disposed of under the jurisdiction of United States Magistrates, pursuant to 18 U.S.C. §§ 3401-3402 (1982 & Supp. V 1987).

[18]This rate is roughly equivalent to the overall federal conviction rate of 81 percent in 1986-1987. See Administrative Office of the U.S. Courts, 1986-1987 Annual Reports of the Director, Appendix Table D-4.

against corporations involve individual co-defendants, who typically are officers or employees of the charged firms.

(3) Approximately 70-75% of organizational dispositions involve antitrust offenses, fraud, or other property crimes, and another 20-25% involve regulatory offenses, predominantly in the areas of environmental regulations, food and drug laws, export control, and currency transaction reporting. Organizational prosecutions for crimes of violence or controlled substance offenses are virtually non-existent, and prosecutions for gambling, obscenity, or racketeering offenses are infrequent.

(4) The predominant form of sentence is a monetary fine, which is used, by itself or in conjunction with a restitution order, for 82% of convicted organizational defendants. The major alternative of probationary supervision is used for 16% of defendants, and then typically for purposes of enforcing a fine or carrying out restitution.

(5) Most federal offenses by organizations involve statutory violations for which civil remedies, including punitive civil penalties, are available at the behest of a federal agency, injured victims, or both. Although the evidence gathered to date is only suggestive and incomplete, it would appear that civil or administrative enforcement is invoked more commonly for organizations than for individuals. It is clear that public civil and administrative enforcement actions far outnumber criminal prosecutions against organizations.

I will discuss each of these features in more detail in the following subsections. Taken together, they narrow the principal focus of organizational sentencing policy in the federal system to business firms convicted of property or regulatory crimes, traditionally punished through monetary fines, and subject to additional penalties through collateral civil and administrative enforcement.

1. Corporate Offenders

Of the 1,221 organizations convicted and sentenced during the four year study period, virtually all were business firms operated for profit.[19] The business firms were predominantly business corporations, but also included a sprinkling of professional corporations and partnerships.

Less than 15 percent of the organizational defendants were large or well-known corporations.[20] Instead, the typical corporate offender was a relatively small, closely-held firm.

For both large and small firms, the nature of organizational offenders focuses federal sentencing policy on the interests and objectives of business corporations. Any penalty system logically must recognize the characteristics of the actual and potential offenders it faces. Criminal penalties traditionally have emphasized very fundamental interests, such as an individual's interests in life and

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[19]Less than 1% of the organizational defendants appeared to be entities other than business firms, and those exceptions were trade or professional associations or cooperatives. Although there are reported cases of prosecutions against labor unions and non-profit associations, none appeared in the Commission staff's study of cases terminated during the period from January 1, 1984 through December 31, 1987.

[20]Only about 11% of the charged organizations could be located in Standard & Poor's 1987 Register of Corporations. About 2% of the organizations (30 firms) were either listed (13) or subsidiaries of companies listed (17) in the 1987 "Forbes 500" listing of 790 large U.S. firms, comprising the largest 500 firms in each of the categories of sales, profits, assets, and market value.

physical liberty, to which offenders are likely to be most responsive. By their very nature, business firms have different interests and objectives from individuals.

Business firms are economic organizations, which exist fundamentally for the purpose of producing goods and services valued by their customers, at a profit to their owners. In our competitive economy, financial profit incentives are the primary organizing and motivating force that produces economic progress. Thus, while business firms (like all producers) are motivated immediately by their own pecuniary gain, their productive activities create benefits that all of society has an interest in preserving.

These basic considerations have immediate implications for the forms and objectives of organizational sentencing. First, the corporate offenders are motivated primarily if not exclusively by monetary incentives, and therefore are likely to be most responsive to monetary forms of punishment, which directly affect financial results. Unlike individuals, corporations have no other fundamental interest: corporations value their "liberty" from supervision, even their very existence, only as a means to the end of favorable financial results. Second, again unlike an individual, a corporation's own interests are merely instrumental to its economic function in society. A punishment that affects the corporation's interests also will affect that function. Third, the corporation's economic function represents more than the profit motivation of its shareholders; it also represents the general societal interest in the process of value creation through competitive business activity. A system of corporate penalties should avoid imposing punishment in a form or manner that disrupts the competitive process, which provides benefits to society as a whole.

2. Vicarious Liability and Joint Prosecution with Agents

Under the longstanding rule of federal criminal law, business organizations are subject to vicarious criminal liability for offenses committed by their agents, if the agents were acting (1) within the scope of their employment or authority, and (2) for the benefit of the organization.[21] The agents themselves need not be prosecuted, convicted, or even identified, so long as it is shown that one or more corporate agents engaged in conduct that, individually or collectively, constituted an offense.[22] In contrast with the prevailing state law rule requiring the involvement of a "superior agent" to establish organizational mens rea,[23] under federal law a corporation is criminally liable for offenses by "subordinate, even

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[21] New York Central & Hudson River R. R. v. United States, 212 U.S. 481 (1909); see generally 1 K. Brickey, Corporate Criminal Liability, chs. 3 & 4 (1984 & Supp. 1987); 1 National Commission for the Reform of Federal Criminal Laws, Working Papers 168-73 (1970). The requirement that the agent act "for the benefit" of the corporation means only that the agent intends to act in behalf of the corporation, and does not require that a benefit be received by the corporation, see United States v. Carter, 311 F.2d 934, 942-43 (6th Cir. 1963); Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945), but would exclude the case where an agent acts solely for his own or a third party's benefit, see Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962).

[22] See United States v. American Stevedores, Inc., 310, F.2d 47 (2nd Cir. 1962); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974).

[23] See 1 W. LaFave & A. Scott, Substantive Criminal Law §3.10, at 366-67 (1986); 1 American Law Institute, Model Penal Code and Commentaries: Part I, Comment to §2.07, at 335-40 (1985). Under the Model Penal Code, except for minor violations and omissions to discharge affirmative duties specifically imposed by law, corporate liability requires that "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high

menial, employees,"[24] or outside agents for the corporation,[25] without any knowledge, authorization, or participation by corporate management and even if the management has specifically forbidden the conduct and taken reasonable measures to prevent the offense.[26]

In addition to this expansive standard of organizational liability, federal law holds agents individually responsible for offenses committed or aided in the course of their employment, under general principles of complicity.[27] For certain offenses, organizational agents also may be subject to a form of expanded liability for the firm's violations by virtue of their position in the company, either under special statutory provisions broadening accomplice liability,[28] or under Supreme Court decisions construing the federal food and drug laws to impose strict criminal liability on officials having a "responsible relation" to an organization's offense.[29]

Thus, in principle most federal "organizational" offenses will produce dual liability in both the organization and its individual agents. In fact, roughly half of all federal prosecutions against organizations involve individual co-defendants.[30] While the expansive federal standard of organizational liability makes it difficult to distinguish degrees of managerial involvement from court records, at least a

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managerial agent acting in behalf of the corporation within the scope of his office or employment." Model Penal Code §2.07(l)(c) (1985). "High managerial agent" is defined to mean an officer or other agent "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation," id. §2.07(4)(c).

[24]Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962); see also C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.), cert. denied, 328 U.S. 869 (1946).

[25]See Texas-Oklahoma Express, Inc. v. United States, 429 F. 2d 100 (10th Cir. 1970).

[26]See, e.g., United States v. Automated Medical Laboratories Inc., 770 F. 2d 399 (4th Cir. 1985); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971).

[27]See 18 U.S.C. § 2; United States v. Wise, 370 U.S. 405 (1962).

[28]See generally 1 National Commission for Reform of Federal Criminal Laws, Working Papers 176-180, 209-213 (1970).

[29]United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943). The precise nature and scope of the Dotterweich-Park standard is unclear as to whether the liability is absolute or requires at least some type of negligence. See 1 W. LaFave & A. Scott, Substantive Criminal Law §3.10, at 374-76 (1986). So far, the doctrine generally has not been applied outside the food and drug context.

[30]In total, approximately 4,200 individuals were prosecuted jointly with organizations, for an average of nearly 3 individuals for each of the 1,569 organizations. However, even when individual co-defendants are added, cases involving organizations account for only 2.6% of defendants disposed of in the federal criminal system.

substantial portion of federal cases do not appear to involve management culpability of the type required under the Model Penal Code.[31]

The federal criminal liability standards, and the resulting pattern of joint prosecution against organizations and individuals, underscore two important issues faced by organizational sentencing policy at the federal level: (1) coordinating organizational and individual sentencing; and (2) encouraging the organization's internal control over its agents. Unlike the state law pattern represented by the Model Penal Code, federal substantive law does not allocate criminal responsibility between the individual and the firm, and imposes dual liability on both. At the federal level, that allocation is left to the sentencing function.

As I will discuss further in Part II of this paper, the problem of the organization's internal control over its agents is central to a consideration of organizational crime and the development of an effective sentencing policy. Individual agents often will not have the same objectives and motivations as the organization, and therefore the organization must expend resources to prevent agents from committing offenses. The penalty system, whether by design or otherwise, in fact will provide organizations with incentives for compliance expenditures. The key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts.

3. Property and Regulatory Crimes

The Sentencing Commission staff's study shows that the majority of federal prosecutions against organizations involve economic or other property crimes, and the remainder involve mostly regulatory offenses. Table 1 provides a breakdown of all organizational prosecutions and convictions based on groupings of the "offense code" assigned by the Administrative Office of the U.S. Courts, which is linked to the principal charging statutes:

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[31]As part of the Commission staff's study, law student coders were asked to rank "officer culpability" from a sample of presentence reports. Despite the small size of most of the organizational defendants, at least 20% of offenses were identified as not involving officer participation.

Table 1
Organizational Defendants by Offense Code Groups,
January 1, 1984 - December 31, 1987

	Prosecutions	Convictions
Property Crimes	1,076 (68.6%)	842 (69.0%)
Antitrust	322	274
Fraud	578	432
Tax & Customs	113	94
Other Property Offenses	63	42
Regulatory Crimes	366 (23.3%)	310 (25.4%)
Food and Drug	87	76
Motor Carrier Act	62	55
Agriculture	42	35
Firearms	8	6
Others	167	138
Other Crimes	127 (8.1%)	69 (5.6%)
Racketeering, Gambling, & Perjury	28	18
Bribery	24	19
Drug Abuse Control	31	14
Immigration	4	3
All Other Offenses	40	15
Totals	1,569 (100%)	1,221 (100%)

There were almost no crimes of violence: the group of offenses included 1 assault, and no homicide, robbery, burglary, or kidnapping. Of the 1,221 convictions, 962 were for felonies.

This analysis of charging offenses is not completely descriptive of underlying conduct, because: (1) some of the more general statutes, such as those prohibiting fraud and false statements,[32] are used to charge a wide variety of conduct, which in the case of "mail fraud" could range from antitrust offenses to safety violations; and (2) the Administrative Office's statistics do not separate some of the regulatory offense categories, such as environmental violations. Accordingly, the Commission's staff obtained

[32]The major examples are 18 U.S.C. §§ 287 (false claims), 1001 (false statements), 1341 (mail fraud), and 1343 (wire fraud).

and examined the full presentence investigation reports[33] on a sample of 370 convicted organizations, and reclassified those convictions into the modified offense categories[34] used in Table 2.

Table 2
Sample of 370 Convicted Organizational Defendants
by Modified Offense Category,
January 1, 1984 - December 31, 1987

	Number	Percent of Total
Property Crimes	274	74.1%
Antitrust	79	21.4%
Fraud-Private Victim	44	11.9%
Fraud-Government Program or Procurement	106	28.6%
Tax and Customs	26	7.0%
Other Property Offenses	19	5.1%
Regulatory Crimes	83	22.4%
Environmental	31	8.4%
Food and Drug	17	4.6%
Currency Reporting	12	3.2%
Export Control	11	3.0%
Motor Carrier & Worker Safety	7	1.9%
Protected Wildlife	3	0.8%
Import Control	2	0.5%
Other Crimes	13	3.5%
Totals	370	100%

This analysis shows that organizational convictions are even more heavily concentrated in economic or property crimes (74.1%) than is indicated by the charge offense breakdown. The remaining convictions are predominantly for regulatory offenses (22.4%), with environmental violations as the largest group.

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[33]The presentence investigation report is prepared by a probation officer to provide the court with information pertinent to sentencing, including the circumstances of the offense, the impact on victims, and the background of the defendant. See Fed. R. Crim. P. 32(c)(2); 18 U.S.C. § 3552. Under prior law, the presentence investigation could be waived by the defendant, with the permission of the court. The Sentencing Reform Act of 1984 changed that rule, by requiring a presentence investigation and report "unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority . . . and the court explains this finding on the record." Fed. R. Crim. P. 32(c)(1), as amended by Pub. L. No. 98-473, Title II, §215(a)(4), 98 Stat. 2015 (October 12, 1984).

[34]These categories are defined in Appendix B.

Thus, not surprisingly, virtually all federal organizational prosecutions involve "white collar" crimes, committed by non-violent means and generally motivated by financial gain. Furthermore, approximately three-fourths of the prosecutions involve economic or property crimes for which the primary harm or loss also was monetary. These characteristics, coupled with the fact that nearly all offenders are business firms operated for profit, suggest that monetary sanctions are appropriate to both the offenders and most offenses encountered in the federal system.

4. Monetary Criminal Sanctions

In fact, monetary fines and restitution are the vastly predominant form of organizational punishment imposed by the federal courts.

Of the 1,221 organizational defendants convicted during the 4-year period examined by the Commission's staff, 1,003 (82.1%) were punished solely by monetary sanctions, consisting of a fine alone or a combination of a fine and restitution payment. A total of 197 defendants (16.1%) were sentenced to some form of probation. Over two-thirds of the probationary sentencings also involved the payment of a fine. In most instances, the conditions of probation focus on the installment payment of a fine or the provision of restitution to victims or another type of restorative remedy, such as "clean-up" for an environmental offense. Other types of probation conditions, such as community service, appear to be used rarely (2% or less of cases), although precise figures are not yet available.

For the entire group of sentenced organizations, the average fine was $57,324 when imposed without probation, and $57,036 when imposed with probation. Probation terms averaged 36.2 months when imposed without fines, and 39.6 months when imposed with fines.

A more detailed analysis of sentence types, including fines, probation, and restitution, was performed for the sample of 370 organizations for which the full presentence report was examined, which are weighted more heavily toward probationary sentences (102 out of 370, or 27.6%, as compared with the general figure of 16.1%).[35] Of the 102 probationary sentences, 22 involved probation alone and 80 involved a combination of probation with monetary sanctions, including fines (57), restitution (9), or both (14). For the remaining 268 defendants penalized by monetary sanctions alone, 4 involved only restitution, 18 involved both restitution and fines, and the remaining 246 involved only fines. The average fine for the entire 370-defendant sample was $70,113 and the average total monetary sanction (restitution and fines combined) was $99,012. In the subgroup of 80 defendants where both probation and monetary sanctions where used, the average fine was about the same ($71,107), but the average total monetary sanction ($144,700) was much higher than the sample as a whole.

In analyzing the relationship between monetary sanctions and dollar loss caused by the offense, the staff examined a subsample comprising 132 of the 370 defendants for whom loss was reported through the Federal Probation Sentencing and Supervision Information System (FPSSIS). In that group, the average ratio of total monetary sanction to loss was 1.91. The ratio of the fine alone to loss was 1.98 where no restitution was ordered, and 1.43 where restitution was ordered. There is considerable variation in this ratio across offense types and absolute levels of dollar loss. However, the preliminary analysis has yet to isolate a definite structure to the variation, which may not be feasible given the small number of cases available for analysis.

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[35]Full presentence investigation reports appear to be prepared far less frequently for organizations than for individuals, but we do not yet have a precise percentage.

5. Collateral Civil Enforcement

Nearly all of the organizational offenses prosecuted in the federal courts involve violations for which federal law also provides civil remedies, including punitive civil penalties in most instances. Table 3 (following this page) provides a summary of the collateral civil remedies available under federal law for the five most common types of offenses--fraud, antitrust, environmental, tax and customs, and food and drug--which together account for over 80% of organizational convictions in the federal courts. For all types other than food and drug offenses, punitive civil remedies--civil or administrative penalties or multiple damages--are available at the instance of a federal agency, a private victim, or both.

The existence of both criminal and civil sanctions for the same conduct obviously raises the question of coordination among those sanctions. Although present to some degree also in individual sentencing,[36] the coordination problem is more critical to the development of organizational sentencing policy at the federal level, for several reasons.

First, the organizational offenses are heavily concentrated in the "white collar" category, for which collateral civil remedies are more likely to be available and practicable. For federal offenders generally, "white collar" crimes account for less than 25% of prosecutions.[37] For organizational offenses, the comparable proportion is over 95%.[38] Moreover, organizations are even more likely than individual white collar offenders to have assets reachable by civil remedies.

Second, the organizational offenders and offenses are a principal focus for a broad range of federal law enforcement activity. Many of the major federal regulatory agencies--the ICC, FDA, FTC, SEC, and EPA, among others--were established primarily to regulate interstate business activities, which are carried out mostly by organizations rather than individuals. Approximately half of all organizational prosecutions in the federal courts are adjuncts to either business regulation or antitrust enforcement. Most of the remaining prosecutions involve fraud affecting federal government activities, either in procurement (predominantly by the Department of Defense) or in carrying out social programs, such as Medicare and Medicaid. In all of these areas, criminal prosecutions are accompanied by active and extensive programs of enforcement through civil and administrative procedures.

Third, criminal and civil sanctions are closer substitutes for organizations than for individuals. Imprisonment plays a central role in individual sentencing, but is not an available option for organizations. Given the absence of the imprisonment option, coupled with the general availability of punitive civil or administrative penalties, both criminal and civil sanctions for organizations take the same two basic forms: (1) monetary; and (2) specific relief. Civil damages, penalties, and forfeitures can have essentially the same effect as criminal restitution, fines, and forfeitures; and civil injunctions and administrative orders can achieve the same results as criminal probation sentences for organizations. To the extent that civil and criminal enforcement can produce equivalent effects, it is only sensible to avoid unwarranted duplication of effort and coordinate the parallel enforcement systems in the most effective manner possible.

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[36]The Commission's existing guidelines for individuals include provisions for coordinating monetary fines with restitution and collateral civil remedies. See Initial Guidelines §§5E4.1(b), 5E4.1(d)(4) &(5).

[37]See Bureau of Justice Statistics, U.S. Department of Justice, Federal Offenses and Offenders: White Collar Crimes, BJS Special Report, NCJ-106876, Table 5 (page 4) (September 1987).

[38]See §A.3, above.

TABLE 3: Federal Civil Remedies Available For Organizational Offenses

Offense Types[a]	Federal Agencies	Public Remedies	Private Remedies
1. Fraud (40.5%)[b]			
— Federal Programs and Procurement	Federal agency affected, predominately the Department of Defense.	(1) Civil penalties of $5,000-$10,000 per false claim, plus treble damages. Civil False Claims Act, 31 U.S.C. §3729-3731. (2) For false claims under $150,000: administrative penalties of $5,000 per false claim, plus double damages. Program Fraud Civil Remedies Act, 31 U.S.C. §3802. (3) Forfeiture. 28 U.S.C. §2514. (4) Debarment for up to 3 years. Federal Acquisition Regulations, Subpart 9.4.	Damages suits by any private parties injured, 31 U.S.C. §3730(b).
— Securities Fraud	Securities and Exchange Commission	(1) Civil penalties for insider trading: three times the profit gained or loss avoided, 15 U.S.C. §78u(d). (2) Injunctive relief. (3) Suspension or permanent disqualification from the securities industry.	Investor suits for rescission or single damages plus costs and attorneys' fees.
— Consumer Fraud	Federal Trade Commission	(1) Civil penalties of up to $10,000 per violation, 15 U.S.C. §45(l), (m). (2) Specific relief and order of restoration to victims, 15 U.S.C. §57(b). (3) Injunctive relief, 15 U.S.C. §45(l).	Credit and Truth-in-Lending Violations: victims' suits for damages, 15 U.S.C. §1640, 1692(k).
— Odometer Tampering	Civil Division, Department of Justice	(1) Civil penalty of up to $2,000 per violation, up to a maximum of $100,000 per series of related violations, 15 U.S.C. §1990(b). (2) Injunctive relief, 15 U.S.C. §1990.	Victims' suits for treble damages or $1,500, whichever is greater, plus costs and attorneys' fees, 15 U.S.C. §1989.
2. Antitrust (21.4%)	Antitrust Division, Department of Justice	(1) Injunctive relief, 15 U.S.C. §§4, 18a, 25. (2) If the federal government is a victim, the public remedies provided for program and procurement fraud.[b]	(1) Victims' suits for treble damages, plus costs and attorneys' fees, 15 U.S.C. §15. (2) Victims' suits for injunctive relief, 15 U.S.C. §26.
	Federal Trade Commission	(1) Specific relief. (2) Civil penalties, for violations of orders under §5 of the FTC Act, 15 U.S.C. §45(l).	

3. Environmental (8.4%)	Environmental Protection Agency	(1) Civil penalties of $25,000-40,000 per day for violations of principal environmental statutes regulating air and water pollution, hazardous and toxic substances, and pesticides.[c] (2) Injunctive relief.	Private enforcement suits, 15 U.S.C. §2619; 33 U.S.C. §1365; 42 U.S.C. §§4911, 6972.[d]
4. Tax & Customs (7.0%)[b]	Internal Revenue Service, Department of the Treasury	Civil penalties: 50% of tax due (for fraud), 26 U.S.C. §6653(b).	None.
	United States Customs Service, Department of the Treasury	(1) Civil penalties generally equal to twice the value of the article or merchandise involved, or up to $10,000 per violation.[e] (2) Forfeiture, 19 U.S.C. §§1595(a), 1462.	
5. Food & Drug (4.6%)	Food and Drug Administration, Department of Health and Human Services Civil Division, Department of Justice	(1) Injunctive relief, 21 U.S.C. §332. (2) Seizure of adulterated or misbranded products, 21 U.S.C. §334.	None.[d]

[a] The percentages shown for offense types are based upon the 370-defendant sample. See Table 2. The cumulative percentage for the types shown is 81.9%.

[b] In addition to the remedies shown, multiple acts of fraud may trigger the availability of the public and private civil remedies provided under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §1964, including private treble damages and attorneys' fees and civil enforcement actions imposing restrictions on future activities of violators, including "dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. §1964(a).

[c] See 7 U.S.C. §1361, 15 U.S.C. §2615; 33 U.S.C. §§1319, 1415; 42 U.S.C. §§300(j), 4910, 6928, 6973, 9609.

[d] In these cases, private victims are likely to have rights of action under state law for personal injury damages.

[e] See 19 U.S.C. §§469, 1436, 1439, 1440, 1454, 1455, 1459, 1581, 1584-1590.

In fact, federal law enforcement authorities do rely heavily on civil and administrative remedies in lieu of or in addition to criminal sanctions, and do seek to coordinate the overall enforcement effort. For all major types of organizational offenses in the federal system, civil and administrative enforcement actions far outnumber criminal prosecutions.[39] The cases that do enter the criminal system generally have been screened by both a referring agency and the Department of Justice on the basis, among other factors, of the availability and adequacy of collateral civil remedies, and thereby reflect to some extent a process of coordination.[40] Some agencies, such as the Department of Defense, have adopted formal policies of coordination among criminal and civil remedies.[41]

The interplay between criminal and civil sanctions presents both challenge and opportunity to organizational sentencing reform. The challenge is to assure that, at a minimum, reformed organizational sentencing standards do not disrupt the appropriate relationships among the several parallel means of enforcement or impair the overall effectiveness of the federal law enforcement system. The opportunity lies in developing an organizational sentencing policy that affirmatively will promote the effective coordination of parallel criminal sentences and civil remedies to achieve an appropriate overall sanction at the least cost to the government, and to society at large.

B. The Sentencing Commission's Task

The United States Sentencing Commission is charged with the principal responsibility for implementing the sweeping reforms to the federal criminal sentencing process mandated by the Sentencing Reform Act of 1984. The basic thrust of the Reform Act was to shift the federal system from discretionary to determinate sentencing, by fostering the development of a comprehensive and coherent body of law to guide the sentencing decisions of the federal courts. The Commission's major role is to "establish sentencing policies and practices for the Federal criminal justice system" to carry out the reforms envisioned by the Act,[42] by promulgating sentencing guidelines that are binding upon

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[39]For example, in fiscal year 1986 the Securities and Exchange Commission initiated 312 civil and administrative enforcement actions against 697 respondents, as compared with 72 criminal prosecutions in SEC-related matters. U.S. Securities and Exchange Commission, 1986 Annual Report 7 (1987). In gross terms, federal civil cases in which the United States is a party--many of which are enforcement actions --outnumber criminal cases by more than 2 to 1. See Administrative Office of the U.S. Courts, 1986 Annual Report of the Director, Appendix Tables C-3 & D-4.

[40]See U.S. Department of Justice, Principles of Federal Prosecution §5 & Comment, at 13-14 (1980): "Although on some occasions [parallel civil and administrative remedies] should be pursued in addition to criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcment interests."

[41]See Secretary of Defense, DoD Directive No. 7050.5, "Coordination of Remedies for Fraud and Corruption Related to Procurement Activities" (June 28, 1985) (on file at the U.S. Sentencing Commission); Office of Inspector General, Department of Defense, Indicators of Fraud in DoD Procurement, Publication IG, DoD 4075.1-H, § 11-2, at 19 (June 1987).

[42]28 U.S.C. § 991(b)(1).

the courts except in extraordinary cases[43] and sentencing policy statements that the courts are required to consider in imposing a sentence.[44]

In essence, the Commission's task is to rationalize the sentencing phase of the federal criminal process, through guidelines and policy statements that will form the core of the new federal law of sentencing. The Commission already has taken the first step along that path, by promulgating its initial set of guidelines and policy statements, which cover most federal offenses but, with the exception of organizational fines for antitrust offenses, apply only to individuals and are structured around the imprisonment option.

For organizations, the basic objectives of sentencing reform are the same, but the essential nature of the offenders and the available sanctions are different. Unlike the imprisonment sanction for individuals, which was left largely unchanged from prior law, the Sentencing Reform Act made significant changes in both the nature and authorized levels of the sentencing options for organizations. Moreover, because imprisonment is not an option, sentencing guidelines and policy statements for organizations must be based upon a different structure than the guidelines for individuals, in order to achieve the objectives of coherence and consistency in imposing sentences that are appropriate to the organizational offenders and offenses presented in the federal courts.

1. The Sentencing Reform Act

The Sentencing Reform Act of 1984, "the first comprehensive sentencing law for the Federal system,"[45] had its roots in several decades of criminal law reform efforts, beginning with the Model Penal Code and continuing through the work of the Brown Commission and subsequent Congressional efforts at comprehensive recodification of the federal criminal laws, as well as sentencing reform and victims' rights initiatives at both the state and federal levels.[46] By the mid-1970's, the proposals for sentencing guidelines promulgated by a permanent federal sentencing commission had evolved essentially into their ultimate form as a part of the federal criminal law recodification under consideration by the Senate.[47] However, the full Congress was unable to act on comprehensive recodification. In the early 1980's, the sentencing reform proposals were renewed as one aspect of "crime control" legislation, and finally enacted as Chapter II of the "Comprehensive Crime Control Act of 1984,"[48] which was signed into law by the President on October 12, 1984.

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[43]18 U.S.C. § 3553(a)(4) & (b).

[44]18 U.S.C. § 3553(a)(5).

[45]S. Rep. No. 98-225, 98th Cong., 1st Sess. 37 (1983) [hereinafter cited as "Senate Report"]. Because the Act ultimately was passed as part of a package of crime control measures that itself was incorporated into a even larger piece of legislation making continuing appropriations, there is no definitive House report, and therefore the Senate Report is the principal source of legislative history.

[46]For a more detailed description of the history of federal sentencing reform, see Chapter 1 of the Sentencing Commission Report on the Initial Guidelines.

[47]See S. 1437, 95th Cong., 1st Sess. (1977); S. 1722, 96th Cong., 1st Sess. (1980); S. 1630, 97th Cong., 1st Sess. (1981). All three bills were reported by the Senate Judiciary Committee, and S. 1437 was passed by the full Senate on January 30, 1978, see 124 Cong. Rec. 1463 (1978).

[48]Pub. L. No. 98-473, Title II, 98 Stat. 1976 (1984).

In addition to sentencing reform, the Comprehensive Crime Control Act of 1984 made a number of important changes in federal criminal law, affecting bail, criminal forfeitures, justice assistance, victim compensation programs, the insanity defense, definitions of particular federal crimes, and many other matters.[49] But even by itself, the Sentencing Reform Act is a very significant piece of legislation, because it charts on entirely new course for the federal criminal sentencing system.

The Sentencing Reform Act essentially replaced all previous federal sentencing provisions with an entirely new and comprehensive statutory structure governing the imposition and execution of criminal sentences, and creating the Sentencing Commission as a permanent and independent agency to prescribe the practices and policies to be followed by the courts within that structure. For the first time in the federal system, the Sentencing Reform Act established general statutory provisions specifying the available sentencing options, setting forth the basic principles and purposes of criminal sentencing, enumerating factors to be considered by the sentencing judge, classifying offenses by a uniform grading system, governing postsentence administration, and setting forth standards for appellate review of a sentence. In addition, although the Act did not change authorized imprisonment levels for federal offenses, it did made other substantive changes in criminal sentences, by generally raising and restructuring statutorily authorized fine levels, establishing probation as an independent sentence, incorporating statutory authority for restitution, creating the new sentence of notice to victims, and completely abolishing parole in the federal system. In its authorization of the Sentencing Commission, the Reform Act established the basic purposes and principles of sentencing guidelines and policy statements, as a well as providing a number of specific requirements and directives for the Commission's work.

A full and detailed analysis of the Sentencing Reform Act's provisions is beyond the scope of this paper. However, for purposes of considering the Commission's task of creating new sentencing standards, both generally and for organizations in particular, I believe that the reforms sought by the Act can be summed up by two major themes to be found in the statute and its legislative history: (1) determinate sentencing; and (2) a principled law of sentencing. Both themes arise from the background of the legislation, which was a response to problems of uncertainty and inconsistency created by the pre-existing system of broadly discretionary sentencing in the federal courts.

Determinate Sentencing. One major impetus for the Reform Act was a growing dissatisfaction with the results produced by the system of discretionary sentencing that had prevailed in the American criminal process, at both federal and state levels, for most of this century. At the federal level, the Congress found that "the unfettered discretion the law confers on [sentencing] judges and parole authorities" had created both uncertainty as to the actual sentence that an offender would serve and unwarranted disparities between sentences imposed on similarly situated offenders.[50] In part, the indeterminacy of sentences was built into the system, because "criminal sentencing is based largely on an outmoded rehabilitation model,"[51] which most participants in the sentencing process now agreed was "not an appropriate basis for sentencing decisions."[52] The disparity and uncertainty created by the discretionary sentencing system also was thought to be unfair to both offenders and the public, and to have undermined the efficacy of the criminal justice system in deterring crime:

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[49]For a summary of the provisions, see U.S. Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress (December 1984).

[50]Senate Report, at 38-39; see id. at 41-50

[51]Id. at 38.

[52]Id. at 40.

"[T]he existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime."[53]

To remedy these defects, the Reform Act sought to replace the broadly discretionary system with a more determinate, but still flexible, sentencing process. After examining the options and considering the experience of several states with sentencing reform,[54] the Congress chose to implement determinate sentencing by establishing a permanent and independent Sentencing Commission to promulgate sentencing guidelines and policy statements that would guide judicial sentencing decisions, and to abolish the institution of parole at the federal level.[55] Thus, the new system seeks to eliminate uncertainty by requiring offenders to serve precisely the sentence imposed by the sentencing judge.[56] In addition, the Act seeks to avoid unwarranted disparity by directives that both the Commission's guidelines and the judge's sentencing decision consider the interest in "avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct."[57]

Although these concerns were generated primarily by the sentencing of individuals to imprisonment and probation, they have more general significance for the Commission's formulation of guidelines and policy statements. The point may seem obvious, but it bears emphasis: determinate sentencing requires determinate rules that specify sentences in terms of a relatively limited number of relatively objective factors. Furthermore, because virtually all sentences ultimately are measured in some type of quantitative "unit" (months of imprisonment or probation, or dollars of a fine or restitution payment), determinate sentencing rules ultimately require some type of quantification of sentencing factors in terms of the punishment "unit."

A Principled Law of Sentencing. A second and more fundamental theme of the Sentencing Reform Act was the legislative intent to foster the development of a comprehensive, consistent, and detailed body of federal sentencing law that would replace the discretionary sentencing system. The Congress attributed much of the uncertainty and disparity of existing practice to the lack of a coherent body of sentencing law to guide trial courts and provide appellate courts with a basis for meaningful review.[58]

The Reform Act sought to cure these defects by creating a framework for the development of federal sentencing law, comprising three elements: (1) general statutory statements of the purposes and

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[53] Id. at 49-50

[54] See id. at 51-58, 60-64. For a recent survey of approaches to sentencing reform, see M. Tonry, Sentencing Reform Impacts (February 1987) (published by the National Institute of Justice, U.S. Department of Justice).

[55] Under the Reform Act, the United States Parole Commission is to be phased out by 1992. In place of parole, the Act creates the option of "supervised release" following a term of imprisonment, administered through the probation service of the federal courts. However, unlike parole, supervised release is a determinate sentence imposed by the sentencing judge and controlled by guidelines.

[56] However, an imprisonment sentence is subject to "good time" credits earned under a statutorily prescribed formula. 18 U.S.C. § 3624(b).

[57] 28 U.S.C. § 991(b)(1)(B); see id. § 994(f); 18 U.S.C. § 3553(b)(6).

[58] See Senate Report, at 38-41, 49-50.

principles of sentencing, and the sentencing options available;[59] (2) the creation of the Sentencing Commission with broad authority to prescribe more detailed sentencing policies and practices for the federal courts;[60] and (3) procedural provisions calling for articulation of the bases for sentencing decisions by trial courts[61] and expanded appellate review of sentences.[62]

The first element of the framework is reflected primarily in new sections 3551 and 3553(a) of Title 18, which set forth general sentencing purposes and principles. Section 3551 enumerates the available sentencing options for individuals and organizations, and states the fundamental principle that punishments should be designed "to achieve the purposes [of sentencing]."[63] Section 3553(a) sets forth four basic purposes of criminal sentencing--just punishment, deterrence, public protection, and rehabilitation[64]--and directs the sentencing court to "impose a sentence sufficient, but no greater than necessary, to comply with [those] purposes,"[65] after considering "the nature and circumstances of the offense and the history and characteristics of the defendant,"[66] the sentencing options available, the Sentencing Commission's applicable guidelines and policy statements, "the need to avoid unwarranted

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[59]See 18 U.S.C. §§ 3551, 3553(a), 3561-3563, 3571-3572, 3581-3584. As summarized in the legislative history:

> "[The bill] contains a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kinds of sentences that may be imposed to carry out those purposes, and prescribes the factors that should be considered in determining the kind of sentence to impose in a particular case."

Senate Report, at 50.

[60]See 28 U.S.C. §§ 991(b), 994; 18 U.S.C. §§ 3553(b); 3742.

[61]See 18 U.S.C. § 3553(c); Fed. R. Crim. P. 32(c).

[62]18 U.S.C. § 3742. Under the Act, both the Government and the defendant may appeal a sentence outside the Commission's guidelines or for error in applying the guidelines.

[63]18 U.S.C. § 3551(a).

[64]18 U.S.C. § 3553(a)(2), which states those purposes as:

> "(2) the need for the sentence imposed -
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> "(B) to afford adequate deterrence to criminal conduct;
>
> "(C) to protect the public from further crimes of the defendant; and
>
> "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

[65]18 U.S.C. § 3553(a).

[66]18 U.S.C. § 3553(a)(1).

sentence disparities,"[67] and "the need to provide restitution to any victims of the offense."[68] These general sections are accompanied by provisions setting forth the availability, basic parameters, and supplemental sentencing factors for each of the major sentencing options of imprisonment,[69] probation,[70] fines,[71] restitution,[72] notice to victims,[73] and criminal forfeiture.[74] Thus, the statutory provisions now provide a comprehensive and consistent statement of sentencing options, purposes, and principles.

However, the Reform Act was not intended to be a detailed codification of specific sentencing policies and rules that would dictate the outcomes of particular cases. Congress rejected the idea of sentencing reform through specifically legislated sentences,[75] and instead chose the more flexible and evolutionary approach of creating a specialized guidelines drafting agency that would work in conjunction with the courts to develop a detailed body of sentencing law.[76] The second and third elements of the Reform Act's framework were designed to achieve this objective.

In constituting the Sentencing Commission as a permanent and independent authority that would establish sentencing policies and practices for the federal system, the Reform Act recognized that flexible authority was important to the success of sentencing reform. Thus, in establishing statutory purposes of sentencing to be observed by the Commission and the courts, the legislation "has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play a greater or lesser roles in sentencing for different types of offenses committed by different types of defendants . . . and recognizes that a particular purpose of sentencing may play no role in a particular case."[77] Similarly, the statutory sentencing factors were required to be considered only to the extent that there were applicable in a particular case,[78] and, therefore, in general,[79] were not

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[67]18 U.S.C. § 3553(a)(6).

[68]18 U.S.C. § 3553(a)(7).

[69]18 U.S.C. §§ 3581-3584.

[70]18 U.S.C. §§ 3561-3563.

[71]18 U.S.C. §§ 3571-3572.

[72]18 U.S.C. §§ 3556, 3663-3664.

[73]18U.S.C. §§ 3553(d), 3555.

[74]18 U.S.C. § 3554.

[75]See Senate Report, at 60-61.

[76]Id. at 50-52.

[77]Senate Report, at 77; see also id. at 59-60, 67, 161.

[78]See 18 U.S.C. §§ 3551, 3562, 3572, 3582.

[79]The principal exceptions are the legislative recognition "that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a); see 28 U.S.C. § 994(k), and the requirements that imprisonment guidelines be confined to specific ranges, see 28 U.S.C. § 994(b), and that all guidelines and policy statements "are entirely neutral as to race, sex, national original, creed

intended to bind the Commission or the courts to particular sentencing outcomes. Rather, the basic legislative approach was to grant the Sentencing Commission broad authority to develop and continuously refine sentencing policies that would achieve the basic goals of certainty and consistency in meeting the general purposes of sentencing,[80] and "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[81]

Finally, the Reform Act contemplates the active and constructive involvement of the courts in developing the new federal law of sentencing. By requiring the courts to apply the Commission's guidelines[82] and consider its policy statements,[83] along with other sentencing factors in reaching a reasoned and articulated sentencing decision,[84] by permitting "departures" from the guidelines in extraordinary cases,[85] and by expanding the availability of appellate review,[86] the Act seeks to add a judge-made component to sentencing law, which can guide subsequent sentencing decisions and inform the Commission's continuing refinement of sentencing guidelines and policy statements.[87] Given the

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and socioeconomic status of offenders," 28 U.S.C. § 994(d)(11).

[80]28 U.S.C. § 991(b)(1)(A) & (B).

[81]28 U.S.C. § 991(b)(1)(C). The legislative history notes that this provision:

> "makes clear that the purposes set forth in subsection (b) [of 28 U.S.C. § 991] are the goals to be reached by the sentencing process and they cannot be realistically assured in every case. Subsection (b)(1)(C) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different appraoches."

Senate Report, at 161. In this regard, while the "most important purpose of the Commission is the establishment of sentencing policies and practices, its "second basic purpose . . . is to develop means of measuring the effectiveness of different sentencing, penal, and correctional practices in meeting the purposes of sentencing." Id. at 161-162; see 28 U.S.C. § 991(b)(2).

[82]18 U.S.C. § 3553(a)(4) & (b).

[83]18 U.S.C. § 3553(a)(5).

[84]18 U.S.C. § 3553(c) & (d); Fed. R. Crim. P. 32(c).

[85]18 U.S.C. § 3553(b).

[86]18 U.S.C. § 3742.

[87]As the legislative history explains:

> "The sentencing guideines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guideines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence outside the guidelines. A sentence that is above the guidelines may be appealed by the defendant. A sentence that is below the guidelines may be appealed by the

availability of appellate review for both departures from the guidelines and incorrect applications of the guidelines, it seems likely that judicial decisions will make a very significant contribution.

Ultimately, the Reform Act's framework can be expected to produce a highly developed and detailed federal law of sentencing, comparable to the remedial branches of the civil law, through the combined efforts of the Commission and the courts. We are now in the initial stages of that evolutionary process, and the Commission's basic task is to lay the foundations for an entirely new system. In approaching that task, the Commission should strive to develop sentencing policies that are not merely rationalizing in effect, but also sound in principle, practical in application, and conducive to the ultimate goal of a coherent and consistent body of sentencing law. As I will develop in Part II of this paper, I believe that all of these objectives are attainable--at least for organizational sentencing, if not more generally--without necessarily choosing among debatable "philosophies" of criminal punishment. Rather, the key lies in the conjunction of two simple ideas: (1) remedies (criminal or otherwise) should be formulated to carry out the objectives of substantive law; and (2) the basic objective of the substantive criminal law is to prevent the harmful effects of criminal conduct.

2. The Commission and Its Work to Date

The Sentencing Reform Act established the Sentencing Commission "as an independent commission in the judicial branch"[88] consisting of seven voting members, including a Chairman, appointed by the President to fixed terms.[89] The purposes of the Commission are to: (1) "establish sentencing policies and practices for the Federal criminal justice system,"[90] by promulgating sentencing guidelines and policy statements;[91] and (2) "develop means for measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."[92] The Commission is a permanent establishment of the United States Government, but its members other than the Chairman will

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> government. The case law that is developed from these appeals may, in turn, be used to further refine the guideines."

Senate Report at 51-52 (footnotes omitted). In addition to the departure situation noted, the guidelines are likely to generate interpretive case law through appeals by the defendant or the government based on contentions that the sentence "was imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(a)(2), (b)(2).

[88]28 U.S.C. § 991(a).

[89]In addition, the Commission has two ex officio, non-voting members. "The Attorney General, or his designee," is a permanent ex officio member, 28 U.S.C. § 991(a). Under §235 of the Sentencing Reform Act (codified as a note to 18 U.S.C. § 3551), the Chairman of the United States Parole Commission, or his designee, will be an ex officio member until November 1, 1992. Pub. L. No. 98-473, Title II, Ch. II, §235, 98 Stat. 2031, as amended. The Parole Commission itself will be abolished as of that date.

[90]28 U.S.C. § 991(b)(1).

[91]The promulgation of guidelines, but not policy statements, is subject to the "notice-and-comment" rulemaking procedures of §553 of the Administrative Procedure Act. 28 U.S.C. § 994(x).

[92]28 U.S.C. § 991(b)(2).

hold full-time positions only through November 1, 1993,[93] when the bulk of its work in establishing federal sentencing policies and practices is expected to be completed.[94] At least three of the members are required to be federal judges, and no more than four Commissioners may be members of the same political party.[95] The Commission has its own staff, supervised by a Staff Director,[96] and also is authorized to draw upon the staff resources of the Administrative Office of the United States Courts and the Federal Judicial Center.[97]

The initial members of the Sentencing Commission took office on October 29, 1985.[98] Approximately eleven months later, the Commission published a preliminary draft of sentencing guidelines.[99] Following public comment and hearings, the Commission published a revised draft in January 1987,[100] and promulgated its initial set of guidelines and policy statements on April 13, 1987.[101]

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[93]See 28 U.S.C. § 992(c), which provides for full-time appointments until the expiration of six years after the Commission's initial set of guidelines take effect, which occurred on November 1, 1987, and part-time appointments thereafter. The Act does not specify the proportion of time that part-time Commissioners are expected to devote, but requires that Commission meetings "be held for at least two weeks in each quarter after the members of the Commission hold part-time positions," 28 U.S.C. § 993(a).

[94]"[O]nce the initial guidelines are established and operating, the responsibilities of the Commission can be discharged by part-time members.." Senate Report, at 163.

[95]28 U.S.C. § 991(a).

[96]28 U.S.C. § 996.

[97]See 28 U.S.C. § 995(b). The statute further authorizes and directs "each Federal agency . . . to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions." 28 U.S.C. § 995(c).

[98]The initial voting members of the Commission were: Judge William W. Wilkins, Jr., Chairman; Michael K. Block; Judge Stephen G. Breyer; Helen G. Corrothers; Judge George E. MacKinnon; Ilene H. Nagel; and Paul J. Robinson. Commissioner Robinson resigned in February 1988, and his office remains vacant at this writing. The ex officio members of the Commission are Benjamin F. Baer, as Chairman of the United States Parole Commission, and Ronald L. Gainer, Associate Deputy Attorney General, as the Attorney General's designee.

[99]U.S. Sentencing Commission, Preliminary Draft: Sentencing Guidelines (September 1986), reprinted in 51 Fed. Reg. 35,080-35,131 (October 1, 1986: Part II). The preliminary draft included a general discussion of possible approaches to organizational sanctions. See id. Chapter 6, Part B, 51 Fed. Reg. at 128-30. The general topic of organizational sanctions was omitted from subsequent drafts.

[100]U.S. Sentencing Commission, Revised Draft: Sentencing Guidelines (January 1987), reprinted in 52 Fed. Reg. 3920-88 (February 6, 1987: Part II).

[101]The guidelines were submitted to Congress on April 13, revised by technical, clarifying, and conforming amendments on May 1, and published in the Federal register, as thus amended, on May 13, 1987. See Initial Guidelines, supra note 3. The guidelines were followed by the Sentencing Commission Report on the Initial Guidelines, supra note 4, which was submitted to Congress in June 1987. For a full description of the Commission's activities leading to the promulgation of the initial guidelines, see id. at 9-11.

As contemplated by the Reform Act, the initial guidelines remained before the Congress for six months,[102] before becoming effective on November 1, 1987.[103] At that time, the guidelines were republished with revised commentary,[104] and distributed to the federal judiciary.[105]

With the one exception of fines for antitrust offenses,[106] the Commission's initial set of guidelines and policy statements do not cover organizations, and focus exclusively on sentencing for individuals.

The basic structure of the initial guidelines is built upon the sanction of imprisonment. Offenders' conduct is evaluated in terms of "offense levels," which, when combined with the offender's "criminal history category," are translated into months of imprisonment by a two-dimensional "sentencing table" including 43 offense levels and six criminal history categories.[107] Each offense level provides an approximately 25 percent range of imprisonment that overlaps with the preceding and succeeding levels.[108] The ranges provided by the sentencing table control guideline sentences to both imprisonment and probation.[109]

The initial guidelines' imprisonment ranges were derived primarily from empirical analysis of the factors that affected imprisonment sentences under prior sentencing practice, as supplemented by selective rationalization based on other sources, including recent federal criminal legislation, the United States Parole Commission's parole guidelines, and unwarranted inconsistencies appearing in the prior practice.[110] The guidelines did not purport to adopt a particular "philosophy" of punishment, finding that a pragmatic approach based on the distinctions developed by prior practice went far

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[102]Sentencing Reform Act §235(a)(1)(B)(ii)(III). During that period, the General Accounting Office conducted a study of the guidelines and submitted its report to Congress in September 1987.

[103]Sentencing Reform Act §235(a)(1). Subsequent amendments or additions to the sentencing guidelines may be submitted between the beginning and May 1 of each Congressional session, and will take effect 180 days after submission, unless "the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress." 28 U.S.C. § 994(p). Policy statements may be promulgated or revised at any time, and need not be submitted to Congress.

[104]52 Fed. Reg. 44, 674-44, 779 (November 20, 1987: Part II).

[105]U.S. Sentencing Commission, Guidelines Manual.

[106]Initial Guidelines §2R1.1.

[107]Initial Guidelines, at 5.2.

[108]See Initial Guidelines, at 1.11.

[109]See Initial Guidelines §§5B1.1, 5C1.1.

[110]See Initial Guidelines, at 1.3-1.4; Sentencing Commission Report on the Initial Guidelines, at 16-19. The Report includes a thorough description of the Commission's empirical analysis and detailed comparisons of the guidelines with prior practice and the parole guidelines. See id. chs. 4 & 5 and Appendices B & C.

toward reconciling academic differences between "just deserts" and "crime control" theories.[111] In the Commission's view, there was "little practical difference in result."[112]

Nonetheless, the initial guidelines were viewed only as "the first step in an evolutionary process"[113] involving continuing refinement, as the Commission reviews the experience under the existing guidelines and addresses new areas, including organizational sentencing.[114]

Although the existing guidelines for individuals provide a useful starting point for examining general sentencing factors and distinctions, organizational sentencing requires an entirely different structure for guidelines and policy statements. The imprisonment-based structure of the initial guidelines obviously is inappropriate for organizations, which can not be imprisoned. Rather, the organizational guidelines must be oriented toward the sentencing options for organizations. Furthermore, empirical analysis of past sentencing practice, though generally informative, is unlikely to provide a fully satisfactory basis for organizational guidelines, because: (1) the sentencing system's extensive experience with individual imprisonment has no counterpart in organizational sentencing, which accounts for less than 1 percent of federal sentencing decisions; (2) preliminary analysis indicates that there are few, if any, factors other than monetary loss that bear a strong relationship to organizational sentences; and (3) unlike the imprisonment sanction for individuals, the basic legislative authority for the major organizational sentencing options was changed substantially by the Sentencing Reform Act. Given these factors, the development of organizational sentencing guidelines will require both an analysis of current practice and a re-examination of the available sentencing options and appropriate principles for organizational sanctions.

3. Organizational Sentencing Options

The Sentencing Reform Act systematized and in some instances modified the available sentencing options for organizations. For the first time in federal law, the Act generalized the distinction between individual and organizational sanctions, and included several provisions specifically addressed to organizational sentencing.

Traditionally, organizations were punished primarily by monetary fines and secondarily through probation in lieu of all or a portion of the authorized fine. Organizations were not subject to a "confinement" sentence analogous to imprisonment for individuals. The Reform Act and its legislative

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[111] See Initial Guidelines, at 1.3-1.4; Sentencing Commission Report on the Initial Guidelines, at 15-16.

[112] "Choosing a single or even a predominant approach was unnecessary because the issue is more symbolic than pragmatic. In practice, the differing philosophies are generally consistent with the same results. Moreover, few theorists actually advocate either a pure just deserts or a pure crime-control approach. Crime-control limited by desert, and desert modified for crime-control considerations, are far more commonly advocated. The Commission saw little practical difference in result between these two hybrid approaches; the debate is to a large extent academic."

Sentencing Commission Report on the Initial Guidelines, at 16.

[113] Initial Guidelines, at 1.4.

[114] Id. at 1.12.

history evince a thorough re-examination of organizational sentencing options, resulting in: (1) rejection of proposals for an organizational "imprisonment" analog and for a new punitive sanction of "publicity"; (2) reaffirmation of the value of monetary fines as sanctions for organizational crimes; (3) modification of the bases for imposing organizational probation; and (4) incorporation of the options of criminal forfeitures, notice to victims, and restitution as components of the overall sentencing decision.

New section 3551(c) of Title 18 sets forth the five sentencing options for organizations: fines, probation, forfeiture, notice to victims, and restitution. The legislative history to §3551 records the Congressional rejection of an organizational equivalent to imprisonment,[115] based on concerns that the application of such a sanction to legitimate business organizations would be harmful to "the public at large and the general economy."[116] Similar concerns also led to the deletion of a more modest proposal that organizations could be barred from a line of business as a condition of probation.[117]

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[115]This sanction had been proposed as part of sentencing reform in 1973, and eliminated in 1977. The Reform Act's legislative history notes that:

> "S.1, as introduced in the 93rd Congress, provided, as an equivalent to a term of imprisonment for an individual offender, that an organization could be barred from its 'right to affect interstate or foreign commerce' for a period of up to the maximum length of time that an individual convicted of an offense of the same seriousness could be sentenced to prison. Because the Committee was concerned that such a provision might too readily be used in an inappropriate case, the provision was deleted in the reported version of S.1437 in the 95th Congress."

Senate Report, at 68 (footnote omitted).

[116]The legislative history to the 1977 bill, S.1437, explains the rationale for deleting the organizational "imprisonment" sanction in favor of proposed authority for barring an organization from a business as a condition of probation:

> "It is not intended that sentences for organizations be more harsh than is necessary to carry out the purposes of sentencing. It is necessary, however, to be able in effect to put an organization out of business if illegal conduct is its usual way of doing business. On the other hand, some cases of illegal conduct by organizations will require very serious consideration by the sentencing judge of the potential economic impact of a sentence on innocent parties, including the public at large and the general economy."

S. Rep. No. 95-605 (Part 1), 95th Cong., 1st Sess. 887 (1977). The Reform Act deleted the option of debarment as a condition of probation as well, finding that such a sanction "might encourage misapplication to the economic detriment of a legitimate enterprise" rather than being confined to "the rare case in which an organization operates in a generally illegal manner." Senate Report, at 69.

[117]See note 116, above and pages 30-31, below.

The Reform Act's legislative history also rejects a proposed punitive sanction of "publicity"[118]--for organizations as well as individuals--in favor of the more limited and purely compensatory option of notice to victims, which is authorized by new § 3555 for "an offense involving fraud or other intentionally deceptive practices."[119] Even on that basis, the notice sanction is conditioned upon special presentence procedures[120] and the court's consideration of "the cost involved in giving the notice as it relates to the loss caused by the offense,"[121] and the total costs imposable on a defendant are limited by statute to $20,000.[122]

The Reform Act essentially carries forward prior statutory authority for the sanctions of criminal forfeiture[123] and restitution.[124] However, the federal policy favoring restitution was strengthened by

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[118]The "publicity" sanction had been proposed by a minority of the Brown Commission, but was rejected by the majority "as inappropriate with respect either to organizations or to individuals, despite its possible deterrent effect, since it came too close to the adoption of a policy approving social ridicule as a sanction." National Commission on Reform of Federal Criminal Laws, Final Report §3007 and Comment (1971). Nonetheless, an expansive "notice" provision authorizing publication of an organizational offense "to the class of persons or the sector of the public affected by the conviction or financially interested in the subject matter" was included in the proposed Criminal Code of 1977, S.1437, 95th Cong., 2d Sess. §2005 (1978). The Reform Act rejected that proposal as overly broad and unduly punitive. See Senate Report at 84-85.

[119]18 U.S.C. § 3555. The order of notice to victims is intended to "facilitate any private actions that may be warranted for recovery of losses," and "alert fraud victims to the advisability of other action on their part (for example, news of the worthlessness of a phony 'cancer cure' may prompt a victim to visit a doctor in time for proper medical attention)." Senate Report, at 83-84. The legislative history emphasizes that the notice is to be reasonably limited to its compensatory purpose:

> "The Committee does not intend that the section be used to order 'corrective advertising' or to subject a defendant to public derision. Publication should not be required beyond that which is necessary to notify the victims of defendant's conviction."

Id. at 85.

[120]See 18 U.S.C. § 3553(d) (requiring written affidavits and memoranda, an oral hearing, and the court's statement of "specific reasons underlying its determinations regarding the nature of such an order").

[121]18 U.S.C. § 3555.

[122]Id.

[123]18 U.S.C. § 3554, referring to the criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 853.

[124]18 U.S.C. § 3556. Restitution traditionally was available in the federal system only as a condition of probation. See 18 U.S.C. former §3651. However, §5(a) of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (October 12, 1982), codified at 18 U.S.C. §§ 3579-3580, had provided independent statutory authority for orders of restitution with respect to defendants convicted of offenses under Title 18 or under §902(h), (i), (j), or (n) of the Federal Aviation Act of 1958, 49 U.S.C. § 1472. Those provisions were carried forward by the Reform Act in

additional Reform Act provisions directing the courts to consider "the need to provide restitution to victims" as a general sentencing factor[125] and to state reasons when full restitution is not ordered at sentencing,[126] and by the recognition in legislative history that non-statutory restitution remains available as a condition of probation "in an appropriate case."[127]

For the traditional organizational sentencing options of fines and probation, the Reform Act and subsequent amendments made several significant changes. Statutorily authorized fine levels were raised dramatically. Probation was established as an independent sentence, instead of an incident of a "suspended" fine, but the permissible probationary conditions are subject to several new limitations, including some directed specifically at organizational probation.

Fines. The legislative reform of statutory fine authority has followed a somewhat tortuous path, involving three separate enactments: the original Reform Act; the Criminal Fine Enforcement Act of 1984,[128] an independent statute covering offenses committed during the period between January 1, 1985, and October 31, 1987; and the recent Criminal Fine Improvements Act of 1987,[129] an amendment to the Reform Act.

The original Sentencing Reform Act made the basic changes of increasing fine levels for both individuals and organizations, and integrating fines into the overall structure of sentencing reform. The Reform Act established the first general fine statute in federal law, and authorized fine levels "considerably higher than those generally authorized by current law, . . . to establish an effective scale for pecuniary punishment and deterrence that will reflect current economic realities."[130] As with the Act generally, the changes in fine authorization were motivated in part by inconsistencies in prior law

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18 U.S.C. §§ 3663-3664.

[125]18 U.S.C. § 3553(a)(7).

[126]18 U.S.C. § 3553(c).

[127]In discussing the authorization in 18 U.S.C. § 3563(b)(3) for making restitution "pursuant to the provisions of section 3556" a condition of probation, the legislative history states that:

> "The court could in an appropriate case order restitution not covered by paragraph (b)(3) (and section 3556) under the general provisions of subsection (b)(20). In a case involving bodily injury, for example, restitution as a condition of probation need not necessarily be limited to medical expenses."

Senate Report, at 95-96. Despite the clarity of this statement, the Justice Department's Criminal Division apparently contends that such restitution will not be available under the Reform Act, at least for non-Title 18 offenses, see Criminal Division, U.S. Department of Justice, Restitution Pursuant to the Victim and Witness Protection Act, at 1, 11-13 (May 1987).

[128]Pub. L. No. 98-596, 98 Stat. 3134 (October 30, 1984), codified at 18 U.S.C. former §§ 3621-3624.

[129]Pub. L. No. 100-185, 101 Stat. 1279 (December 11, 1987).

[130]Senate Report, at 105-106.

and practice.[131] The legislative history paid special attention to the central role of fines as a sanction for white collar crime generally and organizational crime in particular,[132] and the Act established a separate and higher schedule of fines for organizations.[133]

As originally enacted, the Reform Act did not adopt a proposal for an alternative fine amount based on the gain or loss from an offense,[134] and included an aggregate limit on fines for multiple offenses "that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage," of twice the amount imposable for the most serious offense.[135] However, shortly after the Reform Act, which deferred the effective date of these provisions until the implementation of the intial guidelines on November 1, 1987, Congress enacted a separate piece of fine legislation entitled the Criminal Fine Enforcement Act of 1984, which called for general increases in fine levels comparable to the Reform Act and also authorized an alternative maximum fine of double the pecuniary gain or loss caused by an offense, effective for offenses committed on or after January 1, 1985.[136] In December 1987, the Congress enacted the Criminal Fines Improvement Act of 1987, which amended the fine provisions of the Reform Act generally to conform with the Fine Enforcement Act, with the additional change of repealing the aggregate limit on fines for multiple offenses that had been contained in both of the earlier Acts.

The final result of this series of enactments is very expansive statutory fine authority, particularly for organizations. Under the Reform Act as now amended and in effect, the maximum authorized criminal fine per offense (or well-pleaded count) for organizations is the greatest of: (1) the amount set forth in the general organizational fine schedule of 18 U.S.C. § 3571(c), which is $500,000 for a felony or a misdemeanor resulting in death and $200,000 for all other non-petty misdemeanors; (2) the amount

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[131]In addition to noting "[c]omplaints that current fine levels are insufficient to accomplish the purposes of sentencing," the legislative history found that:

> "Present Federal law also includes large and logically inexplicable disparities in the levels of fines permitted as criminal sanctions for offenses of essentially similar natures."

Senate Report, at 104.

[132] "It is recognized that fines often represent the only useful sanction against corporations and other organizations. . . ."

Senate Report, at 104.

[133]See 18 U.S.C. § 3571(b), generally authorizing organizational fines at twice the level of individual fines. "Penalties for organizations are set at higher levels than those for individuals . . . in order to take cognizance of that fact that a sum of money that is sufficient to penalize or deter an individual may not be sufficient to penalize or deter an organization, both because the organization is likely to have more money available to it and because the sentence for an organization obivously can not include a term of imprisonment." Senate Report, at 106.

[134]See Senate Report, at 106.

[135]18 U.S.C. former §3572(b).

[136]See 18 U.S.C. former §3623. However, the Enforcement Act contained the same aggregate limit on fines for multiple offenses.

authorized in the underlying statute setting forth the offense; or (3) double the pecuniary gain or loss resulting from the offense. As under federal law prior to the original Reform Act, there is no aggregate limit on fines for multiple offenses.

Probation. The Reform Act made a basic change in the theory of probation as applied to both individuals and organizations. Under prior law, probation was not a sentence in itself, but merely an incident of the "suspension" of another sentence, such as a fine or imprisonment.[137] The Reform Act reconstituted probation as an independent sentence, which may be imposed in addition to other authorized sentences.[138] This revision, particularly when coupled with the increased fine levels, has the potential to be a far more significant change from prior practice for organizations than for individuals.

Under prior law, probation generally was held to be a "voluntary" status in the sense that a defendant could choose to "reject" probation and instead incur the maximum alternative sentence. For organizations, the only alternative was a fine, and therefore the permissible "burden" of organizational probation was thought to be limited by the amount of the maximum authorized fine.[139] The Reform Act appears to change this result, by substituting general statutory limitations on the duration and permissible conditions of the independent probation sentence[140] for the practical constraint of the former theory. However, whether the practical result will be different is unclear at this time, because the new statutory "reasonableness" constraints have yet to be interpreted or applied, and because the Reform Act is somewhat ambiguous as to whether probation conditions may be enforced by the contempt power in addition to revocation and resentencing.[141] If the contempt power is unavailable, then organizational probation will continue to be limited in practical effect by the maximum alternative sentence. Of course, the increased fine levels will increase that practical limit as well.

In addition to these general considerations, the Reform Act contains more specific provisions that focus organizational probation on relatively narrow objectives. In connection with their rejection of an "imprisonment" equivalent, the Reform Act's drafters focused very specifically on one type of probation condition--the business or occupational restrictions set forth in 18 U.S.C. §3563(b)(6)--that is likely to be the basis for any sort of probation sentence directly affecting an organization's business operations. The legislative history reflects that this provision was changed on last consideration by the Senate Judiciary Committee to remove the standard authority for a probation condition "prohibiting an organization from engaging in a particular business" and to clarify the intent that such a measure was to

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[137] 18 U.S.C. former §3651.

[138] 18 U.S.C. §3551(b) & (c); see Senate Report, at 68.

[139] See generally United States v. Interstate Cigar Co., 801 F.2d 555 (1st Cir. 1986). Because maximum authorized fines generally were viewed as relatively low, this was a more meaningful limitation on probation than the maximum authorized prison terms for individuals.

[140] See 18 U.S.C. §§3562(b), 3563(b).

[141] There is no question of the court's power to enforce probation conditions through the threat of revocation. See 18 U.S.C. §3565. The ambiguity as to the availability of the contempt power for probation conditions is created by explicit references in the Reform Act to its availability for the enforcement of conditions of supervised release, see 18 U.S.C. §3583(e), and in legislative history to its availability for the enforcement of an order of notice to victims, see Senate Report, at 84. In my opinion, these references are not sufficient grounds for holding that a federal court has been divested its general power to secure obedience to "its lawful writ, process, order, rule, decree, or command," 18 U.S.C. §401(3).

be invoked only for "the rare case in which an organization operates in a generally illegal manner."[142] In this respect, the provision distinguishes between organizations and individuals. As thus amended, §3563(b)(6) only permits restrictions for organizations, and the basic intent of the provision was limited to preventing a continuation or repetition of illegal activities. "Paragraph (6) is intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result."[143] As its example of a permissible use of a business restriction, the legislative history puts the case that "an organization convicted of executing a fraudulent scheme might be directed to operate that part of its business in a manner that was not fraudulent."[144] Elsewhere, the legislative history generally emphasizes that "[i]t is not the intent of the Committee that courts manage organizations as part of probation supervision . . . ."[145]

4. Sentencing Guidelines and Policy Statements for Organizations

Given the ends and means supplied by the Sentencing Reform Act, the basic question is how may the Sentencing Commission best proceed with the task of developing sensible sentencing guidelines and policy statements for organizations. At first blush, the objectives seem formidable:

- Sentencing guidelines should be simple, clear, and practical in application, but also sufficiently sophisticated to deal with at least the major variations in cases actually presented by the system.

- Determinate sentencing requires precision in measuring relevant offense and offender characteristics, which at some level must be translated into essentially quantitative units of punishment.

- Consistent sentencing policy providing a suitable foundation for a coherent body of sentencing law seems to call out for a unifying or at least predominant theory. Yet, the legislation enumerates multiple "purposes of punishment" associated with divergent "philosophies."

- The existing guidelines for individuals provide limited assistance: they are based primarily on extensive experience with a sanction that is not available for organizations, as applied to offenders that differ fundamentally from organizations.

- The sentencing options for organizations are somewhat limited, and in some important respects have been changed by the new legislation.

- Past sentencing experience with organizations also is limited, and preliminarily appears to provide little structure.

- Organizations are complex, as they consist of groups of individuals interrelated in a variety of patterns. They have an internal control problem largely unreplicated with individuals.

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[142]Senate Report, at 69. This point was stressed both in the general discussion of sentencing options, id. 68-69, and in the specific discussion of §3563(b)(6), id. 96-97.

[143]Senate Report, at 96-97.

[144]Id. at 96.

[145]Id at 99.

On the other side of the problem, there are some simplifying features that one can draw from the basic facts of the federal system: virtually all organizational offenders are business firms; the vast majority of organizational offenses are property crimes resulting in mostly monetary harms; and monetary sanctions are available with few restrictions.

Although the complexities outnumber the simplications, I believe that there is a simple solution to the problem that produces a practical sentencing policy without engendering intractable "philosophical" disputes. In the remaining Parts of this paper, I will state and discuss an approach to organizational sentencing drawn from the theory of "optimal" penalties developed in the "law-and-economics" literature. In doing so, I will claim more for the theory than the "law and economics" writers themselves: that the theory is consistent with all of the major purposes of punishment for organizations; that the theory effectively solves the problem of internal control over the organization's agents; and ultimately, that the theory does not require an explicitly "economic" perspective at all, but rather proceeds directly from the fundamental aim of the criminal law to prevent harm, and simply extends that aim to the process of punishment.

At the practical level, I will discuss the application of the optimal penalty theory to the problem of organizational guidelines, and the clear solutions that it offers: determinate guidelines emphasizing monetary penalties based directly on the predominantly monetary harms caused by organizational offenses, which can be identified by relatively simple "loss rules" and increased in proportion to the difficulty of detecting and punishing offenses.

II. The Choice of Optimal Penalties

In this Part, I present the basic theory of optimal penalties (§A), and discuss its implications for the major purposes of criminal punishment (§B), the aims of the substantive criminal law (§C), and the appropriate forms of organizational sanctions (§D). The optimal penalty theory's consistency with the traditional purposes of punishment, and its more fundamental congruence with the harm-prevention aim of the criminal law, support the choice of optimal penalties as a goal and a structure for organizational sentencing reform.

The optimal penalty theory is not normative in its basic analysis. Rather, it proceeds from two simple, descriptive insights about criminal punishment: that punishment (1) is costly as well as beneficial, and (2) is less than perfectly certain to be imposed. The prescription follows from these points. The total "cost" of crime (whether measured in dollars or otherwise) is a function of both the harms from criminal offenses and the harms resulting from the costs and uncertainty of punishment; and the "optimal" penalty is one that minimizes this total cost.

These simple ideas have powerful implications for the appropriate means of achieving the purposes of criminal punishment. My discussion of purposes focuses mainly on deterrence, and contrasts the harm-based optimal penalty theory primarily with a "classical" theory of gain-based deterrence. I emphasize deterrence both because deterrence is a dominant theme in most discussions of white collar and organizational crime[146] and because the effects of deterrence best illustrate how the social costs of punishment can outweigh its benefits. Harm-based optimal penalties balance the benefits of deterrence against its costs, while an alternative theory of gain-based deterrence inevitably tends toward a destructive form of "absolute" deterrence that costs more than it is worth in terms of crime prevention. Moreover, the favorable results of "optimal" deterrence also are consistent with the other major purposes of punishment.

The consistency of harm-based optimal penalties with the purposes of punishment exposes the deeper point that optimal penalties are congruent with the basic aim of the criminal law to prevent harm. While the conventional "purposes" of punishment promote that aim only obliquely, optimal penalties take the more direct approach of simply extending the harm-prevention aim of the substantive law to the process of punishment as well.

Finally, the optimal penalty theory plainly identifies monetary penalties as the preferred form of sanction for organizational crimes, because monetary penalties are the least costly for the government, and society at large, to impose on productive business organizations. Organizational offenses cause predominantly monetary harms, which translate most directly to monetary sanctions, which in turn most directly affect the incentives of business firms. Any substntial reliance on direct government intervention into private business activities is likely to harm the economy and produce inconsistent sentencing results.

A. The Economic Approach

The economic approach to penalties, pioneered by Gary Becker in 1968,[147] does not proceed from any of the traditional "purposes" or "theories" of punishment. Rather, optimal penalties result from a description of crime and enforcement as a problem of minimizing total social cost. The major insights

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[146] See Senate Report, at 76: "[Deterrence] is particularly important in the area of white collar crime."

[147] Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

of the descriptive analysis are: (1) criminal conduct is prohibited mainly because of the "external" harm or loss that it imposes on persons other than the offender, including both "victims" in the narrow sense and society at large; (2) enforcement and punishment, as well as crime, are costly to society; and (3) enforcement and punishment also are uncertain, in the sense that an offender's probability of punishment is less than 100 percent. Given these conditions, the "optimal" solution is a broad concept of social compensation: the costs of crime and crime control are minimized when offenders are required to compensate society for the full measure of harm from offenses, including enforcement expenditures, as adjusted to reflected the chances that an offender may escape punishment.

Under the simplest version of the economic analysis,[148] the penalty at the "optimizing" point is a combination of two major factors: (1) the total social "loss" created by an offense; and (2) the probability that an offender actually will be penalized, which is sometimes expressed as a "multiple" or "multiplier" representing the chances against detection and conviction. The total penalty equals "loss" divided by the probability or multiplied by the "multiple." In this simple case, the "optimality" of the penalty is obvious on an aggregate level: total losses from all offenses will be exactly compensated by a penalty equal to the losses created by detected offenses times the chances against detection.

Less obviously, but more importantly for the imposition of punishment in particular cases, this penalty formula also is "optimal" at the level of individual offenses. When a potential offender contemplates a violation, its "expected" penalty should be exactly equal to the amount of social loss caused by its offense. Where all offenders are certain to be penalized, this optimal penalty simply is equal to the loss. However, where enforcement is not perfect, an expected penalty equal to the loss requires an adjustment to reflect the offender's expectation that the penalty may not be imposed, which is simply the chances against conviction and punishment. In any actual enforcement system, punishment always will be less than perfectly certain--sometimes only slightly less certain, and other times significantly less certain. But the "expected" social harm from a particular offense (net of the penalty) always will depend upon both the loss created and the probability that the offender will be detected and punished. The aim of the optimal penalty rule is to set that expected net harm at zero.

Thus, the two factors of "loss" and probability (or the "multiple") identify two different dimensions of social harm from criminal offenses, when considered together with the social response to crime through enforcement and punishment. Loss alone would represent harm in an imaginary world of perfect and costless enforcement. The probability or "multiple" represents the additional harm from crime in a real world where enforcement is imperfect and very expensive, and offenders exploit the opportunities created by society's limited criminal enforcement resources.

At least in the context of sanctions for offenses by business organizations--if not more generally--the "economic" approach makes sense as a policy objective on its own terms. All other things being equal, there appears to be no reason why sentencing policy should not prefer to minimize the total social costs of crime. But the optimal penalty theory has much broader policy implications for criminal law and punishment, because it results in penalties that not only produce a form of "optimal" deterrence that is superior to the results of alternative theories, but also are consistent with the non-deterrence objectives of punishment.

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[148]This version results from three simplifying assumptions that appear to be realistic for organizational offenders: (1) loss and penalties can be expressed in equivalent "units," usually monetary; (2) offenders are "risk neutral"; and (3) there are very few or no erroneous convictions. These assumptions are examined and discussed in Part III, below.

B. The Purposes of Criminal Punishment

In this section, I discuss the implications of optimal penalties for the traditional "purposes" of criminal punishment, considered under the headings of: (1) deterrence; (2) proportionality; (3) public protection and rehabilitation; and (4) compensation to victims.[149] The results are striking. Optimal penalties essentially solve most of the problems of more conventional theories, fundamentally because they balance the costs and benefits of punishment in a manner that promotes the general harm-prevention aims of the criminal law.

1. Deterrence[150]

In considering the deterrent effect of harm-based optimal penalties, I think it is useful to contrast an alternative theory of gain-based deterrence that I call "classical" deterrence, which focuses on denying potential offenders any expectation of gain from criminal conduct.[151] In the context of organizational sanctions, deterrence as a goal and the profit motive as a mechanism initially seems attractive, on the rationale that removing any prospect of gain is likely to eliminate, or very significantly reduce, the vast majority of organizational offenses that are motivated by financial gain.

However, this "classical" deterrence theory ultimately fails to produce a satisfactory system of organizational penalties. The gain measure alone is inadequate for a reliably deterrent effect, primarily because the organization must spend money on controlling its agents in order to avoid an offense. But the "classical" deterrence theory provides no basis for determining the required adjustments, and indicates only that higher penalties achieve more deterrence, without recognizing that deterrence has costs as well as benefits. Because the theory never indicates how much more deterrence is necessary or appropriate, "classical" deterrence tends toward very large penalties and the social costs associated with "absolute" deterrence: the "overdeterrence" of the offense itself as well as lawful activities related to the offense; and the lack of "marginal deterrence," which gives offenders the incentive to choose less serious offenses. The underlying problem is that "deterrence" alone, unconstrained by its costs, is not an adequate basis for a penalty system.

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[149]These topics roughly correspond to the Sentencing Reform Act's statutory purposes of punishment, 18 U.S.C. § 3553(a)(2), with the addition of restitution to victims, which also is a major aim of the reformed federal criminal sentencing system, see 18 U.S.C. §§ 3553(a)(7) & (c), 3556, 3663-3664. For an excellent sumary of the traditional purposes of criminal punishment, explaining variations in terminology, see 1 W. LaFave & A. Scott, Substantive Criminal Law §1.5(a), at 31-36 (1986).

[150]I do not sharply distinguish between "general" deterrence (covering potential offenders as a whole) and "specific" deterrence (covering specific past offenders), although the discussion here emphasizes the "general" problem. In my mind, the basic principles of general and specific deterrence are essentially the same. Accord, F. Zimring & G. Hawkins, Deterrence 70-74 (1973) (discussing deterrence terminology). However, "specific" deterrence is reconsidered below in the discussion of "public protection" and rehabilitation. See Paragraph 3.

[151]Although I do not attribute "classical" deterrence to any particular writer, but simply present it as the conventional view, the idea extends back at least to Bentham's writings on punishment and deterrence, which he called "prevention." See J. Bentham, An Introduction to the Principles of Morals and Legislation 165-74 (1789) (H.L.A. Hart & J. H. Burns eds. 1982). Bentham's "first rule" of punishments was that: "The evil of the punishment must be made to exceed the advantage of the offence." J. Bentham, The Theory of Legislation 325 (1802) (C. K. Ogden ed. 1931).

In contrast, the harm-based "economic" penalties produce "optimal" deterrence by providing potential offenders with measured incentives to bear the costs of complying with the law that correspond with the amount of social harm associated with the particular offense in question. The result is not only a simpler theory that requires no indeterminate "adjustments," but also one that avoids the pitfalls of overdeterrence and lack of marginal deterrence by scaling the penalty more precisely to the harm involved.[152]

a. "Classical" Deterrence, based on Gain

A natural inclination is to think of organizational sanctions in terms of simple or "classical" deterrence. By my definition, "classical" deterrence focuses on the offender's behavior and its motivation, and asks what penalty is sufficient to deter a potential offender from committing the offense. Where offenses are economically motivated, deterrence should be achieved by depriving the offender of any expectation of gain.[153] Thus, like the "economic" approach, the "classical" deterrence theory also makes use of the concept of "expected" results, by multiplying the gain from the offense times the same "multiple" representing the chances against detection and conviction,[154] plus a small "premium" to assure that the offender is not merely indifferent, in computing the total penalty.[155]

However, it soon becomes apparent that this simple form of gain-based deterrence requires some adjustment, because it omits cost factors that must affect the efficacy of a deterrence policy, especially for organizations. But the theory of "classical" deterrence is insufficient to specify the magnitude of

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[152]I discuss here only in passing another system of "deterrent" penalties based on wealth, income, or organizational "size," because very little analysis is required to conclude that such a system achieves neither rational deterrence nor any other legitimate objective of a punishment system. A wealth-based system capriciously overdeters and underdeters offenses by giving the less wealthy incentives to commit more harmful offenses, and vice-versa. Nor is there any necessary correlation between a person's wealth and the harmfulness of the offense committed. Wealth-based penalties also fail to seek or achieve compensation to victims, and I doubt that the ex ante wealth status of a person can affect that person's "just deserts" for conduct (see Para.2, below), even if a person's wealth status could be considered more or less "blameworthy," which itself would require a considerable departure from the basic values of the legal system in this country. Moreover, as applied to business firms, the idea of "wealth" or size-based penalties presents a number of further difficulties addressed below. See note 160 and §D, below.

[153]Of course, Bentham generalized this idea to cover all types of utility, which he called "pleasures." In explaning the rule that "the punishment must not be less in any case than what is sufficient to outweigh the profit of the offence." he stated that:

> "By the profit of an offence, is to be understood, not merely the pecuniary profit, but the pleasure or advantage, of whatever kind it be, which a man reaps, or expects to reap, from the gratification of the desire which prompted him to engage in the offence."

Principles of Morals and Legislation, supra note 151, at 166 & note c.

[154]Unlike the economic approach, the "multiple" in "classical" deterrence is not based on any idea of compensation, but serves only to assure that the offender has no expected gain, which is the only objective of "classical" deterrence.

[155]Bentham also recognized the concept of the multiple. His "second rule" was: "The more deficient in certainty a punishment is, the severer it should be." Theory of Legislation, supra note 151, at 325.

the required adjustments. As a result, while the simple focus on gains fairly clearly provides "underdeterrence," the necessary adjustments inevitably lead to "overdeterrence."

The Deficiencies of a Simple Gain-Based Penalty. An examination of "classical" deterrence's simple gain-based penalty rule identifies several deficiencies that pose the threat of insufficient deterrence. However, the "classical" deterrence theory provides no principle for making measured adjustments, and therefore leads to indeterminately large penalties.

First, and most importantly, setting the offender's gain equal to zero or slightly less will not deter where the costs of avoiding the commission of an offense are substantial, as they are likely to be in the organizational context, given the control problems inherent in organizational structures.[156] In order for an organization to avoid liability, the organization must expend resources on "policing" its own agents. For a penalty system to deter, the penalty must give the organization an incentive to ensure compliance. Therefore, the penalty must be raised beyond simply gain times the "multiple," but the "classical" deterrence theory does not tell us how much, and avoidance costs are likely to vary widely with the particular situation. Proxies for avoidance costs--such as the size or structure of the organization, or the complexity of the substantive law involved--are unlikely to operate precisely and will complicate the penalty rule considerably. Hence, the temptation is to raise the penalty to fit the highest avoidance cost situation, in order to "make sure" that deterrence works.

Second, the efficacy of "classical" deterrence may appear to be very sensitive to an understatement of the "true" multiple, i.e., the chances against detection and conviction. If the multiple could be underestimated by the rulemaker, miscalculated by potential offenders, or manipulated by offenders' attempts to "beat the odds" by concealment, then "classical" deterrence may result in no deterrence or very little deterrence, because all or most potential offenders could still perceive the prospect of some gain. Here again, the temptation is to raise the penalty still more, by choosing a higher multiple in order to adjust for imperfect information on the part of both the rulemaker and the potential offender. But the theory again fails to indicate how far the multiple should be raised, and the tendency again is to "make sure" that the multiple is high enough to deter in the worst case.

Third, and compounding the first two problems, the "classical" deterrence theory says nothing about the costs and benefits of raising or lowering penalties, except that higher penalties will produce more deterrence and lower penalties will produce less. Consequently, "classical" deterrence, which begins from the premise of modest penalties based on criminal gain, ultimately leads to indeterminate and virtually unlimited penalties, because higher penalties always mean more deterrence.

The Tendency Toward Destructive "Overdeterrence." The adjustments for the deficiencies of a simple gain-based rule make simple "classical" deterrence evolve toward "total" or "absolute" deterrence, and reveal a more fundamental flaw in the rationale of "classical" deterrence: the theory does not tell us when more deterrence is worth its cost. More deterrence is not always better, and will be worse when the conduct deterred is less harmful than the effects of deterrence itself. Excessive deterrence can become destructive "overdeterrence" in at least four ways: (1) requiring wasteful compliance costs; (2) "deterring" lawful and beneficial conduct that becomes increasingly remote from the criminal conduct as the penalty level increases or the liability rule becomes less certain; (3) "overdeterring" the criminal conduct itself in the exceptional case where society actually will benefit if the offense takes place; and

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[156]Federal criminal law reinforces this effect, by holding most business organizations (except labor unions) strictly liable for offenses committed by any employee or agent, without any showing of involvement or culpability on the part of a high managerial agent of the organization. See § A.2 of Part I, above.

(4) destroying "marginal" or "incremental" deterrence against more serious offenses, by specify the same high penalties for all offenses.

While the concept of "overdeterrence" may strike some people as a strange and exotic idea, I believe that we can find many examples from everyday life -- not to speak of international relations -- where fear of untoward consequences through miscalculation or mischaracterization may inhibit otherwise desirable conduct. The higher the possible consequences, the greater the fear until, at some point, the inhibition will be unjustified. The basic point is that, while crime is harmful, not all criminal conduct is infinitely harmful. Therefore, attaching infinite penalties at some stage imposes costs that are greater than the harm sought to be prevented, which is not consistent with the aims of the criminal law.

I will illustrate this point by posing two hypothetical cases[157] in which criminal conduct can be "overdeterred," in the sense that, at some penalty level, the punishment costs society more than the "crime" itself.

Case 1: Speeding.[158] The destructive effects of overdeterrence are dramatically illustrated by the hypothetical case of a man who exceeds the speed limit while rushing his wife to the hospital, in order to save her life. In a system that seeks (or inevitably tends toward) "absolute" deterrence, the only penalty adequate to deter that offense is death, and even that penalty may not be enough, if the man values his wife's life more than his own. But that penalty plainly "overdeters" the offense, in the sense of both compliance costs and net social loss. If the man complies, he (and society) loses his wife's life; if he violates, the penalty costs society his life; in either event, "deterrence" costs society more than the harm of simple speeding.[159] Furthermore, if the penalty for all speeding is death, in order to "make sure" that deterrence works at the extremes of avoidance costs, then even non-speeders will incur avoidance costs--by driving very slowly, or not at all--in order to "make sure" that they do not accidentally speed, or are not erroneously charged and convicted. The result is a loss of social benefits from perfectly lawful and useful conduct. Finally, such a penalty also destroys "marginal" deterrence, in that the man speeding his wife to the hospital has every incentive not merely to speed but drive recklessly, or even to murder a policeman who pulls him over, because neither act will increase the penalty.

Changing "absolute" deterrence back into a variable gain-based deterrence does not cure the "overdeterrence" problem of the man speeding his wife to the hospital, and produces a bizarre form of underdeterrence in a second case of a man who speeds in order to save five minutes on the way to his office. The first man's gain-based penalty is still death--because he "gained" a life through unlawful conduct--but the second man's penalty for the same violation is only the "gain" of five extra minutes of working time, which presumably is less than the danger created by his speeding. Thus, gain-based penalties simultaneously may produce both too much and too little deterrence.

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[157]In both examples, the "multiple" is disregarded by assuming a 100 percent probability of detection and conviction.

[158]This example was suggested by the discussion in R. Posner, Economic Analysis of Law §7.2, at 207 (3d ed. 1986).

[159]I put aside here the substantive defense of "necessity" (lesser of evils), which in fact might not be available, if the man "unreasonably" believed that his wife was in extremis, or that she could be saved by the doctors at the hospital. See 1 W. La Fave & A. Scott, Substantive Criminal Law §5.4(d) (1986); 2 P. Robinson, Criminal Law Defenses §§ 124, 184 (1984). However, the existence of the defense illustrates the tension between a "total deterrence" tendency in punishment and the principles of substantive criminal law. I generalize this point in § C, below.

Case 2: Vacuum Cleaner Performance Claims. Lest the speeding example be viewed as overdrawn or inapplicable to "corporate crime," I offer a second hypothetical that is not far removed from some of the corporate offenses that actually are prosecuted. Suppose that the appropriate administrative agency has acted to remedy deceptive practices in the vacuum cleaner industry, by requiring marketing claims of vacuum cleaner power to be accompanied by disclosure in terms of wattage, and prohibiting representions solely in terms of horsepower--a common industry practice--as "misleading" to consumers. Violations of either provision, as well as deliberate misstatements in any form, are punishable as criminal fraud. Assume further that the agency is correct, in that sales based on horsepower claims on average will result in a loss to consumers of 10 percent of their purchase price, of which half accrues to the seller as gain, and the other 5 percent represents the costs to consumers of adjusting their cleaning routine for underpowered vacuum cleaners.

In recognition of the fact that a simple gain-based penalty will underdeter, the penalty for a single violation has been set at 25 percent of an offending corporation's annual sales, in order to "make sure" that violations are deterred.[160] The resulting costs of compliance and avoidance can be enormously wasteful, because the vacuum cleaner industry now has been given the incentive to invest up to 20 percent of its sales volume (the 25 percent penalty less the 5 percent gain) in assuring that all of its salesmen refer to wattage and that none use the forbidden horsepower. If the industry's profit margin is only 15 percent, and if it costs more than that to eradicate all (not only most) violations, then there will be no vacuum cleaners at all, with the resulting loss to consumers of 90 percent of the value of even "fraudulently" sold vacuum cleaners.

Even if average compliance costs can be kept below the industry's profit margin, avoidance efforts are likely to inhibit lawful and beneficial activities, including the provision of information to consumers. The vacuum cleaner companies' policing of salesmen will be more effective with simple rules that seek to avoid violations by sweeping more broadly than the legal prohibition. Because so much is at stake--a single violation could destroy an entire year's profits--the companies want to "make sure" that no violations take place. Some companies may prohibit salesmen from making any oral claims of power ratings, or even discontinue the use of salesmen entirely. Thus, in order to be "sure" that they avoid liability for fraud, the companies are likely to cut back also on communications useful to consumers.

If, as is likely, firms within the vacuum cleaner industry differ in their comparative cost advantages, the disruptions of "absolute" deterrence will be even more harmful. Take two competing firms, A and B. A is relatively more efficient in marketing, while B is the lower-cost manufacturing firm, but both firms had equivalent total costs, and equivalent profit margins of 15 percent, prior to the wattage-horsepower regulation. A is able to achieve perfect compliance by spending an additional 10 percent of its sales volume, but B would have to spend an additional 20 percent. Eradicating "horsepower" claims by sales personnel is difficult--because consumers do respond favorably to such claims--and B may have higher compliance costs because it employs more experienced sales personnel who are accustomed to speaking in horsepower, or a more decentralized marketing system with less direct supervision than A. Moreover, the cost of each additional increment of compliance is likely to rise dramatically: suppose that B can eliminate 90 percent of violations for an expenditure of only

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[160]While the point of the example is made with any "absolute" deterrence penalty level, the percentage of sales penalty also illustrates the capricious effects of an income-based or wealth-based penalty (see note 152, above). If compliance involves any economy or diseconomy of scale, a wealth or income-based penalty arbitrarily favors larger or smaller firms. Suppose that compliance involves a substantial "fixed" component (say, hiring a lawyer who is an expert on vacuum cleaner regulation). In that case, large firms will have a compliance cost advantage. Alternatively, if compliance involves a control problem, which becomes more difficult with larger numbers of people, then smaller firms will have a compliance cost advantage. Neither result serves a rational sentencing policy.

5 percent of sales, and must spend an additional increment of 15 percent to achieve the last 10 percent of compliance. "Absolute" deterrence thus presents B with the Hobson's choice of either leaving the business immediately (because 100 percent compliance would wipe out all profits), or spending only the 5 percent and eventually being fined out of the business when one of the 10 percent of unavoided violations is prosecuted. However, society plainly wants B to remain in business, because the loss to consumers from B's 10 percent of "fraudulent" sales (1 percent of B's total sales) is far less than the resources that would be expended (15 percent of B's total sales) to avoid those violations.

Finally, "absolute" deterrence of horsepower violations also destroys marginal deterrence. Because violations of the horsepower-wattage regulation are subject to the same penalty as deliberate misstatements, the vacuum cleaner firms have no incentive to spend more on preventing their salesmen from lying to consumers. If B has some salesmen that cannot effectively be retrained to avoid horsepower claims, it might as well encourage those salesmen to make other false claims, because doing so will not increase B's exposure.

While less dramatic, the vacuum cleaner example has all of the same features as the speeding example. In both instances, "absolute" deterrence costs society more than it is worth, by encouraging wasteful investment in compliance and avoidance, discouraging useful and lawful activity, failing to allow for the occasional violation creating a net social benefit, and destroying the incentive for potential violators to choose the less harmful offense. All of these effects flow from "classical" deterrence's fundamental failure to recognize any limit on the value of deterrence, which results inevitably in excessive penalties.

The Need for a Focus on Harm. "Classical" deterrence ultimately is unsatisfactory because it does not account for why we want to deter in the first place, which fundamentally is not to prevent offenders from reaping profits from their offenses, but rather is to avoid the social harms from those offenses. In its simplest form, "classical" deterrence is likely to "underdeter" because it fails to recognize the costs of compliance and is very sensitive to imperfect information about the odds of detection and conviction. But if adjusted to account for those shortcomings, "classical" deterrence evolves toward destructive overdeterrence, because the size of the adjustments is indeterminate and the tendency always is toward higher penalties in order to achieve "enough" deterrence, while the theory never recognizes how much is "enough," or too much. The obvious solution is to base deterrence on harm rather than gain, which is precisely the result achieved by optimal penalties.

b. "Optimal" Deterrence, based on Harm

Unlike "classical" deterrence, optimal penalties do not proceed from an explicitly "deterrent" premise. Instead, they are derived from the broader objective of minimizing the total social costs of both crime and law enforcement. Consequently, the harm-based approach neither seeks nor results in "absolute" deterrence, but rather produces an "optimal" deterrence of offenses than are unjustified by the harm they cause. In those occasional instances where the gain from an offense exceeds its harm to society, or when compliance costs are extremely high, optimal penalties will not deter, although they will punish the offenders in proportion to the harm. But in the vast majority of cases where harm exceeds gain and compliance costs, optimal penalties will deter more powerfully than simple "classical" deterrence based on gain. Thus, optimal penalties solve the "underdeterrence" problem of simple "classical" deterrence, without creating the dangers of overdeterrence.

In its basic form, the harm-based approach yields a penalty rule that sets the penalty equal to the social loss from the offense times the same "multiple" of chances against conviction used by "classical" deterrence. While the resulting optimal penalty rule thus appears similar to the "classical" deterrence rule, the replacement of offender's gain by social loss makes a great deal of difference. The optimal penalty rule also achieves deterrence by forcing potential offenders to consider the social loss

"internalized" through the penalty. When social loss is converted to expected harm by the "multiple," the potential offender faces an expected penalty precisely equal to the harmful potential of its offense.

As compared with "classical" deterrence, optimal penalties: (1) solve the underdeterrence problem of an organization's avoidance costs; (2) are less sensitive to the problem of underdeterrence through mistakes in assessing the probability of conviction; and (3) eliminate the need for adjustments that tend toward overdeterrence.

Optimal deterrence solves "classical" deterrence's problem of adjusting for offense-avoidance costs, by providing potential offenders with the appropriate incentive to avoid offenses. If the cost of avoiding the offense (plus "gain," if any) is greater than the social loss resulting from the offense, then society is better off if the offense takes place. Stronger deterrence would "cost" society more than it was worth in terms of net harm. On the other hand, in the vast majority of instances where loss exceeds gain, the difference between them is precisely the amount that organizations should be encouraged to invest in avoiding offenses.

Optimal deterrence also is less sensitive than "classical" deterrence to an underestimate of the multiple. While a relatively small understatement of the multiple is likely to produce little or no "classical" deterrence, it will result only in a proportionately sub-optimal penalty.[161] While an overstatement of the multiple may overdeter under both theories, the main point is that optimal penalties create less temptation to raise the multiple only to "make sure" that there is at least some deterrence, and no tendency to increase penalties to account for compliance costs.

More generally, optimal penalties are far less likely than "classical" deterrence to produce overdeterrence, because the interest of "deterrence" alone does not drive the penalty rule, or determine the penalty level. Instead, optimal penalties are determined only by the size of the loss from the offense and the probability of detection and conviction. There is no need to raise penalties in order to "assure" deterrence. "Optimal" deterrence results automatically from a penalty based on accurate estimates of loss and probability.

Optimal penalties also do not threaten marginal deterrence, because they are scaled to the loss and probability determinants of social harm. The optimal penalty necessarily is proportional to the harm from the offense. Where two offenses produce different degrees of harm, an optimal penalty system will assign the lower penalty to the less harmful offense, and thereby provide an incentive for the offender to choose the less over the more harmful offense.

The advantages of optimal deterrence are illustrated by reconsidering the two examples of speeding and vacuum cleaner regulation from the preceding discussion of "classical" deterrence's tendency toward overdeterrence.

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[161]A numerical example helps to illustrate this point. A hypothetical offense produces $1,000 in gain and $1,500 in social loss for each offender and offense. The rulemakers erroneously have set the multiple at 4 whereas in fact the probability of detection and conviction is 20 percent, and therefore the "true" multiple is 5. Under the rulemakers' multiple, the "classical" deterrence fine is $4,000 and the harm-based fine is $6,000. Applying the "true" multiple, expected fines are $800 and $1,200, respectively. In this situation, "classical" deterrence totally fails, because each offender retains an expected gain of $200, and therefore all commit the offense. Twenty percent are convicted and fined, resulting in a net social loss of $700 per offense. Under harm-based penalties, there is no social loss, because offenders are still deterred, unless compliance costs exceed $200.

In the speeding example, optimal penalties will not deter life-saving speeding to the hospital, and will more effectively deter minor time-saving speeding, because both potential violations are weighed against the same standard of harm. Furthermore, even while not deterring life-saving speeding, optimal penalties preserve the marginal deterrent against reckless driving, or murdering the arresting officer, by progressively increasing the penalty in response to the greater harms of the more serious offenses. And in all instances, optimal penalties encourage precautions against speeding that are proportional to its harm, without encroaching upon lawful and beneficial uses of automobile transportation.

Similarly, optimal deterrence is both more effective and more measured in the vacuum cleaner example. The loss-based optimal penalty will encourage the vacuum cleaner industry to invest only the "optimal" amount in preventing offenses, instead of making wasteful compliance expenditures that produce less benefit to consumers than alternative investments (such as product improvement), or imposing over-inclusive restrictions on their agents, thereby inhibiting lawful sales practices that are helpful to consumers. At the same time, the optimal penalty would serve as a more powerful deterrent to more serious offenses, by punishing deliberate misstatements more severely. Where some firms have relatively higher compliance costs--firm B in the example--optimal penalties would encourage compliance expenditures only up to the point where additional investment no longer avoided equal or greater losses from offenses. Thus, firm B will spend the 5 percent to achieve 90 percent compliance, and pay the additional 1 percent loss as fines. Society is better off allowing B to stay in business and commit the remaining 10 percent of violations, because there is a net social cost of only 6 percent of B's sales, rather than the 20 percent necessary to achieve "total" deterrence.

The superiority of optimal deterrence over "classical" deterrence derives from the focus of optimal deterrence on harm rather than gain. The harm-based optimal penalties will produce both a stronger and more proportional deterrence in the usual case where loss exceeds gain. In the rare case where gain plus avoidance costs exceeds loss, optimal penalties do not deter, because to do so would result in a net loss to society. However, optimal penalties will still punish in proportion to harm. Furthermore, optimal penalties are less prone to instability--particularly in the form of overdeterrence--than is "classical" deterrence, because optimal penalties are determined by the same basic factor that explains the existence of the offense itself: the social harm caused by the offense.

2. Proportionality

Deterrence sometimes is said to conflict with, or be limited by, a second purpose of "just punishment" or "moral desert," which requires proportionality between the punishment and the severity of an offense.[162] While "classical" deterrence might be faulted on this ground, optimal penalties are not subject to the same criticism. To the contrary, optimal penalties are not merely consistent with proportionality, but actually reconcile the two purposes by extending the basic concept of proportionality to a more general analysis that considers the total harm caused by offenses.

There is some variation in both terminology and ultimate rationale for what I call "proportionality." Traditionally, this purpose was associated with "vengeance" or "retribution." In more recent incarnations, the emphasis has shifted to the distribution of punishments on the basis of "just desert," within a system generally justified by considerations of both "reprobation" (essentially, "blaming") and crime-control.[163]

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[162]See J. Andenaes, Punishment and Deterrence, ch. V (1974).

[163]The more recent "just deserts" concept is strongly associated with the writings of Andrew von Hirsch. See A. von Hirsch, Doing Justice: The Choice of Punishments (1976) and Past or Future Crimes (1985); see also G. Fletcher, Rethinking Criminal Law (1978), especially the Preface, at xix-xxiii and §§6.3, 6.6, & 6.7

The Sentencing Reform Act uses an inclusive "just punishment" formulation: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,"[164] which is explained as "another way of saying that the sentence should reflect the gravity of the defendant's conduct."[165] I use the term "proportionality" here as a shorthand for the core principle underlying all of these concepts: that penalties should reflect the severity of the criminal conduct.

The perceived "conflict" between deterrence and proportionality arises from the idea that deterrence-based penalties are determined solely by their deterrent effect on persons other than the offender. Hence, the philosohical objection is that the individuals punished are being treated merely as "means" to some other objective rather than moral "ends" in themselves.[166] Of course, this is no objection to organizational penalties, as organizations are not moral "ends," but simply instruments for the achievement of other objectives.[167] However, more fundamentally, the objection does not apply to "optimal" deterrence--as distinguished from other theories of deterrence based on gain or wealth--because optimal penalities are derived from the same harm-based rationale as proportionality. Optimal penalties simply require an offender to bear the burden of the total harm to others caused by the offense, precisely as desired by proportionality. There is no "conflict" between proportionality and optimal penalties. In fact, optimal penalties actually improve upon and extend conventional theories of proportionality, with a more inclusive analysis of the harm caused by criminal offenses.

Conventional statements of the proportionality theory[168] embody three central concepts: (1) choice (in the sense of the offender's culpability); (2) blameworthiness of criminal conduct; and (3) proportionality of individual punishments to each other and to the underlying severity of the offense. An offender who has chosen to engage in blameworthy conduct is "deserving" of a penalty commensurate with the severity of the offense, viewed absolutely ("cardinal proportionality"), relatively to other offenses ("ordinal proportionality"), and in comparison with other instances of the same or equivalent offense ("parity"). Severity or "seriousness," which seems to be about the same thing as

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For an interesting discussion placing "old" and "new" retribution in context, see H.L.A. Hart, Punishment and Responsibility, ch. I and ch. IX, Part Two (1968). A more summary analysis is provided by 1 W. LaFave & A. Scott, Substantive Criminal Law §1.5(a)(6), at 35-36 (1986).

[164]18 U.S.C. § 3553(a)(2)(A).

[165]Senate Report, at 75.

[166]See J. Andenaes, Punishment and Deterrence 129 (1974); A. von Hirsch, Doing Justice: The Choice of Punishments 50-51 (1976) (both tracing this idea to the philosophy of Immanuel Kant). H. L. A. Hart points up the philosophical error in this argument, see H. L. A. Hart, Punishment and Responsibility 22-23 (1968), but I pass the point, for my purpose here is to show that the objection has no application to optimal penalties.

[167]See Part I, pages 4, 6-7, above.

[168]My description is drawn primarily from Chapters 3-8 of A. von Hirsch, Past or Future Crimes (1985). I refrain here from a full critique of the "deserts" or similar theories, as my main objective is to demonstate the consistency of optimal penalties with the rationale of proportionality. However, I note in passing that the "deserts" theory, as stated by von Hirsch, articulates little or no concern with the present problem of organizational sentencing. "Deserts" analysis seems preoccupied with the problem of rationing imprisonment, which is not a sentencing option for organizations.

"blameworthiness," is measured by two major components: "harm," which refers to the injury or risk of injury from the offense; and culpability, which refers to the offender's choice and state of mind.

Thus considered, the concept of proportionality is perfectly consistent with optimal penalties, which actually solve some of the conventional theory's problems with measuring both the relative and absolute severity of offenses.

Like conventional "proportionality," optimal penalties proportion the level of punishment to the harmfulness of the offense. The optimal penalty rule's "loss" factor plainly is analogous to the proportionality theory's "harm," as they both refer to injury or risk of injury from the offense. To some extent, "loss" includes culpability as well, because an offender's state of mind often will determine the risk of injury caused by the offense. One of the basic functions of the doctrine of mens rea in the criminal law is to separate levels of harmful effect, and, particularly in the case of the inchoate offenses and prophylactic prohibitions, to distinguish criminal from non-criminal conduct.[169]

The optimal penalty rule's second major factor of probability of detection and conviction is less obviously but equally strongly related to concepts of proportionality. The role of the probability or "multiple" in the optimal penalty rule is not to reflect "the large number of persons who commit this crime and . . . the aggregate economic injury done."[170] To the contrary, the probability is independent of whether there are ten or ten million similar offenses. Rather, the probability or multiple reflects a second dimension of harm that is directly related to the offender's culpability. By choosing an offense with a lower probability of detection, or taking actions to reduce the probability of punishment (e.g., concealment, obstruction), the offender multiplies the offense's potential for unredressed harm to society, and for that reason the conduct is more blameworthy and deserving of a higher penalty. The criminal law traditionally has recognized the additional danger to society inhering in conduct that impedes the detection and punishment of the guilty, both by separate punishment for such offenses as obstruction of justice, perjury, and misprision of felony, and by enhanced punishment of crimes involving an element of planning, organization, secrecy, or concealment, such as conspiracy, burglary, or first-degree murder.

In addition to being consistent with proportionality principles, the optimal penalty rule actually solves some of the vagueness of conventional proportionality requirements, by scaling all penalties to the actual amount of harm involved. The conventional theory resorts to such devices as relative rankings of offense severities, and rough "anchoring" of the relative scale, because it lacks a precise scale of severity. Optimal penalties provide that scale, through an inclusive measure of social harm.

Ultimately, the optimal penalty theory identifies and rectifies the same basic deficiency in conventional proportionality as existed in "classical" deterrence, and at the same time unifies those purposes into a more general theory of punishment. Traditional statements of both deterrence and proportionality fail systematically to balance the costs and benefits of punishment. "Classical" deterrence fails to recognize any limit to the value of more deterrence. Conventional proportionality begins to recognize that the value of punishment is constrained by reference to criminal harm, but fails to produce a determinate system for assessing harms, and stops short of explicit recgonition that a full consideration of harm should include the costs and uncertainties of punishment. Optimal penalties solve

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[169] See 1 W. La Fave & A. Scott, Substantive Criminal Law § 3.4(e), at 302 (1986); R. Posner, Economic Analysis of Law, § 7.4, at 218-19 (3d ed. 1986).

[170] A. von Hirsch, supra note 168, at 65. This idea is another form of the same fallacy that "deterrent" punishments necessarily are driven by their effects on persons other than the offender. See notes 166-167 and accompanying text, above.

both problems, by refining the concept of proportionaltiy and balancing the costs and benefits of deterrence, thereby removing any "conflict" between those two purposes of punishment.

3. Public Protection and Rehabilitation

I consider the two purposes of "public protection" and rehabilitation together, as they both seem to be species of the same basic idea that focusing special attention on convicted offenders, or particular categories of convicted offenders such as recidivists, will promote the general goal of crime control. Both purposes traditionally have focused primarily on individual offenders, and appear to have played a very limited role in organizational sentencing. The optimal penalty theory both explains that fact and demonstrates why that result is sound sentencing policy for organizations.

"Public protection" takes in the traditional ideas of "specific deterrence" of the offender as well as "incapacitation" of the offender from committing future crimes.[171] "Rehabilitation," also known as "reformation" or "correction," is the idea that offenders can be turned away from criminal propensities by correctional "treatment."[172] As such, both purposes are aspects of the same basic "crime control" aim also served by general deterrence, and differ primarily in the means employed to reach that objective: "general" deterrence addresses the threat of punishment to potential offenders at large; "specific" deterrence particularizes that threat in the minds of offenders who have undergone punishment; rehabilitation seeks to prevent crime by reforming offenders; and incapacitation seeks to interdict future offenses by restraining past offenders who are likely to repeat. Deterrence, rehabilitation, and incapacitation rely respectively on threat, treatment, and restraint as alternative means of controlling crime.

Given their basic premises, it is easy to see why rehabilitation and "public protection," in the sense of incapacitation, neither have nor should play a key role in organizational sentencing. Both purposes are addressed to the individual personality, and more specifically to the "criminal" personality, which is less responsive to the threat of punishment than the normal person. Rehabilitation asserts that criminal propensities can be "cured" through enlightened "treatment," while incapacitation simply accepts that some personalities need to be restrained in order to prevent future crimes. Neither purpose translates successfully to the organizational context, because organizations do not have a human "personality," and because the interventionist methods implied by both purposes are likely to be ineffective and destructive in the organizational setting.[173]

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[171]As stated by the Sentencing Reform Act, this purpose is "to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), and the emphasis was on restraining repeated serious offenders:

> "This is particularly important for those offenders whose criminal histories show repeated serious violations of the law."

Senate Report, at 76.

[172]The Sentencing Reform evinces a skepticism of the rehabilitative function, at least in the context of imprisonment. See 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k); Senate Report, at 38, 76-77, 119. Rehabilitation had been a central model of the prior criminal sentencing system that had led to the uncertainties and unfairness that the Congress sought to eliminate with a determinate sentencing system based on guidelines. See Senate Report, at 38-39.

[173]I develop this point further in § D, below.

Nonetheless, the optimal penalty theory also integrates public protection and rehabilitation as corollaries to "optimal" deterrence, in a manner that explains the narrow role that they should play in organizational sentencing. The basic mechanism of optimal deterrence is to force an organization to "internalize" the harms that would be caused by an offense. When the potential penalty is presented in monetary form, it directly translates into the monetary incentives that drive business behavior. Most business organizations will be responsive to those incentives, as their survival and success depends on that factor. However, when organizations are unresponsive, optimal monetary penalties automatically will produce the "rehabilitation" or "incapacitation" of the organization. Even where an organization is not deterred by optimal penalties, it is punished in proportion to the harm caused by its offense. If the organization remains unresponsive to optimal monetary penalties, it will in short order be penalized into insolvency.[174] At that point, the bankruptcy system will step in either to "rehabilitate" the organization through reorganization, or "incapacitate" the organization through liquidation. In either event, optimal penalties will have resulted in the appropriate amount of rehabilitation and public protection, by restructuring or completely disabling organizations that produce more harm than value to society, without any direct intervention by the criminal courts into private business activities.

4. Compensation to Victims

In recent years, restitution to victims has become an increasingly significant feature of the federal criminal system. The Victim and Witness Protection Act of 1982[175] established restitution to victims as the norm for most federal offenses, and the Reform Act instructs courts to consider "the need to provide restitution to any victims of the offense"[176] as a sentencing factor in all cases. Thus, the federal criminal sentencing system now embodies a strong compensatory element. Optimal penalties are consistent with the compensatory objective, and indeed are based explicitly on the even broader compensatory rationale of requiring offenders to compensate for the total social costs of crime. The interest in compensation to victims is included within the broader objective of social compensation.

C. The Aims of the Criminal Law

In the preceding section, I discussed the implications of the optimal penalty theory for the traditional purposes of criminal punishment, and found that optimal penalties not only promoted each of those purposes separately, but also reconciled the several purposes into a more general theory of punishment based on the total harm caused by criminal offenses. That result in turn leads to a deeper point: that the superior results produced by the optimal penalty theory are attributable to its congruence with the fundamental aim of the criminal law to prevent harm.

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[174]This does not exclude a role for criminal history characteristics in determining optimal penalties for repeat offenders. Where an organization has been shown to be unresponsive to generally optimal penalties, there is an argument for raising that organization's effective penalty, through closer surveillance or an increased penalty amount.

[175]Pub. L. No. 97-291, § 5(a), 96 Stat. 1248 (October 12, 1982), codified at 18 U.S.C. former §§ 3579-3580. These provisions were carried forward in the Sentencing Reform Act, 18 U.S.C. §§ 3663-3664, and restitution was added as a general sentencing option for most offenses, see 18 U.S.C. §§ 3551, 3556.

[176]18 U.S.C. § 3553(a)(7).

Criminal law authorities are in general agreement that "[t]he broad aim of the criminal law is, of course, to prevent harm to society."[177] The Model Penal Code states, as the first purpose and "major goal" of the substantive criminal law, "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests."[178] And Jerome Hall states that: "Harm, in sum, is the fulcrum between criminal conduct and the punitive sanction."[179]

Hall's comment suggests an even more fundamental principle of law: that the remedy should follow the substantive right.[180] In criminal law, the basic substantive right is society's right to be free of the harmful effects of criminal conduct; the remedy provided to vindicate that right is criminal punishment. Traditional theories of punishment seek to promote the fundamental aim of harm prevention, but they do so only indirectly and without recognition that remedies have costs as well as benefits. The optimal penalty theory produces superior results because it bases the penalty directly on the underlying reason for criminalizing certain conduct--to prevent or at least redress the harmful effects of such conduct, on the victim and the rest of society--and recognizes the practical constraint imposed by costly and uncertain enforcement.

Thus, the choice of optimal penalties rests on more than simply an "economic" approach to crime. To speak of "optimal" penalties or an "economic" approach is merely a matter of convenient terminology. One could entirely reject "optimizing" as an objective and economic analysis as a method, and still reach the same choice of a harm-based penalty system that recognized the potential harms and uncertainties of the remedy itself. Given the congruence between harm-based penalties and the harm-based rationale for defining conduct as criminal, it seems difficult to reach any other choice without impairing the fundamental aim of the criminal law.

D. The Forms of Organizational Sanctions

The optimal penalty theory also has important implications for the appropriate forms of organizational sanctions, and strongly supports a preference for monetary penalties over the alternative of direct intervention into business activities through organizational probation.

The superiority of monetary penalties for organizations is attributable to four major factors: (1) the responsiveness of business firms to monetary incentives; (2) more precise scaling of penalties to harms; (3) lower government expenditures; and (4) less social harm from the imposition of the penalty.

First, business firms--the vastly predominant type of organizational offender in the federal system[181]--are likely to be responsive to the incentives created by monetary penalities, and unresponsive to any other form of sanction. In this respect, organizations differ from individuals, who in certain contexts may be highly responsive to imprisonment or lesser restraints on their liberty, and less directly

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[177] 1 W. LaFave & A. Scott, Substantive Criminal Law §1.2(e), at 14 (1986).

[178] Model Penal Code §1.02(1)(a)(1985). "The major goal is to forbid and prevent conduct that threatens substantial harm . . . ." Id., Explanatory Note, at 3.

[179] J. Hall, General Principles of Criminal Law 213 (2d ed. 1960).

[180] See D. Dobbs, Law of Remedies §1.2, at 3-4 (1973). "The remedy is merely the means of carrying into effect a substantive principle or policy. Accordingly it is a first principle that the remedy should be selected and measured to match that policy." Id. at 3.

[181] See § A.1 of Part I, above.

responsive to monetary sanctions because of attitudes toward risk that deviate from risk neutrality.[182] Organizations, however, have no interest in "liberty" as such, except insofar as it affects their ability to make money, and are likely to be risk neutral.[183] The federal courts implicitly have recognized the distinctive responsiveness of organizations, by traditionally favoring monetary fines over probation by a wide margin.[184] Moreover, ignoring this factor by applying non-monetary sanctions will not change the underlying facts, but only cover up their effect on the efficacy of the penalty system. No matter what form the penalty takes, its ultimate impact on the organization is likely to be evaluated in monetary or economic terms--by investors, competitors, and others--because financial results are the only purpose of the organization and the only measure of its performance in the marketplace. The difference is that the non-monetary penalty, viewed from the perspective of sentencing policy, is indeterminate and unpredictable in its impact.

Second, whereas monetary penalties are capable of being scaled fairly precisely to the predominantly monetary harms caused by organizational offenses,[185] non-monetary penalties lack a comparable scale. The result is yet another source of indeterminacy in sentencing caused by non-monetary penalties. There simply is no established basis for determining how much or what kind of governmental intervention into organizational operations is "enough," or "too much." Consequently, the use of non-monetary penalties inevitably tends toward a model of "absolute" deterrence, in which the aim is to prevent any and all offenses at any cost. The result is even worse than "absolute" deterrence by monetary penalties,[186] because non-monetary penalties would be administered under the direction of government agents, who lack the cost-minimizing incentives and expertise of the organization's own agents. Moreover, the costs created by non-monetary penalties are likely to more a function of the size or structure of the organization than the harm caused by the offense. As the scope of the organization increases, so will the costs--public, private, and social--of seeking to eradicate all offenses. For larger or more diversified organizations, these costs could affect broad sectors of the economy, to the ultimate detriment of consumers and the public in general. Because they lack any definite scale against the harmful effects of offenses, non-nonetary sanctions have the inexorable tendency toward an indeterminate penalty system that does more harm than good.

Third, monetary sanctions are less expensive and burdensome for the courts to impose, and, unlike the non-monetary alternative, actually produce revenue to the government that can be redistributed to victims who have not obtained compensation by other means. There appears to be general agreement across a broad spectrum of views on the criminal justice system that monetary penalties are "far less costly to the public" than non-monetary alternatives.[187]

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[182]For a discussion of the effect of these factors on optimal penalties, see R. Cooter & T. Ulen, Law and Economics ch. 12, §§ II & III (1988).

[183]The risk neutrality assumption for organizations is further examined in § D.2 of Part III, below.

[184]See § A.4 of Part I, above.

[185]See § A.3 of Part I, above.

[186]See § B.1, above.

[187]S. Hillsman, B. Mahoney, G. Cole, & B. Auchter, Fines as Criminal Sanctions 1 (September 1987) (National Institute of Justice: Research in Brief).

Fourth, and perhaps most importantly, the application of non-monetary sanctions to business organizations strikes at the very heart of the competitive process that fuels our national economy, by substituting centralized administration for the decentralized incentive system that has prevailed in this country for the past 200 years and has produced the outstanding results that we all enjoy today. In essence, non-monetary sanctions are a form of direct governmental regulation that displaces the incentive system. Worse yet, they are a system of regulation without specific legislative mandate, administrative expertise, or clear jurisdictional boundaries, and they employ an approach of government standard-setting[188] that is likely to be inappropriate and ineffectual in dealing with the problem of organizational crime. The basic "market failure" involved in organizational offenses is the creation of "externalities" in the form of harm to others. The application of standards to such a situation creates a regulatory "mismatch," and the more appropriate response is to create an incentive system that seeks to "internalize" the costs,[189] which is precisely the aim of optimal monetary penalties.

Given these advantages of monetary penalties, any substantial use of non-monetary sanctions would require a persuasive showing that the non-monetary form has some advantage, either generally or for particular situations. However, the literature arguing for expanded use of corporate probation[190] fails to identify any such advantage, and generally rests upon two erroneous objections to the efficacy of organizational fines: (1) that the impact of a fine is "passed through" to "innocent" parties, such as consumers, creditors, or employees; and (2) that the impact of a fine somehow is diverted from its intended effect by the corporate "technocracy." Both objections are answered definitively by the optimal penalty theory.

The "pass-through" objection ignores the basic point of optimal penalties as well as elementary economics.[191] The aim of the penalty is to force productive activity to bear the costs of external harms. While fines based on some other theory might indeed cause unwarranted disruptions, optimal penalties do not. If the imposition of the penalty causes prices to rise or employment to decrease, then that result implies that the prior position of consumers or employees rested upon the infliction of

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[188]See generally Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L. J. 1 (1980), which sets out a taxonomy of "standards" to "constrict managerial autonomy . . . by prescribing the means by which the harm is to be avoided," id. at 36.

[189]See S. Breyer, Regulation and Its Reform, chs. 10 & 14 (1982). In discussing the case of externalities ("spillovers") caused by environmental pollution, Judge Breyer states that:

> "greater reliance should be placed upon less restrictive regimes as a means for dealing with spillover problems. The classical approach to the spillover problem--standard setting--is difficult to administer, can cause serious anticompetitive harm, and ofttimes freezes existing technology."

Id. at 261. He further notes that precise evaluations of the external harms are less important than the dynamics of the incentive system itself. See id. at 271. However, optimal monetary penalties are likely to provide a very good measure of the harms from organizational offenses, which are predominantly monetary.

[190]An excellent summary of this literature is provided by an internal Sentencing Commission staff memorandum by Sylvia Voreas. See S. Voreas, "Philosophical Approaches to Organizational Sanctions," at 2-3, 7-28 (April 28, 1988) (on file with the U.S. Sentencing Commission).

[191]The points discussed here are fully and ably developed in an internal Sentencing Commission staff memorandum by David Anderson. See D. Anderson, "Criminal Corporate Liability and the 'Pass Through' Problem" (June 6, 1988) (on file with the U.S. Sentencing Commission).

uncompensated criminal harm to others. Even though the consumers and employees may not have been involved in the offense, they can hardly justify a continuation of positions based entirely on criminality. To the extent that their prior positions were not based on the creation of criminal harm to others, there will be no "pass through" to them, except perhaps in the exceptional case of a regulated public utility, and then only if permitted by the regulatory agency. Outside of that context, firms will not raise prices, even if they have monopoly power, because to do so would cause a loss of profits. Similarly, firms will not discharge productive employees or shut down productive plants, because that also will reduce profits. In other words, the "pass through" problem can exist only if one believes that a firm, having received a criminal fine, will then proceed to shoot itself in the foot by impairing its own ability to pay the fine and generate future profits.

The second objection to monetary penalties simply identifies the internal organizational control problem that is solved by optimal penalties. The advocates of probation argue that modern corporations have become bureaucracies in which their agents often have different incentives from the firm, and then conclude that the appropriate response is for the government to step in and restructure corporate operations in order to alleviate the "bureaucratic" incentives. The problem is fairly identified, but the interventionist solution is wrong, because it never specifies how much intervention is appropriate or why the government is in a better position than the firm to provide the solution. The optimal penalty theory both specifies the amount of resources that should be devoted to internal control,[192] and recognizes that the firm is in the superior position to deploy those resources in the most efficient manner. Spending more than the "optimal" amount of resources on control increases the amount of harm from organizational crime, by making control more harmful than the crime itself. Moreover, there is no possibility that the government is in a superior position to exercise direct control over organizational agents than the organization itself. If the organization has difficulty in controlling its own agents because of "bureaucracy," then there is no reason to believe that adding another layer of governmental bureaucracy has any potential for solving that problem, although it has a great deal of potential for wasting society's resources and retarding economic progress by destroying the incentives that otherwise would remain.

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[192] See § B.1, above.

III. Developing an Optimal Penalty Policy

In this Part, I move from the theory to the practice of optimal penalties, by first describing in more detail the derivation of the optimal penalty rule and its underlying assumptions (§A), and considering its implications for Sentencing Commission policy (§B). I then discuss some general problems of evaluating the rule's two major constituents--social loss and probability of punishment (§C)--and conclude by considering some possible refinements to the rule (§D), and its limitations as a practical sentencing policy (§E).

Until reaching the subject of limitations, I focus almost exclusively on monetary penalties, for the reasons discussed in Part II.[193] My general conclusion is that monetary penalties in optimal amounts provide a practical basis for organizational sentencing policy. The simple penalty rule of loss times a multiple, without refinements, is generally adequate for criminal sentencing policy, provided that there is an adjustment for collateral civil penalties or damages. The two factors of loss and probability present some problems of measurement, but can be estimated for most organizational offenses.

However, optimal monetary penalties encounter two potential limitations, where (1) losses cannot be expressed in monetary terms, or (2) offenders are unable to pay the amount of an optimal monetary penalty. Neither problem appears to affect a significant percentage of organizational offenses in the federal system, although we do not as yet have detailed figures. In any event, the existence of these limitations in at least some cases indicates the need to consider whether the less preferable alternative of non-monetary sanctions--which might still be oriented toward the optimal penalty objective--is worthwhile in the limiting cases.

A. Derivation of the Optimal Penalty Rule

As I noted in Part II.A, the optimal penalty rule derives from a more generalized analysis of the social costs of crime and enforcement. The standard approach defines an inclusive social "loss function" of offenses, and then seeks to "optimize" that function with respect to factors within the control of government policy.

While there is some variation in the level of refinement, the basic model considers total "social cost" from an offense as a function of (1) losses to victims and society generally, plus (2) the costs of detection, prosecution, and punishment of the offender, and the social loss associated with those activities, less (3) offenders' gains, and (4) the penalty, reduced to "expected" value by the probability of conviction.[194] Three assumptions, all of which appear to be realistic in the context of organizational sanctions, simplify the analysis considerably: (1) the form of penalty is monetary, which imposes no "social loss" in its imposition beyond the costs of detecting and convicting offenders;[195] (2) all other gains, costs, and losses can be expressed in money; and (3) potential offenders are "risk-neutral,"

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[193] See § D of Part II, above.

[194] I take my "basic" model from the Becker article of 1968. Some of the refinements are discussed in §D, below.

[195] This assumption implies both that the imposition of monetary penalties causes no efficiency loss and that no (or very few) non-offenders are erroneously convicted. The question of erroneous convictions is re-examined in §D, below.

meaning that they view the potential penalty as precisely equal to its expected value.[196] Under those assumptions, the optimal monetary penalty reduces to the simple form of loss divided by probability, and "optimal deterrence" is achieved by deterring all offenses where the offender's gain plus avoidance costs are less than the "expected" penalty, which is exactly equal to loss.

To me, the most striking feature of the basic analysis is that the form of the optimal penalty rule is largely independent of the inclusiveness of the particular "loss function." In effect, "loss" is a more general concept that essentially includes all losses (net of gains) to everyone other than the offender. "Optimality" is achieved whenever those losses are presented to a potential offender in the form of the "expected" penalty, to be balanced against the offender's expected gain.

B. The Sentencing Commission's Perspective

In its basic form, the "optimality" analysis presents two "policy" determinants to be selected simultaneously: (1) the size of the penalty; and (2) the probability of conviction, which is largely determined by enforcement expenditures and priorities. At that level of generality, the choices become problematical, because the analysis suggests that the government can "buy" a great deal of prevention cheaply, by selecting a very high penalty and a very low probability. But at the resulting very high penalty levels, some of the otherwise minor refinements and limitations become important: offenders may no longer be assumed to be risk neutral; the costs of occasional error increase dramatically; proportionality begins to be compromised; and more offenders are unable to pay, thereby requiring more frequent consideration of non-monetary penalties.

Fortunately, however, the Sentencing Commission does not face those complex choices, because the Commission has no authority over the enforcement expenditures and priorities that largely determine the basic probability of punishment. The Commission's only role is to select the penalty, and it must take the probability as given. The Commission's policy decision is simply whether to recognize that level of enforcement commitment by seeking to set the corresponding "optimal" multiple, or not.

Once optimal penalties are chosen as an objective, the basic tasks in setting penalties are to select rules identifying the appropriate measures of social loss, and estimate the multiples implied by current enforcement, both of which are addressed in the next section. The result of those two factors is the "total" penalty for the criminal conduct, representing compensation to both direct victims and the rest of society. Therefore, under the logic of the optimal penalty rule, all other "penalties" (including compensatory civil damages) must be offset. Otherwise, offenders would be overpenalized, and the parallel criminal, civil, and administrative enforcement systems themselves would produce a net social loss.

The "total penalty" result of the optimal penalty rule has two implications in the context of organizational sanctions.[197] First, the "total" penalty would include sanctions against both the organization and participating individuals associated with the organization. Second, any penalties, damages, or disabilities imposed for the same conduct by the civil and administrative systems (federal and state), as well as any state criminal prosecution, also should be deducted from both individual and

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[196]Taken together, these three assumptions make it unnecessary to consider a non-monetary "utility function" applicable to gains and losses, or to consider "elasticities" of responses to differing levels of penalties and probabilities, or differing forms of penalties. The most sensitive assumption is "risk neutrality," which is re-examined in §D, below. Non-monetary losses and penalties are discussed in §E.

[197]I put aside here the problem of allocation among multiple independent defendants, which also would have to be addressed in sentencing guidelines.

organizational criminal penalties imposed by the federal courts. Some possible approaches to establishing rules of coordination in order to assure the appropriate total penalty are discussed in Part IV.[198]

C. Determining Loss and Probability

The two basic components of the "total" optimal penalty are loss and the probability or "multiple." Both components appear to present some difficulties of measurement. In the case of loss, the problems lie in identifying the proper elements of loss and formulating administrable "loss rules" of measurement. For the probability or "multiple," the primary problem is empirical estimation of the existing multiples.

1. Loss

As a general definition, "social loss" under the optimal penalty rule includes all losses or injuries suffered by everyone other than the offender. While the principle is clear enough in broad theory, the existing literature devotes little or no attention to identifying and measuring the components of "loss," either generally or for specific offenses.[199] Nonetheless, I believe that the basic "loss" concept, with some further development and interpretation in specific contexts, can be applied practicably to the formulation of an organizational sentencing structure.

The "social loss" concept seeks to identify losses to all "victims" of an offense considering victims to include not only direct "victims" in the conventional legal sense, but also the government and society in general. Thus, "loss" comprises three basic elements:

(1) losses to direct "victims," as would be recognized in civil damages suits or traditional criminal restitution;

(2) enforcement costs to the government of detecting, convicting, and penalizing the offender; and

(3) more general "social" losses, such as a loss in market efficiency.

The first two elements of the general "loss" formula are fairly easy to identify and quantify. The third element is more difficult. However, for essentially "economic" offenses, that element also yields to applied economic analysis, because such offenses are prohibited precisely for their adverse economic consequences. For example, horizontal price-fixing is prohibited because it undermines the economic efficiency created by competitive markets, and thereby causes both losses to "direct" victims (buyers who were overcharged),[200] and a "deadweight" loss of market efficiency, which represents the lost value to "indirect" victims--the potential buyers who did not buy because of the price increase. Those two factors, plus the government's enforcement costs, represent the total "social loss" from price-fixing.

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[198] See § B of Part IV, below.

[199] The major exception is Landes, Optimal Sanctions for Antitrust Violations, 50 U. Chi. L. Rev. 652 (1983).

[200] Under the optimal penalty rule, even pure "transfer payments" are considered as "loss," in order to produce accurate comparisons by offenders of their private gain with social loss. See Landes, Optimal Sanctions for Antitrust Violations, 50 U. Chi. L. Rev. 652, 654-55 (1983). This same result holds whether the "overcharge" itself is viewed as entirely a "transfer payment," wholly a social loss, or some of both. Id. at 665-66.

Similarly, the optimal penalty structure should be able to identify the total "social loss" from most other organizational offenses by looking to the interests invaded by particular offenses and applying economic analysis. Antitrust, fraud, taxation, and other economic or property offenses represent 75% of all corporate prosecutions in the federal courts. The remaining prosecutions are primarily for regulatory violations involving health, safety, and environmental matters, and even those matters do not appear to present insuperable problems in identifying the interests involved. Rather, the limiting problem is "monetization," i.e., deriving monetary equivalents for the losses identified. Of course, the civil system deals with the "monetizing" problem every day in applying damages rules for non-monetary injuries, which, together with further analysis, can produce acceptable rules of monetary loss even for the regulatory offenses. Where the "monetizing" problem cannot be solved, it may limit the use of monetary penalties (see §E, below).

In addition to identifying the interests involved and monetizing their values, there are at least two other general issues involved in measuring "loss" under the optimal monetary penalty rule: (1) defining the boundaries of the "offense," in terms of both conduct and causation; and (2) deciding whether to use intended or actual consequences in determining "loss." Resolving the first issue will require either general or particularized standards for determining when activities and results will be "counted" for purposes of "loss" computation, and handling overlapping offenses. The second issue arises primarily in the context of the "inchoate" offenses (attempt, conspiracy, and solicitation), but may also be presented by completed offenses where losses are either greater or less than "intended." A similar problem of measurement arises for offenses (such as health or safety offenses) where the "loss" or "injury" may be simply a risk (or increased risk) of injury rather than actual injury, which may not have occurred. In that situation, the "loss" is not zero, but rather the incremental expected loss created by the offense.

2. Probability

The second major component of the optimal penalty rule is the probability that the offender will be detected, convicted, and punished, usually stated as a "multiple" of the chances against an offender being punished. The theory of the "multiple" is clear: it is designed, when applied to "loss," to present the actual or potential offender with an "expected" penalty equal to the loss from the offense. The problems of setting penalty multiples instead derive primarily from the difficulty of obtaining empirical estimates of existing probabilities.

While the multiple may vary somewhat with characteristics of a particular offense and offender, the starting point is an "average" multiple representing the inherent difficulty of detecting and convicting persons who commit the type of offense involved. An approximation of this average multiple would be total convictions divided by total offenses, with a correction for erroneous convictions that in practice is likely to be so small as to be neglectible. However, for "white collar" crimes, as distinguished from "street crimes,"[201] there are no general estimates of total incidence. Therefore, the development of organizational sentencing policy will require estimates of average multiples, probably by a combination of three approaches: (1) estimates by enforcement agencies; (2) statistical modeling; and (3) qualitative analysis of offenses in terms of detectibility.

Enforcement Agency Estimates. In some cases, enforcement agencies will be in a position to provide estimates of total incidence or probabilities, sometimes by looking to a proxy such as lost tax revenue. The Justice Department's Antitrust Division previously provided the Commission with the

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[201]The Justice Department's "National Crime Survey" seeks to estimate the total incidence and reporting rates for some of the FBI's "index crimes," which, when combined with the Uniform Crime Reports' data on clearance rates and official court statistics, could be used to estimate multiples for offenses such as assault and theft.

estimate that only 1 in 10 antitrust offenders is detected and convicted.[202] More recently, the Justice Department's Criminal Division provided estimates of the probability of detection and conviction for various types of fraud offenses by organizations, based on a survey of prosecutors and investigators. Those estimates indicate multiples in the general range of 2.4 to 4.5 for most fraud offenses. The Internal Revenue Service estimates total tax revenue deficiencies, which could be compared with amounts involved in tax convictions to estimate the average multiple. The IRS's approach might be generalized to other types of crime occurring within a system with measured inputs or outputs, such as embezzlement from financial institutions, certain types of government program fraud, conservation and wildlife offenses, or certain types of pollution. Whenever there is regular auditing or sampling, it seems possible at least to place the probability within a definable range.

Statistical Modeling. A second approach, represented by a paper prepared by John Nash of the Federal Trade Commission staff,[203] is to estimate the probability of conviction from available data on convicted offenders, based on assumptions about the general nature of the underlying offense conduct and enforcement approach. Nash collected data on convicted offenders' "time to capture" for four types of violations within the FTC's jurisdiction. For three types of violations--violations of FTC orders, violations of FTC-established standards, and Truth-in-Lending Act cases--the data matched a model in which offenders' chances of detection in any one time period remained constant during the time of the violation. Under that pattern, the average time to capture is equal to the "multiple" for odds against detection in any one period. The data on a fourth type of violation--FTC Act §5 cases, without a prior order or standard--matched a different model, in which the single-period probability of detection rose with the duration of the violation, which corresponded with the FTC's pattern of enforcement based on cumulative complaints. The resulting estimates of the multiples ranged from 1.5 to 4.

This type of analysis might be generalized or combined with other statistical approaches to establish boundaries on multiple ranges.

Qualitative Analysis. A third approach to estimating multiples would look at qualitative aspects of the offenses, and might be quite useful when used in conjunction with empirical estimates for a few types of offenses to "anchor" a scale of relative rankings. The qualitative approach could look at the inherent characteristics of an offense to rank its detectibility, particularly as compared with other offenses, e.g., uncompleted conspiracies are harder to detect than their completed object offenses, fraud is harder to detect than ordinary theft. One variation of this approach is to "decompose" the total multiple into its components, and to look at the known rates, such as "clearance" rates and conviction rates, and ask what those rates imply about inherent detectibility. For example, if a particular offense had lower clearance and conviction rates than another otherwise similar offense, that might also imply that their underlying detection rates were correspondingly related.

When reduced to a relatively small number of possible multiples, and supplemented by enforcement agency advice and data, the qualitative approach may be sufficient by itself. Any estimates of multiples, however they are derived, are likely to be fairly rough approximations. However, the other options--no multiple at all, or purely arbitrary penalties--are even less attractive. The currently available estimates indicate that "real world" multiples for organizational offenses will be fairly low, between 1.5 and 10, with a tendency toward 3 or 4. There are a number of existing federal statutes that allow double or

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[202] See Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, at 8-9 (July 15, 1986) (on file with the U.S. Sentencing Commission).

[203] J. Nash, Optimal Civil Penalties, FTC Working Paper No. 138 (February 1986).

treble civil damages on top of criminal, civil, or administrative penalties.[204] The Sentencing Reform Act authorizes criminal fines equal to a minimum of two times the pecuniary loss--in addition to restitution, forfeitures, and civil remedies--on a per count basis, with no aggregate limit in multiple count cases.[205] Therefore, "total" multiples in the range suggested by the existing estimates will be well within existing legal authority, and probably can be set with tolerable accuracy by a combination of empirical and qualitative methods.

D. Refinements

There are three possible points of refinement to the basic optimal penalty analysis that appear to warrant some consideration: (1) the effect of the penalty level on the probability of conviction; (2) potential offenders' "risk bearing" costs; and (3) erroneous convictions. Each of these refinements seeks to introduce a new factor into the computation of the optimal penalty, in order to account for an effect neglected by the basic rule: the first refinement suggests that the basic rule's penalty, if larger than prior practice, may be too low, because higher penalties may tend to reduce the probability of punishment, through increased defensive efforts or courts' reluctance to convict; the second two refinements both suggest that the basic rule's penalty may be too high, by identifying social costs associated with penalties.

While there is some merit in each point, they identify relatively small effects that are unlikely to be significant within the range and accuracy of "multiples" estimated from the current enforcement system. Therefore, at this point I do not believe that any of the refinements needs to be explicitly incorporated into an organizational sentencing structure based on the optimal penalty rule.

1. Effect of the Penalty Level on Probability

The first refinement is based on the argument that the total penalty level and the probability level are interdependent (i.e., the probability and penalty level are "endogenous"), in that changes in the size of the penalty may affect the actual probability of punishment, by either raising or lowering the stakes of punishment. For example, if the penalty level is raised, the probability of punishment may drop because offenders increase their defensive efforts, or courts are more reluctant to convict under the higher penalty and therefore implicitly raise their "conviction rule."[206] Thus, the refinement is meaningful primarily when the penalty is increased or decreased on the basis of "multiples" observed in a prior period of different penalty levels. If overall penalty levels are unchanged, the effect does not exist.

While there is some logic in the idea of interdependence between the penalty level and probability of conviction, I doubt that this effect will call for a refinement to the optimal penalty rule as a basis for organizational sentencing policy, even if optimal penalties are far higher than current practices.

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[204] See Table 3 in § A.5 of Part I.

[205] 18 U.S.C. § 3571, as amended. The alternative authority for fines equal to twice the gain or loss, id. §3571(d), is only necessary for the relatively larger offenses--involving losses greater than $250,000 for felonies or misdemeanors resulting in death or greater than $100,000 for other Class A misdemeanors, see §3571(c)--which are likely to be more easily detected.

[206] My description of this argument draws primarily from Snyder, Enforcement and Efforts to Influence Verification: Theory and Evidence from Antitrust (draft paper, May 1987) (on file with the U.S. Sentencing Commission).

First, the postulated effects of higher penalties--more defensive efforts and reluctance to convict--are likely to be counterbalanced to some extent by the increased enforcement incentives created by higher penalties. The current system may produce higher "multiples" (lower probabilities of punishment) merely because existing penalties are too low to justify enforcement efforts in many cases. If so, then higher penalties will not increase and may decrease the actual multiples.

Second, even if it occurs, the effect of higher penalties on conviction probabilities is likely to be very small, even with large increases in penalty level. If I interpret its results correctly, the research suggests that the 1974 increase in statutory maximum antitrust penalties--doubling fines and trebling imprisonment for individuals, and increasing maximum corporate fines by twenty times, from $50,000 to $1 million--caused a 2 or 3 percent drop in the conviction rate, which itself is only a very small part of the overall probability of punishment.[207] Conviction rates would reflect both of the postulated effects--defensive efforts and courts' supposed "reluctance" to convict--and therefore the effects on the other components of the total probability, such as detection and clearance rates, would be even smaller, if not in the opposite direction. Moreover, as documented elsewhere, the major effect of the increased antitrust penalties was enhanced deterrence, which itself results in fewer convictions at a constant enforcement level, because there are fewer and less serious offenses.[208] Therefore, an observed drop in conviction rates may indicate nothing at all about the overall probability of detection and conviction for a given offense.

Third, even if assumed to exist, and to be much larger than argued--say, 5 percent of the total probability--the effect of penalty level on probability is still much smaller than the likely error inherent in any effort to estimate multiples from current practice. Thus, a 5 percent effect would be significant only if we otherwise sought to distinguish multiples of 2.0 and 2.1, which is highly unlikely. The more likely case is a distinction between 2.0 and 2.5, for which the effect would have no significance.

Therefore, while the effect of the penalty levels on probabilities of conviction may be interesting in theory, it appears to have no practical significance for organizational sentencing policy at this point. The existence of the effect is speculative, and very small if it occurs. Furthermore, if higher penalties in fact did produce a reduction in probabilities, the remedy is simply to raise the "multiples" by a corresponding amount.

2. "Risk-Bearing" Costs[209]

The second refinement is based on the idea that offenders (or potential offenders) may not be "risk neutral," as is assumed by the basic analysis. The assumption of "risk neutrality" is that potential offenders view a prospective penalty as exactly equal to its objectively "expected" value (amount times probability). If instead offenders are "risk averse," they view an uncertain penalty as greater than its expected value, and the difference might be called their "risk premium;" or conversely, offenders may be "risk-preferring," in which case they have a "risk discount." In essence, deviations from risk neutrality

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[207] See Snyder, supra note 173.

[208] Block, Nold, & Sidak, The Deterrent Effect of Antitrust Enforcement, 89 J. Pol. Econ. 429 (1981); see also Block & Feinstein, Controlling Collusion in the Construction Industry: Some Lessons from Recent U.S. Experience, 28 Swiss Rev. Int. Comp. L. 41 (1986).

[209] A clear introduction to risk-bearing costs is provided by Polinsky, Introduction to Law and Economics, at 77-82 (1983) (considering the case of risk aversion). A more formal analysis is provided by Polinsky & Shavell, The Optimal Tradeoff Between the Probability and Magnitude of Fines, 69 Am. Econ. Rev. 880 (1979).

identify additional social costs of a penalty system. The appropriate adjustment for restoring an "optimal" penalty is to subtract offenders' "risk premium" or add their "risk discount." If different offenders vary in their attitudes toward the risk of penalties for the same offense, the adjustments become more complicated.

However, while deviations from risk neutrality again raise some interesting theoretical points, they are unlikely to be significant for the optimal penalty rule as applied to organizational sentencing, because business organizations probably are "risk neutral" within the practical range of penalties, for two reasons.

First, the underlying attitude of business organizations is likely to be risk-neutral. The predominant form of business organization is the corporation, which exists precisely for the purpose of limiting shareholders' liability exposure. Shareholders are likely to diversify their investments, thereby making them less vulnerable to any one corporation's reverses. The basic structure of the corporate form tends to neutralize the risks of its individual owners (who otherwise might be risk-averse), and therefore the organization is likely to be operated in a risk-neutral manner.[210]

Second, even if the underlying attitude deviates from risk neutrality, "risk bearing" costs become significant only at high levels of both total penalties and "multiples." At the relatively low multiples suggested by the currently available estimates, risk-bearing costs seem unlikely to be significant, regardless of the underlying attitudes, simply because there is a narrower range for subjective departures from the actual risk.

3. Erroneous Convictions

The problem of erroneous convictions identifies a second type of cost that is analogous to risk-bearing, as being a cost associated with the uncertainties of the penalty system itself.[211] When an erroneous conviction occurs, it imposes a social loss similar to losses from criminal conduct. Furthermore, the prospect of erroneous convictions creates a cost that is imposed on the larger group of non-offenders, all of whom face some risk of conviction.

Like risk-bearing costs, the costs of erroneous convictions tend to rise with the size of the penalty and the multiple. Obviously, the smaller the total penalty, the less will be the cost of any particular rate of erroneous convictions. Lower multiples imply lower total penalties and therefore less loss from erroneous convictions. Here again, the relatively modest levels of the likely multiples from current practice suggest that the costs of erroneous convictions are fairly small.

Of course, the ultimate significance of erroneous conviction costs also will depend upon an estimate of the actual rate of erroneous convictions. Because our criminal justice system places a high value on the avoidance of erroneous convictions, I think it is probably safe to assume that the rate is very close

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[210]This condition may not hold for an insubstantial "shell" corporation that is only the "alter ego" of individual owner-managers. However, in that situation, the organizational sanction will be less important than the individual sanctions against the corporate principals, because the "alter ego" organization by definition will have few or no independent assets or activities. Thus, the "risk aversion" concern--that the penalty is too high and therefore "overdeters" the organization--never materializes.

[211]The opposite problem of erroneous acquittals does not require any refinement to the optimal penalty rule, because erroneous acquittals already are taken into account by the "multiple."

to zero. When combined with the relatively low multiples, this factor indicates that a refinement for erroneous convictions is unnecessary.

I should emphasize that the ability to neglect erroneous convictions rests in part on the choice of the optimal penalty theory itself, as the threat of erroneous convictions is one form of the "overdeterrence" that the optimal penalty rule seeks to avoid. If, instead of harm, penalties were based on some arbitrarily high "deterrent" penalty, or some percentage of wealth or income, then the same low rate of erroneous convictions would produce much more serious problems.

E. Limitations

There are two potential limitations on the use of the optimal penalty rule as the basis for imposing monetary penalties on organizations: (1) inability to "monetize" some or all of the "loss" caused by the offense; and (2) offenders' inability to pay the optimal penalty amount in money. These problems do not impair the optimal penalty theory itself, but only limit the use of the preferable monetary form of the penalty and complicate the selection of an "optimal" penalty.

At this point, we do not know exactly how common either limitation will be in practice. Problems of "monetizing" loss do not appear to be significant among organizaitonal offenses. But where they persist, the "monetizing" problems indicate the need at least to consider non-monetary penalties. Offenders' inability to pay is not a "limitation" in the same sense. Where the offender's liquid assets are insufficient to pay the optimal amount, the appropriate course may be to impose the penalty in any event, and thereby force refinancing, reorganization, or liquidation of the firm, unless there is some means available for using non-monetary penalties to produce an equivalent monetary burden. Where all those measures remain insufficient, we face a "limitation" not merely on monetary penalties or "optimal" penalties, but on penalties in general, and in any form.

1. "Monetizing" Loss

As I noted in the general discussion of loss (§C.1, above), "monetizing" loss is unlikely to be a serious problem for the vast majority of organizational offenses that are overtly "economic" or "monetary," such as fraud, antitrust, theft, embezzlement, and tax offenses. The remaining offenses are primarily regulatory, involving health, safety, and environmental violations. Even for those offenses, some or all of the "loss" can be monetized, after further review and analysis. Some of the apparently difficult types of loss--such as health or safety dangers--can be analyzed in terms of the risks created (which are regularly "monetized," implicitly by regulatory agencies, and explicitly in civil liability and damages rules and insurance premiums), or the costs of remedial measures (such as environmental "clean up"). After applying these efforts, it seems likely that there will be a very small percentage of organizational offenses involving non-monetizable items of "loss."

If there are remaining items of non-monetized loss, then they would present very difficult problems of choosing appropriate penalties. It might be possible to pursue the objective of optimal penalties in non-monetary form, particularly if the loss could be expressed in some type of closely related penalty "currency," such as in-kind restitution.[212] On the other hand, the remaining items of non-monetized

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[212]For example, suppose that an environmental offense created certain losses that could not be either rectified or monetized, but could be equated with other conditions of similar environmental pollution that were capable of "clean up." In this situation, the offender might be ordered to remedy an amount of the other pollution equal to the environmental loss from its offense, times the appropriate "multiple." Obviously, such a result would be far inferior to monetary penalties, because of the inherent inefficiencies of this form of remedy, and the example may not be realistic,

loss may be so rare (and intractable) that any attempt at non-monetary penalties would do more harm than good. An arbitrary or wasteful non-monetary penalty may be worse than no penalty at all, or even a very roughly estimated monetary penalty.[213] An alternative approach, such as penalties derived from current practice, perhaps should be followed in those few cases presenting non-monetizable "loss."

In the organizational context, the "monetizing" problem is not solved by using a non-monetary penalty structure. No matter what basis is used to set the penalty, ultimately it will be transformed into a financial impact on the firm, and an economic impact on society. Where that impact is not scaled directly to the harm caused by the offense, the almost certain result is economic waste. Worse yet, this destructive potential largely is unpredictable and uncontrollable, because the social losses imposed by non-monetary penalties are pervasive but very difficult--if not impossible--to measure.[214] These considerations indicate that organizational sentencing policy should take a very conservative approach to non-monetary penalties.

2. Inability to Pay

Offenders' inability to pay presents a different type of "limitation." Conventional ideas of "ability to pay" will have to be expanded in the case of organizational penalties, and forced bankruptcy may sometimes be the appropriate course. But true "inability to pay," in the sense that the unencumbered assets of the organization, any affiliates that should be held liable, and all co-offenders combined are insufficient to satisfy the optimal penalty amount, presents an ultimate limitation on any penalty system. If "inability to pay" in this stronger sense is common, it will undermine the effectiveness of an optimal penalty, or for that matter, any other penalty rule.

While we do not yet know how common the "inability to pay" limitation will be in practice, several factors indicate that it is not very common. The corporate presentence investigation reports we have seen to date indicate that the offenders in those cases (or their principals) were well able to satisfy an optimal penalty. My impression is that the criminal system traditionally has been overly conservative in assessing ability to pay. In the case of organizations, there is no reason not to use full liquidation value, or future discounted cash flows, in assessing ability to pay. Where the offender is an operating subsidiary corporation, it will often be possible to hold the parent criminally liable. Where the offender is an insubstantial corporate shell, it will usually be possible to convict the shareholders directly. In short, more aggressive prosecution, and modern financial analysis, may well solve many "ability to pay" problems.

Where those techniques still fail to achieve full satisfaction, there is a substantial question whether non-monetary penalties should be considered. Unless there is some reason--which I have not found--why non-monetary penalties are better able to extract the full monetary equivalent, it seems to me that forced liquidation (or reorganization) is the appropriate solution. At least then the assets will go to the highest bidder, and society will have minimized its losses, which seems preferable to allowing the continued operation of an organization that by definition is a net social burden, having created more loss than it can recompense. If this result is relatively rare, then the overall effectiveness of the penalty system will not be seriously compromised.

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because environmental losses probably can be monetized.

[213] See S. Breyer, Regulation and Its Reform 171 (1982).

[214] See § D of Part II, above.

However, if penalties exceeding full net asset value are common, the obvious solution--increasing enforcement expenditures and probabilities of punishment--lies beyond the Commission's authority. If a significant percentage of offenders lacked sufficient assets to satisfy optimal penalties, then the overall efficiency of the penalty system would be compromised. Offenders would be systematically underdeterred, and the combined effects of crime and enforcement would impose a net loss on society. Unlike individual offenders' interests in liberty, it is unlikely that business organizations have any non-financial interest that is powerful enough to drive an effective penalty system. In these circumstances, there is no alternative to an increase in enforcement efforts. Beyond that possibility, the inability of offenders at least to compensate for harms they cause is the ultimate limitation of any penalty system, and one of the costs of any social arrangement.

IV. The Elements Of A Guidelines Structure

In this Part, I will briefly summarize the elements of a sentencing guidelines structure for implementing the optimal penalty rule. Detailed draft guidelines and policy statements are under development and will be released in the near future. Therefore, I will confine my discussion here to an overview of the three basic components: (a) computing the total penalty; (b) allocating the total penalty among the multiple remedies applicable to the same offense conduct; and (c) screening cases for the consideration of non-monetary sanctions.[215]

In translating the optimal penalty rule into a guidelines structure for organizational sentencing, I perceive the key objectives as simplicity, practicality, and compatibility with the existing guidelines, while still preserving the essential features of the optimal penalty theory. Because the simple form of the optimal penalty rule seems to be satisfactory for a practical sentencing policy, and because most organizational offenses are overtly economic or property crimes, these objectives do not appear inordinately difficult to achieve.

A. Computing the Total Penalty

The first component of the guidelines structure implements the basic optimal penalty rule of loss times a "multiple." As under the existing sentencing guidelines system of offense levels, the loss and multiple factors can be specified in part by offense groups, and composed of "base" values for each offense group, supplemented by "specific offense characteristics" for the particular offense, and more general "adjustments" applicable to all offenses or broad categories of offenses. The resulting total loss and multiple factors are multiplied together to produce the total penalty.

1. Loss Rules

While the concept of "loss" has some general features that are discussed in Part III, the guidelines approach to loss is likely to rely primarily on more specific "loss rules" formulated for particular offenses. Rather than an average value, "loss rules" would provide measurement standards for identified items of loss, for both the "base" offense and variations.

"Base" loss can be determined by generalized "loss rules" that will seek to identify and quantify the components of loss typically associated with the particular offense or group of offenses. For example, the base "loss rule" for horizontal price-fixing might include the components of overcharges ("direct" victims' losses) and the "deadweight" loss (general "social" loss), accompanied by formulae simplifying the computation (e.g., percentage of sales) and possibly attributing the "loss" among multiple offenders (e.g., in proportion to sales). The Commission's existing guideline covering organizational fines for antitrust offenses[216] essentially follows this pattern. The organization's antitrust fine is specified as a percentage of the "volume of commerce attributable to the defendant," which both provides a proxy--"an

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[215]The discussion here applies to both guidelines and policy statements, which differ primarily in their level of specificity.

[216]Initial Guidelines, supra note3, §2R1.1(c).

acceptable and readily measurable substitute"[217]--for the underlying losses,[218] and implicitly apportions the total loss caused by multiple offenders.[219] For certain other types of offenses, such as safety violations, it may be more appropriate to formulate the "base" loss rules in terms of risk or increased risk rather than actual injury, which often will not be present.

"Specific offense characteristics" for loss could recognize elements of loss or injury that are not included in the "base" rule for the offense, but are known to occur in some proportion of cases.[220] For example, while the "base" loss rule for fraud might limit victims' losses to out-of-pocket expenses, a "specific offense characteristic" for fraud might cover lost resale profits or the costs of a substitute transaction, again stated as a "loss rule" to simplify assessment. The differences between the "base" and "specific offense characteristic" loss rules would be somewhat analogous to the distinction between "general" and "special" damages in the law of civil damages.

More general "adjustments" to loss can include the application of an interest factor to bring the loss forward from the date of loss to the date of sentencing, as well as enforcement costs.

2. The Multiple

The appropriate "multiple"--the odds against detection and conviction of offenders--also is likely to differ among offense groups, at least in its "base" value, if not in "specific offense characteristics" and "adjustments" as well.

Unlike loss, the "base" multiple probably will not be a rule, but rather a figure (or range) representing the average odds against conviction for the "base" offense. "Specific offense characteristics" or "adjustments" can represent variations from average detectibility, and are likely to include factors analogous to the existing guidelines, such as: (1) concealment by "obstruction" of the investigation, or more surreptitious offense conduct than the "average" or "base" offense; (2) "acceptance of responsibility," as by affirmatively bringing the offense to the government's attention; (3) a "small" or "large" offense adjustment, on the view that the size of the loss may affect the probability of detection; and (4) an adjustment for the management level of culpability.[221] In contrast with the

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[217] Id., Background Commentary, at 2.133.

[218] In fact, the sizes of both overcharges and deadweight losses are directly related to sales volume, and to each other. Both also are related to the size of the price-fixing mark-up, which is taken into account by the existing guidelines. See generally Posner, Antitrust Law: An Economic Perspective, Chapter 2 & Appendix (1976). While it might be possible to formulate a more refined "loss rule" for price-fixing, the existing guideline probably provides a reasonably good approximation with a very simple rule.

[219] Initial Guidelines, supra note 3, Application Note 1 to §2R1.1, at 2.131.

[220] For very rare cases, such as personal injury resulting from fraud, the appropriate course may be to invite departures, in much the same manner as Part K of Chapter 5 in the existing guidelines.

[221] The commentary to the existing antitrust guideline (§2R1.1) refers explicitly to management's culpability and a possible "large offense" adjustment, as factors to be considered in setting an organizational fine within the allowed guideline range of multiples between 2 and 5. (See Application Notes 3 and 4.)

"base" multiple, increases or decreases may require "rules" for measuring the incremental effect on detectibility, or specifying the amount of change as an percentage of the "base."[222]

In some instances, the same "specific offense characteristic" may affect both loss and the multiple, as where the same conduct both increases loss and decreases detectibility.

B. Allocating the Total Penalty

The penalty of loss times the multiple is the total optimal "penalty" to be imposed by all authorities, including compensatory civil damages, upon all participants in the same offense. Therefore, it will be necessary for the guidelines structure to allocate the total penalty among the various criminal, civil, and administrative remedies available against all offenders. Otherwise, the total penalties and damages imposed will be excessive, and the legal system itself will create the net social harm that the optimal penalty approach is designed to avoid.

In the context of organizational sanctions, the total penalty must be allocated among at least three categories of multiple remedies: (1) the several federal criminal remedies available against the organizational offender; (2) civil and administrative penalties, forfeitures, damages, and disabilities, and state criminal penalties, imposed on the organization; and (3) "penalties" from all sources imposed upon the organization's individual agents.[223]

At first blush, the necessary allocations appear to present a daunting task. However, the problem actually may be simpler than it seems, and much depends upon the level of refinement sought. The legal system already provides some protection against duplicative remedies, through the Double Jeopardy Clause and the rules of res judicata, among other doctrines. Criminal, civil, and administrative enforcement authorities, at both federal and state levels, already coordinate their activities to some extent. Judging from the corporate presentence reports that have been reviewed, the federal criminal system today routinely considers collateral civil and administrative remedies, as well as restitution and victim impact, as factors in criminal sentencing. The problem of allocations is inherent in any system providing more than one type of remedy, and seems to be handled adequately in the Commission's existing guidelines. As illustrated by some of those guidelines, especially in the allocation of monetary penalties between restitution and fines[224] and between criminal fines and civil remedies[225] the task in many instances can be handled without undue complexity or burden, by general principles or simple rules of allocation.

Therefore, it appears that the necessary allocations could be made in sentencing guidelines with tolerable accuracy through a combination of two general methods: (1) adjusting the federal criminal penalties (or the constituent loss rules or multiples) for an estimate of the expected effect of the collateral remedies; and (2) providing for a deduction of actual collateral remedies imposed. For

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[222]Current practice analysis might provide a basis for quantifying these adjustments, in a manner similar to the existing guidleines' 25 percent reduction for "acceptance of responsibility" (§3E1.1) and 25 percent increases for abuse of trust (§3B1.3) and obstruction (§3C1.1).

[223]I put aside here the separate question of allocation among multiple independent offenders, which can be handled in part through "loss rules." In addition, I do not consider at this point the question whether non-official collateral effects (e.g., loss of business reputation) also should be recognized in the allocation.

[224]Initial Guidelines, supra note 3, §5E4.1(b).

[225]Id., §5E4.2(d)(5).

example, in antitrust offenses, the first approach might subtract three "criminal" multiples to reflect the availability of private treble damages actions, while the second approach would provide a deduction only for damages actually paid. In at least some and perhaps many instances, some of the collateral remedies could safely be ignored, possibly with a right to petition for a modification where the unlikely remedy later is invoked, or an extension of the payment period where collateral remedies are uncertain. In other instances--such as certain remedies imposed on individual agents of the organization--collateral remedies perhaps should be disregarded, or only partially offset.

While a full development of the proper allocations would require a more thorough examination of particular offenses and their corresponding remedies, the general principles are clear and their implementation does not seem to present insuperable obstacles.

C. Screening Cases for Non-Monetary Penalties

The third major component of a guidelines structure would seek to identify cases presenting one or both of the two major limitations on the use of optimal monetary penalties--inability to monetize loss and offender's inability to pay--and provide for appropriate dispositions of those cases.

The first step of identification is likely to involve more extensive presentence investigation in order to distinguish "true" from "false" limiting cases. For example, a "monetizing" problem may be created by an inability to identify victims or difficulty in applying a monetary "loss rule." In such cases, the court might defer sentencing while ordering notice to victims or appointing an expert probation officer to examine the measurement problem, before identifying the case as beyond the "monetizing" limit. Similarly, apparent "inability to pay" should be tested by more thorough financial examination, with procedural rules providing offenders with strong disincentives to feigned insolvency.

After separating "false" limiting cases, the guidelines structure should provide appropriate dispositions for the two types of cases. However, neither situation presents a strong case for non-monetary sanctions.[226] For "inability to monetize" cases, monetary penalties might still be preferable. The "inability to pay" cases would call for non-monetary sanctions primarily to avoid evasion of the monetary penalty. In the pure "inability to pay" situation, the appropriate disposition probably is forced bankruptcy.

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[226] See § D of Part II and § E.1 of Part III, above.

V. Conclusions

In this paper, I have attempted to explore in some detail both the theoretical basis and practical implementation of an organizational sentencing system that seeks to impose optimal monetary penalties wherever possible.

While drawn from "economics," the goal of optimal penalties actually is more fundamental, because optimal penalties seek to minimize the social harm from criminal conduct--whether the harm is viewed "economically," or otherwise--by employing a penalty that is based on harm. A harm-based penalty is superior to alternative systems based on gain or organizational "size," because the harm-based theory embodies an internal control on the harmful potential of the penalty system itself, which is lacking in any system that seeks only "deterrence" or "punishment" for its own sake, without considering its benefits and costs. Because they seek to redress the harmful effects of criminal conduct directly in terms of harm, the harm-based penalties are "optimal" in the sense that they operate to affect offenders' behavior only to the extent that the benefits of punishment exceed its social costs, and thereby minimize the total harm from both crime and punishment.

As applied in the practical context of sentencing policy, harm-based "optimal" penalties have the virtues of simplicity and consistency with the criminal sentencing objectives of deterrence, proportionality, public protection, and compensation to victims. The simple form of the optimal penalty rule, without complicating refinements, provides a practicable basis for sentencing policy that can be translated into workable sentencing guidelines for most of the problems likely to be presented by the sentencing of organizational offenders in the federal courts.

My analysis supports the goal of orienting organizational sentencing policy toward the objective of optimal monetary penalties. The alternative theories of gain-based or "size"-based penalties are inferior, and can be destructive of the basic aims of criminal law enforcement to prevent or at least redress harm. Optimal penalties are consistent with those aims, and appear to be feasible at the practical level of sentencing policies and rules. Monetary penalties obviously should be the preferred form of sanction for predominately monetary crimes committed by organizations that exist to serve, and are motivated primarily by, monetary objectives. Non-monetary penalties are vastly inferior in this context, and should be reserved for highly unusual cases except when used for enforcing or otherewise supporting the effects of the monetary penalties.

J.S.P.

Appendix A: Selective Bibliography of Optimal Penalty Literature

This bibliography contains a small selection of leading works and sources that I found particularly useful to an understanding of optimal penalties. A far more comprehensive bibliography is contained in the book by Pyle (1983).

BOOKS

Cooter & Ulen, Law and Economics, chs. 11 & 12 (1988).

Polinsky, Introduction to Law and Economics, ch. 10 (1983).

Posner, Antitrust Law: An Economic Perspective, ch. 2 & Appendix (1976).

Posner, Economic Analysis of Law, ch. 7 (3d ed. 1986).

Pyle, The Economics of Crime and Law Enforcement, chs. 1, 2, and 5 (1983).

Comments: Polinsky (1983) and Posner's Economic Analysis of Law (3d ed. 1986) are general works on law and economics, primarily addressed to lawyers, that provide brief introductions to the optimal penalty literature. Cooter & Ulen (1988) provides a more detailed treatment, including a discussion of refinements for "risk bearing" costs, in a book intended for use by both lawyers and economists. Pyle (1983) is a far more technical treatment, but still accessible to lawyers, that includes a broad and critical survey of the literature through the date of its publication. Posner's Antitrust Law: An Economic Perspective (1976) is included for its discussion of the social losses resulting from antitrust violations, which provides an illustration of how "loss rules" can be developed.

ARTICLES

Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

Block & Feinstein, Controlling Collusion in the Construction Industry: Some Lessons from Recent U.S. Experience, 28 Swiss Rev. Int. Comp. L. 41 (1986).

Block & Heineke, A Labor Theoretic Analysis of the Criminal Choice, 65 Am. Econ. Rev. 314 (1975).

Block, Nold, & Sidak, The Deterrent Effect of Antitrust Enforcement, 89 J. Pol. Econ. 429 (1981).

Ehrlich, Participation in Illegitimate Activities: A Theoretical and Empirical Investigation, 81 J. Pol. Econ. 521 (1973).

Landes, Optimal Sanctions for Antitrust Violations, 50 U. Chi. L. Rev. 652 (1983).

Landes & Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981).

Polinsky & Shavell, The Optimal Tradeoff Between the Probability and Magnitude of Fines, 69 Am. Econ. Rev. 880 (1979).

Polinsky & Shavell, Pigouvian Taxation with Administrative Costs, 19 J. Pub. Econ. 385 (1982).

Posner, Optimal Sentences for White-Collar Criminals, 17 Am. Crim. L. Rev. 409 (1980).

Posner, An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193 (1985).

Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526 (1970).

Comments: Becker (1968) is the leading article on optimal penalties, followed closely by Stigler (1970). Ehrlich (1973) provides an extension of the Becker analysis, as well the leading early empirical work. Block & Heineke (1975) provides a further generalization of the Becker and Ehrlich models of criminal behavior.

The articles by Block, Nold & Sidak (1981) and Block & Feinstein (1986) provide empirical analysis of the deterrent effect of changes in penalty levels, in the context of antitrust violations.

Landes (1983) provides a detailed discussion of the social loss from antitrust violations and the operation of optimal penalties in that context, with a clear demonstration of how excessive penalties can be harmful to economic efficiency. Landes & Posner (1981), like the Posner book on antitrust law, is included for its development of principles for assessing the effect of market power on the social loss created by antitrust violations.

Polinsky & Shavell (1979) develop the "risk bearing" refinement to optimal penalties, which is presented on a less technical level in the Polinsky book. The second article by Polinsky & Shavell (1982) analyzes the effect of enforcement costs on social loss.

Posner (1985) is a more detailed treatment of the same issues developed in his 1986 book. Posner (1980) is part of a symposium on penalties for white-collar and corporate crime, and traces some of the practical implications of optimal penalties in that context.

Appendix B: Sentencing Commission Staff Study

With the cooperation and assistance of the Administrative Office of the United States Courts, the Sentencing Commission's staff has collected and analyzed data on criminal prosecutions against organizations in the federal courts.

Two principal sources of data were used: (1) the Administrative Office's "Masterfile," which includes data on all criminal cases and defendants commenced and terminated in the United States District Courts, excluding petty offense cases disposed of by United States Magistrates; and (2) the Federal Probation Sentencing and Supervision Information System ("FPSSIS"), which includes data on criminal defendants referred to Probation Offices for some purpose, usually the preparation of pretrial or presentence reports or the implementation of a sentence of probation involving supervision. These data sources were supplemented by records held in the probation and clerks' offices in the districts, some of which were collected directly by field work.

Given the unavailability of reliable earlier data through FPSSIS, the beginning date of the study period was set at January 1, 1984. In order to assure relatively complete data, the ending date of the study period initially was set at June 30, 1987, but later extended to December 31, 1987, so as to take in four full years of data.

The study population was further defined to include only: (1) defendants "terminated"--the Administrative Office's term for a final disposition by dismissal, acquittal, or sentencing--during the study period; plus (2) any co-defendants in the same case (under the same docket number), whenever they were terminated, so long as at least one organizational defendant was terminated within the study period. Thus, the data do not include cases or defendants that may have been filed or commenced before or during the study period, but not "terminated" during that period.

The major data collection problem was the separation of "organizations" from the total population of defendants. While both the Masterfile and FPSSIS included data elements identifying corporate entities, those fields were not fully coded in either data source, and Administrative Office personnel considered them unreliable. Therefore, the identification of organizational defendants and associated records proceeded in several phases.

Initially, the Administrative Office provided a list, generated from FPSSIS for the original 3 1/2 year study period ended June 30, 1987, of 532 defendants identified as organizations by the coded variable for "corporation." From that list, the Sentencing Commission staff identified 399 instances in which the coded data indicated that a presentence report had been prepared. Through the Administrative Office's Probation Division, copies of those reports were requested from probation offices in the districts, and 370 such reports ultimately were received by the Commission and coded for analysis of a sample of organizational cases.

However, subsequent information showed that the original list of 532 cases was not complete even as to organizational defendants recorded in FPSSIS, and it had been known from the outset that FPSSIS did not necessarily contain all organizational defendants sentenced, and contained no defendants that were charged but not convicted. The only source of full data on all defendants was the Masterfile, which does not contain any coded information (beyond that provided in FPSSIS) identifying organizational defendants.

In order to identify organizational defendants from the Masterfile, two collateral procedures were used: (1) visual identification of organizational names from a printout including all of the over 220,000 defendants terminated during the study period, now expanded to cover four years; and (2) computer

searching of names from the Masterfile, based on an algorithim designed to identify phrases associated with organizational names. In addition, an expanded and updated list of organizational defendants was obtained from FPSSIS, based on the coded "corporation" field. These several sources now are being checked against each other in order to assure an all-inclusive list of organizational defendants.

The visual search produced a list of 1,641 organizational defendants. The Administrative Office provided the Commission with Masterfile data on each of those defendants, plus 4,239 co-defendants under common docket numbers. In addition, the Administrative Office's Statistical Analysis and Reports Division processed the data on organizational defendants to produce preliminary reports in the same format as is used in Tables D-4, D-5, and D-7 of the Administrative Office's annual report, but covering the entire four-year study period and including organizational defendants only. Those reports are the principal source for the data in Table 1 of the main paper. Due to the reporting conventions routinely used by the Administrative Office, those reports show a total of only 1,569 organizational defendants. The Sentencing Commission is now examining the data further to determine whether the reporting conventions are appropriate for purposes of its study.

In the meantime, sentencing factors were extracted from the 370-defendant sample of presentence reports by temporary coders supervised by Sentencing Commission staff members. Those data were combined with data available from FPSSIS to create an augmented data base for that sample of cases, which was the principal source for the data in Table 2 of the main paper. The offense categories used in Table 2 were developed primarily from the offense categories in Chapter Two of the existing guidelines, with a division of Part F between public and private fraud, as follows:

Category	Existing Guidelines
Antitrust	Part R
Fraud-Private Victim	Part F; §2N3.1
Fraud-Government Program or Procurement	Part F; Part C
Tax and Customs	Part T
Other Property Offenses	Part B
Environmental	Part Q.1
Food and Drug	§2N2.1
Currency Reporting	Part S
Export Control	Part M.5
Motor Carrier & Worker Safety	none comparable
Protected Wildlife	Part Q.2
Import Control	none comparable

These data also were analyzed for the types and levels of sanctions imposed, and the relationship between monetary sanctions and the dollar loss recorded in FPSSIS, with the results reported in the main paper.

This study is ongoing, and the data, analysis, and results reported above and in the main paper are subject to revision based on further data collection and review.

The staff plans to use the updated and expanded list of organizational defendants to request further records from the districts, including: (1) presentence reports that were not included in the initial set; (2) charging documents (indictment, information, or complaint); (3) docket sheet; (4) judgment and commitment order; and (5) cash ledger. When received, these records should permit: the augmentation of sentencing data; additions to the sample of presentence reports; evaluation and analysis of case processing information; and analysis of monetary penalty collection rates and patterns.

APPENDIX *

American Bar Association Standards for Criminal Justice

Standard 18-2.8: Organizational Sanctions

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*The material in the Appendix is reproduced in this volume for reference and for comparison of the Commission's discussion materials with a previously published proposal on organizational sanctions.

Chapter 18

Sentencing Alternatives and Procedures

1986 Supplement

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January 1986

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INTRODUCTION

Continuity, rather than change, characterizes this chapter of the standards. Undeniably, much has happened since the first edition appeared in 1968. Over this period, probably no other area of criminal justice has witnessed as intense a debate over fundamental assumptions. Why punish? How should punishment be allocated? To whom should the decision be given? These and other questions have spawned a number of competing proposals. In this war of the models, ideas once taken as self-evident have been discarded and others, long dormant, have reemerged to a sudden popularity. In some jurisdictions, the pendulum has swung rapidly, tracing as much as a 180 degree arc from extreme indeterminacy to extreme determinacy. Nonetheless, the response of this chapter is fundamentally conservative, for two reasons. First, we believe that the basic architectural premises of modern criminal law scholarship that shaped the first edition remain fundamentally valid today. In short, the center still holds, and in a time of radical flux, the greater danger may lie in overcompensation. Second, we are skeptical about the attempts to respond to the operational deficiencies of our sentencing system by postulating radically new and different theoretical purposes for the system. It is not theory, but practice, that most needs reform, and we are therefore reluctant to extend the field of debate unnecessarily into an arena where controversy appears inevitable and compromise less likely.

These words should not, however, be misread as a defense of contemporary sentencing practices. The targets of recent criticism are well known: (1) the pervasiveness of sentencing disparities among the similarly situated, (2) the excessive length of sentences as authorized, imposed, and served, (3) the standardless character of the discretion given the sentencing court, (4) the informal, unverified, often anecdotal nature of the presentence investigation and the limited penetration of due process safeguards in the sentencing process, and (5) the dangers of using the uncertain standard of rehabilitative progress as a measure for

determining the length of confinement. On these topics, debate has largely given way to consensus, and a detailed examination of the evidence at this point is not necessary to support the generalization that unrealistic expectations have been placed on the "individualized treatment model" of sentencing.

But if individualization has been carried to an extreme that has led to random variations among offenders with little overall coherence discernible in the aggregate, countervailing dangers also exist today. In particular, we have the most serious of misgivings about the new popularity of a "just deserts" model and its legislative corollary, the determinate sentencing structure. In a time of ferment, the ephemeral can easily be mistaken for the enduring; and remedies can be adopted that a generation of criminal law scholarship has warned may be more dangerous than the evils they were intended to cure. If this happens and an overreaction occurs, the pendulum's pace will only quicken. The resulting oscillations between extremes could leave impaired the public's confidence both in its criminal courts and, ultimately, in the possibility of justice itself. Therefore, reform proposals should begin by identifying those basic principles that have withstood critical scrutiny and that constitute the indispensable structural girders for a sentencing framework that is both fair and feasible. At the risk of seeming to have rediscovered the wheel, we believe the following four principles have the force not only of logic but of experience. In the aggregate, they constitute the bedrock on which a sound sentencing structure should be built.

1. *Above all, the role of the legislature in sentencing must be recognized as a limited one.* Sentencing should be a judicial function because the judiciary uniquely has the position, proximity, and perspective to engage in a carefully individualized, retrospective evaluation of the offense and the offender. The idea of a democratically elected legislature acting as the community's conscience to establish a fixed tariff for every crime is seductively inviting, but few, if any, prescriptions for criminal justice reform are based on a greater illusion. Experience teaches us that when discretion is withdrawn from the sentencing court, the result will be not equity, but crudeness. The goal of curtailing judicial discretion may be to assure that "like cases" are treated more alike, but the greater probability is that it will result in highly dissimilar cases being lumped together for "equal" treatment. A variety of factors share causal responsibility for this: the inevitable overbreadth of the criminal law, the tendency for the definitions of crimes to overlap, and the enhanced

discretionary power that would thus be accorded prosecutors at the charging and plea bargaining stages. Attempts to abolish discretion tend largely to reallocate it, and our concern is that the campaign to reduce judicial discretion may succeed only in shifting the exercise of discretion to other participants in the criminal justice system who wield less visible and accountable powers.

A corollary of this observation is that mandatory penalties, including legislatively set minimum sentences, will rarely accomplish their intended purposes. In practice, at least where the penalties are harsh, they tend to be evaded or nullified by courts, prosecutors, and juries. Indeed, some evidence suggests they may actually make punishment less certain, thereby weakening the deterrent threat of the law that they were intended to enhance. If there is one proposition that should stand above and apart from all other admonitions in this edition, it is this: the legislature should not seek to preempt the field. Rather, its fundamental objective should be to rationalize a penalty structure that in many jurisdictions, including the federal, remains chaotic and unprincipled. In common with the first edition, we believe the initial task before the legislature is the recodification of criminal codes into a reasonably graded structure having no more than a limited number of offense levels. Fine tuning of the sentence to fit more precisely the crime and the criminal should be left by the legislature to others.

2. *To allocate punishment fairly under any coherent theory of punishment, a backward-looking evaluation of the offense and the offender is essential.* Unfortunately, the public's image of crime categories tends to be stereotypical. As understandable as this may be, we know from the practice of our profession that a wide continuum of culpable conduct can be subsumed under most penal offenses. The $10 bribe paid to a police officer not to issue a parking ticket is vastly different in significance from the $10,000 payment made to a high public official. Similarly, a wide gulf separates the theft of a bicycle with a zip gun from the robbery of a bank with a submachine gun. Yet it is the nature of penal statutes to sweep broadly, and cases as diverse as the foregoing can be included under the same definitional rubric. Thus, it is necessary to preserve discretion in some dispositional decision maker in order that the evident moral distinctions between these cases not be slighted. To create a system that cannot respond to the broad range of events and circumstances that frequently coexist within any legal category is to make justice not only blind but feebleminded as well.

There is wide agreement among most reformers that a sentencing

system should relate its sanctions to the blameworthiness of the individual. But attempts to do this in advance of a crime's commission are necessarily crude — no matter how heroic the attempt may be in statute, regulation, or guideline to list all the relevant factors. In contrast, the sentencing court has the proximity in time and place and the opportunity for close observation to respond to the nuances in intent and motivation that inevitably accompany real cases.

3. *No one reason or purpose, standing alone, can satisfactorily supply a comprehensive theory of punishment.* Deterrence, incapacitation, the need to express social condemnation — each may justify a penal sanction in an individual case. But punishment should not be its own justification. This edition is therefore unwilling to accept the "just deserts" model of punishment. We are led to this position, first, by a concern that the tendency of a retributive theory may be to cause the criminal law to stray well beyond a fundamentally preventive rationale and, second, by a belief that only an integrative theory that recognizes a multiplicity of elements and purposes underlying the use of penal sanctions can avoid justifying *reductio ad absurdum* results that offend society's basic moral precepts. Equally important, a "just deserts" rationale inherently undermines the least restrictive alternative principle, which has always been the keystone of these standards. The least restrictive alternative principle would mean little if punishment in excess of that needed for preventive purposes could be justified by resort to retributive principles. This does not mean that these standards reject retribution entirely. Rather, retribution should provide not a justification but a limit: the offender should never receive more than is justly deserved for the offense. Essentially, this is the notion of proportionality: the offender's level of culpability generates a ceiling on punishment that may not be exceeded on utilitarian grounds.

Two jurisprudential principles, then, constitute the structural underpinning of these standards: the least restrictive alternative principle and the proportionality limit. To supplement these two principles, this edition adds a third precatory instruction, which is perhaps less fundamental but still merits serious attention: the goal of sentencing equality. Our intent here is to state a precautionary admonition rather than an iron law: equality among the similarly situated is basic to the appearance of justice, and compelling reasons should therefore exist before disparate treatment of the equally blameworthy is tolerated. Absent such a limiting principle, a scapegoat system of justice could develop in which the social costs of deterrence and prevention might be focused on a few

rather than spread among all offenders sharing the same level of culpability.

4. *The parole system performs important fail-safe functions in our system of criminal justice.* We believe it would be imprudent and indeed hazardous to remove this safety net from underneath our system of criminal justice, based only on the hopeful expectations and fragmentary evidence that currently exist about the consequences of its abolition. Experience with guideline systems may in time make it necessary to reexamine this judgment, but, in general, removing the safety net should be the last step, not the first. This conclusion neither denies the deficiencies in the parole system as it has been administered nor places even modest hopes on the ability of parole authorities to identify some "magic moment" at which offenders are rehabilitated. But critiques of the parole system that focus only on the illusory possibility of gearing release to the offender's rehabilitative progress ignore the other functions of an early release mechanism. In particular, the parole agency has proven effective in mitigating excessive severity in sentencing and in evening out disparities (particularly those caused by prosecutorial practices). Skepticism of indeterminacy may to a degree be justified, but it does not logically lead to the conclusion that shared discretion in sentencing decisions is inappropriate.

In summary, this edition is premised on a belief in moderation which leads it to reject both (1) a legislative model for sentencing in which all criminal behavior is subdivided into precise and narrow penal offenses and a fixed penalty specified for each, and (2) a judicial model in which parole is abolished and all dispositional authority is consolidated in the sentencing court. But if changes in these directions have been rejected, others have been accepted. This edition cannot ignore the steady stream of criticism, both scholarly and popular, that has poured forth since the first edition. The following central tenets of that criticism appear to have substantial validity: (1) An excessive degree of indeterminacy has been built into many, if not most, penal codes, which has aggravated sentencing disparities and compounded the understandable anxiety of offenders about their dates of release. (2) A rehabilitative model for sentencing and parole provides too little principled criteria to be either safe or sound. (3) The discretion given the individual sentencing judge today is virtually standardless. It is neither paralleled in the legal systems of other comparable countries nor easily reconcilable with the idea of a government of laws rather than of men. Although we accept these criticisms and indeed view them as the lowest common denominator in

the current debate over sentencing policy, this edition responds to them by recommending only marginal modifications.

First, in the case of indeterminacy, this edition is unprepared to see an all-or-nothing solution as necessary or desirable. As already discussed, a measure of indeterminacy should be preserved to facilitate the sharing of sentencing discretion among multiple agencies; this both creates a desirable structure of checks and balances and maintains flexibility in the system to respond to unanticipated developments. The frequently voiced complaint that indeterminacy results in holding the offender in a prolonged state of anguished uncertainty has validity, but it can be responded to by an early setting of a presumptive release date by the parole agency.

Second, there are signs that the attack on the rehabilitative model has now crested and may to a limited degree recede in the future. Thus, it is important to emphasize here what this edition does not say. Rehabilitation is not rejected as a goal of corrections; indeed, it is expressly recognized that it can justify the imposition of a nonincarcerative sentence. But where confinement is imposed, the need for treatment is deemed too uncertain and potentially dangerous a standard to affect the determination of the timing of release. The concepts of punishment and treatment should be kept separate to protect the integrity of both. When rehabilitation is permitted to serve as a justification for confinement, considerable evidence suggests that it can have a corrosive effect on the proportionality limits recommended by these standards. In addition, the very idea of equality among the similarly situated becomes a confused concept under a rehabilitative model, since it no longer is clear what is meant by "like cases." Grave doubts are justified also about whether rehabilitation can be systematically identified or measured. Finally, even if the problems connected with defining rehabilitation in satisfactory operational terms were less serious, few ideas are more jurisprudentially troubling than that of extending the period of confinement in order to effect an involuntary cure. There is much to be said for the principle, which many have endorsed, that power over an individual's life should not be assumed by the state in excess of that which would be justified were reform of the individual not an objective. For each of these independent reasons, this edition recommends in standard 18-2.2 that the question of the length of confinement be severed from the question of what to do with the offender while confined.

Third, although this edition recognizes that sentencing discretion is exercised today in a near vacuum of meaningful standards, it also be-

lieves that sentencing is inescapably a human process that neither can nor should be reduced to a set of fixed and mechanical rules. Our prescription, then, is not to abolish discretion but to structure it. The goal of structuring judicial discretion is in essence the middle course of moderation between open-ended indeterminacy and mandatory, or "flat time," sentencing. To steer this middle course between Scylla and Charybdis, this edition recommends the creation of a guideline drafting agency in the judicial branch that would be authorized to promulgate sentencing guideline ranges. The specific role of this agency is discussed in part III of these standards, but the virtues it offers in terms of flexibility, specificity, and an oversight capacity are those that in other contexts have enabled administrative agencies to deal more skillfully with complex problems than can the legislature.

As contemplated, sentencing guidelines would not preempt the role of the court, but rather would assist it by providing it with relevant information in the form of benchmarks. The goal of guidelines is not to inhibit the individualization of justice, but to enhance it by providing the data that courts today are systematically denied: namely, the sentencing practices of their fellow judges. Part III envisions that the court would not only possess the power to deviate from such guidelines, but would be under an obligation to do so where distinctive features existed. The legal effect given to such guidelines should be modest. Their intent is not to confine the court, but to induce it to provide a fuller, more considered statement of its reasons and, in turn, to inform the appellate review process. A series of careful empirical studies suggest that, in the absence of guidelines, appellate review of sentences cannot be effective and a principled common law of sentencing will not develop.

Part IV of these standards outlines a recommended sentencing structure, and therefore of necessity expresses this edition's position on the issue of indeterminacy. The guiding principle offered by this edition is that the degree of indeterminacy should increase with the length of the maximum sentence. In other words, the need for an early release mechanism is more compelling with respect to long-term sentences than short-term ones. In part, this conclusion is based on a significant change in the nature of parole decision making: increasingly, with the advent of parole guidelines, a presumptive term is being determined by the parole agency shortly after the commencement of confinement. The information relied on is thus static and basically the same as that available to the sentencing court; in fact, it largely comes from the presentence

report. Thus, there is less reason to preempt the sentencing court, which generally has greater access to the relevant data, closer proximity to the events in question, and is more amenable to appellate review. In the case of longer-term sentences, however, new information may become relevant, and the parole agency is in a better position to take a second look. In addition, severe sentences are characteristically a problem of American sentencing, and the parole agency once again represents a fail-safe device that we are not yet prepared to deem superfluous. Additional reasons — the problem of prosecutorially caused disparities, the lesser vulnerability of a parole agency to community pressures, the collegial nature of parole decision making, the need to respond to new developments and changed community attitudes — supply additional reasons for retaining the parole agency as a system-wide funnel that potentially offers a final checkpoint for achieving equality and accountability in the allocation of punishment. Admittedly, the consequence of endorsing both sentencing guidelines and parole guidelines is to permit a degree of duplication. But the neatest, most streamlined system is not necessarily the wisest or the safest. Both the sentencing and the parole processes have their special focal point. At sentencing, it is likely to be the "in/out" decision of whether to impose confinement or probation; at the parole stage, the focus shifts to "real time" and the average length of actual confinement for those similarly situated. Discretion needs structuring at both of these levels.

In summary, the principal modifications of this edition are: (1) the endorsement of a "weak" sentencing guideline system, (2) the recommendation that indeterminacy be curtailed, but preserved to the extent necessary to permit a meaningful early release system to continue to function, and (3) the rejection of rehabilitation as a standard for measuring the period of confinement to be served.

Other changes of "second-order" significance have also been made:

Additional due process safeguards are recommended for both the sentencing and the probation revocation hearings. The decline of a rehabilitative orientation and the advent of sentencing guidelines should necessitate an expanded sentencing hearing focused on more specific fact finding. Standard 18-6.4 addresses this expanded hearing and recommends a preponderance of the evidence standard. Standard 18-5.1 requires all material information included in the presentence report to have been verified by the report preparer. Although it is not intended that the sentencing hearing should become a "minitrial," the need for factual accuracy requires that the parties have an effective

opportunity for rebuttal. On occasion, this may necessitate cross-examination of the report preparer, but discretion will remain with the sentencing court in applying these standards.

At the probation revocation stage, this edition now expresses a presumption against the use of confinement simply because the defendant has accumulated a series of "technical" violations. Less drastic alternatives to revocation are recommended where the defendant does not appear to pose a danger to the community's safety. A standard of "clear and convincing evidence" is advocated for the revocation hearing in recognition that the probationer has a present liberty interest. A limited use immunity is also granted for testimony at this hearing in order to avoid the possibility of chilling the probationer's willingness to testify because of a fear that such testimony will be put to use in a subsequent criminal prosecution.

Greater use in general is recommended of nonincarcerative sentencing alternatives, including fines, restitution, community service, and partial confinement. The guideline drafting agency is specifically instructed to factor the use of these alternatives into any table of guideline sentencing ranges. Guidelines both can and should express a presumption against confinement rather than for it. The use of fines and restitution as here endorsed is, however, qualified by the following limitations: (1) the offender's ability to pay, (2) a five-year limit on the duration of probation conditions, (3) the recognition that defenses that would exist at a civil trial should be equally applicable at any restitution hearing, (4) a requirement of an opportunity for an adversary hearing, and (5) the denial of evidentiary significance in any collateral civil proceeding to any restitution order.

Special sanctions for organizational crime are addressed by standard 18-2.8, which recommends that the sentencing court be equipped with many of the equitable remedies now available in civil litigation brought by public agencies, such as the SEC and FTC. Among the remedies given a qualified endorsement are: (1) restitution of pecuniary damages through the medium of a special sentencing hearing; (2) flexible fine schedules geared to the gain or loss derived from, or caused by, the crime; (3) disqualification of organizational officials in specified circumstances from office within the organization; (4) publication by the offender organization of a notice of its conviction in order to reach affected sectors of the public; and (5) the imposition of a period of judicial oversight on the organization where its violations have been repetitive or the public health or safety is endangered. However, it is

strongly recommended that the use of such special remedies be integrated with existing civil law remedies (such as treble damage provisions) in order to avoid excessive multiplication of penalties. Several other qualifications are also expressed in standard 18-2.8 that, consistent with existing ABA policies, seek to ensure that the offender who is made subject to such special sanctions will not be denied the procedural formality necessary to ensure fairness and factual accuracy.

Modifications have been made in standards 18-2.1, 18-2.5, and 18-4.3 dealing with treatment of the dangerous or habitual offender, in order to express agreement with the position adopted by the Brown Commission. In essence, a two-tier sentencing structure providing for enhanced terms for special dangerous offenders continues to be endorsed, but the structure of the two tiers has been revised in order to encourage reduction of the authorized sentence length for the nondangerous offender. Greater reliance is also placed on guidelines in order to avoid radical discontinuities in the sentencing continuum, since it is recognized that differences in offenders tend to be in terms of degree rather than kind. Special due process procedures applicable to the identification of the dangerous offender are specified in standard 18-6.5. A new standard — 18-6.9 — has been inserted to make clearer the inappropriateness of using the sentencing process as a carrot or stick by which to induce actions or cooperation by the defendant.

In other respects, although stylistic and minor substantive changes have been made, the guiding precept in updating this edition has been that of parsimony. Where it has not been necessary to change, it has been considered necessary not to change, since we know too little today to experiment casually with the liberty of any citizen, including the offender.

PART I. SENTENCING AUTHORITY

Standard 18-1.1. Abolition of jury sentencing

Sentencing involves a judicial function, and the jury's role should not therefore extend to the determination of the appropriate sentence. These standards do not deal with whether the death penalty should be an available sentencing alternative and, if so, who should participate in its imposition.

offender's family need for support. It is this core thought which standard 18-2.7(c) is intended to express.

Implementation

To realize the objectives of greater flexibility and equality in the imposition of fines, these standards believe that substantial judicial discretion is necessary. Thus, paragraph (b) recommends against the use of mandatory fines both because such legislative action denies sentencing authorities the ability to individualize the fine imposed to the financial resources of the offender and because it may result in the unnecessary imposition of fines where incarceration is also imposed. The better course for legislative reform would be (as paragraph (d) recommends) to endorse the criteria set forth in paragraph (c) as a means of guiding judicial discretion and to authorize fine schedules employing an index geared to the profit or loss caused by the offense and to the financial resources of the defendant (as paragraph (f) recommends). In order to give sentencing authorities such necessary discretion, enabling legislation should clearly authorize the use of installment payment schedules, flexible fine indexes, and modification orders where the offender's financial resources or obligations call for an alteration in the method of payment. The task of providing more detailed guidance or modified schedule could then be delegated to the guideline drafting agency. The special problems of imposing remedies in the case of crimes committed by organizations ("white collar crime") are addressed in more detail in standard 18-2.8 and commentary thereto.

Finally, to the extent that future constitutional developments leave this question open,[35] penal code revision must prohibit, at an absolute minimum, the imposition of alternative sentences under which a failure to pay a fine automatically results in imprisonment.

Standard 18-2.8. Organizational sanctions

(a) Crimes committed by, or on behalf of, organizations present unique problems of prevention and punishment. The interests of

35. *See* Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972) (holding such alternative sentences to be constitutionally impermissible).

society and the need for fairness to the defendant require greater coordination of criminal and civil remedies and greater flexibility in the discretion accorded sentencing authorities to fit the punishment to the crime. Examples of existing sentencing alternatives that deserve such legislative clarification and codification include:

(i) Restitution. In principle, an organization should be required to make whole and hold harmless those proximately injured by its proven criminal conduct. However, to achieve a desirable integration with existing civil law remedies, any legislation authorizing imposition of restitution as a sentence in a criminal conviction should be subject to the following limitations:

(A) At the sentencing hearing, the defendant should be entitled to assert any substantive defense against any claimant that the defendant could have raised in a civil action for the damages allegedly caused by the crime (except defenses barred under traditional principles of res judicata and collateral estoppel and the defense of the statute of limitations where such statute has expired since the date of the filing of the criminal indictment or information);

(B) To prevent double recovery, the defendant should be permitted to set off amounts paid to any claimant pursuant to any such restitution order against any civil judgment obtained by such claimant for losses arising out of the same transaction;

(C) The findings in any such sentencing hearing and the fact that restitution was ordered or paid should not be admissible in evidence or otherwise given legal weight in any civil action, except one seeking enforcement of the restitution order; and

(D) Recovery in such a proceeding should be limited to verifiable pecuniary losses, including out-of-pocket expenses, sustained by a specific claimant or claimants before the court, the extent of which damages can be efficiently ascertained by the court without a disproportionate burden on its time or resources. Claimants seeking general, exemplary, or punitive damages, or asserting losses that require estimation of lost profits, should be limited to their civil remedies. In determining compensable losses, the court should be entitled to rely upon the findings of special masters appointed by it, subject to subparagraph (b)(ii) below.

(ii) Special fine schedules. Both because organizations cannot

be deterred by the threat of incarceration and because, under existing penalty structures, the cost of compliance with a statute or regulation may sometimes exceed costs incident to conviction, it is appropriate to authorize, as an alternative penalty in the case of organizations, the imposition of a fine not greater than the pecuniary gain derived from, or pecuniary loss caused by, the criminal activity of the defendant. Standards to this effect should be developed by the guideline drafting agency.

(iii) Disqualification from office. As a lesser alternative to incarceration, it may be appropriate to disqualify from office in the specific organization officials who have been convicted of crimes in the following limited circumstances:

(A) where the criminal activity was engaged in by the defendant on behalf of the organization with knowledge of its illegality; and

(B) where the crime was repetitive or was part of a substantial criminal conspiracy of which the official was aware for a sustained period; or

(C) where the crime amounted to a serious breach of trust against the organization, for example, embezzlement of corporate funds. Any such sanction imposed in such a case should be limited so as not to amount to an effective prohibition on employment, and its duration should be subject to the five- and two-year time limits specified in standard 18-2.3 for probation conditions generally.

(iv) Notice of conviction. To implement the goal of restitution and to apprise those injured of their civil remedies, it is appropriate to require a convicted organization to give reasonable notice, by means of publication or advertisement in designated areas, to the class or classes of persons or sector of the public interested in or affected by the conviction. This standard does not apply to the special case of a plea of nolo contendere (*see* standard 14-1.1(b)).

(v) Continuing judicial oversight. Although courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record keeping, and auditing controls designed to increase internal accountability — for example,

audit committees, improved staff systems for the board of directors, or the use of special counsel — but it should not extend to judicial review of the legitimate "business judgment" decisions of the organization's management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:

(A) As a precondition, the court should find either (1) that the criminal behavior was serious, repetitive, and facilitated by inadequate internal accounting or monitoring controls or (2) that a clear and present danger exists to the public health or safety;

(B) The duration of such oversight should not exceed the five- and two-year limits specified in standard 18-2.3 for probation conditions generally; and

(C) Judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorized by the legislature.

(b) Endorsement of each of the foregoing sanctions is subject to the following conditions:

(i) The sanctions described in subparagraphs (a)(i), (ii), and (v) should not be imposed in cases, such as those arising under the antitrust laws or the securities laws, where there are statutory provisions for government or private civil actions for equitable relief, money damages, or civil penalties to accomplish the remedial or deterrent purposes of such sanctions;

(ii) Such sanctions should only be imposed after a full adversary hearing meeting the requirements of standard 18-5.4 at which findings of fact will be made on disputed issues and the preponderance of the evidence standard employed as the burden of proof; and

(iii) Appellate review of the reasonableness of the penalties and conditions so imposed will be available to the same extent it applies to other sentences generally under these standards.

History of Standard

This standard is new and is based on recommendations made by the Brown Commission and incorporated in S. 1437. However, the recommendation that special enhanced-fine schedules be authorized for corporations was set forth in original standard 2.7(g). Several modifications

have been made in this standard since the appearance of the tentative draft of chapter 18 (1979) to express more carefully its intended limitations.

Related Standards

ALI, Model Penal Code §§6.04, 302.2
NAC, Corrections 5.5
NCCUSL, Model Sentencing and Corrections Act §§3-402(d), 3-404(d), 3-601 to 3-605

Commentary

Background

Since the original edition of these standards, the problem of corporate misconduct has come to the forefront of public attention. Watergate, illegal political contributions, foreign bribes, and alleged violations of penal laws protecting the environment, the consumer, and the worker — all of these highly publicized incidents underscore the public interest in achieving a sentencing system capable of deterring the organizational offender. In the absence of reliable comparative data, it is probably misleading to conclude that corporate crime has recently increased, but the diversity and frequency of these alleged violations point up special problems of dealing with criminal misconduct engaged in by organizations. To date, serious attention has only infrequently been given to these problems by commentators interested in the problems of deterrence and the use of criminal sanctions.[1]

A number of unique factors, however, both distinguish and compli-

1. Among the serious efforts in this area that deserve attention, however, are the following: Whiting, *Antitrust and the Corporate Executive* (pts. 1 & 2), 47 VA. L. REV. 929 (1961) & 48 VA. L. REV. 1 (1962); Hamilton, *Corporate Criminal Liability in Texas,* 47 TEX. L. REV. 60 (1968); Comment, *Increasing Community Control over Corporate Crime — A Problem in the Law of Sanctions,* 71 YALE L.J. 280 (1961); Davids, *Penology and Corporate Crime,* 58 J. CRIM. L.C. & P.S. 524 (1967); McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative,* 46 U. CIN. L. REV. 989 (1978); Note, *Decisionmaking Models and the Control of Corporate Crime,* 85 YALE L.J. 1091 (1976); Duchnick & Imhoff, *A New Outlook on the White Collar Criminal as It Relates to Deterring White Collar Crime,* 2 CRIM. JUST. J. 57 (1978); E. SUTHERLAND, WHITE COLLAR CRIME (1949); G. GEIS & R. MEIER, WHITE-COLLAR CRIME (1977); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations,* 30 U. CHI. L. REV. 423 (1963); R. BLAIR, ANTITRUST PENALTIES (Center for Study of American Business 1978).

cate the context of organizational crime and in balance make it essential that specially tailored remedies be available to the sentencing court in such cases.

1. Most obviously, the corporation cannot be incarcerated. Thus, normal fine schedules established primarily as a supplementary penalty for individual offenders are likely to be inadequate. Alternative penalties — such as forfeiture of the corporate charter — have generally proven to be an empty threat. Moreover, even if enhanced, fines alone may fail to provide an adequate deterrent. Although some economists have argued that fines and incarceration should have equivalent deterrent impact,[2] such a theory overlooks some basic realities: If imposed on a corporate official, a fine can frequently be passed on through indemnification and similar means so that its incidence falls on the corporation.[3] If the fine instead is imposed on the corporation, the separation between ownership and control that characterizes many publicly held corporations may leave criminal behavior in the interest of the corporate official even if it is no longer in the interest of the corporation.[4] The costs and benefits of illegal behavior are neither necessarily shared equally by the corporation and its managers nor likely to be analyzed similarly,

2. *Cf.* K. Elzinga & W. Breit, The Antitrust Penalties (1976); Becker, *Crime and Punishment: An Economic Approach,* 76 J. Pol. Econ. 169 (1968).

3. ABA, Model Business Corporation Act §5, permits the corporation to indemnify an officer for "fines and amounts paid in settlement . . . if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation." A further limitation is that the officer must have "had no reasonable cause to believe his conduct was unlawful." The significance of this second limitation is undercut, however, by the fact that the determination of the defendant's state of mind may be made either by the board of directors or by independent legal counsel, either of which may be dominated by the officer seeking indemnification. Of course, even where indemnification is not formally paid, the defendant's salary or other benefits can be increased to restore the defendant to his or her original position by installments. About half of the states have provisions substantially similar to the Model Business Corporation Act. *See* Barrett, *Mandatory Indemnification of Corporate Officers and Directors,* 29 Sw. L.J. 727, 746-747 (1975).

4. The classic statement of the significance of separation of ownership and control is by A. Berle & G. Means, The Modern Corporation and Private Property (1932). A number of recent empirical studies have confirmed Berle and Means's thesis that business firms controlled by their managers perform differently from those controlled by their owners. Most important, it has been found that manager-controlled firms assume more risk. *See* Stano, *Monopoly Power, Ownership Control and Corporate Performance,* 7 Bell J. Econ. 672 (1976) (discussed in R. Blair, *supra* note 1, at 13).

since the manager, unlike the organization, may be more interested in short-run profit maximization.[5] Put simply, it may be in the manager's self-interest to take legal risks that are not in the interest of the corporation to accept. As a result, the deterrent threat of the law may fall persistently short even where the size of the penalty (discounted by the risk of conviction) is sufficiently large to exceed the expected gain.[6]

2. Recurrently, costs of compliance with many statutes applicable to organizations exceed the maximum penalties authorized by the law.[7] This pattern is most prevalent in the area of safety and environmental regulation, where compliance may entail substantial expenditures. In such instances, not only does crime pay, but management may also misperceive a modest penalty as amounting to only a nuisance tax on the activity in question rather than a "true" criminal prohibition. Unsubstantial fines also remove the incentive for shareholders to hold management accountable for the corporation's loss through the medium of the derivative suit.[8]

3. Although the need for special fine schedules in the case of organizations is thus clear, complete reliance cannot be placed on such a remedy alone. Where exemplary fines are used, the incidence of such penalties falls ultimately on persons who generally may be described as innocent: stockholders, creditors, consumers, and employees of the corporation.

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5. For a discussion of the possible conflicts of interest between the manager and the organization regarding involvement in criminal activities, *see* Coffee, *Beyond the Shut-eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response,* 63 VA. L. REV. 1099 (1977). In general, the manager may have a greater interest in short-run profit maximization.

6. This assertion that, even where the expected penalty cost exceeds the expected gain, crime may remain attractive depends on an empirical question regarding the psychology of business managers: Are they "risk averters" or "risk preferrers"? Some evidence suggests that they are the latter and hence will accept substantial risks whenever the probability of apprehension is low even though the severity of the penalty is high. *Compare* R. BLAIR, *supra* note 1, and K. ELZINGA & W. BREIT, *supra* note 2. Some observers of decision making have also found empirically that individuals acting in groups will take much higher levels of risk than they will acting alone — an experimental result known as the "risky shift phenomenon."

7. Commentators of all persuasions have noted the exceptionally low level of fines that have actually been imposed by courts on corporations. *See, e.g.,* Geis, *Criminal Penalties for Corporate Criminals,* 8 CRIM. L. BULL. 377 (1972); K. ELZINGA & W. BREIT, *supra* note 2, at 54-62 (citing study showing average corporate fine for Sherman Act violation was only $13,484); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J. LAW & ECON. 365, 394 (1970).

8. Hamilton, *supra* note 1, at 75; *see also* Blake, *The Shareholder Rule in Antitrust Enforcement,* 110 U. PA. L. REV. 143, 157 (1961).

Thus, the Model Penal Code counsels restraint in the use of punitive fines to deter corporate misbehavior, because such a policy can amount to imposition of "vicarious criminal liability" on a "group ordinarily innocent of criminal conduct."[9] The dilemma, then, is that for adequate deterrence to be achieved through fines, it may be necessary to increase penalties in a manner that is inversely proportional to the culpability of those who bear them.

4. An alternative policy focusing on the individual decision maker within the organization also encounters unique problems. First, it is a common pattern in many forms of organizational crime that the actual decision maker cannot be reliably identified. This may be because no conscious decision to violate the law was ever made. Information often flows poorly within hierarchical organizations, and adverse information in particular may fail to be transmitted upward to those capable of acting on it.[10] As a result, toxic chemicals may be released into a river, workers exposed illegally to harmful substances, or consumers sold a product that test reports suggested had dangerous design defects — all without any senior official being aware of the total pattern of the corporation's activities. In other cases (such as that of price fixing), it is possible that the subordinates actually involved in the criminal conduct were responding either to real instructions or to perceived cues from superiors within the organization encouraging participation in some form of illegality.[11] It is an oversimple response to this problem of veiled signals to rely on use of vicarious criminal liability. Not only are there

9. ALI, MODEL PENAL CODE, comment to §2.07 (Tent. Draft No. 4, 1955); *see also* F. ALLEN, REGULATION BY INDICTMENT: THE CRIMINAL LAW AS AN INSTRUMENT OF ECONOMIC CONTROL (Graduate School of Business Administration, University of Michigan, 1978) at 13 (noting that the burden of criminal fines "falls directly on the owners, the stockholders, who ordinarily will have had no part in the commission of the offenses, will have been unaware that criminal acts were being committed, and, even if suspicious of criminal activity, will often have lacked the means to do much about preventing it").

Still others have expressed doubt based on empirical studies that one can ever deter corporations through monetary penalties. *See* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1334-1337 (1973) (noting that despite $600 million in liabilities imposed as a result of an electrical equipment price-fixing conspiracy, almost no employees were fired or disciplined).

10. For an extensive discussion of the problems associated with "information blockages" in organizations and incentives that exist for subordinates to concede information, *see* Coffee, *supra* note 5.

11. *See* K. ELZINGA & W. BREIT, *supra* note 2, at 38-40 (theorizing that the "difficulty of homing in with precision on the real culprits" explains the limited use of imprisonment by courts and the "high degree of recidivism among large corporations").

serious civil libertarian objections to such a policy, which the ABA has consistently recognized,[12] but substantial evidence also exists that such a policy may prove self-defeating because courts will not seriously enforce it. Empirical studies of federal antitrust enforcement have found, for example, that prison terms have been only rarely used against businesspeople and even when imposed, the term of confinement actually served has seldom exceeded one or two months.[13] Behind this pattern may lie judicial concern for the health and safety of the middle-aged offender in prison, doubt about the relative gravity of the offense, or even a degree of sympathetic identification with a defendant whose background matches that of the court. But whatever the reason, this evidence of judicial nullification in the relatively unambiguous context of price fixing suggests that considerably greater obstacles would arise if a policy of prosecution for vicarious criminal liability were seriously pursued. As a result, in "gray" cases, it may be significantly easier to prosecute the organization as an entity than to seek to allocate criminal responsibility within the organization.

5. A pattern of "corporate recidivism" has characterized a number of corporations.[14] Although this phrase may seem overly dramatic and the evidence cited by some commentators points more to venial sins than to serious crimes, examples can nonetheless be given of corporations that have recurrently run afoul of the antitrust laws,[15] others that have regularly been found guilty of fraudulent activities,[16] and still others

12. At its February 1979 annual meeting, the ABA adopted a policy position opposing the imposition of vicarious criminal liability on corporate officials. A number of respected legal scholars (most notably Francis Allen, *supra* note 9, and Sanford Kadish, *supra* note 1) have expressed similar reservations about the overextension of criminal liability, and particularly vicarious criminal liability, into the field of economic regulation. *But see* United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943). The Brown Commission recommended vicarious criminal liability where the negligence of the supervisor amounted to a "default in supervision." *See* NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT §403(4) (1971).

13. *See* K. ELZINGA & W. BREIT, *supra* note 2, at 33-38 (summarizing antitrust cases involving penal sanctions through 1976 and finding the longest sentence of imprisonment actually served by a white collar offender to have been only nine months).

14. *Cf. id.* at 40.

15. Prof. Posner has found that 46 of the 320 corporations criminally convicted of antitrust law violations between 1964 and 1968 had previous civil or criminal convictions on the same offense, 10 corporations having had 3 or more prior convictions. Posner, *supra* note 7, at 394-395. *See also* D. CRESSEY, OTHER PEOPLE'S MONEY (1973) (cataloging instances of corporate recidivism in other areas); E. SUTHERLAND, *supra* note 1.

16. Christopher Stone's description of the history of the Holland Furnace Company is a classic in this regard. *See* C. STONE, WHERE THE LAW ENDS (1975).

whose products or methods of production have repeatedly brought prosecution on health and safety charges.[17] In such cases, to "rehabilitate" the organization, it becomes essential that an effective internal monitoring system be established by which both the court and the corporation's senior management can be apprised of impending developments. Deterrence is only one means to the law's primary goal of crime prevention, and in cases where illegal behavior was either tolerated or ignored as a result of organizational dysfunction, the court is justified in imposing incapacitative restraints.

These complexities have been stressed to demonstrate both the absence of a single optimal sanction for organizational crime and the general inadequacy of the remedies currently available to the sentencing court. There is an unfortunate irony to the contrast existing today between civil and criminal remedies. For example, if a corporation were civilly held liable for creating an actionable nuisance, the court would have available to it a panoply of equitable remedies, including both injunctions and receivership. Yet, if the same corporation were tried and convicted on a criminal charge growing out of the same conduct, then, notwithstanding the higher burden of proof that would have been satisfied, the court would basically lose its ability to impose an equitable remedy and could only order a fine up to the limit authorized by the legislature. As paradoxical as this denial of equitable remedies to the sentencing court may seem, it can at least be justified, in the context of the individual offender, by constitutional considerations (such as the double jeopardy clause) and by understandable policy objections to the imposition of affirmative duties on the offender that are to be enforced by the threat of incarceration.[18] But, with the threat of imprisonment removed in the context of organizational crime, the denial of equitable remedies to the court may encourage evasion and certainly aggravates the pervasive problem of the shortfall of penalties for organizations. Thus, paragraph (a) stresses the need to give the sentencing court addi-

17. Such allegations have repeatedly surfaced in the case of one chemical concern. *See Small Chemical Firm Has Massive Problem with Toxic Products,* Wall St. J., Feb. 13, 1978, at 1.

18. The black letter law of sentencing has traditionally prohibited the same court from increasing its sentence once service of the sentence has commenced. *See* United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977); United States v. Best, 571 F.2d 484 (9th Cir. 1978). A formalistic interpretation of equitable remedies that permit continued supervision and modification of remedies might see them as permitting postcommencement enhancement of sentences. This rigid interpretation would be particularly senseless in the case of organizations that are not subject to incarceration, since there is little difference between a fine and a civil damage award (the latter being, of course, subject to increase on appeal).

tional flexibility in dealing with organizational offenders. In particular, the forms of relief now available to agencies such as the Securities and Exchange Commission and the Federal Trade Commission in civil litigation should be available in appropriate cases to the sentencing court when the organization has been criminally convicted. Specific applications of the recommendation that civil and criminal remedies be integrated are discussed below.

Restitution

Compensation of the victim is increasingly recognized as a high-priority goal of criminal justice, and it is a goal perhaps uniquely achievable where the offender is an organization, since adequate financial resources are more likely to be available. A variety of routes to this same end are possible. S. 1437 would empower the court to order restitution as an independent sanction in addition to any other penalty imposed, including a fine, where the victim sustained "bodily injury or property damage or other loss."[19] The Model Sentencing and Corrections Act contains a similar provision and, in addition, authorizes the court to hold the fine in trust as part of a general fund for victim compensation.[20] Commonly, statutory lists of authorized probation convictions also empower the court to require restitution as a condition of probation.[21]

Restitution should, however, be an independent sanction, not simply a condition upon which probation may be granted. Otherwise, an unfortunate inconsistency arises: individuals, but not organizations, could be required to make restitution. Probation is neither a traditional disposition for organizations nor one that can be meaningfully enforced by the sanction of revocation. Yet in general, the ability of organizations to make restitution is both greater and unencumbered by conflicting responsibilities to family or dependents. Restitution has long been among the equitable remedies upon which a civil court could draw, and it has become one of the standard remedies sought and obtained by the Securities and Exchange Commission, both in litigated cases and in consent orders.[22] However, although an organization that has engaged

19. S. 1437, §2006.

20. NCCUSL, Model Sentencing and Corrections Act §§3-601, 3-402, 3-103(b)(6).

21. *See* standard 18-2.3(f)(viii); *see also* S. 1437, §2103(b)(3).

22. For cases requiring restitution, *see* Mathews, *Recent Trends in SEC Requested Ancillary Relief in SEC Level Injunctive Actions,* 31 Bus. Law. 1323, 1333-1334, 1339 (1976).

in a fraudulent transaction and is sued by the SEC can be required to make restitution based on the civil trial standard of a preponderance of the evidence, when the same organization is prosecuted criminally for the identical transaction and proven guilty beyond a reasonable doubt, the sentencing court has fewer sanctions available to it than a civil court of equity.

The primary argument of those opposed to empowering the sentencing court to award restitution is chiefly that it would be duplicative. Victims of a crime may already pursue their civil remedies against the organization that has injured them. This argument is, however, supported more by logic than by experience. Logic may suggest that civil remedies are adequate, since principles of res judicata should make the conviction dispositive of many of the issues arising in a civil suit between the victim and the organization. Experience, however, teaches that there are many victims of crimes who lack either the resources or the awareness of their rights to pursue legal remedies. If given reasonable notice of their potential entitlement to restitution, these victims might apply to the sentencing court. The existence of a court already familiar with the facts and issues of the case and empowered to dispense restitution might act as a magnet for eligible claimants who otherwise would be reluctant to become ensnarled in the law's inevitable delays. In addition, the prosecutor could in some circumstances serve as their advocate, thereby reducing the transaction costs to the plaintiff.[23]

The interests of judicial economy also support creation of such a restitutionary remedy. For example, a fraudulent scheme may victimize individuals in a number of states, and unique issues of fact or law may exist in the legal relationships between various victims and offenders, thereby inhibiting the use of a class action remedy. Clearly, considerations of both efficiency and consistency make it more desirable that these issues be resolved by a single court that is already familiar with the underlying fact pattern than for them to be litigated and relitigated to potentially inconsistent results in other courtrooms. Finally, it is a truism that justice delayed is justice denied. Thus, it cannot be ignored that relegating the claims of victims to their civil law remedies may force them to accept settlement offers from the offender that do not fairly

23. Maine already so provides. *See* ME. REV. STAT. tit. 17-A, §1153(3) (Supp. 1978) (authorizing the attorney general or other, court-appointed attorney to seek restitution on behalf of small claimants "if the court finds that the multiplicity of small claims or other circumstances make restitution by individual suit impractical").

reflect the strength of the case. Indeed, the pressure to settle will often be strongest on those injured most, because they can least afford to wait for a protracted civil resolution.

The principle that civil and criminal remedies need greater integration does generate some necessary limits on the scope of a restitutionary remedy, and these are noted in subparagraphs (a)(i)(A)-(D). Subparagraph (A) follows the Model Sentencing and Corrections Act in permitting the offender to assert any substantive defense that could have been raised against an individual plaintiff had such a plaintiff filed a civil action on the date of the criminal indictment or information.[24] This phrasing is intended to halt running of the statute of limitations as of such date. The right to assert such defenses should not, however, permit the convicted defendant to relitigate facts already established at the criminal trial. This standard does not address the technical questions involved in determining which issues the jury has necessarily decided in reaching its verdict, but in some instances it may be appropriate for the court to address supplemental interrogatories or requests for findings to the jury at the request of the prosecutor.

Subparagraph (B) establishes a set-off to prevent double recovery. Of course, this same principle should apply if the civil litigation precedes the criminal trial, but such instances are relatively rare. As an example of the operation of this set-off, a claimant might recover $10,000 for pecuniary damages (*e.g.*, hospital expenses) at the restitutionary hearing and then sue in a civil action and recover a $1 million verdict for both pecuniary and exemplary damages; in such a case, the former amount should be deducted from the latter award. Subparagraph (C) expresses the obvious point that the findings at a restitution hearing should not be made known to any jury in a subsequent civil trial. Not only might this unfairly prejudice one or the other of the civil adversaries in a variety of ways, but it might also reduce the possibility of voluntary settlements at such a hearing.

Subparagraph (D) imposes an important limit on the restitution hearing: only verifiable pecuniary losses should be recoverable. A similar compromise has been reached by the Model Sentencing and Corrections Act.[25] As contemplated, a claimant might seek to recover out-of-pocket

24. NCCUSL, Model Sentencing and Corrections Act §3-601(d).

25. *Id.* §3-601(e). Maine has adopted a similar definition and also permits a set-off where there is a subsequent civil remedy. *See* Me. Rev. Stat. tit. 17-A, §§1322(3), 1327 (Supp. 1978).

expenses or wages lost while hospitalized but not consequential damages or lost profits. With integrated civil and criminal remedies, the relative superiority and efficiency of civil litigation in dealing with complex factual matters must be recognized. The availability of able counsel attracted by the substantial fees that class action litigation frequently affords is in particular a factor that weighs in favor of reliance on civil remedies. In addition, the criminal court must be permitted to retain control over its own docket. In this light, the critical advantage of the restitution hearing for the victim of the crime is not that it will provide full compensation but that it can afford a speedy partial recovery without which it may be impossible to undertake lengthier civil litigation. For example, faced with a need to pay hospital bills or other expenses incurred while unable to work, a crime victim having limited financial resources might be unable to wait and negotiate the same settlement of a civil claim as would be possible under the structure recommended here, where the offender must make in effect a down payment on its eventual total liability.

Fines

Broad agreement exists among recent model codes and standards that special fine schedules are desirable for organizations.[26] Following the lead of New York State, S. 1437 would establish maximum authorized fines for an organization of $500,000 for a felony (as opposed to $100,000 for an individual), $100,000 for a misdemeanor (as opposed to $10,000 for an individual), and $10,000 for an infraction (as opposed to $1,000 for an individual).[27]

As an alternative to these maximum fines, S. 1437 also adopts the recommendation of the Brown Commission that a higher ceiling be authorized equal to the greater of "twice the gross gain derived or twice the gross loss caused."[28] In a similar recommendation, the NAC standards state that the sentencing court should be authorized to "base fines

26. *See Criminal Code Reform Act of 1977: Report of the Committee on the Judiciary, United States Senate, to Accompany S. 1437,* S. REP. No. 605, 95th Cong., 1st Sess. 913-914 (1977). For the position of the Brown Commission, *see* FINAL REPORT, *supra* note 12, §§3301, 3304.

27. S. 1437, §2201(b)(2). *Compare* N.Y. CRIM. PROC. LAW §400.30 (McKinney 1971).

28. S. 1437, §2201(c); *see also* FINAL REPORT, *supra* note 12, §3301(2). Several states have recently adopted treble damage provisions where the corporation commits a crime causing injury to others or gain to it. *See* IOWA CODE ANN. §909.4 (West 1979); N.Y. PENAL LAW §80.10(1)(e) (McKinney 1975); ME. REV. STAT. tit. 17-A, §1301(3)(E) (Supp. 1978).

on sales, profits or net annual income of a corporation where appropriate to assure a reasonably even impact of the fine on defendants of various means."[29] Finally, the Model Sentencing and Corrections Act provides more simply that the court in imposing a fine shall "consider the financial resources and future ability of the offender to pay the fine."[30] Case law suggests that such a variable index is not discriminatory.[31]

Unlike S. 1437 and the Brown Commission, these standards do not endorse fine schedules geared to a multiple of the gain or loss; such a recommendation, which was contained in the tentative draft of this chapter, has been withdrawn after consultation with various sections of the ABA. Although keying fines only to the actual gain or loss might tempt the potential offender with a dangerously attractive "heads I win, tails we break even" opportunity, this analysis is oversimple.

First, the situations are rare where a conviction on criminal charges will not carry a substantial risk of civil liability. In addition, these standards recommend that restitution be available also as a supplementary remedy. Thus, the deterrent threat of the law is sustained without resort to *in terrorem* treble-damage-type penalties. Given the tendency for the real cost of corporate penalties to be passed on to consumers, stockholders, and employees, there is little reason to compound potential liabilities once the deterrent threat of the law is adequately established. Indeed, excessive penalty levels may induce the defendant to settle with the prosecutor in areas where the law's applicability is far from clear (a situation particularly characteristic of statutes regulating economic activity) and may even make the judiciary reluctant to enforce the statute.

One other qualification on this standard's endorsement of a policy of higher fine schedules for organizations derives from the tendency for a single criminal transaction to be fragmented into a lengthy series of separate counts. Frequently, statutes overlap or focus on the use of different jurisdictional means. It seems obvious, for example, that if the penalty imposed for the violation of a mail fraud statute were equal to the gain derived from the fraudulent scheme, the same penalty should not again be reimposed because the same scheme also violated a wire fraud statute. To prevent the multiplication of penalties based only on the existence of different jurisdictional means, the guideline drafting agency should be given the responsibility of defining where such penal-

29. NAC, Corrections 5.5.
30. NCCUSL, Model Sentencing and Corrections Act §3-401(c).
31. *See* Coffey v. County of Harlan, 204 U.S. 659 (1907).

ties overlap, because the underlying criminal transaction is the same. This recommendation parallels the similar one in standard 18-4.5(b)(v) that the agency should define when consecutive sentences are inappropriate "because of the relationship between multiple offenses."

Disqualification from Organizational Office

The problem of how to deal with the white collar criminal who engages in illegal conduct as the agent of an organization has troubled legal commentators. Often the court is faced with an unfortunate all-or-nothing choice between incarceration and probation. The former may be unnecessary either to deter or to incapacitate an offender for whom the experience of apprehension and its attendant stigmatization will be punishment enough (to deter both the individual offender and others similarly situated); conversely, the latter seems to institutionalize a flagrant inequality in favor of middle-class offenders. The need for intermediate sentencing alternatives to fill the void between incarceration and probation has already been emphasized in standard 18-2.4, and greater use of fines, community service, and split sentences not involving substantial confinement are a partial answer. But standing alone, these remedies may be insufficient. Although some economists have argued that monetary penalties exist that are equivalent to incarceration,[32] it is difficult to accept this contention, except in the case of very short sentences. Even where an equivalent monetary penalty may exist, there remain substantial dangers that (1) monetary penalties will be passed on to the corporation through indemnification or increased salaries, (2) other offenders will perceive such qualitatively different penalties for one privileged class of offenders as unfair to them, and (3) the court will understate the monetary equivalent since it is likely to be unaware of the offender's total financial resources. Finally, there is a distinct danger, applicable to community service sentencing alternatives as well, that control of the organization will remain in the hands of an individual willing to take the risk of involving it in illegal activities.[33]

32. *See* sources cited at note 2 *supra.*

33. *E.g.,* a *Fortune* magazine study of the Fruehauf Corporation, whose senior officers were convicted of income tax fraud committed on behalf of their corporation and sentenced to a term of community service, found that the officers remained in de facto control even though formally suspended from office. Said one vice-president of the suspended chairman, "It was like [he] was there all the time looking over our shoulders." Loving, *How Bob Rowan Served His Time,* FORTUNE, Aug. 27, 1979, at 42, 43. *See also* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CAL. L. REV. 1319, 1337 (1973) (noting that few

Indeed, even if the convicted corporate official has been adequately deterred, it will not be evident to subordinates within the organization, who may view the offender's continued presence in a responsible office as an indication that the corporation is willing to tolerate (and even encourage) such involvement. These combined dangers are given credibility by empirical research that has noted the tendency for at least some corporations to become "corporate recidivists."[34]

The remedy best designed to meet these linked dangers is to disqualify the convicted corporate official from corporate office within the specific organization in those situations where there is evidence of knowing misconduct by the official and where there are other indications that a material danger exists of recurrent illegality by the organization. Such "other indications" might be shown by a recent history of corporation criminal violations or by evidence of a substantial conspiracy among officials within the organization to violate the law. In such instances, disqualification from office is in effect a form of incapacitation that can be achieved without unnecessary incarceration. Indeed, since it is also likely to have a deterrent effect on other potential offenders within organizations, it represents an application of the least restrictive alternative principle endorsed by standard 18-2.2.

Of course, such a preventive remedy should not be used uniformly or reflexively. The preconditions expressed in standard 18-2.8(a)(iii) make this clear, and by cross-referencing the limitations on probation conditions contained in standard 18-2.3, they contain an outer limit of five years in the case of a felony and two years in the case of a misdemeanor. Such disqualification should only be from the convicted corporation and its affiliates and not from other corporations generally in order that the disqualification not amount to an effective bar to employment.

As here endorsed, disqualification is to be employed only where the subject official has been convicted and not where the corporation alone has been convicted. However, in the latter instance, the concept of continuing judicial oversight could subsume, for example, the appointment at the court's request of a special counsel to investigate the involvement of corporate officials in the criminal behavior leading to the corporation's conviction. In turn, such a report could alert and trigger

employees convicted in the electrical equipment conspiracy of the 1950s actually lost their jobs even though they "had caused their companies to be liable for millions of dollars in private damages").

34. *See* notes 14 and 15 *supra*.

the corporation's own internal disciplinary powers. Although the court would lack the power to order a resignation, it would have substantial discretion (within the five-year limit hereinafter discussed) as to when to terminate its supervision, and it might take account of the corporation's own internal reforms and administration in making this decision.

Precedent for the use of a disqualification sanction now exists in the statutes of several states.[35] These statutes have been largely modeled after section 3502 of the Brown Commission's proposed Federal Criminal Code, which states:

> An executive officer or other manager of an organization convicted of an offense commited in furtherance of the affairs of the organization may, as part of the sentence, be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the scope or willfulness of his illegal actions make it dangerous for such functions to be entrusted to him.[36]

Precedent for the use of disqualification from private office as a sanction has long existed both in the Federal Criminal Code (although it has been largely confined to the banking field)[37] and in the case law concerning permissible probation conditions.[38] Both the British Companies Act and Canadian law contain provisions of even greater scope.[39]

Notice of Conviction

Subparagraph (a)(iv) recognizes that restitution is an entitlement of only limited utility for many victims unless some procedure is estab-

35. *See, e.g.,* ME. REV. STAT. tit. 17-A, §1153(2) (Supp. 1978); UTAH CODE ANN. §76-3-303(2) (1978). Both statutes permit disqualification for up to five years of a corporate employee if the court "finds that the scope and willfulness of his illegal action makes it dangerous or inadvisable for such function to be entrusted to him."

36. FINAL REPORT, *supra* note 12, §3502. The comment to this section adds that it should be an aggravating, rather than a mitigating, fact that the official committing the crime exceeded the authority delegated to the official.

37. *See* 12 U.S.C. §1829 (1976) (disqualification from office in F.D.I.C.-insured banks); 18 U.S.C. §§1962, 1964 (1976) (disqualification of racketeer).

38. Many of these cases are collected in Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) (upholding probation condition disqualifying convicted union leader from leadership activities in union).

39. Companies Act of 1948 of Great Britain, §188 ("Power to restrain fraudulent persons from managing companies"). These statutes also authorize disqualification of individuals found to have committed certain civil frauds while officers of a company.

lished by which they are given adequate notice of their rights. Thus, the Brown Commission recommends that the organization be required to give "notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise."[40] A substantial minority of that commission would have gone further and authorized the court "to require the organization to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction. . . ."[41] The majority rejected such a "publicity" requirement in favor of the simpler "notice" obligation in the belief that it approached too closely the use of "social ridicule as a sanction."[42] Although one can agree that ridicule is an inappropriate sanction, such a concern seems overstated. There seems little reason for a lack of confidence in the ability of courts to control the phrasing and method of dissemination of such publicity so that simply the necessary information, appropriately summarized and explained, is conveyed. Consistent with the minority position of the Brown Commission, S. 1437 authorizes the sentencing court to require notice "to the sector of the public affected by the conviction."[43] The Model Sentencing and Corrections Act also refers broadly to "members of the public likely to have suffered loss. . . ."[44] Provisions modeled on the Brown Commission's recommendation have been adopted in some states.[45]

Concern has been expressed that such a broad obligation could require expensive direct mailings to an enormous and ill-defined class of citizens, with the result that the cost of the notice obligation could equal or exceed the amount of the fine. Thus, consistent with the position taken by the ABA's House of Delegates at its February 1979 meeting, these standards endorse only the use of newspaper or similar advertisements. Pursuant to subparagraph (b)(i), the defendant should be given an opportunity to comment before such an order is entered. These standards also do not address the special situation of pleas of nolo contendere, where, because principles of collateral estoppel do not apply, there is less likelihood that the conviction will be followed by

40. FINAL REPORT, *supra* note 12, §3007.

41. *Id.*, bracketed alternative version.

42. *Id.*, comment to §3007.

43. S. 1437, §2005.

44. NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT §3-402(d).

45. *See, e.g.*, HAW. REV. STAT. §706-602 (1976); ME. REV. STAT. tit. 17-A, §1153(1) (Supp. 1978); UTAH CODE ANN. §76-3-303(1) (1978); N.D. CENT. CODE §12.1-32-03 (1976).

civil actions. However, since under the Pleas of Guilty standards the court is obligated to consider the interests of the victims before accepting such a plea,[46] it remains possible that the court might consider the appropriateness of restitution in determining whether to accept such a plea.

Judicial Oversight

Subparagraph (a)(v) takes a compromise position with respect to recent proposals that the convicted corporation be placed on probation under conditions tailored by the court to prevent repetition of the crime. For example, S. 1437 would authorize the sentencing court to place a corporate defendant on probation on the same basis it would an individual.[47] The accompanying Judiciary Committee report gives the following example: "[A]n organization convicted of executing a fraudulent scheme might be restricted from continuing that aspect of its business that was operated fraudulently, or directed to operate that part of the business in a manner that was not fraudulent."[48] Even greater reason for concern exists where corporate activities pose a danger to public health or safety, and in several recent instances there have been reports of knowing participation by senior corporate management in the concealment of corporate activities that involved serious threats to the public safety.[49] The specific facts of these cases (involving the disposal of toxic chemicals, the suppression of design safety defects, and the sale and promotion of products known to be carcinogenic) are not here evaluated, but the need for special preventive sanctions where such facts are established is clear. Financial penalties might ultimately deter the corporate offender, but, as Lord Keynes's epigram bears witness, long-run solutions are not satisfactory to those injured in the short run. In addi-

46. Standard 14-1.1(b). *See also,* Patterson v. Stovall, 528 F.2d 108, 110 (7th Cir. 1976) (approving agreement by government to accept plea of nolo contendere in return for defendant's agreement to settle civil suits and pay restitution of approximately $6.5 million to injured victims of crime).

47. S. 1437, §2001(c).

48. S. Rep. No. 605, *supra* note 26, at 887.

49. The *Washington Post* recently observed that it had reported in a previous single issue of its paper "no fewer than five separate accounts of accidental or planned mismanagement of chemicals and chemical and radioactive wastes." Editorial, *Dealing with the Poisoners,* Wash. Post, Aug. 20, 1979, at A-20. Closer examination of several of these incidents, it added, "reveals that top company management approved illegal practices flagrantly violating air- and water-polution permits."

tion, there has been increasing recognition by some economists and students of organizational behavior that the corporation is more than a "black box" whose behavior can only be affected by external sanctions; these commentators have pointed to the need for internal interventions in the corporation's decision-making process in order to highlight and protect public goals.[50]

But once again, disparity exists between the treatment of individuals and organizations. The individual can be placed on probation and, if necessary, subjected to close surveillance. Traditionally, however, the corporation could not be placed on probation, which was a voluntary status that had to be accepted by the offender as a lesser alternative to imprisonment. Recent federal decisions may have changed this,[51] but doubt persists and little experience with the use of corporate probation is available. Such disparity is, of course, unsustainable on any policy basis, and S. 1437's intent in the sanction of corporate probation is one with which these standards are sympathetic in principle.

The problem with such a proposal is that the term "probation" is a misnomer. It conjures up images of courts or special masters running corporations and assorted other imaginary horrors that few, if any,

50. For a review of this literature, *see* Coffee, *supra* note 5, and C. STONE, *supra* note 16. In general, this school of thought has argued that the focus of the law's deterrent efforts should be concentrated on the decision maker within the corporation rather than on the firm as an economic unit, since the corporation as a whole may only respond marginally and belatedly to the most extreme penalties, given the separation of ownership and control. In addition, since the individual manager gains only indirectly through corporate criminal acts and even then only marginally, he or she may be sensitive to a more economical use of sanctions. *See, in particular,* R. BLAIR, *supra* note 1, at 7, and Wheeler, *supra* note 33, at 1319-1352.

51. United States v. Atlantic Richfield Co., 465 F.2d 58 (7th Cir. 1972) (reversing specific condition of probation imposed by lower court but declining to deny court power to place a corporation on probation). *Cf.* United States v. Clovis Retail Liquor Dealers Trade Assn., 540 F.2d 1389, 1390 (10th Cir. 1976) (reversing requirement of "community restitution" where amounts so ordered to be paid were in addition to maximum fine and recipients were not "aggrieved parties" within meaning of 18 U.S.C. §3651). *See also* United States v. Olin Corp., Docket No. Cr. N-78-30 (D. Conn. 1978). As a condition of probation, the court initially required a charitable contribution. *Judge in Arms Case Orders Olin to Pay $510,000 in Charity,* N.Y. Times, March 31, 1978, §4, at 1:1. A charitable contribution was also recently imposed as a condition of probation in the case of a corporation convicted of polluting the Chesapeake Bay. *See* Rich. Times Dispatch, Aug. 25, 1977. Although these standards do not endorse such a use of probation to increase the operative penalties beyond a level authorized by the legislature, they agree with the Model Sentencing and Corrections Act that probation should not simply be a voluntary status which the offender can reject.

would advocate. It also fails to focus on the far more feasible, modest, and important goal of institutionalizing an adequate internal warning system within the corporation.

To understand what goals sentencing authorities should seek to achieve through the use of judicial oversight, it is useful to begin with a summary of the conclusion reached by the staff of the Securities and Exchange Commission in its recent detailed study of improper payments. Looking for common denominators in a wide range of cases, it found in almost all the cases studied a breakdown of the corporations' internal systems of accountability.[52] Adverse information about risky or illegal corporate activities did not filter up to the board of directors or even, in many cases, to the senior management level. This absence of adequate internal controls within a corporation suggests, in turn, a sense in which the corporation can be "rehabilitated": internal controls foster the development of a stronger "superego" within the corporation by making the board and senior management more conscious of the risks and legal consequences of corporate misbehavior. Once senior management is placed on notice, its own responsibility is increased and the danger that the corporation will seek to "optimize" its involvement in crime will hopefully be minimized.[53]

The best examples of specific types of monitoring controls that might be imposed as conditions of probation are found in the recent experience of the SEC. In a series of consent decrees, it has required a variety of reforms, all aimed at establishing improved internal controls: special audit committees of the board, the appointment of special counsel for the board to conduct a further investigation, expanded auditing and reporting requirements, and the creation of a more "independent" board through the use of an independent nominating committee.[54] The SEC has imposed such reforms in some instances where a corporation has been convicted of a felony. Once again, it seems paradoxical that such reforms could be imposed for violation of

52. *See* SENATE BANKING, HOUSING, AND URBAN AFFAIRS COMMITTEE, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, 94th Cong., 2d Sess., at (a) (1976). *See also* Coffee, *supra* note 5, at 1127-1137.

53. In the Foreign Corrupt Practices Act of 1977, Congress appears to have endorsed a similar theory by requiring public corporations to "devise and maintain a system of internal accounting controls sufficient" to assure improved accountability. *See* Securities Exchange Act of 1934, §13(b)(2)(B), 15 U.S.C. §78m(b)(2)(B) (Supp. I 1977).

54. *See* Mathews, *supra* note 22; Herlihy & Levine, *Corporate Crisis: The Overseas Payment Problem*, 8 LAW & POLICY INTL. BUS. 547 (1976).

a civil obligation to make disclosure but not for the criminal violations that went undisclosed.

These standards have always declined to endorse novel remedies or fashionable reforms untested by experience. For this reason, the acceptance by this edition of the case for judicial oversight is carefully limited, and the broader concept of corporate probation proposed by S. 1437 is not endorsed. However, experience is gained over time, and not all of the reforms that might have been dismissed as novel at the beginning of this decade can be accurately described as such today. For example, now that the New York Stock Exchange requires all companies listed on it to maintain an independent audit committee staffed predominantly by outside directors,[55] it would be an exaggeration to describe such a reform when imposed by the court on a convicted corporation as "novel" or "unprecedented." Similarly, considerable experience has been gained with the remedy of appointing special counsel to ascertain the full facts underlying a corporation's involvement in an illegal activity and report them to the board of directors along with proposals designed to prevent repetition. The well-known study conducted by John J. McCloy for Gulf Oil Corporation of its participation in illegal overseas payments and political contributions is frequently and justifiably cited as a model in this regard.[56] It is doubtful that, without that study, the Gulf Board of Directors would have had a full picture of the extent and causes of the corporation's involvement. Both the audit committee and the special counsel study thus constitute examples of the kind of monitoring controls that the court in appropriate cases should have available to it. Indeed, use of audit and similar committees to heighten a board's monitoring capacity has been endorsed by a subcommittee of the ABA Committee of Corporate Laws.[57]

This commentary cannot outline the full range of the controls that should be available to the court. Still, the essential point is that the purpose of the controls is not to replace the board of directors but, rather, to activate it where it has been unaware of the corporation's activities. In an appropriate case, the court could request an experienced

55. *See* SEC Exchange Act Release No. 34-13245, 42 Fed. Reg. 8,737 (1977). For background, *see also* SEC Exchange Act Release No. 34-13346, 42 Fed. Reg. 14,793 (1977).

56. This report to the Board of Directors of Gulf Oil Corporation has been reprinted under the title THE GREAT OIL SPILL, by J. MCCLOY (1976).

57. *See* ABA Subcommittee on Functions and Responsibilities of Directors, Committee on Corporate Laws, Section of Corporation, Banking, and Business Law, *Corporate Director's Guidebook*, 32 BUS. LAW. 5, 35-36 (1976).

corporate attorney, a firm of auditors, or a professional director to serve as such special counsel to supervise the development of improved controls. In cases where a recurring problem involving special technical expertise exists — toxic chemicals, dangerous drugs, unsafe consumer products — the court should similarly be empowered to employ special consultants in these fields to determine whether the public safety is still threatened. Because the SEC's own enforcement resources are finite and, even more important, because its jurisdiction is limited basically to the enforcement of disclosure statutes from which the majority of corporations are largely exempt,[58] judicial oversight is in essence a means of extending the techniques employed by the SEC to cases where an organization's internal system of accountability has broken down. By no means is it suggested that such preventive probation conditions should be uniformly employed any time a corporation is convicted. Indeed, they should be used sparingly and basically only in those cases where, as subparagraph (a)(v)(A) specifies, the absence of adequate internal controls contributed to the crime or the public health or safety is jeopardized.

Examples are useful to illustrate the distinction that these standards intend between a preventive monitoring role for the court and more intrusive judicial intervention, which is disapproved. If, for instance, a corporation were convicted of a crime involving discriminatory hiring practices at a specific plant, the obvious possibility that history can repeat itself might lead the court to require the corporation to take inventory of its practices at other sites. But however fitting the punishment might seem, it would be inappropriate for the court to intervene so as to require the relocation of plants, the establishment of hiring quotas, or other remedial measures (even if these are permissible civil remedies). Similarly, an environmental violation might justify special surveillance measures but not a mandatory contribution to a general environmental research fund or to similar causes. Put simply, the sentencing process is not an appropriate forum to remedy the general ills of society. Once the court has adequately addressed the sentencing goals of prevention, deterrence, and restitution and has given due weight to the avoidance of inequality, its ambitions at sentencing should end. To attempt to do more usurps not only the roles of manage-

58. For the "reporting" and "accounting control" requirements of the Securities Exchange Act of 1934 to apply, a corporation must acquire 500 or more shareholders and $1 million in assets. *See* 15 U.S.C. §78l(b), (g) (1976).

ment and the stockholders but also that of the legislature, which never authorized such penalties. It also places the court in the dubious position of being both prosecutor and judge. The court's lack of capacity to make such decisions is also obvious; it cannot balance the long-run costs and benefits of the managerial decisions it is requiring. Finally, to the extent such actions raise the costs of the corporation's goods and services, it is essentially imposing a private subsidy of public goals whose ultimate incidence may fall on the consumer. Thus, the restrictions set forth in subparagraph (a)(v) are unequivocal.

These limitations do not mean the court might never consider voluntary offers by a corporation in determining how long to continue a period of judicial oversight. But because the possibility of coercion is implicit in such a context, the principles endorsed in standard 18-6.9 should be equally applicable to these proceedings.[59]

General Restrictions

Subparagraph (b) sets forth three general restrictions, of which subparagraphs (b)(ii) and (iii) need little explanation. Their intent is to make certain that important decisions, such as those pertaining to officer disqualification, the amount of required restitution, or the use of oversight controls, are not made in an informal or ex parte manner.

Subparagraph (b)(i) is based on the recognition that the treble damage penalties of the antitrust laws and the typically large class actions that arise in securities litigation make special financial penalties unnecessary and duplicative. The plaintiff who can obtain treble damages will seldom be interested in simple restitution, nor are the financial injuries associated with such crimes of the kind that can be readily determined by the sentencing court "without a disproportionate burden on its time or resources."[60] Finally, as antitrust and securities violations seldom jeopardize public health or safety, the case for judicial oversight is correspondingly reduced.

59. Thus, these standards do not endorse the mandatory charitable contributions required as a condition of probation in the decisions cited at note 51 *supra*. At the most basic level, such a punishment neither fits the crime nor is likely to deter; indeed, the corporation may be able to extract public relations "mileage" from such a sanction. *See* United States v. Clovis Retail Liquor Dealers Trade Assn., 540 F.2d 1389 (10th Cir. 1976).

60. *See* standard 18-2.8(a)(i)(D).

Enforcement of Organizational Sanctions

This standard does not attempt to specify the appropriate means of enforcement when an organization fails to comply with any of the sanctions here described. The Model Penal Code addresses this problem in a related context by authorizing the court to employ the sanction of imprisonment to compel corporate officers to pay fines levied against the corporation.[61] There is little to distinguish this form of default from deliberate noncompliance with a condition of probation. Therefore, it may be appropriate for the legislature also to authorize the sentencing court to utilize the standard contempt penalties where, after reasonable notice, failure to comply appears to have been willful. The recent experiences of the SEC in enforcing similar remedies by consent order suggest, however, that instances will be rare where the court is so defied.[62]

PART III. SENTENCING AUTHORITY

Standard 18-3.1. Sentencing guidelines

(a) The legislature should establish a guideline drafting agency in the judicial branch empowered to promulgate presumptively appropriate sentencing ranges within the statutory limits. The creation of such a body is recommended because:

(i) unstructured judicial discretion tends to produce unwarranted sentencing disparities among similarly situated offenders;

(ii) guideline ranges facilitate a reduction in the excessive indeterminacy that now characterizes many penal codes; and

(iii) the administrative agency approach makes possible

61. ALI, Model Penal Code §302.2. *See also* NCCUSL, Model Sentencing and Corrections Act §3-404(d); NAC, Corrections 5.5; Haw. Rev. Stat. §706-644 (1976); Me. Rev. Stat. tit. 17-A, §1304(1) (1978 Supp.). Ultimately, many statutes also give the court the power to revoke the corporation's charter or license to do business in the jurisdiction. *See, e.g.*, Haw. Rev. Stat. §706-608(2) (1976). Although little used, these statutes make it unlikely that a deliberate refusal to comply with the court's order would long continue.

62. *See also* standard 18-7.4(d).

Chapter 18

Sentencing Alternatives and Procedures

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The terms of former Standing Committee Chairperson *B. James George, Jr.*, Professor of Law, New York Law School, and of former Standing Committee members *William R. Beasley*, Southfield, Michigan, and *Richard J. Brzeczek*, Chicago, Illinois, expired before the publication of this supplement.

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Chapter 18

Sentencing Alternatives and Procedures

Introduction

Page 18·14. Insert a new note on the last line of the second full paragraph:

. . . including the offender.[1]

1. For an excellent review of sentencing reform, *see* NATIONAL RESEARCH COUNCIL PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983). Other general treatments of sentencing include REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING (M. Tonry & F. Zimring eds. 1983); N. KITTRIE & E. ZENOFF, SANCTIONS, SENTENCING, and CORRECTIONS: LAW, POLICY, AND PRACTICE (1981); SENTENCING (H. Gross & A. von Hirsch eds. 1981).

Two useful bibliographies of materials on sentencing have been published under the aegis of the National Institute of Justice and the National Center for State Courts: W. POINTER & C. ROSENSTEIN, PERSPECTIVES ON DETERMINATE SENTENCING: A SELECTED BIBLIOGRAPHY (1982); J. MILLER, M. ROBERTS & C. CARTER, SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY (1981).

Page 18·14. Immediately before the heading **Part I. Sentencing Authority**, *insert:*

able when the original sentence was imposed, with no priority among them as a matter of constitutional compulsion.

Bearden's focus on fundamental fairness in changing a sentence to imprisonment after an initial decision not to imprison the defendant still leaves in doubt the Supreme Court's view of the constitutional imperatives applicable when a court is fixing the original sentence. Given the premise, established by *Bearden*, that nonpayment of a fine is not a justification for imprisonment if adequate alternative sanctions are available, anticipation of nonpayment would provide no justification for imprisonment in the first instance. However, as the separate opinion in *Bearden* indicates, the Court may distinguish between original sentences and resentences after default in meeting payment requirements.[27e]

27a. —U.S.—, 103 S. Ct. 2064 (1983).

27b. The Court offered examples of sentencing alternatives: payment over an extended period of time, payment of a reduced fine, or some form of labor or public service.—U.S. at—, 103 S. Ct. at 2072. The opinion of the Court cited and relied on these standards.—U.S. at—n.10, 103 S. Ct. at 2071 n.10.

27c. —U.S. at—, 103 S. Ct. at 2069. The due process analysis was limited to the circumstances of the particular case and did not involve defining a class of persons for purposes of application of the equal protection requirement.

27d. —U.S. at—, 103 S. Ct. at 2074.

27e. Dictum in the opinion of the Court suggests that the majority did not apply the logic of *Bearden* to original sentences.—U.S. at—, 103 S. Ct. at 2071. *See* Note, *The Supreme Court: 1982 Term*, 97 HARV. L. REV. 70, 93-94 (1983).

Standard 18-2.8. Organizational sanctions

***Page 18·170. Insert a new note on line 6 of the second paragraph under the heading* Restitution:**

. . . sanction of revocation.[21a]

21a. *But see* United States v. Mitsubishi Corp., 677 F.2d 785 (9th Cir. 1982). *See also* Note, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 FORDHAM L. REV. 637 (1984).

Page 18·178. To the end of note 45, add the following new material:

In a California prosecution of a corporation for dumping toxic waste, the trial judge required the defendant to place an advertise-

ment explaining its crime in the *Wall Street Journal*. NATL. L. J., April 23, 1984, at 25.

Standard 18-3.1. Sentencing guidelines

Page 18·189. To the end of note 3, add the following new reference:

See also J. M. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES (1980).

For the results of a major study designed to provide the basis for sentencing guidelines, *see* the three-volume report of the UNITED STATES DEPARTMENT OF JUSTICE, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (1982). Volume II of the study is J. CALPIN, J. KRESS, & A. GELMAN, ANALYTIC BASIS FOR THE FORMULATION OF SENTENCING POLICY (1982). *See also* W. RICH, L. SUTTON, T. CLEAR, & M. SACKS, SENTENCING BY MATHEMATICS: AN EVALUATION OF THE EARLY ATTEMPTS TO DEVELOP AND IMPLEMENT SENTENCING GUIDELINES (1982). For a discussion of problems associated with construction of empirically based sentencing guidelines, *see* Sparks, *The Construction of Sentencing Guidelines: A Methodological Critique*, in 2 NATIONAL RESEARCH COUNCIL PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 194 (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983).

Page 18·193. Insert a new note on line 3 of the first full paragraph:

. . . privately retained counsel.[12a]

12a. One commentator has asserted that a major problem of disparity of sentences is caused by the power of prosecutors to reduce charges as part of plea bargaining (see standard 14-3.1(b)), with the result that measures of disparity do not take into account the "real offenses" committed. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980). Professor Schulhofer proposes to control prosecutorial discretion in charge-reduction and to allow sentences to be imposed on the basis of the "real offenses" committed.

An example of a "real offense" sentencing superseding a plea bargain is found in the practice of the United States Parole Board, which considers not only the offense subject to plea of guilty but also other offenses for which charges were dismissed, in fixing the presumptive date of release from imprisonment. A district court, made aware of this, vacated its sentence under 28 U.S.C. §2255, but the Court of Appeals