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THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS: HOW DO THEY WORK AND WHAT ARE THEY SUPPOSED TO DO?

I. INTRODUCTION

In 1986, the United States Sentencing Commission began holding public hearings and receiving hundreds of legal memoranda and position papers on proposed guidelines for the sentencing of organizations.¹ The Commission also conducted empirical studies of the federal courts' organizational sentencing practices from 1984 to 1990.² After three years and four drafts of the organizational sentencing guidelines, the Commission adopted its final version on April 26, 1991.³ The Commission transmitted the guidelines to Congress just in time to meet the May 1 statutory deadline.⁴

Absent Congressional intervention, the Guidelines for the Sentencing of Organizations⁵ became effective on November 1, 1991.⁶ Reactions varied widely. Some Commentators characterized the Organizational Guidelines as "draconian"⁷ while another accused the Guidelines of letting "big business off easy."⁸ Neither extreme is wholly justified.

This Comment examines the federal Organizational Guidelines by comparing and contrasting them with Ohio's organizational sentencing statutes.⁹ Section II begins by looking at the history and text of the federal and Ohio systems for sentencing organizations. In Section III, this Comment analyzes the Organizational Guidelines by examining the statutory goals established for the Guidelines and the Sentencing Commission, and by contrasting the Organizational Guidelines with the Ohio sentencing system. This Comment concludes by arguing that, while the Organizational Guidelines generally meet their statutory pur-

1. 1991 UNITED STATES SENTENCING COMM'N ANN. REP. 6 (all government reports on the guidelines cited in this Comment are available from the United States Sentencing Commission).

2. *Id.*; see generally SUPPLEMENTARY REP. ON SENTENCING GUIDELINES FOR ORGANIZATIONS (1990) [hereinafter SUPPLEMENTARY REPORT].

3. Stanley S. Arkin, *Corporate Sentencing Guidelines*, N.Y. L.J., June 13, 1991, at 3.

4. 28 U.S.C. § 994f (1988).

5. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, 347-84 (Nov. 1991) [hereinafter U.S.S.G.].

6. U.S.S.G., app. C, Amendment 422, at 690.

7. Leonard Orland, *Corporate Punishment by the U.S. Sentencing Commission*, FED. SENTENCING REP., July/Aug., 1991, at 50; Bruce Rubenstein, *You Have the Right to Remain Silent: Now Spill Your Guts*, CORP. LEGAL TIMES, August 1992, at 1.

8. John C. Coffee, Jr., *Sentencing Guidelines Let Big Business Off Easy*, MANHATTAN LAW., June 1991, at 17 (reaction to final draft of Organizational Guidelines).

9. See generally OHIO REV. CODE ANN. §§ 2901.23, 2901.24, & 2929.31 (Anderson 1987).

poses, they are deficient in some areas. Finally, this Comment suggests that changes be made to the federal Organizational Guidelines.

II. BACKGROUND: SENTENCING OF ORGANIZATIONS

A. Federal Sentencing of Organizations Under the Guidelines

1. History: The Sentencing Reform Act and the United States Sentencing Commission

The establishment of the United States Sentencing Commission and the passage of the Sentencing Guidelines marked a transition from nearly unbridled discretion bestowed upon federal judges to a highly structured criminal sentencing process.¹⁰ This transition did not always meet with approval.¹¹ Only after the United States Supreme Court upheld the constitutionality of the Commission and the Guidelines¹² did the Guidelines begin to have a significant, consistent impact upon federal sentencing.¹³ Thereafter, the Commission entered a new era with the issuance of its Guidelines for the Sentencing of Organizations.

As part of the Sentencing Reform Act of 1984 (SRA),¹⁴ Congress established the United States Sentencing Commission¹⁵ to establish sentencing policies and practices for the Federal criminal justice system that: (1) assured the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18 of the United States Code;¹⁶ (2) provided certainty and fairness in meeting the purposes of sentencing;¹⁷ (3) avoided unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal con-

10. See *infra* note 22 and accompanying text.

11. See *infra* note 23 and accompanying text.

12. See *infra* notes 25-26 and accompanying text.

13. UNITED STATES SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, EXECUTIVE SUMMARY 85 (1991) [hereinafter DISPARITY REPORT].

14. See generally 18 U.S.C. §§ 3551-3559; 28 U.S.C. §§ 991-998. (1988) [hereinafter SRA].

15. See generally 28 U.S.C. §§ 991-98 (1988) (statutes establishing Sentencing Commission and its functions).

16. 28 U.S.C. § 991(b)(1)(A). The purposes of sentencing in 18 U.S.C. § 3553(a)(2) are: (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Id.

17. 28 U.S.C. § 991(b)(1)(B).

duct;¹⁸ and (4) maintained sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.¹⁹ The Commission's first guidelines were submitted to Congress on April 3, 1987, and took effect November 1, 1987.²⁰

In *Burns v. United States*,²¹ Justice Marshall described the evolution of federal sentencing from the pre-guideline era to the present system:

The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes. Before the Act, Congress was generally content to define broad sentencing ranges, leaving the imposition of sentences within those ranges to the discretion of individual judges Now, under the "guidelines" system initiated by the Act, district court judges determine sentences based on the various offense-related and offender-related factors identified by the Guidelines of the United States Sentencing Commission.²²

This transition from prior sentencing practices to the Guidelines sentencing system was not an easy one.

Initially, there were a number of constitutional challenges to the validity of the Commission and the Guidelines²³ charging that the establishment of the Sentencing Commission violated the separation of powers of government.²⁴ The Supreme Court put these challenges to rest in *Mistretta v. United States*.²⁵ The Court, calling the Sentencing

18. *Id.*

19. *Id.*

20. U.S.S.G. at 1.

21. 111 S. Ct. 2182 (interim ed. 1991).

22. *Id.* at 2184. (citations omitted). For a detailed description of the history of the Sentencing Reform Act and the Sentencing Guidelines, see *Mistretta v. United States*, 488 U.S. 361, 363-70 (1989).

23. By mid-1988, the guideline sentencing system had been upheld as constitutional in twenty-one district courts and held unconstitutional by twenty-nine district courts. Petition for Writ of Certiorari at 9-10, nn. 10-11, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-1904). Compare *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988) (statute establishing Sentencing Commission violated separation of powers) with *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989) (SRA does not violate separation of powers doctrine). Occasional constitutional challenges to the Guidelines are still raised. For a recent case holding that the separation of powers doctrine is not violated by the SRA, see *United States v. Richardson*, 925 F.2d 112 (5th Cir.), *cert. denied*, 111 S. Ct. 2868 (interim ed. 1991).

24. For example, in *Mistretta*, the defendant argued that Congress had granted excessive legislative discretion in violation of the nondelegation doctrine. *Mistretta*, 488 U.S. at 371. The nondelegation doctrine states that Congress cannot delegate its legislative power to another branch of government. *Field v. Clark*, 143 U.S. 649 (1892). Congress may, however, seek the assistance of other branches when necessary for government coordination. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

25. 488 U.S. 361 (1989). The court described the facts of the case as follows:

Commission "an unusual hybrid in structure and authority,"²⁶ found that the United States Constitution did not prohibit Congress from delegating the task of formulating sentencing guidelines with "significant statutory direction."²⁷ The Court further found that the constitutional system of checks and balances was not affected by "calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges."²⁸ The Court thus found the SRA and the Sentencing Guidelines constitutional. With the guidance of *Mistretta*, the federal courts applied the Guidelines more consistently.

Under early common law, corporations were held to be incapable of committing a crime, since they were non-entities.²⁹ The individual members of the corporation, however, could be held criminally liable.³⁰ Corporations can now be found vicariously liable³¹ under federal law for the criminal acts of their employees or agents committed within the scope of their employment.³² This has been the rule since 1909, when

John M. Mistretta (petitioner) and another were indicted in the United States District Court for the Western District of Missouri on three counts centering in a cocaine sale. Mistretta moved to have the promulgated Guidelines ruled unconstitutional on the grounds that the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines. [T]he District Court was not persuaded by these contentions.

Petitioner had pleaded guilty to the first count of his indictment (conspiracy and agreement to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B)). The Government thereupon moved to dismiss the remaining counts. That motion was granted. Petitioner was sentenced under the Guidelines to 18 months' imprisonment, to be followed by a 3-year term of supervised release. . . .

Petitioner filed a notice of appeal to the Eighth Circuit, but both petitioner and the United States, pursuant to this Court's Rule 18, petitioned for certiorari before judgment. Because of the "imperative public importance" of the issue, as prescribed by the Rule, and because of the disarray among the Federal District Courts, [the Supreme Court] granted those petitions.

Id. at 370-71. (citations omitted).

26. *Id.* at 412.

27. *Id.*

28. *Id.*

29. *New York Cent. R.R. v. United States*, 212 U.S. 481, 492 (1909).

30. *Id.*

31. Vicarious liability is defined as "criminal liability, where the defendant, generally one conducting a business, is made liable, though without personal fault, for the bad conduct of someone else, generally his employee." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 250 (2d ed. 1986).

32. Scope of employment is defined as actions which the agent is "authorized to perform, and . . . must be motivated-at least in part-by an intent to benefit the corporation." *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982). *See generally* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment*, 18 *U. DAYTON L. REV.* 563 (1988).

the United States Supreme Court stated “[w]e see no valid objection in law and every reason in public policy why the corporation which profits by the transaction . . . shall be held punishable”³³ After the first version of the Sentencing Guidelines became effective on November 1, 1987, federal courts continued to sentence corporations³⁴ for the acts of their employees or agents on the theory of vicarious liability.³⁵ Due to concerns about the complexity of the subject matter and statutory deadlines, the Commission decided to defer drafting sentencing guidelines for organizations for offenses other than antitrust offenses until after it released the first version of the Sentencing Guidelines in 1986.³⁶

2. The Organizational Sentencing Process

Chapter Eight of the Sentencing Guidelines governs the sentencing of all “organizations”³⁷ for felony and Class A misdemeanor offenses.³⁸ The Organizational Sentencing Guidelines, along with the other federal guidelines, are contained in the *Federal Sentencing Guidelines Manual*,³⁹ which contains actual “guidelines,” policy statements of the Sentencing Commission, and commentary.⁴⁰ The Organizational Guidelines employ a number of devices, including restitution,⁴¹ remedial

33. *New York Cent. R.R.*, 212 U.S. at 495.

34. Corporations are about one percent of the criminal defendants sentenced in the federal system in an average year. Otto G. Obermaier, *A Practical Partnership*, NAT'L L.J., November 11, 1991, at 13. Publicly held corporations, as a percentage of all corporations facing sentencing in the federal courts, has risen from 7.5 percent in 1988 to 36 percent in 1989-1990. *Id.* Between January 1, 1988 through June 30, 1990, the most common offense category for organizations was fraud and deceit (31.9%), followed by antitrust violations (23.1%). 1991 UNITED STATES SENTENCING COMM'N ANN. REP. 155.

35. See, e.g., *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.) (failure of bank personnel to inquire about reportability of transactions supported finding of willfulness of bank), *cert. denied*, 484 U.S. 943 (1987); *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979) (corporate officer acted with intent to benefit corporation, so his willfulness could be imputed to the corporation); see also *United States v. Basic Constr. Co.*, 711 F.2d 570, 572 (4th Cir.) (example of valid jury instructions concerning corporate liability), *cert. denied*, 464 U.S. 956 (1983).

36. SUPPLEMENTARY REPORT, *supra* note 2, at 1.

37. An “organization” is statutorily defined as “a person other than an individual.” 18 U.S.C. § 18 (1988). “The term [organization] includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pensions funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.” U.S.S.G. § 8A1.1, commentary n.1.

38. U.S.S.G. § 8A1.1.

39. United States Sentencing Commission, *Guidelines Manual* (Nov. 1991).

40. Policy statements are different from guidelines and are not generally binding. For purposes of determining whether a departure from the guidelines is warranted, however, “the [policy] statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy could lead to an incorrect determination that a departure was appropriate.” *Williams v. United States*, 112 S. Ct. 1112, 1119 (interim ed. 1992).

41. U.S.S.G. § 8B1.1.

orders,⁴² community service,⁴³ notice to victims,⁴⁴ fines,⁴⁵ and organizational probation.⁴⁶

Chapter Eight of the Sentencing Guidelines employs a methodical process for sentencing organizations.⁴⁷ Under Chapter Eight, the court must remedy the harm by first determining whether restitution, remedial orders, or notice to victims is warranted.⁴⁸ Next, the court must determine whether to impose any fine.⁴⁹ The court must then determine whether probation is necessary.⁵⁰ Finally, the court can impose any special assessments, forfeitures, and costs.⁵¹

a. Remediating the Harm from the Criminal Conduct

In all cases, "the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense."⁵² Courts can accomplish this through three main tools: (1) restitution; (2) remedial orders; and (3) notice to victims. In some cases, an order of community service may also be warranted.

Under Guidelines section 8B1.1, restitution orders must be entered to compensate identifiable victims⁵³ of the offense if restitution is authorized under Title Eighteen, sections 3663-3664 of the United States Code.⁵⁴ Restitution may take the form of a sentence under Sections

42. *Id.* § 8B1.2, p.s.

43. *Id.* § 8B1.3, p.s.

44. *Id.* § 8B1.4.

45. *Id.* §§ 8C1.1-8C4.11.

46. *Id.* §§ 8D1.1-8D1.5.

47. *See id.* § 8A1.2 (sets out steps to be followed in applying guidelines).

48. *Id.* § 8A1.2(a).

49. *Id.* § 8A1.2(b).

50. *Id.* § 8A1.2(c).

51. *Id.* § 8A1.2(d).

52. *Id.* at Ch.8, pt.B, intro. commentary.

53. For purposes of restitution, a victim of an offense means "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663(a)(2) (Supp. 1990).

54. U.S.S.G. § 8B1.1(a)(1). Generally, restitution is allowable under statute in the following circumstances:

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense. . . .

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

18 U.S.C. § 3663 (Supp. 1990).

According to § 3664:

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any

3663-3664 or a condition of probation.⁵⁵ Restitution need not be ordered if the organization has already made restitution to the victims or if any complication or prolongation of the sentencing process outweighs the need to provide restitution to the victims of the criminal offense.⁵⁶

The court may also enter a remedial order which serves to "remedy the harm that has already occurred and . . . prevent future harm."⁵⁷ On occasion, a remedial order requiring corrective action by the organization will be necessary to prevent future injury resulting from the offense. One remedial option suggested in the Guidelines is the establishment of a trust fund to address future harm, if the magnitude of any future harm may reasonably be anticipated.⁵⁸

The court may also issue a remedial order requiring community service as a condition of probation.⁵⁹ According to the Commission, an order of community service is less desirable than a monetary sanction.⁶⁰ Where the convicted organization possesses unique knowledge, facilities, or skills that qualify it to repair damage caused by the offense, however, community service directed at repairing the damage may be desirable.⁶¹

Finally, the court may order the defendant to pay the costs of giving notice of the offense to the victims in cases of fraud or other deceptive practices.⁶² The notice should explain to the victims the defendant's conviction for the offense in any manner approved by the court.⁶³ Notice may be given by mail, by advertising in specific areas, or by other "appropriate means."⁶⁴

victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

18 U.S.C. § 3664 (Supp. 1990).

55. U.S.S.G. § 8B1.1, commentary (backg'd). "[I]f a restitution order would be authorized under 18 U.S.C. §§ 3663-3664, except for the fact that the offense of conviction is not an offense set forth in Title 18, United States Code, or 49 U.S.C. § 1472(h), (i), (j), or (n), [the court shall] sentence the organization to probation with a condition requiring restitution." U.S.S.G. § 8B1.1(a)(2).

56. U.S.S.G. § 8B1.1(b).

57. U.S.S.G. § 8B1.2, commentary (backg'd). In appropriate cases, any remedial order must be coordinated with any administrative or civil actions taken by government regulatory agencies. *Id.*

58. *Id.* § 8B1.2(b).

59. *Id.* § 8B1.3, p.s.

60. *Id.* § 8B1.3, p.s., commentary (backg'd). Community service can be performed by an organization only by employing its resources or paying its employees or others to do so. Thus, community service serves merely as an indirect monetary sanction. *Id.*

61. *Id.*

62. *Id.* § 8B1.4 (applies U.S.S.G. § 5F1.4 (Order of Notice to Victims)).

63. 18 U.S.C. § 3555 (1988).

b. Fines

Prior to imposing any fine, the court must determine if the organization is a "criminal purpose organization."⁶⁵ A criminal purpose organization is defined in the Guidelines as an organization "operated primarily for a criminal purpose or primarily by criminal means"⁶⁶ In identifying a criminal purpose organization, the court must consider "the nature and circumstances of the offense and the history and characteristics of the organization"⁶⁷ If the court determines the organization is a criminal purpose organization, it must set the fine at an amount sufficient to divest the organization of its net assets.⁶⁸

If the court determines the organization is not a criminal purpose organization, then the fine is an amount arrived at through a long series of steps.⁶⁹ First, by consulting a list of the applicable offenses,⁷⁰ the

In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than \$20,000 to give notice.

U.S.S.G. § 5F1.4, commentary (backg'd); see *supra* note 19.

65. U.S.S.G. § 8C1.1.

66. *Id.* The Guidelines offer no other objective criteria to identify a criminal purpose organization. See *infra* notes 209-13 and accompanying text.

67. U.S.S.G. § 8C1.1.

68. *Id.* Note, however, that the fine may not exceed statutory maximums for the offense. *Id.* "Net assets," for purposes of this section, means "the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors." *Id.* at commentary n.1.

69. See generally U.S.S.G. §§ 8C2.1-8C2.10 (sections used to determine fine).

70. See *id.* § 8C2.1 (Applicability of Fine Guidelines). The applicable offenses are:

- (1) larceny, embezzlement, and other forms of theft; (2) receiving, transporting, transferring, transmitting, or possessing stolen property; (3) property damage or destruction; (4) trespass; (5) bribery in procurement of a bank loan and other commercial bribery; (6) criminal infringement of copyright; (7) criminal infringement of trademark; (8) altering or removing motor vehicle identification numbers, or trafficking in motor vehicles or parts with altered or obliterated identification numbers; (9) offering, giving, or soliciting a bribe, or extortion under color of official right; (10) offering, giving, soliciting, or receiving a gratuity; (11) payment or receipt of unauthorized compensation; (12) loan or gratuity to bank examiner, or gratuity for adjustment of farm indebtedness, or procuring bank loan, or discount of commercial paper; (13) fraud involving deprivation of the intangible right to the honest service of public officials, or conspiracy to defraud by interference with governmental functions; (14) unlawful sale or transportation of drug paraphernalia; (15) illegal use of registration number to manufacture, distribute, acquire, or dispense a controlled substance; (16) manufacture of a controlled substance in excess of or unauthorized by registration quota; (17) illegal transfer or transshipment of a controlled substance; (18) engaging in a gambling business; (19) transmission of wagering information; (20) other gambling offenses; (21) unlawful conduct relating to contraband cigarettes; (22) offering, accepting, or soliciting a bribe or gratuity affecting the operation of an employee welfare or pension system; (23) theft or embezzlement from employee pension and welfare benefit plans; (24) false statements and concealment of facts in relation to documents required by the Employee Retirement Security Act; (25) embezzlement or theft from labor unions in the private sector; (26) failure to maintain and falsification of records required by the Internal Revenue Code; (27) prohibited payments or lending of

judge must determine if the Organizational Guidelines apply to the offense being sentenced.⁷¹ These offenses are set out in other parts of the Guidelines Manual.⁷² Individual offense Guidelines are used to arrive at a figure called the "base offense level." A base offense level is a number chosen by the Commission to reflect the seriousness of the crime, and is used as a starting point in determining the applicable penalties.⁷³ The Guideline for a particular offense will often have specific offense characteristics, which can increase the base offense level.

Once a base offense level has been established, it is used to determine the range from which the judge will select a fine to impose.⁷⁴ First, if it is "readily ascertainable" that the organization cannot and

money by employer or agent to employees, representatives, or labor organizations; (28) fraud and deceit; (29) insider trading; (30) importing, mailing, or transporting obscene matter; (31) failure to report theft of explosive materials; (32) improper storage of explosive materials; (33) unlawful receipt, possession, or transportation of firearms or ammunition, and prohibited transactions involving firearms or ammunition; (34) smuggling, transporting, or harboring an unlawful alien; (35) odometer laws and regulations; (36) bid-rigging, price-fixing, or marker-allocation agreements among competitors; (37) laundering of monetary instrument; (38) engaging in monetary transactions in property derived from specified unlawful activity; (39) failure to report monetary transactions or structuring transactions to avoid reporting requirements; (40) failure to file currency and monetary instrument report; (41) tax evasion; (42) willful failure to file return, supply information or pay tax; (43) fraud and false statements under penalty of perjury; (44) aiding, assisting, procuring, counseling, or advising tax fraud; (45) fraudulent returns, statements, or other documents; (46) failure to collect or truthfully account for and pay over tax; (47) failing to deposit collected taxes in a trust account as required after notice; (48) offenses related to withholding statements; (49) conspiracy to impair, impede, or defeat tax; (50) non-payment of alcohol or tobacco taxes; (51) regulatory offenses relating to alcohol and tobacco taxes; (52) evading import duties or restrictions (smuggling); and (53) receiving or trafficking in smuggled property. *Id.* § 8C2.1(a). Additional applicable categories in which the underlying offense is determined from one of the above sections: (1) unlawful conduct relating to racketeer influenced and corrupt organizations; (2) attempt, solicitation, or conspiracy (not covered by a specific offense guideline); (3) aiding or abetting; (4) accessory after the fact; (5) and misprision of felony.

Id. § 8C2.1(b).

71. *Id.* "For any count or counts not covered under §8C2.1 . . . the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. The court should determine the appropriate fine amount, if any, to be imposed in addition to any fine determined under §8C2.8 . . . and §8C2.9" U.S.S.G. § 8C2.10.

72. *See, e.g.*, U.S.S.G. § 2B1.1 (larceny, embezzlement, and other forms of theft); *Id.* § 2F1.1 (fraud and deceit).

73. *See* U.S.S.G. Ch.1, pt.A, intro. commentary n.3, p.s. The Commission utilized data from pre-sentence investigations, differing elements of crimes as distinguished by statutes, and data from the United States Parole Commission to make the necessary distinctions to assign base offense levels. *Id.*

74. "[T]he determinants of the base fine are selected so that . . . 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." *Id.* § 8C2.4, commentary (backg'd).

will not be able to pay restitution, no fine will be imposed.⁷⁵ If restitution can be paid by the organization, Guidelines section 8C2.4 contains an "Offense Level Fine Table," which sets out base fines at thirty-three levels, starting with \$5,000, for a level six offense or less, increasing steadily to \$72,500,000, for a level thirty-eight offense or greater.⁷⁶ The fine from the table will be applied as the base fine unless that amount is less than either the pecuniary gain⁷⁷ to the organization from the offense, or the pecuniary loss⁷⁸ from the offense caused by the organization done "intentionally, knowingly, or recklessly."⁷⁹ In such cases, the greater of the three will be used as the base fine.⁸⁰

The base fine is then subject to an increase or decrease consistent with the organization's "culpability score." A "culpability score" is a "measure of how culpable the organization was in committing and responding to the occurrence of the offense."⁸¹ All organizations automatically begin with a culpability score of five.⁸² The culpability score is then increased or decreased according to a number of factors. These factors are: size of the organization and the role of the supervisory personnel; prior history; violation of an order; obstruction of justice; the existence of an effective program to prevent and detect violations of law; and whether the organization reported the offense itself, cooperated in the investigation, or clearly demonstrated acceptance of responsibility.⁸³ An offender with a higher culpability score will then be sub-

75. *Id.* § 8C2.2(a); *see also Id.* § 8C3.3(a) (fine may be reduced if imposition of fine would impair the organization's ability to make restitution to victims).

76. *Id.* § 8C2.4(d) (Offense Level Fine Table).

77. Pecuniary gain is defined as "the additional before-tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenue or cost savings." *Id.* § 8A1.2, commentary n.1.

78. "Pecuniary loss . . . is equivalent to the term 'loss' as used in Chapter Two." *Id.* "Loss," as defined in Chapter Two, "means the value of the property taken, damaged, or destroyed." *Id.* § 2B1.1, commentary n.1.

79. *Id.* § 8C2.4(a)(3).

80. *Id.* § 8C2.4(a). If the individual offense guideline has special instructions for organizational fines, those instructions must be followed. *Id.* § 8C2.4(b). Also, if calculating pecuniary gain or loss would unduly delay or prolong the process, they need not be considered in determining the base fine. *Id.* § 8C2.4(c).

81. UNITED STATES SENTENCING COMMISSION, THE NEW FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONAL CRIMES: QUESTIONS AND ANSWERS, at 5. "Culpable conduct" is defined as conduct which is "blamable; censurable; involving the breach of a legal duty or the commission of a fault. . . . (I)t implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose." *Werner v. Upjohn Company, Inc.*, 628 F.2d 848, 856-57 (1980), *cert. denied*, 449 U.S. 1080 (1981) (quoting BLACK'S LAW DICTIONARY 379 (4th ed. 1968)).

82. U.S.S.G. § 8C2.5(a).

83. *Id.* § 8C2.5. The implementation of programs to detect and prevent violations of law, and their effect on organizations, is outside the scope of this Comment. For discussion of these

ject to higher minimum and maximum "multipliers,"⁸⁴ which are used to set the guideline fine range.

The minimum and maximum fine range is calculated by applying the respective multipliers to the base fine.⁸⁵ Using the fine range, the sentencing judge, after considering a number of factors,⁸⁶ determines the fine to be assessed. The fine is increased to include any gain to the organization not already divested by restitution or other remedial measure.⁸⁷ The resulting fine may be imposed unless it is subject to some other statutory restriction.⁸⁸

After the guideline fine is determined, a court may decide to depart from the guidelines. Under the statute, a departure is warranted if the court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."⁸⁹ The Sentencing Commission listed several circumstances in which an upward or

pliance Programs, 4 ACCA Docket 48 (1991); Obermaier, *supra* note 34; David M. Zornow & Benjamin B. Klubes, *The New Organizational Sentencing Guidelines*, THE AMERICAN LAWYER, March, 1992, at 8; see also Judah Best et al., *Complying With Sentencing Guidelines*, NAT'L L.J., June 8, 1992, at 19 (suggested steps to implement compliance program).

84. Multipliers are numbers assigned to a culpability score, with each level of culpability score having a minimum and maximum multiplier. See U.S.S.G. § 8C2.6. The multipliers range from a minimum multiplier of 0.05 with a maximum multiplier of 0.20 for a culpability score of zero or less, to a minimum multiplier of 2.00 and a maximum multiplier of 4.00 for a culpability score of ten or more. *Id.*

85. *Id.* § 8C2.7. If it is "readily ascertainable" after determination of the guideline fine range that the organization cannot and is not likely to be able to pay the minimum, (even with an installment plan), no further determination of the fine range is necessary. The fine will be modified under U.S.S.G. § 8C3.3. *Id.* § 8C2.2(b); see *supra* note 75. The court may impose a fine lower than the minimum range, if the organization cannot and will not be able to pay, provided that the reduction is only enough to avoid "substantially jeopardizing the continued viability of the organization." U.S.S.G. § 8C3.3(b).

86. See *Id.* § 8C2.8, p.s. Some of the factors to be considered are "the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization; . . . the organization's role in the offense; . . . [and] any collateral consequences of conviction, including civil obligations arising from the organization's conduct." *Id.*

87. *Id.* § 8C2.9.

88. *Id.* § 8C3.1. If the minimum guideline fine is greater than the maximum authorized by statute, the statutory maximum will be imposed as the guideline fine. *Id.* If the maximum guideline fine is less than the minimum fine required by statute, the statutory minimum will be imposed as the guideline fine. *Id.*

89. 18 U.S.C. § 3553(b) (1988); U.S.S.G. Ch.8, pt.C, Subpt. 4, intro. commentary. To determine if a circumstance was adequately considered by the Commission, the court may only consider the "sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b); see *Williams v. United States*, 112 S. Ct. 1112, 1119 n.2 (interim ed. 1992); see also *United States v. Tsai*, 954 F.2d 155, 166-67 (3d Cir.) (upward departure inappropriate where increase based on factor that the Sentencing Commission had already included in the base offense); *cert. denied*, 113 S. Ct. 93 (interim ed. 1992).

downward departure from the guidelines may be warranted,⁹⁰ but "the list is not exhaustive."⁹¹

c. Probation and Costs

Under Guidelines section 8D1.1(a)(1), a court must impose probation⁹² in a number of instances. Generally, probation is mandatory when it is necessary to ensure that another penalty will be fully implemented, or to ensure that actions are taken by the organization to prevent future criminal conduct.⁹³ Probation may not last more than five years, but must last more than one year if a felony is involved.⁹⁴ After the need for probation has been determined, any special assessments, forfeitures, or costs must be imposed, if required by statute, for the particular offense of which the organization has been convicted.⁹⁵ Once any additional costs have been determined, the Guideline sentencing process is complete and the district court judge may impose the sentence.

d. Discretion of the Sentencing Judge and Appellate Review

It is within the trial court's discretion to select the appropriate sentence from within the guideline range, as well as to depart from the

90. See U.S.S.G. §§ 8C4.1-8C4.11, p.s. Circumstances where the Commission suggests a departure from the Guidelines may be warranted include:

substantial assistance to the authorities; risk of death or bodily injury; a threat to national security; a threat to the environment; threat to a market; official corruption; the organization is a public entity; members or beneficiaries of the organization are victims; remedial costs greatly exceed gain; the organization had a program to prevent and detect violations of law, but it was implemented under a court or administrative order; and exceptional organizational culpability (a culpability score greater than 10).

Id. "To the extent that any policy statement form Chapter Five, Part K (Departure) is relevant to the organization, a departure from the applicable guideline fine range may be warranted." *Id.* at Ch. 8, pt. C, subpt. 4, intro. commentary.

91. *Id.*

92. Probation is "designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation . . ." *Burns v. United States*, 287 U.S. 216, 220 (1932); *accord* *United States v. Gordon*, 961 F.2d 426, 432 (3d Cir. 1992).

93. See U.S.S.G. § 8D1.1 (circumstances where probation must be ordered by the court). Some circumstances from the Guidelines when probation must be imposed:

(1) if, at the time of sentencing, an organization having fifty or more employees does not have an effective program to prevent and detect violations of the law; (2) if, in the previous five years, the organization was convicted of any similar misconduct; or (3) if the sentence imposed upon the organization does not include a fine.

Id.

94. *Id.* § 8D1.2.

95. See generally *id.* §§ 8E1.1-8E1.3. For example, pursuant to Title Eighteen, § 3013(a) of the United States Code, the court must impose an assessment of \$50 for a Class B misdemeanor, \$125 for a Class A misdemeanor, and \$200 for a felony. *Id.* § 8E1.1, commentary, backg'd.

range.⁹⁶ Any decision to depart from the Guidelines must be appropriately explained, and the judge must point to specific mitigating or aggravating factors in the record.⁹⁷ In reviewing a district court's decision to depart from the Guidelines, the appellate court considers three issues in its analysis:⁹⁸ (1) whether, as a matter of law, the sentencing court adequately stated grounds that justify a departure;⁹⁹ (2) whether the facts that underlie the grounds for departure actually exist;¹⁰⁰ and (3) whether the degree of departure is reasonably linked to the structure of the guidelines.¹⁰¹ A trial court's refusal to depart from the Guidelines is discretionary and is not appealable.¹⁰² Thus, where adequate stated grounds exist for departing from the Guidelines, a trial court's exercise of discretion will not be overruled.

3. A Hypothetical Case

A hypothetical situation is helpful to understand more fully how the Organizational Guidelines work.¹⁰³ Transcor Construction, Inc., ("Transcor") and three of its employees, including its on-site manager, were named in a ten count indictment. Count 1 charged the defendants with conspiracy to defraud the United States government from January 1992 to July 1992 in violation of Title Eighteen, section 371 of the United States Code.¹⁰⁴ Counts 2-10 charged the defendants with knowingly making false statements and reports to the Secretary of Transpor-

96. See *Williams v. United States*, 112 S. Ct. 1112, 1116 (interim ed. 1992) (selection of sentences and departures are decisions left "solely" to the sentencing court); see also *Burns v. United States*, 111 S. Ct. 2182, 2186 (interim ed. 1991) (whether a *sua sponte* departure from the guidelines would be legally and factually warranted is a matter relating to the appropriate sentence).

97. 18 U.S.C. § 3553(c)(2) (1988); see *United States v. Dockery*, 965 F.2d 1112, 1115 n.5 (D.C. Cir. 1992) (judge must state specific reasons for sentences differing from the Guidelines); accord *United States v. Himsel*, 951 F.2d 144, 147 (7th Cir. 1991); *United States v. Wells*, 878 F.2d 1232, 1233 (9th Cir. 1989).

98. See, e.g., *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 663 (8th Cir. 1992); *United States v. Johnson*, 952 F.2d 565, 583 (1st Cir. 1991), *cert. denied*, 113 S. Ct. 58 (interim ed. 1992); *United States v. DeFelippis*, 950 F.2d 444, 447 (7th Cir. 1991).

99. See *DeFelippis*, 950 F.2d at 447 (adequately stated grounds for departure is a question of law, which applies a *de novo* standard of review); accord *United States v. Hershberger*, 962 F.2d 1548, 1550 (10th Cir. 1992).

100. See *DeFelippis*, 950 F.2d at 447 (factual determinations are accepted by the appellate court unless clearly erroneous); accord *Hershberger*, 962 F.2d at 1550; *Johnson*, 952 F.2d at 583;

101. See *DeFelippis*, 950 F.2d at 448 (determination of trial court is appropriate as long as it adequately reflects the structure of the guidelines).

102. *Johnson*, 952 F.2d at 585; *United States v. Evidente*, 894 F.2d 1000, 1004 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990).

103. At certain points in the hypothetical choices will be made that are within the judge's discretion. This Comment does not suggest that this particular set of facts could only lead to the precise sentence imposed in this case.

104. "Conspiracy to commit offense or to defraud United States." The statute states, in pertinent part,

tation from January 1992 through July 1992 in violation of Title Eighteen, section 1020 of the United States Code.¹⁰⁶ Transcor and its employees were found guilty on all counts. Prior to this incident, there was no record of any wrongdoing by Transcor.

The government awarded Transcor a contract to repair a section of an interstate highway. The company had sixty employees, including supervisors. The evidence showed that both before and during construction, Transcor knowingly submitted overpriced reports to the Department of Transportation for costs of materials and labor. The on-site manager ("the manager") perpetrated this action. Construction has been completed on the bridge, and the government has already paid the bill. The only issue remaining is how much the project actually cost, and how much is owed the government. The trial court found that the manager obstructed the investigation by altering and destroying records. The evidence further showed that the government's total loss as a result of this fraud was approximately \$275,000.00.

Since the illegal activity took place after the new organizational guidelines took effect, Chapter Eight of the Sentencing Guidelines is applicable.¹⁰⁶ The first step is to determine "the sentencing require-

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1988). The scope of the conspiracy is explained in the text of the hypothetical case.

105. "Highway projects." The statute states:

Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to a material fact in any statement, certificate, or report submitted pursuant to the provisions of the Federal-Aid Road Act approved July 11, 1916 (39 Stat. 355), as amended and supplemented,

Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.
18 U.S.C. § 1020 (1988).

106. See *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991) (offensive conduct must occur after the guidelines were in effect); see also *United States v. Young*, 955 F.2d 99, 109 (1st Cir. 1992) (guidelines apply to offenses involving a course of conduct that begins before the effective date, but continues beyond that date). Applicability of Guidelines due to timing of the offense is a determination to be made by the sentencing court under a preponderance of the evi-

ments and options relating to restitution, remedial orders, community service, and notice to victims.”¹⁰⁷ The only identified victim is the government, and the jury determined that the loss incurred amounted to \$275,000. Therefore, an order of restitution of \$275,000 is appropriate. There does not appear to be any need for a further remedial order, community service, or notice to the victims.¹⁰⁸ Therefore, the federal judge will order restitution of \$275,000 to be paid to the United States.

Next, the federal judge must consider the sentencing requirements for the imposition of fines.¹⁰⁹ Transcor does not qualify as a criminal purpose organization.¹¹⁰ The next step, therefore, is to determine the guideline offense level to be applied. The applicable guidelines and specific offense characteristics for fraud¹¹¹ establish that the guideline offense level would be sixteen.¹¹² The base fine is determined to be \$275,000.¹¹³

A court would then determine Transcor’s culpability score. Transcor has a total culpability score of ten. Each organization starts with a culpability score of five.¹¹⁴ In this case, because Transcor has more than fifty employees, and substantial authority personnel (the manager) participated in the offense, two points must be added.¹¹⁵ Also, there is no question in this hypothetical case that Transcor tried to obstruct justice by destroying and falsifying records after the investiga-

dence standard. *United States v. Underwood*, 932 F.2d 1049, 1053 (2d Cir.), *cert. denied*, 112 S. Ct. 382 (interim ed. 1991).

107. U.S.S.G. § 8A1.2(a).

108. *See id.* §§ 8B1.2-8B1.4 (relevant provisions); *see also supra* notes 57-58 and accompanying text (remedial orders, in general); 59-61 and accompanying text (community service); and 62-64 and accompanying text (notice to victims).

109. U.S.S.G. § 8A1.2(b); *see Id.* §§ 8C1.1-8C4.11 (provisions for fines).

110. Transcor performs legitimate construction business operations and is operated by legitimate (non-criminal) means, and there is no past criminal history for the corporation. Thus, there is no basis for finding Transcor a criminal purpose organization. *See id.* § 8C1.1. *See supra* notes 65-68 and accompanying text.

111. *See* U.S.S.G. § 8C2.1(a) (the guideline section on fraud (§ 2F1.1) is applicable). A court imposing a sentence under the Guidelines applies the offense guideline section most applicable to the offense of conviction. *Braxton v. United States*, 111 S. Ct. 1854, 1856 (interim ed. 1991); U.S.S.G. § 1B1.2(a).

112. A conviction of fraud begins with a base offense level of six. U.S.S.G. § 2F1.1(a). The offense level must be increased by eight because the loss was more than \$200,000. *Id.* § 2F1.1(b)(1)(I). Finally, the offense level is increased by two because the offense involved more than minimal planning. *Id.* § 2F1.1(b)(2)(B). “More than minimal planning is deemed present in any case involving repeated acts over a period of time, unless. . . each incident was purely opportune.” *Id.* § 1B1.1, cmt. n.1(f). The total base offense level, therefore, is sixteen.

113. *Id.* § 8C2.4(a). The base fine is the greatest of: (1) the amount from the Offense Level Fine Table, (in this case an offense level of sixteen gets a \$175,000 fine); (2) the pecuniary gain to the organization (roughly \$275,000); or (3) the pecuniary loss caused by the organization intentionally, knowingly or recklessly (\$275,000). *Id.*

114. *Id.* § 8C2.5(a).

115. *Id.* § 8C2.5(b)(4).

tion began. Three points must be added for obstruction of justice.¹¹⁶ Therefore, the total culpability score is ten. For a culpability score of ten or greater, the minimum fine multiplier is 2.00 and the maximum multiplier is 4.00.¹¹⁷ Applying the respective multipliers to the base fine (\$275,000), the guideline fine range is \$550,000 to \$1,100,000.¹¹⁸

The fines that can be imposed upon Transcor are subject to certain statutory restrictions. In this case, however, the fine range is well within the maximum allowed by statute.¹¹⁹ The selection of the actual fine within the guideline fine range is then left to the discretion of the sentencing judge.¹²⁰ After considering the factors listed in the Guidelines,¹²¹ the sentencing judge would decide on a fine of \$1,000,000, to be paid in installments over a five year period, with the restitution to be paid immediately.¹²² In this case, there is no reason to depart from the guidelines because the Commission has adequately considered all the circumstances regarding fraud in this case.¹²³

Next, the sentencing requirements regarding probation must be determined.¹²⁴ Under the Guidelines, probation must be imposed because, at the time of sentencing, the organization had more than fifty employees but did not have an effective program to prevent and detect violations of law.¹²⁵ The term of probation will last for five years to correspond with the payment schedule of the fine.¹²⁶

In addition to the standard probation conditions,¹²⁷ the judge would order Transcor to notify the court or its probation officer immediately upon learning of any adverse change in its financial condition,

116. *Id.* § 8C2.5(e).

117. *Id.* § 8C2.6.

118. *See id.* § 8C2.7 (range calculated by multiplying base fine by each respective "multiplier").

119. *Id.* § 8C3.1. Under Title Eighteen, § 3571 of the United States Code, an organization may be fined no more than \$500,000 for a felony. With multiple counts, the maximum fine may be increased in relation to the number of counts. *Id.* § 8C3.1, commentary (backg'd.). In this case, 10 counts of fraud would result in an aggregate maximum fine of \$5,000,000.00.

120. *Williams v. United States*, 112 S. Ct. 1112, 1121 (interim ed. 1992).

121. *See* U.S.S.G. § 8C2.8, p.s. (factors); *see supra* note 86.

122. *See* U.S.S.G. § 8C3.2(b) (allowing payment by installment schedule if immediate payment poses undue burden of organization); *see also* 18 U.S.C. § 3572(d) (1988) (the maximum period for payment of fine is five years).

123. *See* 18 U.S.C. § 3553(b) (1988) (departure is not allowed when Commission adequately considered circumstances of the case).

124. U.S.S.G. § 8B1.2(c).

125. *Id.* § 8D1.1(a)(4).

126. For a felony, the term of probation must be more than one year, but not more than five years. *Id.* § 8D1.2(a)(1).

127. U.S.S.G. § 8D1.3 contains the standard conditions of probation for organizations:

(a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization shall not commit another federal, state, or local crime during the term of probation.

or of any major litigation, administrative investigations, or proceedings against the corporation.¹²⁸ Transcor must also pay the fine in monthly installments.¹²⁹ Finally, Transcor must draft and submit to the court a program to prevent and detect future violations of law, as well as submit to periodic inspections to confirm implementation of the program.¹³⁰

The final step for the federal judge is to impose any special assessments, forfeitures, or costs.¹³¹ A special assessment of \$200 must be imposed on Transcor pursuant to Title Eighteen, section 3013 of the United States Code for each of the ten felony counts.¹³² No forfeiture of property is necessary in this case because it is not required under the criminal statute for Transcor's offenses.¹³³ The court may also impose the costs of the prosecution.¹³⁴

In sum, Transcor must make payment in excess of \$1,277,000, which includes restitution, fines, special assessments, and costs of prosecution.¹³⁵ In addition, the corporation is subject to a number of probation restrictions.¹³⁶

(b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: a fine, restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

Id. § 8D1.3.

128. *Id.* § 8D1.4(b)(3), p.s.

129. *See id.* § 8D1.4(b)(4), p.s. (periodic payment to be made in order of: (1) restitution; (2) fine; (3) any other monetary sanctions).

130. *See id.* § 8D1.4(c) (provisions for drafting, implementing, and monitoring programs); *see also supra* note 83 for articles concerning implementation of these programs.

131. U.S.S.G. § 8A1.2(d).

132. *Id.* § 8E1.1. A court may not waive the imposition of assessments. *Id.* The statute states in relevant part:

(a) The court shall assess on any person convicted of an offense against the United States- . . .

(2) in the case of a felony-

(B) the amount of \$200 if the defendant is a person other than an individual.

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

18 U.S.C. § 3013 (1988).

133. *See* U.S.S.G. § 5E1.4 (forfeiture is implied by statute), applied by § 8E1.2. The statute for this case does not provide for forfeiture. *See supra* note 105.

134. 28 U.S.C. § 1918 (1988); U.S.S.G. § 8E1.3.

135. \$275,000 (restitution); \$1,000,000 (fine); \$2,000 (special assessments); costs of prosecution.

B. Sentencing of Organizations in Ohio

1. The Sentencing System

Criminal procedure in Ohio "is governed entirely by statute."¹³⁷ Ohio has had a statutory system for sentencing organizations since 1975.¹³⁸ Under the Ohio Revised Code, section 2901.23,¹³⁹ an organization¹⁴⁰ may be convicted of an offense only under the following circumstances:

137. *Leis v. Outcalt*, 438 N.E.2d 443, 445 (Ohio 1982). *Accord* *Municipal Court of Toledo v. Platter*, 184 N.E. 1, 3 (Ohio 1933); *Ohio v. Addison*, 530 N.E.2d 1335, 1336 (Ohio Ct. App. 1987).

138. See generally OHIO REV. CODE ANN. §§ 2901.23, 2901.24, & 2929.31 (Anderson 1987).

139. *Id.* § 2901.23. Section 2901.23 provides, in its entirety:

(A) An organization may be convicted of an offense under any of the following circumstances:

(1) The offense is a minor misdemeanor committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment, except that if the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable or the circumstances under which it is accountable, such provisions shall apply.

(2) A purpose to impose organizational liability plainly appears in the section defining the offense, and the offense is committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment, except that if the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable or the circumstances under which it is accountable, such provisions shall apply.

(3) The offense consists of an omission to discharge a specific duty imposed by law on the organization.

(4) If, acting with the kind of culpability otherwise required for the commission of the offense, its commission was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment.

(B) When strict liability is imposed for the commission of an offense, a purpose to impose organizational liability shall be presumed, unless the contrary plainly appears.

(C) In a prosecution of an organization for an offense other than one for which strict liability is imposed, it is a defense that the high managerial officer, agent, or employee having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission. This defense is not available if it plainly appears inconsistent with the purpose of the section defining the offense.

(D) As used in this section, "organization" means a corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity. "Organization" does not include an entity organized as or by a governmental agency for the execution of a governmental program.

Id.

140. See *id.* § 2901.23(D). "Organization" for this section means a corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estates, trust, or other commercial or legal entity. *Id.* "Organization" does not include an entity organized as or by a governmental agency for the execution of a governmental program. *Id.*; see *supra* note 139; see also OHIO REV. CODE ANN. § 1.02(A) (Anderson 1987) (in the Revised Code, the words

(1) The offense is a minor misdemeanor committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment,¹⁴¹

(2) A purpose to impose organizational liability plainly appears in the section defining the offense, and the offense is committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of its employment,¹⁴²

(3) The offense consists of an omission to discharge a specific duty imposed by law on the organization,¹⁴³

(4) If, acting with the kind of culpability otherwise required for the commission of the offense, its commission was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment,¹⁴⁴ or

(5) When strict liability is imposed for the commission of an offense, a purpose to impose organizational liability shall be presumed, unless the contrary plainly appears.¹⁴⁵

“Since an organization cannot be jailed,”¹⁴⁶ regardless of the usual penalties for murder, felonies, or misdemeanors, an organization convicted of an offense pursuant to Section 2901.23 will only be fined.¹⁴⁷ A corporation may also be judicially dissolved if the court finds “that the

141. OHIO REV. CODE ANN. § 2901.23(A)(1) (Anderson 1987). *See, e.g.*, *Ohio v. Cecos Int., Inc.*, 526 N.E.2d 807, 811 (Ohio 1988). If the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable, or the circumstances under which it is accountable, then those provisions apply. *Id.*; *see supra* note 139. For a definition of scope of employment, *see supra* note 32.

142. OHIO REV. CODE ANN. § 2901.23(A)(2) (Anderson 1987). If the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable or the circumstances under which the organization is accountable, those provisions shall apply. *Id.*; *see supra* note 139.

143. OHIO REV. CODE ANN. § 2901.23(A)(3) (Anderson 1987); *supra* note 139. *See, e.g.*, *Burrs v. Burrs*, 585 N.E.2d 918, 921 (Ohio Ct. App. 1991) (corporation held liable for failure to notify child support agency of lump sum payment to employee who owed child support and alimony payments).

144. OHIO REV. CODE ANN. § 2901.23(A)(4) (Anderson 1987); *supra* note 139. *See, e.g.*, *Atram v. Star Tool & Die Corp.*, 581 N.E.2d 1110, 1113 (Ohio Ct. App. 1989) (corporation liable for misrepresentations of president); *see also* *Ohio v. Wintersong Village of Del. Inc.*, 591 N.E.2d 291, 293 (Ohio Ct. App. 1990) (because accused corporate officers were found not guilty, corporation could not be found guilty).

145. OHIO REV. CODE ANN. § 2901.23(B) (Anderson 1987); *see supra* note 139.

146. OHIO REV. CODE ANN. § 2929.31 (Anderson 1987) (Committee Comment to H 511).

147. Maximum fines range by the offense level from \$1,000 for an unclassified misdemeanor to \$100,000 for aggravated murder. OHIO REV. CODE ANN. § 2929.31(A) (Anderson 1987). *See, e.g.*, *Ohio v. Longhorn World Championship Rodeo, Inc.*, 483 N.E.2d 196, 198 (Ohio Ct. App. 1985) (the corporation violated Ohio Revised Code § 959.20, which is classified as a misdemeanor under § 959.99(F), by permitting “a flank strap or bucking strap to be placed on several horses and bulls engaged in [a] rodeo performance,” a first degree misdemeanor, allowing a maximum fine of \$5,000).

corporation was organized or systematically used to further criminal purposes."¹⁴⁸ In addition, an officer, agent, or employee of the corporation can be held personally liable for commission of such offenses.¹⁴⁹

The trial court need not set forth its reasons for imposing a sentence.¹⁵⁰ "A silent record," under Ohio case law, "raises the presumption that a trial court considered the [statutory] factors" necessary for sentencing.¹⁵¹ Title 29 of the Revised Code sets out factors that a court should take into consideration when imposing a sentence.¹⁵² The sentencing statutes utilize a mix of mandatory instructions and suggested factors for consideration that are not controlling.¹⁵³ If the sentence is within the acceptable statutory ranges, an appellate court will not disturb the sentencing decision unless there has been a clear abuse of discretion.¹⁵⁴ An abuse of discretion constitutes an "unreasonable, arbitrary,

148. OHIO REV. CODE ANN. § 1701.91(A)(5) (Anderson 1987).

(A) A corporation may be dissolved judicially and its affairs wound up:

.....

(5) By an order of the court of common pleas of the county in which the corporation, whether for profit or nonprofit, has its principal office, in an action brought by the prosecuting attorney of the county, when it is found that the corporation was organized or systematically used to further criminal purposes, or as a subterfuge to engage in prostitution, gambling, loan sharking, drug abuse, illegal drug distribution, counterfeiting, obscenity, extortion, corruption of law enforcement officers or other public officers, officials, or employees, or other criminal activity.

Id.

149. See OHIO REV. CODE ANN. § 2901.24 (Anderson 1987). See, e.g., *Ohio v. Stirnkorb*, 580 N.E.2d 69, 74 (Ohio Ct. App. 1990) (on-site supervisor of hazardous waste disposal facility held individually liable); *Atram v. Star Tool & Die Corp.*, 581 N.E.2d 1110, 1113 (Ohio Ct. App. 1989) (president held individually liable).

150. See *State v. Cyrus*, 586 N.E.2d 94, 96 (Ohio 1992) (no duty on trial court to set forth reasoning); accord *Ohio v. O'Dell*, 543 N.E.2d 1220, 1227 (Ohio 1989); *Ohio v. Bivens*, 550 N.E.2d 497, 499 (Ohio Ct. App. 1988). But see *Ohio v. Cable*, 493 N.E.2d 285, 287 (Ohio Ct. App. 1985) (while the sentencing judge need not state his reasons for sentencing, when imposing the maximum sentence, the record must indicate he considered the criteria of R.C. § 2929.12).

151. *Cyrus*, 586 N.E.2d at 95, (quoting *Ohio v. Adams*, 525 N.E.2d 1361, 1363 (Ohio 1988)); accord *Ohio v. Lukens*, 586 N.E.2d 1099, 1111 (Ohio Ct. App. 1990); *O'Dell*, 543 N.E.2d at 1227.

152. See, e.g., OHIO REV. CODE ANN. §§ 2929.11-2929.15 (Anderson 1987) (penalties for felonies); OHIO REV. CODE ANN. §§ 2929.21, 2929.22 (Anderson 1987) (penalties for misdemeanors).

153. See *Ohio v. Crouse*, 528 N.E.2d 1283, 1285 (Ohio Ct. App. 1987) (mitigating factors of O.R.C. § 2929.12 are not controlling); see also *Ohio v. Miller*, No. 60640, 1992 Ohio App. LEXIS 2795, at *11 (Ohio Ct. App. June 4, 1992) (citing language of O.R.C. § 2929.12(B), "[T]he following do not control the court's discretion . . ."); *Ohio v. Bivens*, 550 N.E.2d 497, 499 (Ohio Ct. App. 1988) (reviewing criteria of O.R.C. § 2929.13).

154. See *Ohio v. Hatcher*, 595 N.E.2d 457, 459 (Ohio Ct. App. 1991) (absent a constitutional violation, in discretionary matters, the trial court's decision is not reviewable); see also *Akron v. Wendell*, 590 N.E.2d 380, 387 (Ohio Ct. App. 1990) (court refused to set aside sentence within statutory guidelines absent abuse of discretion); accord *Miamisburg v. Smith*, 449 N.E.2d 500, 502 (Ohio Ct. App. 1982).

trary or unconscionable" attitude on the part of the court.¹⁵⁵ An appellate court may vacate a sentence, even when the trial court states in the record that it considered the statutory criteria, if this statement is contradicted in the record, or if it is shown that the criteria were not considered.¹⁵⁶

2. The Hypothetical Case

a. Facts and Background

A hypothetical will be used to illustrate the Ohio organizational sentencing system which consists of the fact pattern used earlier,¹⁵⁷ with a few changes. First, for simplicity, the corporation is called Mason Construction, Inc. ("Mason"). Second, instead of contracting with the United States, Mason contracted with the State of Ohio to repair a section of state highway. Finally, the fraud perpetrated was the falsifying of records of costs of extra work beyond the original contract which Mason said was necessary to complete the project. Mason was convicted of ten counts of tampering with records¹⁵⁸ pursuant to Ohio Revised Code, section 2901.23(A)(4).¹⁵⁹

Mason Construction, Inc., and three individual employees, were convicted of six counts of tampering with, and falsification of, records with a purpose to defraud in violation of Ohio Revised Code, section 2913.42(A)(1).¹⁶⁰ Mason was also convicted of four counts of falsifying

155. *Ohio v. Montgomery*, 575 N.E.2d 167, 171 (Ohio 1991), *cert. denied*, 112 S. Ct. 1215 (interim ed. 1992); *accord Penbaur v. Leis*, 437 N.E.2d 1199, 1201 (Ohio 1982); *Ohio v. Adams*, 404 N.E.2d 144, 149 (Ohio 1980); *Columbus v. Munson*, 589 N.E.2d 1390, 1392 (Ohio Ct. App. 1991).

156. *See Bivens*, 550 N.E.2d at 500 (if it can be demonstrated the trial court did not consider statutory criteria, reversal is required); *Cincinnati v. Clardy*, 385 N.E.2d 1342, 1345 (Ohio Ct. App. 1978) (record contradicts trial court's statement that it considered statutory criteria, reversal required).

157. *See discussion supra* part II.A.3.

158. *See text of statute infra* note 160.

159. An organization may be convicted under this section if, acting with the culpability otherwise required for the commission of the offense, its commission was authorized or performed by a high managerial officer or employee acting in behalf of the organization and within the scope of his office or employment. OHIO REV. CODE ANN. § 2901.23(A)(4) (Anderson 1987). In this fact pattern, all actions ordered by the manager were within the scope of his employment and he was acting on behalf of the corporation.

160. The statute states, in pertinent part:

(A) No person, knowing he has no privilege to do so, and with purpose to defraud or knowing that he is facilitating a fraud, shall do any of the following:

(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, data, or record;

...
(B) No person, knowing he has no privilege to do so, shall falsify, destroy, remove, conceal, alter, deface, or mutilate any computer software or data.

(C)(1) Whoever violates this section is guilty of tampering with records.

and concealing computer data in violation of Section 2913.42(B).¹⁶¹ Mason's manager attempted the same cover-up that the manager attempted in the Transcor case. Under Ohio Revised Code, section 2913.42, counts one through six are second degree felonies.¹⁶² Counts seven through ten are fourth degree felonies.¹⁶³ The jury found that Mason had fraudulently overcharged the state by \$24,500.

b. The Sentencing

Once the classification of the offenses has been determined, the sentencing of an organization convicted of a crime under Ohio Revised Code, section 2901.23, is not complicated. For any or all of the felonies for which Mason is convicted, the court may require Mason to make restitution.¹⁶⁴ An order of restitution of \$24,500 is appropriate. Once restitution is determined, the judge may impose fines and costs.

Under the fine schedule for organizations,¹⁶⁵ Mason can be fined a maximum of \$20,000 for each of the six counts of second degree felonies,¹⁶⁶ and a maximum of \$10,000 for each of the four counts of fourth degree felonies.¹⁶⁷ After considering the factors suggested in the Revised Code for felonies,¹⁶⁸ the state judge would likely impose the

....
(3) If the offense involves a violation of division (A) of this section involving data, tampering with records is whichever of the following is applicable:

....
(c) If the value of the data involved in the offense or the loss to the victim is one hundred dollars or more, a felony of the second degree.

(4) If the offense involves a violation of division (B) of this section, tampering with records is whichever of the following is applicable:

....
(c) If the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is one hundred thousand dollars or more, a felony of the second degree.
OHIO REV. CODE ANN. § 2913.42 (Anderson 1987).

161. See *supra* note 160.

162. See OHIO REV. CODE ANN. § 2913.42(C)(3)(c) (Anderson 1987) (violation involving data incurring loss to the victim in excess of one hundred dollars); see also *supra* note 160.

163. See OHIO REV. CODE ANN. § 2913.42(C)(4)(c) (Anderson 1987) (any violation of § (B) when perpetrator has not been previously convicted of a theft offense); *supra* note 160.

164. See OHIO REV. CODE ANN. § 2929.11(D)(E) (Anderson 1987) (allows restitution for all or part of the value of property that is subject of any "theft offense, as defined in section (K) of section 2913.01 of the Revised Code . . ."); see also *id.* § 2913.01(K) (" 'theft offense' means any of the following: (1) A violation of section . . . 2913.42 . . . of the Revised Code.").

165. See *id.* § 2929.31.

166. *Id.* § 2929.31(A)(4).

167. *Id.* § 2929.31(A)(6).

168. See generally *id.* §§ 2929.11-2929.15 (felony provisions).

maximum fine for all counts.¹⁶⁹ The total fine would amount to \$160,000.

Unlike the federal Guidelines, there are no provisions for organizational probation in the Ohio Revised Code. Thus, the final step in the Ohio sentencing process is the imposition of costs. In this case, the state judge must impose the costs of prosecution, including jury fees, on Mason.¹⁷⁰ The state judge must also impose additional costs of \$11¹⁷¹ and \$20¹⁷² for the general state revenue fund and the state reparation fund, respectively. In sum, Mason Construction, Inc., must make payment in excess of \$160,030 (fines and costs) for defrauding the state of \$24,500.

III. ANALYSIS

A. *The Statutory Purposes of the Sentencing Guidelines*

Under the SRA, the Sentencing Commission was given a mandate by Congress to perform certain functions and fulfill specified goals. Congress implemented the Guidelines sentencing system to establish sentencing policies and practices for the federal criminal justice system that would: (1) provide certainty and fairness in meeting the purposes of sentencing;¹⁷³ (2) avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct;¹⁷⁴ (3) maintain sufficient flexibility to permit individualized sentences when warranted by mitigating factors not taken into account in the establishment of general sentencing practices;¹⁷⁵ (4) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;¹⁷⁶ (5) afford adequate deter-

169. The trial judge does not need to state any reasons for his or her sentencing choices. *State v. Cyrus*, 586 N.E.2d 94, 96 (Ohio 1992).

170. OHIO REV. CODE ANN. § 2949.27 (Anderson 1987); see also *Ohio v. Smith*, 19 Ohio Op. 454 (Ohio C.P. 1940) (the costs in a criminal case, including violations of ordinances, are as much a part of the sentence as the fine itself).

171. OHIO REV. CODE ANN. § 2949.091(A)(1) (Anderson Supp. 1991) (\$11 must be imposed in every criminal case, which will go to the general revenue fund). See Op. Att'y Gen., No. 91-039, 1991 Ohio AG LEXIS 37 (Sept. 12, 1991).

172. See OHIO REV. CODE ANN. § 2743.70(A)(1)(a) (Anderson, 1992) (\$20 must be paid for a felony, which will go to the state reparations fund). See Op. Att'y Gen., No. 91-039, 1991 Ohio AG LEXIS 37.

173. 28 U.S.C. § 991(b)(1)(B) (1988).

174. *Id.*

175. *Id.* Section 991(b)(1)(C) also says that the Guidelines should "reflect, to the extent possible, advancement in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 991(b)(1)(C). Since that applies to all the previously stated purposes, this Comment will not treat it as a separate purpose.

176. 18 U.S.C. § 3553(a)(2)(A) (1988).

rence to criminal conduct;¹⁷⁷ (6) protect the public from further crimes of the organization;¹⁷⁸ and (7) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹⁷⁹ These statutory purposes provide a reference point for determining the relative success or failure of the Sentencing Commission in fulfilling its congressional mandate with the new Organizational Guidelines.

1. Certainty and Fairness in Sentencing

The first statutory purpose of the Sentencing Guidelines is to provide certainty and fairness in sentencing.¹⁸⁰ While the statute may suggest certainty and fairness are the same idea,¹⁸¹ an inherent tension exists between the two which must be balanced. For example, one commentator has noted that, due to the use and effect of culpability scores, the fines imposed by the Organizational Guidelines can range from \$250 to \$290,000,000, without regard to gain to the organization or loss to the public.¹⁸² The determination of fines through an established, structured system lends itself to more certainty in the determination of fines.

A purely mathematical determination of a fine penalty, however, may seem unfair to the organization and the public.¹⁸³ Any "unfairness" to the organization is offset by other provisions in the Guidelines that allow a reduction in the fine range due to mitigating circumstances.¹⁸⁴ Divesting the organization of any remaining monetary gain from the offense after payment of the fine¹⁸⁵ and causing the forfeiture of certain property, when allowed by statute,¹⁸⁶ serves fairness to the public. Thus, providing a structured, established method of determining fines serves the goal of certainty in sentencing. Assuring that the fine imposed reflects the circumstances of a case and that an offending organization will not profit from the criminal activity likewise furthers fairness.

177. *Id.* § 3553(a)(2)(B).

178. *Id.* § 3553(a)(2)(C).

179. *Id.* § 3553(a)(2)(D).

180. 28 U.S.C. § 991(b)(1)(B) (1988).

181. See *supra* note 173 and accompanying text.

182. See Obermaier, *supra* note 34, at 14.

183. See Obermaier, *supra* note 34, at 14.

184. See *supra* notes 81-84 and accompanying text.

185. U.S.S.G. § 8C2.10.

186. U.S.S.G. § 8E1.2. For example, 18 U.S.C. § 3681 (1988) authorizes the court to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium.

While the structure of the Organizational Guidelines may generally promote certainty in sentencing, the provisions governing corporate probation violate this principle by leaving the sentencing judge considerable discretion.¹⁸⁷ The Guidelines give little guidance by which to differentiate between appropriate and inappropriate occasions for probation.¹⁸⁸ There is no real limitation on the power to impose probation in light of the catch-all Guideline section 8D1.1(a)(8), which mandates that probation is appropriate whenever "it is necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)."¹⁸⁹ Moreover, once a judge determines that probation is appropriate, the Guidelines offer little help to the judge attempting to fashion the appropriate conditions.¹⁹⁰ A fair and just sentence will result if a judge uses discretion properly. Such wide discretion, however, leaves the probation area uncertain.

A fairness issue revolves around the credit given to an organization in its culpability score when it has a program to prevent and detect violations of law.¹⁹¹ These programs tend to be implemented only by large corporations due to availability of resources. As such, this provision could functionally shut out smaller organizations from a reduction in their culpability scores.¹⁹² This creates a potential for inequality. Under the Guidelines,¹⁹³ however, a sentencing judge must consider certain statutory factors in imposing a fine. These factors take into account the size of the organization, any measures taken to discipline the responsible parties, and efforts to prevent a recurrence of such an offense.¹⁹⁴ A judge employing such factors should recognize the limited resources of smaller organizations and adjust the fine accordingly. Therefore, compliance programs do not promote inequality as long as the sentencing judge recognizes the needs and resources of smaller organizations.

Furthermore, culpability scores, in and of themselves, promote fairness in sentencing. Due to the vicarious liability imposed upon organizations for the acts of its agents and employees,¹⁹⁵ the offense

187. Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2036 (1992).

188. *Id.*

189. See *supra* notes 173-79 and accompanying text for federal statutory purposes of sentencing under 18 U.S.C. § 3553(a)(2) (1988).

190. See U.S.S.G. §§ 8D1.3-8D1.4 (mandatory and recommended conditions of probation, respectively).

191. See Orland, *supra* note 7, at 50.

192. See Orland, *supra* note 7, at 50.

193. U.S.S.G. § 8C2.8(a)(10).

194. 18 U.S.C. § 3572(a)(7) (1988).

195. See *supra* notes 31-32 (federal) and 141-45 (Ohio) and accompanying text.

charged to the organization is only one aspect of an organization's culpability. An organization can operate under the most righteous principles, yet still be held liable for the acts of a single bad employee.¹⁹⁶ The Ohio organizational sentencing system establishes only one fine range per offense level¹⁹⁷ without reference to the general practices or policies of an organization. The federal Guidelines' use of culpability scores, with their upward or downward adjustments¹⁹⁸ for the organization's culpability, recognizes the dynamics of organizational liability.

One difference between the federal and Ohio sentencing systems is the "openness" of sentencing which is a "fairness" concern. In Ohio, a judge need not comment on why or how the sentence is chosen.¹⁹⁹ A federal judge, by contrast, must at least follow a structured process of decision-making up to the determination of the fine from within the guideline range.²⁰⁰ With the exception of the choice of fine within the range, the federal judge must show exactly what was and was not considered in the decision-making process. While the federal system is arguably too structured and long, it is better to err on the side of openness and similar sentences for similar offenders to further public faith in the judicial system. The Guidelines strike a good overall balance between certainty in sentencing and fairness.

2. Avoiding Unwarranted Sentencing Disparity

The second statutory purpose of the Sentencing Guidelines is to avoid unwarranted sentencing disparities.²⁰¹ According to the federal statute,²⁰² "disparity [in sentencing] exists when defendants with similar criminal records found guilty of similar criminal conduct receive dissimilar sentences."²⁰³ Until a number of offenders are sentenced under Chapter Eight, and the results can be compared, it is impossible to determine with any certainty the Organizational Guidelines' effect on sentencing disparity. Some preliminary observations may be made, however, by looking at the structure of the Organizational Guidelines and studies of the prior Guidelines.

196. See, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972) (corporation liable for actions of employee when the employee disobeyed express instructions), *cert. denied*, 409 U.S. 1125 (1973).

197. See *supra* note 147.

198. See *supra* notes 81-83 and accompanying text.

199. See *supra* notes 150-51 and accompanying text.

200. See U.S.S.G. § 8A1.2 (application instructions which set out organizational sentencing process).

201. 28 U.S.C. § 991(b)(1)(B) (1988).

202. *Id.*

203. DISPARITY REPORT, *supra* note 13, at 31; 28 U.S.C. § 991(b)(1)(B) (1988).

The Guidelines sentencing system, by establishing a structured sentencing process, necessarily makes federal sentencing practices more uniform and, therefore, has some impact on disparity in sentencing. In a study conducted by the Sentencing Commission, seventy-six percent of prosecutors and fifty-nine percent of probation officers believed that the Guidelines reduced disparity in sentencing.²⁰⁴ Of the federal judges polled, fifty percent felt the Guidelines reduced disparity in sentencing.²⁰⁵ Thus, the Commission's study suggests that, at least in the minds of those who work with the Guidelines, the Guidelines reduced sentencing disparity.²⁰⁶

The Guidelines, by establishing a structured sentencing system, necessarily impact upon the sentencing discretion of judges. The reduction of discretion for sentencing judges encourages uniformity in sentencing. The judges themselves, however, disagree over whether the Guidelines actually reduce disparity in sentencing.²⁰⁷ The Organizational Guidelines have a few areas that will keep this disparity in sentencing debate alive, such as the provisions for criminal purpose organizations and probation.²⁰⁸

The Guidelines' provision for divesting the net assets of criminal purpose organizations gives little guidance to a judge in determining what qualifies as a "criminal purpose organization."²⁰⁹ This Guideline merely instructs the sentencing judge to consider "the nature and circumstances of the offense and the history and characteristics of the organization" to determine if the organization is "operated primarily for a criminal purpose or primarily by criminal means."²¹⁰ The comparable Ohio provision for the dissolution of criminal purpose organizations likewise offers little guidance as to what is a "criminal purpose"

204. See DISPARITY REPORT, *supra* note 13, at 6.

205. See DISPARITY REPORT, *supra* note 13, at 6.

206. See DISPARITY REPORT, *supra* note 13, at 33-54. The study focused on four major offense types: bank robbery; bank embezzlement; heroin distribution; and cocaine distribution. *Id.* at 33. In bank robbery, the Commission found "dramatically more similar sentences under the guidelines" than prior to their implementation. *Id.* at 43. In the other three categories, the Commission found reductions in disparity, with more sentencing uniformity after eliminating departure cases. *Id.* at 47, 48-51, 54. But see JON A. SALE & BENSON B. WEINTRAUB, ALI-ABA COURSE OF STUDY: "CRIMINALIZATION" OF CIVIL LAW CLAIMS, CORPORATE SENTENCING FOR CORPORATE COUNSEL: PRELIMINARY CHALLENGES TO GUIDELINE SENTENCING OF ORGANIZATIONAL DEFENDANTS, April 18, 1991 (criticizing organizational guidelines for being released without more empirical data).

207. See DISPARITY REPORT, *supra* note 13, at 6.

208. U.S.S.G. §§ 8C1.1 (criminal purpose organization) and 8D1.1-8D1.5 (probation). See *infra* notes 209-17 and accompanying text.

209. See U.S.S.G. § 8C1.1.

organization.²¹¹ Without more instruction, under the federal Guidelines, similarly culpable organizations may have drastically different sentences imposed upon them. One convicted organization could merely pay restitution, pay a fine, and possibly be placed on probation, while another organization convicted of the same crime could receive a sort of "corporate death penalty" and be divested of all of its net assets.²¹² The federal and Ohio criminal organization provisions border on being unconstitutionally vague,²¹³ and leave an opening for disparity in sentencing.

The federal provisions governing organizational probation could lead to similar disparity in sentencing. The wide latitude afforded sentencing judges in those sections,²¹⁴ along with a lack of guidance in the appropriateness of probation, make probation an unpredictable and uncontrolled instrument.²¹⁵ While it is estimated that the fine provisions will apply to approximately eighty-one percent of all organizations sentenced,²¹⁶ there is no way to estimate when or how often probation will be imposed by sentencing judges. Such a "loose cannon"²¹⁷ in the Guidelines could lead to great disparity in sentencing.

The Organizational Guidelines system reduces disparity in sentencing. The Guidelines provisions for the divestment of the net assets of criminal purpose organizations and for organizational probation can produce disparity in sentencing. The Organizational Guidelines will generally reduce sentencing disparity among organizations, however, by its structure and the corresponding reduction in the discretion of sentencing judges.

3. Maintaining Flexibility to Permit Individualized Sentences

The third statutory purpose of the Sentencing Guidelines is "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices"²¹⁸ The provi-

211. See *supra* note 148. The Ohio statute, however, does offer some instances where certain crimes, such as counterfeiting and prostitution, constitute per se criminal activity meriting judicial dissolution. *Id.*

212. Wray, *supra* note 187, at 2027.

213. Orland, *supra* note 7, at 50. A criminal provision is void for vagueness if a person "could not reasonably understand that his contemplated conduct is proscribed." *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963). Statutes will not be invalidated merely because it is difficult to determine whether certain marginal offenses are proscribed by the statute, rather, an interpretation that supports the statute's constitutionality is prescribed. *Id.* at 32.

214. See generally U.S.S.G. §§ 8D1.1-8D1.5 (probation).

215. Wray, *supra* note 187, at 2036.

216. Obermaier, *supra* note 34, at 14.

217. Wray, *supra* note 187, at 2037.

218. 28 U.S.C. § 991(b) (1988).

sions for upward and downward departures from the Guidelines address this goal.²¹⁹ The statutory provision for departures is contained in Title 18, section 3553(b):

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.²²⁰

One potential problem with this statutory scheme is the vague standard of "adequately taken into consideration."²²¹

The Organizational Guidelines identify eleven instances where a departure may be appropriate and, thus, offer some help in determining when the sentencing commission has adequately considered the circumstances.²²² One commentator has identified a problem with respect to guideline departures for sentences for individuals: appellate courts seem to presume that the Sentencing Commission gave adequate consideration to nearly all of its sentencing policies and choices.²²³ Adequacy of consideration should be affirmatively demonstrated in the Guidelines Manual.²²⁴ In the case of organizational crimes, the listing of areas where departure may be appropriate²²⁵ affirmatively demonstrates that the Sentencing Commission has adequately considered circumstances related to organizational offenses except in the eleven instances enumerated by the Guidelines. The recognition of extenuating circumstances, and allowances for corresponding departures from the Guidelines, allows flexibility for individualized sentences.

The Guideline governing the imposition of probation also promotes the interest in maintaining flexibility for individualized sentences.²²⁶ While this particular Guideline is vague, it gives judges discretion to consider mitigating circumstances when imposing probation. The

219. See U.S.S.G. §§ 8C4.1-.11; *supra* notes 89-91 and accompanying text.

220. 18 U.S.C. § 3553(b) (1988).

221. *Id.*

222. See *supra* note 90.

223. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1753 (1992).

224. *Id.*

225. See *supra* note 90.

catch-all provision allowing probation whenever necessary to accomplish a purpose of sentencing²²⁷ is especially conducive to the consideration of mitigating circumstances. A mitigating circumstance, not adequately considered by the Commission, could exist and thwart a purpose of sentencing. The catch-all provision addresses this possibility. While not normally considered in the area of mitigating circumstances, the Guideline for probation adds flexibility necessary to permit individualized sentences when warranted.

The Organizational Guidelines' provisions for determination of fines and for departures from the Guidelines promote individualized sentences. One of the few similarities between the federal and Ohio organizational systems is the establishment of a graduated table of fines used to determine maximum fines.²²⁸ Even in this regard, however, the systems differ in their approach to using those established fines. Under the federal system, the maximum fine is determined by referencing the offense, a fine table, the organization's culpability, the circumstances of the case, and by performing some minor mathematical calculations.²²⁹ The Ohio sentencing system, on the other hand, establishes the maximum fine by classifying the basic offense.²³⁰

While Ohio's system employs fewer steps, such an inflexible formula is not desirable. The Ohio sentencing system does not consider the circumstances of the case to determine the possible range of fines.²³¹ Ohio utilizes the same maximum fine no matter the size of the organization, any attempts by the organization to stay within the law,²³² or any other consideration. The federal system reflects the differences in actions taken by large organizations as compared to small organizations and considers efforts by the organization to discover and prevent illegal conduct in setting the fine range.

227. U.S.S.G. § 8D1.1(a)(8).

228. Compare U.S.S.G. § 8C2.4(d) (Offense Level Fine Table) with OHIO REV. CODE ANN. § 2929.31 (Anderson 1987) (Organizational Penalties).

229. See U.S.S.G. §§ 8C1.1-8C4.11.

230. See OHIO REV. CODE ANN. § 2929.31 (Anderson 1987). Section 2929.31 states that if an organization is convicted of an offense pursuant to Ohio Revised Code § 2901.23, then the fine "shall" be fixed at a maximum corresponding to the offense, "regardless" of other penalties in the Code. *Id.*

231. See *supra* note 230 and accompanying text.

232. But see OHIO REV. CODE ANN. § 2901.23(C) (Anderson 1987).

In a prosecution of an organization for an offense other than one for which strict liability is imposed, it is a defense that the high managerial officer, agent, or employee having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission. This defense is not available if it plainly appears inconsistent with the purpose of the section defining the offense.

Furthermore, the federal system gives judges the opportunity to depart from the guidelines when appropriate.²³³ The federal system also allows the trial judge to reduce the fine to insure payment to victims,²³⁴ or because of simple inability of the organization to pay.²³⁵ There is no minimum fine for organizations for Ohio. This allows an Ohio judge to impose an unusually low fine when proper due to aggravating circumstances. Thus, with respect to lowering fines, the federal and Ohio organizational sentencing systems are not markedly different. An Ohio judge, however, cannot impose a higher fine than the maximum for the offense due to mitigating circumstance no matter how reprehensible the conduct of the organization or unique the circumstances of the case.²³⁶ Such disregard for the unique circumstances of a case leaves the door open to the possibility of manifest injustice.²³⁷ Justice should not give way to simplicity, and the federal provisions for departures from the Guidelines recognize that fact.

The Organizational Guidelines recognize that no rigid sentencing system can take into account all possible circumstances of a criminal case. The provisions for upward and downward departures from the Guidelines promote flexibility in sentencing. The Guidelines provision for the imposition of organizational probation further promotes sufficient flexibility to permit individualized sentencing.

4. Reflecting Seriousness of the Offense, Respect for the Law, and Just Punishment

The next statutory purpose for the Sentencing Guidelines is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."²³⁸ In a poll, sixty-five percent of federal judges, eighty-three percent of federal prosecutors, and sixty-nine percent of probation officers believed the Guidelines, prior to the addition of Chapter Eight, were "mostly appropriate" for providing just punishment.²³⁹ Their opinions of the Organizational Guidelines are as yet unknown.

233. See *supra* notes 89-91 and accompanying text.

234. U.S.S.G. § 8C3.3(a).

235. U.S.S.G. § 8C3.3(b).

236. See OHIO REV. CODE ANN. § 2929.31(A) (Anderson 1987). The statute establishes maximum fines, but there are no provisions in the Revised Code for imposing fines in excess of the maximum for the level of offense. See *id.*

237. See U.S.S.G. ch. 1, pt. A, n.3, at 2, p.s. (a sentencing system designed to cover every case would become unworkable and compromise certainty of punishment and deterrent effect).

238. 18 U.S.C. § 3553(a)(2)(A) (1988).

239. DISPARITY REPORT, *supra* note 13, at 12. Sixty percent of private attorneys, however, felt the Guideline Sentences were "mostly inappropriate." *Id.* The three choices offered in the poll published by the Commission (1992) "mostly inappropriate," and (3) "mixed opinion." *Id.*

The Organizational Guidelines reflect the seriousness of the offense by establishing a graduated table of fines that increases in severity with the level of the offense.²⁴⁰ The seriousness of a crime is further reflected by the provision providing for the divestment of all net assets of a criminal purpose organization.²⁴¹ Operating a criminal purpose organization is a very serious offense that merits a very serious penalty.

The statutory purpose of "just punishment" invokes a principle of "parsimony" - of imposing "the least restrictive sanction necessary to achieve desired social goals."²⁴² Except for the most serious crimes, coupled with the most culpable organizational conduct, a fine coming close to \$290 million²⁴³ would be more than is necessary to fulfill any or all of the sentencing purposes of Section 3553(a). Moreover, imposition of such high fines would only serve to penalize the shareholders or consumers of a corporation, rather than the employees or officers who were actually involved in the criminal conduct.²⁴⁴ The desired social goals for criminal sentencing stated by Congress,²⁴⁵ however, cannot be met by a weak sentencing system that merely gives criminal organizations a "slap on the wrist" by imposing a small fine. Thus, the organizational guidelines comport with the principles of just punishment and parsimony by employing sanctions necessary to further desired social goals.

5. Adequate Deterrence from Criminal Conduct and Protecting the Public from Further Crimes

The next two statutory purposes of the Sentencing Guidelines are "to afford adequate deterrence to criminal conduct,"²⁴⁶ and "to protect the public from further crimes of the defendant."²⁴⁷ These two purposes are served concurrently by the Organizational Guidelines' emphasis on programs to prevent, detect, and report criminal conduct. The Organizational Guidelines provide a "carrot and stick" approach to deter criminal conduct and protect the public from further crimes by organizations. The only way an organization can reduce its culpability in a criminal proceeding, prior to a crime occurring, is to establish a pro-

240. See *supra* note 76 and accompanying text.

241. U.S.S.G. § 8C1.1.

242. See SALE & WEINTRAUB, *supra* note 206, § VIII.

243. See Orland, *supra* note 7, § I, A (\$290 million dollar fine possible under the Organizational Guidelines).

244. See SALE & WEINTRAUB, *supra* note 206, § III.

245. See *supra* notes 173-79 and accompanying text.

246. 18 U.S.C. § 3553(a)(2)(B) (1988).

247. 18 U.S.C. § 3553(a)(2)(C) (1988).

gram for preventing, detecting, and reporting criminal conduct. These programs are commonly referred to as a "compliance programs."²⁴⁸

Organizations can receive up to a five point deduction from their culpability score if they detect the crime prior to a government investigation, report it to the authorities in a timely manner, and clearly accept responsibility.²⁴⁹ Coupled with the three points deducted for a program to prevent and detect violations of the law, the incentives for an organization to prevent criminal conduct are enormous. The lower the culpability score, the lower the fine that may be imposed by the judge.²⁵⁰

This emphasis on incentives to deter and report criminal conduct has not met with approval by all commentators. The system establishes a "practical partnership" between organizations and United States attorneys.²⁵¹ This system, it has been suggested, "creates a radical regime of semi-compulsory confession inconsistent with the underlying premises of the American accusatorial system."²⁵² An organization, however, cannot claim a constitutional right against self-incrimination.²⁵³ Thus, the Organizational Guidelines system is compatible with the American accusatorial system.

Under the Organizational Guidelines system, an organization must establish a compliance program. Failure to establish such a program could constitute professional malpractice, exposing a corporation and its officers and directors to shareholder derivative lawsuits where a drastic fine has been imposed.²⁵⁴ The incentives provided by the Guidelines deter criminal conduct, and if the programs are established after sentencing, the incentives will help prevent future criminal conduct by an organization.

6. Rehabilitation

The final statutory purpose of sentencing is "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."²⁵⁵ While

248. U.S.S.G. § 8C2.5(f).

249. *Id.* § 8C2.5(g).

250. See *supra* notes 81-88 and accompanying text.

251. See Obermaier, *supra* note 34.

252. Orland, *supra* note 7, § II(c).

253. See *Braswell v. United States*, 487 U.S. 99 (1988) (organization cannot claim Fifth Amendment privilege against self-incrimination); see also *United States v. Miller*, 425 U.S. 435 (1976) (one who engages in commercial transactions utilizing banking facilities has no reasonable expectation of privacy in the papers, so it can make no claim under the Fourth Amendment).

254. Gary G. Lynch & Susan L. Merrill, *Enforcement in the 1990s: The Corporate Response - The United States Sentencing Commission Guidelines* (PLI Corp. Law and Practice Course Handbook Series No. B4-6978, 1991).

255. 18 U.S.C. § 3553(a)(2)(D) (1988).

rehabilitation, in the usual sense of providing educational or vocational training, or medical care is not useful for the sentencing of organizations, the Guidelines do provide for correctional treatment for an organization. The provisions for organizational probation mandate probation when "necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct."²⁵⁶

The Guidelines provide for, as a recommended condition of probation, the establishment of programs to detect and prevent violations of the law.²⁵⁷ The program must be approved by the court before it can be implemented.²⁵⁸ This ensures adequate correctional changes within the organization. The Guidelines also provide for periodic inspections of the organization's books and records, and occasional interviews of knowledgeable personnel within the organization during probation.²⁵⁹

There is no corresponding provision under Ohio law for organizational probation. Mere penalization by the fining of an organization will not ensure changes are made in the organization. Under current Ohio law, it is very possible that a convicted organization will commit more crimes without fundamental changes in the way the organization functions. Rehabilitation for organizations, as for individual criminals, is absolutely vital and necessary to prevent future criminal conduct. The federal Organizational Guidelines successfully promote "rehabilitation" of organizations by the use of probation.

IV. CONCLUSION

The federal Organizational Guidelines sentencing system has much to its credit. It generally meets its statutory goals. The author proposes that the section of the Organizational Guidelines concerning criminal purpose organizations should be amended by the Commission to offer more guidance on exactly when an organization is a criminal purpose organization. Identifying more characteristics of a criminal purpose organization, such as a minimum percentage of income derived from criminal activities, would be appropriate. The extreme penalty provided by this Guideline demands careful attention to avoid unwarranted sentencing disparity. With the amendment of this section, the new Guidelines will more accurately reflect the statutory purposes of the Guidelines.

Of course, only after organizational criminal cases start winding their way through the federal court system and the Organizational

256. U.S.S.G. § 8D1.1(a)(6).

257. *Id.* § 8D1.4(c).

258. *Id.* § 8D1.4(c)(2).

259. *Id.* § 8D1.4(c)(3).

Guidelines are implemented will it be seen whether the Organizational Guidelines are workable. It is likely that experience will show some changes will need to be made. The Federal Guidelines for the Sentencing of Organizations are a successful attempt at what should be the goals of all criminal sentencing systems: fairness, flexibility, and similar sentences for similar crimes.

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