

# THE FEDERAL SENTENCING GUIDELINES FOR CORPORATIONS: THEIR DEVELOPMENT, THEORETICAL UNDERPINNINGS, AND SOME THOUGHTS ABOUT THEIR FUTURE

ILENE H. NAGEL\*  
WINTHROP M. SWENSON

## I. INTRODUCTION

Historically, the executive, legislative, and judicial branches have shared responsibility for setting sentences for offenders convicted of federal crimes.<sup>1</sup> The executive branch traditionally influences sentencing primarily through its authority to initiate prosecution, select appropriate charges, and enter into plea agreements.<sup>2</sup> Congress influences sentencing by defining criminal conduct and by establishing the range of possible penalties for violations of criminal law.<sup>3</sup> The judiciary influences sentencing by selecting sentences for convicted offenders from within the congressionally prescribed statutory ranges.<sup>4</sup> Over the years, the relative degree of sentencing authority exercised by each of the three branches has varied, due in part to changes in the prevailing goals and purposes of sentencing.<sup>5</sup>

In 1984, in the most dramatic criminal justice reform of this century,

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\* Ilene H. Nagel is a member of the United States Sentencing Commission and Professor of Law at the Indiana University (Bloomington) School of Law. Winthrop M. Swenson is Deputy General Counsel and Legislative Counsel of the United States Sentencing Commission. The views expressed here are those of the individual authors and are not meant to represent the views of the United States Sentencing Commission. Special thanks are extended to Barry L. Johnson and Karen E. Kelly for their research assistance.

1. See *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (federal sentencing "never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of government"). See also Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892-95 (1990) (discussing delegation of legislative sentencing authority to the judiciary between 1880 and the 1960s).

2. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (prosecutor has broad authority to determine whether to prosecute, and what charges to file); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (prosecutor has wide discretion in plea bargaining).

3. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (Congress has power to fix sentences for federal crimes).

4. See *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (scope of judicial sentencing discretion subject to congressional control).

5. See Nagel, *supra* note 1, at 894, 899 (describing legislative delegation of sentencing author-

Congress enacted the Sentencing Reform Act (the "Act").<sup>6</sup> Congress passed the Act with the primary purposes of decreasing unwarranted sentencing disparity, increasing sentencing uniformity and certainty, and for some select offenses, increasing sentence severity in order to more effectively deter and more justly punish convicted offenders.<sup>7</sup> While most sentencing scholars and practitioners believe that *individual* offenders were the primary targets of sentencing reform, neither the statute nor the legislative history provides support for the theory that Congress intended to exempt organizational offenders. Accordingly, the full panoply of reforms enacted by Congress now applies to corporate as well as to individual offenders.<sup>8</sup>

While full explication of the terms of the Sentencing Reform Act can be found elsewhere,<sup>9</sup> a brief description of some key features of the Act and of the federal Sentencing Guidelines for organizations (the "Sentencing Guidelines" or the "Guidelines") may aid in understanding how and why the United States Sentencing Commission (the "Commission") undertook the task of promulgating sentencing guidelines for organizations convicted of federal crimes.

### *The Sentencing Reform Act and the Federal Sentencing Guidelines*

The Sentencing Reform Act created a new, full-time, bipartisan, independent agency in the judicial branch—the United States Sentencing

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ity to the judiciary, based on prevailing rehabilitative model of sentencing, and subsequent restriction of that authority when rehabilitative model fell into disfavor.

6. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 28 U.S.C. §§ 991-998 (1988); 18 U.S.C. §§ 3551-3673 (1988)).

7. See Nagel, *supra* note 1, at 899. See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988); S. REP. NO. 225, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 [hereinafter S. REP. NO. 225].

8. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, ch. 8 (1992) (Sentencing of Organizations) [hereinafter U.S.S.G.].

9. For descriptions of the purposes and terms of the Sentencing Reform Act and the Guidelines, see, e.g., Breyer, *supra* note 7, at 6-31; Charles J. Ogletree Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944-51 (1988); Nagel, *supra* note 1, at 899-906, 913-39.

The proposals and provisions of the Sentencing Reform Act also are explored in the Supreme Court's opinion in *United States v. Mistretta*, 488 U.S. 361 (1989), and in the briefs submitted in *Mistretta*. See Brief for the United States Sentencing Commission as Amicus Curiae at 4-15, *United States v. Mistretta*, 488 U.S. 361 (Nos. 87-1904, 87-7028); Brief for Joseph F. DiGenova et al. as Amicus Curiae at 16-21, *United States v. Mistretta*, 488 U.S. 361 (Nos. 87-1904, 87-7028). See generally S. REP. NO. 225, *supra* note 7.

Commission—and assigned it the responsibility for developing and implementing a consistent, just and rational sentencing policy.<sup>10</sup> The Act requires the Commission to promulgate guidelines and policy statements for federal district court judges to use in determining the type and duration of sentences to be imposed on offenders convicted of federal crimes.<sup>11</sup> The statute provides that these sentences must be responsive to the goals of just punishment for the offense, deterrence, incapacitation and rehabilitation.<sup>12</sup> This commitment to multiple goals represents a substantial shift in sentencing policy away from the overwhelming emphasis on rehabilitation which governed federal sentencing in the decades preceding 1984.<sup>13</sup> Moreover, by stressing the importance of the just punishment and deterrence rationales of sentencing, the statute also prompted a shift in the focus of sentencing by requiring greater attention to the characteristics of the offense, and less attention to the offender's personal characteristics.<sup>14</sup>

The Sentencing Reform Act clearly reflects Congress' decision to take back from individual judges much of the sentencing discretion it previously had delegated to them, and to vest that discretion instead in the Commission, a single administrative body. Congress created the Commission specifically to devote its full attention to developing a uniform sentencing policy, based on research and reflection, and to implement that policy through a system of guidelines and policy statements.<sup>15</sup>

Appointed in 1985, the United States Sentencing Commission, consistent with its statutory mandate, submitted its first set of proposed guide-

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10. See 28 U.S.C. §§ 991, 994, 995.

11. See 28 U.S.C. § 994.

12. See 18 U.S.C. § 3553(a)(2) (requiring judges to consider the four basic purposes of sentencing before imposing a particular sentence).

13. See S. REP. NO. 225, *supra* note 7, at 38-40, 50 (rejecting the "outmoded" model of "coercive rehabilitation" in favor of congressional recognition of just punishment, deterrence and incapacitation, as well as rehabilitation).

14. See Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293 (1986). This shift away from emphasis on offender characteristics was, in part, the natural consequence of rejection of the rehabilitative model of incarceration and its focus on the personal background and characteristics of the offender. It was also a result of Congress' explicit instructions that the Commission draft guidelines "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders," and that the Commission's guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(d)-(e).

15. See generally 28 U.S.C. §§ 994, 995.

lines for *individual* offenders to Congress in May 1987.<sup>16</sup> The guidelines for individual offenders became effective in November 1987.<sup>17</sup> These guidelines are binding on sentencing courts, absent a finding that there are aggravating or mitigating circumstances warranting a decision to depart from the prescribed guidelines and to impose a different sentence.<sup>18</sup> Such departures are subject to appeal.<sup>19</sup>

Once the initial package of sanctions for individual offenders became law, the Commission turned its attention to the question of sentencing policy for corporate and other organizational offenders. This Article traces the substantive terms of the dialogue and debate that led the Commission in 1991 to promulgate guidelines for the sentencing of organizations convicted of federal offenses. As with the guidelines for the sentencing of individual offenders, Congress passed no bill rejecting the Commission's proposed package of organizational sanctions; thus, these guidelines automatically became law six months later in November 1991.<sup>20</sup> To date, courts have sentenced very few organizational offenders under the corporate Sentencing Guidelines because they generally apply only to prospective criminal conduct,<sup>21</sup> and criminal cases against orga-

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16. UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS (Apr. 13, 1987). These guidelines also included one broad provision governing the sentencing of organizations convicted of antitrust offenses, *see id.* § 2R1.1, that has since been superseded by the corporate guidelines promulgated in 1991. *See* U.S.S.G., *supra* note 8, ch. 8.

17. *See* Breyer, *supra* note 7, at 1 n.2 (noting that the Sentencing Reform Act "provided that the proposed Guidelines would take effect six months after they were submitted, unless Congress modified or disapproved the Guidelines").

18. *See* 18 U.S.C. § 3553(b) (providing that a sentencing court shall impose a sentence within the range specified by the guidelines "unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described" by the guidelines).

19. *See* 18 U.S.C. § 3742 (providing that either the defendant or the government may appeal a sentence that is outside the guidelines range, imposed as a result of an incorrect application of the guidelines, or imposed in violation of law).

20. *See* 56 Fed. Reg. 22,762 (1991).

21. While Congress did not appear to anticipate this result, *see* 18 U.S.C. § 3553(a)(4), (5) (providing that a sentencing court consider policies and guidelines "in effect on the date the defendant is sentenced"), the courts of appeals have held uniformly that the guidelines in effect at the time of sentencing may not be used if they punish more severely than those in effect at the time of the offense. *See, e.g.*, *United States v. Young*, 932 F.2d 1035 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779 (4th Cir. 1991); *United States v. Nagi*, 947 F.2d 211 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992); *United States v. Sweeten*, 933 F.2d 765 (9th Cir. 1991); *United States v. Smith*, 930 F.2d 1450 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991); *United States v. Lam Kwong-Wah*, 924 F.2d 298 (D.C. Cir. 1991); *United States v. Haroutunian*, 920 F.2d 1040 (1st Cir. 1990); *United States v. Suarez*, 911 F.2d 1016 (5th Cir. 1990);

nizations typically take years to ripen.<sup>22</sup> Nevertheless, the mere publication of these new rules appears to have spurred some sweeping changes in the corporate world.

There is increasing evidence in recent months that many American businesses are revisiting—or considering seriously for the first time—their in-house policies toward employee noncompliance with the law and related misconduct.<sup>23</sup> According to one distinguished federal prosecutor, “[f]or the first time, corporations have been conscripted into the fight against crimes.”<sup>24</sup> If this assertion is true, the question one may ask is how did private companies come to be “drafted” into a war against corporate crime? Although other forces are surely at work,<sup>25</sup> the new corporate<sup>26</sup> Sentencing Guidelines promulgated by the United States

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United States v. Swanger, 919 F.2d 94 (8th Cir. 1990) (per curiam); United States v. Worthy, 915 F.2d 1514 (11th Cir. 1990). In light of the concerns raised by these decisions, practitioners appear to be taking the approach that the organizational guidelines should be applied only to conduct occurring on or after the November 1, 1991 effective date.

22. See Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, 1988-1990, 71 B.U. L. REV. 247 (1991).

23. See generally Margaret Cronin Fisk, *Helping Corporations Comply with Rules is New Legal Business*, NAT'L L.J., Dec. 14, 1992, at S4; Barbara Franklin, *Get Ready for Guidelines: Clients are Urged to Take Compliance Seriously*, N.Y. L.J., Oct. 17, 1991, at 5; David S. Machlowitz, *Making a Compliance Program Work: A Practical Guide*, AM. LAW., Mar. 1992, at 16 (special supplement highlighting preventive law for corporate counsel to comply with the organizational sentencing guidelines); Barnaby J. Feder, *Helping Corporate America Hew to the Straight and Narrow*, N.Y. TIMES, Nov. 3, 1991, at F5 (companies fighting the high cost of misconduct with ethics programs).

In December 1990, the Ethics Resource Center and the Behavior Research Center published a survey of corporate compliance policies. The detailed survey leads to the conclusion that substantial numbers of American corporations had, at best, marginal compliance policies. See ETHICS RESEARCH CENTER & BEHAVIOR RESEARCH CENTER, *ETHICS POLICIES AND PROGRAMS IN AMERICAN BUSINESS* (1990).

24. Otto G. Obermaier, *Drafting Companies to Fight Crime*, N.Y. TIMES, May 24, 1992, at F11.

25. For example, contractors in the defense industry have voluntarily agreed to principles requiring self-policing with regard to potential violations of the law. The agreement, known as the Defense Industry Initiative on Business Ethics and Conduct (“DII”) was described in DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS AND CONDUCT, 1991 ANNUAL REPORT TO THE PUBLIC AND THE DEFENSE INDUSTRY (Feb. 1992) [hereinafter 1991 ANNUAL REPORT]. The Department of Defense Inspector General Voluntary Disclosure Program supplements the DII by providing incentives, in the form of a reduced risk of prosecution and other sanctions, to companies to voluntarily disclose violations. See *id.* at A-35 to A-38. The Environmental Protection Agency recently adopted criteria closely tracking the Sentencing Guidelines’ definition of “an effective program to prevent and detect violations of law” as the criteria it will use in determining whether a company debarred from federal contracting for an environmental violation will be permitted to re-new contracting. See 56 Fed. Reg. 64,785, 64,787 (1991).

26. Strictly construed, the Guidelines apply to all convicted “organizations,” see U.S.S.G., *supra* note 8, § 8A1.1, although almost all federal organizational defendants are for-profit corpora-

Sentencing Commission in 1991<sup>27</sup> may have constituted the chief impetus for this development because they create specific and substantial incentives for organizations to take preventive measures to reduce the likelihood that their employees will commit crimes. They also create incentives for corporations to take measures that should increase the likelihood that employees who *do* commit crimes will be held accountable for their misconduct.

The centerpiece of the Sentencing Guidelines structure is the fine range, from which a sentencing court selects the precise fine to impose on a convicted organization. The Commission designed the guideline provisions that established the fine range to meld the two philosophical approaches to sentencing emphasized in the enabling legislation: just punishment for the offense, and deterrence. By varying the fine based on whether, and to what extent, a company has acted "responsibly" with respect to an offense, the Guidelines embody a "just punishment for the offense" philosophy.<sup>28</sup> Consistent with this paradigm,<sup>29</sup> the Guidelines provide for substantial fines when a convicted organization has encouraged, or has been indifferent to, violations of the law by its employees, but impose significantly lower fines when a corporation has clearly demonstrated in specified ways its antipathy toward lawbreaking. At the same time, the guideline structure embodies principles derived from the deterrence paradigm.<sup>30</sup> The specified ways in which a convicted organization may demonstrate its intolerance of criminal conduct, thus enti-

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tions. See UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS (Aug. 30, 1991) [hereinafter SUPPLEMENTARY REPORT]. While this Article will generally refer to the new organizational guidelines as "corporate" Sentencing Guidelines for this reason, the Guidelines govern the sentencing of all federal organizational defendants.

27. See U.S.S.G., *supra* note 8, ch. 8.

28. 18 U.S.C. § 3553(a)(2)(A); S. REP. NO. 225, *supra* note 7, at 75-76.

29. For discussions of the theory of just punishment, see Steven Walt & William Laufer, *Corporate Criminal Liability and the Comparative Mix of Sanctions*, in WHITE COLLAR CRIME RECONSIDERED 309 (Kip Schlegel & David Weisburd eds., 1992); KIP SCHLEGEL, *JUST DESERTS FOR CORPORATE CRIMINALS* (1990); John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723 (1982); Andrew von Hirsch, *Desert and White-Collar Criminality: A Response to Dr. Braithwaite*, 73 J. CRIM. L. & CRIMINOLOGY 1164 (1982); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

30. 18 U.S.C. § 3553(a)(2)(B); S. REP. NO. 225, *supra* note 7, at 76. For general discussions of the theory of deterrence, see Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 554-61 (1989); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983); Richard Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM.

ting it to a more lenient sentence, are actions that, at least theoretically,<sup>31</sup> should discourage employees from committing offenses.

The process by which the Commission reached consensus on what should be the philosophical underpinnings of the organizational guidelines and how to draft guidelines to serve these principles was complicated and protracted. This Article traces the Sentencing Commission's path in completing that task<sup>32</sup> and considers what work lies ahead. The Article addresses four specific questions: (1) Given that the Commission's primary mandate is to facilitate greater certainty, uniformity, effectiveness and rationality in the sentencing of *individuals*, why did the Commission tackle the area of *corporate* sentencing at all? (2) How did the Commission arrive at the philosophical bases that underlie the fine provisions of the corporate sentencing guidelines? (3) How did the principles of deterrence and just punishment for the offense shape the Commission's decisionmaking with respect to the key structural issues involved in creating the corporate fine guidelines, and what other factors played a role in the construction of these guidelines? and (4) Are the corporate Sentencing Guidelines cast in stone, or can organizations and attorneys expect changes in the future?

## II. QUESTION ONE: WHY DID THE COMMISSION VENTURE INTO THE THORNY AREA OF CORPORATE SENTENCING?

As early as 1986, one year after the appointment of the first members to the Commission and one year before the promulgation of the first<sup>33</sup>

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L. REV. 409 (1980); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).

31. The Sentencing Guidelines for organizations are unprecedented for many reasons. Not only do they embody the first comprehensive system of *sentencing* laws for corporations, but they also codify an incentive-based approach to corporate sanctions that has never been utilized before, at least not in this detailed and comprehensive a form. Cf. U.S. DEP'T OF DEFENSE INSPECTOR GENERAL VOLUNTARY DISCLOSURE PROGRAM (DODIG), see 1991 ANNUAL REPORT, *supra* note 25, at A-35 to A-36 (containing similar self-policing incentives as those in the Guidelines, but the Guidelines are more far-reaching in conduct considered, and are more definite in the penalties prescribed).

Because the Guidelines are relatively new, time and experience may eventually demonstrate ways they can become more effective. Thus, one can expect the Guidelines to evolve.

32. Seven voting members comprise the Sentencing Commission. See 28 U.S.C. § 991(a). Because it is a collegial decisionmaking body, whose members have personal perspectives that will not necessarily be fully expressed through formal votes or the discourse of public meetings, definitive characterizations of its decisions are impossible. This Article will therefore offer interpretations of the more important decisions the Commission made regarding the Sentencing Guidelines for organizations.

33. The Sentencing Commission's enabling statute contemplates that "[t]he Commission peri-

iteration of individual sentencing guidelines, the Commission held its first public hearing on the topic of sentences for organizations convicted of federal crimes.<sup>34</sup> The Commission, due to time constraints and the complexity of the objectives at issue, deferred promulgation of any organizational sentencing rules until after the guidelines for individuals had been implemented.<sup>35</sup> A fundamental question that arose at the outset of the Commission's work on organizational sanctions continued to permeate its deliberative process: should the Commission involve itself in the area of corporate sentencing?

The Commission understood Congress' principal concern in establishing the Commission: unfettered judicial sentencing discretion fostered unwarranted disparity and discrimination, and other unsatisfactory results<sup>36</sup> in the sentencing of *individuals*. Congress focused primarily upon the sentencing of individuals when it enacted the Sentencing Reform Act.<sup>37</sup> The Act's lengthy legislative history contained, for example, only a handful of explicit references to organizational sentencing. While the presence of these references made clear that Congress did not intend for organizational offenders to be exempt from this scheme for sentencing reform, none of these references irrefutably demonstrated that Congress expected the Commission to promulgate mandatory guidelines for *corporate* offenses.<sup>38</sup> With prominent representatives of the business commu-

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odically shall review and revise, in consideration of comments and data coming to its attention, the guidelines." 28 U.S.C. § 994(o). Congress may amend the guidelines once a year between the date that a new session of Congress commences (generally, early January) and May 1. 28 U.S.C. § 994(p). Congress then has 180 days to review the guideline amendments, which will become effective automatically, unless Congress enacts legislation to the contrary. *Id.* The first set of guidelines took effect on November 1, 1987. Because of the demanding goals of the Sentencing Reform Act, *see generally* 28 U.S.C. §§ 991(b), 994; S. REP. NO. 225, *supra* note 7, at 161-84, the complexity of crafting guidelines that fully achieve these goals, and changing statutory penalties enacted by Congress, the Commission has already made nearly 500 refinements to the guidelines. *See* U.S.S.G., *supra* note 8, app. C (amendments to GUIDELINES MANUAL).

34. *See* SUPPLEMENTARY REPORT, *supra* note 26, at 3.

35. *Id.* at 1.

36. The unduly lenient sentences for some offenses in the existing sentencing practice concerned Congress. Thus, the enabling statute required the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m).

37. *See* S. REP. NO. 225, *supra* note 7.

38. *See id.* at 66-67, 97, 166. Indeed, in its most direct discussion of how the Commission might treat organizational offenses, the Senate Report stated:

Another area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses . . . . Given the breadth of discretion thus available to the court in the context of sentencing an organizational defendant, the Committee believes that it would be appropri-

nity urging the Commission to refrain from entering this highly complex area<sup>39</sup> and alleging that no statutory *requirement* for the Commission to promulgate corporate guidelines existed, why, then, did the Commission venture ahead?

### A. Statutory Guidance

Although the Commission never formally determined that its enabling statute *required* the promulgation of organizational sentencing guidelines, certain individual Commissioners clearly held this view. To support his belief that organizational guidelines were statutorily *mandated*, one Commissioner cited Congress' pronouncement in the enabling legislation that an organization must be sentenced to a term of probation or a fine;<sup>40</sup> he cited as well a seemingly straightforward directive in another section that the Commission "shall promulgate . . . guidelines . . . for use of a sentencing court in determining . . . whether to impose a sentence to [sic] probation, [or] a fine . . . [and] the appropriate amount of a fine or the appropriate length of a term of probation."<sup>41</sup> Since these congressional directives to the Commission failed to mention an explicit exception for organizations, and since the sanctions involved clearly pertained to organizations, this Commissioner believed that the Commission was

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ate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning such matters as: (1) considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available under the circumstances; (2) considerations relevant to the imposition of sanctions involving forfeiture, notice to victims, and restitution; and (3) considerations relevant to the selection of conditions of probation involving such judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case.

S. REP. NO. 225, *supra* note 7, at 166.

Because the Senate Report used the words "might wish to issue" and referred to "general policy statements," some argued that Congress intended the Commission to act cautiously in this area. Those who believed that Congress created a statutory duty for the Commission to issue binding guidelines for corporate sentencing, *see infra* notes 40-42 and accompanying text, noted that the topics the report identified for possible treatment through policy statements did *not* include the key issues of fine amount and whether to impose probation.

39. *See, e.g.*, Comments of the American Corporate Counsel Association on Proposed Organizational Sentencing Guidelines (on file with the authors). The Association stated:

In light of these factors, one must wonder why the Commission is going through this exercise . . . For the Commission to proceed to address a problem that may only exist in theory without a solid fact base does not seem to be the best use of Commission or Congressional resources and may well inflict real harm on the business entities subject to the guidelines.

*Id.* at 2.

40. 18 U.S.C. § 3551(c)(1), (2).

41. 28 U.S.C. § 994(a)(1)(A), (B).

obligated—if not immediately, then at least at some point in the near future—to promulgate probation and fine guidelines for convicted corporations.<sup>42</sup>

Other Commissioners were less persuaded by this formal legal argument than by their interpretation of the broader mandate Congress gave the Commission. In addition to a range of specific requirements relating to guideline and policy statement promulgation,<sup>43</sup> Congress conferred on the Commission a *general* duty to “establish sentencing policies and practices for the [f]ederal criminal justice system” that satisfy several objectives relating to effectiveness, just punishment, uniformity and certainty.<sup>44</sup> Some Commissioners believed that this more general mandate obligated the Commission to explore the possible benefits of issuing corporate sentencing rules.

#### *B. Evidence that the Courts Lacked a Coherent Rationale for Sentencing Corporations*

In the decade preceding the Commission’s work on organizational sanctions, the relevant literature clearly illustrated a lack of consensus among academics regarding corporate sentencing.<sup>45</sup> More directly relevant to the Commission’s mandate, there was evidence that some federal courts struggled with the normative question of what are the most appropriate sanctions for corporations. Furthermore, an initial empirical examination of sentencing practices in the past, undertaken by the Commission in 1988, yielded some inconclusive but troubling findings.<sup>46</sup>

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42. See also 28 U.S.C. § 994(b)(1) (requiring that the Commission establish a sentencing range “for each category of offense involving each category of defendant,” and containing no exception for organizational defendants).

43. See generally 28 U.S.C. § 994.

44. 28 U.S.C. § 991(b). See also 28 U.S.C. § 994(a)(1) (using the word “including” to indicate that statutorily listed requirements for guideline promulgation were not intended to be exhaustive); S. REP. NO. 225, *supra* note 7, at 161. Congressional hearings showed that at least some members of Congress believed the Commission had a general duty to promulgate corporate guidelines. See generally *Oversight on the U.S. Sentencing Commission and Guidelines for Organizational Sanctions: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *Guidelines for Organizational Sanctions: Hearings*].

45. See generally Michael K. Block & Joseph G. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131 (1980); John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980); Fisse, *supra* note 30; Posner, *Optimal Sentences for White-Collar Criminals*, *supra* note 30; SCHLEGEL, *supra* note 29; von Hirsch, *Desert and White-Collar Criminality*, *supra* note 29.

46. Mark A. Cohen et al., *Report on Sentencing of Organizations in the Federal Courts, 1984-*

For example, this research, limited only to a review of sentences imposed upon corporations that had the ability to pay a fine, found that the median fine courts imposed on organizations convicted of criminal offenses was substantially *less than* the actual dollar loss caused by the offense.<sup>47</sup> Since the profit from an economic crime is often the same as the loss the offense caused, this finding raised the specter that prevailing federal sentencing practices for convicted corporations were, in essence, ensuring that crime pays.<sup>48</sup>

This same research effort revealed evidence of an additional problem of particular relevance to the Sentencing Commission's mission:

[T]he most obvious pattern [in the study] 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 loss; in the other it was only [four percent] of the loss. Solvency did not appear to be an issue in any of these cases.<sup>49</sup>

While the Commission's own research focused on unwarranted disparity among corporations convicted of similar offenses, it also recognized that some members of Congress, and a majority of the public, perceived an unwarranted disparity in the severity of sentences meted out to white collar offenders when compared to the severity of sentences meted out to non-white collar offenders.<sup>50</sup> This perception is consistent with the long-

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1987, in UNITED STATES SENTENCING COMMISSION, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS (1988) [hereinafter DISCUSSION MATERIALS].

47. See *id.* at 7-11.

48. Criminal fines may comprise only a portion of the monetary sanctions imposed on a corporation. Overall, the study found that the total monetary sanctions imposed approximately equaled the loss in the median case. *Id.* at 21 (tbl. 9). Given that not all offenses are detected, this figure lends further credence to the theory that the federal sentencing system was making crime profitable for some organizational offenders.

49. *Id.* at 10-11.

50. See, e.g., *Confirmation Hearings on Federal Appointments, Hearings Before the Senate Comm. on the Judiciary*, pt.6, 101st Cong., 2d Sess. 647 (1990) (statements by Sen. Kennedy and Sentencing Commission nominee Julie E. Carnes) [hereinafter *Hearings on Appointments*]. See also *infra* text accompanying notes 94-97.

standing research tradition of social science that provides evidence of preferential treatment for white collar offenders.<sup>51</sup>

Finally, during the same period of time when some continued to argue that Congress never intended the Commission to take action in this area, the repeated formal and informal requests from members of the Senate and House Judiciary Committees regarding the Commission's progress on, and proposals for, organizational sanctions patently contradicted the contention that Congress intended organizations convicted of federal crimes to be exempt from its scheme for sentencing reform.<sup>52</sup>

On balance, since the Commission's empirical examination of sentences meted out to convicted corporations before 1988 strongly supported the belief that promulgation of corporate guidelines might further the goals of the Sentencing Reform Act, the Commissioners decided that drafting workable and reasonable corporate sentencing rules would serve the Commission's broader mandate of establishing sound and effective sentencing policies for the federal courts.

In addition to the above, the Commission undertook a review of reported decisions specifying sentences for convicted corporations. This review revealed that some courts imposed such sanctions as "corporate imprisonment"<sup>53</sup> or the compulsory endowment of a faculty chair in ethics.<sup>54</sup> The Commission judged these sanctions to be ineffective or incon-

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51. See, e.g., STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* (1988); EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UN-CUT VERSION* (1983); John L. Hagan & Ilene H. Nagel, *White Collar Crime, White Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York*, 20 AM. CRIM. L. REV. 259 (1982); Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982); MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* 284-98 (1980); Gilbert Geis, *White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961*, in *CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY* 139 (Marshall B. Clinard & Richard Quinney eds., 1967).

52. See, e.g., *Guidelines for Organizational Sanctions: Hearings, supra* note 44; *Hearings on Appointments, supra* note 50, at 646-49 (question posed by Senator Kennedy).

53. See *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856 (E.D. Va. 1988), *rev'd in relevant part*, 870 F.2d 656 (4th Cir. 1989) (tbl.).

54. See *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984). See also *United States v. John Scher Presents, Inc.*, 746 F.2d 959 (3d Cir. 1984) (vacating condition of probation that corporate defendants use promotional business to raise money for charities designated by the probation office); *United States v. Wright Contracting Co.*, 728 F.2d 648 (4th Cir. 1984) (vacating sentence of probation which imposed charitable contributions); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785 (9th Cir. 1982) (upholding a sentence requiring three companies to lend high-level executives' services to charity for one year without compensation and to pay contributions to the same charity); *United States v. Arthur*, 602 F.2d 660 (4th Cir.) (upholding requirement that white collar defendant accept full-time employment without salary in a charitable organization as

sistent with the goals of sentencing articulated in the enabling legislation. The revelation of these *ad hoc* sentencing schemes provided further support that the Commission needed to formulate systematic corporate sentencing rules.<sup>55</sup> The Commission determined that a consistent, rational policy for organizational sanctions was necessary. Given the enormous complexity of the undertaking, the question was whether the Commission could settle on an approach to developing such rules.

### III. QUESTION TWO: HOW DID THE COMMISSION ARRIVE AT THE JUST PUNISHMENT AND DETERRENCE-RELATED PHILOSOPHIES THAT UNDERLIE THE CORPORATE SANCTIONS PROMULGATED TO CONGRESS?

#### A. *The Search for "Optimal Penalties"*

While the Commission was not able to commence sustained work on organizational sanctions until after the initial set of guidelines for individual offenders was in place, the 1986 "Preliminary Draft" of sentencing guidelines for individuals laid the groundwork for later deliberations.<sup>56</sup> In addition to setting forth draft guidelines for *individual* offenders designed to elicit public comment, the Preliminary Draft contained a general discussion of issues specifically related to organizational sentencing.<sup>57</sup> Reflecting the two predominant schools of thought, the Preliminary Draft posited that organizational "[f]ines may accomplish the purposes of just punishment and deterrence, but those two purposes have different implications for the structure of fines."<sup>58</sup> At the time of the Preliminary Draft the primary Commissioner proponents of these two schools of sentencing had strict and conflicting notions of how guidelines

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part of probation), *cert. denied*, 444 U.S. 992 (1979); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389 (10th Cir. 1976) (vacating sentence of probation which included financial contribution to county alcoholism council); *United States v. Nu-Triumph, Inc.*, 500 F.2d 594 (9th Cir. 1974) (upholding condition of probation requiring company not to engage in the distribution of pornographic material); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983) (requiring bakery companies to donate fresh baked goods to specified charitable organizations).

55. The courts lacked a coherent approach to corporate sentencing. These cases are not only complex, but individual judges must address them only occasionally. See *infra* text accompanying notes 86-87.

56. UNITED STATES SENTENCING COMMISSION, PRELIMINARY DRAFT SENTENCING GUIDELINES (Sept. 1986) [hereinafter PRELIMINARY DRAFT].

57. *Id.* at 161-66.

58. *Id.* at 162.

should be structured to achieve their respective ends. Eventually, however, the Commission determined that a more relaxed conceptualization of these two purposes could coexist harmoniously in a single guideline structure.<sup>59</sup>

In 1988, after the first set of *individual* guidelines had gone into effect, the Commission elected to proceed with an exploration of what it termed the "deterrence" approach as articulated in the Preliminary Draft. In reality, the deterrence approach under review was a version of the "law and economics" theory of "optimal penalties."<sup>60</sup> The Commission decided to use the optimal penalties model as the primary means by which to elicit and examine public comment on organizational sentencing issues for two principal reasons. First, in the context of organizational as contrasted to individual penal sanctions, the theory of optimal penalties was relatively well developed—at least in concept, if not in detail. Just punishment was less well developed in theory and in practice.<sup>61</sup> In addition, using the optimal penalties approach allowed the Commission to avoid the initial conceptual hurdle of what it means to "justly" punish an entity that has "'no soul to be damned, and no body to be kicked.'"<sup>62</sup> Second, the leading proponent on the Commission for a strict just punishment approach to sentencing had recently resigned from the Commission. His resignation was prompted in part by the Commission's rejection of his proposed guideline structure, a system derived from the just punishment paradigm.<sup>63</sup> The leading proponent of the optimal penalties paradigm was chairman of the Commission's organizational sanctions project.

According to its proponents, a guideline structure adhering to the optimal penalties approach required that a court base fines on two calcula-

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59. See *infra* notes 60-81 and accompanying text. This change occurred after a change in the Commission's membership. In 1986, Commissioner Paul Robinson was a proponent of a strict application of the just desert paradigm. Commissioner Michael Block was a proponent of a strict "optional penalties" deterrence-oriented approach. The Commission moved toward more flexible treatment of the purposes of sentencing after these Commissioners had resigned. See Nagel, *supra* note 1, at 914-20.

60. For further discussion of the optimal penalties approach, see *supra* note 30 (authorities cited therein).

61. For a description of how the Commission initially conceptualized organizational guidelines under a just punishment approach, see PRELIMINARY DRAFT, *supra* note 56, at 164. For further discussion of the just punishment theory, see *supra* note 29 (authorities cited therein).

62. See John C. Coffee, Jr., "No Soul To Damn: No Body To Kick": *An Unscandalized Inquiry Into The Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward, First Baron Thurlow, Lord Chancellor of England).

63. For a discussion of the Commission's deliberations regarding the just desert draft guidelines, see Nagel, *supra* note 1, at 918-20.

tions: "the value, converted into money, of all harm caused [by the offense] and the probability of conviction."<sup>64</sup> While the challenge of reducing harms to monetary terms proved formidable, the Commission was willing to undertake these challenges, as demonstrated by the approach it ultimately adopted in the corporate fine guidelines.<sup>65</sup> However, the Commission received what later proved to be insurmountable objections to other aspects of the optimal penalties approach in the form in which it was advanced.

The first of these objections related to the implementation of the requirement that fines be based, in part, on the likelihood of conviction. In a set of draft guidelines the Commission circulated for public comment in 1988,<sup>66</sup> the likelihood of conviction was to be measured by estimates of the probability of detection; these estimates were derived from survey responses as to likely detection rates for each individual offense.<sup>67</sup> After an exhaustive but frustrating effort, the strict optimal penalties proponents on the Commission and Commission staff conceded that "[a]ny estimates of multiples [reflecting the probability of detection], however they are derived, are likely to be fairly rough approximations."<sup>68</sup> They believed, however, that rough estimates in the cause of a pure theory were better than any next best alternative.<sup>69</sup>

In the end, the majority of Commissioners could not support this method of determining what are the optimal penalties for each category of offense. Estimates about the probability of detection based on non-random survey responses were judged to be too "rough," bordering on mere assumptions; empirical verification of these rough estimates was impossible. Furthermore, the optimal penalties draft guidelines contemplated that judges would make subsequent independent judgments as to whether any of ten specified factors had "materially increased [or de-

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64. PRELIMINARY DRAFT, *supra* note 56, at 164.

65. Part C of the Guidelines governs the imposition of fines and requires judges to make two principal calculations, one assessing the seriousness of the offense, *see* U.S.S.G., *supra* note 8, § 8C2.4, the other assessing an organization's "culpability." *See id.* § 8C2.5. The former calculation generally uses three alternative measures to gauge offense seriousness, including the "loss" the offense caused. *See id.* § 8C2.4(a)(3). In some instances, the Guidelines provide special rules that serve as proxies for measuring loss. *See id.* §§ 8C2.4(b), 8C2.4 (comment. (n.5)).

66. *See Proposed Chapter Eight for the Guidelines Manual*, in DISCUSSION MATERIALS, *supra* note 46.

67. *See* U.S.S.G., *supra* note 8, §§ 8B3.1, 8B3.2.

68. Parker, *supra* note 30, at 55.

69. *Id.*

creased] the difficulty of detecting and prosecuting the offense."<sup>70</sup> Thus, a sentencing court would, in each case, have to modify the presumptive offense multiple, where the presumptive offense multiple reflected mere estimates of the probability of detection. This approach, requiring each sentencing judge to make an independent assessment of an inherently speculative factor—but one that could substantially affect the fine—appeared unworkable to the majority of the Commissioners, however persuasive or noble the theory of optimal penalties was in the abstract.

Other concerns with the pure optimal penalties approach, as it was proposed, included: (1) an exaggerated concern for the possibility of overdeterrence; (2) the view of corporate probation as never an appropriate sanction; (3) the fact that the approach completely disregarded the organization's gain when assessing the seriousness of the offense; and (4) the perception that in certain circumstances, the proposed fines appeared to result in unjust or ineffective sanctions.

Regarding the proposal of probation as a corporate sanction, the Commission included in the 1988 Discussion Materials (in which the draft optimal penalties guidelines figured significantly) an exploration by three prominent academics of a more expansive use of probation than the law and economics adherents supported.<sup>71</sup> The academics argued that while limitations on the use of corporate probation were important,

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.<sup>72</sup>

Ultimately every Commissioner, except one, was persuaded that the strict optimal penalties approach to probation was too grudging and too restrictive,<sup>73</sup> at least in the form in which it had been advanced. The majority of the Commission wanted to explore the viability of corporate probation as part of any package of sanctions submitted for congressional

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70. *Proposed Chapter Eight for the Guidelines Manual*, in DISCUSSION MATERIALS, *supra* note 46, §§ 8B3.1, 8B3.2.

71. See John C. Coffee, Jr., et al., *Draft Proposal on Standards for Organizational Probation*, in DISCUSSION MATERIALS, *supra* note 46.

72. *Id.* at 8.

73. Ultimately, the Commission chose to afford courts a large degree of discretion in determining whether to impose probation. The Commission's probation guidelines established several mandatory grounds for probation. U.S.S.G., *supra* note 8, §§ 8D1.1(1)-(5). In addition, the courts retain flexibility to impose probation in other instances. *Id.* §§ 8D1.1(6), (8). See *infra* notes 149-54 and accompanying text.

review. Furthermore, a majority of the Commission rejected the optimal penalties adherents' strong belief that loss alone, and not the profit or "gain" from an offense, should establish the base amount of the fine,<sup>74</sup> because this view directly conflicted with the congressional policy set forth in the general fine statute.<sup>75</sup> The idea also evoked concern that organizations would have an incentive to break the law if the potential loss was uncertain or speculative, but the potential profit from the offense was significant.<sup>76</sup>

A final concern with the strict optimal penalties approach related to the tension between theoretical ideals and the real world. For example, the concept of deriving an "optimal" penalty for an offense assumes that precisely the right fine will induce the corporation to expend precisely the right quantity of resources to "control" its agents and prevent them from breaking the particular law in question.<sup>77</sup> Suppose, however, that a firm responded to the threatened sanction by exerting its best efforts to achieve compliance—diligent efforts by any objective measure—and, despite these efforts, one of its employees violated the law. It is well settled in legal scholarship that the interests of employees and the corporation often diverge.<sup>78</sup> The question for the Commission was whether to treat at sentencing a company that clearly demonstrated good faith and diligent efforts to achieve compliance the same as a company that made no compliance-related effort at all. This question arose because, under federal law, an organization's compliance efforts generally will not insulate it from criminal liability.<sup>79</sup> Under the strict optimal penalties approach advanced to the Commission, the fine imposed on a company that had rigorously attempted to achieve compliance generally would be the same

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74. See Parker, *supra* note 30, at 35-42.

75. See 18 U.S.C. § 3571(d) (providing for an alternative fine maximum based on twice the pecuniary gain or loss from the offense). See also 15 U.S.C. § 78u-1(a)(2) (1988) (establishing maximum civil penalties for insider trading of up to three times the profit gained or loss avoided).

76. Proponents of the optimal penalties approach conceded this flaw, but argued that only in rare circumstances would gain significantly exceed loss. Parker, *supra* note 30, at 40. The Commission's later research verified that gain would exceed loss in only about two percent of the cases. See SUPPLEMENTARY REPORT, *supra* note 26, at 22. However, since ignoring gain in these cases could result in profitable crime, and since Congress had provided for the use of gain in setting fines, see *supra* note 75, the Commission was extremely reluctant to ignore this measure of offense seriousness. As adopted, the fine guidelines for organizations establish the measure of offense seriousness by requiring a sentencing court to use the highest of three alternative methods, including gain. See U.S.S.G., *supra* note 8, § 8C2.4.

77. See Parker, *supra* note 30, at 4.

78. See Coffee, *supra* note 62, at 393-400.

79. See *infra* note 157.

as the fine imposed on a company that made no serious effort to achieve compliance.<sup>80</sup> The Commission's early sensitivity to this limitation in the optimal penalties approach sowed the seeds for the just punishment principles it incorporated into the corporate guidelines ultimately enacted.

In sum, for the foregoing reasons and others the Commission concluded in late 1989, after a protracted review of the approach favored by the law and economics community, that a pure optimal penalties/deterrence based system of sanctions would not lead to a workable and defensible set of corporate guidelines.<sup>81</sup>

### B. *No Safety in Numbers*

The Commission's enabling statute requires that in the development of its guidelines, the Commission consider the "average sentences imposed" for relevant categories of cases sentenced in the past.<sup>82</sup> The same statutory provision advises that "the Commission shall not be bound by such average sentences," and expressly cautions that any guidelines promulgated should "reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."<sup>83</sup> Given these statutory directives, after an extensive review and a significant number of normative refinements, the Commission found that in setting penalty levels for individuals it clearly could not "write guidelines rotely mimicking past practice,"<sup>84</sup> but concluded that past practice could serve as a useful

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80. The optimal penalties draft guidelines listed compliance efforts aimed exclusively at prevention as one of the 10 factors that the court should consider in deciding whether the case was atypical in terms of the detectability of the offense. See *Proposed Chapter Eight for the Guidelines Manual*, in DISCUSSION MATERIALS, *supra* note 46, § 8B3.2. Under this approach, because preventive compliance efforts constituted only one of 10 potentially relevant factors, one could generally expect compliance efforts to have, at most, a marginal impact on the fine.

81. It is possible that if the proponents of the law and economics approach had been amenable to a system of guidelines derived *largely* rather than *exclusively* from the optimal penalties/deterrence theoretical paradigm, support for adopting such a guideline system might have emerged. However, as in the development of the individual guidelines, those who subscribed to a particular theoretical perspective, either just deserts or deterrence, viewed compromise as unacceptable. In both instances, however, attaining consensus for such a strict approach was difficult because a majority of the Commission was committed to an amalgam approach, where guidelines would serve the twin purposes of just deserts and deterrence. The majority emphasized the statute and Congress' rejection of single purpose guidelines to justify their position. See *infra* notes 123-31 and accompanying text.

82. 28 U.S.C. § 994(m).

83. *Id.*

84. Nagel, *supra* note 1, at 928.

starting point or "anchor" for its analysis.<sup>85</sup> In contrast to the guidelines for sentencing individual offenders, past practice played a considerably less pronounced role in the development of the corporate guidelines, especially with respect to setting penalty levels. There are essentially five reasons why past practice data were less significant in the corporate context.

First, as with any empirical analysis, a sufficient quantity of data is necessary if generalizations based on these data are to be robust, valid, and reliable. The Commission's review of data on sentencing for the years 1984 through 1990 demonstrated that the federal courts sentenced approximately 300 to 400 convicted organizations each year.<sup>86</sup> In comparison, the federal courts sentenced approximately 40,000 to 45,000 convicted individuals each year.<sup>87</sup> Furthermore, significant variations among past organizational defendants, in terms of net worth, gross annual revenue, and other factors, existed within the relatively small universe of organizational sentencing cases.<sup>88</sup> Thus, from the outset, it was clear that it would be difficult to draw supportable generalizations from this small population of heterogeneous cases.

Second, as described above,<sup>89</sup> the Commission's empirical research strongly suggested that past organizational sentencing practices were suspect from a normative perspective. Profits derived from many past offenses apparently exceeded the monetary sanctions imposed. Furthermore, courts sometimes relied on questionable "penalties" such as compulsory contributions to court-designated charities. Requiring the corporation to give to charity prompted some critics to argue that the courts, while well meaning, were devising sanctions that ultimately conferred honor on the offending corporation.

Third, in the era of the "Ill Wind" defense procurement fraud scan-

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85. *Id.* at 930. *See id.* at 927-32 (discussing the role that past sentencing data played in devising the first federal sentencing guidelines for individuals). *See also* Breyer, *supra* note 7, at 17-25.

86. *See* SUPPLEMENTARY REPORT, *supra* note 26, at D-1 (app. D).

87. According to the Reports of the Administrative Office, based on a fiscal year which runs July through June, 46,725 defendants were sentenced in 1990. There were 44,524 sentenced in 1989, and 42,902 in 1988. Comparatively, in 1984, 36,104 defendants were sentenced in the federal courts. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1990).

88. *See generally* SUPPLEMENTARY REPORT, *supra* note 26 (tbls. following p. 24). The data showed, for example, that approximately equal numbers of organizational defendants in the period 1988 through June 30, 1990 were insolvent, had net worths of \$100,000 to \$499,000, and had net worths of over \$1 million. *See id.* (tbl. 10).

89. *See supra* notes 46-48 and accompanying text.

dals,<sup>90</sup> extremely high profile insider trading prosecutions<sup>91</sup> and convictions,<sup>92</sup> heightened concern for environmental crimes, and highly publicized cases of corporate offenses such as the Beech-Nut adulterated apple juice scam,<sup>93</sup> the public's attitude toward white collar crime was changing. Many believed that courts had underpunished these offenses in the past.<sup>94</sup> This public perception directly related to the Commission's mission, because its enabling statute required the Commission to consider the "community view of the gravity of the offense" and the "public concern generated by the offense" in drafting its guidelines.<sup>95</sup> Moreover, Congress had itself written admonitions into the Sentencing Reform Act's legislative history that current sentencing practices were "creat[ing] the impression" that fines in white collar cases "can be written off as a cost of doing business"<sup>96</sup> and that "white collar offenders . . . frequently do not receive sentences that reflect the seriousness of their offenses."<sup>97</sup> Given public and congressional views that the federal courts inadequately punished economic crimes, data reflecting past sentencing practices, especially as evidence regarding appropriate penalty levels, were of limited utility to the Commission.

Fourth, and of related importance, Congress had recently raised the maximum penalty levels contained in a number of fine statutes applicable to organizational crimes.<sup>98</sup> This action signaled congressional concern

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90. The "Ill Wind" investigation alleged that payments were made to government officials in exchange for secret information about pending government contracts. *See, e.g.*, *United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 4, 1992) (No. 92-960); Paula Dwyer, *Nobody's Laughing at Ill Wind Now*, *Bus. Wk.*, Jan. 23, 1989, at 34.

91. *See, e.g.*, *SEC v. Levine et al.*, Litig. Release No. 11,095 [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,717, at 93,481 (May 12, 1986).

92. *See, e.g.*, *SEC v. Boesky*, Litig. Release No. 11,288 [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,991, at 94,856 (Nov. 14, 1986) (involving a \$100 million settlement for insider trading); *SEC v. Drexel Burnham Lambert, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,474, at 93,026 (June 20, 1989) (\$650 million settlement for insider trading).

93. *See United States v. Beech-Nut Nutrition Corp.*, 677 F. Supp. 117 (E.D.N.Y. 1987), *aff'd*, 871 F.2d 1181 (2d Cir. 1989).

94. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPT' OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, 162, tbl. 2.23 (1985) (survey indicating that 65% of Americans viewed sentences for white collar defendants as too lenient).

95. 28 U.S.C. § 994(c)(4), (5).

96. S. REP. NO. 225, *supra* note 7, at 76.

97. *Id.* at 77.

98. *See, e.g.*, Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-174, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.); Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4631 (codified as amended in scattered sections of 10, 18, 28, 31 & 41 U.S.C.);

that the penalties imposed were sometimes too low.<sup>99</sup> It also meant that the fines imposed in past cases would necessarily be poor indicators of fine levels that would (or should) have been imposed had the higher statutory maximums been in force at the time the courts imposed the past sentences.

Finally, evidence existed that prosecution policies were changing in the years immediately preceding promulgation of the organizational guidelines. Specifically, it appeared that prosecutors increasingly targeted larger, publicly traded companies during this period.<sup>100</sup> Thus, at a minimum, the Commission would have to scrutinize the data carefully before it could assume that past penalties were germane to current organizational cases.

Notwithstanding the foregoing discussion, empirical analyses of past sentencing practices were useful to the Commission for the insight they provided into federal organizational crimes and sentencing patterns. The Commission ultimately collected the most extensive data base ever compiled<sup>101</sup> on sentences imposed by the federal courts upon convicted organizations, spanning the years 1984 through mid-1990.<sup>102</sup> These data revealed the kinds of organizations sanctioned, the offenses for which convictions were obtained, the penalties imposed, and key factors that affected the nature of the sanction and the size of the fine.<sup>103</sup> The data

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Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18 to 3207-39 (codified in scattered sections of 12, 18, & 31 U.S.C.); Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (codified as amended in scattered sections of 18 U.S.C.). More recently Congress raised the maximum statutory penalty from \$1 million to \$10 million per count for antitrust offenses. See Sherman Act, Pub. L. No. 101-588, § 4, 104 Stat. 2880 (1990).

99. The House Report to the Criminal Fine Enforcement Act of 1984 stated, for example, "The maximum fine levels are currently too low and should be increased to the point where they can no longer be considered a cost of doing business." H.R. REP. NO. 906, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.A.N. 5433, 5434.

100. See Cohen, *supra* note 22, at 252; SUPPLEMENTARY REPORT, *supra* note 26, tbl. 8 (showing increase in number of publicly traded corporations sentenced from 1988 to 1989, and an increased rate of such sentences in the first half of 1990).

101. One significant earlier study of illegal organizational conduct looked at cases from 1975 and 1976. See MARSHALL B. CLINARD, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, ILLEGAL CORPORATE BEHAVIOR (1979). This study analyzed fewer total cases than the Sentencing Commission's study, focused only on larger cases, and did not attempt to distinguish between criminal and civil enforcement.

102. For a description of the empirical analyses conducted by the Commission, see SUPPLEMENTARY REPORT, *supra* note 26, at 1, D-1 to D-3 (app. D).

103. See generally *id.* at 17-21 (and corresponding tables). Among the more salient conclusions, the Commission found that past fine amounts tended to increase as loss amounts increased, although fine/loss multiples were higher with smaller loss amounts. *Id.* at 18. The Commission also found

also allowed the Commission to "model" sentencing outcomes that could be expected under the various draft guidelines it was considering, including the final set of guidelines ultimately promulgated to Congress.<sup>104</sup>

In sum, while the data did permit the Commission to make reasonably well-informed decisions with respect to the consequences of the guidelines ultimately adopted, the data on past sentencing practices provided relatively little assistance in the development of a normative roadmap for these guidelines.

With pure theory and past practice data both failing to chart a definite course, what remained the best alternative for the Commission was to develop policies for sentencing based on practical insight, informed judgment, a desire to achieve the key purposes of organizational sentencing, and, perhaps most importantly, a willingness to formulate a rational and reasonable compromise.

### C. *Toward Practical Conceptualizations of Just Punishment and Deterrence*

Once the Commission recognized that the strict optimal penalties approach, as advanced by its proponent on the Commission, did not produce a consensus among Commissioners, the Commission embarked upon a nearly three-year effort to find practical and effective principles to guide its drafting of corporate sanctions. This process included: (1) formally publishing four sets of draft guidelines for public comment;<sup>105</sup> (2) circulating numerous informal working drafts to interested parties for comment; (3) convening groups of academics, practitioners, judges and probation officers to react to key drafts; (4) holding five public hearings on organizational sanctions;<sup>106</sup> and (5) reviewing approximately 400 sep-

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that fine amounts tended to correlate with the level of the most senior official who had knowledge of the offense (i.e., highest fines were imposed when top executives were involved and lowest fines were imposed when management personnel were not involved). *Id.* at 20. Loss and level of hierarchical involvement are also significant for fine amounts under the Guidelines. *See* U.S.S.G., *supra* note 8, §§ 8C2.4(a)(3), 8C2.5(b).

104. *See* SUPPLEMENTARY REPORT, *supra* note 26, at 21-24 (and corresponding tables).

105. Two draft "options" were published in 1989. *See* 54 Fed. Reg. 47,056 (1989). In 1990, a Commission draft and a proposal the Commission published at the request of the Department of Justice were also published. *See* 55 Fed. Reg. 46,600 (1990).

106. In addition to holding a hearing on June 10, 1986, the Commission convened public hearings dealing with organizational sanctions on October 11, 1988, December 2, 1988, February 14, 1990, and December 13, 1990.

arate written comments submitted from the public.<sup>107</sup>

It was during this lengthy deliberative process that a consensus slowly began to emerge with regard to how best to establish fines—the necessary centerpiece of any set of organizational sentencing guidelines. This consensus view took shape early from a Commission-appointed “Corporate Defense Attorney Working Group.” The Commission convened this advisory group to determine whether a consensus approach could be devised that would take account of the multiple underlying complexities involved in corporate sentencing.<sup>108</sup> While this advisory group ultimately declined to suggest specific guideline proposals, leaving the details to the Commission, the group submitted a set of general recommendations, urging “a system for sentencing of organizations . . . that provide[s] proper *incentives for organizational managers to prevent crime, and that punish[es] on the basis of harm and culpability.*”<sup>109</sup>

The principles recommended by the advisory group embodied twin premises: (1) that organizational fine guidelines should provide incentives to companies that will reduce the likelihood of crime; and (2) that organizational punishment should vary according to principles of institutional “culpability.” In 1990, as the Commission approached a new amendment cycle,<sup>110</sup> United States Sentencing Commission Chairman William W. Wilkins, Jr., working together with the full Commission, distributed a memorandum proposing fifteen principles; these principles were intended to guide drafting in what many hoped would be the final deliberative phase before promulgation. After consultation and review, the Commission unanimously adopted these principles<sup>111</sup> and relied on them, subject to important refinements over the succeeding months, to produce the package of organizational sanctions ultimately adopted. While the fifteen principles provided structural and substantive direction in many respects,<sup>112</sup> the sixth principle, which provided that the guide-

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107. Many of the submissions are lengthy, detailed and similar to legal briefs. These submissions are on file with the United States Sentencing Commission, Office of the Communications Director.

108. Joseph E. diGenova chaired the group. Robert Bennett, Samuel Buffone, Ernest Gellhorn, Robert E. Jordan, Carl Rauh, Bert Rein, Earl Silbert, Winthrop M. Swenson, Justin Thornton, and Victoria Toensing also participated.

109. Letter from Joseph E. diGenova to Chairman William W. Wilkins, Jr., 1-2 (May 19, 1989) (on file with the United States Sentencing Commission) (emphasis added).

110. See *supra* note 33.

111. SUPPLEMENTARY REPORT, *supra* note 26, app. A (setting forth the principles adopted).

112. A number of key principles directly influenced the guidelines actually promulgated. These include: Principle No. (1), providing that restitution be required “regardless of any other sanctions . . . imposed,” *id.* (Principle No. (1)); *cf.* U.S.S.G., *supra* note 8, § 8B1.1; Principle No. (3), provid-

lines “be designed to reduce fines for two primary reasons: to recognize an organization’s relative degree of culpability; and to encourage desirable organizational behavior,”<sup>113</sup> was especially significant. Interestingly, these concepts—organizational culpability and what many eventually termed “carrot and stick”<sup>114</sup> incentives to control crime—are in fact surrogates for the traditional sentencing principles of just punishment and deterrence. These goals became the cornerstones for the fine provisions of the organizational guidelines. The guidelines fleshed out these principles, not by reference to abstract theory or inapt data regarding past sentencing practices, but rather by drawing upon the wealth of public comment and expertise generated by its exhaustive notice and comment and deliberative process.<sup>115</sup>

IV. QUESTION THREE: HOW DID THE PRINCIPLES OF JUST  
PUNISHMENT (ORGANIZATIONAL CULPABILITY) AND  
DETERRENCE (CARROT AND STICK INCENTIVES)  
SHAPE THE FINE GUIDELINES WITH  
RESPECT TO KEY STRUCTURAL ISSUES—  
WHAT OTHER FACTORS PLAYED A ROLE?

A. *Compromise*

In answering the third question, it is perhaps strategic to start with one of the “other factors” first, since its influence was pervasive. This particular factor—the need to develop sentencing policy through reasonable

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ing that offense seriousness “be based on the higher of the pecuniary loss, the pecuniary gain, or an amount corresponding to the guideline offense level,” SUPPLEMENTARY REPORT, *supra* note 26 (Principle No. (3)); *cf.* U.S.S.G., *supra* note 8, § 8C2.4; and Principle No. (10), providing:

Organizational probation is warranted when necessary (1) to ensure that a monetary penalty is paid; (2) to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; and (3) to impose another remedy that can only be imposed as a condition of probation. Organizational probation may also be appropriate in other circumstances. (Because of the lack of judicial experience with organizational probation as an independent sanction, the Commission should identify the heartland areas in which probation is clearly appropriate.)

SUPPLEMENTARY REPORT, *supra* note 26 (Principle No. (10)); *cf.* U.S.S.G., *supra* note 8, § 8D1.1.

113. See SUPPLEMENTARY REPORT, *supra* note 26, at A-2 (app. A).

114. One of the earliest public expressions of this term was made during a congressional oversight hearing on the progress and direction the Commission was taking with respect to organizational guidelines. See *Guidelines for Organizational Sanctions: Hearings*, *supra* note 44 (statement of William W. Wilkins, Jr.). See also Winthrop M. Swenson & Nolan E. Clark, *The New Federal Sentencing Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, 1 CORP. CONDUCT Q. 1, 1 (Winter 1991).

115. See *supra* notes 105-09 and accompanying text.

compromise—influenced the determination of how other factors would affect any fine calculus. As previously noted,<sup>116</sup> by statutory design, the Commission is a collegial body. Congress anticipated that Commissioners would reflect “a diversity of backgrounds”<sup>117</sup> and therefore, necessarily, that the Commission “should be a body which can cooperate”<sup>118</sup> as it developed sentencing policy.

Congress’ statutory requirements that the Commission be bipartisan, comprised of judges and non-judges, and represent a wide array of background and experience, guaranteed a diversity of views.<sup>119</sup> Congress generally assumed that the Commission’s development of any sentencing guidelines would necessitate sensible, action-oriented compromise. Because of the way in which the terms of the initial appointees to the Commission were staggered, the Commission’s composition changed during the time the Guidelines were under study.<sup>120</sup> Unexpectedly, however, those Commissioners who subscribed either to the orthodox application of just desert principles, or deterrence principles, no longer served when the Commission prepared the final structure of the organizational Guidelines.<sup>121</sup> When the Commission finally voted on the Guidelines promulgated to Congress, the vote was unanimous. Several Commissioners, however, made individual statements to prevent an interpretation that they agreed with all of the provisions of the Guidelines merely because they voted in support of the package of sanctions. The final product does not reflect the view of any one Commissioner, but rather a consensus view of what many hoped would represent a workable beginning<sup>122</sup>

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116. *See supra* note 10 and accompanying text.

117. S. REP. NO. 225, *supra* note 7, at 160.

118. In determining what size fines are appropriate for each offense, some Commissioners worried about fines that would be inadequate to deter or punish. In contrast, others worried about fines that might over-deter and force legitimate corporations out of business or lead to an unwarranted decrease in competitiveness. The fine structure ultimately adopted reflects these countervailing concerns.

119. *See generally* 28 U.S.C. § 991(a); S. REP. NO. 225, *supra* note 7, at 159-60.

120. The seven members first appointed in 1985 were confirmed for terms varying from two to six years. *See* 28 U.S.C. § 992(a).

121. The following Commissioners served on April 26, 1991, when the Commission voted to promulgate the organizational guidelines: William W. Wilkins, Jr., Chairman; Julie E. Carnes; Helen G. Corrothers; Michael S. Gelacak; George E. MacKinnon; A. David Mazzone; Ilene H. Nagel; Paul L. Maloney, who was at the time the ex-officio, non-voting representative of the Attorney General; and Benjamin F. Baer, who served as the ex-officio representative of the Parole Commission until his death on April 9, 1991.

122. As has been the case with the individual guidelines, the corporate guidelines can be expected to evolve. *See generally infra* part V.

approach.

Because this Article has underscored the importance of compromise to the drafting process, one should note that this compromise operated not as a horse trading process of "this for that" between Commissioners, but rather through mutual respect for such competing concerns as over- and under-deterrence, and excessive and insufficient punishment. Similar to the development process of the individual guidelines,<sup>123</sup> compromise in drafting the organizational guidelines consisted, first, of a group commitment to creating a reasonable and workable product. In order to settle on a single unified approach, the search for the perfect could not become the enemy of the good.<sup>124</sup> In the process of guideline drafting, this is a particularly difficult principle to accept. With the advent of the Sentencing Reform Act, virtually all observers recognized the tremendous imperfections of the pre-guideline sentencing system, where, for example, there was (1) no consensus regarding the purpose(s) of sentencing; (2) no guidance regarding what constituted an appropriate sentence; (3) no appellate review for excessive severity or leniency; (4) almost completely unfettered judicial and prosecutorial discretion; (5) no safeguard against unwarranted disparity; and (6) no commitment to imposing sentences to serve agreed upon articulated goals, such as deterrence and just punishment. Nevertheless, when the Commission took on the task of writing rules to reform and improve this system, the temptation was great to reject any attempt that had potential flaws. Eventually, the Commission accepted that designing a perfect system was not within its reach. Thus, the Commission's standard was whether what it proposed could improve the extant system, not whether it would handle all of the complexities and solve all of the inequities of the criminal justice process.

Against this background, compromise required the Commission to openly and candidly recognize: (1) the limits of what could be known;<sup>125</sup>

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123. See generally Breyer, *supra* note 7.

124. See *id.* at 2 ("[I]n guideline writing, 'the best is the enemy of the good.'").

125. For example, the Guidelines allow a court to reduce fines if a company had a qualifying compliance program at the time of the offense. See U.S.S.G., *supra* note 8, § 8C2.5(f). While the Commission provided substantial guidance in defining "an effective program to prevent and detect violations of law," see U.S.S.G., *supra* note 8, § 8A1.2 (comment. (n.3(k))), it deliberately did not attempt to describe definitively the features that a qualifying program must contain. The Commission recognized that the "science" of what constitutes an effective program is still at an early stage and that company specifics will influence effectiveness. Thus, the Commission defined only general principles and provided examples, allowing companies flexibility to design programs that are appropriate for them. The Commission used this approach of "structured flexibility" throughout the Guidelines.

(2) various institutional constraints;<sup>126</sup> and (3) other constraints, such as the import of laws the Commission did not make<sup>127</sup> and public perception of its work.<sup>128</sup> In these practical and necessary ways, compromise played a vital role in allowing the Commission to resolve most of the key issues it had before it.

Finally, the Commission deemed some problems intractable or insoluble without further experience and experimentation. The necessity of compromise required deferral of these issues despite recognition of their ultimate importance.<sup>129</sup>

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126. For example, experience informed the Commission that a desire to achieve uniformity through overly-detailed and overly-complex guidelines can backfire, with complexity actually fostering inconsistent results. Consequently, the Commission devoted much attention to the reports of a working group of probation officers. Assembling the group to review draft corporate guidelines, the Commission recognized that probation officers play a prominent role in the sentencing process. See FED. R. CRIM. P. 32(c)(2)(B) (requiring probation officer to prepare a presentence report containing a proposed application of the Sentencing Guidelines to the defendant's case).

127. The Commission was required to acknowledge the well-settled federal law of vicarious criminal liability, and the possible applicability of non-criminal sanctions for the same conduct giving rise to the federal criminal sentence. See *infra* parts IIIC & IIIF.

128. Public perception affected at least one structural feature of the Guidelines. The staff used 15 drafting principles in the final effort to produce the corporate Guidelines. These principles directed them to consider a scheme that *presumed* highly culpable conduct (and therefore high fines), but would allow a corporate defendant to "mitigate down" by showing less culpability. See SUPPLEMENTARY REPORT, *supra* note 26, at A-2 (app. A) (Principle No. (4)).

Although the Commission initially believed this approach might be desirable by forcing the convicted corporation to bear the burden of *demonstrating* reduced culpability, many commentators believed this approach was unbalanced because it provided for only mitigating factors and not aggravating factors. Although either approach would lead to essentially the same result, the Commission ultimately adopted a culpability measuring scheme that presumed average culpability but which varied as a court considered aggravating *or* mitigating factors. See U.S.S.G., *supra* note 8, § 8C2.5. The Commission wanted to prevent perceptions of a lack of balance to skew proper application and understanding.

Yet another example of the influence of public perception centered on the determination that the Guidelines would not permit a fine to go to zero dollars other than by way of departure. While the Commission could identify the rare case in which restitution alone would serve the purposes of deterrence and just punishment, it feared that a fine of zero dollars would be misinterpreted as a repudiation of the government's decision to prosecute or of Congress' decision to proscribe some behavior as unlawful. Many responded during the public commentary that the zero fine was subject to this misinterpretation. Thus, the Commission directly prescribed no zero dollar fines in the Guidelines.

129. The Commission discussed at length the question of whether and how to coordinate criminal and civil sanctions within each case. It was unable to resolve the issue, however, because no one could identify workable solutions to the array of problems attendant to such coordination. See *infra* part IIIF.

*B. The Overall Framework of the Corporate Guidelines: A Structural Basis for the Fine Guidelines' Focus on Just Punishment and Deterrence*

Before specifically discussing how just punishment and deterrence principles shaped the fine provisions of the corporate guidelines, it is useful to understand how the fine provisions fit within the overall framework of the corporate guidelines. Just punishment and deterrence became extremely important to the fine provisions of the Guidelines because Congress directed the Commission to foster these statutory purposes of sentencing,<sup>130</sup> and because these purposes are, for the most part, not addressed elsewhere in the corporate Guidelines.

The Guidelines are comprised of three principal substantive parts. First, "Remedying Harm from Criminal Conduct"<sup>131</sup> stands for the principle that, regardless of the culpability or fault of a corporation in committing an offense, it should "take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by [that] offense."<sup>132</sup> Similar to the general statutory scheme,<sup>133</sup> restitution,<sup>134</sup> which is solely designed to make victims whole again, is completely distinct from the punitive portion of any sanction.<sup>135</sup>

The second major substantive part of the Guidelines governs fines. Here, the Commission divided convicted corporations into two groups. "Criminal purpose organizations" are organizations that have "operated primarily for a criminal purpose or primarily by criminal means."<sup>136</sup> These kinds of organizations include, for example, those operating a boiler room fraud scam, or engaging in hazardous waste disposal where

130. Some of the statutory purposes of sentencing that the Commission is directed to foster, see 28 U.S.C. § 991(b)(1)(A), include just punishment, deterrence, incapacitation, and rehabilitation. See 18 U.S.C. § 3553(a)(2).

131. U.S.S.G., *supra* note 8, pt. B.

132. *Id.* (Introductory comment.).

133. See 18 U.S.C. § 3556 (authorizing restitution as an independent sanction).

134. Part B of the Guidelines (Remedying Harm from Criminal Conduct) also authorizes remedial orders and a narrowly defined version of community service when these sanctions are more suitable to remedy harm than restitution. See U.S.S.G., *supra* note 8, § 8B1.2 (Policy Statement); *id.* § 8B1.3 (Policy Statement).

135. The Commission recognized a possible exception to this general rule. In instances in which the remedial costs stemming from an offense greatly exceed the organization's gain from the offense, the costs of remedying the harm may appear punitive. In such cases, the Commission has authorized a possible departure from the Guidelines, especially if the level and extent of involvement by those with "substantial [discretionary] authority" is minimal. See U.S.S.G., *supra* note 8, § 8C4.9 (Policy Statement).

136. U.S.S.G., *supra* note 8, § 8C1.1.

the company had no legitimate means of disposing of the waste.<sup>137</sup> For these relatively uncommon organizational defendants,<sup>138</sup> the Commission determined that the sentencing purpose of incapacitation<sup>139</sup> is most apt. Accordingly, the Sentencing Guidelines direct sentencing courts to set the fine for a criminal purpose organization sufficiently high to divest the organization of its assets, if possible.<sup>140</sup>

All other organizations are subject to a different set of fine provisions.<sup>141</sup> These provisions mandate two basic calculations in determining the applicable fine. The first calculation seeks to assess the seriousness of the offense the corporation has committed. Under the Guidelines, the court generally<sup>142</sup> determines the seriousness of the offense by choosing the highest of (1) an amount from a table (corresponding to an "offense level" calculation made under the individual guidelines); (2) the gain from the offense; or (3) the pecuniary loss caused by the offense, to the extent that the loss was intentionally, knowingly, or recklessly caused.<sup>143</sup>

Once the sentencing court makes this initial "base fine" calculation, the actual fine level may vary substantially, according to the court's determination of the organization's "culpability score."<sup>144</sup> As explained below,<sup>145</sup> by crediting such corporate actions as whether the company had a rigorous compliance program at the time of the offense<sup>146</sup> or voluntarily reported the crime to the authorities,<sup>147</sup> the culpability score is the means by which the fine provisions of the Guidelines implement the sentencing purposes of just punishment and deterrence. The "culpability score" establishes the applicable minimum and maximum multiple by which the base fine dollar loss or gain is multiplied to produce the fine range.

The third major substantive portion of the Guidelines governs proba-

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137. *Id.* (comment. (backg'd)).

138. From 1988 through June 30, 1990, the Commission found that in cases in which sufficient information existed to make the determination, criminal purpose organizations comprised only about three percent of all federal organizational defendants. See SUPPLEMENTARY REPORT, *supra* note 26, tbl. 7.

139. See 18 U.S.C. § 3553(a)(2)(C).

140. See U.S.S.G., *supra* note 8, § 8C1.1.

141. See generally *id.* §§ 8C2.2 to 8C4.11 (Policy Statement).

142. Exceptions to this general approach exist. See *id.* §§ 8C2.4(b), 8C2.4 (comment. (n.5)).

143. See U.S.S.G., *supra* note 8, § 8C2.4(a).

144. See *id.* § 8C2.5.

145. See *infra* notes 157-87 and accompanying text.

146. See U.S.S.G., *supra* note 8, § 8C2.5(f).

147. See *id.* § 8C2.5(g).

tion. Proceeding with a somewhat cautious approach, the Commission recognized that the concept of corporate probation is still relatively new. Thus, the Commission did not want to constrain unduly the development of appropriate judicial experience with this sanction. Accordingly, the Commission identified a number of specific, mandatory grounds for probation,<sup>148</sup> as well as a list of recommended probationary conditions;<sup>149</sup> beyond these directives, the Commission left the courts substantial discretion to impose probation in appropriate circumstances.<sup>150</sup> Some of the specific mandatory bases for probation are to ensure that the court can effectively impose another sanction,<sup>151</sup> and to meet a technical requirement of statutory law.<sup>152</sup> The remainder of the mandatory bases, however, are generally aimed at the sentencing purpose of rehabilitation.<sup>153</sup>

As this general framework suggests, the corporate Sentencing Guidelines outside of the fines area quite naturally came to focus on sentencing purposes other than just punishment and deterrence. Accordingly, the attention that the fine guidelines devote to just punishment and deterrence is probably a natural consequence of what became the Guidelines' emerging structure regarding non-fine sanctions. With a structural basis for focusing the fine guidelines on just punishment and deterrence, the real question for the Commission became not whether, but *how* to build just punishment and deterrence principles into the fine guidelines.

### C. Vicarious Liability

Of all the conceptual issues presented, perhaps the greatest hurdle in developing corporate fine guidelines was how to deal with the principle of law that holds corporations vicariously liable for the criminal conduct of

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148. See *id.* §§ 8D1.1(a)(1)-(5), (7).

149. See *id.* § 8D1.4 (Policy Statement).

150. See *id.* §§ 8D1.1(a)(6), (8).

151. See *id.* §§ 8D1.1(a)(1), (2).

152. See *id.* § 8D1.1(a)(7). This provision implements the requirement of 18 U.S.C. § 3551(c), which requires that a court impose a term of probation if the sentence of a convicted organization does not include a fine. See U.S.S.G., *supra* note 8, § 8D1.1 (comment. (backg'd)).

153. These rehabilitation-oriented grounds for mandatory probation generally signal weakness in the corporation's institutional environment regarding compliance with the law. See *id.* § 8D1.1(3) (company lacks a creditworthy compliance program at the time of sentencing); *id.* § 8D1.1(4) (company has a recent history of prior similar misconduct); *id.* § 8D1.1(5) (a senior company official involved in the offense was involved in prior similar misconduct). The Commission has recommended that the sentencing court consider several probationary conditions aimed at rehabilitation when imposing probation for any of these grounds. See *id.* § 8D1.4(c).

their employees.<sup>154</sup> Under the common law, a corporation's criminal liability is derivative; the acts and intent of corporate officers and agents are imputed to the corporate entity. Courts generally impute criminal liability to the corporation when an employee acts within the scope of his or her employment and for the benefit of the corporation. Courts apply these standards broadly,<sup>155</sup> with some automatically imputing liability even when an employee operates in direct opposition to express corporate policy.<sup>156</sup> The fundamental question for the Commission was whether courts should make distinctions at the sentencing stage to reflect varying levels of culpability, where the doctrine of vicarious liability requires the courts to reject the same distinctions for the purpose of determining guilt at the adjudicative stage.

The doctrine of vicarious liability presented an additional dilemma for the Commission because it meant that very different kinds of corporations would be presented at sentencing, ranging from a company that took reasonable measures to prevent offenses, but whose employees broke the law despite its efforts, to a company whose senior management directed, or tacitly approved of the criminal offense. In order to facilitate drawing reasonable distinctions among the many types of convicted organizations, the Commission formulated a "culpability score."<sup>157</sup>

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154. See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909) (upholding vicarious liability of a corporation for the acts or omissions of its employees). The Court stated:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

*Id.*

See also *Developments in the Law: Corporate Crime Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979) ("[A] corporation may be held criminally liable for the acts of any of its agents if an agent (1) commits a crime (2) within the scope of employment (3) with the intent to benefit the corporation.").

155. *Standard Oil Co. v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962) ("The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or . . . the result turns out to be adverse."); *Continental Baking Co. v. United States*, 281 F.2d 137, 149-51 (6th Cir. 1960) (holding apparent authority sufficient to impose criminal liability on a corporation).

156. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir.) ("Even if an employee is violating express corporate policy, the corporation might still be responsible."), *cert. denied*, 113 S. Ct. 305 (1992); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (imposing vicarious liability where the employee committed an act against company policy), *cert. denied*, 409 U.S. 1125 (1973).

157. See U.S.S.G., *supra* note 8, § 8C2.5.

Based on factors specifically enumerated in the Guidelines,<sup>158</sup> the culpability score is meant to provide an index that measures a corporation's "good citizenship."<sup>159</sup> By assessing a company's crime-controlling *actions*, both before an offense occurred and in response to the offense giving rise to the conviction, the culpability score is designed to provide for just punishment for the offense, as measured by the company's actions, and deterrence, as fostered by the effects of the company's actions.

With respect to pre-offense conduct, the Guidelines require the court to determine whether the organization took a strong, unequivocal stand against violations of the law and effectively communicated its position to employees and agents. The culpability index takes into account a company's "effective program to prevent and detect violations of law"<sup>160</sup>—a species of a compliance program. During the many notice and comment periods on the various draft guidelines, the corporate community strongly argued in favor of compliance programs having a substantial mitigating effect on any potential fine. Corporate counsel asserted, for example, that this factor reveals more about a company's "good citizenship" with respect to lawbreaking than any other effort.<sup>161</sup> Although the Commission largely agreed, it determined that compliance programs should receive credit only if they bear strong indicia of an institutional commitment and due diligence in seeking both to prevent and detect violations of law.<sup>162</sup> This is particularly important for larger companies whose programs require more structure and formality in order to successfully reach far-flung employees. The Commission faced the difficult task of providing definitions of what constitutes effective compliance programs, especially recognizing that courts need to be able to distinguish genuine efforts to prevent and detect violations from paper plans designed more for show than for effect. Attempting to define the contours, the Commission articulated seven mandatory "types of steps" in the Guidelines.<sup>163</sup> Moreover, the Guidelines require that fine mitigation

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158. *See id.* §§ 8C2.5(b)-(g).

159. *See Swenson & Clark, supra* note 114, at 1; Obermaier, *supra* note 24.

160. *See U.S.S.G., supra* note 8, §§ 8C2.5(f), 8D1.1(a)(3).

161. *See, e.g.,* Letter from Walter D. Bradley, Assistant General Counsel, Dow Chemical Company, to the United States Sentencing Commission (Feb. 14, 1990) (on file with the United States Sentencing Commission); letter from Donato A. Evangelista, Senior Vice President and General Counsel, International Business Machines Corp., to the United States Sentencing Commission (Feb. 13, 1990) (on file with the United States Sentencing Commission).

162. *See Swenson & Clark, supra* note 114, at 3.

163. U.S.S.G., *supra* note 8, § 8A1.2 (comment. (n.3(k))).

for a compliance program be blocked for several reasons, including if a senior official “participated in, condoned or was willfully ignorant of the offense,”<sup>164</sup> or if the company discovered the offense but failed to voluntarily disclose it to authorities.<sup>165</sup>

The “carrot and stick” incentives to establish a qualifying compliance program are fairly clear. If the court finds that an organization had an effective program, a very substantial mitigating impact on the fine will result.<sup>166</sup> Conversely, if the court finds that a company (with fifty or more employees) failed to establish an effective program at the time of sentencing, the court must place the company on probation<sup>167</sup> and may require that it satisfy potentially restrictive and demanding probationary conditions.<sup>168</sup>

The Guidelines reward post-offense “good citizenship” by examining the corporation’s post-offense conduct. On the one hand, if the corporation in essence ratified the criminal conduct by obstructing justice, the corporation will face a stiffer sanction.<sup>169</sup> If, on the other hand, the organization strongly signaled its intolerance of lawbreaking by voluntarily disclosing the offense,<sup>170</sup> fully cooperating with enforcement officials in the investigation,<sup>171</sup> and/or demonstrating acceptance of responsibility for the offense, it will receive a lesser penalty.<sup>172</sup> Thus, the fluctuating penalty levels established by the Guidelines provide substantial incentives for companies to take post-offense “good citizenship” actions as well.<sup>173</sup>

Two culpability score factors do not fit neatly into either the pre-of-

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164. *Id.* § 8C2.5(f).

165. *Id.*

166. For example, assume a company’s fraudulent failure to test a component of some military hardware it was supplying to the government caused a \$10 million loss. If no other aggravating or mitigating factors applied, the typical fine range in this case would be \$10 to \$20 million, *see* U.S.S.G., *supra* note 8, §§ 8C2.5, 8C2.6, plus full restitution. *See id.* § 8B1.1. If the court found that the company had a qualifying compliance program when the offense occurred, its fine range would drop to \$4 to \$8 million. The company possibly could lower the fine even further if it fully cooperated and accepted responsibility for the offense. *See id.* § 8C2.5(g)(2).

167. *Id.* § 8D1.1(a)(3).

168. *See id.* § 8D1.4(c)(4) (allowing for “unannounced examinations” of corporate books and “interrogation” of key officials).

169. *See id.* § 8C2.5(e). A corporation may obstruct justice within the meaning of the Guidelines not only by directing activities that have the effect of impeding some aspect of the criminal justice process but also by “fail[ing] to take reasonable steps to prevent such obstruction” if it had knowledge of the activities. *Id.*

170. U.S.S.G., *supra* note 8, § 8C2.5(g)(1).

171. *Id.* § 8C2.5(g)(1)-(2).

172. *Id.* § 8C2.5(g)(1)-(3).

173. *See generally id.* §§ 8C2.5(e), 8C2.5(g), 8C2.6.

fense or post-offense conduct category and only indirectly establish incentives for a particular course of action. The Commission intended these two factors, "Involvement in or Tolerance of Criminal Activity"<sup>174</sup> and "Prior History"<sup>175</sup> to reflect the need for the sentence to provide just punishment for the offense given the offending corporation's culpability.

The first of these two culpability score factors—"Involvement in or Tolerance of Criminal Activity"—gauges the hierarchical level and degree of discretionary authority of the individuals actually involved<sup>176</sup> in the offense. Generally, the more senior the position,<sup>177</sup> and the greater the degree of total discretion<sup>178</sup> possessed by those involved, the higher the culpability score and potential fine. The impetus for using this factor as a measurement of organizational culpability or just punishment emerged from the debate surrounding vicarious liability. Some questioned the basic premise of vicarious liability and argued that the Guidelines should impose no fine unless senior management was directly implicated in the offense.<sup>179</sup> This argument tracked a proposal in the Model Penal Code that criminal liability generally should not attach to the corporation unless a "high managerial official" was involved.<sup>180</sup> The Commission responded to this argument by recognizing that it is simply beyond the Commission's authority to revisit the doctrine of vicarious liability. The Commission acknowledged, however, that some justification may exist for distinguishing between companies at the sentencing phase based on the level and extent of managerial involvement. The Commission ultimately embraced the position that an offense involving

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174. *Id.* § 8C2.5(b).

175. *Id.* § 8C2.5(c).

176. *See generally id.* § 8C2.5(b).

177. Participation by "high level personnel" generally increases a fine, *see id.* § 8C2.5(b)(1)(A)(i), (b)(2)(A)(i), (b)(2)(B)(i), (b)(3)(A)(i), (b)(3)(B)(i), more than participation by "substantial authority personnel." *See id.* § 8C2.5(b)(4), (5). *See id.* § 8A1.2 (comment. (n.3(k))) (definition of "high level personnel"); *id.* § 8A1.2 (comment. (n.3(c))) (definition of "substantial authority personnel"). The culpability score is not affected when other employees who do not fit within these categories were involved in the commission of the offense.

178. The culpability score also increases if the sentencing court concludes that tolerance of the offense by those exercising substantial authority was "pervasive." *See U.S.S.G., supra* note 8, § 8C2.5(b)(1)(A)(ii)-(B)(ii), (b)(2)(A)(ii)-(B)(ii), (b)(3)(A)(ii)-(B)(ii).

179. *See* Comments of the American Corporate Counsel Association, *supra* note 39, at 3-4. Comments of the Business Roundtable on the Proposed Guidelines for Sentencing Organizations 3 (Feb. 14, 1990) (on file with the United States Sentencing Commission); letter from Daniel J. Popeo, General Counsel, Paul D. Kamenar, Executive Legal Director & John C. Scully, Counsel, Washington Legal Foundation 3 (Feb. 15, 1990) (on file with the Commission).

180. MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962).

corporate officials who exercise a high degree of the organization's discretionary authority deserves more punishment—for this higher level of "organizational culpability"—than an offense in which such officials were in no way implicated.

For these reasons, the culpability score provides for higher fines when those with significant degrees of discretionary authority are involved. Yet, the company is not exonerated from a penalty standpoint merely because high level officials do not participate in the offense. When management has gone *further* than merely not being involved in the offense, by taking affirmative pre-offense steps to reduce the prospect of crime<sup>181</sup> and post-offense steps to help ensure that those individuals who have broken the law are held accountable,<sup>182</sup> then fines can drop to a relatively nominal level.<sup>183</sup>

Since recidivism can indicate an ambivalent corporate attitude toward violations of the law under certain circumstances, the Guidelines treat the organization's prior history of misconduct as an indicator of higher culpability.<sup>184</sup> The Commission appreciated that in large corporations a violation of a state wage and hour reporting requirement in one sector of the business might reveal little about corporate attitudes toward law-breaking simply because an offense involving the unauthorized use of public lands has occurred in another major division. Laws are numerous and complex, and some companies are sufficiently large and diverse that prior misconduct may not *necessarily* signal a higher degree of company culpability deserving of an increase in the fine for the instant offense. Thus, corporate recidivism counts in the culpability score only when prior misconduct is "similar" to the instant offense and when it has occurred within the same "separately-managed line of business," if the company is large enough to operate separate lines of business.<sup>185</sup> In other instances, the court may in its discretion decide to treat prior history as an indicator of increased culpability by choosing a higher fine

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181. See U.S.S.G., *supra* note 8, § 8C2.5(f) (credit for an effective program to prevent and detect violations of law).

182. See *id.* § 8C2.5(g)(1)(2) (credit for self-reporting and cooperation).

183. When an organization's management was not involved in the offense, it had a qualifying compliance program, it fully cooperated with authorities and it accepted responsibility, the sentencing court will assign a culpability score of 0 and a fine range of 0.05 to 0.20 of the "base fine." See U.S.S.G., *supra* note 8, §§ 8C2.5(f), (g)(2), 8C2.6. In addition, in instances involving low organizational culpability, the Commission suggests that the courts depart from the Guidelines to consider an even lower sentence. See *id.* § 8C4.11 (Policy Statement).

184. *Id.* § 8C2.5(c).

185. *Id.*

within the applicable guideline fine range.<sup>186</sup>

In sum, the doctrine of vicarious liability presented the Commission with the challenge of establishing guidelines that could rationally and effectively sanction corporate defendants that would be implicated in the criminal justice process under a wide array of circumstances. The Guidelines attempt to draw distinctions between convicted companies by gauging "good citizenship" with respect to pre- and post-offense conduct and the role of senior management in the particular offense. In this context, the culpability score relies in part on a just punishment philosophy. This view holds that companies that have demonstrated their commitment to complying with the law by a number of objective measures deserve less severe sanctions. Since many of these same measures constitute crime-controlling *actions* that the company can elect to initiate before an offense has occurred, or in response to it once the company becomes aware of the offending conduct, the culpability score also embodies an incentive-driven deterrence approach.

#### *D. Guidelines vs. Policy Statements*

Aside from the substantive issues of how to treat vicarious liability, and the normative questions of what fines a company deserves and will deter future crime, the Commission wrestled with the overarching question of whether it should attempt to establish corporate sentencing policy for the courts through presumptively mandatory guidelines<sup>187</sup> or through discretionary policy statements.<sup>188</sup> A united business community argued that the Commission should issue non-binding policy statements, emphasizing the unprecedented nature of sentencing laws for corporations, the blurring distinction between civil and criminal violations, the absence of

186. *See id.* § 8C2.8(a)(7) (Policy Statement).

187. Sentencing "guidelines" are issued by the Commission pursuant to, among other potentially relevant provisions, 28 U.S.C. § 994(a)(1). Pursuant to 18 U.S.C. § 3553(b), application of guidelines by the court is presumptively mandatory:

The court shall impose a sentence of the kind, and within the [guideline] range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

*See* 18 U.S.C. §§ 3742(a)(2), (a)(3), (b)(2), (b)(3). If a court incorrectly applies the guidelines or imposes a sentence other than that specified by the guidelines, the parties have a right of appeal. *Id.*

188. "Policy statements" are issued by the Commission pursuant to, among other potentially relevant provisions, 28 U.S.C. § 994(2). In imposing sentence a court must "consider" relevant policy statements. 18 U.S.C. § 3553(a)(5). Sentences inconsistent with policy statements are not reviewable on the ground of the inconsistency, and are otherwise reviewable only if in violation of law or if "plainly unreasonable." *See* 18 U.S.C. §§ 3742(a)(1), (a)(4), (b)(1), (b)(4).

past sentencing practice data to guide guideline drafting, and the small number of cases of organizational offenders relative to individual offenders on which the courts must impose a sentence. The business community argued that if a problem of unwarranted disparity or excessive leniency later arose, then perhaps the Commission could convert a set of amended policy statements into mandatory guidelines.<sup>189</sup>

United States Department of Justice representatives, along with those in the community who strongly believed that history demonstrated a pattern of too much tolerance for corporate crime and excessive leniency at sentencing for those few corporations convicted, urged the Commission not to waiver on this critical decision by issuing non-binding policy statements which by law the courts could all but ignore. They emphasized that the Commission had implemented mandatory guidelines for individual offenders, and argued that corporate offenders were no more entitled to the benefits of lenity presumed to ensue from unfettered judicial discretion. In addition, they argued that the Commission's own review of pre-1988 corporate sentences revealed that the fines imposed were often less than the loss caused. They observed that this practice served neither deterrence nor just punishment objectives and contributed to the public perception that white collar crime was harming the country without an appropriate response from the judiciary. Proponents of both positions expressed their arguments regarding the question of guidelines versus policy statements in strong terms.<sup>190</sup>

The Commission's enabling statute was less than clear on this point.<sup>191</sup> Yet even those who believed that the Commission had a statutory obligation to issue guidelines conceded that the duty did not require fulfillment within any set time period. Some believed that the Commission could follow the counsel of the business groups and issue discretionary policy statements initially, followed at a later time by mandatory guidelines.

After a protracted debate, the Commission elected to promulgate

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189. See Comments of American Corporate Counsel Association, *supra* note 39, at 1-2; Comments of the Business Roundtable, *supra* note 179, at 1-2.

190. See, e.g., Letter from the Associations Council, National Association of Manufacturers, to the United States Sentencing Commission (Feb. 9, 1990) (on file with the Commission) (characterizing mandatory guidelines as a "death penalty," and "cruel and unusual punishment" for many small corporate entities and employees); Amitai Etzioni, Professor, George Washington University, Remarks submitted to the United States Sentencing Commission (Feb. 17, 1990) (on file with the Commission) (entitled "No Valentine's Day for Corrupt Corporations," urging the Commission to "ignore the self-serving cries of outrage by business interests").

191. See *supra* notes 40-44 and accompanying text.

mandatory guidelines for the key provisions, but to allow non-binding policy statements to govern some less central decisions. For example, mandatory guidelines govern restitution,<sup>192</sup> the calculation of the applicable fine range,<sup>193</sup> and grounds for probation.<sup>194</sup> In contrast, non-binding policy statements guide remedial orders,<sup>195</sup> the court's selection of the precise fine within the applicable guideline fine range,<sup>196</sup> and, in general, the conditions of probation.<sup>197</sup>

An explanation of the rationale that led to the Commission's decision to favor mandatory guidelines is warranted because the various affected constituent groups defined the guidelines versus policy statements debate as a watershed. The Commission ultimately adopted a more guideline-oriented system for four primary reasons. First, Congress created the Commission to bring greater certainty to sentencing.<sup>198</sup> By definition, mandatory guidelines sharply limit the courts' discretion. In contrast, purely advisory policy statements may restrict discretion little or not at all. The Senate's review of the experience with state guideline systems demonstrated that non-mandatory guidelines failed to achieve their intended reforms because the judiciary largely ignored them.<sup>199</sup> Little doubt existed that mandatory guidelines would achieve greater certainty. Other considerations being equal, the guidelines approach was most consistent with the Commission's general mandate.

Second, the Commission was able, over time, to develop an approach that addressed the business community's chief concern that corporate cases might be too complicated to be governed by binding "one size fits all" sentencing rules. The Commission's favoring of guidelines over policy statements has been described elsewhere as "structured flexibility."<sup>200</sup> This term embodies twin ideas:

The [corporate] guidelines should have sufficient definition to ensure that sentencing discretion will be meaningfully guided and the generally desired outcome achieved. At the same time, the guidelines should have sufficient flexibility so that judges will be able to apply reasoned judgment to the

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192. See U.S.S.G., *supra* note 8, § 8B1.1.

193. See *id.* §§ 8C2.1-8C2.7.

194. See *id.* § 8D1.1.

195. See *id.* § 8B1.2 (Policy Statement).

196. See *id.* § 8C2.8 (Policy Statement).

197. See *id.* § 8D1.4 (Policy Statement).

198. See 28 U.S.C. § 994(b)(1)(B); S. REP. NO. 225, *supra* note 7, at 41-50, 161.

199. S. REP. NO. 225, *supra* note 7, at 79.

200. *E.g.*, Swenson & Clark, *supra* note 114, at 2.

sometimes unique issues, and frequently complex facts, raised by corporate defendants.<sup>201</sup>

Consistent with this approach, the Commission framed many key definitions in the Guidelines in terms of both specific and general principles.<sup>202</sup> With respect to fines, the applicable range from which the court selects the precise fine amount is generally four times broader than the range governing the terms of imprisonment for individuals.<sup>203</sup> With respect to corporate probation, this combination of structure and flexibility provided for certain mandatory grounds for probation,<sup>204</sup> while in other instances leaving the courts with the same level of discretion to impose probation that they would have had if guidelines had not been promulgated.<sup>205</sup>

The third reason is related. The Commission felt reasonably comfortable with the specific mandatory provisions and degree of binding structure adopted because, by the end of the promulgation process, a reasonable degree of consensus existed that the provisions formed a workable basis upon which to *begin* to reform corporate sentencing practice. The Commission's open process of continually allowing members of the public (including the corporate and law-enforcement communities) to comment on guideline drafts allowed it to gauge this consensus.

Finally, with the emergence of the "carrot and stick" philosophy of modulating fines to foster crime-detering actions by organizations, it became clear that mandatory guidelines would better serve the statutory goals set for the Commission. Asking a company, for example, to voluntarily disclose that it committed an offense leaves it vulnerable to a range of potential sanctions including, but not limited to,<sup>206</sup> the criminal penalty. If companies cannot determine with a high degree of certainty that their self-reporting will result in a substantial reduction in the criminal fine ultimately meted out, the "carrot" for taking this action may appear too indefinite to induce companies to self-report. Because non-binding,

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201. *Id.*

202. For a discussion of how the definition of "an effective program to prevent and detect violations of law" comports with this approach, *see id.* at 2-3.

203. By statute, imprisonment ranges for individuals generally must be no greater than 25%. 28 U.S.C. § 994(b)(2). No similar provision was enacted to apply to organizational fines; the Guidelines typically provide for ranges of 100%. *See* U.S.S.G., *supra* note 8, §§ 8C2.6-8C2.7.

204. *See id.* § 8D1.1(a)(1)-(7). *But see id.* § 8D.1(a)(6) (quite discretionary).

205. *See id.* § 8D1.1(a)(8).

206. For example, collateral civil consequences may result, including civil fines, shareholder derivative actions, and in some instances debarment. *See supra* part IIIF.

discretionary policy statements do not ensure the definite results necessary to establish effective, crime-controlling incentives, they did not appear to serve the deterrence approach the Commission favored.

### *E. The Coordination of Individual and Corporate Penalties*

The tug and pull of competing ideas and the just punishment/deterrence-related theories behind the corporate fine guidelines led to an important compromise regarding the coordination of corporate and individual penalties. The Commission adopted the view that since federal law contemplates that both corporations and individuals may be criminally liable for offenses,<sup>207</sup> and since Congress has provided an array of sanctions for both,<sup>208</sup> there should be no direct and automatic offset in the corporate fine for penalties imposed on individuals. The Commission made a limited exception to this rule for fines imposed on substantial owners of closely held corporations.<sup>209</sup>

On the other hand, the Guidelines do provide *conditionally* for coordination. The condition is that the corporation must have taken actions to increase the likelihood that the individuals responsible for the offense would be held accountable for their illegal conduct. As corporations take these kinds of steps, thereby lowering their own fine exposure, the probability that lawbreaking employees will face criminal sanctions increases. In this way, the Sentencing Guidelines partially provide for coordination of corporate and individual penalties.<sup>210</sup>

To understand the operation of this conditional offset, one must recognize that the Guidelines' carrot and stick incentives encourage actions that inherently create a "wedge"<sup>211</sup> between a company that wishes to demonstrate its own "good citizenship" and individuals within the company who have violated the law. For example, a qualifying compliance program under the Guidelines requires that the company diligently seek

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207. Courts long have recognized that both a corporation and individuals within a corporation may be held accountable by the criminal law for a given course of conduct. *See, e.g.*, *United States v. Empire Packing Co.*, 174 F.2d 16 (7th Cir.) (affirming conviction and sentence of both corporation and its president for filing false claims for government subsidies), *cert. denied*, 337 U.S. 959 (1949).

208. *See, e.g.*, 18 U.S.C. § 3551(a) (setting forth authorized sentences for individuals); 18 U.S.C. § 3551(b) (setting forth authorized sentences for organizations).

209. Even this offset is discretionary with the court. *See* U.S.S.G., *supra* note 8, § 8C3.4.

210. As stated earlier, the Commission deferred more specific coordination for the size of the fine when the responsible individual is sentenced to a term of imprisonment; it declined to resolve this issue until more data became available to assess the variety of patterns and the frequency with which each occurs.

211. *See* Swenson & Clark, *supra* note 114, at 3.

to "detect" lawbreaking,<sup>212</sup> that it subject responsible individuals to appropriate "discipline,"<sup>213</sup> and, if the company has detected the violation, that the company disclose it to authorities.<sup>214</sup> The Guidelines also provide for mitigation for disclosure of the offense to authorities,<sup>215</sup> and for full cooperation.<sup>216</sup> For cooperation credit to apply, the company must provide, *inter alia*, "information . . . sufficient for law enforcement personnel to identify . . . the individual(s) responsible for the criminal conduct."<sup>217</sup>

Each of the steps by which a corporation may reduce its own fine exposure is intended to have the ancillary effect of helping to ensure that employees who have broken the law will be held accountable by the criminal justice system. By fostering individual accountability, the Guidelines should generally<sup>218</sup> and specifically deter criminal conduct, just as they coordinate the penalties for the corporation according to the steps it has taken to bring about individual accountability.

#### F. *The Coordination of Collateral Sanctions*

In addition to criminal penalties, corporations that violate a federal criminal law may be subject to substantial non-criminal penalties such as debarment,<sup>219</sup> treble civil damages,<sup>220</sup> and shareholder derivative actions.<sup>221</sup> Because these penalties can be significant, some argued that the Guidelines should address these collateral consequences, preferably as an offset against any potential criminal fine.<sup>222</sup> Others argued that the crim-

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212. U.S.S.G., *supra* note 8, §§ 8C2.5(f), 8A1.2 (comment. (n.3(k))).

213. *Id.* § 8A1.2 (comment. (n.3(k)(6))).

214. *See id.* § 8C2.5(f).

215. *See id.* § 8C2.5(g)(1).

216. *See id.* § 8C2.5(g)(2).

217. *Id.* § 8C2.5 (comment. (n.12)).

218. It seems logical that if employees in companies are on notice that their employers can and will detect, report, and fully cooperate in the investigation of offenses employees commit, then they will be far less likely to commit such violations.

219. *See, e.g.*, Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406 (1991).

220. *See* Clayton Act, 15 U.S.C. §§ 4, 15 (1982).

221. *See, e.g.*, *Mosez v. Welch*, 638 F. Supp. 215 (D. Conn. 1986) (shareholder derivative action against General Electric for allegedly submitting false claims in connection with government contracts and for subjecting the corporation to criminal charges). For surveys of such potential collateral penalties, see AMERICAN BAR ASSOCIATION, WHITE COLLAR CRIME COMMITTEE, COLLATERAL CONSEQUENCES OF CONVICTIONS OF ORGANIZATIONS, FINAL REPORT (Feb. 1991) [hereinafter ABA REPORT]; Parker, *supra* note 30, at 13, tbl. 3.

222. As discussed below, practical difficulties prevented the Commission from following this approach. Public comment urging coordination of criminal and collateral sanctions was typically

inal sanction is unique and separate from any civil penalties, which often are mere "costs of doing business," and therefore should remain distinct.<sup>223</sup> Finally, some observed that a civil penalty offset would unduly complicate the process, since a criminal case would likely precede any civil action.<sup>224</sup> Moreover, the Commission was concerned that courts might be tempted to mitigate the criminal fine on the purely speculative assumption that the corporation would subsequently suffer a civil penalty of some unknown size.

For both substantive and technical reasons, the Commission ultimately determined to approach the matter cautiously. In the substantive context, Congress has traditionally provided for multiple sanctions; the history of legislative action suggests that offsets might be inconsistent in some circumstances with congressional intent. Furthermore, recent case law developments indicate that the courts are still in the process of resolving coordination issues based on double jeopardy arguments.<sup>225</sup> Both of these considerations suggested that the Commission should allow this constitutionally-grounded coordination of penalties to develop further before stepping into the arena. Additionally, offsets can raise complicated dual sovereignty policy issues if applied to sanctions imposed by state and local enforcement schemes. On the other hand, offsets raise

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vague regarding the best way to accomplish this goal. See, e.g., Comments of the Business Roundtable, *supra* note 39, at 10.

223. See, e.g., Letter from Arthur N. Levine, Deputy Chief Counsel for Litigation, United States Department of Health & Human Services, Food and Drug Division, to United States Sentencing Commission (Feb. 15, 1990) (on file with the Commission).

224. See, e.g., Letter from Steven A. Saltzburg, Member Ex-Officio, United States Sentencing Commission, to William W. Wilkins, Jr., Chairman (Feb. 14, 1990) (on file with the Commission).

225. See generally *United States v. Halper*, 490 U.S. 435 (1989) (holding disproportionately large civil sanction imposed upon defendant who has already sustained a criminal penalty for the same conduct may violate the multi-punishment prong of double jeopardy in certain circumstances); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.) ("Although in this case the civil penalty preceded, rather than followed the criminal indictment, the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment."), *reh'g denied*, 907 F.2d 1145 (11th Cir.), *cert. denied*, 111 S. Ct. 178 (1990); *United States v. Furllett*, 781 F. Supp. 536 (N.D. Ill. 1991) (holding that where the criminal prosecution precedes the civil proceeding, civil sanctions remain available so long as they do not reach the punitive level; however, where civil sanctions have already been imposed before a criminal proceeding is initiated, and those sanctions are deemed punitive, that option is lost because double jeopardy prohibits the second prosecution), *aff'd*, 974 F.2d 839 (7th Cir. 1992); *Ingalls Shipbuilding, Inc. v. United States*, 21 Cl. Ct. 117, 126-27 (1990) ("Although the double jeopardy provision only applies to successive attempts at criminal prosecution, the underlying philosophy for which the framers created the right is applicable in the civil context as well, particularly where a contractor is continually forced to defend both its reputation and its purse.").

consistency concerns if they apply to federal civil and administrative sanctions but do not apply to state and local sanctions.

In the technical context, coordination is difficult at best. Timing is the most obvious problem of coordinating criminal and other sanctions. Because of the backlog of cases in the federal courts and the priority they assign to the criminal calendar over the civil calendar, federal courts simply would not know at the time of sentencing what collateral sanctions, if any, the corporation eventually will suffer.

The Commission resolved this dilemma by providing no *direct* offset for collateral sanctions but by providing means by which they *may* be taken into account. The Commission designed the Guidelines' fine ranges to accommodate a "permissive offset." In general, the ranges are broad; typically, the maximum of the range is twice the minimum.<sup>226</sup> Thus, the court can take collateral consequences into account in selecting the precise fine to impose. Moreover, the Guidelines explicitly direct that "the court, in setting the fine within the guideline range, should consider any collateral consequences of conviction, including civil obligations arising from the organization's conduct. . . . [P]unitive collateral sanctions [that] have been or will be imposed on the organization . . . may provide a basis for a lower fine within the guideline fine range."<sup>227</sup> The Commission designed this compromise approach to leave courts (which are best able to assess this particular factor) with sufficient flexibility to weigh collateral consequences appropriately.

It should be observed that if steep collateral sanctions are imposed on an organization despite its having taken the kind of "good citizenship" actions the Sentencing Guidelines recognize the collateral sanctions may dilute the Guidelines' incentives for taking these actions, perhaps to the point of rendering the Guidelines' "carrot and stick" approach ineffective. If the Guidelines' incentives contribute to controlling corporate crime, this turn of events would be unfortunate. The Commission is committed to monitoring and continuing to analyze this issue. For now, because Congress has quite deliberately devised multiple enforcement schemes, and given dual federal and state sovereignty issues, resolution of this problem is beyond the Commission's direct control. The potentiality of this problem may, however, weigh in favor of greater coordination among the various enforcement authorities to consider adherence to the

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226. See U.S.S.G., *supra* note 8, § 8C1.6.

227. *Id.* § 8C3.8 (Policy Statement, comment. (n.2)).

deterrence-related approach of the Guidelines and, in any case, to assure an overall enforcement policy that brings philosophical coherence to the imposition of criminal and civil sanctions.

### G. *The Size of the Corporation*

The final conceptual issue central to the Commission's deliberative process about what fines would simultaneously provide deterrence and just punishment was whether the size of the convicted organization should matter, and if so, how it should affect the size of the fine.<sup>228</sup> The Commission's review of past practice data revealed that judges seemed to consider the size of the offending corporation, but not in any discernibly systematic way. One side argued that large corporations should pay larger fines to prevent them from absorbing the fine as a cost of doing business and thus making criminal violations efficient. On the other side, some contended that when two corporations are convicted of a fraud that creates a loss of \$100,000, the sentence each receives should be a function of the size of the loss, not the size of the corporation. They argued that this latter approach was consistent with the emphasis in the enabling legislation on uniform sentences according to the offense, not the offender.<sup>229</sup> Rather than adopt any kind of a blanket approach, the Commission ultimately responded to this question in what it hoped would be a practical, multifaceted manner.

As a general proposition, size does not directly bear on the computation of a corporation's fine. The same rules<sup>230</sup> apply whether the convicted company is a "Fortune Fifty" manufacturing conglomerate or a

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228. This debate emerged early on when the proponents of a strict just punishment approach to corporate sentencing advocated "impos[ing] a fine in terms of a percentage of the organization's income or wealth." PRELIMINARY DRAFT, *supra* note 56, at 162. In contrast, the optimal penalty proponents flatly rejected the relevance of corporate size. See Parker, *supra* note 30, at 36 n.152 (asserting that "little analysis is required to conclude that such a system achieves neither rational deterrence nor any other legitimate objective of a punishment system").

229. While Congress did not intend to eliminate consideration of offender characteristics in guidelines sentencing, its requirements in 28 U.S.C. § 994(d)-(e) that the Commission "shall ensure" that the guidelines "are entirely neutral to the race, sex, national origin, creed, and socioeconomic status of offenders" and that the guidelines "reflect the general inappropriateness" of considering an offender's "education, vocational skills, employment record, family ties and responsibilities, and community ties" suggest a decreasing emphasis on offender characteristics. See Van Graafeiland, *supra* note 14, at 1293 (statutory mandate led Commission to concentrate more on harm caused by the offense, rather than offender's characteristics). See also *United States v. Pharr*, 916 F.2d 129, 132 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991); *United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989).

230. See U.S.S.G., *supra* note 8, § 8A1.2.

“mom and pop” dry cleaner. The way in which the seriousness of the offense is computed<sup>231</sup> is not fundamentally influenced by size. Indeed, the Commission ultimately saw no logical way of proceeding other than by measuring offense seriousness consistently. Any other approach would “capriciously overdeter[] and underdeter[] offenses by giving the less wealthy [organizations] incentives to commit more harmful offenses, and vice versa.”<sup>232</sup>

After establishing the theoretical foundation of consistency, the Commission permitted several practical exceptions relating to size. First, in contrast to the proposals of the orthodox optimal penalty advocates,<sup>233</sup> the Guidelines do not require a company to seek bankruptcy if a fine is beyond a company’s means. In this context, then, structured flexibility<sup>234</sup> entailed giving courts the discretion to reduce a fine to the extent necessary to allow the company to remain viable,<sup>235</sup> but also requiring that courts consider whether supervision, by placing the corporation on probation, is necessary.<sup>236</sup>

A second means in which size indirectly may become important involves the culpability score factor that assesses the role of management or other senior officials in the offense.<sup>237</sup> As noted earlier, the culpability score determines the number by which the sentencing court multiplies the loss or gain or an approximation for the harm. When “high level personnel”<sup>238</sup> are involved or when tolerance of the offense by those with “substantial [discretionary] authority”<sup>239</sup> is pervasive, the culpability score is increased.<sup>240</sup> The amount of the increase, however, itself rises with an organization’s size.<sup>241</sup> Thus, if a top executive of a 200-person firm was involved, the culpability score increases three points, but if a top executive of a company with 5000 or more employees was involved, the culpability score increases by five points.

Probably more than any other compromise, no one was entirely satis-

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231. See *supra* notes 142-43 and accompanying text.

232. See Parker, *supra* note 30, at 555 n.172.

233. *Id.* at 585-91.

234. See *supra* notes 200-05 and accompanying text.

235. See U.S.S.G., *supra* note 8, § 8C3.3(b).

236. See *id.* §§ 8D1.1(2), (7).

237. See *id.* § 8C2.5(b).

238. See *id.* § 8A1.2 (comment. (n.3(b))).

239. See *id.* (comment. (n.3(c))).

240. See *id.* § 8C2.5(b).

241. See *id.*

fied with the way in which the size of the corporation affects the fine calculus. Some who voted for the package of sanctions that went to Congress are strongly critical of the Guidelines' consideration of size. Nevertheless, Congress indicated that the size of an organization may be a relevant sentencing factor,<sup>242</sup> and the Commission's approach considers size in the Guidelines in a manner that may be defensible. Clearly one could argue that when those who manage large numbers of individuals have acted in a lawless manner, the risk of harm and the risk of recruiting others into lawbreaking is generally greater than when those with far less responsibility are involved.<sup>243</sup> In addition, from a culpability standpoint, "as organizations become larger and their managements become more professional, participation in . . . criminal conduct by such management is increasingly a breach of trust or abuse of position."<sup>244</sup>

Third, the Guidelines consider the size of a corporation as it relates to the expectations for a company's compliance program. Some early critics of the corporate guidelines posited that smaller companies might not be able to receive credit for compliance programs because they would lack the means to institute the kinds of formal compliance mechanisms necessary for the sentencing court to find that the corporation had in place an effective program to detect and prevent violations of the criminal laws.<sup>245</sup> This assertion ignores the Commission's explicit commentary that "the requisite degree of formality of a program to prevent and detect violations of law will vary with size of the organization: the larger the organization, the more formal the program typically should be."<sup>246</sup> In short, the Commission has indicated that as long as the corporation satisfies the definition's general requirements, small organizations—whose management will be in personal contact with employees on a regular basis—can establish relatively informal compliance programs. In a related vein, this explains the probation guideline requirement that a court impose probation if, at the time of sentencing, the company lacks a qualifying compliance program, but limits this requirement to corporations with at least fifty employees.<sup>247</sup> One can expect highly informal compliance programs in smaller organizations, making court supervision

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242. See 18 U.S.C. § 3572(a)(7).

243. See U.S.S.G., *supra* note 8, § 8C2.5 (comment. (backg'd)).

244. *Id.*

245. See, e.g., John C. Coffee, Jr., *Big Corporations, Off the Hook*, LEGAL TIMES 22 (May 6, 1991).

246. U.S.S.G., *supra* note 8, § 8A1.2 (comment. (n.3(k)(7)(i))).

247. See *id.* § 8D1.1(a)(3).

of the program's "implementation" of questionable necessity. The Commission's research indicated that indeed, small corporations will not frequently be able to qualify for compliance credit; this is not, however, because they cannot meet the definition's criteria, but because top management will typically be involved in the offenses smaller companies commit,<sup>248</sup> a factual occurrence that negates any credit for the compliance program.<sup>249</sup>

Recognizing this provided the rationale for a fourth way in which the court may take account of size. The Guidelines permit courts to reduce, on a *pro rata* basis determined by a percentage of ownership, the fine of a closely held corporation if its owners have been fined. Since most closely held corporations are small, this should primarily benefit smaller companies.

The question of whether and how to consider size was a particularly difficult issue. It remains to be seen whether in striking a compromise, the Commission found the right balance of considerations.

## V. QUESTION FOUR: ARE THE SENTENCING GUIDELINES FOR ORGANIZATIONS CAST IN STONE, OR CAN CHANGES BE EXPECTED?

### A. *The Corporate Guidelines as Evolutionary Law*

Because the Sentencing Commission has now promulgated a set of guidelines to govern the sentencing of both individuals and organizations, the Commission is sometimes asked what work is left to be done. This question reflects a common misunderstanding of Congress' basic vision for sentencing reform.

First, Congress created the Sentencing Commission to be a permanent agency—there is no sunset provision limiting the Commission's tenure. Congress made the Commission a permanent agency because it expected the Commission's work to be ongoing. Specifically, Congress mandated that the Commission "shall review and revise [the guidelines], in consideration of comments and data coming to its attention."<sup>250</sup> Toward this end, Congress directed the courts to submit to the Commission relevant

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248. Reported data partially illuminate this fact. See SUPPLEMENTARY REPORT, *supra* note 26, tbls. 8, 11 (showing that most federal organizational cases involve closely held corporations and most involve cases in which owners were aware of or involved in the offense).

249. See U.S.S.G., *supra* note 8, § 8C2.5(f).

250. 28 U.S.C. § 994(o).

information on each sentence imposed under the guidelines,<sup>251</sup> and instructed the Commission to analyze critically the data that the courts supply.<sup>252</sup>

Second, Congress provided the Commission with a statutorily defined schedule and process, including a method for eliciting public comment, by which the Commission is to make amendments to the guidelines.<sup>253</sup> Congress expected the Commission to make amendments based on an understanding of the actual operation of the guidelines and in response to changes in the statutory definitions of the gravity of the offense and changes in public attitudes toward the offense.<sup>254</sup>

Third, Congress identified as one of the guidelines' primary goals that they "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."<sup>255</sup> The relevant legislative history explains that this provision "is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches."<sup>256</sup>

Thus, based both on a relatively immediate review of how specific guidelines operate in actual cases<sup>257</sup> and on longer-term research,<sup>258</sup> Congress expected the Commission continually to assess and, as necessary, to amend the guidelines to ensure that they are as effective as possible in meeting the purposes of sentencing.<sup>259</sup> The Commission has more than followed Congress' instruction to review and revise the guidelines by making nearly 500 formal amendments (some substantive, some technical and clarifying) to the individual guidelines during the approximately five years since they were originally promulgated.<sup>260</sup>

While predictions as to specific future amendments to the corporate

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251. 28 U.S.C. § 994(w).

252. *Id.*

253. See 28 U.S.C. § 994(p), (x).

254. See generally 28 U.S.C. § 994(c), (o), (p), (s).

255. 28 U.S.C. § 991(b)(1)(C).

256. S. REP. NO. 225, *supra* note 7, at 161.

257. For a discussion of the Commission's monitoring efforts with regard to actual cases, see UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT 39-142 (1991) [hereinafter ANNUAL REPORT].

258. Authority for the Commission's research activities is generally set forth at 28 U.S.C. § 995(a)(12)-(16). For a discussion of research recently conducted by the Commission, see ANNUAL REPORT, *supra* note 257, at 143-64.

259. For additional legislative history setting forth congressional views on Commission research and ongoing refinement of the Guidelines, see S. REP. NO. 225, *supra* note 7, at 178, 182.

260. See U.S.S.G., *supra* note 8, app. c.

Guidelines are neither possible nor particularly useful, it can be predicted that the Commission will employ the overall *approach* of making revisions in light of experience and research, which will almost certainly lead to modifications. There are a number of reasons why this is so.

First, the Commission has learned first-hand that case data reflecting actual court experience with the guidelines is extremely useful in assessing whether a guideline is being applied as intended, and whether, even if it is being applied correctly, it is fully capturing the most important factors of a given category of case. As noted, Congress expected that the review of actual cases would be instructive; there is no reason to believe that this process would be any less so with the corporate Guidelines. Indeed, since the corporate Guidelines contain a number of groundbreaking measures,<sup>261</sup> one might expect case experience to be especially helpful in revising the initial guideline structure and in pointing to ways in which it can be improved.

The Commission's decision to ground the corporate Guidelines in an approach of "structured flexibility"<sup>262</sup> will virtually require close scrutiny of guideline application in specific cases. The structured flexibility approach means that courts and practitioners have a considerable measure of freedom in interpreting the intent of the corporate Guidelines. While the Commission believed that this measure of flexibility made sense, especially for an initial set of corporate guidelines, greater discretion increases the risk that the key goals of sentencing reform—such as the promotion of certainty, uniformity and fairness in sentencing, and the reduction of unwarranted sentencing disparity<sup>263</sup>—could be thwarted. Accordingly, the Commission's structural approach to the initial corporate guidelines will, of necessity, require careful monitoring. This process, in turn, will likely lead to guideline refinements.

Recent history suggests that other forces may foster modifications in the corporate Guidelines as well. As noted, changes in prosecution poli-

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261. See *supra* note 31.

262. See *supra* notes 200-05 and accompanying text.

263. See 28 U.S.C. § 991(b)(1)(B).

cies<sup>264</sup> and public attitudes<sup>265</sup> toward particular kinds of offenses can provide impetus for change. Most importantly, changes in statutory law can require guideline amendments.<sup>266</sup>

For these reasons, among others, the corporate Guidelines should be viewed as an initial foray into an area of law that will evolve. The Commission has demonstrated its responsiveness to case experience, public comment and other appropriate factors in refining the individual guidelines. The same can be expected with the corporate Guidelines.

### B. *The Development of Environmental Fine Guidelines*

A final reason that the Sentencing Guidelines for corporations can be expected to evolve is that the Commission deliberately deferred the decision whether to make the fine provisions of these Guidelines applicable to all categories of offenses. Specifically, while the remedial and probationary parts of the corporate Guidelines apply to *all* federal Class A misdemeanor and felony convictions,<sup>267</sup> the scope of the fine provisions has been limited to exclude environmental offenses, food and drug violations, and certain other crimes.<sup>268</sup>

The development of guidelines to govern environmental offenses committed by organizations is an immediate Commission priority. In the early spring of 1992, the Commission asked Commissioner Michael S. Gelacak and one of this article's authors, Commissioner Ilene H. Nagel,

264. As an example of how prosecution policies may influence guideline amendments, the Commission recently studied prosecutor charging decisions with respect to money laundering offenses. The study found that money laundering charges were brought in cases in which the seriousness of the money laundering conduct varied significantly. In light of these findings, the Commission is now considering whether "fine-tuning" the money laundering guidelines may be desirable. *See* 57 Fed. Reg. 62,832, 62,839 (1992).

265. *See generally supra* notes 90-95 and accompanying text.

266. Over time, the Commission has considered or adopted guideline amendments in response to the creation of new offenses, *see, e.g.*, 57 Fed. Reg. 62,832, 62,842 (1992) (inviting public comment on possible amendments for a new federal carjacking offense), in response to increases in statutory maximum penalties, *see, e.g.*, U.S.S.G., *supra* note 8, Amend. No. 95 (app. C) (increasing guideline sentences for certain sex offenses) and in response to statutory directives to the Commission, *see, e.g., id.* Amend. No. 364, (app. C) (implementing instruction to the Commission to provide for increased offense levels for major bank crimes).

267. *See* U.S.S.G., *supra* note 8, § 8A1.1, § 8A1.1 (comment. (n.2)).

268. *See id.* §§ 8A1.2(b)(2), 8C2.1. Technically speaking, the fine guidelines *do* cover all Class A misdemeanors and felonies in the sense that guidelines exist that tell the court what to do for all of these offenses. However, for what are referred to as "excluded" offenses, the relevant guideline merely directs the court to consider general factors set forth in title 18. Among other "excluded" offenses are RICO and export control violations. *See id.* §§ 8C2.1, 2E1.1, 2M5.1, 2M5.2.

to co-chair an advisory group of outside experts to consider issues relevant to the development of environmental sanctions for convicted organizations. Unlike some other advisory groups convened by the Commission, the environmental advisory group's members were selected specifically to capture the full spectrum of perspectives; its membership deliberately maximizes diversity of views on the normative question of what sanctions are appropriate for organizations convicted of environmental crimes. Its sixteen members come from the defense bar, corporate management, the enforcement community, academia, and public interest groups.<sup>269</sup> Its mandate has been to produce a detailed set of proposals for the Commission to consider, through a process somewhat analogous to a negotiated rulemaking. Members have been asked to think openly and critically, to "check their institutional agendas at the door," and to act as a group of responsible citizen experts.

Since its initial meeting, the advisory group has labored for almost a year to draft a detailed set of proposed guidelines for consideration by the Commission. In March 1993, the advisory group agreed to make public its first draft, and solicit comments from all interested parties and affected constituent groups. After a reasonable period of public comment, the advisory group will review the comments generated by the publication of their draft, and thereafter present a refined and revised set of proposed guidelines to the Commission thereafter. The Commission will then consider the advisory group's proposed guidelines in the course of its normal deliberative process and will adopt in whole, in part, or none of the advisory group's proposed package of sanctions.

Because the environmental guidelines pinpoint an area in which the organizational Guidelines quite clearly will evolve, and because the subject of environmental guidelines for corporations has generated substantial interest, it may prove fruitful to summarize briefly the Commission's reasoning for deferring coverage in this area.

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269. Members of the advisory group are: Frederick R. Anderson, Cadwalader, Wickersham & Taft; Stephen M. Axinn, Skadden, Arps, Slate, Meagher & Flom; Jim Banks, Chemical Waste Management, Inc.; Meredith Hemphill, Jr., Bethlehem Steel; Jane Barrett, U.S. Attorney's Office; John C. Coffee, Jr., Columbia University School of Law; Douglas I. Foy, Conservation Law Foundation; Michael S. Gelacak, U.S. Sentencing Commission; Lloyd Guerri, Mayer, Brown & Platt; David Hawkins, Natural Resource Defense Council; Andrew E. Lauterback, U.S. Environmental Protection Agency; Ray Mushal, U.S. Department of Justice, Environmental Crimes Section; Ilene H. Nagel, U.S. Sentencing Commission; Judson W. Starr, Venable, Baetjer, Howard & Civiletti; John T. Subak, Rohm & Haas Company; Jonathan R. Turley, George Washington University; Larry Wallace, Vinson & Elkins; and J. Bryan Whitworth, Phillips Petroleum Company.

The over-arching reason why the Commission elected to postpone the organizational fine guidelines' coverage of environmental offenses is that there was consensus that these offenses *might* be sufficiently different from other kinds of crimes that organizations commit to warrant separate treatment. The Justice Department shared this view, and accepted the Commission's decision to defer coverage.

Four principal considerations led to this consensus. The first was the potential difficulty in many environmental cases of defining and computing loss—a key measure of offense seriousness under the existing corporate Guidelines.<sup>270</sup> Loss in environmental cases can be especially difficult to determine for a variety of reasons. Clean-up costs can be equated with a dollar measurement of loss in some cases, but in other cases clean-up costs may not be fully known for years after the sentence in an environmental case will be imposed. In other cases, for example cases involving air emission violations, there may be *no* ascertainable clean-up costs to serve as a proxy for measuring the harm caused by the offense because clean-up is not feasible. Furthermore, in the environmental context, the calculation of the dollar amount of the loss can be limited to actual loss, or not so limited, allowing, for example, projected losses to anchor the dollar amount of any fine. Defining the harm in an environmental case is also an issue that generates considerable debate. Some prefer to limit the harm estimate to easily measured economic losses, while others insist that the material degradation of the environment be calculated as well. In developing sanctions for tax, antitrust or fraud offenses, the question of defining loss or harm, and how they are measured was not the subject of heated debate. In the environmental context, opinion is more divided and views seem to be more strongly held.

A second reason why environmental offenses were considered to be somewhat different from other offenses relates to the legal question of scienter. Under various environmental statutes, unlike most other areas of criminal law, a defendant corporation can be convicted on a showing of negligence, or in some cases without *any* showing of specific or general intent. For example, under the Refuse Act, it is a crime to discharge any refuse matter into a navigable water of the United States (or into any tributary that flows into any navigable water) without a permit.<sup>271</sup> Congress has deemed it appropriate to impute liability to corporations in the

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270. See *supra* note 143 and accompanying text.

271. 33 U.S.C. § 407 (1988).

absence of a showing of intent because environmental offenses are likened to public welfare offenses, long held by the courts as appropriate for strict liability provisions. The question at sentencing is whether sanctions should vary with culpability, even when the conviction has been obtained under a strict liability statute.

In addition to the strict liability issue, there is the further question about the nature of the offense. Under the Clean Water Act,<sup>272</sup> criminal liability may be imposed upon a person who knowingly or negligently discharges a pollutant from a point source into waters of the United States without an appropriate permit or in violation of a permit condition.<sup>273</sup> The question at sentencing is whether the nature and the amount of the pollutant should affect the severity of the sanctions; and if so, in what ways and by how much.

Environmental statutes with a knowledge requirement may require knowledge only with respect to the action, and not with respect to the action's unlawfulness or consequences, or to the existence of any regulation or permit requirements. For example, under the Resource Conservation and Recovery Act (RCRA),<sup>274</sup> it is a violation to knowingly transport hazardous waste to an unpermitted treatment facility.<sup>275</sup> Liability attaches when the transporter knowingly transports hazardous waste regardless of the transporter's mental state with respect to the treatment facility's permit status. Thus, a transporter from whom the treatment facility has actively concealed the revocation of its permit has violated the Act just as completely as a transporter who negligently fails to inquire about a treatment facility's permit or one who knows the treatment facility has no permit.

While the Commission was not convinced at the time it promulgated the corporate Guidelines that prosecutors would frequently pursue charges for some of the relatively less serious kinds of environmental violations, the fact that the environmental statutes *could* reach such conduct had to be considered. The Commission's position was that guidelines for environmental offenses should be able to account for the full array of varied offense conduct which falls under the environmental crimes rubric and that important variation in the nature of the offense conduct should be reflected in any package of sanctions.

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272. 33 U.S.C. §§ 1251-1387 (1988).

273. 33 U.S.C. §§ 1311(a), 1319(c).

274. 42 U.S.C. §§ 6901-6992 (1988).

275. 42 U.S.C. § 6928(d)(1).

The third reason why the Commission considered that environmental offenses might be distinct from other offenses covered by the corporate Guidelines is that, arguably, more than other kinds of offenses, environmental violations are subject to overlapping enforcement schemes and collateral sanctions. State and local enforcement of environmental violations, for example, can be more co-extensive with federal enforcement efforts than is the case with other frequently committed<sup>276</sup> organizational offenses, such as government procurement fraud, tax or antitrust violations.

The fourth principal reason to treat environmental crimes separately is because opinion is so divided as to how to balance concerns for the environment with concerns for corporate effectiveness. On the one side, there are those who attach the highest priority to environmental protection; generally, those of this persuasion prefer sanctions that are high enough to deter any and all corporate environmental crimes. On the other side, there are those who attach the highest priority to unrestricted corporate conduct. Those of this persuasion prefer no criminal penalties, for they fear over-deterrence and abhor regulation. In between these two polar opposites are those who seek a mid-position that balances concerns for the environment with concerns for the cost of regulation. In the environmental context, these positions appear to be felt passionately, each believing in the moral virtue of their position. In contrast, in the context of most fraud or tax violations, the views are not so divided nor the positions so strongly held, and few stand up and defend the offenses as non-criminal in nature, or attack Congress as misguided for defining the prohibited conduct as criminal.

For all of these reasons—and the implications they may have for such matters as whether the credit or definition for environmental compliance programs ought to be the same as for other corporate offenses—*inter alia*, the Commission decided to defer promulgation of guidelines for environmental offenses. The development of environmental guidelines will constitute an important next step in the evolution of the corporate Sentencing Guidelines.

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276. During the period 1988 though June 30, 1990, approximately 10% of federally prosecuted organizational crimes were environmental. See SUPPLEMENTARY REPORT, *supra* note 26 (tbl. 1).

### CONCLUSION

The Commission did not, we believe, intend to focus on corporate offenders when it began its task of promulgating sentencing guidelines. Yet, for all the reasons herein articulated, a consensus emerged that corporate offenders were neither exempt nor should be exempted from Congress' scheme for sentencing reform. And so it was that corporate Sentencing Guidelines came to pass.

It is far too early to tell whether in responding to the myriad concerns, and the competing agendas, the right balance has been struck. The hope is that the corporate Guidelines will increase deterrence and if not, will at least provide a structure for the imposition of just punishment for those organizations convicted of these offenses. As with all sentencing guidelines, the goal is to increase uniformity, fairness, and certainty, and to reduce the commission of crime; the hope is to achieve these goals without compromising the courts' ability to mete out appropriate sanctions for convicted offenders and to have a system of sentencing responsive to the societal need to reduce the impact of crime.

