RULES WITHOUT . . . : SOME CRITICAL REFLECTIONS ON THE FEDERAL CORPORATE SENTENCING GUIDELINES

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INTRODUCTION

On November 1, 1991, following an extended gestation period marred by controversy,[1] the United States Sentencing Commission's[2] corporate

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1. *See* Jeffrey S. Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 FED. SENTENCING REP. 133 (1990) (summarizing the history of the Sentencing Guidelines through late 1990). The final Guidelines are very similar to the Sentencing Commission's proposal discussed in that article.

Although the Commission's consideration of corporate sentencing dates back to the beginnings of the Commission's operations in 1985, the subject was shelved until after the Commission promulgated its initial guidelines for individuals in 1987. *See* United States Sentencing Commission, *Notice of Sentencing Guidelines and Policy Statements*, 52 Fed. Reg. 18,046 (1987) [hereinafter *Initial Guidelines*] (incorporating technical, clarifying, and conforming amendments submitted to Congress on May 1, 1987); UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987) [hereinafter INITIAL SUPPLEMENTARY REPORT] (explaining the basis for the Guidelines). In each of the next three years, the Commission published draft proposals for corporate sentencing guidelines that reflected the continuing controversy both within the Commission and between the Commission and the United States Department of Justice. Eventually these conflicts were resolved into the approach reflected in the Guidelines promulgated in 1991. In the meantime, the controversy had sparked Congress' interest. The Criminal Justice Subcommittee of the House Judiciary Committee held oversight hearings during 1990 which focused upon the delays in the development of the corporate Guidelines and on charges of undue influence over the process by the White House. *See generally Oversight on the United States Sentencing Commission and Guidelines for Organizational Sanctions: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, House of Representatives*, 101st Cong., 2d Sess. 112 (1990) [hereinafter *1990 House Hearings*].

2. The Commission is an exotic species of federal government agency: "an independent commission in the judicial branch," 28 U.S.C. § 991(a) (1988), created by Congress in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, §§ 211-239, 98 Stat. 1837, 1976, 1987-2040 (codified at 18 U.S.C. §§ 3551-3673, 3742; 28 U.S.C. §§ 991-998), to implement the new sentencing guideline system mandated by that Act. *See generally* Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 533-44

sentencing guidelines[3] finally became effective.[4] As of January 1993, when this Article was in preparation, there were no significant judicial interpretations of the federal corporate Sentencing Guidelines (the "Sentencing Guidelines" or the "Guidelines") from the courts, and no empirical data were available from the Commission on the actual operation of the Guidelines.[5]

Therefore, at this point we have only the corporate sentencing rules themselves, the tortured history of their development, and predictions about their ultimate impact. When more information becomes available on the Sentencing Guidelines in practice, we will be able to assess their effects more accurately. Let us hope that the future findings on the impact of the corporate Sentencing Guidelines are unexpectedly favorable for the health of our economy and our polity, because the current outlook is bleak. On their face, and based upon what we know of the think-

(1989). The Commission's unusual function and placement within the government led to attacks on the Commission's constitutionality under the separation-of-powers doctrine. The Supreme Court resolved these challenges in favor of the Commission in Mistretta v. United States, 488 U.S. 361 (1989). However, the *Mistretta* decision is predicated on a view of the Commission's function that does not embrace the type of legislative-style policymaking embodied in the new corporate Sentencing Guidelines. Therefore, as the Article discusses below, the Guidelines—in addition to many other infirmities—continue to expose the Commission to attack on separation-of-powers grounds.

3. The term "corporate Sentencing Guidelines" is used in this Article, even though the Guidelines technically apply to all organizations. The federal criminal code defines "organization" as "a person other than an individual," 18 U.S.C. § 18 (1988). Under general federal statutory law, the term "organization" includes corporations as well as partnerships, associations, and societies, whether or not operated for profit. *See* 1 U.S.C. § 1 (1988) (definition of "person" or "whoever" as used in federal statutes). However, most of the organizations actually prosecuted in federal courts and sentenced under the Guidelines are business corporations. *See* Parker, *supra* note 2, at 518-33.

4. The Sentencing Guidelines for organizations are contained in Chapter Eight of UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (Nov. 1992) [hereinafter U.S.S.G.]. That chapter was added by amendment 422, effective November 1, 1991. *See id.* at U.S.S.G. app. C, at 245-49. Like the initial guidelines for individuals, *see supra* note 1, the Commission issued the corporate Sentencing Guidelines accompanied by a background report that detailed their development, UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS (1991) [hereinafter SUPPLEMENTARY REPORT]. Although the Commission disavows its own report as the statutorily required "statement of reasons" for its guidelines, *see id.* at i (Introduction), that report, together with the official "commentary" appearing in the *Guidelines Manual*, are the best sources for determining what, if anything, forms the basis for the Guidelines' provisions.

5. Research for this Article did not locate any reported decisions as of December 1992. Inquiries to the Sentencing Commission regarding sentences imposed under the Guidelines indicated that two cases had been sentenced under the Guidelines. However, because the Commission refused to provide the names, docket numbers, or any other detailed information, retrieval of the publicly available court documents was impracticable. Telephone Interviews with Michael Courlander & Pamela Montgomery, Sentencing Commission staff (Nov. 1992 through Jan. 7, 1993).

ing that animated their provisions, the corporate Sentencing Guidelines are a disaster for sentencing policy, and another blow to the American economy.

For the Sentencing Guidelines are the rules "without": without any rational basis in coherent sentencing policy for their core structure; without statutory authority for many of their key features; and without constitutional validity to some of their more startling innovations. What the corporate Sentencing Guidelines do contain is the unmistakable imprint of statism: an authoritarian desire to replace private incentive with public bureaucratic control of business activity, under the pretext of preventing crime. This may make for good politics, and that may be the only point of the corporate Sentencing Guidelines.

There always has been an important component of political theater to crime and punishment: the morality play of evil receiving its just desert seems to be popular, at least so long as the price of admission is not too high. When the time comes actually to impose sentences in particular cases, the saving grace of the corporate Sentencing Guidelines may well be their permeability. The Guidelines are a lawyer's dream of ambiguous phrases, complex provisos, and diffuse factual determinations that will defy effective appellate review. Many of the key provisions are deliberately open-ended, thereby allowing sentencing courts considerable discretion in defining the operative rules of law. The incidence of federal prosecution against corporations is so low[6] that, without a major in-

6. As of the mid-1980s, federal corporate prosecutions averaged about 400 annually, as compared with an annual total of approximately 55,000 defendants prosecuted in federal courts; about 305 of those corporations were convicted and sentenced, meaning that the average federal judge sentenced one corporation every 21 months. Parker, *supra* note 2, at 521; *see also id.* 522-33, 594-604 (providing more detailed data on offenses, firms, and sanctions); Mark A. Cohen, *Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984-87*, 26 AM. CRIM. L. REV. 605 (1989). Only 11% of the firms convicted had 50 or more employees and $1 million or more in sales, only 3% had publicly traded stock, and only 2% were "Forbes-500" companies. Parker, *supra* note 2, at 522 n.24.

The volume of corporate prosecution, and the size of the typical corporate defendant, may or may not have increased during the late 1980s. In a 1990 update to his earlier study, Mark Cohen found little change in the volume of firms sentenced (324 firms sentenced annually as opposed to a prior average of 305) or the size of the firms involved (4.6% publicly traded and 15% crossing the 50 employee/$1 million sales threshold, versus 3% and 11%, respectively) from a full set of 1988 data, but found some indication of increased firm size in a partial set of 1989-90 data. Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-90*, 71 B.U. L. REV. 247, 251-52 (1991). The Commission's background report on the Guidelines, which appeared in August 1991 (still containing only partial data for 1990), indicates a fairly level volume of prosecution, SUPPLEMENTARY REPORT, *supra* note 4, at ch. 3, tbl. 8 (reporting 328 corporate sentencings in 1988, 273 in 1989, and 173 for the first six months of 1990); but also reports

crease, it will be years before the pattern of actual outcomes filters up through the Commission to potential public disclosure. In the meantime, the prosecutors will have a free hand in their few high-profile cases, the Commission will have its zero-tolerance rhetoric, academics can wring their hands, and business leaders can furrow their brows in concerned attention to the problem. Everyone else probably will nod knowingly and enjoy the performances. If we are lucky, the admission price of yet another drain on the vitality of the economy will not be devastating in its effects on citizens' jobs and purchasing power.

More disturbingly, however, this somewhat cynical vision probably is the best case scenario for the public welfare. If the Guidelines are taken at the face value of their rhetoric, the scenarios could be much worse. If applied to the limits of their potential, the Sentencing Guidelines could become a potent weapon of oppression and destruction. Furthermore, even if that potential is never realized, there remains the question of how such a product ever could issue from an agency of the United States government as putative law. Therefore, albeit with the fondest hope of being justifiably criticized in retrospect as hyperbole by one of those hand-wringing academics,[7] this Article is devoted to addressing (1) what is wrong with the corporate Sentencing Guidelines, (2) how it went wrong, and (3) what, if anything, can be done to rectify the situation, should that become necessary.

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that the percentage of convicted corporations with "openly-traded" stock had grown from 5.8% in 1988 to about 10% in 1989-90.

Thus, although the volume of corporate sentencings appears to have remained essentially constant for the past seven years, the targets of federal prosecution may have shifted somewhat. Moreover, the Sentencing Guidelines, which dramatically increase average penalties and explicitly punish organizational size, may have a "supply effect" of encouraging the government to prosecute more and larger corporations. The currently available data do not permit an assessment of whether and how this effect will influence prosecutions.

7. In addition to that charge, some may also criticize me as an ex-staff member at the Commission (Deputy Chief Counsel, 1987-88), and as a veteran of some of the early battles in the corporate sentencing wars (principal drafter of the 1988 "Discussion Draft," *see United States Sentencing Commission, Draft of Sentencing Guidelines and Policy Statements for Organizations*, 10 WHITTIER L. REV. 7 (1988)). Such criticisms generally are accompanied by adjectives such as "disgruntled" or "disappointed," either expressly stated or implied by context or innuendo. To all such criticisms, I quote Blackstone's "postscript" to the preface of his *Commentaries*, responding to his critics:

> [W]here [the author] thought the objections ill-founded, he hath left, and shall leave, the book to defend itself; being fully of opinion, that if his principles be false and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, author's preface, at xxxix (1766) (William Carey Jones ed., 1916).

Essentially, what is wrong with the Guidelines is that they are rules "without"—without rationality, without authority, without constitutionality. What went wrong is an old pattern of deficiency in government that seems to recur in endless variation: power without adequate discipline becomes tyranny. The possible solutions are equally simple: reinforce the discipline, or withdraw the power. The former tends to be a risky strategy for a free people, for most disciplinary procedures can be circumvented. Therefore, perhaps it is time to reexamine whether the power should be granted at all, that is, whether the Sentencing Commission should be put out of the business of corporate sentencing.

I. RULES WITHOUT RATIONALITY

The most fundamental requisite of all law is rationality. Unfortunately, the corporate Sentencing Guidelines do not meet even this minimal requirement, for they neither rest on a coherent theory of punishment nor are they linked with the accumulated wisdom of past sentencing practice.

Oliver Wendell Holmes' most famous aphorism was that "[t]he life of the law has not been logic: it has been experience."[8] One need not agree or disagree with Holmes, however, to see that those two possibilities—follow the experience of courts, or develop a coherent logical theory—exhaust the options for rationally-based sentencing guidelines promulgated by a politically unresponsive sentencing commission. A politically representative body, such as Congress, may have a third option of simply reflecting the political preferences of its constituencies. But there is no such option open to the United States Sentencing Commission under the Sentencing Reform Act of 1984, particularly as the Act was construed by the Supreme Court in *Mistretta v. United States*[9] to uphold the constitutionality of the Commission expressly on the ground that the Commission was *not* invested with "political authority" of any kind, but rather was constituted as an "expert body" to engage in the "neutral endeavor" of rationalizing the judicial process of sentencing.[10] The majority's opinion in *Mistretta* rested critically on the distinction between the permissi-

8. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1938) (1881).

9. 488 U.S. 361, 396, 407, 412 (1989).

10. For a complete discussion of the *Mistretta* decision and a development of its implications for the Commission's institutional competence, see Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-*Mistretta): *Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289 (1989).

ble nonpolitical role of the Commission and what the dissenting Justice Scalia characterized as a "junior-varsity Congress." The Sentencing Commission simply is not permitted constitutionally to function as an inferior legislature.

This same distinction is reflected in the provisions of the Sentencing Reform Act itself,[11] which requires the Commission to develop its guidelines from the "starting point" of past sentencing practice.[12] Deviations from average past practice sentences are permitted only if the Commission makes a finding, after empirical study, that the past sentence levels were inadequate.[13] Increases in sentence levels are limited to sentences that are "sufficient, but not greater than necessary,"[14] to comply with the statutory purposes of sentencing, in accordance with "advancement in knowledge of human behavior as it relates to the criminal justice process"[15] and as evaluated through Commission-developed "means of measuring the degree to which [sentencing practices are] . . . effective."[16] Like Holmes, the Sentencing Reform Act gives primacy to "experience"—average past sentencing practice. The Act permits "logic" to justify deviations, but only upon the most rigorous showing of the inadequacy of past practice and the necessity for change, especially when the change is to the basic structure or average punishment levels.

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11. For a fully developed discussion of the points summarized here see Parker & Block, *supra* note 10, at 292-315. That article argues that the provisions of the Sentencing Reform Act, in themselves and as interpreted by the Court in *Mistretta*, require the Sentencing Commission to direct its guidelines toward improving the efficiency of the federal sentencing system, with efficiency taken in the economic or utilitarian sense of minimizing the costs of both crime *and* punishment combined. *Id.* at 293. For present purposes, however, the decisive points are less rigorous: (1) the Commission cannot operate as an inferior legislature, a constraint inherent in the *Mistretta* rationale; and (2) to the extent that the Commission deviates from past experience, it must act only on the basis of a logically coherent theory of sentencing policy, whether or not that theory recognizes the requirement of efficiency. This less rigorous restatement of the requirement is sufficient here because the Guidelines lack logical coherence under any theory.

12. 28 U.S.C. § 994(m) (1988).

13. The Act provides that while the Commission must use average sentences as a starting point, it is "not bound by such average sentences." 28 U.S.C. § 994(m). The legislative history explains that the Commission "need not follow the current average sentences if it finds that they do not adequately reflect the purposes of sentencing." S. REP. NO. 225, 98th Cong., 1st Sess. 177 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3183 [hereinater S. REP. NO. 225]; *see also id.* at 61 ("[T]he Sentencing Commission will be able, if necessary, to change those [past] practices."). *See* Parker & Block, *supra* note 10, at 297-300 (developing this and other aspects of the Sentencing Reform Act and its legislative history).

14. 18 U.S.C. § 3553(a) (1988).

15. 28 U.S.C. § 991(b)(1)(C).

16. 28 U.S.C. § 991(b)(2).

Thus, under the Sentencing Reform Act, the Commission must follow one or a combination of both of two generic approaches to developing sentencing guidelines: (1) on the basis of a coherent set of sentencing principles; or (2) on the basis of prior experience, as reflected in past sentencing practice in the federal courts. In the case of the original guidelines for individual sentencing[17]—though perhaps not in subsequent amendments[18]—the Commission essentially chose the second of these two approaches, by promulgating guidelines developed from empirical analysis of past practice, and without major changes from average past sentence levels. But in the case of the Sentencing Guidelines for organizations, the Commission followed neither of the permissible approaches: the corporate Guidelines are intended to increase punishment levels radically and arbitrarily, doing so on motivations that are incoherent as sentencing policy.

A. Punishment Without Principle

The basic idea of the Sentencing Guidelines for corporations is described by the Commission itself as a "carrot-and-stick approach."[19] Even as metaphor, that phrase is not well-chosen: the "stick" clearly is the radical increase in overall penalty levels; but the "carrot" apparently is intended to refer to a somewhat smaller "stick" that will be applied when convicted corporations have performed the tricks desired by the Commission. However, as I have pointed out previously,[20] this type of

17. The initial sentencing guidelines for individuals followed the general punishment levels and, with some exceptions, the distribution of punishment under past practice. *See Initial Guidelines*, *supra* note 1, at 18,047-053; INITIAL SUPPLEMENTARY REPORT, *supra* note 1, at 15-17; Parker & Block, *supra* note 10, at 315-18.

18. The problem of non-empirically based amendments arose in 1989 in the midst of controversies over corporate sentencing. *See* Michael K. Block, *Emerging Problems in the Sentencing Commission's Approach to Guidelines Amendments*, 1 FED. SENTENCING REP. 451 (1989).

19. The phrase appeared in a statement entitled *Overview* that accompanied the Commission's October 1990 draft proposals. The approach of that draft was carried over to the final 1991 promulgation of the Sentencing Guidelines. A contemporary article by the Commission's Chairman explained the phrase:

> In summary, the guidelines draft currently under consideration takes an approach that rewards the organization for actions to prevent and detect criminal conduct by its agents, but significantly punishes the organization that does not have its house in order. It is a carrot and stick approach—quite simply, it rewards the good and punishes the bad.

William W. Wilkins, Jr., *Sentencing Guidelines for Organizational Defendants*, 3 FED. SENTENCING REP. 118, 120 (1990).

20. Parker, *supra* note 1, at 136. Professor Coffee of Columbia Law School voiced a somewhat similar critique of the indeterminacy of the plan. John C. Coffee, Jr., *"Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants*, 3 FED. SENTENCING REP. 126 (1990). Cof-

populist notion, though politically attractive in conjuring up images of corporations jumping through hoops, cannot be equated with a rational sentencing policy.

Both the sizing of the "stick" and the tricks necessary to obtain the "carrot" are what matter to sentencing policy, and on these dimensions, the Commission's Guidelines are very likely to be destructive. The "stick" may be large enough to beat the American economy senseless, but destruction for its own sake is not rational law enforcement policy. Furthermore, consuming the "carrot" may be even worse, because the "carrot" appears to be poisonous. Certainly, neither the Commission nor anyone else has any basis for believing that the "carrot" has nutritional value, and our knowledge and experience of the sorts of tricks desired by the Commission—all of which are predicated on the notion that central bureaucratic control works better than individual incentive or market discipline—tell us that they are more likely to impoverish the American consumer than to prevent crime.

From this perspective, the Commission's awkward metaphor is revealing: as the "carrot" turns out to be just another "stick," the Commission's approach to corporate guidelines is revealed to be a policy of punishment for its own sake, which is punishment without principle.

1. The Big "Stick"

Under the Sentencing Guidelines for corporations, an organization's fine is computed as a "base fine" times a "multiplier," which in turn is based on a "culpability score."[21] Where do the numbers come from? According to the Commission's background report, both the base fine and the multiplier were chosen to make guideline fines overlap with statutory *maximum* penalties. Furthermore, the base fine is defined as the greatest of three possible numbers—gain, loss, and an arbitrary "offense level" amount[22]—thus adding an arbitrary structure to the arbitrary fine levels. The Commission articulated no coherent principle whatsoever for

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fee's primary concern was that "the 'stick' may be illusory" because many convicted corporations might earn a high "mitigation score" (since then inverted into a "culpability score" in the final guidelines). *Id.* at 126. He also doubted the "carrot," noting that its effect was "to force the implementation of particular monitoring and control strategies that are still of unproven efficacy," and that it "may be vulnerable to manipulation." *Id.* at 128; *see also* Michael K. Block, *Guest Editor's Observations*, 3 FED. SENTENCING REP. 115, 117 (1990) (noting the plan's lack of economic rationality, which could actually cause an increase in crime).

21. U.S.S.G., *supra* note 4, §§ 8C2.4-8C2.7.

22. *Id.* § 8C2.4(a).

making any of these choices. They simply are arbitrary expressions of a set of preferences held by the Commissioners.

Arbitrary Levels I: Guideline Fines at the Statutory Maxima. By definition, sentencing guidelines are intended to deal with average or typical cases, leaving unusual or extreme cases to the sentencing courts' "departure" authority. In fact, this is the approach of the Commission's sentencing guidelines for individuals.[23] However, it is not true of the corporate Sentencing Guidelines: unlike the remainder of the guidelines, the corporate Sentencing Guidelines were constructed deliberately to "accommodate" statutory maximum penalties.[24] Why? The Commission never says, but this is one of several aspects of the corporate Guidelines in which the Commission goes for the highest possible number whenever there is a choice. The only "principle" here is to inflict damage on corporations.

Arbitrary Levels II: Offense Levels as "Seriousness." As one of three measures of the base fine, the corporate Sentencing Guidelines specify a figure linked to the offense level table of the guidelines for individuals,[25] on the apparent view that the offense level is an alternate to gain or loss as a measure of the "seriousness" of the offense.[26] As noted above, the precise numbers assigned to the offense levels, and the rate of change between the numbers, were chosen arbitrarily.[27] But in addition, the

23. The Commission stated that "each guideline [is] carving out a 'heartland,' a set of typical cases." U.S.S.G., *supra* note 4, ch. 1, at 5. The individual guidelines generally do base guideline sentence levels on average past practice outcomes. *See* INITIAL SUPPLEMENTAL REPORT, *supra* note 1, at 17, 22-39. Under the Sentencing Reform Act, sentencing courts are required to follow the Commission's guidelines, subject to the authority to "depart" when "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 guidelines." 18 U.S.C § 3553(b).

24. *See* SUPPLEMENTARY REPORT, *supra* note 4, at 11-15.

25. U.S.S.G., *supra* note 4, § 8C2.4(d); *cf. id.*, ch. 5, pt. A (sentencing tbl.).

26. "As a general rule, the base fine measures the seriousness of the offense." U.S.S.G., *supra* note 4, § 8C2.4, (comment. (backg'd.)).

27. *See supra* note 24. In particular, the Commission set offense level amounts by "backing out" from the statutory maximum fines, under an assumed multiplier of two, which is the maximum multiplier at a culpability score of five, and the minimum multiplier at a culpability score of 10. U.S.S.G., *supra* note 4, § 8C2.6. Thus, as the Commission's own background report states, "in a case involving no aggravating or mitigating factors (*i.e.*, with a culpability score of five), the court would be able to impose the statutory maximum fine" without departing from the Guidelines. SUPPLEMENTARY REPORT, *supra* note 4, at 14. In other words, the Guidelines set guideline penalties for typical cases at the statutory maxima, which Congress intended not for the typical case, but rather "for an offense committed under the most egregious of circumstances." S. REP. NO. 225, *supra* note 13, at 114 (discussing maximum imprisonment terms under the Sentencing Reform Act).

This feature has an almost comical circularity as applied by the Commission to the higher fine

original offense level structure never was and cannot be a scale of "seriousness," because it was developed from entirely different considerations for entirely different purposes.

In fact, the offense level structure of the original guidelines is purely an artifact of the empirical approach used to develop those guidelines. The original guidelines' offense levels were, in essence, the coefficients found in multiple regression analyses of past *imprisonment* sentences;[28] they are not derived from the "seriousness" of the underlying offense conduct, but are based upon the unique characteristics of imprisonment of individuals as a sanction, and have no rational application whatever to the determination of fines for organizations. Moreover, the offense level structure is not an arithmetic scale of any kind, because the underlying regression analyses were logarithmic: the offense level number itself is an exponent. This is why imprisonment sentences increase by about twelve percent per offense level. In other words, the sentencing table of the individual guidelines is, in effect, a compound interest table at a twelve percent interest rate. Given the multiple factors that bear on the determination of an imprisonment sentence—such as an individual offender's responsiveness to varying lengths of imprisonment—it cannot be said that, for example, a level seventeen offense necessarily is more serious than a level sixteen offense. The only thing that the offense level table tells us is that, among the 10,000 sentencings of individuals used to develop the original guidelines, on average the level seventeen offender was sentenced to

maxima established by Congress in the Sentencing Reform Act. In the Act, Congress did raise statutory fine maxima. However, it was reacting not only to a perceived insufficiency in the maximum (not average) levels, but also to "large and logically inexplicable disparities in the levels of fines permitted as criminal sanctions for offenses of essentially similar natures." *Id.* at 104. In raising the maximum fine limits, Congress sought "to permit considerable flexibility in tailoring the fine level to the situation in a particular case," *id.* at 108, "without implying that sentences have been rationalized—a step which . . . should be undertaken with the assistance of the Department of Justice, the United States Sentencing Commission, and other interested agencies, after passage of this bill." *Id.* at 87. Thus, Congress intended the maximum fine levels as a temporary stopgap, and looked to the Commission for assistance in the ultimate task of rationalization. But when the Commission developed the Sentencing Guidelines, it relied on the same stopgap measures as if they represented a congressional "rationalization" and a definitive statement of policy as to "seriousness"—another subject on which Congress looked to the Commission for advice and assistance. *See id.* at 86-88. This sort of "I've got it, you take it" interchange reminds one more of an Abbott and Costello routine than it does of government policymaking with serious implications for the nation's welfare.

28. *See* INITIAL SUPPLEMENTARY REPORT, *supra* note 1, chs. 3, 4 (providing full details). At the time of that report, the Commission itself had no delusions about whether the "offense level" table was a "seriousness" scale, and specifically disavowed the notion that the system reflected a just desert approach of scaling penalties in relation to severity or seriousness. *See id.* at 15-17.

about twelve percent more months in prison than the level sixteen offender. There is nothing more universal in offense levels than this particular empirical finding.

Thus, the Commission's extension of the offense level system to corporate sentencing is merely playing around with numbers that have nothing to do with the problem of corporate sentencing, or with either of the two principal forms—fines and probation—of corporate sanctions.

Arbitrary Structure I: Find the Highest Number. Under the corporate Sentencing Guidelines, the base fine is highest of three numbers: (1) the arbitrary offense level number; (2) "the pecuniary gain to the organization from the offense," or (3) "the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly."[29] Of those three, only loss has something to do with a rational sentencing policy. But let us put aside that point for the moment and ask: why the highest of the three? The Commission provides no coherent answer.

Apparently, the Commission's idea is that loss, gain, and the offense level amount are alternative measures of "the seriousness of the offense."[30] At least that admission dispels any remaining doubt about the offense level table being a "seriousness" scale. But it still does not answer why the highest number is appropriate. Why not the lowest? Or, if the Commission is so uncertain of its "seriousness" evaluations, why not the average of the three? In order to find the answer, we must read carefully between the lines of the Commission's oblique explanation:

> The determinants of the base fine are selected so that, in conjunction with the multipliers . . . , they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.[31]

Now, let us try to translate the explanation: because we know how the levels were selected, we now know what "guideline fine ranges appropriate to deter" means—it means statutory maximum fines. In plain English, the Commission wants a big stick, the biggest that Congress will allow. We also know why: so that corporations will consume the "carrot"—"internal mechanisms for preventing, detecting, and reporting criminal conduct," but only those satisfactory to the Commission, as

29. U.S.S.G., *supra* note 4, § 8C2.4(a).
30. *Id.* (comment. (backg'd.)).
31. *Id.*

other parts of the Sentencing Guidelines specify. In other words, the Commission prefers the highest number because it gives the government—Commission, prosecutors, and courts—the most leverage over the internal mechanisms of private firms.

Arbitrary Structure II: The Obsession with "Pecuniary Gain." Both in the base fine provisions and elsewhere in the Sentencing Guidelines, the Commission singles out one concept for special attention: what the Commission calls "pecuniary gain" and defines as "the additional before-tax profit to the defendant resulting from the relevant conduct of the offense," specifically including "either additional revenue or cost savings."[32] Unlike the alternate measure of "pecuniary loss," which can be blocked from consideration when it was not "caused intentionally, knowingly, or recklessly,"[33] pecuniary gain need not be "caused" at all but may only "result" from the offense, and it may result completely accidentally. Under the Commission's Guidelines, profit-making is a strict liability offense that does not require a showing of causation.

Repeated references to the possibility of "gain" throughout the Guidelines make it clear that the Commission can conceive of no more evil thing than the prospect that someone might make a profit. One explanation for the structure of the base fine is "to deter organizations from seeking to obtain financial reward through criminal conduct," and therefore, "when greatest, pecuniary gain to the organization is used."[34] Whether or not it is used, the Guidelines also contain a special provision, entitled "disgorgement,"[35] which "is designed to ensure that the amount of any gain that has not and will not be taken from the organization for remedial purposes will be added to the fine."[36] Thus, even when the harm of the offense can be repaired for less, the Commission wants to ensure that any residual gain is, in the Commission's own word, "taken" by the government. And even when otherwise recognizing a basis for downward departure in exceptional circumstances, the Commission adds the proviso that "such fine should not be lower than if determined under § 8C2.4(a)(2),"[37] which is the provision calling for a fine based on pecuniary gain.

32. *Id.* § 8A1.2 (comment. (n.3 (h))).
33. *Id.* § 8C2.4(a)(3).
34. *Id.* § 8C2.4 (comment. (backg'd.)).
35. *Id.* § 8C2.9.
36. *Id.* (comment. (n.1)).
37. *Id.* § 8C4.11.

Obviously, all of Commission's attention to pecuniary gain will produce a field day for litigation lawyers and a nightmare of administration for the courts (if they take it seriously at all),[38] especially because there is very little experience in law generally, and virtually none in prior sentencing practice,[39] with such determinations. The difference in treatment between loss and gain, the ambiguity created by using "profit" as if it were synonymous with "revenue," and the tax treatment,[40] are all highly provocative features. One can imagine endless litigation over the difference between a "caused" loss and a "resulting" gain, among numerous other issues. Should the expenses of producing the "illicit" gain be offset in determining the pretax profit? Just what is the illicit aspect of a gain? If the same gain would have resulted from noncriminal conduct, is it still a "gain"? Because firms probably do not often keep a ledger entitled "criminal gains," who bears the burden of proof and of uncertainty? Can gain be estimated by labeling a particular department or line of business as illicit or "infected" by criminal behavior? What if the offense gain is negative? These questions could be multiplied indefinitely.

But the administrative difficulties, though formidable, are beside the main point, which is that gain has nothing whatever to do with a rational sentencing policy. Although it is tempting to believe that a gain-based penalty is an appropriate deterrence policy, actually this is a fallacy. It simply disconnects sentencing from the rationale for the substantive criminal prohibition, and therefore always leads to inappropriate re-

38. Under the amorphous standard of "to the extent that the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process," U.S.S.G. § 8C2.4(c), the Sentencing Guidelines supply the courts with an escape hatch from determinations of either loss or gain. It remains undetermined how often, and on what bases, the courts will choose this escape route. However, if appellate courts do not police this option rigorously, it obviously opens a large hole in the tripartite base fine structure.

39. The best empirical information is that gain did not constitute a significant factor in past sentencing practice. *See* SUPPLEMENTARY REPORT, *supra* note 4, at 18 & tbl. 3 (showing no systematic relationship between fines and gain).

40. For example, the use of the phrase "additional before-tax profit" is interesting because it makes the government a beneficiary of the illegal activity: the more criminal gains, the more tax revenue. Furthermore, the IRS may take a "heads-I-win/tails-you-lose" approach to this subject by disallowing deductions associated with the criminal profit under § 162(c) of the Internal Revenue Code, and imposing yet another penalty for the crime of deducting the criminal expenses. *See* I.R.C. §§ 7701-7707. Thus, the convicted firm first pays tax on its profits, then pays more tax on any disallowed deductions (with possible further penalties). In addition, the firm then pays a fine based on the "pre-tax profit." It may not deduct that payment because it is a fine, § 162(f), and therefore again pays income tax on the fine.

sults.[41] Congress does not define conduct as criminal because it results in a gain to the offender, but rather because it produces an actual or potential harm to others. By basing a sentence on the different criterion of gain, the Commission is disregarding the substantive rationale for the prohibition,[42] and therefore is following neither law nor rationality in sentencing policy.

However, such a sentencing structure does do one thing, aside from providing work for future generations of lawyers and judges: it imposes yet another burden on all profit-making activity.

2. *The Poisonous "Carrot"*

As this Article noted earlier, the big "stick" is nothing other than arbitrarily high penalties, chosen through a curious structure that reflects only the idea of finding the highest penalty possible, and evinces a hostility toward the corporate form in general and the "pecuniary gain" in particular. However, the main point of brandishing the "stick" is to force every organization to consume the "carrot," or, more accurately, to jump through the hoops necessary to reach the "carrot," which in fact is only a slightly smaller "stick."

If every corporation did consume the "carrot," then they would be beaten with only the smaller "stick." But this does not mean that the big "stick" is irrelevant, because corporations' incentives to consume the

41. For a developed analysis, see Parker, *supra* note 2, at 554-63; for a more general analysis, see Jeffrey S. Parker, *Avoidance Costs in Optimal Penalties* (Jan. 1990) (unpublished manuscript, on file with author). For analysis within the specific context of corporate sentencing proposals, see Parker, *supra* note 1, at 135; *1990 House Hearings*, *supra* note 1, at 448-51 (post-hearing statement of Jeffrey S. Parker).

42. The simple example given in the *1990 House Hearings* illustrates the point:

> [C]onsider the example of two environmental offenses involving illegal dumping of wastes: case 1 involves a large volume of rubbish, unsightly but otherwise relatively harmless, dumped on the side of the road; case 2 involves a small amount of highly toxic material in highly concentrated from [sic] poured into a river in a densely populated area. In such cases, "gain" ordinarily is considered to be the saved cost of lawful disposal. Assume (as is likely to be the case) that the cost of lawful disposal is very high for the rubbish but low for the toxic material. Clearly, a strictly gain-based penalty is entirely backwards in these circumstances. But even the "greater of" penalty distorts the relative severity of the two offenses, and thereby unwisely distorts the incentives given to potentially offending firms in terms of prevention: public policy should encourage the firms to concentrate proportionately more resources on preventing toxic dumping, but that differential has been obscured by the penalty system. Now consider why the dumping was prohibited in the first place. Certainly, it was not to reduce the profits of the potentially offending firms, but rather to protect the environment against harm. Thus, the gradations implied by the substantive policy now also have been muted by the gain-based or "greater of" sentencing policy.

1990 House Hearing, *supra* note 1, at 449-50 (post-hearing statement of Jeffrey S. Parker).

"carrot" will be determined by the imposing size of the big "stick." Nonetheless, if the "carrot" were known to have nutritional value up to the expected size of the big "stick," then at least the fining provisions of the Guidelines perhaps could be saved from destructive irrationality. Unfortunately, however, there is no reason to believe that the Commission's "carrot" is nutritive; and there is every reason exists to believe that in fact it is poisonous to our economy, if not to our society more generally. The carrot is statism—central economic planning by government, undisciplined by market forces, carefully measured penalties, or, for that matter, any other effective legal or political constraint.

The principal vehicle of the Sentencing Guidelines for administering the "carrot" is the culpability score used to determine the size of the multiplier to be applied to the base fine—the more "carrot" consumed beforehand, the smaller the "stick" applied.[43] However, the same impulses also are reflected in the Guidelines' provisions for supervisory probation sentences designed to force-feed the "carrot"—after a thorough beating with the big "stick"—to corporations for which the threat was insufficient.[44] In both instances, the contents of the "carrot" are essentially the same: the Commission has legislated that corporations subject to the laws of the United States, at least those with fifty or more employees, shall have a bureaucracy to "prevent and detect violations of law,"[45] and that the precise composition and activities of that bureaucracy will be dictated by a new government bureaucracy within the federal judiciary. The probation guidelines directly mandate the compliance bureaucracy, while the fining guidelines enforce it by giving the corporation a higher culpability score and therefore a larger multiplier if it lacks the prescribed form of bureaucracy.

As with the fine levels generally, the numbers for the culpability score were chosen arbitrarily: the arbitrary multipliers simply were divided into ten increments, each now called a point in the culpability score. All defendants begin at the midpoint, and go up or down depending upon whether they have jumped through the specified hoops either before or after the offense, have had previous brushes with public law enforcement (civil or criminal), and have cooperated with the government's investigation of the instant offense.[46] In addition to its centerpiece of the compli-

43. *See* U.S.S.G., *supra* note 4, §§ 8C2.4-C2.6.
44. *See id.* § 8D1.1.
45. *Id.* § 8C2.5(f).
46. *See id.* § 8C2.5.

ance bureaucracy, the culpability score features some interesting new legislation by the Commission on organizational "intent," introducing some concepts into federal sentencing that previously have been unknown in federal criminal law, or, for that matter, any criminal law. Among these include the ideas of culpability by "corporate culture" and punishment based on size alone, which have been fixtures of statist critiques of the free enterprise system for decades.[47] Those features, together with the mandated compliance bureaucracy answering to a government bureaucracy, go very far toward creating a regime of central bureaucratic planning of the American economy, which all of our knowledge and experience tells us is poison to our material well-being, and to our freedoms.

Guilt by "Culture." A large portion of the Commission's culpability score (up to five points, with the exact amount depending solely upon the organization's size as an indicator of its "culpability"), depends upon a new construct of corporate culpability that approximates the idea that a corporation's "culture" or "atmosphere" can be characterized as good or bad.

To implement this idea, the Sentencing Guidelines invent a number of new culpability concepts and definitions, based on two new categories of corporate agents: "high-level personnel" and "substantial authority personnel," viewed with respect to either the organization as a whole or "the unit of the organization within which the offense was committed."[48] Both are defined expansively. "Substantial authority personnel" is defined so broadly as to be completely unpredictable in advance, and intentionally so. As the Commission states: "Whether an individual falls within this category must be determined on a case-by-case basis."[49]

47. The idea that business activity created a "bad" culture which produced violations of the law was central to the theories of Edwin Sutherland, the sociologist who coined the term "white collar crime." *See* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME—THE UNCUT VERSION, ch. 15 (Gilbert Geis & Colin Goff eds., 1983). Later attacks, such as those by Ralph Nader, focused principally on large size as the problem needing correction. *See, e.g.*, RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976) (proposing federal chartering and supervision of the largest firms in the United States).

48. *See* U.S.S.G., *supra* note 4, § 8C2.5(b) (culpability determinations); *see also id.* § 8A1.2 (comment. (n.1)) (definitions of "high-level" and "substantial authority" personnel).

49. *Id.* § 8A1.2 (comment. (n.3(c))). The basic definition of "individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization," *id.*, would seem to include any employee whose job is other than machine-like. The Commission confirms that such persons need not be "part of an organization's management," and gives examples such as sales personnel. *Id.* For instance, consider customer service representatives assigned to

Thus, the definitions give us very little guidance in advance for which personnel will fall into these categories.

Whoever these people are, if (1) a member of "high-level personnel" in what the Commission apparently considers a "larger" firm (200 or more employees) or "substantial authority personnel" in smaller firms (10-199), "participated in, condoned, or was willfully ignorant of the offense;" or (2) for the larger firms only, "tolerance of the offense by substantial authority personnel was pervasive throughout the organization," or a sub-unit, then in either case the organization receives an increase in its culpability score, depending upon the size of the organization or the unit.[50] Except for the explicit size penalty, some of this may sound vaguely familiar to lawyers as similar to the "superior agent" standard of corporate criminal liability in state law,[51] and the "willful blindness" concept of mens rea in general criminal law.[52] But in fact, the Commission's concepts are quite different and radically broader, to the extent that they are intelligible at all.

Whereas the undefined "participated in" may not be objectionable in itself (if it is limited by the criminal law doctrine of complicity), "condoned" is defined broadly to mean "knew of the offense and did not take reasonable steps to prevent or terminate the offense."[53] "Willful ignorance" is not the equivalent of criminal law "willful blindness"—which is a form of knowledge meaning that "the person is aware of a high probability of [a fact's] existence, unless he actually believes that it does not exist," as it is expressed by the Model Penal Code.[54] The Commission's definition is much broader—essentially, it is negligent non-suspicion of a legal conclusion rather than a fact: "An individual was 'willfully ignorant of the offense' if the individual did not investigate the

answer consumer complaints. Without a verbatim script, these employees would appear to exercise discretion in exactly how they respond to the consumer.

50. U.S.S.G., *supra* note 4, § 8C2.5(b)(1)-(5). Presumably, this structure reflects the assumption that "smaller" firms do not have "high-level personnel" or that those personnel cannot be distinguished from "substantial authority personnel" in the smaller firms. In either case, the size of the addition to the culpability score is directly related to firm size. *See infra* notes 59-68 and accompanying text.

51. *See generally* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.10(c) (2d ed. 1986).

52. *See generally id.* § 3.5(b).

53. U.S.S.G., *supra* note 4, § 8A1.2 (comment. (n.3(e))).

54. MODEL PENAL CODE § 2.02(7) (1985). Although some variation among American jurisdictions exists, the majority rule limits willful blindness to something closely approximating actual knowledge, and excludes negligent blindness. 1 LAFAVE & SCOTT, *supra* note 51, § 3.5(b) & n.30.

possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred."[55] The concept of "tolerance" is undefined, but appears to be even broader (non-negligent non-suspicion?).[56] It is accompanied by the equally diffuse concept of "pervasiveness," also undefined and again one of those determinations that, according to the Commission, "will be case specific."[57]

What does all of this mean? In practical terms, it means years of litigation over the vague terminology employed by the Commission. In legal and moral terms, it means that the Commission has defined an entirely new range of criminal culpability that has no relationship to any accepted concept of criminal responsibility. The Commission's construct is, in effect, a punishment of status alone, or on "bad thoughts" unaccompanied by culpable behavior.[58] In policy terms, it means that firms now have an incentive to assure that no one who conceivably could be "high-level" or "substantial authority" personnel ever knows enough to be guilty of the new offense of non-suspicion of their subordinates. In terms of *rational* policy, it means nothing, because there is no indication from any source that encouraging ignorance within firms' management has any salutary effect on crime prevention. It does, however, discourage effective management in general, and thereby paves the way for the Commission-mandated compliance bureaucracy while at the same time interfering with productive activities.

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55. U.S.S.G., *supra* note 4, § 8A1.2 (comment. (n.3(j))). Obviously, this formulation contains ambiguities, such as whether the person in question had a duty to investigate—or whether the Guidelines now impose that duty; whether the standard presupposes or imposes some knowledge of law; whether the suspicious circumstances had to suggest unlawful conduct of the type represented by the offense that ultimately occurred; and whether the unlawful conduct that the individual should have suspected must even be a crime. These and similar points create additional grounds to contest in litigation.

56. Although the term and its context suggest that tolerance connotes less direct involvement, the Commission's discussion of the pervasiveness inquiry introduces an ambiguity by suggesting that perhaps tolerance only means one or more of participation, condonation, or willful ignorance: "Pervasiveness . . . will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense." *Id.* § 8C2.5 (comment. (n.4)).

57. *Id.* The only thing that the Commission states in assessing pervasiveness is to count the number of substantial authority individuals who exhibited tolerance, and then weigh their tolerance by their degree of authority. *See id.*

58. A basic premise of criminal law is that "conduct, to be criminal, must consist of something more than a mere bad state of mind . . . . [T]his requirement is reflected in court decisions holding that mere status or condition cannot constitutionally be made a crime." 1 LAFAVE & SCOTT, *supra* note 51, at 269-70; *see also id.* at 366-69 (discussing traditional standards of corporate liability).

Big is Bad. The Commission's culpability score adds a second status penalty based on organizational size alone, with larger organizations taking a larger hit to their culpability scores for "high-level" or "substantial authority" personnel involvement, simply because they are larger and for no other reason. The Commission's background report denies the intent to punish size alone,[59] but the truth is obvious from an examination of the rules themselves, which consist of three separate subsections that are identical except for the specification of the size proxy of the number of employees and the associated number of culpability points for that size: five points for 5000 or more employees, four points for 1000 or more employees, and three points for 200 or more employees, in either the organization or a unit of it.[60] Because the only thing that differs as among these provisions is size, the Commission's assertion—that "the basis for the increase is not the size of the organization, *per se*"[61]—is simply disingenuous.

What is the Commission's rationale for these provisions? The Commission's background report again is opaque. The Commission essentially concedes that it neither found any such thing in past practice[62] nor could even articulate a coherent basis for the size penalty.[63] The Commission's background report also hints at the fallacious line of reasoning that "a larger fine would be needed to sufficiently punish and deter a larger organization," which is contrary to elementary economics.[64] But

59. "[F]ines can be higher for larger organizations, but the basis for the increase is not the size of the organization, *per se*." SUPPLEMENTARY REPORT, *supra* note 4, at 9.

60. U.S.S.G., *supra* note 4, §§ 8C2.5(b)(1), (2), (3).

61. *See supra* note 59.

62. "Empirical evidence failed to illuminate clearly the relationship between the size of an organization and the fine imposed." SUPPLEMENTARY REPORT, *supra* note 4, at 9. In other words, when controlling for other factors that affected the penalty, such as loss and ability to pay, no relationship existed between firm size and the fine imposed. *See id*. at 9.

63. "The Commission's general approach to this conceptually difficult issue was to take the size of the organization into account." *Id*. at 9. In other words, the Commissioners wanted to punish based on firm size, but could not find a legitimate basis for doing so.

64. The background report notes that this idea was proposed to the Commission, but does not purport to rely upon it. SUPPLEMENTARY REPORT, *supra* note 4, at 9. This idea has superficial appeal—suggesting that larger organizations may have higher law compliance costs—but analysis shows that it is specious. There are two key points. First, an inherent difference exists between individuals and organizations in terms of wealth: unlike individuals, organizations do not have "wealth" in the sense that the last dollar of income is less important than the first—what the economists call diminishing marginal utility of income. Corporations are merely mechanisms for facilitating efficient production and investment, not ends in themselves. *See* Parker, *supra* note 2, at 519, 522-23. Therefore, to a corporation, the last dollar of income is equal to the first, as neither the last nor the first "belongs" to the corporation in the same sense as an individual. Second, simple eco-

the official story in the final guideline commentary is even more disturbing:

> [A]s organizations become larger and their managements become more professional, participation in, condonation of, or wilful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. . . . [A]s organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive.[65]

At least this passage gives us a better idea of what the Commission actually is trying to do. Of course, the premise is counter-factual: there is no necessary, or even likely, correlation between the number of employees of an organization and the "professionalism" of its management (whatever that means to the Commission), or whether there is a breach of trust or abuse of position, when considered without regard to the ownership, management structure, and activities of an organization. There are many quite large and successful organizations that are privately owned and managed by "unprofessional" entrepreneurs. In those situations, whose trust is being breached?

On a more mundane level, one might ask why organizations and their subunits are being instructed through these provisions to reduce their size. There is no evidence or theory suggesting that smaller organizations control their employees better or commit fewer violations of law. Indeed, the findings, including some reported by the Commission, seem to indicate the opposite—that smaller firms may be *more* prone to violations.[66] Moreover, here again simple economics would tell us that some

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nomics indicates that firms differ in size for the same reasons that they differ in other ways—some firms operate more efficiently at different sizes. If penalties vary with firm size alone, it will disrupt the normal economic incentives that determine firm size: larger firms will have an incentive to become smaller simply to reduce penalty exposure without necessarily changing their law compliance level, and smaller firms will have an incentive to reduce their law compliance level. Both of these effects will tend to impair productive efficiency without reducing, and possibly increasing, the incidence of crime.

If a court applies an appropriately measured penalty, then both large and small firms will have an incentive to increase their compliance efforts, because a dollar is a dollar for all firms. The Commission's size penalty contradicts this logic, and reduces economic efficiency, without showing that the size penalty improves compliance with the law.

65. U.S.S.G., *supra* note 4, § 8C2.5 (comment. (backg'd.)).

66. Every empirical study to date, including the Commission's own background report on the Sentencing Guidelines, has found that large, publicly held firms constitute only a small percentage of organizational defendants in the federal courts. *See supra* note 6. Given the scope of these firms' activities, and the degree of surveillance that the government already exercises over them through regulatory agencies, it is likely that this finding reflects the obvious—such firms have a lower inci-

firms become large because they operate more efficiently on a larger scale; whereas other firms operate more efficiently on a smaller scale. By giving firms an artificial incentive to be smaller than ordinary market forces would dictate, the Commission necessarily is acting irrationally by destroying the economic value of efficient firm sizes for no demonstrated payoff in terms of crime prevention.

But the Commission's concern in these provisions does not appear to be with factual fidelity, existing legal constructs, economic rationality, or sensible sentencing policy, but rather with setting off on a new agenda of corporate restructuring. "Abuse of position" in reference to private business managers long has been an evocative term used in proposals for more extensive public control of private enterprise.[67] The idea here is pure statism: any position of power or influence, no matter how achieved, ultimately is answerable to the government, which is presumed to be the ultimate repository and regulator of all forms of power—public or private. Thus, we need not ask how the sole owner of a successful business, built entirely through the imagination and effort of that individual, could breach a trust to the nonexistent beneficiaries or abuse a position gained purely through private efforts, because, under the statist's view of the world, no position exists except at the sufferance of the government and all positions are held in trust for the government.

This same sort of social re-engineering underlies the Commission's idea about "pervasive tolerance"—whatever that concept is supposed to mean—as leading to "the risk of criminal conduct beyond that reflected in the instant offense," in other words, unknown or future crimes of some unspecified type that have yet to be committed. Even when supported by hard empirical data—as in proposals for "selective incapacitation" of violent recidivist individual offenders—this sort of idea is highly controversial in terms of accepted concepts of legality in punishment.[68] But in the case of the Commission's Guidelines, the proposal is not to rehabilitate or incapacitate, but rather is to punish a firm retrospectively as more

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dence of crime. For a theoretical treatment consistent with that finding, see Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315 (1991).

67. The Nader proposals for federal chartering (*i.e.* bureaucratic control) are among the best known of a long line of thinking in this vein. *See supra* note 47; *see also* CHRISTOPHER D. STONE, WHERE THE LAW ENDS (1975) (arguing that corporations are private governments that should be restructured along the lines of the public government).

68. *See generally* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES (1985) (comparing "selective incapacitation" with "just desert" sentencing).

culpable for future crimes that have never been committed and may never be committed, which is completely over the edge of rationality.

The Obsession with Control. All of the Commission's other culpability concepts, however, are but a prelude to the centerpiece of the Sentencing Guidelines, which is to force the creation of a compliance bureaucracy throughout corporate America. This is essentially why the big "stick" is wielded in the first place; it permeates both the "culture" and size penalties, and it is expressly formulated as the innocuous-sounding "effective program to prevent and detect violations of law."[69] A Commission-qualified program in place prior to the offense will reduce the culpability score by three points;[70] however, an otherwise qualified program is conclusively disqualified if it fails to render "high-level personnel" in larger firms or units (200 or more employees), and compliance program administrators in all firms, at least non-negligently non-suspicious, *i.e.*, not "willfully ignorant."[71] Thus, for the potentially most culpable largest firms (5000 or more employees), the combined net difference in culpability score based on the compliance program and its consequences for managerial ignorance of the offense is eight points (three for the program itself plus five for resulting non-negligent ignorance) out of a total range of ten, and therefore is the major difference between the big "stick" and the smaller "stick" that the Commission calls a "carrot."

Furthermore, even if a firm takes a beating with the big "stick" because it does not have a Commission-qualified pre-offense compliance program, it nonetheless, in addition to the fine, must be placed on probation if it is a medium to large firm (fifty or more employees) and "if, at the time of sentencing," the firm does not have a Commission-qualified "effective program to prevent and detect violations of law."[72] The Commission also throws in an unrestricted compliance requirement as an independent ground for a mandatory probation sentence, which is required to be imposed "if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal

69. *See* U.S.S.G., *supra* note 4, § 8A1.2 (comment. (n.3(i)-(iii))) (defining this concept).

70. *Id.* § 8C2.5(f).

71. *Id.* There is also a presumptive disqualification if a substantial authority person participated in the offense. *Id.* It remains unclear whether this undefined participation is the same as that contemplated for high-level personnel, and how, if at all, it is related to the tolerance standard elsewhere applied to substantial authority personnel.

72. *Id.* § 8D1.1(a)(3). This is only one of eight circumstances specified in which the court must order probation.

conduct."[73] Apparently, this unrestricted provision would apply even if the organization already had an "effective program to prevent and detect violations of law." Furthermore, there is no limitation in the Guidelines of what "changes . . . within the organization" may be ordered under such a sentence. At least as far as the Commission is concerned, removal of some or all of the management, or divestiture of ownership by some or all of the pre-existing stockholders, would be permissible—indeed, expressly encouraged by the Guidelines—if the sentencing court believed that such changes would reduce the likelihood of future criminal conduct of some unspecified nature. Presumably, for any firm that likelihood is never zero, and therefore always could be reduced infinitesimally, which appears to be all that is required under the Guidelines.[74]

Even aside from the alarming potential of the unrestricted authority for corporate restructuring—which essentially gives a blank check for the courts to run American business—the potential impact of these compliance provisions is breathtaking. In effect, they mandate an entirely new and alien approach to criminal law enforcement—and corporate management—both for the relatively small number of firms caught in the toils of the federal criminal system and the much larger number of firms that never have and never will violate federal law, but are sufficiently threatened by the big "stick" to implement the Commission's regime. There should be no mistake about the fact that the Commission's Guidelines mandate a regime, not a standard of generally reasonable conduct

73. *Id.* § 8D1.1(a)(6). An even more general catch-all mandates probation "if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)." *Id.* § 8D1.1(a)(8). The referenced statute includes such formulations as "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and "to afford adequate deterrence to criminal conduct." *Id.*

74. This is subject to the statutory constraints on probation conditions in 18 U.S.C. § 3563(b), which carry over into the Guidelines, U.S.S.G., *supra* note 4, § 8D1.3. The Commission has set up an unusual dichotomy by mandating a probation sentence in a compulsory guideline, *id.* § 8D1.1, but setting forth associated probation conditions in a permissive policy statement, *id.* § 8D1.4. Thus, for example, although a court must sentence a corporation to probation if it lacks a qualified compliance program, the Guidelines do not require a sentencing court to force a corporation to create one as part of the probation conditions. *Id.* § 8D1.4(c). However, the Guidelines do recommend such programs as part of probation. *Id.* This structure apparently is intended to deprive the corporation of its appeal rights under the Sentencing Reform Act, which permits appeals only "if the sentence . . . was imposed as a result of an incorrect application of the sentencing *guidelines*" or if the sentence "includes a more limiting condition of probation . . . than the maximum established in the *guideline* range." 18 U.S.C. § 3742(a)(2), (3) (1988) (emphasis added). As the "recommended" probation conditions are mere "policy statements" as distinguished from "guidelines," presumably the government will take the position that no appeal may be taken from their imposition.

or "optimal care," as some may argue.[75] Neither the Commission nor anyone else has anything like the amount of information necessary to prescribe an optimal care standard for internal corporate compliance efforts, and the Commission does not purport to do so. Instead, the Commission's Guidelines embody an obsession with public control of private activity that is at war with the fundamental precepts of a free market economy. It seeks to re-make private management structures into the monolithic image of government bureaucracy, thus undermining the diversity of approach that lies at the heart of our freedoms and our well-being, both economic and political.

Once again, elementary economics shows that the Commission's program, even if interpreted in the most innocuous manner possible, is wrong-headed and destructive. Given the limitless variety of firms within our economy, it may be that *some* firms would benefit from the type of formal, bureaucratic compliance effort that the Sentencing Guidelines envision. But there is no reason to believe that all firms are likely to benefit from that approach; there is every reason to believe that different approaches will be optimal in different firms. Some firms are inherently less bureaucratic, and might well achieve better compliance rates through less bureaucratic mechanisms, such as financial rewards and penalties, or separations of functions in particular ways. Furthermore, all of our experience tells us that, given the proper incentives, the decisionmakers in the best position to determine the optimal form of such efforts are the management or ownership of the firm in which they have a personal stake, not seven Commissioners in Washington, sentencing judges, or probation officers.

In short, public-style bureaucracy is not the only way to solve a problem of law compliance, nor is it likely to be the best way for every private firm in the United States, as currently mandated by the Commission's Guidelines. Indeed, as a first approximation, common experience tells us that public-style bureaucracy often is the worst way to solve any problem of business management. Nor is it the predominant approach that has been taken to law enforcement problems historically, especially criminal law enforcement. To the contrary, the still-predominant method of criminal law enforcement relies primarily on measured incentives—penalties specified in advance, to be imposed when prohibited acts take place—and

75. Nolan Clark, the current Deputy Chief Counsel to the Commission, proposed this view. Nolan E. Clark, *Drafting the Guidelines: Rush to Judgment?*, 14-15 (manuscript), *in* THE SENTENCING GUIDELINES TAKE HOLD (Roger Pilon & John R. Lott, Jr., eds., forthcoming 1993).

does not seek to specify the means by which the private actor avoids the prohibited circumstances. The choice of means is left to the private actor, guided by the incentive supplied by the penalty. In that way, the interests of public law enforcement are balanced against the autonomy of the individual and the efficiency of the firm in carrying out its lawful economic activities, which benefit all of society. To borrow the Commission's metaphor, this might be called the "stick or no stick" approach. Its superiority from a policy perspective is obvious from the different informational requirements for the formulation of sensible public policy: policymakers need not worry about the nutritional value of "carrot," but only about the size of the "stick."

However, the standard of evaluation here is not what is better policy, but rather whether the Commission's rules pass the test of minimal rationality. In this case, they do not, both because the nutritional value of the "carrot" is unknown and because the "stick" is sized arbitrarily. Contrary to the Commission's apparent premise, the introduction of the "carrot" does not make the size of the "stick" immaterial, because both the size of the "stick" and the placement of the hoops will determine how much "carrot" will be consumed. From this perspective, the best that can be said of the corporate Sentencing Guidelines is that they are a misguided attempt to import the theory of "optimal care" from the law-and-economics literature on civil negligence standards.[76] Although that theory has its limitations even as a characterization of civil negligence law, it cannot be superimposed on the strict corporate liability system of federal criminal law, for several reasons.

First, whatever may be said of the correlation between the civil negligence standard and an ideal of socially "optimal care," the Guidelines' compliance regime does not approximate a civil negligence standard. The Commission's definition of "effective program to prevent and detect violations of law" makes liberal use of such terms as "reasonable" and "due diligence." However, it ultimately prescribes a formal, bureaucratic model for internal compliance efforts including program administrators, personnel screening and disciplinary procedures, formalized

76. According to the basic concept of the law-and-economics literature, government can achieve optimal—meaning socially cost-minimizing—law compliance either by a strict liability rule that makes the actor liable for all external costs created by the activity, or by a negligence rule that makes the actor liable only when he or she has not exercised optimal care. For an excellent summary of this law-and-economics literature, see A. MITCHELL POLINSKY, INTRODUCTION TO LAW AND ECONOMICS, ch. 6 & bibliographic app. (2d ed. 1989).

monitoring and auditing systems, and the like. For the reasons discussed above, that model has no possibility of coinciding even with the form, much less the level, of socially optimal care in all or probably most situations. This deficiency is exacerbated by the procedural context in which a sentencing court will evaluate such a program, after a crime has been committed, at the instance of public prosecutors (not injured private parties), and under the further threats of both the big "stick" and the inevitability, under the probation guidelines, of either a mandated compliance program to be implemented under judicial supervision, or, worse yet, the unrestricted corporate restructuring authority.

Second, a critical component of any optimal care specification is the level of resources devoted to compliance. Under the Commission's Guidelines this is indeterminate, and is likely to be influenced by the size of the big "stick." The optimal care mechanism of pure theory only works under the assumptions that: (1) optimal care is specified to social perfection; (2) it is literally costless for the private actor both to characterize its own situation and to compare its care level to optimal care ex ante; and (3) it is literally costless and perfectly error-free for the adjudicator to determine ex post whether optimal care was exercised ex ante.[77] It is only under all of these idealized assumptions that the size of the big "stick" can even arguably be disregarded.[78] No real-world penalty system, and certainly not our current federal criminal system, even approaches any of these ideal conditions.[79] But if any one of them is not satisfied—*i.e.*, until all the relevant information becomes perfect and costless—then the size of the big "stick" matters very much; indeed it is determinative of the efficacy of the system, which might actually *increase* the level of crime, and in any case will decrease overall social welfare, unless the big "stick" is sized optimally.

77. For a discussion of the possible consequences of deviations from these assumptions, see, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986); Mark F. Grady, *Discontinuities and Information Burdens: A Review of the Economic Structure of Tort Law by William M. Landes and Richard A. Posner*, 56 GEO. WASH. L. REV. 658 (1988).

78. For the leading statement of the argument for the big "stick" of highly punitive sanctions, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

79. This helps explain why the criminal law insists upon a subjective state of mind as a requirement of criminal liability, which in turn helps solve the private information problem of the actor's self-characterization. *See* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. (forthcoming, 1993). This, however, does not completely solve the other information problems, particularly in the area of adjudicative error. *See supra* note 77.

Third, in the pure theory of optimal care penalties, the alternative to the big "stick" is no stick at all—a zero penalty, indeed no liability at all—whereas the Commission's structure calls for liability with a smaller "stick," which changes the entire incentive structure by diluting the payoff to what would be otherwise optimal hoop-jumping. Introducing this further complexity makes the information problem even worse, because now the optimality of the overall system depends on perfect information not only about optimal care, but also about both the big and smaller "sticks" and their relationship to the true level of external harm created by the offense.[80]

In sum, adding a "carrot" to the "stick" does not make the problem any simpler, but immensely more complex, and essentially requires omniscience in the penalty structure. Short of costless omniscience, such a penalty structure is more likely to be destructive than beneficial to society, and may be worse than no penalty at all. Any penalty system that cannot make even a plausible claim to superiority over no penalty at all is not rational.

The Commission's failure here is not that it lacks omniscience, but that it fails to understand the implications of that fact, or worse yet, does not care. There is no indication within the Commission's materials that it understands any of the foregoing points. Yet that is the less serious problem, because there also is no indication that the Commission cares at all about how much damage to the American economy could result from its corporate penalty system, or even whether that system is likely to decrease the actual incidence of crime within corporations. Certainly, the Sentencing Guidelines do not reflect any coherent theory that could make such a claim. The Commission's Guidelines reflect only an obsession with government control over private enterprise.

B. Policy Without Reality

The lack of a coherent principled basis for the corporate Sentencing Guidelines leaves the alternative of "experience"—basing sentencing guidelines on empirical analysis of past sentencing practice, as the Commission did with its initial sentencing guidelines for individuals. In this

80. For an examination of this point in the context of organizational sentencing, see Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 397-409 (1991), which completely explodes the theory of the Commission's compliance fixation. Professor Block presented the paper at a conference held one year before the Sentencing Guidelines became effective.

respect, no extensive analysis or discussion is necessary, because the corporate Sentencing Guidelines are not, and do not purport to be, based upon prior sentencing practice. To the contrary, they admittedly are a dramatic departure from past practice. Furthermore, although they clearly are a radical departure—by order of magnitude, a ten to twenty-fold increase in the general level of penalties—no one, but especially not the Commission, has a very good idea about how radical a change is being made to the level and structure of corporate penalties. These facts, when coupled with the lack of a principled basis for the new structure, raise legal questions, discussed in Part II below, regarding the Commission's authority to promulgate such a product. This section focuses on what the Commission knew regarding past practice, and the explanations the Commission gave for ignoring that experience.

In this respect, the Commission again presents an opaque explanation suggesting that past practice data did not provide useful information:

> [T]he Commission concluded that estimates of the average fines imposed upon organizations are less meaningful than were the estimates of past practice relating to the length of imprisonment terms served by individuals. For many organizations, it appears that fines had been set based on inability to or limited ability to pay a fine. Moreover, the amount of dollar loss in organizational offenses has significantly increased in recent years, as has the maximum fine amounts authorized by statute.[81]

This very carefully-drafted language needs to be carefully parsed for what it does and does not say. Obviously, "less meaningful" is merely a euphemism for "completely ignored." But now let us consider the supposed justifications:

(1) The Commission's statement that it appears that fines had been based on inability or limited by ability to pay means that the Commission could not find a binding constraint statistically. But even if they had found such a thing, why not look at a subset of cases that were not constrained? In fact, the Commission did so, presenting in the very same document a set of cases selected on that precise basis.[82] One does not have to be a statistician to see that, once a constraining factor is removed from the data or controlled in the analysis, the resulting findings are no less valid than if there were no constraint at all. The Commission could have developed unconstrained findings, like independent outside

81. SUPPLEMENTARY REPORT, *supra* note 4, at 11.

82. *Id.* at app. C (entitled Profiles of Organizational Defendants that Appeared able to Pay the Minimum of the Upper-Bound Guideline Fine Range).

researchers.[83]

(2) "The amount of dollar loss has significantly increased" apparently is intended to suggest that the older cases were useless. However, from the beginning of the Commission's empirical work in 1987, the analysis has included an investigation of the *ratio* of fines to loss, thereby automatically controlling for loss. In the same report, the Commission presents data controlled for loss, thereby demonstrating that it knows how to do so.[84] Once again, one does not need to be a mathematician to see the transparent fallacy of the Commission's explanation, which essentially says that whenever one variable takes different quantities, an equation cannot be solved. Mathematically, the exact opposite is true.

(3) By noting that "the maximum fine amounts authorized by statute" have increased in recent years, the Commission apparently seeks to imply, without actually asserting, another constraint in the older data. This is made slightly more explicit in the Commission's specific excuse for ignoring four years' worth of data on corporate sentencings in 1984-87, which had been collected by considerable effort at taxpayers' expense. The Commission excluded the data because "the fines in many of the cases were limited by statutory maxima," and the data were "incomplete" in certain other respects.[85] Here again, such a constraint—if it did exist—could be reflected in adjustments to the analysis. But the facts in this instance are known, because the 1984-87 data were compared to later data precisely for the purpose of testing the hypothesis of a statutory maximum fine constraint or even an influence, and the empirical findings—both by internal Commission staff analysts[86] and by independent outside research[87]—were that, when controlling for loss levels, there was no general change in fine levels. Nonetheless, the 1984-87 data were thrown away on the basis of a *dis*proved constraint and because they were "incomplete"—which no data set, including that ultimately used by the Commission, ever is—and the staff members who conducted that study subsequently left the Commission. Once again, one need not be an expert in empirical analysis to see that neither a constraint—much less a disproved one—nor incompleteness justifies discarding data. The only

83. *See, e.g.*, *supra* note 6.

84. *See* SUPPLEMENTARY REPORT, *supra* note 4, tbl. 21.

85. *Id.* at 17.

86. *See 1990 House Hearings*, *supra* note 1, at 469.

87. *See* Cohen, *Corporate Crime and Punishment: A Study of Social Harm*, *supra* note 6, at 659.

reason to completely discard data is to suppress the facts those data show.

One wonders, however, why the Commission even bothered to present these transparently fictitious explanations, because the Commission acknowledges that it is not following past practice levels. Perhaps the explanation lies in the Commission's assertion that it is only doubling or tripling the general level of fines,[88] whereas independent outside research—some of it using precisely the same data—estimates increases of ten to twenty-fold, or larger.[89] Given the impulses within the Commission that produced the ultimate guidelines, it is apparent that the Commission neither knows nor cares what the ultimate impact will be.

Basically, past practice reflects penalty levels far below those contemplated by the new Guidelines. Furthermore, the structure of past practice contradicts virtually every major feature of the Commission's edifice. Past practice fines were related primarily to loss, at a decreasing rate as loss increased, and almost never related to either pecuniary gain or the size of the organization. There was no focus on compliance programs, and, aside from a few aberrational cases, no supervisory probation sentences of the type that characterize the Commission's attempt to legislate a compliance bureaucracy for the American economy.[90] In terms of the past corporate sentencing practices of the federal judiciary, the corporate Sentencing Guidelines set off into completely uncharted territory.

II. RULES WITHOUT AUTHORITY

Can an administrative agency be authorized to issue rules without a rational basis in either logic or experience? As a proposition of general law in this country, the question answers itself with a resounding negative. But some readers may wonder whether the Sentencing Reform Act even purports to authorize the breadth of social experimentation reflected in the Sentencing Guidelines. That answer again is a resounding no: both in its detailed provisions and in the general framework established for the Commission's activities, the Act not only fails to authorize,

88. SUPPLEMENTARY REPORT, *supra* note 4, at 22-24.

89. Using the Commission's own selected sample of cases unconstrained by ability to pay, John Lott found a 20-fold increase in average penalties. John R. Lott, Jr., *Will Consumers Be Haunted by the United States Sentencing Commission's Corporate Guidelines?*, *in* THE SENTENCING GUIDELINES TAKE HOLD, *supra* note 75.

90. *See* Mark A. Cohen et al., *Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions, and Sanctions*, 10 WHITTIER L. REV. 103, 107-08 (1988); *see also supra* note 6.

but in many instances affirmatively disables, the Commission from acting on the impulses reflected in the Guidelines. This Part presents a brief discussion of the relevant provisions of the Act as applied to the key structural features of the corporate Guidelines. In addition, it explores, as a case study in the inadequacy of constraint by legislative intent alone, one of the innovations of the Commission's new regime of corporate control by probation—the "shaming" sanction of court-ordered adverse publicity—which was affirmatively denied to the Commission by the Congress in the Act, but nonetheless appears in the corporate Sentencing Guidelines.

While some of the statutory language might be criticized as less than perfectly clear in imposing constraints on the Commission, the main problem here is an inadequate enforcement mechanism. The principal check on overreaching by the Commission is political rather than legal, and the political process has proved inadequate to the task.

A. Taxation Without Representation

One reason why lawful Commission guidelines must be based in either past practice, or a rigorous demonstration of compelling policy grounds for deviation from past practice, is that the Commission is institutionally incompetent to function as an inferior legislature—what Justice Scalia, dissenting in *Mistretta*, called a "junior-varsity Congress."[91] The majority in *Mistretta* did not rule that a "junior-varsity Congress" was constitutional, or even lawful under the Sentencing Reform Act, but rather differed from Justice Scalia on whether the Commission was intended to operate in that manner.[92] At the time of its definitive construction of the Act in *Mistretta*, the Court had before it only the initial guidelines for individuals, which were firmly based in past sentencing practice, with only minor deviations. Unlike the initial guidelines, the corporate Sentencing Guidelines are premised expressly on a radical and systematic departure from the penalty levels of past practice. This feature of the new corporate Guidelines exceeds the Commission's legal authority under the Act, because it essentially constitutes "taxation without representation"—a general increase in penalty levels that cannot be justified as a rationalization measure, promulgation by a politically unrepresentative

91. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

92. *See supra* notes 2, 11, 12 and accompanying text.

body.[93]

There is nothing in the Act to suggest that the Commission is authorized to mandate an overall increase in penalty levels, particularly where, as in the case of the corporate Guidelines, neither reason nor experience demonstrates that past levels were in any way inadequate. To the contrary, in such circumstances, both the Act and general principles of separation of powers indicate that the Commission's overall increase of penalty levels is unauthorized; it involves the Commission in arrogating to itself the power to impose a new tax on the American economy.[94] Whatever else the Commission may be authorized to do, it is not authorized simply to tax, which is quintessentially a legislative function.

From this perspective, it is important to distinguish between a redistribution of penalties and a general, systematic, across-the-board increase in penalty levels. Whereas a redistribution arguably might be justified as part of the Commission's rationalization role, an across-the-board increase cannot be justified on any legal ground, and violates both the Act and the basic constitutional limitation on the Commission's institutional competence.

The Sentencing Reform Act does not contain the slightest indication that Congress intended to delegate its legislative authority to set overall penalty levels to the Commission. The provisions of the Act suggest the contrary, because they require the Commission to use average levels of past practice penalties as a starting point in the development of the Guidelines, and authorize deviations from past practice only on a rigorous showing of necessity to meet the statutorily-declared purposes of sentencing.[95] However those purposes are construed, the requisite showing of necessity cannot be made merely by the Commission's recitation of the statutory words in its background commentary, for that view would reduce the statutory constraint to an empty platitude. But if any more rigorous test is applied, then the corporate Guidelines fail, because no aspect of these Guidelines' deviation from past practice even meets the standard of rationality, much less demonstrated necessity.

The Act's statutory constraint is reinforced by the constitutional limits on the Commission's powers, as recognized by the Supreme Court in

93. *See generally* Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, Part II, *in* THE SENTENCING GUIDELINES TAKE HOLD, *supra* note 75.

94. When penalties exceed the socially optimal level, they function similarly to an excise tax. *See* Block, *supra* note 80, at 398-402.

95. *See supra* 12, 14 notes and accompanying text.

Mistretta, which confirmed that the Commission lacks "political authority" and that its proper role is to "rationalize" the sentencing process. It seems doubtful that any across-the-board increase in penalty levels ever could be defended as a rationalization measure. Certainly the corporate Guidelines do not qualify as such, because they are not based on any coherent rationale for the systematic increase in penalty levels.

B. Regulation Without Legislation

The second major feature of the corporate Sentencing Guidelines is the compliance bureaucracy that is imposed upon American business through the culpability score and the expansive provisions for corporate probation, under the supervision of the courts as a shadow regulatory bureaucracy.[96] The legal problem with the shadow bureaucracy is that it was never authorized by any act of Congress. Moreover, the Commission's enabling statute, the Sentencing Reform Act, clearly reflects a congressional intent to deny the Commission any power to set up a new bureaucracy for supervising American business. That legislative intent is flouted by the Guidelines.

The legislative history of the Sentencing Reform Act reflects careful congressional attention to the potential problem of over-expansive judicial supervision of organizations through the criminal process and especially the probation sentence, and an intent to confine such activities to what is demonstrably necessary either to carry out another sentence or to prevent "the continuation or repetition of illegal activities."[97] In general, the legislative history rejects the idea "that courts manage organizations as part of probation supervision."[98]

The Commission's elaborate compliance bureaucracy provisions are totally at odds with the congressional intent. Even under the most favorable interpretation of its motivation, the compliance bureaucracy is not predicated on an assertion—much less the requisite showing—that these provisions are necessary to prevent a "continuation or repetition" of the illegal activities. Rather, at best they are a standard of reasonable care. They are in no way limited to the type of offense for which the organization is prosecuted. They are, instead of limited restrictions narrowly tailored to a specific problem, a broad form of social re-engineer-

96. *See* Parker, *supra* note 93, at 42 (manuscript).
97. S. REP. NO. 225, *supra* note 13, at 96-97.
98. *Id.* at 99.

ing, only masquerading under the rubric of crime prevention. Thus, merely in basic concept—quite aside from all of the difficulties of implementation and administration—the Commission's structure violates the Act.

Furthermore, as the Commission never was intended to be a regulatory agency with respect to private activity, its enabling statute contains none of the usual controls that are designed to keep regulatory powers within their proper bounds—such as a clear statement of regulatory objectives and jurisdiction, rigorous process control on policymaking activity, and direct judicial review of administrative initiatives. As a result, when the Commission assumes a private regulatory role, it is beyond control by the ordinary standards of administrative law.[99] When any agency of government is placed outside control by either political or legal means, the inevitable and predictable result is overreaching of the type represented by the corporate Guidelines.

C. Punishment Contrary to Law: The "Punitive Publicity" Sanction

As a further example of overreaching by the corporate Sentencing Guidelines that is unambiguous, consider the Guidelines' endorsement of a "punitive publicity" sanction to be imposed as a condition of probation:

> The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.[100]

Apparently, the Commission thinks that this will be a politically popular way of "shaming" corporations and adding a further threat of harm to a firm's reputation, over and above the conviction itself.[101] However, and quite aside from its vagueness, the Commission's endorsement of this proposal is illegal because the Sentencing Reform Act clearly rejected the

99. For an interesting analysis of the administrative law implications of the Commission's unique role and statutory authority, see Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991) (arguing that courts should judicially review the Commission's actions through the courts' power under the Sentencing Reform Act to depart from the Guidelines). Wright's view, however, does not seem to contemplate an outcome similar to one envisioned by the corporate Sentencing Guidelines.

100. U.S.S.G., *supra* note 4, § 8D1.4(a).

101. Especially for corporations, but to some extent for any convicted criminal, formal criminal penalties are only the beginning of the consequences of conviction. Further consequences include subsequent civil actions brought by private or government plaintiffs, potential loss of licenses, and important reputational or stigma effects. Empirical research shows that for organizations, the reputational effect overshadows all formal penalties, both civil and criminal. *See* JONATHAN

entire notion of a punitive publicity sanction. In response to proposals for just such a sanction, the Act substituted the sanction of notice to victims of certain types of offenses,[102] which was purely compensatory in nature and strictly limited in terms of the burden that may be imposed upon a defendant.

The Commission's error here appears to be based on some faulty history. According to an explanation given by the Commission's Chairman, the idea of punitive publicity "was endorsed two decades ago by the United States National Commission on Reform of Federal Criminal Laws."[103] But in fact, the majority of that commission—popularly known as the Brown Commission—expressly *rejected* the idea of a punitive publicity sanction, which was a minority view.[104]

More importantly, this same idea of punitive publicity actually was presented to Congress, and rejected by Congress, in the Sentencing Reform Act itself. In the course of the federal recodification efforts of the 1970s, a less expansive version of a publicity sanction—now called an "order of notice to victims"—was proposed;[105] even that was rejected by Congress in the Sentencing Reform Act. The legislative history of the Act reflects the rationale that public notice should be limited strictly to

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KARPOFF & JOHN R. LOTT, JR., THE REPUTATIONAL PENALTY FIRMS BEAR FOR COMMITTING FRAUD (UCLA, Anderson Graduate School of Management, Working Paper No. 90-11, 1990).

The Guidelines' "shaming" provisions thus may also displace another market in reputation. The existence of the reputational effect shows that a market operates in the distribution of information regarding firms' activities. Presumably that market—which includes not only the general media but also trade and financial media—is competitive. Where is the market failure that justifies the Commission's intervention? Perhaps more accurately, what assures that the government-mandated information is accurate?

102. 18 U.S.C. § 3555.

103. Wilkins, *supra* note 19, at 120.

104. A computer search of the formulation used by the Chairman's article suggests that the source of the Commission's apocryphal history may be a misreading of a 1983 article by the Australian law professor Brent Fisse. *See* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1229 (1983). However, Fisse was referring to a 1970 Study Draft published for comment by the Brown Commission. The Brown Commission's final report, issued the following year, rejected the idea of punitive publicity "as inappropriate with respect either to organizations or to individuals, despite its possible deterrent effect, since it came to close to the adoption of a policy approving social ridicule as a sanction," and instead proposed a narrower concept of notice to victims. NATIONAL COMM'N ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT § 3007 & cmt. (1971). Fisse's article acknowledged these later developments. *See* Fisse, *supra*, at 1230 n.424.

Moreover, Fisse wrote his article prior to the enactment of the Sentencing Reform Act of 1984, in which Congress rejected even the Brown Commission's proposal as overly broad and unduly punitive.

105. Proposed Criminal Code of 1977, S. 1437, 95th Cong., 2d Sess. § 2005 (1978).

the compensatory purpose of facilitating civil relief and other corrective actions by actually notifying victims:

> The Committee does not intend that the section be used to order "corrective advertising" or to subject a defendant to public derision. Publication should not be required beyond that which is necessary to notify the victims of the defendant's conviction.[106]

The resulting statutory provision, 18 U.S.C. § 3555—the direct lineal descendent of the Brown Commission proposal—is limited to "an offense involving fraud or other intentionally deceptive practices," requires special presentence procedures and considerations, and limits the permissible cost of notice to $20,000.[107]

The Commission's endorsement of this obviously problematical proposal[108] cannot be based on mere ignorance, as both the facts and this analysis were supplied to them years ago.[109] Nor do any of the Commission's current materials suggest any basis for reconciling this provision with the Sentencing Reform Act of 1984 that defines the Commission's powers, as opposed to "the English Bread Acts of the early 19th century"[110] or a twenty-year old proposal ultimately rejected by the Brown Commission and Congress. There is no principle of statutory interpretation or judicial review of agency action that is sufficient to permit the Commission to follow "early 19th century" English acts and ignore the intent of the United States Congress as expressed in 1984, under a currently operative statute defining the Commission's powers.

D. Defective Process

The foregoing sections of this Part have shown that the Commission has violated the provisions of its enabling statute, and exceeded the

106. S. REP. NO. 225, *supra* note 13, at 85; *see also id.* at 83-84.

107. Although the Guidelines purport to authorize the publicity sanction as a condition of probation rather than under § 3555, it is highly unlikely that Congress, having carefully crafted these limitations on the explicit sanction of public notice, nonetheless intended to permit the Commission and the courts to evade those limitations recasting the sanction as a condition of probation. The statutory authority for probation conditions includes an order of notice to victims, but only "pursuant to the provisions of section 3555," as one of the listed conditions permitted. 18 U.S.C. § 3563(b)(4).

108. The analysis here does not reach this proposal's constitutional aspect or the likely problems in its administration, but instead focuses only on the threshold question of congressional intent, which clearly runs counter to this idea.

109. *See* Parker, *supra* note 2, at 545-46. *See* United States Sentencing Commission, 1988 *Discussion Materials*, 10 WHITTIER L. REV. 14 (1988) (noting these points).

110. Wilkins, *supra* note 19, at 120.

bounds of its constitutionally permitted authority as conceived by both the majority and dissenting opinions in *Mistretta*, by promulgating the Guidelines. However, Congress took no action to disapprove or modify the Guidelines under the provisions of the Sentencing Reform Act,[111] and the judicial review provisions of the Act seem calculated to discourage any effective review of the Guidelines' rationality.[112] Thus, while the adverse publicity sanction may be subject to at least some scrutiny by the courts when applied in particular case, the main structural features of the Guidelines are unlikely to be reviewed.

Given the weakness of these enforcement mechanisms, it should come as no surprise that we observe the Commission now engaged in social experimentation, for no effective discipline has been applied. The Commissioners themselves do not have to be re-elected, they cannot be removed by the President except for cause, and, unlike all federal judges except those on the Supreme Court, they do not have to answer to a higher court. Thus, while the substance of the Sentencing Reform Act purports to impose a discipline, the Commission already has learned that it may exceed the substantive constraints with impunity. Every reason exists to believe that it will continue to do so.

III. RULES WITHOUT CONSTITUTIONALITY: THE CASE OF THE "CRIMINAL PURPOSE ORGANIZATION"

With so many problems in terms of basic rationality, and disobedience to the statutory mandate, it is not surprising that the corporate Sentencing Guidelines raise a number of constitutional problems as well, which to some extent are anticipated in the foregoing discussion. The basic features of the Guidelines obviously raise problems under some of the most fundamental constitutional doctrines—due process,[113] separation of pow-

111. 28 U.S.C. § 994(p).

112. Although the Guidelines are subject to the notice-and-comment rulemaking standards of the Administrative Procedure Act, *see* 28 U.S.C. § 994(x), Congress withheld the authority for judicial review under general standards of administrative law. *See* S. REP. No. 225, *supra* note 13, at 181 ("It is . . . not intended that the guidelines be subject to appellate review under chapter 7 of title 5."). As a result, courts can review the Guidelines only in particular criminal cases and only when narrowly specified grounds for appeal are met. 18 U.S.C. § 3742. Some argue that courts should have even narrower judicial review channeled through the courts' power to depart from guidelines sentences in atypical cases, *see* Wright, *supra* note 99, at 58-66. Under this view, the core of the Guidelines would be virtually immune from judicial review.

113. In addition to their vagueness and overbreadth, the Sentencing Guidelines probably violate substantive due process. Given the lack of coherence in the Commission's approach as shown in Section I of this Article, it may not matter whether a reviewing court applies the legislative-style

ers,[114] and equal protection[115]—that are deserving of full consideration. But in the interest of confining this Article to a reasonable length, this Part will focus instead on a second case study of yet another radical feature of the Sentencing Guidelines: the Commission's legislation of a "death penalty" for what it calls a "criminal purpose organization." In this arena, the Commission's Guidelines present a virtual encyclopedia of methods of governmental overreaching.

The "criminal purpose organization" provision of the Guidelines is the ultimate embodiment of the Commission's statist approach: a determination, based entirely on matters *other than* the offense of conviction, whether a particular person is "good" enough to be allowed to live or "bad" enough to be given the death penalty for an offense that otherwise, by definition, does not warrant such a penalty. It should not provide us with much solace that, at least in this initial application, the person is an "artificial" one.

The Commission's corporate death penalty directs the courts that:

> If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount . . . sufficient to divest

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rational basis test adopted in cases like Williamson v. Lee Optical, 348 U.S. 483 (1955), or a more stringent rationality test supplied by administrative law. *See* Wright, *supra* note 99, at 55-69. Given the Commission's statutory exemption from the judicial review provisions of the Administrative Procedure Act, how will anyone obtain review of the basic structure of the Guidelines? *See id.*

114. *See supra* notes 91-99 and accompanying text.

115. Although the Sentencing Guidelines formally apply to all organizations, *see supra* note 3, the Commission's preferred target is business firms and their potential for pecuniary gain. The Guidelines provide for downward departures both for public entities, U.S.S.G., *supra* note 4, § 8C4.7, and for firms that do not have shareholders, particularly if they fall into the preferred category exemplified by "a labor union convicted of embezzlement of pension funds":

> If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of the organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

Id. § 8C4.8; *see 1990 House Hearings*, *supra* note 1, at 176-77 (testimony of Commission Chairman). Here again, under any level of scrutiny, it is difficult to see any basis for preferring members or beneficiaries over shareholders. Many instances of corporate criminal liability can and do have the effect of doubly victimizing shareholders in the manner described. Is there something inherently bad about shareholding and good about being a debt creditor of the same entity? Both may invest to secure their retirement. Or, what about mutual insurance companies? Are the policyowner-stockholders the preferred beneficiaries or the disliked shareholders?

the organization of all its net assets.[116]

Here again, we have a proposal that is likely to be politically popular—at least until one realizes what "criminal purpose organization" actually means under the Guidelines. But it is inconsistent with the Sentencing Reform Act and unconstitutional.

As with the punitive publicity idea, there is no statutory authority for this provision, and considerable evidence of legislative intent to the contrary. The most closely analogous situation Congress considered was the imposition of business restrictions on convicted organizations as conditions of probation. In that context, Congress was so concerned about overly broad applications that it deleted the provision authorizing "debarment" of an organization from a particular line of business as a standard condition of probation, on the rationale that it "might encourage inappropriate use to put a legitimate enterprise out of business."[117] Congress further provided some indication of what would be considered to be an "illegitimate" business, as one that "consistently operates outside the law" and "in a totally illegal manner . . . [as] where a business exists only as a front for those individuals who use it for their own fraudulent purposes."[118] While even these formulations may suffer from some vagueness and overbreadth, they are far narrower than what the Commission apparently has in mind.

Compared with the rare case in which the Congress thought that a debarment from a line of business may be appropriate,[119] the Commission's background report indicates the application of its death penalty fine could be anywhere from five percent to fully one-third of all convicted corporations.[120] At neither end of that spectrum does the Commission-defined case for destroying firms seem rare at all; at the upper

116. U.S.S.G., *supra* note 4, § 8C1.1.

117. S. REP. NO. 225, *supra* note 13, at 97; *see also id.* at 68-69.

118. *Id.* at 69.

119. Congress believed that it would be a rare case, S. REP. NO. 225, *supra* note 13, at 69, where the measure under its consideration would be appropriate, and that measure was not the death penalty fine ultimately adopted by the Commission, but instead a probation condition that would bar the firm from a particular line of business for the duration of the probation sentence.

120. The Commission classified 15 out of 328 firms sentenced in 1988 as criminal purpose organizations, with another four as missing data/unknown, for an approximate rate of 5%. SUPPLEMENTARY REPORT, *supra* note 4, tbl. 7. For the years 1989 and 1990, the rate of offenders definitively classified as criminal purpose organizations fell, but the number of missing data/unknown rose dramatically. If one adds the unknowns—which could well be undecided in the staff's simulations—then the rates for 1989 and 1990 would change to about 33% and 23%, respectively.

end, it would mean that the Commission was going into the business of destroying some 100 firms per year through the federal sentencing system.

The Commission's definition of criminal purpose organization is one "operated primarily for a criminal purpose or primarily by criminal means"—not "totally," "exclusively," "consistently," or even "principally," but only "primarily." What does this mean? Supreme Court authority indicates that "primarily" does not require very much.[121] For example, if a highly diversified firm has one substantial department whose business is supposedly infected by criminal practices, then the entire organization could be declared criminal and required to forfeit its right to exist, even if the vast majority of its operations were perfectly legitimate. The Commission may or may not intend this result, but one cannot determine from the language employed.[122] However, it is clear that a Congress unwilling to authorize even the lesser sanction of debarment from a particular line of business for anything short of a "totally illegal" operation is highly unlikely to have intended to permit an organizational death penalty under less aggravated circumstances.

Furthermore, the Commission's criminal organization proposal does not appear to require that the criminality be related to the instant offense of conviction, nor indeed to any adjudicated violation of law at all. Rather, it seems to permit, or perhaps even to require, that the courts make such a determination on the basis of undefined "history and characteristics of the defendant." Therefore, the Commission has declared open season for any sort of prosecutorial allegations of misconduct—past or future—without requiring proof beyond a reasonable doubt, or even by competent evidence.

Thus, the Commission's criminal organization proposal violates virtually every one of the legal and constitutional rules that make up the doc-

121. In Board of Governors v. Agnew, 329 U.S. 441 (1947), the Supreme Court construed the term "primarily," as used in the management-interlock provisions of § 32 of the Banking Act of 1933, 12 U.S.C. § 78 (1988), to mean only substantial, 329 U.S. at 446. The Court applied that definition to hold that a firm whose revenues from underwritings ranged from 26% to 39% of its total revenues was primarily engaged in the underwriting of securities, notwithstanding that its brokerage business at all times had a larger share of its revenues. *Id.* at 446-47.

122. If the Commission intended a narrower application, it had other verbal formulations available. *Agnew* distinguishes "principally" as a higher threshold. *See* 329 U.S. at 447-48. Corporate law often uses an "all or substantially all" formulation in regulating corporate transactions. But it is unnecessary to look outside the legislative history of the Sentencing Reform Act, which uses "totally" or at least a "generally" formulation. S. REP. NO. 225, *supra* note 13, at 69.

trine of "legality" in criminal law:[123] it lacks authority in the enabling statute; it offends due process by failing to specify the proscribed conduct in advance,[124] by its oppressive vagueness,[125] and by failing to require proof beyond a reasonable doubt[126] by competent evidence in a trial by jury;[127] it makes up a new offense ex post,[128] without guiding standards; and it declares someone a "criminal," unworthy of existence, without trial and on the basis of status ("history and characteristics") rather than specified conduct.[129] It is nothing more than a vaguely-worded, ex post facto law that purports to authorize a judicial bill of attainder,[130] consisting of a death penalty that is, by definition, disproportionate to the un-

123. For a general discussion of the doctrine of "legality," see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (arguing that the core principle is a standard of regularity in governmental actions).

124. A criminal prohibition "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

125. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (local vagrancy ordinance void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice . . . and because it encourages arbitrary and erratic arrests and convictions").

126. *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt constitutionally required as a matter of due process).

127. The Sixth Amendment guarantees trial by jury "[i]n all criminal prosecutions." U.S. CONST. amend. VI.

128. "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3.

129. Robinson v. California, 370 U.S. 660, 667 (1962) (punishment on status alone violates the Eighth Amendment prohibitions on cruel and unusual punishment).

130. The core prohibition of the bill of attainder clause is punishment without trial, whether based on conduct or status. *See* United States v. Lovett, 328 U.S. 303, 315-18 (1946). The Supreme Court's earliest applications struck down post-Civil War loyalty oaths imposed for admission to practice law in federal courts and for state licensing of various professionals. *See, e.g.*, *Ex parte* Garland, 71 U.S. 333 (1866); Cummings v. Missouri, 71 U.S. 277 (1866). After some backsliding, *see* American Communications Ass'n v. Douds, 339 U.S. 382 (1950), this application was extended to a new era of crime by association, *see* United States v. Brown, 381 U.S. 437 (1965). More recently, the Supreme Court has focused on whether certain disablements outside the context of criminal penalties constitute bills of attainder. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (retention of presidential papers); Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984) (ineligibility for federal financial assistance).

No such ambiguities attend the application of the bill of attainder prohibition to the Commission's criminal purpose organization penalty, which clearly is intended to be punishment, and is imposed in a criminal case. Furthermore, it is levied on the basis of matters that, if conduct at all, have not been proved at a trial. The basis for calling an offender a criminal purpose organization is by definition conduct (or history and characteristics) other than the offense of conviction proven at trial. The Commission's provision is a bill of attainder. The more interesting legal questions are whether the Bill of Attainder Clause can be invoked by corporations, since the Supreme Court held it unavailable to states in South Carolina v. Katzenbach, 383 U.S. 301 (1966), and whether courts will hold it inapplicable to the Commission, on the ground that the Commission is not the same as Congress, and therefore nothing it promulgates could be deemed legislation.

derlying offense.[131]

For what supposedly compelling policy objective has the Commission acted? Essentially nothing. True criminal "front" organizations tend to be gossamer things that usually disappear prior to sentencing. They can be far more effectively controlled by the individual sentencing of the principals. If the principals are not effectively restrained, they simply will create a new "front." Thus, the practical effect of the Commission's guideline on front organizations is likely to be zero. Only the legitimate firm has something to fear from this provision.

IV. WRONG WITHOUT REMEDY?

The foregoing discussions of this Article have identified a number of very serious problems with the rationality, legality, and constitutionality of the corporate Sentencing Guidelines, without even purporting to present an exhaustive analysis. Enough has been said, however, to identify the underlying problem with the Commission that now has resulted in a set of proposals that are, to say the least, disturbing. They are disturbing not because corporations are "good" rather than "bad." Ultimately corporations are neither: they are mere instrumentalities, only means to an end. However, the same is true about sentencing guidelines and sentencing commissions.

Corporate sentencing is important, if at all, only because corporations are an important means to an important end, which is the freedom and autonomy of individuals to pursue their lawful objectives, both economic and otherwise, through voluntary, private association. The Sentencing Guidelines, to the extent that they interfere unnecessarily with the efficacy of the corporation as a private associational mechanism, are a threat to the freedom—and not only the material well-being—of individuals in our society. Many if not most readers of this Article will disagree with the strongest form of the argument here that the Commission's corporate Guidelines reflect a philosophy of statism, in seeking to interfere with

131. This provision is one of the few punitive actions that courts could actually hold unconstitutionally disproportionate based on the current state of the Supreme Court's Eighth Amendment jurisprudence. In Harmelin v. Michigan, 111 S. Ct. 2680 (1991), the Court backed away from the consensus test of Solem v. Helm, 463 U.S. 277 (1983), essentially on the ground that authoritative standards of proportionality do not exist. *Harmelin*, 111 S. Ct. at 2686. But the Guideline's criminal purpose organization provision provides a rare exception: in this instance, the Commission already has established, in the remainder of the Guidelines, the proportionate punishment for the offense in question. Thus, by definition, the additional criminal purpose organization punishment is disproportionate, to the extent that the factors considered are improper.

corporate operations precisely because they are one of the last bastions, and symbols, of private autonomy left after a generation of dramatic expansion in governmental power through a myriad of other means. But the fair-minded among them might concede that the Commission's product certainly weighs in on the interventionist side of the balance.

The more fundamental question is how the Commission reached the point of promulgating its interventionist product under a statute that simply cannot be read as a mandate to restructure the American economy, or, for that matter, to support any sort of interventionism by the Commission into corporate management. The case studies given above—especially the adverse publicity example—indicate that the Commission believes it can get away with anything, including a direct contradiction of a clearly expressed congressional intent. In this author's judgment, the Commission probably is correct in that belief. The corporate Guidelines laid before the Congress for six months before they became effective; nothing was done to postpone or modify them. This might be explained as an artifact of current politics, or the general inertia of Congress, but that seems doubtful. The Commission has been able to obtain virtually any statutory amendment it has desired.[132] Thus, for example, if the adverse publicity provision becomes an embarrassment, the Commission probably will be able to have the statute changed before it will have to withdraw the guideline.

Without effective political discipline, the legal constraints on the Commission's powers also are unlikely to prove effective. In terms of substance, the Commission was placed under the fairly severe statutory discipline of choosing between empirically-based guidelines following past practice and providing a rigorous demonstration of the inadequacy of past practice. In the corporate Sentencing Guidelines, the Commission chose neither. Congress bypassed its chance to disapprove; thus it seems unlikely that the courts will do anything about it. Even if they wished to do so, they are discouraged by the limitation on judicial review imposed by the Sentencing Reform Act, which focuses judicial review on microscopic issues arising in particular sentencings and therefore away from examining the rationality of the basic structure. Successful litigation challenges are likely to be those nibbling around the edges of the

132. The key provision specifying the Commission's powers under the Sentencing Reform Act has been amended six times in the nine years since its enactment. *See* 28 U.S.C. § 994. In most cases this was done at the instance of the Commission and in the substance desired by the Commission.

Guidelines. A fairly target-rich environment for defense lawyers is still left, but it also leaves a fundamentally interventionist core in place.

From this perspective, Justice Scalia was more perceptive than the majority in *Mistretta* when he condemned the Commission as a "junior-varsity Congress" designed to make the "senior-varsity" less politically responsive:

> By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. . . . This is an undemocratic precedent that we set . . . .[133]

Justice Scalia was concerned primarily with the temptation for Congress to delegate "thorny, 'no-win' political issues" to the unresponsive body, thus insulating the members of Congress from the ire of their constituents in the "no-win" situation. But that concern may not go far enough to explain the problem of the Sentencing Commission, at least as it has played out in the Sentencing Guidelines for organizations. Members of Congress also are members of government, and, as such, share an interest with members of the Commission in aggrandizing public power at the expense of private autonomy. It may not be simply that Congress wishes to avoid the troubling features of the Guidelines; Congress itself may have an affirmative interest in facilitating the Commission's agenda, under the political cover of the "expert" agency.

If that is so, then why does no one else seem to care enough to impose political costs on the Congress for creating this structure? The corporate and business community is relatively well-positioned to influence Congress, and yet there is little indication that it sought to do so when the Guidelines were pending. There are three possible interpretations here—one more optimistic than the others, but all somewhat troubling.

The most optimistic interpretation is the "cynical" scenario set forth at the beginning of this Article: that, in fact, the corporate Sentencing Guidelines will have only a limited adverse effect on the economy in general, and are merely political theater. Under this interpretation, the business community could believe that providing the politicians with their theater is an acceptable price to pay for protection from an even more aggressive form of government intervention in business.

133. 488 U.S. at 422 (Scalia, J., dissenting).

The more pessimistic interpretations are that some segments of the business community actually may have incentives to join with the government. One such interest group is corporate management; another is the more bureaucratically managed firms.

The alternative to corporate entity liability and punishment is individual punishment. Individuals within firms generally will not bear the full cost of the Commission's compliance regime; it will be passed on to shareholders and consumers. Yet they do bear the costs of individual penalties, so that expanding the notion of corporate culpability and bureaucratic controls could have some payoff to them. From this point of view, the relative quiescence of the business community *vis-a-vis* the Guidelines might indicate only another example of the "agency cost" problem of divergence between the interests of the firm and its agents.

Finally, there would be some incentive for more bureaucratic firms to support the Commission's structure as a means of gaining a competitive advantage over less bureaucratic rivals. As noted above, the mandated compliance regime is likely to have a more severe impact on the less bureaucratic firms.

All of these interpretations, however, are troubling from the perspective of the long-term relationship between the individual and the state. Whether the firms are simply making a small "protection" payment, the managements implicitly are "plea bargaining" with their firms' resources, or some firms are seeking advantage over their rivals; in any case, they are only temporizing with the underlying problem of unchecked governmental power. The "protection" analogy is most useful here: making the payoff provides only a temporary respite; the longer-term result usually is a demand for an even higher payment.

In the particular case of the Commission's corporate Sentencing Guidelines, the potential could be controlled simply by taking the subject away from the Commission. In retrospect, corporate sentencing probably never should have been assigned to the Commission, simply because corporate sentencings do not occur with sufficient frequency in the federal courts to justify the sort of empirically-based guideline system that the Sentencing Reform Act envisioned. The cleanest solution would be to abolish corporate criminal liability altogether, as that concept is at best a useless legal anomaly, and often much worse than useless, as is illustrated by the Guidelines.[134] Short of that measure, the only legisla-

134. *See* Parker, *supra* note 93 (proposing this argument).

tive action that is likely to be both feasible and efficacious is simply to withdraw corporate sentencing from the Commission's jurisdiction entirely. No less rigorous structural constraint seems capable of restraining the Commission's impulses. No non-legislative action is likely to be effective at all. Given the existing institutional arrangements, there is no possibility of relief inside the Commission, and very little in the courts.