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THE DEVELOPMENT OF ORGANIZATIONAL PROBATION

AND ITS IMPLICATIONS FOR CRIMINOLOGY

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by

William S. Lofquist

A dissertation submitted to the Faculty of the University of Delaware in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Sociology

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ABSTRACT

On November 1, 1991, federal sentencing guidelines for organizational offenders promulgated by the United States Sentencing Commission became law. Included are guidelines for the use of organizational probation, a new and little used sanction. Diverging from traditional reliance on market-based organizational sanctions, which fully preserve the prerogatives of management, organizational probation is a politics-based sanction; the courts are granted the power to intervene in the organization and require changes designed to reduce the likelihood of future law violations.

This dissertation examines the historical development of organizational probation and its implications for criminology. The case study methodology is employed. Documentary records from the National Commission on Reform of Federal Criminal Laws, the United States Congress, and the United States Sentencing Commission, the three forums in which organizational probation was considered, are examined. In addition, interviews with key players from each of these forums are used to supplement the documentary record.

The federal sentencing guidelines provide extensive, and often mandatory, uses of organizational probation. This legal outcome

is unexpected given the weakness of Congressional authorization to the Sentencing Commission in this area, the opposition of business to organizational probation, and the historical reliance on market-based corporate crime controls. Sociology of law provides several theoretical frameworks through which unexpected legal outcomes can be explained; pluralist, structuralist, and state capacity perspectives are found to be applicable in this case.

A multi-theoretical explanation of the development of organizational probation results. Primary attention is focused on state capacity. The United States Sentencing Commission is a unique federal agency, extensively protected from political influence. Entrepreneurialism on the part of well-placed individuals, legitimacy concerns on the part of the Sentencing Commission, strategic actions and misunderstandings by business, and strong and detailed support for organizational probation from regulatory agencies, led the Sentencing Commission to exercise this state capacity in the development of remedial organizational probation.

Implications of this study include the need for continued refinement of the place of "the state" in sociolegal theory. Numerous state actors, often with different and even conflicting interests, were active in this case. The rationality often assigned to individual and organizational actors by sociolegal theories, particularly instrumentalism and structuralism, is also called into question. Finally, greater attention to the role of law in creating and enhancing state capacity is suggested by this case study.

> If you look at the American criminal law experience, sentencing has not been our finest hour. There has been virtually no thinking about what to do with organizations.
>
> G. Robert Blakey[1]

Chapter One

ORGANIZATIONAL PROBATION: CHANGING THE LEGAL LANDSCAPE

This dissertation describes and explains the development of organizational probation, a novel addition to the statutory criminal law that allows the courts to intervene into the operations of corporations. Until recently, corporate criminal sentencing was limited to fines and other market-based sanctions. Though fining has been sharply criticized on numerous theoretical and empirical grounds (Coffee, 1977, 1979-80, 1980; Stone, 1975; Geraghty, 1979; Fisse, 1985, 1986), meaningful alternatives have only rarely been proposed. Few of these proposals (Nader, Green, and Seligman, 1976; Stone, 1975, 1976b; Conley, 1977; Clinard and Yeager, 1980) have received serious consideration. Rather, it has been widely accepted in theory and practice that traditional fines are the only criminal sanction

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[1] Professor of Law, Notre Dame University. Quote taken from an interview with the author, August 2, 1991.

available for corporations (Newman, 1958; Williams, 1961; National Commission on Reform of Federal Criminal Laws, 1970a; Harvard Law Review, 1979).

Since being introduced into the sentencing reform debate in 1970, however, organizational probation has become the primary alternative to fines in sanctioning organizations convicted of crimes in the federal courts. Most of the attention to organizational probation during this lengthy period of law creation came between 1988 and 1991, when the United States Sentencing Commission debated organizational sanctioning. In the federal organizational sentencing guidelines it promulgated in May 1991, and which became law on on November 1, 1991, organizational probation is mandatory in many cases, with conditions stressing the development of compliance plans.

Organizational probation, particularly in the form of statutory sentencing guidelines, provides historically underpowered prosecutors and judges with an important new and strengthened means of sanctioning corporate criminals. Now, for the first time in the history of American criminal law, federal organizational sentencing guidelines supply clear statutory guidance to courts on the types and ranges of sentences available for organizational offenders. More significantly, no longer are prosecutors solely reliant on market mechanisms for crime control. Through organizational probation, these guidelines provide unprecedented statutory support for government interventions into the structure and practices of defendant organizations.

Criminological and Sociolegal Issues for Research

The development of organizational probation over the last two decades raises important sociolegal and criminological issues. Sociolegal issues center on examining the origins of organizational probation, the forces that have shaped its development, and how it has managed to become a major sanctioning alternative despite business opposition and extensive government support for free markets. Criminological issues center on the implications of organizational probation for corporate crime control and corporate criminology. More specifically, how organizational probation fits into corporate crime control theories and policies is examined, as are the prospects of this sanction for controlling corporate crime. Each of these sets of issues is explored in this dissertation.

Elaboration of Research Issues

In suggesting ways in which the study of the massive amounts of existing and newly created law can be most fruitfully approached by social scientists, William J. Chambliss states that

> what we should be concerned with is not the mountain of minutiae produced as law but the critical events, the points at which laws are produced which provide a new approach to a problem, a basic revision of the existing relationships between state, polity, government and basic institutions (1986: 27).

It is a central contention of this dissertation that the development of organizational probation represents such a case. The four primary points developed in support of this contention are outlined next, and form the theoretical core of this dissertation. This discussion is followed by an introduction to the final organizational probation provisions promulgated by the United States Sentencing Commission and a historical overview of their development. This chapter concludes by discussing the research design and methodology employed in this case study and overviewing each of the subsequent chapters.

Statutory Foundations. First, it is significant that organizational probation has taken statutory form. Statutory law provides a legal foundation that, though still subject to judicial interpretation and weakening at the point of enforcement, limits the potential effectiveness of future court challenges (Snider, 1990a). Historically, much of the law used to criminalize corporate misconduct has been outside the statutory law, making it vulnerable to challenges by corporations. The extension of criminal liability to corporations, for example, has been almost exclusively judge-made (Brickey, 1984; Bernard, 1984). Even in its more recent statutory form (1 U.S.C. Section 1), corporate criminal liability exists only by reference to individual-based offense statutes and is conditioned on judicial interpretations of those statutes. Corporate criminal sentencing law has historically also been judge-made, through the extension of individual sanctions to organizations. In each of these cases, through the juristic person standard (Coleman, 1974), the individual criminal law has served as the basis for the development and application of the corporate criminal law.

On the one hand, the practice of judicial interpretation and the creation of the juristic person standard have been fundamental to the application of the criminal law to corporations (Bernard, 1984), providing for legal developments that have not occurred outside the common law tradition (Mueller, 1957; Laitinen, 1991). Yet, these features of the American criminal law experience also place limits on the use of the criminal law to control corporations. The individualistic assumptions that underlie the criminal law limit its applicability to corporations (Stone, 1975; Friedman, 1979; Fisse, 1983; Rourke, 1990) and provide the basis for continuing arguments that corporations should not be subject, at all or in large part, to the criminal law (Parker, 1991b; Orland, 1980; but see Fisse, 1983). The development of separate, organization-specific statutory offense and sentencing laws provides an opportunity to go beyond these assumptions, and in so doing clarify the principles through which corporations are dealt with by the criminal law. The significance of the development of a statutory criminal sentencing law for corporations is magnified where this law takes the form of binding guidelines, as in the present case.

Politics and Markets. Second, the development of statutorily supported and even mandated organizational interventions represents an important change in the legal landscape of corporate crime control. The market has historically been the sole source of corporate crime control measures, both legal and non-legal. Even more, market logic has dominated political (United States Senate, 1983b), legal (American Bar Association, 1979), and public (DeVos, 1985; Lipset and Schneider, 1987) consideration of corporate crime and its control. Business has strongly preferred a market-based approach over interventionism because it protects organizational autonomy (Silk and Vogel, 1976; Galbraith, 1985). Organizational probation challenges this logic by using a politics-based mechanism to control corporate crime. By authorizing judicial interventions intended to alter organizational structures and processes thought to be linked to crime, state power is brought directly into the conduct of business.

Organizational probation thus represents more than a new sanction. It represents a change in the way the law views organizations and seeks to redress corporate crimes. Historically, corporate sanctioning has involved confronting the defendant with a negative profit contingency, the organizational effect of which is wholly contingent upon management's response. Sanctioning in this manner is entirely private. Organizational probation, on the other hand, is based on a political logic that empowers courts to require organizational defendants to take those actions "necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct" (United States Sentencing Commission, 1991). This approach opens to outside scrutiny the practices of organizations involved in criminal activity.

Relationship to Organizational Theory. Third, the transition from reliance on market-based sanctioning to the introduction of a politics-based alternative has strong and important links to organizational theory. This signals a repudiation of law and economics, which advances the view that market-based policies, or, better yet, markets free of state interference, are superior in regulating corporate conduct (Becker, 1968; Posner, 1979-80; Parker, 1988a). Contrary to this approach, there is substantial social scientific evidence that the characteristics of organizations limit the applicability of market-based assumptions and solutions to the control of organizational wrongdoing (Simon, 1947; March and Simon, 1963; Simon, 1979; Allison, 1971; Ermann and Lundman, 1978, 1982; Ermann, 1990), thereby directing attention to the organization itself as the location for crime control efforts.

Translated into organizational theoretical terms, the debate is between the rational actor and organizational process models of organizational behavior (Allison, 1971). According to the first view, organizations are rational, unitary, maximizing actors, best controlled by applying market logic to externally manipulate the costs and benefits of their behavior. The organizational process model regards organizations as complex, differentiated entities, simultaneously in pursuit of different and often conflicting goals. Control is most effectively exercised by altering organizational structures and procedures in a manner designed to improve internal accountability and coordination of goals and activities.

Explaining Unexpected Legal Outcomes. Fourth, given the recent influence of the law and economics movement among legal policymakers, as well as more general public and political support for business and free markets (DeVos, 1985; Lipset and Schneider, 1987), the development of organizational probation poses difficult questions for the sociology of law. The 1980s was an era characterized by close relations between business and the state, active government deregulation of business, and the elevation of free market ideology to a level unseen since at least the 1920s (Phillips, 1990). That this influence has not carried over into the development of organizational probation suggests a number of possible explanations to be explored. Drawing from sociolegal theory, legal outcomes inimical to business interests can be explained in several ways: sufficient autonomy and capacity on the part of the Sentencing Commission to act independent of business interests; support for organizational probation from other interest groups great enough to overcome the opposition of business; divisions within the business community regarding organizational probation; and legitimacy concerns confronting the Sentencing Commission.

The inclusion of organizational probation in the small arsenal of sanctions available to federal prosecutors confronting corporations represents a qualitative change in the legal landscape by authorizing organizational interventions and encouraging negotiative relations between the state and defendants in administering this sanction. What is at stake, then, with the new organizational sentencing guidelines, is not only the types and severity of punishments that corporations will face, but larger issues of how corporations operate, the public and private boundaries around corporate action, the legal standards for corporate control, and prevailing understandings of corporate criminal lawmaking. This dissertation ties these points together through a detailed socio-historical analysis of the development of organizational probation.

A Note on Statutory Law

The literature on corporate crime control is replete with reminders that the use of the criminal law against corporations is infrequent (Clinard and Yeager, 1980; Coleman, 1985b) and that enforcement is the final measurement of the effectiveness of law (Yeager, 1991; Snider, 1991). Some go so far as to suggest that "laws on the books mean little in and of themselves. They are meaningful only insofar as they are backed by the mobilization of state power" (Shover, Clelland, and Lynxwiler, 1986: 2). While it is no doubt true that enforcement is fundamental to the full meaning of law, and that lack of enforcement has historically served as a serious impediment to corporate crime control efforts (Braithwaite, 1989a; Goff and Reasons, 1978; Yeager, 1991), to suggest that law does not have meaning independent of enforcement is to take a static view of the social context of law enforcement and a disinterested approach to the effects of law creation on its constituents.

Statutory law represents the foundation of legal society, impacting behavior independent of enforcement through its influence on social actors. Moreover, statutory law represents a latent state capacity to more directly intervene in social relations. As such, it serves as a potential means to redress social inequalities (Auerbach, 1983) and limit the power of even dominant social actors (Thompson, 1975). As social conditions change over time and across space, in part as a result of statutory law itself, this capacity takes on different meanings. Without it, the ability of the state to respond to change would be limited by the need to constantly recreate law. That the development of organizational probation has to a substantial extent taken mandatory form, limiting the discretion of judges regarding its imposition, further reduces the distinction between law and its enforcement. Again, discretion remains, and further discretion will no doubt be created by judges where it is not thought to exist in statute. However, the potential effectiveness of actual and threatened challenges to the application of organizational probation is limited by its mandatory form.

A Brief History of Organizational Probation: Where We Were and Where We Are

On November 1, 1991, the United States Sentencing Commission's guidelines for organizational sentencing became law. This marked the culmination of a twenty-five year effort to develop and specify statutory sentencing standards for individual and organizational offenders.[2] Included in these guidelines are binding and nonbinding (known as policy statements) standards to be observed by judges in imposing fines, restitution, community service, notice to victims, and probation on corporations and other organizations convicted of crimes in the federal courts. These standards provide guidance as to the circumstances in which particular sentences are appropriate and the severity or conditions of these sentences.[3]

Sentences within the ranges or consistent with the statements provided in the guidelines, both binding and nonbinding, are not subject to appeal. Sentences outside these standards may be appealed by the defendant if they exceed the standards or by the state if they do not meet the minimum standards. This statutory specificity is new. Prior to the development of sentencing guidelines, which have proliferated at the state level in the past decade (see Shane-DuBow, Brown, and Olsen, 1985), sentencing was largely a judicial function and sentencing law was largely judge-made. The principles guiding the United States Sentencing Commission in the construction of federal guidelines represented the full range of goals of sentencing: just deserts, deterrence, incapacitation, and rehabilitation.

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[2] Federal sentencing guidelines for individual offenders went into effect on November 1, 1987.

[3] Sentences are based on offense and offender characteristics, such as amount of loss or gain, prior record, or level of culpability, rather than on type of offense. However, the maximum fines found in offense statutes still serve as upper limits on fines.

United States Sentencing Commission and Organizational Probation

During the three year period in which the Sentencing Commission debated organizational sanctions, discussed in detail in Chapters Five and Six, two Commission-endorsed draft proposals were published for public comment, several external proposals were commissioned and considered, and numerous other drafts were circulated among interested parties. As ultimately developed by the Sentencing Commission, organizational probation involves placing a convicted organization, almost always a corporation, under the direct or indirect supervision of the courts, with the likely requirement that the organization undertake certain internal changes in order to be released from supervision.

This approach is viewed by its opponents, particularly business groups, the American Bar Association (ABA), and law and economics scholars, as inviting judicial and regulatory agency experimentation in corporations. These groups assert that the courts are incompetent to manage corporations and that organizational probation will inevitably lead toward this end, at the expense of efficiency, competitiveness, and fairness (Parker, 1988a; United States International Trade Commission, 1988; Toensing, 1990). To others in the academic and regulatory communities and the Sentencing Commission, these concerns are either misplaced, given the negotiative approach to probation taken in the guidelines and the substantial discretion retained by business (First, 1988; Gruner, 1990a, 1990c, 1991), or hyperbole designed to undermine support for organizational probation (Nagel, 1991).

In the view of supporters, the probation provisions promulgated by the Sentencing Commission represent a reasonable approach to encouraging the creation of organizational structures that facilitate law compliance in corporations convicted of violating the criminal law. While convicted corporations must expect some limitations on their activities (Gruner, 1988a; Gelacak, 1991), probation advocates argue, their control over legitimate business decisions remains undisturbed and their involvement in developing compliance plans is substantial. In this view, the reality of business power makes the active involvement of defendants in restructuring efforts not only programmatically desirable but also a practical necessity (Braithwaite, 1982).

The outcome of this conflict between probation advocates and opponents is interesting because of the contrast it provides with the organizational fining provisions. While the fines found in the final guidelines are widely viewed as more lenient than earlier Commission proposals (Coffee, 1991b; R. Rogers, 1991; Heider, 1991; Business Roundtable, 1991; Frey, 1991), though harsher than past practice (Standen, 1991; Block, 1991; Cohen, 1991c), this same view does not extend to the probation provisions. In fact, these provisions are seen by many, particularly probation advocates in the academic and regulatory communities (Gruner, 1991; Levine, 1991; Bellin, 1991), but also by opponents of probation (Lott, 1991; Parker, 1991a, 1991b), as more interventionist and remedial than any previously published proposal. Arthur Levine, who as Deputy Chief Counsel for Litigation of the Food and Drug Administration (FDA) was actively involved in the development of the organizational sentencing guidelines, stated that "[t]he guidelines submitted to Congress reflect a clear 'victory' for those advocating organizational probation" (Levine, 1991).

The Final Organizational Probation Provisions

To preliminarily assess Levine's claim and to clarify from the beginning the scope and details of this new and little known sanction, the final organizational probation provisions promulgated by the Sentencing Commission are presented in this section. In the final guidelines (United States Sentencing Commission, 1991), organizational probation is mandatory under a range of circumstances. They are: if necessary to ensure satisfaction of other sanctions; if an organization of more than fifty employees lacks an effective program to prevent and detect law violations; if the organization has been convicted of a similar offense in the past five years; if high-level personnel participated in the offense and had been convicted of similar activities in the previous five years; if necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; if the sentence does not include a fine; or if necessary to accomplish one of the four purposes of sentencing.

Mandatory conditions of probation include commission of no further crimes and payment of a fine or restitution, or performance of community service in all felonies. Also, as part of the binding conditions of probation, courts are authorized to impose any other conditions reasonably related to the instant offense and imposing no unnecessary deprivations of liberty or property. Possible discretionary conditions of probation are provided in the form of policy statements. These include publicity paid for by the defendant in media specified by the court detailing the crime, conviction, sentence, and remedial steps taken; development by the defendant and court approval of "an effective program to prevent and detect" future law violations; notification of employees and shareholders of the offense and of the details of the compliance program; periodic reports to the court regarding progress in implementing the compliance program, occurrence of new offenses, or investigations involving the defendant; and periodic examinations of facilities and records, and interviews of employees by the court (or special probation officer) to monitor compliance.

The Commentary accompanying these provisions notes that regulatory agencies should be consulted in developing probation conditions. It also provides that regulatory officials may be employed by the court as probation officers. Additionally, it states that violations of probation will lead to extension of probation, stricter conditions of probation, or revocation and resentencing. Finally, the furthest reaching supervisory provision establishes that "in the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders" (United States Sentencing Commission, 1991).

The Sentencing Commission, as part of its effort to foster organizational self-policing, also provides a detailed definition of "an effective program to prevent and detect" future law violations (more often referred to as a compliance plan). This definition serves as a baseline against which to assess existing compliance plans and craft new plans. An effective compliance plan is defined as a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. The occurrence of criminal conduct when a compliance program is in place, however, is not necessarily evidence of the ineffectiveness of the program. Rather, the key factor in making this determination is the presence or absence of due diligence on the part of the corporation in seeking to prevent and detect criminal conduct by its employees and other agents.

Due diligence is characterized by the necessary presence of each of these minimum requirements: the existence of compliance standards and procedures that are reasonably capable of reducing the likelihood of criminal conduct; the assignment of compliance oversight responsibility to specific individual(s) in the upper ranks of management; reasonable care taken in assuring that individuals whom the organization knows, or should know through due diligence, have a propensity to engage in illegal activities, have strictly limited discretionary authority; reasonable efforts on the part of the organization to communicate effectively its compliance standards and procedures to all employees and other agents; the use of monitoring and auditing systems, reporting systems, and/or other mechanisms necessary to implement the compliance plan; the use of appropriate disciplinary mechanisms to enforce compliance among employees and other agents and to punish violators; and active and complete responses to all detected violations, including any necessary modifications of the compliance program.

In its final provisions, this definition states that the precise actions necessary for an effective compliance program depend upon a number of factors. Among these relevant factors are the size of the organization, with larger organizations requiring more formalized compliance programs; the likelihood that certain offenses will occur within certain types of businesses, with greater steps being necessary where the risk of violation is greater; and the prior legal history of the organization, with greater vigilance expected where past misconduct has occurred.

Organizational Probation in Congress and the Courts

Sentencing is perhaps the most controversial and unsettled issue in criminal justice. Its history of reform is lengthy, unending, and often contentious (Rothman, 1983), dating at least to the publication of Beccaria's On Crimes and Punishments in 1764. This continuing tumult, clearly visible throughout the sentencing reform movement, is linked to the recognition that sentencing is the most common and substantial means by which the state limits the liberty of its citizens (Morris, 1977) and the absence of agreement regarding the theoretical foundations and practical purposes of this power. The relative merits of incapacitation, retribution, deterrence, and rehabilitation remain at issue, as do the accompanying issues of disparity, individualization, and standardization. Because organizational probation emerged from the most recent sentencing reform movement (see Scull, 1977 and Rothman, 1971, for discussions of earlier sentencing reform movements), examining the contours of this movement provides an initial assessment of the distance traveled in development of this sanction. This historical outline also provides an overview of the case study in Chapters Three through Six.

Until quite recently, debates among academicians and legal policymakers over the goals of sentencing and the best way to achieve them have centered entirely upon individual offenders. When the modern sentencing reform movement began in 1952, with the initiation by the American Law Institute (ALI) of efforts to draft a Model Penal Code, corporations were included as possible defendants subject to the traditional sanction of fines and the remote threat of charter suspension or revocation. However, little independent consideration was given to organizational sanctioning. The inclusion of this issue reflected the comprehensiveness of the Model Penal Code project more than any innovation or even interest in organizational sanctioning.

With the ALI's initial effort at criminal code reform, rationalization, and simplification as its impetus, Congress in 1966 established the National Commission on Reform of Federal Criminal Laws (P.L. 89-901, 80 Stat. 1516). Known as the Brown Commission due to the chairmanship of former California Governor Edmund Brown, this panel of judges and Congressmen submitted its final proposal to Congress in 1971. In the sentencing provisions of its recommendations to Congress, the Brown Commission introduced several novel alternatives into the organizational sentencing debate: publicity, notice to victims, and probation. However, in the case of organizational probation, no definition or elaboration of how it was to be implemented was provided (see National Commission on Reform of Federal Criminal Laws, 1970a, 1970b, 1971). Though the Brown Commission took the important step of establishing probation for both individuals and organizations as an independent and affirmative sentence rather than as a suspended sentence, as had historically been the case, the conditions provided were only those traditionally imposed on individuals. In fact, it is only in retrospect that any significance can be attached to its inclusion among the Brown Commission's organizational sentencing provisions.

After submission of the Brown Commission report, Congress took up the criminal code reform effort, immediately holding hearings on criminal law reform and introducing legislation toward this end. Between 1971 and 1984, Congress considered thirty-eight criminal code reform bills, and eventually passed criminal code reform legislation.

The Sentencing Reform Act of 1984 (P.L. 98-473, 98 Stat. 1987), Title II of the larger Comprehensive Crime Control Act (P.L. 98-473, 98 Stat. 1976), included provisions establishing separate frameworks for sentencing individual and organizational defendants and created the United States Sentencing Commission to develop precise guidelines based on these frameworks. Following the recommendations of the Brown Commission, Congress also established fines and probation as the primary sanctions for organizations. However, again following the Brown Commission, the conditions of probation remained only those traditionally imposed on individuals. Recognizing the difficulties and political constraints it faced in developing more precise sentencing standards, Congress delegated this task to an independent sentencing commission and to the courts (Blakey, 1991; Gainer, 1991).

During the same period in which Congress was considering organizational sentencing reform, organizational probation was initially, infrequently, and unsystematically used as a criminal sanction in the federal courts. The simultaneous legislative and judicial application of probation to organizations was coincidental. Beginning in 1971 (U.S. v. Atlantic Richfield Co., 465 F.2d 58) with an innovative interpretation of the Federal Probation Act (FPA), organizational probation was imposed in numerous cases. These efforts were frequently, and often successfully, appealed (see Levin, 1984; Gruner, 1988a), revealing the weakness of the statutory foundation for organizational probation provided by the FPA and the importance of the types of statutory changes proposed by the Brown Commission.

Lacking explicit statutory support for imposing probation on corporations, over the next several years judicial efforts to shape remedial probation conditions decreased. A "common law" of organizational probation, characterized by use of probation only as a means to provide corporations time to establish fine payment, restitution, and community service programs, developed.

It was with the work of the United States Sentencing Commission, beginning in 1985 and ending with the submission of final organizational sentencing guidelines to Congress on May 1, 1991, that organizational probation received its most sustained attention and substantial development. What is most interesting about the work of the Sentencing Commission is that, though Congressional hearings held over the previous thirteen years had discussed organizational probation in some detail, the Comprehensive Crime Control Act stated only that it was to be a sentence available to judges. As with the Brown Commission, none of the conditions of probation listed in this legislation applied specifically to organizations, and few applied even indirectly. Bills providing more specific language had been rejected, and the final Congressional report (U.S. Senate, 1983a) expressed concern about the intrusiveness of remedial organizational probation and general indifference to organizational sanctioning.

In fact, it has been a central argument of business that Congress did not provide the Sentencing Commission with the authority, or at least the statutory obligation, to issue organizational sentencing guidelines. Business has also argued that

Congress opposed interventionist probation conditions. These issues are raised to indicate that the Sentencing Commission received no strong mandate to develop a remedial form of organizational probation. Using organizational probation as a fine collection mechanism, as had historically been the case, would have been entirely consistent with the Comprehensive Crime Control Act. Yet, the Sentencing Commission has extensively debated organizational probation and has developed sophisticated and potentially intrusive guidelines for remedial interventions in defendant corporations.

Organizational Probation and Sociolegal Theory

The emergence of sentencing guidelines and of separate sentencing law for organizations means that it is no longer adequate for criminal law theorists to focus on the creation and enforcement of offense statutes. The organizational, ideological, and structural forces behind sentencing law creation must also be examined to understand the full meaning of criminalization. The importance of these considerations is magnified in the present case because what is at issue is not merely the traditional advisory or indeterminate sentencing standards that provide judges substantial and generally unreviewed discretion. Over the course of the sentencing reform movement, the sentencing guidelines movement developed with the goal of establishing specific and narrowly defined sentencing limits from which judges had limited discretion. This particular view of sentencing reform was adopted by Congress and implemented by the Sentencing Commission.

As elaborated in Chapters Three through Seven, elements of several sociolegal theories are combined herein to explain the development of organizational probation. The complexity of the resulting theoretical framework makes it difficult to succinctly detail the interactions between each of its elements. However, an outline of these interactions is possible. Deriving initially from entrepreneurial and rationalizing interests on the part of state actors engaged in the development of a uniform federal criminal code, the state capacity to legislate sentencing guidelines for individuals and organizations was increased throughout the 1970s. The application of individual-based offense and sentencing statutes to organizations was made explicit. As statutory specificity increased, business and legal groups lobbying Congress expressed opposition to proposed corporate crime control measures. Their efforts were partially successful in minimizing state capacity to further develop organizational probation.

The Sentencing Commission, however, took a broad view of the whole range of the powers granted it by Congress. When the debate over sentencing guidelines moved into the Sentencing Commission, business groups focused most of their attention on fundamental legal questions relating to their criminal liability and on attacking the ability of the Sentencing Commission to legislate in this area. This lobbying strategy decreased the legitimacy of the Sentencing

Commission by subjecting it to public and political criticism at the same time that it increased the resolve of the Commission to use its lawmaking capacity to the extent possible. This approach also removed business from constructive debate over the form and uses of organizational probation. The resolve of the Sentencing Commission was supplemented by strong and programmatically specific support for organizational probation from the regulatory community. This scenario provided for the development of organizational probation beyond the extent anticipated by Congress and other interest groups.

Research Design: Elaboration of the Case Study

Over the past twenty-five years, since its "invention" by the National Commission on Reform of Federal Criminal Laws, organizational probation has developed into the primary corporate criminal sentencing alternative to fines. This dissertation explains in detail the origins, processes, and significance of this case of law creation by examining and elaborating the four points discussed earlier in this chapter. The empirical component of this effort uses the case study methodology. This methodology has undergone a revival in recent years. Long criticized due to problems in generalizing from single or several cases, the absence of rigorous and clearly specifiable techniques for moving from data to conclusions (Miles, 1979), and from mistaken classification of case studies as single case experiments (Campbell and Stanley, 1966), case studies have increasingly proved their utility in understanding policymaking and other social and organizational processes and products (Yin, 1981, 1989; Yin and Heald, 1975). In fact, the inductive approach associated with case studies has become quite popular in sociology in recent years, provoking renewed criticism of the limitations of this approach for general theorizing (Kiser and Hechter, 1991). In the areas of the present research, criminology and sociology of law, the case study is a prominent methodology (see Braithwaite, 1984; Ermann, 1990; Berk, Brackman, and Lesser, 1977; Fisse and Braithwaite, 1983).

Following Yin's definition of a case study as a type of empirical inquiry that

> investigates a contemporary phenomenon within its real life context when the boundaries between phenomenon and context are not clearly evident and in which multiple sources of evidence are used (1989: 23),

documentary records and interviews comprise the primary source material for analysis of the development of organizational probation by the Brown Commission, Congress, and the United States Sentencing Commission between 1966 and 1991. These materials are supplemented by secondary literature discussing the sentencing reform movement, though the recency of the work of the Sentencing Commission limits the availability of secondary materials. No other analysis of the development of the federal organizational sentencing guidelines has been conducted.

The documentary records available to address the development of organizational probation are extensive. Beginning with the Brown Commission, its Working Papers and Final Report are available. To examine the work of Congress, the documentary record includes each of the bills submitted in which organizational sentencing provisions were included, the hearings and floor debates on these bills, and the reports printed pursuant to these hearings (see Appendix A). The documentary record of the Sentencing Commission includes five public hearings held on organizational sanctioning, hundreds of written commentaries submitted to the Commission, the minutes of Commission meetings, internal memoranda from organizations participating in the debate, each of the proposals drafted by the Commission and other participants in the drafting process, and the organizational sentencing data base developed by the Commission (see Appendix B). This entire documentary record has been reviewed for materials relevant to organizational probation. Federal court cases involving organizational probation have also been selectively employed to assess the use of this sanction under the Federal Probation Act.

In addition to these documentary records, twenty-eight interviews, with individuals from each interest group and from each historical period in the development of organizational probation (see Appendix C), have been completed. After an initial review of the history of the development of organizational probation, individuals and organizations that played key roles in this history were contacted. Some contacts were made by mail, others by phone. Overall, thirty-seven requests for interviews were made, nine of which were rejected. With one exception, all interviews were conducted by phone. A broadly constructed interview schedule was employed, allowing for substantial departures to discuss particular facets of the interviewee's involvement in or assessment of the development of organizational probation. In general, each interview involved discussion of the final probation provisions, likely enforcement scenarios, and details of whatever phase of development of organizational sentencing guidelines with which the interviewee was involved. Numerous additional written requests for information from participants in the organizational sentencing reform debate resulted in receipt of documentary materials and letters detailing the positions of particular individuals or groups on different issues.

Based on this empirical inquiry, an effort is made to arrive at a theoretical understanding of the development of organizational probation. This case is in turn used to inform and expand existing sociolegal theoretical explanations of corporate criminal lawmaking. In this regard, it is important to note that

> a case study does not allow verification or clear falsification of rather complex theories. It can, however, suggest modifications of their hypotheses and help to develop further research questions (Savelsberg, 1987: 554-555).

A related point, made in the context of state theorizing but equally true for sociolegal theory, is that "different theories of the state may well be not mutually exclusive but complementary and sequentially compatible, especially when seen from a historical perspective" (Heydebrand, 1990: 494). This latter point turns out to be particularly relevant in the present case, as is indicated by the theoretical framework sketched earlier in this chapter. The combined effect of these recognitions is a rejection of a positivist or grand theoretical approach to sociolegal theorizing in favor of a more flexible, constructive, and middle range approach.

Development of Research Design and Presentation of Findings

Analysis of the development of organizational probation is presented in seven chapters. Chapter Two provides a detailed discussion of corporate criminal law and develops the markets and politics distinction of corporate crime control strategies that frames this research. Chapter Two also demonstrates the utility of this framework and organizes the existing literature on corporate crime control around it. The second part of Chapter Two surveys theories of law creation, with particular attention to the circumstances under which they provide for legal outcomes opposed by business. Chapter Three marks the beginning of the case study portion of this research by exploring the legislative and judicial origins of organizational probation. In particular, this chapter illustrates the problems associated with use of organizational probation in the absence of express statutory support, and the early efforts to develop such support. Chapter Four continues analysis of the development of statutory support for organizational probation by examining the work of Congress in drafting and passing criminal code reform legislation.

Chapter Five begins consideration of the Sentencing Commission's development of organizational probation. This involves a detailed chronological presentation of the changing shape of organizational probation and the changing debate of its merits. Analysis of the work of the Sentencing Commission concludes in Chapter Six by tracing the events leading up to the promulgation of the final organizational sentencing guidelines. These guidelines are also examined in the context of the previous proposals and the positions taken by the interest groups involved in drafting the guidelines. The various sociolegal theories used throughout this dissertation are brought together in Chapter Seven to present a unified understanding of the forces affecting the development of organizational probation. Finally, Chapter Seven concludes this research by exploring the criminological and legal significance of organizational probation. This includes an assessment of the extent to which organizational probation is likely to be used by prosecutors and judges. Also explored in this chapter is the relationship between the operational form taken by organizational probation and the literature on regulatory relations.

> The problems we face in controlling corporations today have their roots in legal history; they are a legacy of the law's failure to search out and take into account special features of business corporations as actors that make the problem of controlling them a problem distinct from that of controlling human beings.
>
> Christopher D. Stone[1]

Chapter Two

LOGICS AND LIMITS OF CORPORATE CRIME CONTROL

Corporate criminal law derives from individual criminal law and is underdeveloped as a result of these origins (Coleman, 1974; Fisse, 1983; Bernard, 1984; Friedman, 1979). Through the juristic person standard and a series of judicial decisions, some of which have been institutionalized in statutes, organizations have increasingly become subject to the criminal law. Paradoxically, this process has brought American corporations under the purview of the criminal law to a greater extent than in nations both within and outside of the common law tradition (Laitinen, 1991; Mueller, 1957; Lansing and Hatfield, 1985) at the same time that its underlying

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[1] This statement, from the opening paragraph of Where the Law Ends: The Social Control of Corporate Behavior (Stone, 1975: 1), is thematic for Stone and for this dissertation.

logic has limited it in achieving effective legal control of corporations.

Though judicial interpretation is a principal source of legal development in common law systems, application of old laws to new legal actors provides only for incremental legal changes (Thomas and Bishop, 1987). Rather than viewing corporations as fundamentally different social actors than individuals, and therefore necessitating a distinct legal regime, application of the criminal law to corporations has resulted in a legal regime in which corporate activities are defined, processed, and sanctioned based on principles derived from individual criminal law (Yale Law Journal, 1982b). As a result, "the anthropomorphism of the corporation has thoroughly infected legal thought" (Friedman, 1979: 173; see also Fisse, 1983), limiting legal control of organizations to the extent they do not behave like individuals.

At the heart of the juristic person standard and of criminal law more generally, often unarticulated though clearly operational, is the classical school view of actors as individual, rational, and subject to control through the external manipulation of choices. At the heart of the alternative, organization-specific view (Friedman, 1979; Stone, 1975; Rourke, 1990; Yale Law Journal, 1982b) is a conceptualization of organizations as organizations: complex, multifaceted entities larger than the sum of their individual parts, able to exert influence over these individuals, and with multiple, sometimes conflicting goals. As such, organizations are most effectively controlled when subject to distinct, organization-specific criminal laws, characterized at least in part by sanctions directed toward the alteration of internal organizational structures and processes in cases of wrongdoing.

The distinction underlying these alternative approaches to corporate criminal law is between markets and politics as locations, and even "logics," of corporate crime control. The term "logics" is used to make explicit the relationship between the juristic person standard and traditional corporate criminal sanctions and to point out the problems that arise for the juristic person standard and for these sanctions when the logic on which they are based is questioned, as in the present case. The development of organizational probation represents the introduction into corporate crime control efforts of a politics-based, organization-specific sanction with strong linkages to organizational theory. It thus represents an important break with sole reliance on market-based sanctioning and related market-based assumptions regarding the rationality of organizations and the disciplinary powers of markets.

The first part of this chapter develops the concepts of markets and politics as logics of corporate crime control, elaborates organizational probation and its relationship to organizational theory, and places this sanction within the larger corporate crime control debate. This discussion is divided into two parts, corresponding to the fundamental issues of liability and sanctioning in the criminal justice process. The development of corporate criminal liability and the key constructs and contradictions upon which it rests are discussed first. The major point of this discussion is that organizational theory reveals inadequacies in the prevailing legal basis for corporate criminal liability. The second part of this discussion focuses on sanctions. The relationship between the juristic person standard and fining is addressed, as is the relationship between organizational theory and organizational probation. At this point, the theoretical problems for corporate crime control presented by organizational theory are shown to be substantially addressed by organizational probation.

After establishing the historical and theoretical significance of the development of organizational probation, the second part of this chapter addresses the sociolegal theoretical perspectives through which this case of lawmaking can be understood. Accepting Joel Rogers' advice to "travel light" (1991: 292) in analyzing lawmaking, by which he means to resist the burdens and assumptions imposed by carrying excessive theoretical baggage into a case study, and instead let the case study reveal the intricacies and operations of lawmaking, this discussion is broadly stated and preliminary. Emphasis is placed on identifying in contemporary theoretical perspectives the means to explain legal outcomes opposed by business. This provides the theoretical framework for the case study and identifies important points to look for in the historical development of organizational probation without overanticipating or overexplaining that which follows in Chapters Three through Six.

Conceptualizing Corporate Crime Control: The Logics of Markets and Politics

In his classic book Politics and Markets, Charles Lindblom (1977: ix) establishes the market and political sectors as primary and competing locations of social policy;

> aside from the difference between despotic and libertarian governments, the greatest distinction between one government and another is in the degree to which market replaces government or government replaces market.

As a location of social policy, the market sector, whether used to control crime, limit pollution, or distribute health care, structures outcomes by manipulating the relative costs and benefits of behavior, goods, and services in an environment with minimal state involvement. Recently popular school choice and pollution credit plans are examples of efforts to affect behavior by externally manipulating the choices available to actors. In the case of corporate crime control, to the extent that such control occurs through market mechanisms, such as fines, it is said to be the result of the introduction of an unfavorable economy of criminal action.

The political mechanism, on the other hand, enlists state action to structure to some degree the social, political, economic, or organizational environment in which behavior occurs, and to direct action within that environment. Politics-based social policies thus involve the use of state power to directly pursue ends only indirectly and unreliably achieved through market action. Establishment of best technology available (BTA) pollution control programs, collective bargaining laws, and creation of industrial policy boards with mandated labor and business participation, such as those associated with corporatism, are examples of politics-based legal mechanisms. In this case of organizational probation, to the extent that corporate crime is controlled, it is said to be linked to the use of state power to create organizational structures that do not produce crime.

The distinction between politics and markets as locations of social policy is ideal typical. As a result, its practical application in this case and others is somewhat unsatisfying. State power is inevitably used to shape market structures and relations, meaning that pure markets do not exist. Similarly, politics-based policies are never completely divorced from market-based considerations. Organizations placed on probation, for example, are not removed from market relations. Organizational changes are imposed only with substantial input from the defendant. These changes are further informed by the state's assessment of market-related issues. Despite these limitations, the markets and politics distinction captures the essential difference between fines and organizational probation as well as the linkage between these sanctions and theories of corporate crime and organizational behavior. Integrated logics of market rationality and political rationality result, and may be broadly applied to other social policy debates.

The traditional legalistic definition of crime (Tappan, 1960), with its emphasis on intent, is based on an implicit view of the actor as a unitary and rational entity. Though strict and vicarious liabilities facilitate the application of this definition to organizations, they do so by suspending assumptions of rationality rather than replacing them with an organization-specific definition of behavior. Moreover, the prevailing view that mens rea is fundamental to crime, even when not legally required, limits the application of the criminal law to organizations (Frank, 1983, 1984b; Fisse, 1983). Also, at the sentencing stage, market-based assumptions return in the form of near-exclusive reliance on fines.

This same market logic has dominated theoretical criminology. Market-based assumptions of rationality and choice, beginning with the classical school criminology of Beccaria (1764; but see Beirne, 1991) and Bentham (1776/1988), have pervaded academic discussions of organizational crime and its control. Though this is more true in the past (see Clinard, 1946; Aubert, 1952; Nader, Green, and Seligman, 1976; McVisk, 1978; Yoder, 1978) than the present (see Finney and Lesieur, 1982; Ermann and Lundman, 1987; Braithwaite, 1989b; Ermann, 1990), criminological discussions of organizational crime remain well-populated by organizational actors responding to largely instrumental needs (Barnett, 1981; Kramer, 1984; Gottfredson and Hirschi, 1988; Simon and Eitzen, 1986; Coleman, 1985b; Young, 1981). Control strategies are likewise dominated by classical school considerations of deterrence (Kadish, 1963; Becker, 1968; Posner, 1979-80; Harvard Law Review, 1979; Clinard and Yeager, 1980; Parker, 1988a; Standen, 1991) and deserts (Schlegel, 1990).

Markets, Politics, and Corporate Criminal Liability

The extension of the criminal law to corporations followed the earlier imposition of corporate civil liability (Stone, 1975). The landmark criminal case was New York Central & Hudson Railroad Co. v. United States (212 U.S. 481) in 1909, in which the Supreme Court upheld a finding that organizations were able to form criminal intent, and were thus subject to criminal liability, though only for economic offenses.[2] The legal basis for this finding was the juristic person standard (see Coleman, 1974, 1982; Stone, 1975; Bernard, 1984), a long standing common law principle which holds that organizations are persons under the law. Organizations are thus treated as legal individuals, liable through vicarious liability for the acts and omissions of all the natural persons in their service. This liability pertains regardless of the disposition of cases involving individual agents and employees, the state of knowledge of management regarding the alleged offense, and the existence of organizational policies and directives specifically prohibiting the alleged conduct.

The juristic person standard has since been repeatedly upheld by judges and established in statute, with the result that corporate and individual criminal liability are "nearly coextensive"

[2] Application of criminal liability to corporations for noneconomic offenses has been slower to develop and is still often rejected by judges and juries (see Swigert and Farrell, 1980-81). A recent interview study of civil jurors involved in corporate cases found that jurors had difficulty in conceptualizing the civil liability of organizations (Hans and Lofquist, forthcoming).

(Brickey, 1984: 8n). Title 1, Section 1 of the United States Code establishes that in acts of Congress, the terms "person" and "whoever" include corporations, "unless the context indicates otherwise" (1 U.S.C. Section 1, 1970). This limitation on the juristic person standard is a substantial one, and has been used by some courts, as Chapter Three indicates, to limit the imposition of probation on corporations. Nonetheless, and despite the uniqueness of corporate criminal liability in comparative perspective (Mueller, 1957; Laitinen, 1991; Brickey, 1984), continuing questions about its appropriateness by some (Harvard Law Review, 1979; Elkins, 1976; Cressey, 1988; Clarke, 1990; Parker, 1991b), and substantial efforts to limit its applications (Orland, 1980; American Law Institute, 1985; National Commission on Reform of Federal Criminal Laws, 1970a), corporate criminal liability is by now firmly institutionalized as a matter of law (Brickey, 1984).

As these impediments and doubts suggest, however, the individualistic, market-based origins of corporate criminal law have provided numerous hurdles to the practical application of the criminal law to corporations. Brickey characterized this situation by remarking about the juristic person standard that "the simplicity of such notions lay only in their inspiration, not in their execution" (Brickey, 1984: 14n). This is particularly true in the area of liability. Mens rea is at the heart of criminal liability, and courts have been reluctant to characterize organizations, despite the legal fiction of personhood and the absence of legal barriers, as possessing the rationality at the basis of traditional understandings of intent. The concepts of strict and vicarious liability borrowed from tort law have only partly overcome this conceptual barrier. The implications of this barrier are well documented in research by Frank (1983, 1984b; see also Blum-West and Carter, 1983; Clinard and Yeager, 1980), which found that concern about the appropriateness of corporate criminal liability on the part of prosecutors, rather than issues related to corporate power, limit the extent to which criminal prosecutions are chosen over civil proceedings.

The point at issue here has substantial practical and theoretical significance. While the juristic person standard and the practice of judicial interpretation have facilitated the development of corporate criminal liability, this same standard limits effective application of the criminal law to corporations to the extent that fundamental differences exist, or are perceived to exist, between individual and organizational actors. The result of the tension between corporations as actors and traditional understandings of crime and culpability is that

> corporate criminal liability is in such a weak and undeveloped state that many commentators urge that corporate criminal sanctions be displaced by civil monetary penalties, injunctions and negotiation and guidance, backed up when necessary by individual criminal sanctions (Fisse, 1983: 1143-44).

The shortcomings of the application of the rational actor model to organizations, particularly those associated with mens rea, are being widely used to reject corporate criminal liability, rather than seeing in these legal standards a pro-corporate bias (Hopkins, 1986) and seeking new theoretical and legal bases for corporate criminal liability.

As Fisse's comment suggests, to the extent that the proper relationship between the criminal law and corporations has been debated, the debate has been between corporate criminal liability and individual criminal liability. Those favoring individual criminal liability reject corporate criminal liability as anthropomorphism and contrary to legal standards of intent. Strict and vicarious liability are seen as masking these problems more than eliminating them (Cressey, 1988). Despite the apparent strength of these claims, the alternative, individual criminal liability, is an even more untenable approach due to difficulties in identifying and proving individual liability within complex organizations, the replaceability of individuals, and structural influences on individuals within organizations (Ermann and Lundman, 1987; Ermann, 1990; Finney and Lesieur, 1982). The problem in this debate is that the juristic person standard is often unquestioned as the basis for the corporate criminal law. As a result, the choice is often posed as either pretending that corporations are merely big people, and treating them as such, or pretending that individual action within an organization is identifiable, and that offenses that primarily benefit the organization are adequately punished by focusing the criminal justice system's attention on individual employees.

Suggesting a resolution to this dilemma, a well-developed theoretical and empirical critique of the rational actor model has emerged and has been argued to have gained primacy in recent years (Braithwaite, 1985b; Kanter and Brinkerhoff, 1981). At the center of this critique is a rejection of the view of corporate criminality as rational, profit-driven activity and the corporation as an anthropomorphized entity. Succinctly stated, the primary theoretical criticism of the rational actor approach is that it "is blind to organizational theory and practice" (Fisse, 1978: 366). The alternative approach (Fisse, 1983; Rourke, 1990; Friedman, 1979; Coffee, 1981; Orland, 1980; Ermann and Lundman, 1982; First, 1988), organizational in its central thrust, views corporations as legally created complex structures characterized by conflicting goals and bounded rationality.

This critique has developed, or at least has been applied, almost entirely in the context of sanctioning rather than liability, as the next section indicates. The practical and legal implications of organizational theory for the juristic person standard have yet to be adequately addressed. However, it can also be argued that the United States Sentencing Commission has, in its lengthy and detailed definition of an effective compliance plan (see Chapter One) developed an organization-specific model of criminal liability. This was not their intention. Nonetheless, the structural characteristics associated with effective compliance plans could be used to inform determinations of organizational criminal liability. While this is not necessary due to the availability of strict liability, an organization-specific approach to culpability would provide a stronger theoretical rationale than mens rea for imposing liability on organizations.

A recent comment by Jeffrey Parker inadvertently points in the direction of organization-specific liability. In opposing the expansion of corporate criminal liability, and corporate criminal liability more generally, he stated,

> no longer is it necessary to find a guilty intent in the mind of a human being. Crime can now occur by accident, by inadvertence, or simply by a lack of communication (Parker, 1991b: 17).

In making this statement, Parker was voicing support for a return to individual criminal liability. However, by identifying organizational elements of crime, his criticisms sound more like those of an organizational theorist, and point out the importance of developing a legal mechanism able to respond to these circumstances. In a society such as ours, where the criminal law provides a scope of coverage not available in regulatory law and where it serves as the increasingly common currency of social disapproval, its application to corporations should not be limited by resolvable conceptual concerns.

Markets, Politics, and Corporate Criminal Sanctioning

The historical relationship between the juristic person standard and corporate criminal sanctioning is, again, characterized by innovation and limitation. As organizations were increasingly subjected to the criminal law, judges and legislators chose from among the sanctions available for individuals those deemed appropriate for organizations. New criminal sanctions were not developed for these new offenders. Existing sanctions included fines, imprisonment, and probation, and until quite recently only fines were deemed applicable to organizations by academic commentators and legal policymakers (Harvard Law Review, 1979; National Commission on Reform of Federal Criminal Laws, 1970a). Echoing this conclusion, Clinard and Yeager stated that "a case cannot be made for the arguments that the criminal sanction can incapacitate or rehabilitate a corporation" (1980: 90). The use of probation or imprisonment on organizations involved legal innovations beyond the imagination of the judiciary and most legal commentators. More fundamentally, reliance on fines and individual criminal liability was consistent not only with the pattern of development of corporate criminal law, but also with prevailing theories of the causes of corporate crime and with the historical deference shown corporations.

Market Logic and Sanctioning. Market logic, then, has historical origins that have been buttressed by theoretical and ideological views of organizations. In each case, the legal inviolability of the corporate form is paramount. Consistent with these circumstances, control strategies have emphasized the ability of unregulated market forces to discipline corporations and the simulation of these forces by the regulatory or criminal law where illegal conduct occurs. The legal response to corporate crime thus involves confronting corporations with a negative profit contingency in cases of law violation, usually through directly assessed monetary penalties, to which rational actors respond through general and specific deterrence (Dershowitz, 1961; Kadish, 1963; Becker, 1968; Ball and Friedman, 1965/1977; Harvard Law Review, 1979; Posner, 1979-80; Parker, 1988a; Friedman, 1962; Thompson, 1991).

More recent innovations in corporate criminal sanctioning have also been based in market logic. Their innovativeness is located in the means by which they invoke market logic and harness market forces, not directly as in the past, but through sanctions designed to affect the corporation's market strength. This latter approach includes publicity (Fisse, 1971, 1986; Cullen and Dubeck, 1985; Fisse and Braithwaite, 1983), restitution (Abel, 1985; Yeager, 1984), notice to victims (National Commission on Reform of Federal Criminal Laws, 1970a), and alternative fines (Coffee, 1977, 1979-80, 1990b; Kennedy, 1985). Corporate social responsibility, though sometimes presented as involving substantial organizational changes (Nader, Green, and Seligman, 1976; Stone, 1975), and criticized as subversive (Friedman, 1970), is also ultimately voluntary and market-based (Engel, 1979; Stone, 1975). Whatever remedial ends it may seek, this approach is reliant on moral exhortations (Stevenson, 1974) mediated by market considerations. The likelihood of organizational change is thus quite limited (see Mathews, 1989; Brenner and Molander, 1977).

With each of these recently developed sanctions, the organizational response to real and supposed market threats is completely discretionary to management, and therefore private. Regardless of the seriousness of the offense, personnel and policy changes may or may not be undertaken. Stone (1980: 8) described this situation in stating that, in the case of fines,

> the outside world remains indifferent to how the enterprise participants - its investors and managers, in particular - adapt to the law's threats and distribute among themselves the law-driven losses that occur.

The likelihood and structure of organizational reform is entirely a function of these adaptations, though market logic suggests that the organization will respond to the sanction by in turn sanctioning the responsible individuals. Simply stated, market logic suggests punishing the principal and letting the principal take care of the agent, and itself (Coffee, 1986).

Market-based sanctions draw theoretical strength from their rational actor view of organizations. From this perspective, elaborated by Allison (1971), organizational decisionmaking processes are analogized to resource-rich individuals. Organizations are viewed as rational, calculating, unified, and value-maximizing entities, able to make fully-informed and strategic responses to circumstances based on known alternatives. Organizational behavior is thus the product of carefully calculated measures designed to maximize organizational benefits relative to costs. Since money is in this view literally and figuratively the currency of relevance in capitalism, rational actors will respond to its manipulations, if properly gauged, in ways that will maximize their return. If crime control is sought, fines must be designed to ensure that the costs of crime exceed the benefits.

The purest expression of the market-based approach is in law and economics, a wholly economistic approach to organizational behavior (Posner, 1979-80; Parker, 1988a; see also Byrne and Hoffman, 1985; Fisse, 1986) that has flourished since its first application to corporate crime in the late 1960s (Becker, 1968). In this view, organizations are driven entirely by the desire to maximize profitability, and are subject to control via this same force. This assumption can be seen in the approach taken by Harvard Law Review (1979). In a lengthy article calling for reliance on civil and individual criminal liability, it was stated that

> [s]ince corporations are primarily profitseeking institutions, they choose to violate the law only if it appears profitable. Profit-maximizing decisions are carefully based upon the probability and amount of potential profit, so a corporate decision to violate the criminal law would generally include a calculation of the likelihood of prosecution and the probable severity of any punishment. Making these costs sufficiently high should eliminate the potential benefit of illegal corporate activity and hence any incentive to undertake such activity (1979: 1365).

In addition to reliance on monetary sanctions, the policy implications drawn from this are that organizations should be free of all government intervention and subject to only minimal government regulation. The regulation that does occur should mimic market mechanisms, thereby maximizing the efficiency of the criminal law. Ermann and Lundman (1982) refer to this as a "beneficiary-choice" approach to controlling corporate crime because free and competitive markets are proposed to force corporations to serve their beneficiaries, particularly stockholders, consumers, and employees.

Recognizing the extent to which markets are shaped by law (Fligstein, 1990), market logic is "curiously one-sided" (Jones, 1982: 176). Business seeks out and depends on the state to assure capital accumulation in the face of business-generated accumulation and legitimation crises (O'Connor, 1973; Habermas, 1973), and in this way develops an interdependent relationship with the state. At the same time, business seeks full autonomy within these markets, rejecting as anathema restrictions on its autonomy (Galbraith, 1985), even after wrongdoing. The resulting state of affairs is one in which "the role of the state is to ensure the conditions of economic freedom and not to eliminate its unacceptable consequences" (Jones, 1982: 175). Politics-based sanctioning rejects this state of affairs, and seeks to remediate and reduce the likelihood of criminal consequences of capital accumulation.

Political Logic and Sanctioning. In recent years, the rational actor model of corporate crime and its accompanying market-based approach to corporate crime control have come under sustained attack from the academic (Orland, 1980; Stone, 1975, 1981; Katzmann, 1980; Ermann and Lundman, 1982; Fisse, 1978; Moore, 1987; Baucus, 1989; Simon, 1979; Schrager and Short, 1978) and policy (United States Sentencing Commission, 1988c, 1988d, 1990a) arenas. Criticisms center on the ability of corporations to absorb fines; the belief that fines, because they are easily externalized and nonspecifically applied, impact the wrong parties within an organization; the "deterrence trap" of excessively high fines that develops as fines are increased to the point necessary to provide deterrence given the fractional likelihood of apprehension; and the perception that among corporations fines are viewed merely a cost of doing business (Coffee, 1977, 1981; Fisse, 1985, 1986). Civil proceedings, the most common means through which organizations are sanctioned, have even been said to resemble business transactions.

More fundamental criticism centers on the disjunction between fines as a sanctioning mechanism and the literature on organizational decisionmaking (Geraghty, 1979; Yale Law Journal, 1982b; Allison, 1971; Metzger and Schwenk, 1990). From an organizational perspective, sole reliance on fines confuses organizational motivation with behavior. To say that corporations are motivated by monetary interests is an obvious truism in a capitalist economy. However, this is not necessarily to say that organizations are able to directly and clearly translate this motivation into behavior. Having profitability as a goal at the highest level is far different from pursuing that goal through organizational actions at the level of each division, work group, and employee. Organizational structure and complexity, actions of employees at different levels and places within the organization, unclearly communicated or misunderstood directives, the absence of oversight, and many other circumstances seriously confound the ability of an organization to unitarily pursue organizational goals. These organizational variables are central to the organizational process model (Allison, 1971).

Sanctioning premised on the rational actor model is subject to the same criticisms; it views the organization based on its stated goals rather than its operational realities. As Ermann and Lundman (1982: vii) note, corporate wrongdoing is

> seldom produced by single-minded commitments to financial gain compelling the corporation to violate norms whenever rationally calculated corporate interests indicate that profits for stockholders would be increased.

Rather, organizational crime is more often a product of the interactions among the complex of role relations within an organization (Yale Law Journal, 1982b), a view for which there is growing empirical support (Stone, 1975; Hopkins, 1979; Kramer, 1987; Ermann, 1990). As a result, the impacts of sanctions such as fines, like the organizational communications implicated in wrongdoing, are diffused within the organization itself.

The development of the organizational process perspective began with Simon's (1947; March and Simon, 1963) earliest works. In these works, Simon questioned the classical view of the firm (Barnard, 1938), arguing organizational behavior is characterized by "bounded rationality." In describing the work of Cyert and March (1963), which was also instrumental in the development of the organizational process approach, Allison (1971: 75) writes that

> [i]n contrast to traditional theories that explain the firm's behavior in terms of market forces, Cyert and March focus - as organization theory would suggest - on the effect of organizational structure and conventional practice upon the development of goals, the formulation of expectations, and the execution of choice.

Support for and elaboration of this view of organizations as complex, non-optimizing structures has grown substantially over subsequent years, both among organizational theorists and criminologists.

Christopher Stone has gone so far as to suggest instances of corporate crime always involve defective organizational procedures (Stone, 1976a). Subsequent commentators have developed from this theoretical orientation the concept of structurally-induced crime (Geraghty, 1979; Conklin, 1977; Needleman and Needleman, 1979). Drawing the linkage between liability and sanctioning, and pointing out the deficiency of market logic in both cases, Geraghty defines "structural crimes" as cases "in which a corporation commits a criminal offense but no criminally culpable individual can be identified" (1979: 359).[3] Such identification is difficult because organizational features may shield culpable individuals or because in complex organizations "cumulative individual inadvertence alone can generate criminal violations by the corporation" (1979: 359).

This cumulative inadvertence, by which outcomes emerge as byproducts of the process of production rather than as a planned product, is more fully captured by Ermann's concept of escalating commitments (Ermann, 1990). In this view, corporate crime often

[3] Orland (1980: 503n) points out that a number of the most important and innovative works in the area of corporate crime have been Notes written by law students. This pattern can be dated at least to Dershowitz (1961), and includes Kriesberg (1976), Geraghty (1979), Katzmann (1980), Yale Law Journal (1982b), and Harvard Law Review (1979), suggesting greater willingness on the part of the students to venture to the margins of corporation and criminal law. It would be interesting to systematically pursue the reasons for the seemingly disproportionate attention to corporate crime by young rather than established legal scholars.

occurs when employees and organizations become committed to initially legitimate courses of action which lead to criminality only after investments of time and the involvement of numerous employees make recognition and control of this emergent criminality difficult. An example of this is found in Representative George Miller's (D-CA) description of defense contractor fraud. In testimony before the House of Representatives, Miller stated,

> I am sure in many instances systems that were brought to the Congress were overpromised and underengineered, if you will, in terms of their success. So that started a process of shaving corners, looking the other way, substitution of materials, falsification of tests, because, in fact, you wanted to deliver on the promise that you made to the Department of Defense and to the Congress (U.S. House of Representatives, 1990b: 26).

Given these circumstances, sanctions must be designed to "come to grips ... with the corporate structure" (1990b: 27) by seeking to remediate the organizational structures and processes that contributed to criminal activity.

Linking Organizational Theory and Corporate Criminology

Despite the growth of organizational theory and corporate criminology beginning with the works of Simon and Sutherland, respectively, in the 1940s, the theoretical linkage between the fields they developed were not explored until 1976. Even then, the first commentators were legal scholars rather than social scientists (Braithwaite, 1985b). In an article entitled "Decision Making Models and the Control of Corporate Crime," Kriesberg (1976) took the important step of applying Allison's (1971) three models of organizational decisionmaking to corporate crime control. These three models are the rational actor, organizational process, and bureaucratic politics models.[4] Kriesberg sought to develop theoretically informed policy recommendations for corporate crime control based on Allison's models.

The prevailing situation, Kriesberg (1976: 1099) noted, was that "legal policy has not been based on a systematic analysis of corporate decisionmaking that sets out the factual patterns and deterrence strategies implied by the various assumptions" but rather on unarticulated, untested, and often misguided assumptions. Legal policymakers, including legislators, judges, and prosecutors, uncritically accepted the rational actor conception of corporate decisionmaking, and therefore failed to explore the legal implications of the organizational form or look outside the traditional, individualistic assumptions of the criminal law. This remained the case despite the clear failure of the law to effectively respond to organizational wrongdoing (see Clinard and Yeager, 1980; Ross, 1980; Simon and Eitzen, 1986; and Etzioni, 1990a, for discussions of the extent of corporate crime).

After exposition of each decisionmaking model, Kriesberg proceeds to their policy implications. In the case of the rational

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[4] Only the first two of these three models are considered herein due to their correspondence to the markets and politics schema used in this analysis. Also, the policy implications of the bureaucratic politics model overlap substantially with those of the organizational process model. To the extent that they differ, the bureaucratic politics model calls for individual criminal liability.

actor model, monetary sanctions directed against the organization are suggested. The logic of this is that the rational actor model views the organization as a unitary decisionmaking entity, guided by its pursuit of maximal return on its investments. By imposing on this entity costs or potential costs that exceed gains, control is achieved. Kriesberg also points out that publicity and disqualification from certain types of business, though somewhat less precise as deterrents, are consistent with market logic.

Though Kriesberg successfully draws theoretical linkages between the rational actor model and existing sanctions, his effort to identify the policy implications of the organizational process model reveals the influence and limitations of traditional legal categories, and the difficulties that result when these limitations are confronted. For the organizational process model, Kriesberg begins by stating, as Simon, Allison, and other organizational theorists would surely agree, that within this model "employees have limited capacity to control the decisionmaking process" (1976: 1112). However, he goes on to state that individual criminal liability is nonetheless most appropriate because it underscores the importance of "placing liability for corporate lawbreaking clearly and specifically on those in a position to promulgate and oversee the SOPs [standard operating procedures] of subcorporate units" (1976: 1112-1113). Difficulties in identifying such persons, structural contributions to individual action, concern with scapegoating, and numerous other characteristics of complex organizations are overlooked in this case.[5]

The sources of this contradiction between theory and policy implications are in Kriesberg's oversimplification of Allison's organizational process model and in his failure to transcend rational actor assumptions. These shortcomings are revealed when Kriesberg states that the organizational process model "fails to illuminate the motivation of the decisionmaking unit" (1976: 1114). Unlike the rational actor model's emphasis on profit-maximization, Kriesberg states that in the organizational process model, the "subcorporate unit is simply following preestablished procedures." Because this latter approach "explains only how the decisionmaking unit acts and not why it acts, the model offers no guidance on the relative effectiveness" of sanctioning alternatives (1976: 1114-1115).

What is unrecognized by Kriesberg in explaining the organizational process model is that there are multiple "whys" or motivations that have to be considered in assessing corporate actions. To suggest otherwise is to implicitly characterize corporations, or even decisionmaking units, as unitary. Additionally, as Fisse notes, Kriesberg's treatment of the organizational process model is incomplete because he "fails to explain how the law should

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[5] Kriesberg does, however, make useful recommendations about the importance of establishing SOPs that are lawful, designating individuals to monitor their implementation, and monitoring feedback from such implementation. These are important means to remediate the decisionmaking inadequacies inherent in complex organizations, and are important features of organizational probation.

proceed where it proves impossible or unfair to hold individual cybernauts responsible for offenses committed on corporate behalf" (1978: 369). The policy implications of the organizational process model must be focused primarily on organizational structures and standard operating procedures, not on individual employees.

When confronted with the obvious incompatibility of the juristic person standard and the organizational process model, Kriesberg retreated to individual criminal liability rather than moving into politics-based sanctioning. A closer fit between organizational theory and public policy, recognized by subsequent commentators (Fisse, 1978, 1983; Geraghty, 1979; Metzger, 1984; Rush, 1986), is to move beyond the boundaries of traditional market-based sanctions and develop organizational sanctions that provide for interventions directed at altering organizational structures and procedures linked to criminality. It is precisely here that organizational probation is of greatest relevance.

<u>Organizational Theory and Organizational Probation</u>. Rather than positing a relationship between government and business that protects the decisional prerogatives of business, but seeks to control crime by externally influencing these decisions, organizational probation seeks to control crime by altering organizational structures and processes directly (Rush, 1986; Curran, 1986; Gruner, 1988a; Coffee, Gruner, and Stone, 1988; Metzger, 1984; Metzger and Schwenk, 1990). These interventions are negotiated and involve substantial input from business, though they are often

mandatory and retain an important coercive component (Braithwaite, 1982) in the event of noncooperation in developing compliance plans or noncompliance with the plans once established.

Despite being widely rejected as a sentencing goal for individuals, and being relegated to the last and clearly least important position among the sentencing goals provided to the United States Sentencing Commission by Congress, rehabilitation is the primary goal of organizational probation. As described by Stone, though not in the context of organizational probation in particular,

> traditional legal strategies have only limited success in bringing about, within the organization, the internal institutional configurations that are necessary if some problem is to be remedied, that is, to induce the ideal authority structures, patterns of information flow, and the like, without which the corporation is not likely to 'go straight' in the future .... what seems to be needed as a 'remedy' is some institutional analogue to the role that responsibility plays in the human being (1975: 120).

The extent to which organizations can be manipulated, particularly when viewed from an organizational process perspective, suggests that these rehabilitative efforts may have a better chance of success than individual rehabilitation (Corporate Crime Reporter, 1987).

Recognition of the legal implications of the organizational process model is increasing among academics and policymakers. After a lengthy period of exclusive reliance on market-based sanctions, and a period of difficulty in drawing out the implications for sanctioning of the organizational process model,

> criminal law scholars [have] begun seriously to consider that the criminal law could also intervene directly by interjecting the court or its agents into the corporation's decision-making process in an attempt to

> remedy dysfunctions that seem causally related to the criminal behavior (Coffee, 1981: 448).

With the development of organizational probation by the United States Sentencing Commission, the criminal law has institutionalized this recently developed sanctioning strategy.

In so doing, the Sentencing Commission has taken an important step in efforts to clear away "the massive underbrush of doctrine stemming from the too-facile application of notions of individual responsibility to corporations" (Friedman, 1979: 173) and develop instead the organization-specific criminal law necessary to deal adequately with organizational deviance. The effort to do so has not been without controversy and considerable difficulty, as this case study reveals. There are many who share with Milton Friedman (1970) the view that reliance on political mechanisms rather than market mechanisms represents a move toward socialism, central planning, or some similar undesirable end. This sentiment has been particularly well represented in Washington, D.C. in the last decade.

Additional Politics-Based Sanctions. Though organizational probation is the only politics-based sanction to be made part of sentencing law, other such sanctions exist. In his discussion of the asymmetry between individual and organizational actors that has developed with the proliferation of corporate actors and the use of the juristic person standard as the basis of legal control of these actors, Coleman provides the theoretical foundation for these sanctions. He identifies an "explicit recognition by the law of the power disparities that can exist due to size differences between juristic persons and natural persons" as "a major step toward restitution of resources from corporate actors to persons." Toward this end, he suggests two steps: "either an explicit unbalancing of rights, in order to balance the realization of interests among unequal parties, or else somewhat more direct intervention of the law into the exercise of rights" (Coleman, 1974: 77). Organizational probation can be seen as an example of the latter type of step, in that it aims to alter the structures and policies through which organizations operate.

While examples of this first approach, which presumably would include steps such as holding organizations to a higher standard of liability than individuals, have not been part of the criminal code reform debate, there are a series of other politics-based sanctions that are also examples of the second type of policy recommended by Coleman. These sanctions center on the expansion of stakeholder rights (Kelley, 1991; Stevenson, 1974; Stone, 1975; Rothschild-Whitt, 1984; Rothschild and Russell, 1986; Gautschi and Jones, 1987; Barnett, 1981). Arising out of Coleman's observation that a key characteristic of corporate society is the asymmetrical power enjoyed by corporations relative to individuals, these latter approaches seek to create and/or empower countervailing organizations (Galbraith, 1956). These organizations may be community, labor, environmental, or consumer-based, to name only the more likely possibilities. Suggested approaches to stakeholder empowerment include granting stakeholders representation on boards of directors and requiring management consultation with stakeholders in certain specified areas of decisionmaking. Such requirements are more intrusive than those usually associated with organizational probation, and have not met with success in the political arena despite some advocacy, particularly in the 1970s (Los Angeles Times, 1979; Stone, 1976b; Carnoy and Shearer, 1980; Kelley, 1991).

Organizational Probation and the Logics of Corporate Crime Control

By identifying corporate crime control policies as either market-based or politics-based, a newer and more sociologically relevant distinction is introduced into the corporate crime control debate. This provides a means to organize the growing literature on corporate crime control which has developed in recent years, and which, until now, has lacked any shared models or concepts. Past discussions of regulatory and corporate crime control strategies have identified the distinction between intrusive and non-intrusive sanctions, but have not linked this distinction to broader social and political processes. Rather, the distinction is posited in descriptive or legalistic terms, such as between direct and indirect controls (Stone, 1977a); preventive, reparative, and structural approaches (Fiss, 1978); penetrating and non-penetrating controls (Ermann and Lundman, 1982); liability and intervention (Stone, 1982); and economism and legalism (Braithwaite, 1981-82). Zald (1978) developed the distinction between market, hierarchy, and polyarchy as types of organizational controls, but did not apply them to organizational crime.

These distinctions are fine as far as they go. However, because they lack a linkage to more sociologically relevant categories, their conceptual power is limited. The markets and politics distinction, on the other hand, allows recognition of the crucial differences between, for example, the use of fines and the use of probation in terms of the larger social processes and structures through which they operate. This distinction also provides for links between corporate crime control policies and the whole range of social policies. Further, by focusing on the ways in which sanctions are implemented rather than the precise ends to be achieved by them, this distinction provides a means-based mechanism for organizing corporate crime control policies. Whether or not rehabilitation or deterrence or deserts is achieved and whether or not the practical differences between the sanctions used towards these ends are recognizable is uncertain. That these sanctions are fundamentally and importantly different, however, is clear when they are linked to larger social policy categories.

Markets and politics are important and competing locations of state action. Too often, however, due to the predominance of markets as the primary mechanisms of the distribution of opportunities and rewards in the United States, as well as to their ideological predominance, the availability of other locations of state action is ignored. The inattention to politics-based crime control indicates that criminal justice policies reflect and reproduce larger social relations. Business interests, with the support of the state, have historically preferred market-based social policies of all types (Galbraith, 1985; Silk and Vogel, 1976; Vogel, 1978; Martin and Lodge, 1975) because these policies accept the fundamental legitimacy of existing business-dominated social relations and seek only to provide for change within this context.

Politics-based approaches to social policy, on the other hand, confront and potentially exceed the historical limits of law by constraining organizational actions and providing for externally introduced organizational changes. Politics-based sanctions, for example, are often portrayed as a threat to business autonomy and a step toward a judicially-managed economy (DeMott, 1977; Toensing, 1990). As a result of these concerns, politics-based approaches to social policy generally receive little attention. Over the last decade in the United States, in fact, the state, particularly the federal state, has greatly reduced its role in making and implementing social policy. These burdens, never large when compared to other liberal democracies, have been increasingly placed on private business and states. This makes the recent development of organizational probation all the more anomalous. At a time when the prerogatives of business are gaining currency in policymaking and when the state is increasingly reluctant to locate policymaking in the political realm, understanding the origins and debates about organizational probation is especially important.

The Development of Organizational Probation: Explaining Unexpected Outcomes

The primary goal of the first part of this chapter was to establish organizational probation as a significant development in corporate criminal law. It is a change in the legal landscape of corporate crime control from exclusive reliance on market-based sanctions to the use of politics-based controls. Moreover, the final organizational probation provisions developed by the Sentencing Commission, with extensive mandatory uses and several mandatory conditions, went well beyond what was expected, and arguably even beyond what was authorized by statute. As a result, the gap between the law in the books and the law in action that has historically favored corporations and supported instrumentalist and structuralist theories (Carson, 1974; Braithwaite, 1989b) has been narrowed. This resulted despite substantial business opposition to organizational sentencing guidelines, a Sentencing Commission that was otherwise receptive to the concerns of business, and a pro-business, free market sociopolitical environment. The remainder of this chapter outlines the theoretical frameworks through which the development of organizational probation is assessed in Chapters Three through Six.

Theoretical Perspectives in Corporate Criminal Lawmaking

That large corporations exert a substantial and sometimes decisive influence over their social, political, and legal environments is not seriously argued. In a capitalist economy corporations are privileged actors and their concerns are paramount in policymaking. This privileged position is seen most clearly in the development of facilitative laws, which establish and supplement the legal basis for capital accumulation (Chambliss and Seidman, 1982; Turkel, 1981, 1982; Delaney, 1989; Turkel and Lofquist, 1991). At the same time that the state facilitates capital accumulation, however, corporate regulatory and criminal lawmaking regularly demonstrates the inability of corporations to maintain a unilaterally favorable legal environment. In recent years in particular, the volume of law developed to regulate corporate conduct has increased substantially (Coffee, 1991c; Orland, 1980), most recently with the development of organizational probation.

Based on the conclusion that organizational probation represents an important, politics-based addition to corporate crime control policies, explaining the forces behind its development provides insights into the means by which the traditional, market-based limits of law were transcended. The full range of contemporary sociolegal theories provide for outcomes inimical to business interests. The precise nature of the relationship between business, state, and other actors varies in each theory, as do the sociopolitical circumstances in which these outcomes are possible. Rather than focusing on a single theoretical perspective, as Yeager (1991) did in his application of dialectical structuralism to the development and implementation of federal water pollution control legislation, a more theoretically inclusive approach is taken.

Elements of pluralism, instrumentalism, structuralism, and state capacity theories are found to contribute to understanding the present case of lawmaking.

Pluralism. Pluralist or interest-group conflict theories view law, like other political products, as the outcome of conflicts between social groups. These interests are not class-based, but rather reflect the numerous cleavages, such as those based in political party identification, gender, occupation, or region, that characterize modern society. Nor are these groups necessarily of equal power, though each has the ability under certain circumstances to affect political outcomes (Dahl, 1956; Friedman, 1977) and no group is uniformly successful. Policymaking involves conflict and compromise between numerous societal interests within the political sphere, with outcomes reflecting the vector sum of "exerted social force" (Friedman, 1977: 99). The state is generally viewed as an arena in which conflict occurs, but which does not have independent interests. As a result, the state does not shape or even contribute interest group conflict (Shover, Clelland, and Lynxwiler, 1986).

Theorists within this tradition range from the consensual orientation of Dahl and others (Polsby, 1980; Friedman, 1977), who view law creation as a process of working out the differences between various interests to create a mutually satisfactory outcome, to the more conflict-oriented approach of Dahrendorf (1959) and Turk (1969), who view social conflict as widespread and hierarchically-based, but who reject class as inadequate for describing the basis of these conflicts. In the former view, the process of lawmaking and the role of the state in this process are seen as neutral, and are thus outside empirical consideration. In the latter case, the state and the lawmaking process are seen as systemically advantaging business groups, and thus meriting independent empirical consideration. This latter approach, which is argued by some (Carnoy, 1984; Schmitter, 1974) to violate the assumptions of pluralism, comes close to that taken by Skocpol (1980, 1985; Skocpol and Finegold, 1982) and others who employ Marxist categories but who approach the blurry distinction between Marxist and non-Marxist conflict theories. This perspective is discussed herein in the context of state capacity theory.

Research by Heinz, Gettleman, and Seeskin (1969) on the development of criminal law in Illinois uses a pluralist framework. These authors advance the view that criminal law is the outcome of conflicts within a neutral arena between private interest groups. These conflicts and negotiations lead to the development of "agreed bills;" privately drafted bills that gain easy public ratification by the legislature. A particularly interesting conclusion of these authors is that small, single issue interest groups may be successful against larger, more powerful groups. Despite their resource disadvantages, small groups may be advantaged by the sharpness of their focus and the quality of their advocacy of a particular position, providing for the possibility of outcomes contrary to those anticipated by the size, status, and power of the interest groups active in the particular case of lawmaking. Other researchers analyzing criminal justice policymaking (Stolz, 1984; Fairchild, 1981; Melone and Slagter, 1983) have also found an agreed bill process to be in operation.

The most comprehensive application of pluralism to criminal law creation is the research of Berk, Brackman, and Lesser (1977). In their extensive effort to identify the forces contributing to Penal Code changes in California between 1955 and 1971, these authors develop a four part framework, composed of social structure, values and beliefs, bureaucratic interests, and legislative processes. The interactions among these variables, which systematically advantage some groups, shape legal outcomes. A similar approach has more recently been taken by McGarrell and Castellano (1991; see also Sabatier, 1977), who argue that structural, cultural, political, and ideological variables, mobilized in response to triggering events, produce legal outcomes. In each case, the breadth and vagueness of their explanatory variables suggests a tautological component to these theories, wherein almost any outcome can be argued to fit within this framework. Nonetheless, a legal outcome that provides a sharp contrast to one or more of the elements of these frameworks, such as a statute that advances the development of industrial policy in the United States, can be termed unexpected.

Other work within the pluralist tradition includes studies by Becker (1963), Gusfield (1963) and Platt (1969), each of whom identify well-organized entrepreneurial organizations as central to the development of law (see also Hagan and Leon, 1977). Exemplifying a more conflict oriented approach, these studies view law as a means through which usually privileged social actors, often acting in response to or behind the cover of moral concerns, impose their values on weaker parties. Efforts by less powerful groups or even individuals energized by a "crusading" spirit (Becker, 1963) to enact legal changes are also entrepreneurial. The efforts of the consumer movement, and particularly of Ralph Nader, have been characterized in this manner (Harris and Milkis, 1989). In this latter case, a small, well-organized campaign was successful in bringing about unexpected legal outcomes.

As the last example points out, the clearest means by which unexpected legal outcomes emerge from a pluralist framework is through the sheer force of public pressure. Under such circumstances, the advantages, whether systemic, organizational, or material, traditionally enjoyed by business groups, are overwhelmed by the efforts of mobilized interest groups to enact or block legal changes. The state, in this case, is viewed either as an arena in which interest group conflict occurs without at the same time shaping the outcome of that conflict or as limited by public pressure in its ability to protect the interests of dominant groups. In the present case study, pressure groups are distinguished from entrepreneurial interests by the size of the interest group and their methods of operation. Large groups, such as those associated with the environmental and abortion movements, and operating primarily through public political mechanisms, are characterized as pressure groups.

Smaller groups or individuals operating through positions of privilege and often privately are characterized as entrepreneurial.

Instrumentalism. Contrary to pluralist theories, instrumentalist theories view conflict and conflict groups as explicitly and entirely class-based. Political power is seen as a reflection and an instrument of economic power, the result of which is that capitalists constitute a ruling class (Miliband, 1969; Domhoff, 1983, 1990). Evidence of this is often located in the shared background characteristics of economic and political elites, the frequent movement of these individuals between corporate and governmental leadership positions, and policy outcomes that favor business. Law is a particularly important instrument of elites; it is a means by which capitalists establish and maintain access to labor and resources and protect their assets from redistribution. The origins of this perspective are in the famous passage from The Communist Manifesto which asserts that "the executive of the modern State is but a committee for managing the common affairs of the whole bourgeoisie" (Marx and Engels, 1955: 11-12).

In its most rudimentary construction, a perfect correlation between the interests of capitalists, viewed as a cohesive and politically active entity, and the actions of the state is theorized (Quinney, 1974, 1977). Laws limiting the power of capitalists, or at least appearing to do so, are in this case explained as the product of the recognition by farsighted capitalists that legal changes are necessary for the long term welfare of the capitalist system (Block, 1977a). In practice, these laws are said to be of little effect, outside of their important symbolic power (Edelman, 1964) of preserving the appearance that business is subject to law. In addition to questionable assumptions regarding the unity and rationality of capitalists (Block, 1977a), this theory breaks down when confronted with the large number of contrary cases, in which laws were enacted over the real and vigorous opposition of business (Gold, Lo, and Wright, 1975; Hopkins, 1975; McCaffrey, 1982). In this way, instrumentalism fails to provide for working class-based nonrevolutionary social reforms (Gold, Lo, and Wright, 1975).

More sophisticated instrumentalist constructions recognize the existence of conflicts among capitalists and that law may be used to advantage one group of capitalists over others. The best known proponents of this view have been corporate liberal theorists, writing almost exclusively in the context of the Progressive era. Empirical research in this tradition (Sklar, 1988; Kolko, 1963; Weinstein, 1968; Feld, 1983) has focused on the role of regulatory law as a means for enlightened and farsighted capitalists and the large corporate interests they represent to increase their advantage over small business. Big business, in this case, works through the state to rationalize the capitalist system by establishing product quality standards, labor laws, and other reforms, and in so doing imposes burdensome regulatory costs on smaller businesses. In this way, legal reforms can be said to be a "triumph" for the interests of capitalists (Kolko, 1963) over the competitive threat posed by smaller businesses. The contributions of public, particularly working class, pressures in provoking these conflicts are sometimes identified (Weinstein, 1968). However, it is capitalists who shape and benefit from corporate liberalist policy outcomes.

While these historical works provide valuable insights into law creation and the relationship between business and government, corporate liberal theorists also underestimate the extent of real business opposition to regulation (Block, 1977b). Though legal changes may in fact have brought relative advantages to larger businesses, these businesses nonetheless opposed these laws and lacked the unity or foresight to understand how they could benefit from them (Smandych, 1986; Vogel, 1978). Also, the existence of shared background characteristics among state and business elites does not in itself provide evidence of direct links between these groups. It is instead necessary to specify in case studies the mechanisms through which elite involvement in the state is translated directly and causally into elite-supportive outcomes (Block, 1977b; Chambliss and Seidman, 1982). As Balbus (1982: 91) states,

> the political ... cannot be directly and mechanically reduced to the economic; the state is not merely an instrumental phenomenon, but plays, by virtue of its internal structure, a constitutive role of its own.

Also, there are good reasons to believe that social changes, particularly the growth in state capacity deriving from the New Deal and World War II (Skocpol, 1980, 1985; Skocpol and Finegold, 1982) and the development of well-organized non-business interest groups, such as consumer and environmental organizations (Yeager, 1983), have fundamentally altered the social basis of lawmaking by limiting the ability of business to control public policymaking. Without arguing the adequacy of corporate liberalism in the context of the Progressive era (see Sanders, 1990), its contemporary utility is limited by the tremendous growth that has occurred in the state sector and in public interest movements. In support of this conclusion, instrumentalism is generally found lacking in more recent cases (Beirne and Quinney, 1982; Carnoy, 1984; Skocpol, 1985).

Both traditional instrumentalism and corporate liberalism provide for legal outcomes inimical to business interests. However, more so that any other perspective considered herein, these outcomes are limited by the high levels of correspondence between capital and state to those that are deemed unimportant or irrelevant by capitalists (Carson, 1974) or, in the case of corporate liberalism, to those that advantage one segment of the business community at the expense of another segment. Legal outcomes broadly and actively opposed by business, such as many of those undertaken as part of the New Deal (Skocpol, 1980; Skocpol and Finegold, 1982), are not anticipated by instrumentalism and cannot be explained by it. The linkages between business and state actors are too strong to explain such outcomes.

Structuralism. The sharpest criticisms of pluralism and instrumentalism have often been made from the perspective of structuralism. In each case, criticism centers on the failure to adequately conceptualize the state (Skocpol, 1985; MacPherson, 1985; Shover, Clelland, and Lynxwiler, 1986). According to these critics, pluralism fails to consider the ways in which state structures and processes systematically advantage certain groups in lawmaking and the ways in which state actions influence legal outcomes. It cannot simply be assumed that outcomes reflect inputs, without an intervening state contribution. Rather, it must be recognized that "the requirements of capital accumulation set limits to, and set the direction of, the state's response to plural pressures" (MacPherson, 1985: 71). Also, state actors may have independent interests. At the same time, rather than viewing the relationship between capitalists and the state as personal and instrumental, structuralists have developed the position that this relationship is better characterized by shared long-term interests (Poulantzas, 1973; Block, 1977a, 1977b; Beirne, 1979; Caringella-MacDonald, 1990; Heydebrand, 1990). The state, from the structuralist perspective, acts not at the behest of capital, but on behalf of capital.

In this view, the state enjoys relative autonomy from capitalists, allowing it to act in ways that may appear to conflict with the interests of capitalists, and may in fact conflict with their short term interests. This allows state actors to take steps they perceive to be necessary to rationalize capitalism and to serve their own interests. Given the ultimate correspondence within capitalism between the interests of capitalists and the interests of those who manage the capitalist state, however, structural bonds exist "that make the state serve capitalist ends regardless of whether capitalists intervene directly and consciously" (Block, 1977a: 12). The need to preserve a healthy investment climate and to protect the profits of capitalists, for example, impose real limits on the ability of state managers to respond to self-interests or pressures from non-business groups. Actions that threaten macro-economic conditions threaten both business and state actors.

As Block (1987) pointed out, the ability, though limited, of state managers to respond to other interests provides an opportunity for the state to take actions that rationalize and reproduce capitalism by ameliorating its greatest contradictions. Pressures from labor for changes in wages, working conditions, or welfare programs, or from environmentalists for pollution controls, though contrary to the short-term interests of capitalists, provide important real and symbolic changes in the operations of the capitalist system. This results in greater public support for capitalism, greater productivity of labor, and other benefits. The ability of state managers to pursue these policies is bounded by macroeconomic and political considerations, which are themselves variable. In some cases, where public pressures are substantial and the linkage between business and the state is somehow attenuated, outcomes may sharply contrast with the interests of business.

This approach was first advanced to explain the relations between capitalists and the state in responding to fiscal and legitimacy crises (O'Connor, 1973; Habermas, 1973). The structure of this argument is that the capitalist system contains within it contradictions that must be managed to preserve the health of the system. The most prominent of these contradictions is that the operation of capitalism generates class conflict and high levels of social expenditures, such as those associated with education, unemployment, and environmental protection. In responding to these contradictions, the state takes reformist actions which mediate these conflicts, and in so doing protects capital accumulation, though at high costs. At some point, the state confronts a fiscal crisis, which may lead to retrenchment of social services. It is at this point that the limits of legal change are confronted, as the state takes steps to limit the legal burdens and costs on business.

In applying this approach to lawmaking, Chambliss has termed it dialectical theory (Chambliss, 1979; Chambliss and Seidman, 1982). From this perspective, the contradictions of capitalism, particularly the social costs of private production, come to the surface through working class or more general public action. Law is then developed to manage these contradictions by reducing the exploitation of resources without altering the fundamental relations within capitalism. Law and policy are thus ultimately cooptive, regardless of their sometimes apparently non-capitalist orientation. Gunningham's (1974) research on the development of environmental regulations, which he explains through the recognition by capitalists that legal controls serve their long-term interests by controlling their exploitation of natural resources, is an example of this approach.

Within structuralism, contemporary studies of corporate regulatory and criminal law creation almost invariably identify public pressures exercised during a period of enhanced state responsiveness to such pressures as the key to overcoming business opposition to new law (Snider, 1987, 1991; Hopkins, 1979; Clinard and Yeager, 1980; Cullen, Maakestad, and Cavender, 1987). It is sometimes asserted (Snider, 1987) that concerted public pressure is essential to legal reform efforts. Without public pressure, the strong structural and instrumental ties between the state and business undermine independent state action. Though it is arguable that these public groups satisfy any rigorous definition of class, there is little doubt that their power is substantially asymmetrical relative to their corporate opponents.

Yeager's recent study (1991) of environmental regulatory enforcement is an example of a structuralist explanation of law creation. The passage of the National Environmental Protection Act and amendments to the Federal Water Pollution Control Act during the early 1970s are identified by Yeager as the result of sustained public pressure and the Nixon Administration's efforts to improve its standing among the middle class constituency most active on environmental issues and most opposed to the war in Vietnam. The enforcement of this legislation was a constantly shifting struggle between ecological and economic forces, with outward boundaries defined by the need to preserve legitimacy in the face of public pressure and the need to preserve economic stability in the face of business pressure. Similarly, the development of the Occupational Safety and Health Act several years earlier has been attributed to growing concern among labor regarding the safety of workplaces mobilized at a time when President Johnson was seeking to enhance his support among labor (Donnelly, 1982; Calavita, 1983). In these cases, the limits of law became most apparent at the point of enforcement (Yeager, 1991; Carson, 1974).

In research on sentencing reform movements, Link and Shover (1986) have also found support for structuralism. Seeking to determine "what social and economic contexts produce extensive sentencing code reforms" (1986: 330), an issue directly relevant to the present research, these authors found that state sentencing reform efforts were initiated in response to declining economic conditions and increasing fiscal strains, and the consequent need to exercise stricter control over "problem" populations. This is consistent with empirical work by Caringella-McDonald (1990) and Scheingold (1984) on criminal justice policy toward individual offenders during the Reagan era, as well as earlier theoretical contributions of Spitzer (1975).

Structuralism thus provides a number of ways in which legal outcomes inimical to business interests are possible. The weakening of political and business interests as a result of scandal or large scale public opposition creates opportunities for state actors to enhance legal controls on business (Block, 1987). Strategic determinations on the part of business that proposed legal changes are not threatening to them provide similar opportunities (Carson, 1974), as does disorganization and miscalculations by business in responding to proposed legislation (McCaffrey, 1982). At the same time, structuralists assert that these laws are ultimately limited in their ability to establish meaningful controls on corporations. Though structuralism has in recent years provided for greater state independence in lawmaking, there remains a strong sense that

> [a]ll measures taken by the capitalist state, even those imposed by the popular masses, are in the last analysis inserted in a pro-capitalist strategy or are compatible with the expanded reproduction of capital (Poulantzas, in Balbus, 1982: 96).

As a result of this common assumption, there is inadequate attention among structuralists to the means through which the state acts to serve the interests of capitalists (Gold, Lo, and Wright, 1975; Snider, 1991) and little need to examine empirically the actions and motivations of state actors (Panitch, 1977).

By the early 1980s, as the decade-long debate between instrumentalists and structuralists came to an end, sociologists of the state and law increasingly realized that each of these perspectives had lost touch with the empirical reality of law and politics. By too often measuring actions against some future transition to socialism, however defined, and rejecting as cooptive anything less than this, actual legal and political activity was trivialized to the point that its analysis at the level of human activity was largely irrelevant. To instrumentalists, state agents were reliable agents of capital. To structuralists, state agents were somewhat less reliable, at least in the short term, but were ultimately beholden to capitalism. Also, empirical examination of state actors below the level of politically-appointed elites was largely and notably lacking (Sanders, 1990).

State Capacity Theory. Theoretical criticisms of structuralism and case studies of corporate lawmaking have derived from and contributed to the development of state capacity theory. Associated mostly with the work of Skocpol (1980, 1985) and Block (1987), the state autonomy or state capacity perspective emphasizes the importance of state actors as independent forces in lawmaking. It is this perspective that makes the greatest contribution to our understanding of the development of organizational probation, as is indicated by the range and conflicting interests of state actors involved in this case of lawmaking. To a considerable extent, the state autonomy perspective represents not an independent theory but rather a contribution to and refinement of structuralism. It gains relevance as the historically weak American state (Vogel, 1978) gains strength. As with structuralism, the state capacity perspective provides state actors with short and long term interests potentially separate from those of capitalists, or any other interest group.

However, moving beyond variants of Marxism and other society-centered approaches, this approach conceives states as organizations that may, in the short and long terms, "formulate and pursue goals that are not simply reflective of the demands or interests of social groups, classes, or society" (Skocpol, 1985: 9).

Research by Katz (1980), for example, on the "social movement" against white-collar crime in the United States in the 1970s provides support for a state capacity approach. Katz found that intra-elite conflicts, with prosecutors seeking expanded resources and publicity, were of primary importance in the aggressiveness of white-collar criminal prosecutions in the years immediately following Watergate. Business opposed these efforts and public groups were inactive.

State actors exercise and seek to expand their legal powers to the extent that legal and political structures permit independent action. Law creation, then, is viewed as an important opportunity for state actors "to extend their resources and control capacities" (Savelsberg, 1987: 556). Sociolegal research must thus clearly and closely examine different state actors to identify their particular interests, the ways in which proposed laws will affect those interests (Schmitter, 1985; Sanders, 1990), and their structurally-based capacity to pursue these interests (Skocpol, 1985). At a minimum, legislative, judicial, and executive branch actors can be expected to respond differently to developments in corporate criminal law depending on how new laws affect their work loads and their resources, where enforcement is located, and who benefits from sanctions. A second important difference is whether state actors have a political orientation, which often characterizes those who have been appointed in leadership roles, such as the Attorney General, and those who have a professional and bureaucratic orientation, such as enforcement personnel.

Though the American state has historically been weak, particularly in relation to business, the state has, especially since World War II, developed the capacity to advance its own interests in policy formation and implementation (Skocpol, 1980, 1985). As elaborated by Skocpol, this capacity takes the form of material and human resources, institutional development, and institutional role definition (Skocpol and Finegold, 1982; Finegold and Skocpol, 1984). Also, whether weak or strong at a particular historical moment or in a particular sphere of society, the more important point about the state is that it is a relevant variable in all discussions of social policy. Maintaining important ties to structuralism, however, Skocpol notes that state autonomy is not fixed or absolute (1985: 13-14). Rather, under conditions of crisis, capture, or inadequate state development, state actions are likely to be more closely linked to dominant societal interests.

Circumstances in which state managers are more likely to take steps to increase legal controls on business and increase their own powers include when business is weakened as a result of political or economic circumstances. Another is when business is disorganized or internally in conflict, and therefore unable to present a strong case against legal change (McCaffrey, 1982). It should not be assumed that business is able to correctly recognize how a particular law will affect them or will be interpreted by regulatory agencies and courts. This may be particularly relevant in the present case, where several "legislative" groups, including Congress, the Sentencing

Commission, and the federal courts, shape the meaning and the uses of organizational probation. In addition to these considerations, which are also associated with structuralism, the particular contribution of state capacity perspective is the importance of examining the structure of state power to assess the opportunities for independent action. Some structures are more associated with capture by business or political interests than others, depending on the extent to which they are legally shielded from political and business pressures.

Conclusions

Law-based crime control efforts must ultimately be founded on statutory statements of the types of offenders and offenses subject to legal control, as well as the type of sanction through which this control is exercised. Though this does not ensure effective or uniform law enforcement, it does provide a strong foundation upon which law enforcement efforts can be built. In this way, statutory law increases state capacity. Without this legislated foundation, law enforcement is constantly subjected to judicial interpretations and political pressures. For example, if it is not statutorily stated that organizations may be placed on probation, then the use of such a sanction will likely be limited in both frequency and effectiveness.

Organizational probation represents a case in which the statutory law has been changed to make explicit that organizations may be placed on probation. Moreover, this sanction allows probationary sentences to be imposed on organizational defendants, requiring organizational changes designed to reduce the likelihood of future law violations. This not only increases state capacity, it increases it in a direction not previously charted by the criminal law. Corporations are now subject to politics-based criminal sanctions, through which the state may intervene in their internal operations. No longer can corporations be assured of reaching into their often large financial reserves to pay historically meager fines or even large fines; certain that whichever the case, the organization itself will remain inviolable regardless of the seriousness of their conduct.

Explaining this outcome forces a consideration of the conditions under which the limits of law in the corporate sphere, identified as a central element of the full range of sociolegal theories, can be transcended. Several such conditions elaborated in the theoretical and empirical literatures of sociology of law are identified. Most important of these are public pressure, entrepreneurial activity, legitimacy concerns on the part of the state, and state autonomy and capacity. The subsequent four chapters of this dissertation examine in detail the development of organizational probation, identifying the presence of these conditions in the social relations, strategies, and perceptions of the interest groups central to this case of lawmaking.

In exploring the development of organizational probation, the problems with market logic that were previously identified as limiting the effectiveness of traditional corporate crime controls are found to impede understanding of corporate law creation. Rather than resulting from a calculated effort to enhance corporate crime controls, it is concluded that organizational probation has developed primarily as a result of the exercise of organizational power in furtherance of more limited organizational needs and goals. Regulatory agencies have sought expanded enforcement powers and resources. Business has focused on limiting its exposure to the criminal law and to fines. It has given less attention to organizational probation, believing it will not be frequently used, particularly against the large corporations that have dominated business lobbying. The Sentencing Commission has sought to protect its legitimacy in the face of allegations of organizational disorder and pro-business bias. Finally, statutory protections established primarily to rationalize the criminal code and to insulate the Sentencing Commission from political pressure in developing individual sentencing guidelines have provided the Commission substantial power to legislate organizational sanctions.

It is not logical, argues the government, to subject corporations to certain criminal statutes and yet exclude them from others for, after all, the Probation Act is but a portion of the United States' codified criminal laws under Title 18 of the United States Code.

U.S. v. Atlantic Richfield Co., 405 F.2d 58, 1972[1]

Chapter Three

JUDICIAL AND LEGISLATIVE FOREBEARS:

EMERGING DEFINITIONS OF ORGANIZATIONAL PROBATION

Title 18 of the United States Code is entitled "Crimes and Criminal Procedure." It is the designated repository of the Federal statutory criminal law. Prior to the passage of the Comprehensive Crime Control Act of 1984, Title 18 lacked any organizing principles or structures, except for its alphabetic arrangement of statutes. It was aptly described as a "hodge-podge" of statutes, often redundant, anachronistic, or unclear (Brown and Schwartz, 1970a; Schwartz, 1977). Important components of the Federal criminal law, such as the insanity defense and rules of culpability, entrapment, and self-defense, were not included in the statutory criminal law, and were

[1] By a 2-1 vote, the United States Court of Appeals for the Seventh Circuit upheld the imposition of probation on corporations, but rejected the conditions of probation. The ARCO case is discussed in detail later in this chapter.

thus never subject to Congressional consideration. Further, each statute that defined a criminal offense also prescribed a maximum punishment. As a result, for each of the many, often only slightly different robbery, burglary, fraud, and other statutes, wholly different punishments were provided. Compounded by broad judicial discretion, this introduced substantial disparities into sentencing (see Morris, 1977, for a discussion of federal sentencing law).

In introducing criminal code reform legislation to Congress in 1979, Senator Kennedy described this situation by stating,

> [t]he plain fact is that the current Federal criminal law is a disgrace. Judges, academicians, law enforcement personnel, and civil libertarians alike have all agreed on the need for prompt development of a comprehensive, logically organized and internally consistent Federal criminal law. The approximately 3,000 criminal laws on the books today have no standardized definitions or logical consistency. Offenses are scattered throughout all 50 titles of the United States Code. There are some 80 separate theft offenses and 70 counterfeiting and forgery offenses all with their own conflicting language and definitions (125 Congressional Record 23538).

The consequences of this statutory disorder were a federal criminal law that differed from judge to judge, that often treated similar conduct differently, and that defied easy understanding and application.

In the area of corporate criminal sentencing, a number of features of the Federal criminal code worked against the effective application of the criminal law. Most fundamentally, only rarely was a statutory distinction made between individual and organizational offenders or sanctions. This left corporate criminal liability constantly subject to judicial interpretation and corporate criminal offenders subject to individual criminal sanctions. As a result, despite often enormous resource differences and similarly large differences in their ability to inflict harm, "until 1987 corporations and individuals were liable for the same levels of fines" (Adler and Lord, 1991: 799) throughout the Federal criminal law. Under these circumstances, prosecutors had little reason to choose criminal proceedings when prosecuting organizations. Further, despite the historic use of the juristic person standard to extend the individual criminal law to corporations, exceptions to this existed. Thus, as detailed later in the chapter, when sole reliance on fines was ended by the first use of organizational probation in 1971, the same barriers that kept this sanction from being used earlier hindered its effective application. As the interpretation of the federal probation statute also illustrates, the very possibility of applying some criminal laws to corporations varied by jurisdiction. The meaning of these statutes once applied varied as well, depending on the observed precedents. Hence, fines have remained the almost exclusive corporate criminal sanction. Probation, to the limited extent it has been used, has lacked consistent meaning, application, and remedial powers.

Approximately twenty-five years ago, the first steps were taken to expand the types and severity of criminal sanctions available for use against corporations and to strengthen the legal structure through which these sentences are administered. These steps were taken in two places, independently and simultaneously: first by the National Commission on Reform of Federal Criminal Laws, a legislative advisory agency also known as the Brown Commission; followed closely by the federal judiciary. This chapter explores the origins and details of these steps and their implications for the development of organizational probation. Of particular interest is the relationship between the legal form of organizational probation and the extent and form of its use. Though the efforts of the Brown Commission and the Federal courts to develop organizational probation were in and of themselves limited, they identified the weaknesses of existing law and established the foundation for subsequent enhancement of legal controls on corporations. Examination of these efforts makes clear the centrality of state capacity to corporate crime control.

Corporate Sentencing and the Early Criminal Code Reform Movement

The modern approach to the legal control of corporate behavior in the United States dates its origins to the passage of the Interstate Commerce Act (1887) and the Sherman Antitrust Act (1890) (Sklar, 1988). These laws marked the transition from charter-based corporate controls to more universalistic market-based, statutory controls. In the century since then, the entire legal regime for corporations, such as it is, has developed. However, the majority of this development, and almost the entirety of the criminal law's application to corporations, has occurred in the past twenty years. Though corporate criminal liability received the support of the Supreme Court in 1909, in New York Central & Hudson Railroad Co. v.

U.S. (212 U.S. 481), corporate criminal prosecutions are less common than civil proceedings.

There are undoubtedly numerous reasons for this. Among them are the belief that corporate wrongdoing is only aggressive capitalism, necessary for economic growth and competition and produced by overregulation (Kadish, 1963). Other reasons include the influence of business on policymakers and prosecutors (Sutherland, 1945), the absence of enforcement resources (Schneider, 1982; Yeager, 1991; Clinard and Yeager, 1980), and preference for civil litigation (Frank, 1983, 1984b; Blum-West and Carter, 1983). An additional reason, which is focused on in the present research, is the inadequacy of the legal framework for prosecuting and sanctioning corporate criminal offenders. Prosecutors make strategic legal and career-oriented decisions in choosing between civil and criminal proceedings (Katz, 1980; Frank, 1984b). To the extent that the legal framework for criminal prosecutions is strengthened, the decisionmaking calculus is altered in favored of such prosecutions (Cohen, 1989, 1991d; Lombardero, 1991).

Prior to 1970, the application of the criminal law to corporations received almost no attention among legal policymakers, prosecutors, or the legal community. To the extent that corporations were subject to the criminal law, it apparently was presumed that existing individual-based statutes, with support from judicial precedents applying them to corporations, were adequate for criminal prosecutions of organizations. In fact, in the 1950s and 1960s, three professional organizations concerned with the criminal law, the American Law Institute (ALI), the National Council on Crime and Delinquency (NCCD), and the American Bar Association (ABA), each proposed model legislation for criminal justice, including sentencing. It is an interesting commentary on the then-status of the corporate criminal law, and the changes that have taken place since then, that none of these proposals gave much attention to corporate criminal sanctioning, or suggested any changes in this regard.

The Model Penal Code

In 1952, the American Law Institute, with financial support from the Rockefeller Foundation, undertook the development of a unified, rational, statutory criminal code, known as a model penal code. This model legislation was to serve as the basis for state and federal criminal code reform efforts, which had previously failed to create a uniform criminal code. Congressional-led Federal criminal law reform efforts had been undertaken in 1877 (Revised Statutes), 1909 (35 Stat. 1088), and 1948 (62 Stat. 683). These efforts brought about minor code changes, including elimination of some obsolete statutes, but served mostly to consolidate, redundancies, contradictions, and anachronisms intact, the statutory criminal law provisions that had been enacted and placed in other titles of the United States Code (see U.S. House of Representatives, 1947, for a history of early federal criminal code reforms). No logical structure was created within Title 18.

Under the leadership of legal scholars Herbert Wechsler, Louis B. Schwartz, and Paul W. Tappan, the Model Penal Code project reviewed almost the entirety of the statutory and judicial criminal law and placed it into a four-part framework.[2] The first part of this framework was composed of "General Provisions," including "issues that arise regardless of the nature of the particular offense" (Schwartz, 1963), such as entrapment and use of force. Part II grouped all specific offenses into classes, such as crimes against persons and crimes against property. Part III established general guidelines for sanctioning. Part IV focused on the administration of corrections.

Ten years and thirteen drafts later, the ALI published its final Model Penal Code in 1962. Reflecting existing statutory law and judicial practice, its sentencing provisions and discussions of them (see Tappan, 1958; Turnbladh, 1958), focused largely on individual offenders. However, two organization-specific provisions were included, in addition to fines. The proposed fines were larger than existing statutory fines and included loss-based and double damage fines. The first of these organizational provisions held that the "Court may suspend the sentence of a corporation or an unincorporated association which has been convicted of an offense or may sentence it to pay a fine" (American Law Institute, 1962: 94). Though it was ultimately through the suspension of the execution of the statutory

[2] Criminal procedure, juvenile offenses, treason, espionage, sedition, and public order offenses were not considered.

sentence and the use of an alternative sanction in its place that probation was imposed on corporations, the ALI was referring to the suspension of the imposition of the sentence. In this case, no sanction at all was administered; the corporation remains unpunished in any fashion. Indicating the leniency of existing sanctions, this was referred to by the ALI as a "traditional corporate sanction" (American Law Institute, 1985: 64).

The second corporate sentencing provision of the Model Penal Code, also based in existing law, provided for the use of civil proceedings to bring about the forfeiture of a corporation's charter in cases of persistent, serious illegal conduct involving high managerial agents. In a recently published volume of Commentaries on the Model Penal Code it was noted that corporate dissolution through charter forfeiture, a potentially powerful organizational sanction, never caught on among subsequent corporate criminal sentencing law reformers (American Law Institute, 1985). Neither did it catch on in the courts.

Discussing sanctions that were advanced as a product of the sentencing reform movement after the Model Penal Code, the Commentaries stated that there were, however, "a number of other special sanctions" that were developed in the case of corporate crime (1985: 68). The first of these was adverse publicity, in which the defendant corporation is required to advertise its crime and conviction. The second was notice to victims, through which the corporate defendant is required to notify those it harmed, and thereby facilitate potential civil claims against itself. Third was disqualification of managerial personnel as a condition of organizational probation. This discussion of corporate sanctioning concluded by stating that

> mention should also be made of an apparently unique proposal set forth in the newest version of the ABA Standards on Sentencing Alternatives and Procedures to permit temporary judicial oversight of a convicted organization (American Law Institute, 1985: 70).

This reference was to the ABA's 1979 Standards for Criminal Justice. Though organizational probation had been part of the sentencing reform movement since the Brown Commission, used in the federal courts since 1971, included as an independent sanction in the Comprehensive Crime Control Act, and given a remedial component in Congressional discussions, its oversight potential was unrecognized in these Commentaries.

In neither the Model Penal Code nor in the Commentaries was there any discussion of organizational probation. Rather than being viewed as deriving logically from existing probation statutes, which had been in place in every state and at the Federal level since 1925 (Gruner, 1988), and which would have led to its inclusion in the Model Penal Code, or as a recent remedial innovation in corporate sentencing, which would have prompted consideration in the Commentaries, organizational probation inhabited a position of uncertainty and formlessness. That this position was held as recently as 1985 suggests that organizational probation did not come to the attention of criminal law commentators until developed by the United States Sentencing Commission beginning in 1988.

The Model Sentencing Act

As the ALI was completing its work, the American Bar Association and the National Council on Crime and Delinquency were beginning efforts to draft model sentencing legislation. In October 1963, the Advisory Council of Judges of the NCCD completed its work with the publication of its Model Sentencing Act (Crime and Delinquency, 1963). The primary goal of this effort was to move the "penal law onto a new and higher level. Instead of 'rectification' of the existing pattern of codes, our goal was a statute conforming to the best concepts of modern penology" (Crime and Delinquency, 1963: 340). Despite these lofty goals, no mention was made of organizations anywhere in this Act. Rather, the language was geared strongly toward sentencing designed to rehabilitate individual offenders. Given this language, it is unlikely that the criminal sentencing of organizations was even contemplated by the NCCD. Though such sentences were rare at the time, the complete omission of organizational sentencing provisions was a serious oversight in a document designed to be both comprehensive and progressive.

The American Bar Association's Standards for Criminal Justice

The ABA initiated its project on Standards for Criminal Justice by establishing a Committee on Minimum Standards for the Administration of Criminal Justice, in August 1964. In 1968, this committee completed the sentencing portion of this project by publishing its Sentencing Alternatives and Procedures (American Bar Association, 1968). Almost exclusive attention was given to individual offenders. The fining provisions made brief mention of organizations, including recognition that separate fining schedules should be developed for organizations. However, no alternatives to fines were mentioned. Revised Standards for Criminal Justice, including an extended discussion of organizational sentencing, were approved and issued by the ABA in 1979 (American Bar Association, 1979). These revised standards, which provide an excellent illustration of the changing nature of public, professional, and political consideration of corporate crime in the 1970s, are discussed in detail in Chapter Four.

The Brown Commission: Developing the Agenda for Reform

Though corporate criminal sentencing law had been part of the Model Penal Code project, its inclusion reflected the comprehensiveness of these reforms more than any articulated plan or logic for corporate sentencing or any substantial independent concern with this issue. It was not until 1970, when the National Commission on Reform of Federal Criminal Laws published its Working Papers (1970a) and draft proposal (1970b), that organizational sentencing issues were placed on the public agenda or that meaningful alternatives to fines were suggested. In these materials, alternative fines, restitution, community service, publicity, notice to victims, and organizational probation were included.

By the mid-1960s, the Model Penal Code movement was in full swing. Numerous states were considering legislation to reform their criminal codes. The federal government also became involved in this movement when, in 1966, as part of President Johnson's "National Strategy Against Crime," Congress created the National Commission on Reform of Federal Criminal Laws (P.L. 89-901, 80 Stat. 1516) to review and revise the Federal criminal law. The Brown Commission was composed of three members from each the House and Senate Judiciary Committees, three federal judges, three presidential appointees, and a fifteen member advisory committee. Its entire mandate, succinct but substantial, was to

> make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice (P.L. 89-801).

What was mandated, then, went well beyond the limited purposes of previous federal code reform efforts. The Brown Commission was created not only to eliminate obsolete laws and rationalize the "crazy quilt patchwork of laws" (U.S. House of Representatives, 1966: 3) constituting the federal criminal code, but also to create, if necessary, a new penalty structure, and to codify case law. The Johnson Administration had originally favored a more limited restatement of existing law and a reduction of sentencing disparity. The bill in which this narrower approach to criminal code reform was contained, H.R. 13548, was rejected by Congress. Nonetheless, controversy over the precise meaning of the Brown Commission's mandate, and the appropriate scope of reform, continued well after the Brown Commission completed its work (Liebmann, 1970; U.S. Senate, RFCL, 1971).

Though created in 1966, the Brown Commission was not fully constituted until 1968. Despite requesting and receiving extensions from Congress for submission of its final report, once seated it had an enormous task to complete in less than three years, and few resources with which to do so (Blakey, 1991; Schwartz, 1991). Compounding these difficulties was a change in Presidential administration during the tenure of the Commission. The election of President Nixon in 1968 followed a campaign in which criminal justice issues were prominently featured, and marked a conservative shift in federal criminal justice policy. As a result, the generally liberal Brown Commission and staff found themselves out of step with a changing approach to crime in Congress, the White House, and among the public (Blakey, 1991). Because the success of its recommendations ultimately depended on their acceptance by an increasingly conservative Congress, the Brown Commission staff focused most of its attention on largely technical changes in the criminal code. On the other hand, controversial issues, such as civil rights, the scope of federal jurisdiction, the death penalty, obscenity, and the scope of corporate criminal liability, occupied much on the Commission's time in its infrequent meetings (Schwartz, 1991; Blakey, 1991).

The Brown Commission's Recommendations to Congress

The final report of the Brown Commission, unanimously approved and issued in the form of a proposed revision of Title 18 of the United States Code, was submitted to President Nixon on January 7, 1971. Its sentencing provisions were found in Part C, Chapters 30 through 33. Chapter 30, entitled "General Sentencing Provisions," provided an overview of the recommended sentencing scheme. Included prominently in this chapter were a distinction between individual and organizational defendants and a listing of the sanctions available for each of these defendants. This distinction was not found in existing law, which relied on the juristic person standard to extend the criminal law to organizations, and proved to be particularly significant and controversial in the future development of organizational probation. At the time, however, listing organizational and individual defendants and sentences separately signalled only an intent on the part of the drafters to make explicit that corporations were subject to criminal sanctions. There is no evidence of a more active interest in fundamentally changing corporate criminal sanctioning.

Breaking additional new ground, the Brown Commission recommended that organizational defendants be subject to "probation or unconditional discharge ... a fine ... or the special sanction" (National Commission on Reform of Federal Criminal Laws, 1971: 271).

The use of a fine or special sanction could be as an alternative to or in addition to probation. This listing of sentences was significant in that it established probation for both individuals and organizations as an independent and affirmative sentence, rather than as a suspension of sentence, and expressly provided for the application of probation to corporations and other organizations. Prior to this, under the Federal Probation Act of 1925, probation was imposed only after the suspension of the original sentence. As a result, it was generally not possible to impose probation with another sentence. Moreover, under most interpretations, the defendant could refuse the suspension of sentence in favor of the original sentence. Such an outcome was unlikely for individuals placed on probation since the alternative facing them was incarceration. However, organizational defendants were quite likely to refuse probation since the alternative was invariably a fine.

The special sanction provided by the Brown Commission was notice to victims, a novel market-based sanction through which the organizational defendant is required to

> give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise (1971: 276).

This sanction was designed to facilitate civil suits by acting as an idealized market would to inform consumers and others of corporate wrongdoing. After including publicity as an additional special sanction in its first draft (National Commission on Reform of Federal

Criminal Laws, 1970b), in its final draft the Brown Commission majority rejected its use as

> inappropriate with respect either to organizations or to individuals, despite its possible deterrent effect, since it came too close to the adoption of a policy approving social ridicule as a sanction (1971: 429).

However, a publicity sanction appeared in parentheses in the Commission's final report to Congress, indicating that this sanction retained minority support.

Chapter 31 of the Brown Commission report, "Probation and Unconditional Discharge," provided extensive criteria, some proposed as binding, others as advisory, guiding the imposition of probation, as well as numerous possible conditions of probation. However, how these criteria and conditions were to apply to organizations was not clarified. Despite the clarity of the distinction between individuals and organizations in authorizing sentences in Chapter 30, in Chapter 31 this distinction was completely absent. Though the criteria and conditions of probation applied to both types of defendants, they were written in terms of "persons" and in most cases made assumptions that the actor was an individual. Requirements of working faithfully at suitable employment, supporting dependents, and undergoing psychiatric treatment do not translate well or at all to corporations. That left paying fines and restitution, allowing visits by a probation officer, and other conditions "reasonably related" to rehabilitation, as potentially applicable to corporations.

The Brown Commission and Organizational Probation

In examining the documentary record provided by the Brown Commission for some understanding not available in the statutory provisions of what it had in mind for organizational probation, no clarification is forthcoming. In the published Working Papers of the Brown Commission (1970a), covering two volumes and over 1,400 pages, there was no discussion or even mention of organizational probation. In fact, in describing its organizational sentencing proposals, the Working Papers (1970a: 163) stated that

> [s]everal innovations in sanctions against corporations are proposed, namely a discretionary power in the judge to order appropriate publicity of a corporate conviction and to direct the institution of a class action for the recovery of small claims arising from the criminal offense.

This points out a puzzling disparity between the working record of the Commission and its final product with respect to organizational probation. It was the other, market-based alternatives to fines - publicity, notice, and restitution - that were given extensive discussion. While the Brown Commission criticized fines as ineffective, stating that they "do not have affirmative rehabilitative value" and had an "uncertain" impact on offenders (1971: 296), the alternatives it deemed "special" were consistent with a market model. Though the costs they imposed of defendants were less calculable and predictable than those associated with fines, organizational responses to these sanctions remained solely the prerogative of management.

Organizational probation, on the other hand, the sanction provided in Chapter 30 as the primary alternative to fines, was simply not elaborated. As a result, whether the Brown Commission foresaw in this sanction rehabilitative interventions consistent with politics-based sanctioning and not available from fines is not clear. Examining the Commission's Working Papers provides no evidence suggesting a broad reading of the Federal Probation Act as authorizing organizational probation. This helps to explain the failure of the authors of the Working Papers to elaborate this sanction. Instead, the Working Papers stated the already clearly developed position that organizations were included as persons in reading statutes, and that fines were "the only present sanction available against corporations" (1970a: 163).

The meaning and application of organizational probation was thus muddled at best. This sanction was, in the record of the Brown Commission, neither new nor old, neither innovative nor presently available. It was, this would seem to indicate, included in the preliminary and final proposals of the Brown Commission with little or no independent consideration. When questioned about this, and in particular about the failure of the Brown Commission to include organizational probation among its innovations, former Commission Research Director Louis Schwartz stated that this was due to the Commission's belief that the availability of individual probation obviated the need for independent consideration of organizational probation conditions (Schwartz, 1991). Corporations would simply be subject to the conditions developed for individuals unless and until Congress and the courts provided further elaboration of the application of probation to organizations.

Robert Blakey, a former member of the Commission research staff, provided further insight into this issue. When asked about the Commission's consideration of organizational probation, and in particular why the Commission was not clearer in its views on organizational probation, he stated:

> Let me stop you right in your tracks. Don't assume that the Commission had a mind and thought anything. That's not the way government commissions work. Organizational probation was introduced by staff people - Lou Schwartz or Dick Green or me or one or two other people (Blakey, 1991).

He went on to state that somebody on the staff thought probation was an idea with potential, and introduced it into the initial draft (1970b) "and that's about it" (Blakey, 1991). This was done without a literature review, empirical studies, or anything else; organizational probation was simply seen by a staff member as an interesting idea. Adding further to the view that organizational probation was placed on the Commission's agenda by the staff, Blakey stated that the Working Papers were drafted by outside consultants rather than staff members, and that "more often than not, [the Working Papers] were a touchstone for Schwartz to go ahead and do what he wanted to do" (Blakey, 1991).

This also helps to explain the inconsistency between the Working Papers and the proposals drafted by the Commission staff. The authors of the Working Papers were mostly established law professors.

They wrote their contributions in 1968 and 1969 and submitted them to the Commission as the theoretical and legal bases for the working draft published in 1970. It was only after these papers were completed that organizational probation was first placed on the agenda. This suggests that the subsequent legislative development of this sanction was linked at least in part to entrepreneurial activity on the part of a staff member of the Brown Commission. Rather than emerging from the writings of expert consultants or from the deliberations of the Commission itself, the legislative origins of organizational probation were in the actions of a staff member interested in expanding organizational sanctioning options.

The massive task assigned to the Commission, the paucity and brevity of its meetings, and its focus on higher profile criminal justice issues apparently prevented it from giving closer consideration to the details of the staff's work. The issues of what organizational probation was and how it should work were never elevated to the level of the Commissioners nor introduced into the written discussion of the Brown Commission. It was as a result of these circumstances that organizational probation was recommended by the Brown Commission. It was also as a result of these circumstances that this recommendation provided only the thinnest basis for further legislative development of organizational probation. This sanction was supplied by the Brown Commission to Congress as an undeveloped potential; a crime control mechanism that could be shaped by Congress in the way it saw fit.

However, this explanation of the Brown Commission's consideration of organizational probation should not been seen as minimizing their contribution to the development of this sanction. As was shown, prior to 1970, no Congressional or professional criminal law reform proposal had included organizational probation. Since 1970, few criminal code reform bills and no professional reform proposal has excluded this sanction in some form. In a very real way, then, the Brown Commission "invented" organizational probation, and in so doing changed the legal landscape. The full implications of this invention are only now beginning to be realized.

The Judicial Role: Organizational Probation Under the Federal Probation Act

On June 17, 1971, just five months after the submission of the Brown Commission report to Congress, in the United States District Court for the Northern District of Illinois, Judge James B. Parsons, Jr. suspended the available fine and placed the Atlantic Richfield Company on probation for criminal violations of federal water pollution statutes (U.S. v. Atlantic Richfield Co., 71 CR 524). Indicative of the limitations associated with the juristic person standard, and a more general failure of legal imagination, this was the first time an organization was placed on probation. The statutory authorization for this sanction was a novel interpretation of the Federal Probation Act. Despite their temporal proximity, there is no evidence that the actions of Judge Parsons and the Brown Commission were in any way connected. The court record from the ARCO case contains no references to the Brown Commission. Further, given the absence of any elaboration of organizational probation by the Brown Commission, it seems unlikely that this obscure and undeveloped sanction would have received notice so soon after the submission of the Brown Commission's recommendations to Congress.

The Federal Probation Act

The Federal Probation Act was passed in 1925. The impetus for its passage was a 1916 ruling by the United States Supreme Court (Ex Parte United States, 242 U.S. 27, 37 S.Ct. 72) that the courts did not have a common law power to suspend the execution of a sentence; this presumed power had been the traditional basis for probation. Rather, the Supreme Court ruled, statutory authority for the suspension of sentence was required. Congress responded immediately, but took nine years to pass legislation (Gruner, 1988). The Federal Probation Act was a statutory statement of the power of the courts to suspend the execution of a sentence in favor of an alternative, more lenient, disposition. Importantly, in the FPA, probation was not an independent, affirmative sentence. It was a grace granted by the courts to allow convicted offenders to remain in the community. As a result, it provided little sanctioning capacity to the courts in cases where defendants opposed its imposition.

The details of when and how probation was to be implemented pursuant to the FPA were surprisingly few. The opening paragraph of this statute (18 U.S.C. Section 3651) stated:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

To guide the judicial discretion provided in this statement, a nonexclusive listing of probation conditions was provided. They were:

> While on probation and among the conditions thereof, the defendant may be required to pay a fine in one or several sums; and may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and may be required to provide for the support of any persons, for whose support he is legally responsible.

The possibility of assigning probationers to treatment programs of various types was also provided, as were requirements for the defendant to report to a probation officer and provide information pertaining to conduct while on probation. There was no further specification of the uses or conditions of probation. It was left up to judges to more clearly develop these areas and to determine the extent to which the specific statutory conditions of probation impinged on the authority of the court to do what it "deems best."

The Federal Probation Act made no mention of organizations. This omission was not an issue for the first forty-five years it was on the books. When the ARCO sentence was handed down, however, the fact and the parameters of the FPA's applicability to organizations immediately became issues. The principle at work here, that "persons" as the term is used in statutes refers also to corporations, was neither new nor in most cases controversial. It has been an ever growing part of common law statutory interpretation for centuries (Coleman, 1974; Bernard, 1984), and is now found in statute (1 U.S.C. Section 1). Though there are cases where such an interpretation is held to so strain the original statute that it cannot be allowed, as in efforts to extend the common law felonies to corporations (Brickey, 1984; Stone, 1975; Swigert and Farrell, 1980-81) or to imprison corporations (U.S. v. Allegheny Bottling Co., 695 F.Supp 856, 1988), the personhood of organizations is well established.

This section examines more notable federal organizational probation cases, beginning with a detailed discussion of the ARCO case and continuing until the Federal Probation Act was superceded by the Comprehensive Crime Control Act on November 1, 1987. The purpose of this effort is to analyze the judicial development of organizational probation, identify the factors that shaped this development, and examine the responses of the courts, Department of Justice, and business to this sanction. Particular attention is given to examining and assessing the adequacy of the statutory foundation for organizational probation provided by the FPA. This provides a background for subsequent discussions about the significance of the Comprehensive Crime Control Act and the federal organizational sentencing guidelines for development of organizational probation.

The ARCO Case: Historical Precedent

On March 23, 1971, the Atlantic Richfield Company was observed by the United States Coast Guard releasing oil from its dock in Stickney, Illinois, into the adjacent waterway, the Chicago Sanitary and Ship Canal. ARCO was charged with a single violation of the Rivers and Harbors Act of 1899, which prohibits the discharge of refuse into navigable waters.[3] On June 17, 1971, ARCO pleaded nolo contendre to this charge before Judge James B. Parsons, Jr., in federal district court in Chicago. On the same date, Judge Parsons[4] imposed sentence, suspending the statutory maximum fine of $2,500 and placing ARCO on probation for six months with the condition that it set up and complete within 45 days a program to prevent further oil spillage at the Stickney facility. Failure to do so would result in the appointment of a trustee or special master by the court to supervise the development of such a program (71 CR 524).

The origins of this decision are of historical interest due to the novelty of organizational probation and of practical significance for understanding the roots of legal innovations. As it turns out, however, these origins introduce another layer of

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[3] That the discharge of oil into a waterway was a crime under the Rivers and Harbors Act was a recent development. The original intent of this legislation was to protect navigation by restricting physical obstructions to shipping, such as those posed by lumber and animal carcasses. Its use as a means to protect public health by restricting more insidious forms of pollution began with judicial interpretations in the 1960s (Yeager, 1991).

[4] Judge Parsons also presided over the folding carton conspiracy case in the mid-1970s, a large and longstanding price-fixing conspiracy (U.S. v. Alton Box Board, et al., 76 CR 199, U.S. District Court, Northern District of Illinois, Eastern Division). In the folding carton cases, Judge Parsons imposed very lenient sentences, and was criticized as a result (Cramer, et al., 1980). Despite pressure from the Department of Justice for harsh sentences due to the seriousness of the offense and the blatant way in which it was committed, none of the 45 executives who pleaded nolo contendre spent any time in jail. Rather, jail sentences of up to ten days were imposed and suspended.

uncertainty and misunderstanding into the early development of organizational probation. The decision to place ARCO on probation was made by Judge Parsons (71 CR 524; Stone, 1990; Parsons, 1991), not at the urging of the prosecutor (as reported in Stone, 1975), though the prosecutor supported this decision. Parsons did so based on his belief that probation was a common sanction for organizational defendants. When ARCO challenged the applicability of probation to organizations, and presented evidence that organizational probation had never been successfully applied in the past, and never attempted in the Federal courts, Judge Parsons disagreed, stating,

> if we go back into our memories far enough we remember innumerable cases in which corporate defendants have been given probation, have not appealed from it, and so that there are no reported opinions about it (71 CR 524, Vacate Hearing: 35).

During a remand hearing held one year later, after a successful appeal by ARCO, Judge Parsons and Mr. McSweeney, the attorney for ARCO, returned to the issue of the novelty of ARCO's sentence. Judge Parsons maintained his original position, saying of organizational probation that "it is done all the time." To this, Mr. McSweeney replied,

> Your Honor, I know you and I disagreed on that before. I again have to say I have never seen it. The Court of Appeals has agreed it is a case of first impression. Maybe as a matter of practice it is done all the time. I had never seen it (71 CR 524, Remand Hearing: 5).

Even today, Judge Parsons rejects the assertion that the sentence he imposed on ARCO involved a novel interpretation of the Federal Probation Act or that it was the first use of organizational probation (Parsons, 1991), though he provides no citations in support of his position.[5]

Given the exhaustive case law review performed by ARCO's attorneys, as well as the absence of any references to earlier uses of organizational probation in the literatures on corporate criminal liability (see Brickey, 1984, 1986) and organizational probation (Stone, 1975; Curran, 1986; Rush, 1984; Gruner, 1988), or in the lengthy deliberations of Congress and the Sentencing Commission, it is almost certain that Judge Parsons applied the Federal Probation Act as he did thinking that earlier civil law injunctions were actually criminal law probation cases.[6] As a result, he did not realize that he was grounding his sentencing decision in a novel reading of the Federal Probation Act.

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[5] It may be pertinent to understanding this error that Judge Parsons has been ranked as the worst Federal judge in the Seventh Circuit (Cramer, et al. 1980). Attorneys practicing in his court made this determination based on inconsistencies in sentencing, his lenient sentences in the folding carton industry cases, and personal characteristics.

[6] It is possible, that Judge Parsons intentionally misstated the history of organizational probation in order to provide support for the sentence he sought to impose in the ARCO case. As Melvin Wulf (1991: 700) stated in discussing the development of a right to privacy in the Constitution,

> the way of ... litigation is to tread a path already worn, insofar as that is possible. Judges dislike breaking entirely new ground. If they are considering adopting a novel principle, they prefer to rest their decision on earlier law if they can, and to show that the present case involves merely an incremental change, not a wholesale break with the past.

However, such an interpretation is in conflict with the record of numerous statements on the part of Judge Parsons that organizational probation was a common disposition.

The Grounds for Appeal. After being placed on probation, ARCO immediately filed a motion to vacate and correct the sentence. The hearing on this motion was held in Judge Parsons' court on June 25, 1971. The transcript from this hearing (71 CR 524, Vacate Hearing) reveals that ARCO presented a three-pronged defense against the use of probation. Their first and most fundamental argument was that the Federal Probation Act simply did not apply to corporations. Second, ARCO argued that it had the right to refuse the suspension of sentence in favor of the original sentence. Third, ARCO claimed that the condition of probation imposed by Judge Parsons was onerous and vague. Rather than being placed on probation, ARCO argued that it should be subject to the maximum available fine of $2,500. While recognizing that this fine was a small amount for a corporation its size, ARCO argued that coupled with the negative publicity it had received as a result of its conviction, sufficient deterrence would result. Judge Parsons responded to this assertion by saying "$2,500 doesn't hurt you and there ought to be a little pain in the punishment" (71 CR 524: Vacate Hearing: 8).

In support of its first contention, ARCO argued that the provision in the statutory statement of the juristic person standard (1 U.S.C. Section 1) holding that the interpretation of the term "persons" to include organizations must be consistent with the context of the statute, should exclude the use of probation against corporations. ARCO cited the historical use of probation as a "grace" designed to give less serious offenders another opportunity to remain in the community, and numerous such definitions of probation from court cases (Roberts v. U.S., 320 U.S. 264, 1943; Burns v. U.S., 287 U.S. 216; 1932), as the basis for their contention that by negative inference, the FPA should not be held to pertain to organizations.

ARCO's attorneys also stated that they had reviewed past case law and found only one reference to organizational probation. This was a state supreme court case from Missouri in 1911 (State ex relator Crintz v. West Plains Telephone Company, 232 Mo. 579, 135 S.W. 20), which held that corporations could not be placed on probation. As described by ARCO's attorney, Donald W. McSweeney, the Court in this earlier case determined that

> since the purpose of the statute [Missouri Parole Act] was to place the individual criminal under the supervision of the court to the end that a good citizen might be made of him, inclusion of a corporation under or within the statute for probationary or parole purposes was illegal (71 CR 524, Vacate Hearing: 14).

No other details of this case are provided in the record of the ARCO case or in other discussions of the history of organizational probation (see Stone, 1975; Coffee, 1981; Gruner, 1988).

The second argument of ARCO, that if organizational probation was possible under the Federal Probation Act it could only be imposed with the consent of the defendant, was also based on the historic use of probation as a grace. The defendant, ARCO argued, must be given the opportunity to choose the initial sentence rather than the suspended sentence. To hold otherwise would be contrary to the spirit of probation. It would also move probation impermissibly toward being an independent and punitive sentence, particularly where the suspended sentence imposed greater costs than the authorized fine. The Federal Probation Act does not directly address the issue of what is to be done in such a case, though a suspended sentence more severe than the original sentence would seem to violate the spirit of probation as used at the time. Also, some states had at the time ruled that defendants in individual probation cases had the right to refuse probation (Baldwin, 1974).

This was perhaps the critical issue in the application of probation to organizations under the FPA (see Baldwin, 1974: 301-304). The determination that probation could be rejected by the defendant would effectively exclude any condition of probation that imposed an affirmative duty on the corporate defendant (Coffee, Gruner, and Stone, 1988; Gruner, 1988a) and thus negate the most compelling feature of this sanction. Affirmative conditions are fundamental to organizational remediation. However, the costs and uncertainties they introduce almost certainly exceed the punishment associated with fines, particularly given the low maximum fines available. In addition, remedial conditions restrict organizational autonomy in ways not possible through fines.

The final, and narrowest, argument of ARCO was that the particular condition of probation imposed in this case was onerous for two reasons. First, the short time period provided to develop a cleanup program made compliance almost impossible, in which case a trustee would be appointed. Second, the broad language of the condition created uncertainty as to the circumstances under which the oil spill program condition could be satisfied. At a minimum, then, ARCO contended that this condition should be redrawn. Judge Parsons rejected each of these arguments, stating that there was "no question in [his] mind about the legality of probation as a sentence or as a corrective measure used with relation to a corporate defendant" (71 CR 524: Vacate Hearing: 34). He made no modifications in the original sentence. ARCO then filed an appeal on the same grounds it argued to Judge Parsons.

The Outcome of ARCO. On appeal (U.S. v. Atlantic Richfield Co., 465 F.2d 58, 1972), the Seventh Circuit Court of Appeals took a narrower view than did Judge Parsons of the authority granted judges by the Federal Probation Act. However, on the threshold issue of the applicability of probation to organizations, the Appeals Court upheld Judge Parsons. In so doing, it stated that the FPA

> was meant to be means by which offender could be rehabilitated in hope that further illegal acts would not be committed and that general purpose can be applicable to corporations as well as individuals (at 58).

No other organizational probation cases were cited in making this determination. Nonetheless, precedent was established for future use of organizational probation.

Beyond this threshold, the Appeals Court wrote that in applying the FPA to organizations, "knotty questions leaped out of the woodwork" (at 59). Effective and regular application of probation to organizations required resolution of these issues. However, the Appeals Court did little in this regard. Most significantly, it refused to rule on the important issue of whether defendants had the right to refuse the imposition of probation in favor of the original sentence. It was held that such a determination was unnecessary since it court could "adequately dispose" of the case by basing its ruling on the narrower grounds of the legality of the specific probation condition imposed by Judge Parsons.

In considering this condition, the Appeals Court held that Judge Parsons had exceeded the authority granted him by the FPA in requiring ARCO to develop within 45 days an oil spill response program, and that this condition must be redrawn. The Appeals Court did not elaborate on the problems with this condition other than stating that it was vague and would therefore be difficult for ARCO to determine when it had satisfied the court. Despite the admitted difficulties of these issues, this opinion provided little specific direction to Judge Parsons or general direction to future courts considering the use of organizational probation (Baldwin, 1974).

On remand, Judge Parsons met with attorneys for ARCO in his courtroom on September 12, 1972. At this hearing, Judge Parsons opened by stating that "I think that all I have to do to obey the mandate of the Court of Appeals is vacate" the trustee condition he had imposed on ARCO, leaving the spill program requirement in place (71 CR 524, Remand Hearing: 2). ARCO took the broader position that the appellate decision required the imposition of a fine and no probation. In an effort to reconcile these conflicting interpretations and bring about a final disposition of the case, ARCO then informed the court (71 CR 524, Remand Hearing: 7) that

> since we were last here, your Honor, we have taken extensive steps to correct this problem. I think the question of a [spill clean-up] program is academic in that we have instituted a program

to control oil spills. ARCO's attorney went on to explain the details of this program, concluding that "it would seem to me that there is no need for further supervisory sanctions" (71 CR 524, Remand Hearing: 8). After questioning an ARCO engineer associated with the design and construction of its oil spill containment system, Judge Parsons agreed that the original condition of probation had been met. The case was dismissed.

The status of organizational probation after ARCO was only slightly clearer than before the case. The important step of extending the Federal Probation Act to include organizations had been formally taken and approved on appeal. Yet, the permissible conditions of probation were left almost wholly unresolved. The use of organizational probation in a remedial, politics-based fashion was not achieved in this case, and the legal support for such efforts in the future was unclear. Whether probation conditions, or probation itself, could be refused by the organizational defendant in favor of the original sentence was also unclear. As one commentator noted, the ARCO decision was an "inadequate interpretation of a potentially effective means of dealing with a class of white collar criminals that flaunt the law with alarming regularity and increasing openness" (Baldwin, 1974: 305). However, it was apparent that flaws within the

FPA made it unlikely that it would ever be used regularly or effectively against organizations.

The Issue of Injunctions

The belief of Judge Parsons that the imposition of probation in the ARCO case was in keeping with past practice was almost certainly due to his mistaken belief that past civil law injunctive cases were probation cases. At the time of ARCO, Judge Parsons' error was not a serious one. The statutory bases for civil and criminal law interventions into organizations were similarly weak, and such interventions were quite rare. However, as organizational probation has developed, it has increasingly been distanced from civil law interventions in terms of the available statutory authority for interventions and the form taken by these interventions. Further, there are important features of the criminal law that distinguish it from civil law. Nonetheless, throughout the development of organizational probation, it has frequently been argued that this sanction is unnecessary due to the availability of civil law remedies (American Bar Association, 1991; Heider, 1991). This section considers the differences between probation and injunctions and other civil law remedies, thereby providing a means to assess the arguments of critics of probation.

Statutory Versus Nonstatutory Interventions. First, and perhaps most important, civil interventions are often nonstatutory. For example, the Securities and Exchange Commission (SEC), widely viewed as both a model regulatory agency (Coffee, 1980; Seligman, 1982; Vise and Coll, 1991) and as the most powerful regulatory agency in terms of interventionist capabilities (American Bar Association, 1991; Dent, 1983), has limited statutory authority for such interventions, particularly in requiring remedial changes. While the SEC used the courts to greatly expand the use and scope of remedial injunctive remedies throughout the 1970s, a power it had previously been reluctant to use (Dent, 1983; Farrand, 1976; Mathews, 1976), judicially supplied powers are inherently tenuous. As Dent notes, by the early 1980s, the increasingly conservative Supreme Court had already taken steps "restricting the federal securities laws and limiting the power of federal courts to imply remedies." These steps "cast doubts on the courts' power to grant many ancillary remedies" (Dent, 1983: 868). When these interventions occur, they are most often negotiated remedies based on ancillary regulatory powers (see Dent, 1983) rather than on statutory authority.

Further, other regulatory agencies lack the statutory and implied powers of the SEC, perhaps indicating the intent of Congress and the willingness of the courts to grant the most extensive remedial powers to that agency charged with policing the financial relations between businesses and maintaining the fairness of the stock market (see Mathews, 1976). More clearly and widely authorized civil interventions apparently fall outside the historical limits of law in regulating corporate conduct, particularly by social regulatory agencies. Perhaps because they are older and more established, and perhaps because they are charged primarily with policing relations between businesses, economic regulatory agencies such as the Federal Trade Commission (FTC) and the SEC are also more powerful than other agencies (Coleman, 1985b; Clinard and Yeager, 1980; Farrand, 1976).

Lacking statutory strength and historical usage, the remedial powers of social regulatory agencies are poorly developed and vulnerable to corporate opposition and changing regulatory climates (Stone, 1976a, 1981). For example, the Environmental Protection Agency (EPA), an enthusiastic supporter of organizational probation, has had difficulty in making use of civil interventionist powers (Adler and Lord, 1991). The injunctive powers of the Occupation Safety and Health Administration (OSHA) are similarly limited, having been consistently interpreted to provide temporary and nonremedial relief from "imminent dangers," and then only after other alternatives have been explored (Yale Law Journal, 1982a).

Private Versus Public Interventions. Second, most civil law interventions involve non-corporate organizations. The best known cases involve school desegregation and prison litigation (see Harvard Law Review, 1965; Fiss, 1978; Horowitz, 1977; Katzmann, 1980; Easton, 1990; DeIulio, 1990), which have proliferated since the 1970s. Interventions into private organizations, such as corporations, are much rarer. Perhaps the best known corporate case is Reserve Mining Company v. Environmental Protection Agency (514 F.2d 492, 1975), in which the EPA won an injunction to curtail hazardous waste disposal.

This injunction was gained only after several years of negotiation, during which hazardous discharges continued to flow into Lake Superior (Yeager, 1991). The novelty of intervening into private organizations is at least in part due to the greater realm of privacy and autonomy granted corporations, and reluctance to challenge this autonomy. In fact, with the exception of the work of Stone (1975, 1976a, 1976b), politics-based corporate interventions received virtually no academic attention prior to 1977. Discussions of organizational interventions focused on public organizations.

Unilateral Versus Bilateral Interventions. Third, civil law interventions into corporations are frequently bilateral and business-related. The intervention in these cases is undertaken as part of a contract or informal agreement between the business and the state. Though this situation provides for state input in traditionally private organizational structures and processes, these contracts are entered into voluntarily and provide clear benefits to both parties. Examples of this include defense procurement (Stone, 1975), government loan guarantees to corporations (Turkel, 1981, 1982; Turkel and Costello, 1985), civilian nuclear power development (Turkel and Lofquist, 1991; Stone, 1975), and bankruptcies (Delaney, 1989). Criminal law interventions, on the other hand, are unilateral. Though negotiations may occur, such negotiations focus more on the terms of intervention than on the fact of intervention. Also, criminal law interventions are unrelated to the legitimate business operations of the corporation.

Positive Versus Negative Interventions. Fourth, in the remaining cases, civil sanctions against organizations are often in the form of prohibitory or preventive decrees, designed to stop an actual or anticipated harm (see Clinard and Yeager, 1980: 84-91). The best known examples of this type of legal mechanism are cease and desist orders and consent decrees, which may be refused by the corporation and which are difficult to enforce (Coffee, 1981; Henderson and Pearson, 1978). The language of these injunctions has historically been negative, stating what is not supposed to happen. This substantially limits the ability to use these sanctions to fashion positive remedial orders. In a series of cases in the 1970s, the FTC made creative use of cease and desist orders to impose affirmative conditions on corporations (Soloman and Nowak, 1980). However, there was no clear statutory authority for these orders, and their use was apparently discontinued after the regulatory climate changed (Eisenstadt, 1990).

Universal Versus Limited Scope of Interventions. Fifth, the scope of civil interventions is limited and "the jurisdiction of most regulatory agencies is not coextensive with the full range of possible corporate criminal misbehavior" (Coffee, 1981: 452; see also Geraghty, 1979). While organizational probation is available for use in all federal corporate criminal convictions, civil interventions are potentially available only for offenses that also fall within the scope of federal regulatory statutes. Even then, as the above discussion indicates, collateral civil interventions comparable in type and in legal authority to organizational probation are not always or even often available (Blakey, U.S. Senate, RFCL, 1973).

Open Versus Secret Settlements. Sixth, injunctions, cease and desist orders, and consent decrees are often private (Clinard and Yeager, 1980; Coleman, 1985b). This is central to their attraction to business for two reasons. First, private agreements protect defendants from potential civil suits by circumventing public admission of responsibility. Second, private agreements undermine the possibility for market discipline by denying stockholders and potential investors knowledge of the terms and even the fact of the settlement. Organizational probation, on the other hand, makes public the nature of the offense and the remedial action taken pursuant to conviction. In fact, notifying employees and stockholders of the offense and sentence are often conditions of probation. This facilitates civil suits and makes possible other forms of market discipline, in addition to its internal organizational implications.

Closely related to this, the use of the criminal law includes important symbolic and moral components lacking in civil sanctioning (Coffee, 1981; Mokhiber, 1988). It is widely held that the defining characteristic of the criminal law is its role as an expression of community disapproval of an act (Durkheim, 1982). The decision to pursue criminal proceedings against a corporation makes available as a controlling force public concern about corporate wrongdoing and accords with public opinion evidence of substantial concern about corporate crime (Cullen, Clark, et al., 1985; Grabosky, Braithwaite, and Wilson, 1987). To the extent they become publicly known, civil agreements have the appearance of business arrangements more than government sanctions. This perception undermines the moral force of the civil law.

Courts Versus Regulatory Agencies. Seventh, and last, the criminal courts are less subject to the types of lobbying, political pressure, and budget cuts brought to bear on regulatory agencies (Coffee, 1981). There is social scientific evidence of a long-standing close relationship between presidential politics and regulatory enforcement patterns (Moe, 1982), strengthened further by vague statutes. The deregulatory efforts of the Reagan and Bush Administrations, and their substantial effects on enforcement activities (Yeager, 1991; Schneider, 1982; Henriques, 1991; Hilts, 1991a; Lublin and Conte, 1983), provide recent and dramatic evidence of this relationship. The openness of the Regulatory Relief Task Force and the Council on Competitiveness to business pressure (Shute, 1991) is perhaps the clearest evidence of the vulnerability of regulatory agencies. The almost unrestrained wave of mergers and junk bond activity in the 1980s (Behr, 1988), followed by scandals at numerous locations on Wall Street, indicates that even the powerful FTC and SEC are subject to political pressures (see Coleman, 1985b; Vise and Coll, 1991; Corporate Crime Reporter, 1988). For example, due to substantially diminished resources and free market ideology, the FTC investigated only thirty of 2,533 corporate mergers in 1983, and issued only six injunctions (Coleman, 1985b).

Despite these numerous differences, there are close and interesting parallels between the development of civil and criminal law interventions (see Dent, 1983; Katzman, 1980; Mathews, 1976; Farrand, 1976; Henderson and Pearson, 1978; Easton, 1983; Harvard Law Review, 1965; American Bar Association, 1991), not the least of which are the parallels between the arguments of their critics and supporters (see Horowitz, 1977; Fiss, 1978; DeIulio, 1990). Concerns about organizational autonomy, judicial management, and externally introduced inefficiencies are pitted against the rationalizing potential of regulatory input, criticisms of markets and other supposed self-regulatory forces, and the belief that law violators, particularly in the most serious cases, must expect to sacrifice some autonomy in the public interest.

Subsequent Federal Probation Act Cases: Limited Organizational Reform

It is unclear how many corporations were placed on probation by the federal courts between 1971 and the supercession of the Federal Probation Act by the Comprehensive Crime Control Act in 1987. In fact, it is possible that corporations are still being sentenced to probation under this statute for offenses committed prior to November 1, 1987. The legal literature on organizational probation (Geraghty, 1979; Coffee, 1981; Gruner, 1988; Curran, 1986; Rush, 1984; Kutcher, 1981; Kahn, 1983) contains a core of approximately a dozen cases that are the subject of frequent discussion. It is clear that probation was imposed on organizations in at least two hundred other cases (Cohen, Ho, Jones, and Schleich, 1988), though these cases were not appealed and did not raise new issues or contain new uses of probation. Rather, their use of probation was primarily as a fine collection mechanism. These dozen core cases, examined below, provide interesting insights into the limitations of the Federal Probation Act.

In 1974, two notable organizational probation cases were decided. In U.S. v. J.C. Ehrlich Co. (372 F.Supp.768), the defendant was convicted of several violations of the Migratory Bird Treaty Act, which carried maximum fines of $500 per count. The court suspended all but $50 per count of this fine, and placed the defendant on five years probation. No special conditions of probation were imposed. Rather, it was stated that if the defendant was found in violation of this statute during the duration of probation it would be required to pay the remainder of the original fine in addition to facing new charges. This case is notable in that probation was used to reduce the already small penalty facing the defendant. Perhaps the court recognized that the authorized sanction was too small to be effective, and that probation would provide greater deterrence and publicity. The appeal in this case was from the Department of Justice, which favored implementation of the original fine. The use of probation was upheld on appeal on the grounds that it was clearly authorized by the FPA.

In U.S. v. Nu-Triumph, Inc. (500 F.2d 594), the defendant was convicted of mailing obscene materials. In imposing probation, the judge suspended all but $2,000 of the statutory fine of $5,000 on the condition that the defendant "not engage in the distribution of pornographic material" (at 594) during probation. Nu-Triumph was found to have violated this condition, and was required to pay the suspended fine. This led them to appeal the original sentence as vague and as a violation of the First Amendment. The latter claim was based on the court's restriction of the defendant's ability to engage in a legal activity, rather than a narrower restriction on the distribution of obscene materials. The appellate court rejected both of these claims, ruling that the defendant's First Amendment rights were not "impermissibly impinged" (at 594) and that there was a reasonable relationship between the probation conditions and protection of the public. Nu-Triumph, Inc. was required to pay $1,500 and remain on probation.

In 1976, a new usage of organizational probation, which would remain controversial in the courts for a decade (see Fisse, 1981; Stone, 1977b; Gruner, 1988), was introduced. In U.S. v. Clovis Retail Liquors (540 F.2d 1389), several New Mexico liquor stores were convicted of Sherman Act violations for price-fixing. Their sentences were suspended, and the defendants were ordered as a condition of probation to pay $233,500 to the county council on alcoholism. Citing the probation conditions authorized by the FPA, the Department of Justice appealed this sentence on the grounds that the beneficiary of this restitution was not a directly aggrieved party, as required for restitution. Monetary payments, the government argued, must be paid either to the federal treasury or to directly aggrieved parties. The Tenth Circuit Court of Appeals agreed, and remanded the case for resentencing. The argument of the defendants, who favored the sentence, that the Federal Probation Act authorized the court to impose probation "upon such terms and conditions as the court deems best" was rejected in favor of the narrower view that the possible uses of probation were limited to those expressly provided by statute. This decision seriously impeded use of organizational probation within the Tenth Circuit.

The Tenth Circuit Court of Appeals upheld this narrow interpretation of the FPA in a case several years later. In U.S. v. Prescon and VSL (695 F.2d 1236, 1982), the defendants were convicted of Sherman Act violations for bid-rigging in road construction projects. The district court suspended the authorized fines of $250,000 and $302,000, respectively, in favor of conditions of probation requiring $50,000 and $75,000 contributions to a local crime control program. The government appealed these conditions again on the grounds that the recipients of restitution were not aggrieved parties. The appeals court agreed, and remanded the case for resentencing.

Several subsequent bid-rigging cases outside the Tenth Circuit led to the same results, establishing a generally accepted narrow reading of the FPA. In U.S. v. Missouri Valley Construction

(741 F.2d 1542, 1984), U.S. v. John A. Beck Co. (770 F.2d 83, 1985), and U.S. v. Wright Contracting Co. (728 F.2d 648, 1984), appellate courts, responding to government appeals, rejected the use of probation as a mechanism for making charitable contributions or performing other community services because the beneficiaries of such actions were not aggrieved parties.[7] In each case, the argument that the court could impose those probation conditions it deemed best was rejected. The willingness of the defendant to make such payments was deemed irrelevant due to superceding statutory considerations.

In the Missouri Valley Construction case, an additional, remedial condition of probation was imposed. This condition, which required the defendant to

> adopt a policy for detecting and reporting possible bid-rigging by their employees, and ... to conduct an annual seminar on antitrust compliance, at which each of the corporations' bidding officers would be required to subscribe to a court-approved statement on corporate antitrust compliance policy (741 F.2d 1542, 1546)

was struck down without comment on the separate legality of this provision. This was one of the few cases since ARCO in which the court had the opportunity to rule on a remedial probation condition. It was this type of case that best illustrated the limitations to politics-based sanctioning imposed by FPA. Far from judicial management of an organization, the use of probation in this case

[7] For more complete discussions of the use of organizational probation to impose charitable contribution requirements, see Griffin (1983), Notre Dame Lawyer (1985), Rutgers Law Journal (1984).

sought to direct the establishment of a compliance plan and use probation to enforce this plan.

At the same time, and under similar circumstances, in the Eighth Circuit the use of probation with a charitable contribution condition was upheld on appeal. In U.S. v. William Anderson Co. (698 F.2d 911, 1982), the defendant, a construction company, was convicted of bid-rigging. The authorized fine was suspended in lieu of payment of the same amount to a charity for which executives of the defendant corporation had been separately sentenced to perform community service. An additional condition compelled the organization to create "a written policy requiring notice to the probation officer whenever corporate officers or employees think they are being subjected to pressure to participate in collusive bid rigging practices" (698 F.2d 911, 914), precisely the type of condition rejected in Missouri Valley Construction.

Interestingly, the government appealed not only the payment of the restitution to a non-aggrieved party, but also this whistle-blower condition. Their argument was that "since a corporation is but a fiction existing in contemplation of law, it cannot be subjected to conditions designed to promote rehabilitative behavior" (698 F.2d 911, 914). The Eighth Circuit Court of Appeals upheld the sentence, terming the government's argument "medieval antiquarianism." The Court went on to state that the assertion that

> decisionmaking processes cannot be affected, in the area of collusive or monopolistic pricing or other illegal restraints of trade, by rehabilitative measures and

> punitive sanctions is an argument divorced from reality (698 F.2d 911, 914).

Further examination of this decision reveals that the Appeals Court took seriously the juristic person standard, imposing on William Anderson Co. the same legal responsibilities of individuals.

In the William Anderson Company case, the Department of Justice (DOJ) went beyond reliance on the aggrieved party argument that had been widely successful in the past. In part, this resulted from a preference for fines, which are easily administered and conducive to negotiated settlements. More importantly, the DOJ's position reflected an ideological expression of preference for protecting organizations from legal interventions. This involves a rejection of the organizational process model in favor of a rational actor conception of organizations and the accompanying market-based sanctions. The emphasis in its prosecutions on market-based sanctions and the inattention to or rejection of alternative sentences by the Department of Justice during the Reagan Administration was largely consistent with their approach to organizational sentencing reform efforts by Congress and the Sentencing Commission during this time, as subsequent chapters document.

Also in 1982, in the case of U.S. v. Mitsubishi International Co. (677 F.2d 785), the Ninth Circuit Court of Appeals took a similarly broad approach to the power of district court judges to fashion organizational probation conditions. In this case, the defendant was convicted of multiple counts of violating the Elkins Act (32 Stat. 847), which regulates interstate trade. The statutory maximum fine of $20,000 per count was imposed. All but $1,000 per count of this fine was suspended by the court on the condition that Mitsubishi loan an executive to the National Alliance for Business for one year to assist in the development of community programs for ex-offenders and donate $10,000 to the same program.

Mitsubishi appealed this sentence. The appellate court upheld the original sentence, citing the concern of the sentencing judge that sole reliance on fines made it possible for corporate defendants to "just write a check and walk away" (677 F.2d 785, 788). However, in addressing the aggrieved party issue, the appellate court stated that if the defendant believes the conditions of probation are more punitive than the original sentence, "they have the option to avoid them by paying the fines" (677 F.2d 785, 789). As a result, there is made clear within this case the unresolvable tension, characteristic of organizational probation under the FPA, between the effort to impose some sentence other than a fine and the limits on meaningful alternatives.

Finally, in U.S. v. Danilow Pastry (563 F. Supp.1159, 1983), several wholesale bakeries were convicted of price-fixing after the government uncovered evidence of a lengthy price conspiracy in the New York City wholesale baking industry. Each corporation was fined amounts ranging from $10,000 to $100,000. These fines were then suspended, and each corporation was required to make weekly donations in specified dollar amounts of fresh baked goods to court designated community organizations. The government appealed on aggrieved party grounds. The Court of Appeals upheld the District Court, stating that the use of probation in this case was consistent with the rehabilitative intent of the FPA and was reasonably related to the treatment of the defendant and protection of the public. Recognizing the existence of a deterrence trap, the appellate court also stated that "a fine substantial enough to achieve appropriate measure of deterrence would have bankrupted the corporate defendants causing widespread unemployment and economic damage" (563 F.Supp. 1159, 1160). As a result of these limitations, the court argued that deterrence and rehabilitation should be sought through publicity and through the continuous reminders of wrongdoing provided to executives by weekly contributions.[8]

In its comprehensive database of federal organizational criminal convictions from 1984 though 1987, the United States Sentencing Commission documents that though probation was imposed in 18% (of 1,283) of all cases, in most of these cases (no precise figures or details of cases are reported) "probation is meant simply to extend the period of time within which the defendant may make payments to satisfy the fine or restitution" (Cohen, Ho, Jones, and Schleich, 1988: 7; see also Cohen, 1989; Coffee, Gruner, and Stone, 1988). In Commission-collected data from 1988, probation was again imposed in 18% (59 of 328) of cases (Cohen, 1991d). In these 59

[8] Interestingly, in this discussion, the court favorably cited Geraghty's (1979) article on structural remediation through organizational probation. Perhaps the limitations of the FPA prevented a fuller implementation of Geraghty's ideas.

cases, however, only 23 (7.1% of total) involved some sort of supervision. Most of these cases were environmental, the EPA being a major supporter of organizational probation. Also, most defendants placed on supervised probation were small corporations. None were publicly-traded corporations. In the other cases, probation was either unsupervised or used as a fine collection mechanism (Cohen, 1991b). Successful uses of remedial organizational probation are not reported by these authors or in any other discussion of FPA cases (Gruner, 1988; Curran, 1986; Rush, 1984).

The specific cases discussed in this chapter and the aggregate data collected by the Sentencing Commission suggest a clear tendency for organizational probation, at least under the Federal Probation Act, to be used against smaller, private corporations. The ARCO and Mitsubishi cases are the only exceptions to this discussed herein. Though the significance of this is difficult to interpret in and of itself due difficulties in determining whether organizational probation under the FPA is more or less punitive than fines, when combined with the fining data, there is a fairly clear tendency toward disproportionate criminal sanctioning of smaller corporations. For example, Adler and Lord report that of all the corporations criminally prosecuted under federal environmental laws since 1984, "only six percent were among the nation's 500 largest industrial corporations in 1989. In fact, only 1.6% of the Fortune 500 have ever been prosecuted for an environmental violation" (1991: 796).

Assessing Organizational Probation Under the Federal Probation Act

These rulings make clear the numerous limitations on organizational probation and on state capacity more generally under the Federal Probation Act. Though this statute authorizes courts to impose probation under the circumstances it "deems best," the more precise language of the FPA provides narrow circumstances for its use. It was these narrower circumstances which most often served as the basis for deciding cases. Though trial courts frequently pointed out that the three listed conditions of probation should not be read to exclude other possibilities, such other possibilities frequently met with the opposition of the defendant, the Department of Justice, or the court of appeals. Further, the status of probation as a suspended sentence required the courts to impose less than the maximum fine when placing the corporation on probation[9] and prevented the courts from imposing conditions that were or were perceived by the defendant to be harsher than the original sentence.

As a result, courts were confronted with a confounding situation. Efforts to impose alternative, and invariably lower, monetary sanctions met with three possible outcomes. They could be opposed by the government on the grounds that the restitution recipients were not aggrieved parties and that payment should be made

[9] In U.S. v. Interstate Cigar Company (801 F.2d 555, 1986) the First Circuit Court of Appeals overturned a probation sentence on the grounds that the statutory maximum fine of $1,000 was not reduced when the defendant was placed on probation and required to make monthly sworn statements of law compliance. No other probation conditions were imposed. One of the judges who heard this appeal was Stephen Breyer, who was at the time also serving as a Commissioner on the United States Sentencing Commission.

to the federal treasury. They could be opposed by the defendant also on the nonaggrieved party grounds, in which case the defendant would likely be ordered to pay the original fine. Or, they could be implemented with the hope that the increased publicity associated with alternative sanctioning provided deterrence not otherwise available. Appeals made the third possibility unlikely.

Where non-monetary alternatives were sought, the options were fewer and less complicated. The Federal Probation Act states that restitution and reparation are to be made only to aggrieved parties. Interpreted broadly, this may include the community, and therefore seems to make possible conditions requiring the organization to make changes designed to reduce the likelihood of future harm to those parties. However, such conditions were required to meet burdensome standards: their costs could not exceed the originally imposed fine, they had to bear a reasonable relationship to the offense, they had to provide reparation to aggrieved parties, and they had to be preferable to fines to the defendant. The situation to be expected from this, and the situation that resulted, was that organizational probation became a mechanism for overseeing the collection of fines. Given that these fines were invariably lower than those available when probation was not used, it is not surprising that the government was more likely than the defendant to file an appeal.

Without statutory status as an independent sentence, and without clear statements of the types of circumstances in which it could be imposed and the types of conditions to accompany its imposition, little more than unsystematic, market-based use of organizational probation was possible. Though the relative frequency with which probation was imposed on corporations may indicate a desire on the part of the courts to do more than simply impose fines, corporations are so able and willing to appeal unfavorable sentences that such efforts cannot be expected to bear fruit without statutory support for meaningful alternatives to fines.

In ARCO and in other cases following this precedent, federal judges quickly confronted the limitations on judicial extension of the criminal law to corporations through the juristic person standard. Again, though judicial interpretation and the juristic person standard were integral to the development of corporate criminal law, fuller extension of the criminal law to corporations required the formation of an organization-specific criminal law. A statutory statement, such as that found in 1 U.S.C. Section 1 extending through a legal fiction the entire body of criminal law to corporations, does not fully substitute for specific statements within each statute that corporations are to be included in the scope of that statute. In the same way, the Fourteenth Amendment only slowly, imperfectly, and not without setbacks, extends the Bill of Rights to states. In this context, the work of the Brown Commission regarding probation, though seemingly of little consequence at the time, was essential to the development of organizational probation. A new statutory foundation was needed, and the Brown Commission made this possible by placing this issue on the Congressional agenda.

Conclusions: The First Steps on the Road to Reform

The early legislative and judicial efforts to develop organizational probation reveal both the limitations of the individual-based criminal law for responding to organizational crime and the means to move outside these limitations. The cases discussed above make it clear that the Federal Probation Act could not serve as an effective basis for organizational probation. Once the issue was raised, the federal courts were quick to rule that organizations could be placed on probation. Their ruling that probation was a supervisory rehabilitative mechanism equally applicable to individuals and organizations was equally quickly shown to be false in practice. The FPA was too full of individual-based assumptions, and the differences between organizations and individuals are too great, to make effective use of the FPA in rehabilitating organizations. A statute designed to provide a second chance to less serious individual offenders is profoundly lacking as a mechanism for remediating the structural problems of organizational offenders.

This view contrasts sharply with the argument that the existing legal apparatus is sufficient to control organizational crime (Cullen and Dubeck, 1985; Business Roundtable, 1988). Taking this conservative position, one witness before Congress (Givens, U.S. Senate, RFCL: 1556), asserted that

> there would seem to be no reason why a corporation as well as an individual could not be placed on probation in an appropriate case. There would thus be no reason for any distinction whatever in the Code between sanctions for the two types of defendants (the physical fact that organizations cannot be imprisoned requires no statutory declaration of this truism).

The error in this logic is in confusing the statutory availability of organizational probation under the FPA with the adequacy of that statute for placing organizations on probation. The experience in the courts indicated that without affirmative language for organizational probation, courts, under the pressure of appeals from business defendants and the government, retreated to a minimal use of organizational probation.

The Brown Commission provided the way out of this situation, though only in a preliminary fashion. By authorizing separate sanctions for individuals and organizations and by providing, at least in the case of fines, different conditions for the imposition of these sanctions, the Brown Commission established the foundation for an organization-specific criminal sentencing law. Further enhancement of state capacity depended on the development of separate, organizationally-relevant conditions of probation, an issue simply not addressed by the Brown Commission. The federal courts, though making some efforts to construct probation conditions uniquely responsive to organizations, were hindered by statutory limitations and government and defendant appeals. It was up to Congress to determine whether and how the statutory foundation for organizational probation would develop.

> If the penalties provided by a specific statute are thought inadequate to bring about compliance, the proper course is to increase the penalty .... In our view, the problem underlying corporate criminal sanctions is not that new and different sanctions are needed but that the ones on the books need prompt, energetic, and innovative enforcement.
>
> National Association of Manufacturers[1]

Chapter Four

CONGRESSIONAL CONSIDERATION OF ORGANIZATIONAL PROBATION, 1971-1984

Parties facing increased legal controls typically argue that existing law is adequate, or even excessive. At most, they argue that greater use should be made of available law through expanded enforcement efforts. However, in the present case, the application of the criminal law to organizations has been piecemeal and the range of criminal laws to which corporations are subject is often unclear. In arguing in the above statement for vigorous use of existing corporate criminal sanctions, the National Association of Manufacturers (NAM) was, at the time, arguing in favor of fines and against publicity and notice to victims. Following the recommendations and the emphases of the Brown Commission, it was these two sentencing innovations that

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[1] From written comments submitted to the Senate Judiciary Committee during Reform of the Federal Criminal Laws (RFCL) Hearings, March 20, 1972.

initially drew public response and business opposition. In fact, in the lengthy comments from which this statement is drawn, the NAM makes no reference to organizational probation. The availability and implications of this sanction are unrecognized.

A closer reading of the Brown Commission report and a closer eye on the actions of the Federal courts would have revealed to the NAM and others that the status quo it was arguing in support of was changing in ways potentially, though remotely, threatening to business. The Brown Commission had brought to the attention of Congress that "the books" to which the NAM referred, included the Federal Probation Act, which could be read to provide for the use of probation against corporate criminal defendants. The Brown Commission supported this novel reading and recommended statutory changes to make explicit the availability of organizational probation. However, because of the novelty of this sanction and the failure of the draft statute proposed by the Brown Commission to distinguish organizational and individual probation conditions, the potential organizational applications of probation were not immediately recognized by participants in the Congressional criminal code reform debate. Once these applications began to be considered, organizational probation moved off the reform agenda and into the reform debate as a remedial organizational sanction.

This chapter traces Congressional consideration of organizational probation from 1971 to 1984. Doing so involves analysis of the bills in which organizational probation provisions were contained, the hearings in which these bills were discussed and amended, and the broader political, social, and legal contexts in which organizational probation was considered. The federal criminal code reform effort was an enormous task, encompassing the entire range of criminal justice issues. As a result, consideration of any single issue by Congress was limited. Organizational probation received little independent attention. This makes it difficult to assign theoretical significance to actions affecting the development of organizational probation; so often these actions were part of a response to a much larger package of issues. This task is made more difficult by the recognition that the full statutory meaning of organizational probation has only very recently emerged.

Within the Congressional debate, however, efforts to strengthen or weaken the capacity of Congress and the Sentencing Commission to legislate in this area are identifiable. Advocates of stricter legal controls on corporations faced strong resistance from the business and legal communities. This resistance was effective in limiting the scope of change in the criminal code and in weakening the mandate provided to the Sentencing Commission in the area of corporate crime. In fact, it was argued by some (Gelacak, 1991; R. Rogers, 1991) that Congress did not intend for the Sentencing Commission to develop sentencing standards for organizations. It is the conflict over the scope of state capacity to legislate in the area of corporate crime that is theoretical focus of this chapter. Examining this conflict provides the basis for assessing the subsequent development of organizational probation by the United States Sentencing Commission.

Statutory "Developments"

If changes in the language of proposed legislation are taken as a measure of legislative productivity, Congress produced little in regard to organizational probation in the thirteen years in which this sanction was considered. In its recommendations to Congress, the Brown Commission established probation as an affirmative sentence, and provided for organizational probation for misdemeanors and felonies, for periods of one to five years. The only mandatory condition of probation was avoiding all offenses during probation. Thirteen discretionary conditions, generally rehabilitative in intent and all developed for individual offenders, were also provided. Most of these conditions were clearly inapplicable to organizations. Among them were maintaining suitable employment and undergoing mental health counseling. Also included were conditions with arguable organizational applications, such as paying restitution or a fine, receiving visits by a probation officer, and satisfying other conditions reasonably related to rehabilitation.

The first Congressional bill introduced in response to the Brown Commission report, S.1 (1973), did nothing to further the development of organizational probation. In fact, though S.1 did take the novel step, not repeated in any subsequent legislation, of introducing an organizational equivalent to imprisonment,[2] it did not provide for organizational probation. The second criminal code reform bill, S.1400, introduced twelve weeks later, copied with only minor changes the language of the Brown Commission regarding organizational probation. Separate individual and organizational sentences, including probation, were authorized. Again, though, none of the conditions of probation applied explicitly to organizations, and many did not apply even implicitly. Nearly all subsequent bills included organizational probation provisions very similar to those in S.1400.[3]

Finally, the Comprehensive Crime Control Act of 1984 (P.L.98-473, 98 Stat. 1987), establishes probation as an independent, affirmative sentence. The statutory distinction between individuals and organizations and the separate sentences authorized for these offenders by the Brown Commission also became law. Further, this legislation authorizes use of organizational probation for felonies and misdemeanors, for terms ranging up to five years. The only mandatory conditions of probation are avoidance of all criminal conduct while on probation and payment of a fine, restitution, or notice to victims. None of the twenty discretionary conditions of probation pertain explicitly to organizations, except one which

[2] In the "Authorized Sentences" section of S.1, it is stated that "The court may: (1) sentence him to imprisonment or, if the offender is an organization, to suspension of the right to affect interstate or foreign commerce."

[3] The few exceptions to this are discussed in detail throughout this chapter.

states that organizational probation cannot be used to limit the right of an organization to engage in any specific business. A few conditions may be read to include organizations, though notice to victims and community service are the only ones of these not provided by the Brown Commission. Overall, the language of these conditions remains oriented overwhelmingly toward individuals.

Even at the end of its work, Congress left organizational probation unclearly defined and statutorily incomplete. This raised at least as many questions about this sanction and its uses as it answered, ensuring that debate of this issue would continue well after the passage of sentencing reform legislation. As this chapter details, despite the striking similarities between the organizational probation provisions of the first and last sentencing reform bills Congress considered, Congress was not inactive on this and closely related corporate crime issues. Rather, alternative organizational probation provisions were considered. The concept of a sentencing commission was introduced, debated, and implemented. Efforts were made to shape the subsequent development of organizational probation by structuring the Sentencing Commission's lawmaking capacity in this area. Finally, between 1971 and 1984, Congress provided the forum for the most diverse and sustained discussion of criminal justice policy toward corporations in American history. Though this debate gave primary attention to culpability and criminalization, its consideration of sentencing formed the basis for the mandate given to the United States Sentencing Commission.

In addition to these contributions, during Congressional consideration of criminal code reform legislation, the meaning and level of understanding of organizational probation and the potential significance of its development underwent important changes. Organizational probation came to be seen by many witnesses as a politics-based sanction, a status it did not attain under the FPA. Also, probation was established as an independent, affirmative sentence. As a result of these changes, the development of organizational probation elicited growing business and legal opposition. However, this opposition was restrained by persisting misunderstandings, more immediate statutory concerns, and the conviction of business that organizational probation would not develop into a commonly available organizational sanction.

Minimal availability and minimal intervention were anticipated and deemed appropriate by all but a handful of participants in the Congressional debate on organizational probation. Public interest groups were supportive of organizational probation, but were not particularly active. Regulatory agencies were inactive. As with the Brown Commission, it was primarily Congressional staff members who sought to develop organizational probation, or at least assure the statutory basis and state capacity for its later development by the Sentencing Commission. In the end, just as Congress had created the Brown Commission to initiate legislative consideration of criminal code reform, to resolve the sentencing debate it created the United States Sentencing Commission.

The Legislative Debate Begins:
Responding to the Brown Commission Report

For the Brown Commission, with its twelve members, infrequent meetings, and three-year term limit, the effort to draft a comprehensive federal criminal code was a formidable task. Though this effort was ultimately successful, thanks in large part to the earlier work that had been done in drafting the Model Penal Code, the proceedings of the Brown Commission were nonetheless highly politicized and sometimes contentious (Blakey, 1991). When this same task was undertaken by Congress, with its 535 members, constant electoral pressures, the burden of making law rather than advising lawmakers, and unlimited time to debate each issue, tremendous additional difficulty was added to the task. Despite the recommendations of the Brown Commission, efforts by Congress to draft statutes pertaining to such issues as the death penalty, abortion, obscenity, civil rights, corporate criminal liability, and drug offenses, and to integrate these statutes into a criminal code reform package able to win Congressional support, were certain to strain the limits of federal lawmaking.[4]

[4] A few figures provide a sense of the size of this reform effort. The Congressional criminal code reform debate lasted thirteen years. During this time, thirty-eight bills including criminal sentencing reform provisions were introduced. Six sets of hearings were held, four in the House and two in the Senate, over 123 separate days. During this time, more than 700 witnesses testified, thousands of additional exhibits were submitted into the record, and a total of over 25,000 pages of records were created. For a more detailed elaboration of the documentary record of these hearings, see Appendix A.

Just in the area of corporate crime, a range of issues had to be considered in drafting criminal code reform legislation. These issues were of three types. First, the extent of criminalization of corporate conduct had to be established. Debate on this issue centered on whether or not regulatory violations should be subject to criminal sanctions, a direction in which courts were increasingly moving but which the Brown Commission had opposed. Second, the standards for establishing corporate criminal liability also required attention. The major questions in this area were the appropriateness of strict and vicarious liability for corporate offenses, particularly for agents and employees acting outside organizational policies. The courts had upheld unrestricted organizational liability for illegal actions of employees (Brickey, 1984). The ALI, business, and other groups sought limits on such liability. Also considered was a reckless endangerment provision that would have created organizational criminal liability in cases of knowing disregard for safety on the part of management. Third, the types and ranges of available and appropriate sentences also required consideration. This chapter does not attempt to explore the full scope of Congressional consideration of corporate crime.[5] Rather, attention is concentrated on sentencing, and, more particularly, on organizational probation.

[5] Such exploration is certainly warranted, and remains to be done. In addition to the information provided in Appendix A, for discussion of Congressional consideration of corporate crime issues, see Frank, 1984b; Cohen, 1973; Fairchild, 1981; Gruner, 1988a; Hauptly and Rider, 1979; Maddock, 1974; Melone, 1983, 1985; Melone and Slagter, 1983; and Scheibla, 1980.

As indicated earlier, the issue of sentencing received less attention from Congress than did other corporate criminal issues. There were two primary reasons for this. First was the practical procedural point that sentencing is the last stage in criminal prosecutions. As a result, given limited time and resources, this issue received less attention as interest groups clashed instead over what should be defined as crime. Former House Criminal Justice Subcommittee Counsel Thomas Hutchison made this point in describing criminal code construction from the perspective of Congress:

> The fights were about the extent of liability, not about the punishment. Most people were focusing on that [liability] and didn't feel the need to focus on the punishment aspect. First you make it a crime and then you worry about the punishment if what you've prescribed isn't adequate (Hutchison, 1991).

The second reason for the relative lack of consideration given to sentencing was the early introduction into the Congressional debate of a proposal to create a sentencing commission to develop sentencing guidelines. Congress decided to delegate this difficult task to an independent commission for expert consideration.

The First Congressional Hearings

Beginning just one month after submission of the Brown Commission's final report, Congress began hearings on its recommendations for criminal code reform. The first set of hearings, referred to as the Reform of the Federal Criminal Laws (RFCL) hearings, began on February 10, 1971, before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee. It was quickly apparent that the Brown Commission's recommendations were the source of considerable controversy. This was true despite Chairman Brown's subsequent statement that "the Commission wanted to avoid controversial areas of the criminal law," reasoning that "these areas should be developed in separate legislation" so that they did not interfere with the important task of recodification (quoted by Cohen, 1973: 538).

Opposition to Changing Corporate Criminal Sanctioning. From the perspective of business, the sources of this controversy were proposals in the Brown Commission report, particularly those related to corporate criminal liability and sentencing, that would make explicit in the criminal law the standards for prosecuting and sanctioning corporate crime. In making the argument that business offenses were more properly subject to the civil law, Charles S. Maddock, chair of the ABA's Section on Corporation, Banking, and Business Law, and a prominent participant in Congressional criminal code reform efforts, stated that

> [w]e recognize that business and businessmen have no special claim to privilege under either the civil or the criminal law. They are, however, entitled to the same consideration and even-handed treatment available under our system of law to all segments and individuals in our society (U.S. Senate, RFCL, 1972: 1632).

The argument for equal application of existing law suggests the substantial discrepancy between equity and legal equality for individuals and organizations. The criminal law was written largely for individuals, and translated only imperfectly to organizational applications, a situation benefitting organizations. Developing a more organization-specific criminal law would promote legal equality by diminishing the conceptual and legal barriers to application of the criminal law to organizations.

Efforts toward this end, through expanded use of criminal prosecutions of corporations where deemed appropriate and expanded use of alternatives to fines, met with resistance during Congressional hearings. Until this time, corporations had only rarely been subject to the criminal law (Coffee, 1991; Clinard and Yeager, 1980). In the area of sanctions, controversy centered on the notice to victims and adverse publicity provisions recommended by the Brown Commission. These provisions were described as "onerous," "vague" (U.S. Senate, RFCL, 1972), "retrogressive" (U.S. Senate, RFCL, 1975), and, most often, simply unnecessary. However, the most notable feature of the discussion of organizational probation was the almost complete lack of controversy. Due to a narrow reading of the Brown Commission report, the absence of organization-specific probation conditions, difficulty in conceptualizing politics-based sanctions, and the absence of actual cases to suggest a broader reading, the introduction of organizational probation into this debate was slow. The Brown Commission report and early Congressional hearings reflect no particular concern or even perceived novelty regarding organizational probation. The task of putting some meaning and legislative direction into the probation provisions provided by the

Brown Commission remained for subsequent legislative and judicial parties.

George W. Liebmann, a private attorney and a published critic of the Brown Commission (Liebmann, 1970), was the third witness to appear before Congress and the first to testify regarding corporations. His testimony typifies in both substance and tone the business position at the time, and therefore provides insights into the prevailing business interpretations of the implications of the Brown Commission's organizational sentencing provisions. Liebmann was strongly, often hyperbolically, opposed to the alternative sanctions proposed by the Brown Commission, particularly publicity and notice to victims. He based his opposition on two points. First, as a general principle of criminal law reform,

> novelty should be avoided in the preparation of criminal codes. It is fashionable in some quarters to pronounce that the law, and even criminal law, is the sharp cutting edge of social change. I do not think this is so except in totalitarian states (U.S. Senate, RFCL, 1972: 121).

In his spoken testimony, Liebmann extended this point by stating that he opposed "undue experimentation with untested definitions .... [which] may very well lead to some quite unintended consequences" (U.S. Senate, RFCL, 1972: 118) during enforcement.

Liebmann's second point was directed against fines designed to disable corporations determined to be criminal enterprises. It may also be read as a more general indictment of judicial interventionism and politics-based sanctioning:

> it is true as Dean Francis Allen has warned, that "the courts are well adapted to weigh the competing claims of individual litigants but are poorly equipped to resolve broad issues of policy involving, for example, the reallocation of resources among large social groups or classes".... One can agree that some stiffening of present corporate fine levels is required while considering that measures should be avoided which give individual federal district judges a life and death power over whole industries, whatever the abstract appeal of the provisions (U.S. Senate, RFCL, 1972: 123-124).

Though neither of these statements refers to organizational probation, they express strong opposition to alternative corporate sanctioning, whatever its form. That this opposition was based on a rejection of legal innovation and judicial activism, both of which characterize organizational probation, indicates that the implications of organizational probation were not at the time recognized by Liebmann.

Even the ABA, which through its Antitrust and Corporation, Banking, and Business Law Sections was the leading pro-business voice throughout the first phase of the Congressional hearings, was initially unclear about the meaning and potential applications of organizational probation. While taking a strong stand against publicity and notice to victims, saying they "appear to be wholly unnecessary, wholly punitive, and suggest a tendency toward derogation of organizations and their officials" (U.S. Senate, RFCL, 1972: 1639), Charles Maddock took a much narrower approach to organizational probation. In fact, his only reference to probation during the hearings on the Brown Commission report was that "[n]o court should have the power to prohibit an offender who is on probation from seeking work with a corporation" (U.S. Senate, RFCL, 1972: 1640). Given his subsequent statements of strong opposition to organizational probation, it was clear that the ABA did not yet read the probation provisions of the Brown Commission report to apply to corporations as actors. The same was true of Richard R. G. Hobson, Chairman of the Corporate Law Committee of the Virginia Bar Association. Though describing his organization as "shocked" at the excessiveness and anti-business bias of the corporate crime provisions of the Brown Commission report, Hobson made no mention of organizational probation (U.S. Senate, RFCL, 1972: 1652-1663).

Support for Expanding Corporate Criminal Sanctioning. The first witness to develop the politics-based implications of organizational probation was Alan Miles Ruben, a law professor at Cleveland-Marshall College of Law. Professor Ruben was a former student of Louis Schwartz and assisted the prosecution during the electrical price-fixing conspiracy trials in the early 1960s (Ruben, 1991). In testimony to Congress in March 1972, Professor Ruben began by discussing the organizational origins of corporate criminal conduct. As part of this discussion, he stated that

> as organizations become larger and more complex, decisional responsibility is diffused and it becomes increasingly difficult to single out the individuals who have authorized the culpable acts .... Employees at the operational level of the hierarchy, even without direction or approval from their superiors ... manage to get the message as to what is required of them. They tend to be supervised not so much as to the means used to accomplish objectives as they are with respect to failure

> to produce desired results (U.S. Senate, RFCL, 1972: 1663-1664).

These comments marked a sharp departure from traditional rational actor assumptions that dominated discussion of organizations.

Following from this theoretical position, after speaking in support of higher fines and publicity, Ruben turned to the issue of organizational probation. He identified this as a potentially effective rehabilitative sanction. However, he noted that while "[t]he proposed code provides that an organization convicted of an offense may be sentenced to probation," the available conditions of probation were not relevant to organizations (U.S. Senate, RFCL, 1972: 1665). To remedy this, Ruben proposed a number of organizational-specific conditions of probation, including the presence of a probation officer at corporate meetings, court review of corporate records, court access to corporate premises for inspection purposes, and "the development and implementation by the corporation of an 'affirmative compliance policy and program'" (U.S. Senate, RFCL, 1972: 1666).[6] He went on to explain that supervision in such cases could be performed by regulatory personnel rather than regular probation officers, and could be charged to the defendant. In support of this approach to organizational probation, Ruben cited a federal case from Ohio (<u>U.S. v. Cleveland Electric Illuminating</u>

[6] These conditions are remarkably similar to conditions later considered and adopted by the United States Sentencing Commission.

Company, 1971), decided soon after the ARCO case, in which a corporation was placed on probation.

Under questioning by Senate Criminal Laws and Procedures Subcommittee Counsel Robert Blakey, Ruben discussed the problems with reliance on fines and the need for alternative organizational sanctions. Among these comments, he stated that organizational probation provided "great hope" as such an alternative (U.S. Senate, RFCL, 1972: 1674). Senator Hruska responded to this by asking whether the imposition of probation on a corporation did anything more than "add a little frosting" to the reputation of the judge as being strict (U.S. Senate, RFCL, 1972: 1675). Ruben responded that it did, particularly as a mechanism to ensure that necessary organizational changes were carried out. Hruska said nothing further on the issue. It turned out that this was one of the few times organizational probation was publicly addressed by a member of Congress. This issue remained mostly below the surface, pushed and pulled by the larger debate on corporate crime and protected to a considerable extent by the comprehensiveness of the reform effort.

In a recent interview, Professor Ruben stated in regard to Congress' response to his comments on organizational probation that he "didn't detect in my testimony any sort of responsive accord on the matter or that anyone wished at the time to pursue it. I just don't think it was high on the agenda" (Ruben, 1991). When asked to explain the apparent disinterest of business in organizational probation, particularly in light of the potential threats to corporate autonomy it posed, Ruben pointed out that

> there was no signal that the Senate was particularly interested in pursuing the idea [of organizational probation]. And I'm sure their lobbyists kept them well informed as to what the bills were ultimately going to look like. And my guess is that they weren't signalled that there was going to be any kind of developed probationary plan with monitors and so on in the corporate boardroom. There simply wasn't any expectation that there would be any significant development in this area (Ruben, 1991).

Rather, the Brown Commission and Congress indicated their interest in the market-based notice to victims and publicity provisions of the organizational sentencing recommendations, and business responded accordingly. When asked to explain the inattention of Congress to organizational probation, staff members from the House and Senate identified a determination on the part of Congress to let the courts work out the operational details of organizational probation (Summitt, 1991; Blakey, 1991; Hutchison, 1991).

Two months after Ruben's testimony, in May 1972, public interest lobbyists Ralph Nader and Mark Green, well-known advocates of increased government control of corporations, testified on behalf of the Nader-founded Corporate Accountability Research Group. In their testimony, which focused on antitrust offenses, they spoke in support of increased corporate sanctioning. However, they made no mention of organizational probation, leaving it uncertain whether they recognized the potential implications of this sanction. Instead, they focused on the importance of increased fines, publicity, and individual criminal prosecutions. It is also interesting to note that they took a rational actor approach to organizational crime, stating that antitrust "violations are neither spontaneous nor ad hoc, but are carefully planned out by intelligent people weighing the benefits and risks" (U.S. Senate, RFCL, 1972: 3010).

It is clear that with the exception of Professor Ruben, the potential remedial and interventionist implications of organizational probation were undeveloped and widely unrecognized at this point. As a result, business did not express opposition to this sanction and public interest groups, who by this time were active in national efforts to expand legal controls of corporations (see Nader and Green, 1973), did not express support for it. The statutory basis of organizational probation was not yet adequately developed. Without this foundation, the gap between probation as commonly understood and probation as an interventionist organizational sanction was too great to pose a threat to business or provide a promise to public interest groups. Despite, and to a certain extent because of, this inattention, it was Professor Ruben's conceptualization of organizational probation that was most closely realized in the final guidelines promulgated by the United States Sentencing Commission.

The First Legislation: Emergence of the Brown Commission Minority

On January 4, 1973, two years after the submission of the Brown Commission report, the first federal criminal code reform bill was introduced in Congress. Indicating the importance placed on the

Criminal Justice Codification, Revision, and Reform Act of 1973, this legislation was numbered S.1 (119 Congressional Record 92). Its sponsors were Senators McClellan (D-AR), Hruska (R-NE), and Ervin (D-NC), all former members of the Brown Commission who usually found themselves together in the conservative minority in the Commission's many 9-3 votes (Gillers, 1976). Indicative of the opposition of its sponsors to the recommendations of the Brown Commission, S.1 took a substantially different approach to criminal code reform.

The corporate sentencing provisions of S.1 were most notable for their exclusion of explicit references to the types of sentences authorized for individual and organizational offenders, an important innovation of the Brown Commission used in every subsequent criminal code reform bill. Rather, the term "him" was used throughout the sentencing provisions, thereby reintroducing the statutory confusion that had historically hindered the application of the criminal law to corporations. The only exception to this was the imprisonment provision of S.1, which included an explicit organizational analogue to imprisonment (see Millspaugh, 1990).[7] The probation and fining provisions contained no mention of organizations, and only generic individual probation provisions were provided.

[7] The idea of imprisoning a corporation by suspending its right to engage in commerce can be traced at least to Richberg (1906). When originally presented, this proposal provoked a debate (Judson, 1906; Richberg, 1907) that largely parallels and prefigures the current debate between individual criminal liability and organization-specific sanctions.

After extensive examination of the Brown Commission report (Frank, 1984b; Gainer, 1991), the Justice Department, with the support of the Nixon White House drafted S.1400, the Criminal Code Reform Act of 1973. This bill, introduced on March 27, 1973, also by McClellan and Hruska (119 Congressional Record 9634), returned to the form though not the content of the Brown Commission report by clearly distinguishing between individuals and organizations in its sentencing provisions. Fines, probation, and notice to victims were authorized for organizations. The fines could range up to $100,000 or twice the loss or gain, marking a substantial upward departure from past practice. However, the organizational probation conditions remained undeveloped. Due largely to concerns about civil liberties and excessive punitiveness raised by liberal opponents to these bills, neither of these bills was reported out of the Subcommittee on Criminal Laws and Procedures (see Schwartz, 1977; and Gillers, 1976, for discussions of these bills).

In the House of Representatives, two criminal code reform bills were also introduced during the Ninety-Third Congress. A group of fifteen Republicans co-sponsored H.R. 6046, the companion bill to S.1400, introduced on March 22, 1973 (119 Congressional Record 9066). Representatives Kastenmeier (D-WI) and Don Edwards (D-CA), both of whom served on the Brown Commission and were part of its liberal majority, introduced H.R. 10047 on September 5, 1973. This legislation was modeled closely on the Brown Commission report. No action was taken on either of these bills. Rather, from the beginning of the Congressional criminal code reform process, and continuing throughout most of its thirteen year history, the House was reluctant to consider comprehensive reform legislation. A more incremental approach, in which reform proposals were introduced in separate bills rather than in comprehensive legislation, was favored. The opposing approaches of the House and Senate created considerable conflict.

An explanation of the House of Representatives' approach was provided in a House Criminal Justice Subcommittee report written in 1978. This report stated that

> the federal criminal justice system is not on the verge of collapse; there is no crisis, or impending crisis, which makes it imperative that the Congress restructure, in some manner, the entire Federal criminal justice system. Failure to enact ... legislation will not have dire consequences for federal law enforcement and will not endanger the citizenry (U.S. House of Representatives, 1978: 35).

As a result of this position, most legislative activity on criminal code reform and attendant issues, including corporate sanctioning, took place in the Senate. In fact, the House did not even hold hearings on criminal code reform until 1977. The House Judiciary Committee did not vote on criminal code reform legislation until 1980. The full House did not vote on such legislation until 1982.

Hearings on S.1 and S.1400. When Senate hearings on S.1 and S.1400 opened in 1973, the ABA resumed its leadership position on business issues. It declared the corporate crime provisions of these bills "horrendous" (quoted in Cohen, 1973: 535), largely on the grounds that they established statutory standards that criminalized regulatory offenses and defined the scope of corporate criminal liability. Mark Crane of the Antitrust Section of the ABA was the first witness to address corporate sanctioning issues during these hearings. After stating the ABA's opposition to restitution and double damage fines, he turned to the issue of organizational probation. Signalling the inattention of the Brown Commission and Congress to this issue, and suggesting the need for clarification of the operations of organizational probation, he recommended that

> [p]robation is historically something imposed on people, not corporations .... The principal problem I have with it is that the standards set forth don't apply. For example, a court can't sentence a corporation to support his family (U.S. Senate, RFCL, 1973: 5593).

Crane also pointed out that no provisions had been made for making available competent probation officers for corporate cases. Given these problems, and the availability of injunctive remedies, civil sanctions obviated the need for organizational probation.

These comments provoked an exchange with Subcommittee Counsel Blakey, who noted that there were conditions of probation available in S.1400 that could be applied to corporations, including the general condition of complying with orders of the court. Blakey also pointed out that "there are not parallel injunctive remedies to all crimes" (U.S. Senate, RFCL, 1973: 5594), and asked whether Crane would support the use of organizational probation in cases where injunctive relief was unavailable. Crane agreed that this was true, but said that he was concerned only with antitrust offenses, where parallel injunctive remedies were available. He concluded by stating that it was the position of the Antitrust Section that, given the underdevelopment of probation and its preference for injunctive remedies, "corporations should be exempted from probation pending additional analysis of actual experience under existing sanctions applicable to corporations" (U.S. Senate, RFCL, 1973: 5608).

By the time the National Association of Manufacturers submitted its second set of written comments on criminal code reform to the Senate in 1974, the testimonies of Ruben and Crane and the publicity surrounding the ARCO sentence had apparently led it to recognize the potential significance of organizational probation. However, like most other commentators at the time, the NAM was not entirely clear as to what was at issue with this sanction. Richard Godown, President of the National Association of Manufacturers, wrote in comments submitted to Congress, "organizational probation, it seems to us, is an entirely new concept to the criminal law. Traditionally, probation is designed to affect the rehabilitation of human beings" (U.S. Senate, RFCL, 1974: 7513). Suggesting that this confusion was largely linked to the absence of Congressional clarification, Godown went on to point out the inapplicability to corporations of the available conditions of probation.

Charles S. Maddock of the ABA also testified during the hearings on S.1 and S.1400. On the issue of organizational sanctioning, he stated that his section, the Corporation, Banking, and Business Law Section, was in complete agreement with Crane. As a result, he focused his attention on the criminalization of regulatory offenses, which he identified as "far and away" the greatest concern of business (U.S. Senate, RFCL, 1973: 6654). Maddock viewed the expansion of criminal liability to regulatory offenses as a serious threat to business and one which should be strongly resisted. In a subsequent issue of The Business Lawyer (Maddock, 1974), the journal of the Section on Corporation, Banking, and Business Law, he wrote the lead article, advising business lawyers to "beware" of criminal code reform. Up to this point, he wrote, business has

> shown a remarkable lack of interest in the legislation. Of all the witnesses who have appeared before the Subcommittee, only six have offered testimony that even touches the provisions relating to business law (U.S. Senate, RFCL, 1974: 7518).

Despite this criticism, it was not until 1978 that business groups became more actively involved in the criminal code reform debate.

The final witnesses to address corporate sentencing during this second set of hearings were Ralph Nader and Morgan Downey, appearing on behalf of Public Citizen. During this testimony, Nader voiced support for the entire range of corporate sanctions being considered by the Senate. He voiced particular support for the "corporate quarantine" provisions of S.1, stating this was an important sanction and an innovative analogue to individual imprisonment. He took this sanction one step further by recommending, for "seriously repetitive criminal actions," its use to impose

> a form of public trusteeship to permit continuation of the enterprise if it promises to fulfill certain conditions, much like the present system of probation, under close government supervision for a period of time. Such conditions would include reorganizing the board of

> directors and/or management, temporarily placing a Federal officer on the board to insure future compliance with Federal and State laws, liquidating the company and selling its assets to those with the strongest legal and moral claim to them, divesting certain property or operations, and seizing or recalling property (U.S. Senate, RFCL, 1974: 7878-7879).

This proposal was much further reaching than any organizational sanction considered by Congress.

It is interesting that while referring to probation and suggesting probation conditions, Nader chose organizational imprisonment rather than organizational probation as the basis for this proposal. This would seem to indicate either a belief that organizational probation as proposed was inadequate to support his proposal or an unfamiliarity with the Brown Commission report, S.1400, and the emerging view of organizational probation as an affirmative, expressly authorized sentence. Here and elsewhere there is evidence that witnesses, even when representing large and presumably well-informed organizations, were not fully aware of the legislation under consideration. This undermines support for instrumentalist theories of law creation. It also suggests that the plurality of meanings assigned to organizational probation contributed to its development by diffusing potential opposition.

Revised S.1: The Prevalence of Market-Based Assumptions

When the 94th Congress convened in 1975, the effort to pass comprehensive criminal code reform legislation was placed at the top of its agenda. The center of this effort was a revised version of

S.1, the Criminal Justice Reform Act of 1975. This legislation was sponsored by a large and bipartisan group of Senators led by McClellan (121 Congressional Record 211). Their hope was that through bipartisan sponsorship and removal of some of the most controversial civil liberties issues of the earlier versions of S.1 and S.1400, a more widely acceptable bill would result. Watergate and continued concern over the civil liberties implications of this legislation undermined this hope.

In introducing the new S.1 to the Senate on January 15, 1975, Senator Hruska described its corporate criminal sentencing reform provisions by noting that

> [t]wo significant changes are made with respect to organizations that engage in criminal activity. While an organization is treated as a person in other areas of the law, this fictional treatment breaks down when it comes to sentencing an organization. Quite simply, the organization cannot be sent to jail. The question is what type of sentence will deter organizations from engaging in criminal conduct and properly reflect society's sense of retribution. The code makes two significant changes in this respect. First, it increases the fine levels to reflect the greater capacity to pay. All too often, current fine levels amount to a slap on the wrist to the corporation or labor union. The second change is the creation of a new sanction - the 'notice sanction.' This sanction requires an organization that has defrauded a number of people to give notice of the conviction to those innocent victims who may be entitled to file civil claims for damages (121 Congressional Record 219).

This remark was significant because in recognizing that corporations cannot be imprisoned and that fines are often ineffective, Hruska presented as innovative alternatives market-based approaches that were consistent in form and theory with past practice, and which treated organizations as individuals. Also, notice to victims was not a new sanction; it had been included in the Brown Commission report. Further, no mention was made of organizational probation, though it was included in this bill and represented the type of sanction most consistent with an organization-specific approach to sentencing. This further indicates that despite the testimony of Crane and Ruben, the view of organizational probation as an innovative, potentially intrusive remedial sanction was not common. Even Hruska, who had questioned Ruben on this subject, apparently ignored Ruben's approach to organizational probation. Assumptions of rationality, organizational autonomy, and market discipline remained largely unchallenged.

During the hearings on the revised S.1, only one witness addressed corporate sanctioning. Mark Crane returned on behalf of the ABA's Antitrust Section. His testimony focused on the three major problems with this bill, one of which was its inclusion of organizational probation. During the nearly two years since his previous testimony, the Antitrust Section had come to a definitive position on organizational probation. Betraying his earlier recognition of the limits on injunctive relief, and the consequent propriety of criminal law analogues where parallel civil sanctions were unavailable, Crane stated that because it was "tantamount to entering an injunction and appointing a receiver as part of the sentencing process .... We urge the Committee to eliminate organizational probation as a remedy" (U.S. Senate, RFCL, 1974: 233-

234) in all cases. He instead favored continued reliance on civil proceedings for organizational interventions. Crane did not discuss the limitations on this power suggested earlier by Blakey or the absence of clear statutory authority for many remedial civil interventions. Nor were these issues raised in questioning of him.

Ultimately, the real and symbolic similarities of the revised S.1 to the original S.1 proved too great. Despite extensive mark-up in the Subcommittee on Criminal Laws and Procedures and greater support among witnesses than was shown the original S.1 (Melone, 1986), after the revised S.1 was submitted to the Senate Judiciary Committee with full subcommittee support on October 21, 1975 (121 Congressional Record 33308), it went no further. Due to pressure from liberals during Subcommittee hearings and to a broader public campaign to "Stop S.1" (Crystal, 1975; Ungar, 1976), and despite revisions that moderated many of its most controversial and repressive features (Schwartz, 1977), this bill lacked the support to force its consideration by the full Judiciary Committee.

The failure of S.1 and its House counterparts signalled the end of the first phase of the Congressional code reform debate. When the debate resumed in the Ninety-Fifth Congress in 1977, several important changes had occurred or would soon occur. A Democratic administration had been elected. The control of the criminal code reform effort by former members of the Brown Commission, mostly from its conservative minority, had weakened. In the wake of Watergate and its attendant scandals, corporate crime became a prominent issue for the Department of Justice and the public, and in reform legislation. Finally, and perhaps most importantly, the sentencing guidelines movement began. This latter development eventually shifted debate on organizational sanctioning from the details of particular sanctions to the lawmaking capacity of the Sentencing Commission.

The Post-Watergate Period: Increased Attention to Corporate Crime

In his recent book detailing the socioeconomic consequences of the Reagan years, Kevin Phillips (1990) described the post-Watergate years as an "Indian summer" for liberalism, a brief return to earlier liberalism before the full onset of the present conservative era. Applying this metaphor to criminal justice policy, the period of the 1960s and early 1970s, which saw the development and rapid expansion of social regulation and social welfare programs, emphasis on rehabilitation, and the nationalization of the Bill of Rights represented summer, though the prominence of law and order themes in the 1968 election foretold an early frost. Within this broadly sketched historical framework, it is interesting to note that corporate crime did not become a political, academic, or public issue of consequence until the late 1970s, after the resurgence of business power and pro-business politics had begun (Boyte, 1977; Useem, 1983, 1984). As a result, the historic opportunity for political and public discussion of corporate crime was brief. Its boundaries were approximately those of the Carter Administration.

During this time, little of lasting impact was achieved; changes in the statutory law pertaining to corporate crime were few. Taking a state capacity approach, Katz (1980) argues that Watergate temporarily weakened traditional controls, particularly deriving from the White House and the business community, on enforcement of laws pertaining to business. As a result, ambitious and entrepreneurial prosecutors and judges were able for a few years to lead a social movement against white collar crime. However, this movement lacked strong public support and a legislative component, instead centering on case by case prosecution and creative expansion of the limits of existing statutes. When executive and business power resurged in the late 1970s, the absence of institutional and statutory changes undermined the movement against white collar crime and led to a quick return to the status quo. This is telling for the present case; it indicates the importance of statutory law for corporate crime control. Increases in state activity without increases in state capacity inevitably fall to business pressures. Though increases in state capacity do not fully protect against this, they do provide an important tool in such efforts.

Even the development of organizational sentencing standards, as the subsequent discussion indicates, did not benefit from the enhanced political visibility of corporate crime in the post-Watergate years. The sentencing commission concept, though introduced during this time, was developed independent of Watergate. Further, the other legislative proposals introduced during this period were strongly and successfully opposed by business, with no detectable legacy for supporters of enhanced legal controls on organizations. However, a sentencing commission provided the potential for the development of such controls by strengthening state autonomy and capacity to legislate. It is from this forum that organizational probation emerged as a meaningful sanction.

S.1437: The Pinnacle of Corporate Crime Control Efforts

On May 2, 1977, Senators Kennedy (D-MA) and McClellan introduced S.1437, the Criminal Code Reform Act of 1977, a further revised and symbolically renumbered descendant of S.1 (123 Congressional Record 13059). Its companion bill in the House was H.R. 6869, introduced by Representative Rodino (D-NJ) on May 3 (123 Congressional Record 13301). S.1437 included several corporate crime provisions not found in earlier bills, and represented the most comprehensive corporate crime control legislation introduced during the entire criminal code reform effort. These changes included expanded corporate criminal liability for harms related to business conduct, an offense of reckless endangerment (see Frank, 1984b), substantially increased fines, and a condition of probation permitting temporary disqualification of organizations from those areas of commerce in which the offense occurred. As described in the Senate report on S.1437, "the innovative sentencing structure found in the [bill] provides those who enforce the law with the best weapons yet devised to deal with corporate defendants" (1977: 888).

The Concept of a Sentencing Commission. Another innovation introduced into the criminal code reform debate by S.1437, and ultimately enacted into law as the centerpiece of the Sentencing Reform Act, was the concept of a sentencing guidelines system to be promulgated by a sentencing commission. The immediate impetus for this proposal by Senator Kennedy was the emerging critique of sentencing by Judge Marvin Frankel (Frankel, 1972, 1973; see Kennedy, 1979) and other guidelines advocates (Morris, 1974). The central issue in this critique was perceived excessive sentencing disparity, which was rooted in the disorganization of the statutory law and the legacy of indeterminate sentencing. The proposed remedy was a sentencing guidelines system developed by a sentencing commission to limit and guide judicial discretion. The details of this sentencing guidelines system were drawn by Kennedy from a proposal developed at Yale University (O'Donnell, Churgin, and Curtis, 1977).[8]

The creation of a commission to deal with difficult issues is an increasingly common practice on the part of Congress (Hawkins

[8] In a law review article in 1972 (Frankel, 1972), Judge Marvin Frankel was the first to introduce the concept of sentencing guidelines developed by a sentencing commission into the law reform debate. He further developed this critique in Criminal Sentences: Law Without Order (1973). This critique and the Yale proposal became the basis for the Kennedy bill, which called for a guidelines system with sentencing ranges and substantial discretion for judges in determining the precise sentence. The Hart-Javits bill, introduced one day after the Kennedy bill, also favored the creation of a sentencing commission, but substantially limited judicial discretion to the imposition of 'presumptive' sentences. This latter approach was based on the work of von Hirsch (1976) and Dershowitz (1976). In practice, the distinction between these proposals has largely been lost. Existing sentencing guidelines are now characterized as either voluntary and advisory (often known as "policy statements") or mandatory and binding (Tonry, 1991).

and Thomas, 1989). In this particular case, because of the complexity of developing sentencing standards for all federal offenses and the unavoidable political impediments to legislating such standards, Congress determined that it was institutionally unable to carry out this task (Wright, 1991; Gainer, 1991; Blakey, 1991). In its efforts up to this point, Congress had learned that in discussing sentencing "rhetoric escalated quickly and blocked the use of the best information available" (Wright, 1991: 10).

Ronald Gainer, who served as an Assistant Attorney General throughout this period, and later as the Department of Justice's ex-officio member of the United States Sentencing Commission, provided support for this view of the legislative origins of the sentencing commission concept. Gainer described these origins by stating that

> the overall concept was to create a commission of thoughtful people with a little knowledge and a decent staff to do the thinking ... which seemed to be the best way to get something sensible through Congress, since if Congress looks at something it probably isn't going to come out right (Gainer, 1991).[9]

As a result, several proposals for an independent, bipartisan expert sentencing commission were introduced and debated.

The supporters of a sentencing guidelines system went beyond the growing criticisms of indeterminacy and rehabilitation (Wilson,

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[9] Consistent with this view, it is interesting to note that of the three forums in which criminal sentencing reform was discussed - the Brown Commission, Congress, and the United States Sentencing Commission - two of them were created by Congress to resolve issues that Congress deemed itself incapable of resolving. The Brown Commission and the Sentencing Commission were also each much more productive in their tasks than was Congress.

1975; Martinson, 1974; von Hirsch, 1976) and the accompanying demands of many for longer, often mandatory, sentences (see Paternoster and Bynum, 1982; Greenberg and Humphries, 1982; von Hirsch, 1990). They favored development of a sentencing commission as a legal mechanism to regulate sentencing and reduce disparity. This reform had broad liberal and conservative support (Travis, 1982; von Hirsch, 1990), and met with no organized opposition within or outside Congress, though particular proposals were debated. Among its academic adherents and members of Congress, a sentencing commission was viewed primarily if not exclusively as a means to improve individual criminal sentencing, mostly by reducing disparity. The great majority of all federal convictions each year were of individuals, and disparities in the resulting sentences were substantial. Sentencing disparity was not a concern with organizational sentencing; such sentences were too few and too constrained by statute and practice to be widely disparate.[10]

However, this does not mean that the sentencing commission concept was seen as irrelevant to all participants in the organizational sentencing reform debate. Quite to the contrary, there were a number of Department of Justice and Congressional staff people, particularly in the late 1970s, who supported tougher and

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[10] The absence of disparity in organizational sanctioning would later be used as a grounds for arguing against the propriety of organizational sentencing guidelines by critics of the work of the Sentencing Commission. The Commission argued that its mandate was to reduce disparity and increase fairness, efforts that were not entirely overlapping.

more innovative organizational sanctioning and viewed a sentencing commission as the best means to attain such sanctions. Interviews with key staff members from both the House and the Senate (Summitt, 1991; Hutchison, 1991; Blakey, 1991), and with a representative of the Department of Justice (Gainer, 1991), elicited several comments about the positive role of a sentencing commission in developing organizational sanctions.

Assistant Attorney General Ronald Gainer described the Department of Justice as seeking to establish adequate state capacity for subsequent development of organizational probation. He asserted:

> we were trying ... as best we could to permit the most severe sorts of restrictions that conceivably could be appropriate so that a commission would have the widest reasonable range of latitude in determining appropriate penalties for different offenses (Gainer, 1991).

Whereas until this time the courts were looked to for eventual development of organizational probation, a sentencing commission could now also provide a forum for development of this sanction. If adequately empowered, its statutorily authorized lawmaking powers could enable it to make a stronger legal contribution to corporate crime control than could the courts. Entrepreneurial actions by these staff members ensured continued availability of organizational probation until it could be considered by the Sentencing Commission.

<u>The Business Attack on S.1437</u>

Despite the urging of Charles Maddock (1974) and others for greater business participation in the criminal code reform effort, the business community was slow to take a full and active role in this debate. There were a number of reasons for this. Among them, it was likely true, as Maddock suggested, that complacency and inattention limited business' familiarity with the proposed legislation. However, two other explanations can be cited. First, until the late 1970s, the business community found little in the proposed legislation to merit concerted attention. Second, prosecutions of corporate crime were so few that corporations gave little attention to criminal law issues (Frank, 1984b). Around 1978, with the introduction of S.1437 and a changing political and public mood toward corporations (Lipset and Schneider, 1987; Martin and Lodge, 1975), this situation began to change. Business groups mobilized against far reaching changes in the federal criminal code proposed by S.1437 and were largely successful in their lobbying efforts (see Frank, 1984b; Scheibla, 1980).

The years 1978 to 1980 were the pivotal period in establishing the form and content of the comprehensive criminal code legislation that ultimately passed in Congress. This is particularly true for the organizational sentencing provisions of the eventual legislation. It was during this period that business, the ABA, and the Department of Justice gave their greatest attention to corporate crime. Business lobbied intensively for limitations on liability and criminalization and for sole reliance on traditional fines. The Department of Justice sought increased fines and expanded use of organizational probation, though fines were clearly their greatest concern.[11] The ABA published its revised Standards for Criminal Justice, which contained its positions on all aspects of criminal code reform, and lobbied Congress for adoption of these standards.

Emergence of the Business Roundtable. After having relied on the NAM and the ABA to lobby Congress on behalf of business interests, the Business Roundtable (BRT)[12] became actively involved in this debate beginning in 1978. For the next two years, the BRT, which has a clear big business orientation, remained at the center of the debate on corporate criminal law reform, exerting substantial influence on the outcome of these efforts. The NAM, which includes large and small businesses, played only a minor role throughout the Congressional criminal code reform process, despite its early entrance. Its lobbyists were viewed by those in Congress as less active and less influential than those of the BRT (Gainer, 1991; Summitt, 1991).

The primary spokesperson for the BRT was Irving Shapiro, then Chief Executive Officer of DuPont and former chair of the BRT. The positions he advanced were formulated by the Corporate

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[11] As Chapter Six shows, increased fines were always the primary policy interest of the Department of Justice. They gave relatively little attention to organizational probation.

[12] The Business Roundtable was created in 1972. It is composed of the executives of more than half of the Fortune 500 corporations, and is generally recognized as the most powerful voice for corporate America in public policymaking. Its founding principle, that business should play a more active role in public policy, and its prominence in policymaking since its founding, lend credence to the argument that business has become more politically active since the early 1970s (Boyte, 1977; Useem, 1982).

Organization Policy Task Force, chaired by Alden W. Clausen, President of Bank of America. In his frequent appearances before Congress and behind the scenes (Gainer, 1991; Summitt, 1991), as well as in several written commentaries, Shapiro supported higher fines and a sentencing commission. The latter was seen as a source of uniformity and predictability in sentencing. Shapiro opposed all alternatives to traditional fines. Unifying these positions on sanctions was the belief that the debate on alternative sanctions was premature, and should be suspended until increased fines have been "given a chance to work" (U.S. House of Representatives, LRRFCL, 1978: 2600).

The BRT made its opposition to alternatives to fines clear by stating regarding publicity and order of notice sanctions that "the novel sanctions imported from civil actions, and proposed in the Code, have such serious substantive and procedural inadequacies that they should be deleted" (U.S. House of Representatives, LRRFCL, 1978: 2600). In its comments, the BRT also strongly opposed the organizational disqualification condition of probation proposed in S.1437, and was successful in bringing about its removal from further consideration. Regarding organizational probation more generally, the BRT stated its support for the position of the ABA in opposition to this sanction. Their concern, like that of business witnesses throughout the sentencing reform process, was that organizational probation "would render organizations subject to the control of federal judges" (Gainer, 1991).

There is evidence, however, that as late as 1979, and perhaps later, the BRT did not fully understand what was being proposed in the organizational probation provisions of the bills under consideration. In testimony before the House in 1979, Shapiro criticized a House working draft because "it omits to state that a sentence of probation cannot be entered without the defendant's consent and we recommend that it do so" (U.S. House of Representatives, RFCC, 1979: 10854). Though this consent was generally required under judicial interpretations of the applicability of the Federal Probation Act to organizations, each of the bills under consideration in Congress, as well as the Brown Commission report, clearly made probation for individuals and organizations an independent and affirmative sentence. Believing that the FPA approach to probation was or should have been the approach taken in the proposed legislation, as some business witnesses did, limited the extent to which opposition to this sanction was featured among the standard recitation of business concerns. Had a more contemporary understanding of its implications prevailed, a more aggressively oppositional response to organizational probation could have been expected.

However, there were those on both sides of the corporate sentencing debate who carefully considered the implications of proposed changes in corporate criminal sentencing. These witnesses responded more to the potential applications of organizational probation than to its past and present uses. The earlier testimony of

Professor Ruben is one example. Another was the second testimony of George W. Liebmann. Returning to testify before Congress for the first time since 1971, this time in the House, Liebmann was much clearer than in his previous testimony in his view of organizational probation. The direction in which this sanction was developing in Congress and the courts concerned him. After agreeing with business groups that expansions of organizational liability and criminality in S.1437 must be withdrawn, he stated that the probation provisions "should be amended to make clear that probation is available only with respect to individual as distinct from organizational defendants" (U.S. House of Representatives, LRRFCL, 1978: 1120).

In addition to the strong opposition of business and the ABA, the package of criminal code reforms found in S.1437 was opposed by many on the left due to its civil liberties and individual criminal provisions and on the right as a result of its obscenity and abortion provisions. Many of these concerns, including those of business, were addressed during mark-up sessions. After these revisions, S.1437 was approved by a vote of 14 to 2 by the Senate Judiciary Committee. It was submitted to the full Senate for a vote on November 15, 1977. After eight days of floor debate, S.1437 passed in the Senate by a vote of 72 to 15 on January 30, 1978 (124 Congressional Record 9), with most opposition coming from conservative Republicans (Congressional Quarterly Almanac, 1979). This was the first comprehensive criminal code reform bill to pass in either house of Congress.

The 95th Congress was ultimately unsuccessful in its efforts to pass criminal law reform legislation due to continued opposition to comprehensive code reform in the House. After lengthy hearings on H.R. 6869, the House companion to S.1437, it was rejected by the Subcommittee on Criminal Justice of the House Judiciary Committee. The Subcommittee instead submitted H.R. 13959, a bill it had drafted during the hearings on H.R. 6869, to the House Judiciary Committee for floor consideration on August 17, 1978. This new bill represented an incremental approach dramatically different from the Senate approach. Only minimal changes in the criminal law were proposed. Emphasis was instead placed on reorganizing the existing law and eliminating only the most obvious inconsistencies and anachronisms. Due to the lateness of its submission to the Judiciary Committee, no action was taken on this legislation in the House (Congressional Quarterly Almanac, 1979).

In the aftermath of the corporate assault on S.1437, there was movement toward an agreement among business, the ABA, the Department of Justice, and Congress on the shape of future criminal code provisions pertaining to corporations. The development of a privately drafted and publicly ratified "agreed bill" (Heinz, Gettleman, and Seeskin, 1969) was sought. In particular, business and legal groups pursued an end to efforts to statutorily specify the application of the criminal law to corporations. The more limited, case by case adjudication of the courts was preferred to the broad, legislative state capacity of Congress. Such an agreement would eliminate the possibility of surprises in subsequent legislation and effectively end the debate on organizational crime, at least until the United States Sentencing Commission began its deliberations.

Congress Bows to Business Pressure

As these negotiations continued, a fourth major effort to draft and pass criminal code reform legislation began in the 96th Congress. Senators Kennedy, Thurmond, DeConcini (D-NM), Hatch (R-UT), and Simpson (R-WY) submitted S.1722, the Criminal Code Reform Act of 1979, on September 7, 1979 (125 Congressional Record 23537).[13] In the House, hearings on H.R. 6869 and H.R. 13959 continued, with no new legislation being submitted in the House until 1980. However, an important change had taken place in the House at the beginning of the 96th Congress. The chairmanship of the House Criminal Justice Subcommittee transferred from Representative Mann (D-SC), who did not seek reelection, to Representative Drinan (D-MA). Mann had been a strong opponent of comprehensive code reform, working hard and successfully to ensure that such legislation did not get through his Subcommittee. Drinan, on the other hand, supported the comprehensive approach taken by the Senate, and immediately signalled the

[13] Senator McClellan, the leading Congressional proponent of criminal code reform since his service on the Brown Commission, died in November 1977. Senator Thurmond took his place as the leading conservative voice in the Senate criminal code reform debate.

willingness of the House to consider such legislation (Drinan, Ward, and Beier, 1981).[14]

Drinan did so by introducing, with Representative Kindness (R-OH), H.R. 6233 on January 22, 1980 (126 Congressional Record 286). After extensive mark-up, this bill was reported out of the Subcommittee in MArch 1980 as H.R. 6915, the Criminal Code Revision Act of 1980. Indicative of the approach to corporate crime taken in this bill, Mark Green sharply criticized it during testimony in the Senate, comparing it unfavorably to S.1722 and saying that the House had "dropped nearly every provision ... concerning white-collar sanctions" under pressure from the Business Roundtable (U.S. Senate, RFCL, 1980: 10134). The ABA also took credit for these changes, stating that it had been "almost totally successful" in shaping the corporate provisions of this legislation (U.S. Senate, RFCL, 1981: 1087). Among other changes, organizational probation was excluded in favor of a narrower conditional discharge sanction, and corporate criminal liability was sharply limited.

Support for Organizational Probation. In this same Senate testimony, repeated later in the House (RFCC, 1980), Green was also critical of S.1722. Among his concerns were the removal of the organizational disqualification condition of probation, which he sought to have reinstated, and the continued lack of clear language

[14] Drinan remained as subcommittee chair only until 1980, when he retired from the House. He was replaced by Representative John Conyers, who favored a return to a more incremental approach to criminal code reform.

regarding the application of probation to corporations. Citing the "modest" precedent set in ARCO, he stated that at present, "this concept [organizational probation] is not prohibited by Section 2103, but neither is it made explicit" (U.S. Senate, RFCL, 1979: 10142). Green suggested the development of organization-specific conditions of probation to provide the necessary clarification of the implementation of this sanction.

Combining concepts from politics-based sanctioning and individual rehabilitation, Green stated that

> [i]f a court finds an institutional structure that inclines a post-conviction company to violate the law, it should be able to try to cure that defect to avoid recidivism (U.S. Senate, RFCL, 1980: 10142).

Green concluded his testimony by drawing an analogy to street crime to illustrate what was sought by supporters of organizational probation; "If the law will send a dangerous person away to jail to protect the community, it should at least be able to send a probation officer to a company in order to protect the community" (U.S. Senate, RFCL, 1979: 10142). There was no response to Green's comments either during the hearing or in the language of subsequent bills.

Responding to the dramatic changes in the organizational crime provisions of H.R. 6915, Representative Conyers signalled his unwillingness to support a weakening of these provisions and his support for remedial organizational sanctions. In his written dissent to the Subcommittee's favorable report on H.R. 6915 (U.S. House of Representatives, 1980), he stated that

> [a]nyone searching for evidence of provisions reflecting the emerging public outcry to upgrade prosecution of major forms of corporate and white collar crime anywhere in the hundreds of pages which comprise the so-called House Criminal Code "reform bill" would be searching in vain. It is nothing short of incredible that the House bill - which could be a major determining factor in how well our Federal law enforcement apparatus will be equipped statutorily to combat corporate and white collar crime for decades to come - fails almost completely to offer any modern approaches to deter and prosecute acts every bit as harmful to the public as so-called "street crimes" (U.S. House of Representatives, 1980: 684).

Conyers was particularly interested in the inclusion of a "special master" provision among the conditions of organizational probation. Such a provision would facilitate the type of supervision and remediation that had thus far been lacking in proposed legislation. Basing his support for this approach to organizational probation on an organizational process model of corporate crime, Conyers quoted Green to the effect that organizational probation could be used to remediate organizational structures.

After extensive hearings and mark-ups, S.1722 was approved by the Senate Judiciary Committee by a vote of 14 to 1 on December 4, 1979, and reported to the full Senate on January 21, 1980. However, neither this bill nor its companion bill in the House, H.R. 6915, which had obtained the approval of the House Judiciary Committee by a vote of 20 to 12, received floor consideration due to the opposition of conservatives to the absence of a federal death penalty and weak obscenity provisions (Congressional Quarterly Almanac, 1980; Scheibla, 1980). Senator Kennedy, the leader of the criminal code reform effort in the period immediately following McClellan's death, was unable to push for passage of this legislation despite unprecedented support, due to his campaign for the Democratic presidential nomination (American Bar Association Journal, 1979).

Before the 97th Congress convened, and a fifth-generation criminal code reform bill was introduced, two major efforts to standardize the terms of the organizational crime debate were completed. First, and more important, was the establishment, after considerable debate among the DOJ, BRT, ABA, and Congressional leaders, of a working agreement on future organizational crime provisions. Public Citizen and Representative Conyers were not included among the parties to this agreement. Second, the ABA completed and promulgated revisions to its Standards for Criminal Justice. These revisions established its positions on all facets of criminal code reform. Of particular interest, after disagreements and inconsistencies in past testimony regarding organizational probation, an official position on this sanction was developed. Each of these developments and their impacts on the organizational crime control debate are detailed in the following sections.

The "Working Agreement" to Uphold the Status Quo

The outcome of the intense debate on corporate crime in the late 1970s was a working agreement among the sponsors of criminal code reform legislation and the major interest groups to maintain the statutory status quo. The form this agreement took was

> a general commitment to avoid changes in current law. If observers of the legislation perceive ways in which the

> proposed criminal code would alter current law in the business regulatory area, the sponsors will attempt to undo that change (Legal Times, 1979: 7; see Drinan, Ward, and Beier, 1981).

This agreement, forced by extensive lobbying by the Business Roundtable (Scheibla, 1980; Ignatius, 1979; Gainer, 1991), meant that post-Watergate provisions to extend corporate criminal liability to include reckless failure to supervise and omission to perform a duty were eliminated, as was the offense of consumer fraud and other innovations in corporate criminal law. When some segments of the business community expressed dissatisfaction with this agreement (Scheibla, 1980), the Department of Justice succeeded in blocking further legislative concessions (Ignatius, 1979).

The statutory baseline for the working agreement was not entirely clear, however, since the sentencing structure introduced by the Brown Commission but not enacted in law was not challenged. The distinction between individual and organizational offenders remained, as did the provision of different sanctions for each type of offender. For the most part, though, further legal changes were not possible; the substantive debate on organizational crime, to the extent it continued, was forced to the margins of the reform effort. The more fruitful area of debate centered on the structure and mandate of the Sentencing Commission, though the belief of most interest groups that organizational sanctioning was not an area of concern minimized attention to the Sentencing Commission's powers in this area. As with the Brown Commission, Congressional attention to the specific language of sentencing provisions was dominated by staff personnel (Blakey, 1991; Gainer, 1991).

For organizational probation, this agreement resulted in its inclusion among the sentencing alternatives available to judges, but not the development of conditions to encourage or guide its use. Thomas Hutchison, Counsel to the House Judiciary Committee during this period, described the effects of the working agreement in noting that "any effort to expand and spell out what organizational probation might mean would have been resisted and would have fallen by the way side under the ground rules" (Hutchison, 1991). This meant that efforts to achieve a common understanding of organizational probation, particularly whether it was to have a remedial component, would not be possible, at least in Congress. However, Hutchison also pointed out that even the agreed upon changes were a substantial improvement over the Federal Probation Act because they made explicit what was only inferred in the past, that organizations could be placed on probation. As Hutchison noted in this regard, "when you spell it out you highlight it and in theory ... you encourage its use" (Hutchison, 1991).

The only probation-related casualty of the working agreement, at least at the time, was the elimination of consideration of any probation condition that would allow restrictions on the ability of a business to engage in legal commerce. Such restrictions would be permissible only if imposed on individual employees after separate criminal proceedings. In describing its efforts to develop this condition, a Senate Judiciary Committee report stated that the "intent of the Committee had been that the condition barring conducting of a particular business shall be used only for an organization that conducted business in a flagrantly illegal manner." However, "the Committee understands the concerns of business that the condition might encourage misapplication to the economic detriment of a legitimate enterprise" (U.S. Senate, 1983a: 66). Criminal organizations could still be driven from business by disabling fines and other probation conditions.

Business groups had clearly dominated in shaping the outcome of the working agreement. Public interest involvement, limited mostly to the work of Ralph Nader and Mark Green, had been marginalized and excluded from private negotiations. Labor groups, historically important in supporting legal reforms to limit the power of business (Weinstein, 1968; Skocpol, 1985), were as subject to the organizational criminal laws at issue as was business. Their lobbying efforts, though substantial, were focused entirely on protecting their right to strike and other labor-specific concerns. Consistent with Katz's (1980) findings, the development of the working agreement was an intra-elite effort, arraying those who sought a retraction of the criminal law's application to corporations against those who sought an expansion. The differences in these positions were not substantial, and were compromised at a point that mostly preserved the pre-reform parameters of the criminal law. For corporate crime this agreement meant the end of further substantive innovation. The corporate crime provisions of subsequent bills were nearly uniform.

The ABA's Revised Sentencing Standards

The ABA's original Standards for Criminal Justice were passed in 1968 (see Chapter Three). The only organizational sanction included was fines. This created some difficulty for the ABA and its many sections in dealing with the criminal code reform legislation proposed throughout the 1970s, since all of this legislation included alternatives to fines. Without an established organizational position, the different sections of the ABA established and advanced their own positions. In the case of organizational probation, the relevant sections on corporate crime issues, the Antitrust Section and Corporation, Banking, and Business Law Section, established positions strongly opposed to probation. Beginning in 1977, however, when the ABA initiated its revision efforts, a somewhat different organizational position emerged.

The Reporter for the ABA Task Force on Sentencing Alternatives and Procedures was John C. Coffee, Jr., who would later establish a reputation within the legal and academic communities as a leading advocate of corporate sentencing reform and organizational probation. As Reporter, Coffee, along with the drafting task force and the Standards Committee, was charged with drafting the reforms that would be submitted to the sections and the House of Delegates for approval. Coffee favored inclusion of organizational probation, and his position as Reporter afforded him the opportunity to place this sanction in the draft Standards (Coffee, 1991). The provisions of this organizational probation proposal authorized judicial interventions designed to identify and remediate organizational structures and processes linked to criminal conduct.

When this draft went before the various sections for consideration, the Section on Corporation, Banking, and Business Law, led by George Freeman, was strongly opposed to the inclusion of organizational probation (Coffee, 1991; Robinson, 1991). This same section, under the earlier leadership of Charles Maddock, had led the movement against changes in the corporate criminal law. The conflict between Freeman and Coffee was vigorous, and was ultimately settled by compromise. The nature of this compromise was that the ABA would support "judicial oversight" as the primary alternative to fines, while rejecting organizational probation due to its potential for remedial interventions.

Although Coffee described the differences between judicial oversight and organizational probation as "cosmetic" (Coffee, 1991), the description of judicial oversight provided by the ABA suggests a much narrower remedial authority than that proposed earlier and sought by probation advocates. In its 1979 Standards (1979, 162-163), the ABA asserted:

> Although courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of

> recognized reporting, record keeping, and auditing controls designed to increase internal accountability - for example, audit committees, improved staff systems for the board of directors, or the use of special counsel - but it should not extend to judicial review of the 'legitimate business judgment' decisions of the organization's management or its stockholders or delay such decisions.

To clarify the nonremedial focus of this sanction, the Standards also stated that "judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorized by the legislature" (1979: 163).

Later in this report there were statements that seemed to support Coffee's position that the differences between judicial oversight and organizational probation were minor. For example, rehabilitation was accepted as a sentencing goal in corporate cases (1979: 169). Also, it was stated that there were cases in which there was a "need for internal interventions in the corporation's decision-making process" (1979: 180). However, given the strong statements of the ABA against probation prior to and after the development of these standards (U.S. Senate, RFCL, 1979; U.S. House of Representatives, FCLR, 1981), it seems more likely that the pro-remedial views expressed in the 1979 Standards were the result of the failure of the business forces within the ABA to fully eliminate the more pro-interventionist parts of the text.[15] In later testimony, for example, opposition to probation was described as a "bedrock position" of the

[15] For further analysis of the relationship between the ABA and business interests, see Melone (1977, 1983, 1985) and Melone and Slagter (1983).

ABA (U.S. Senate, RFCL, 1979: 9974). By the time this debate moved into the Sentencing Commission, the ABA asserted that its judicial oversight provisions should not be read to authorize any form of judicial remediation of defendant corporations (Buffone, 1991).[16]

Return to Law and Order: Criminal Code Reform in the 1980s

By 1980, the window of opportunity for public and political debate of corporate crime had closed. Despite the claims of politicians that "no other issue in the legal community will attract more attention in the 1980s than white-collar crime" (Conyers, 1980: 300) and the efforts of public, labor, and religious groups to initiate a "decade-long drive ... to place sharp curbs on the powers of corporate America" (Los Angeles Times, 1979: C19), legal control of business was actively minimized as a political issue (Pear, 1980; Reagan, 1981; Braithwaite and Geis, 1982; Stockman, 1987) by the beginning of the first Reagan Administration. Whereas throughout the 1970s public and political statements of the need for increased control of business were common, by 1981 the opposite sentiment prevailed. The magnitude of this change grew throughout the 1980s (Lipset and Schneider, 1987). In Congress, changing political times and the new working agreement silenced some and marginalized others of those who retained an interest in this subject.

[16] Chapters Six and Seven trace the ABA's position on organizational probation throughout the Sentencing Commission debate, and show that this position became increasingly pro-business oriented.

The Reagan Administration came into office promising business a more hospitable regulatory climate. It delivered a "capitalist blowout" (Phillips, 1990: 54), a period of seemingly unrestrained business activity. This involved more than a simple change toward less regulation. A qualitative shift in the type of regulatory regime (Harris and Milkis, 1989; Bardach and Kagan, 1982) occurred. The adversarial, pro-regulatory approach begun in the late 1960s had seen the creation, most notably, of the EPA and OSHA, and the strengthening of other agencies, particularly the FTC and the SEC. This approach was replaced by a more accommodative (or perhaps inattentive) and openly deregulatory regime. Enforcement efforts decreased dramatically (Schneider, 1982; Harris and Milkis, 1989; Calavita, 1983; Coleman, 1985b). Acknowledged opponents of regulation, such as Anne Gorsuch Burford at the EPA and James C. Miller III at the FTC,[17] were placed in charge of regulatory agencies. The rhetorical and real focus of social control attention and resources shifted decidedly downward. From this point forward, the central issues of debate on criminal code reform were the death penalty, drugs, obscenity, and violent interpersonal crime.

Statements made less than two years apart in testimony to Congress by the Department of Justice illustrate this shift. In 1979,

[17] Miller once suggested that the FTC should not be a traditional "law enforcement agency" but "an economic agency out to achieve an efficient working of the market place" (quoted in Reagan, 1987: 65). This approach clearly did not include the use of politics-based sanctions at the FTC, such as those described by Solomon and Nowak (1979).

Assistant Attorney General Philip B. Heymann, a strong advocate of increased corporate crime control measures (Gainer, 1991; Summitt, 1991), and the primary opponent of the Business Roundtable in negotiating the working agreement, noted:

> I have a section of the Criminal Division that does this kind [corporate crime] of work, and there are hundreds of people dead in the cases it is looking at. And any of them are grossly reckless cases, aware of a risk, terrible behavior. At the same time I have many more people taking much more seriously ordinary theft crimes. I have some kind of feeling that a decent nation worries about lives of workers and consumers and residents more than we are worrying about them (U.S. House of Representatives, RFCC, 1979: 123).

This statement reflected the policy, or at least the public position, of the Department of Justice under President Carter. Though the commitment of that Administration to the prosecution of white-collar and corporate crime, in terms of resource expenditures, should not be overstated (Taubman, 1979; Conyers, 1980), its stated commitment to such efforts was substantial (Heymann, 1980) and its actual efforts to bring the criminal law to bear on corporate behavior exceeded those of its predecessors.[18]

In contrast, immediately upon election, the Reagan administration transition team declared its intention to end the Department of Justice's "preoccupation with white collar crime" (Pear, 1980: 9) and to "apply the criminal statutes to business activity only where the conduct was clearly willful, egregious, and

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[18] Prior to 1977 no representative of the Department of Justice testifying before Congress on criminal code reform discussed corporate crime.

malevolent" (Pear, 1980:.9). This position was contrary to years of judicial precedents regarding corporate criminal liability (see Brickey, 1984). William French Smith, the first Attorney General under Reagan, provided a sharp contrast to Heymann's statement in expressing the Reagan Administration's approach to criminal code reform. In his closing remarks to Congress in support of newly proposed criminal code reform legislation, Smith said,

> I would hope that a new code would contain a variety of improvements that would help the Federal Government meet the problems of violent crime .... I do not mean to minimize the importance of the Federal responsibilities with regard to serious large-scale frauds, offenses involving corruption of officials, and other areas of traditional Federal concentration. I wish only to emphasize that crimes resulting in death, physical disfigurement, and emotional terror, as opposed to crimes involving loss of money, carry costs that only victims and their families can begin to understand (U.S. House of Representatives, FCLR, 1981: 5-6).

The working agreement clearly positioned Congress to respond favorably to Smith's recommendations.

Violating the Working Agreement

New criminal code legislation was introduced in the Senate and House during the Ninety-Seventh Congress. In the Senate, S.1630, the Criminal Code Reform Act of 1981, sponsored by a bipartisan group of eleven members of the Senate Judiciary Committee, was introduced on September 17, 1981 (127 Congressional Record 21073). Its corporate crime provisions reflected the working agreement. In the House, two criminal code reform bills were introduced. The first, H.R. 1647, the Criminal Code Revision Act of 1981, introduced on February 4, 1981, was identical to the pro-business H.R. 6915 (127 Congressional Record 1650). The narrowness of these provisions, which would have reduced the scope of existing corporate criminal law, constituted a violation of the working agreement. After being referred to the Criminal Justice Subcommittee, H.R. 1647 was held in the Subcommittee by Chairman Conyers as a result of the weakness of its corporate crime provisions. This prohibited consideration by the Judiciary Committee.

Conyers then introduced a second bill, H.R. 4711, on October 7, 1981 (127 Congressional Record 23540). In this bill, Conyers took a much more aggressive approach on organizational sentencing than any past bill by following through on his earlier statement that a special master provision was needed to strengthen organizational probation. This bill authorized appointment by the court of a special master to "oversee any relevant operations of the defendant business organization which it deems appropriate, in order to assure compliance with any condition." This proposal also constituted a violation of the working agreement. Nonetheless, Conyers and Rodino included it in each of their subsequent criminal code reform bills.

The "special master" provision of H.R. 4711 was obviously a substantial deviation from past practice in corporate criminal sanctioning. The breadth and strength of the statutory interventions it provided exceeded even the strongest civil injunctive powers. There was no possibility that it ultimately would be adopted into the mainstream of the reform effort, either in the Senate or the House (Hutchison, 1991). In fact, no special master provision was ever included in a Senate criminal code reform bill. Further, despite its intrusiveness, this provision did not even provoke substantial business opposition. The BRT, for example, did not reenter the sentencing reform debate after testifying for the last time in 1979 and submitting its last comments in January 1980. The establishment of the working agreement apparently satisfied their concerns. The NAM did testify subsequent to the working agreement (U.S. Senate, RFCL, 1981), expressing support for the proposed Senate bill and making no mention of H.R. 4711. Subsequent House and Senate hearings, and there were many in the 1980s (U.S. Senate, CCCA; U.S. House of Representatives, FCLR), gave little attention to corporate crime in general or to this particular provision.

Examining the Views of the ABA: Opposition to Intervention

The ABA remained active in the organizational sentencing reform debate due to the broad scope of its interest in criminal code reform and to its institutional practice of reviewing, within the appropriate standing committee, all proposed legislation (Melone, 1985). It commented in detail on this bill and similar subsequent legislation. In their comments, the ABA invoked the traditional anti-interventionist arguments against a special master provision. Their concerns were that

> [a] judge's discretion in imposing novel sanctions on organizations should be carefully limited by statute. Courts lack the competence to manage organizations, even indirectly through special masters. Judicial oversight is best implemented through the use of recognized reporting, recordkeeping and auditing controls designed to increase

> internal accountability ... [and] it should not extend to judicial review of legitimate "business judgment" decisions of the organization's management or its stockholders or delay such decisions (U.S. House of Representatives, FCLR, 1981: 263-264).

To the extent that the special master provision went beyond the ABA's judicial oversight provision, then, it was excessive. The ABA also commented critically on a second feature of H.R. 4711. This feature, a "catch-all condition" allowed for the use of whatever additional conditions of probation were thought necessary to bring about law compliance. Such a condition, the ABA argued, invited judicial innovation, and should be excluded (U.S. House of Representatives, FCLR, 1981: 265). The ABA was unsuccessful in this regard. Both Congress and the Sentencing Commission included a "catch-all condition" of probation in their final proposals.

During hearings held in the Senate at the same time (U.S. Senate, RFCL, 1981: 11837-11860), the ABA made statements that further limit the extent to which its judicial oversight provisions could be read as indicating its support for politics-based sanctions. These statements also undermined its stated support for the working agreement. First, the ABA remarked that there should be no further expansion of criminal liability into the regulatory arena. Going further, they suggested that Congress revisit those regulatory statutes that already provided for criminal liability so as to eliminate these provisions in favor of civil liability. In effect, this position held that corporations should not be criminally liable for any but common law offenses, such as fraud. Combined with their support for mens rea as an essential component of criminal liability, the ABA rejected a large part of corporate criminal liability. Under these conditions, judicial oversight faced almost insurmountable barriers to implementation. Its use would seem to be limited to serious, repetitive cases of rationally calculated corporate criminality. Even then, individual criminal liability and fines were seen as adequate and preferable (U.S. Senate, RFCL, 1979).

In later testimony, an exchange between George Freeman of the ABA and Representative Conyers on the issue of special masters illustrates the major points of the business argument against organizational probation. Freeman took the position that the use of special masters was "inappropriate and we think they would have to be very carefully circumscribed." By this, he meant that special masters, if used at all, should be used only against criminal enterprises, whose survival were of little consequence. He continued that the use of special masters "just seems to us to be getting the courts in over their head and into things that they really don't know how to do" (U.S. House of Representatives, FCLR, 1981: 2235-2236). Conyers agreed that there are some circumstances where special masters and oversight are inappropriate, but then stated:

> maybe we should look more carefully at the wording. We are talking about moving forward in the American law to deal with the supervising of conduct at the corporate level. How do we do that? How do we move into this area of crime activity far more effectively than it is now being treated? I hope that you are as uncomfortable as I am about the way our system approaches corporate crimes (U.S. House of Representatives, FCLR, 1981: 2236).

Conyers was looking for a less intrusive means to achieve the oversight ends he sought. However, the working agreement left his dilemma irresolvable, at least in Congress.

The Failure of Comprehensive Criminal Code Reform

Despite its initial support, S.1630 languished on the Senate floor before being removed from consideration. From the right, the new and powerful Moral Majority, a coalition of conservative senators, and other groups attacked the bill as soft on drugs, pornography, and abortion (Melone, 1986). From the left, the ACLU continued to oppose the bail reform, civil rights, and individual sentencing components of the bill. Combined with election year timidity (Thornton, 1982), these issues led the bills' supporters to withdraw it from further consideration. The corporate crime provisions of this legislation were not debated.

Immediately afterwards, Senator Thurmond and sixty-two co-sponsors introduced S.2572 (128 Congressional Record 26464), a crime bill lacking some of the controversial provisions of its predecessor. Provisions relating to the insanity defense, death penalty, labor issues, and several other controversial issues were removed for separate consideration. Representative McClory (R-IL) introduced a companion bill, H.R. 6497, the Violent Crime and Drug Enforcement Improvements Act of 1982, in the House the next day (128 Congressional Record 12155). S.2572 embodied a second compromise on criminal code reform, this one between the piecemeal approach of the

House and the comprehensive approach of the Senate. Despite a working consensus on corporate crime, eleven years of Congressional effort, passage of Model Penal Codes in thirty-five states, and the availability of the model provided by the Brown Commission, with the failure of S.1630 Congress abandoned the goal of comprehensive criminal code reform in favor of the more modest goal of criminal code revision.

The effort to win full Congressional support for a uniform criminal code required gaining and maintaining broad support for definitions of such controversial subjects as obscenity, discrimination, insanity, and mens rea. Also necessary was agreement of the status of the death penalty, the boundaries of corporate criminal liability, and the goals of criminal sentencing. This proved too difficult (U.S. Senate, 1981) in the face of renewed House opposition to comprehensive legislation and increasing controversy within the Senate precipitated by the Moral Majority (Congressional Quarterly Almanac, 1982). The more modest, incremental approach of S.2572 included chapters on diverse issues (such as bail reform, sentencing reform, violent crime, drug offenses), but lacked any unifying principles. Obsolete statutes were eliminated and some reorganization was accomplished. However, the statutory criminal law remained "a wilderness of misnamed statutes" (Morris, 1990), often overlapping with or contradicting other statutes that had been enacted over the past 200 years.

S.2572 passed 95 to 1 on September 30, 1982, with the lone dissent from Senator Mathias, who opposed the creation of a sentencing commission. S.2572, attached to an unrelated House bill, H.R. 3963, passed in the House on December 20, 1982, after compromises forced by Conyers led to removal of its sentencing provisions (see 128 Congressional Record 32916-32936). These provisions, he believed, rolled back existing corporate criminal sentencing law. This was the first criminal code reform bill to pass in the House. However, after voicing strong support for criminal code reform legislation, on January 14, 1983 President Reagan vetoed H.R. 3963 due primarily to his opposition to the creation of a cabinet-level drug policy office (Congressional Quarterly Almanac, 1982). H.R. 6497, the original House crime bill, was never reported out of committee. However, this compromise achieved the desired results. After more than a decade, criminal code reform introduced in the Ninety-Eighth Congress was passed and signed into law.

The Final Session: Passage of the Comprehensive Crime Control Act

With the opening of the 98th Congress in 1983, two criminal code reform bills were introduced in the Senate. On March 16, Senators Thurmond and Laxalt (R-NV) introduced S.829, the Reagan Administration's bill, entitled the Comprehensive Crime Control Act of 1983 (129 Congressional Record S3076). On the same day, Senator Biden, with twenty-seven Democratic co-sponsors, introduced S.830, the National Security and Violent Crime Control Act of 1983 (129

Congressional Record S3162). The differences between these bills centered on provisions such as the death penalty and drug offenses. Their corporate crime provisions duplicated those that the Senate had been considering since establishment of the working agreement.

Hearings were held on both bills (U.S. Senate, 1983), during which there was no discussion of corporate crime. The differences between these bills were compromised in the Senate Judiciary Committee to form S.1762. This bill was formally introduced in the Senate on August 4, 1983 (129 Congressional Record 22883), and passed by a vote of 91-1 on February 2, 1984. The lone dissenter was again Mathias, who viewed the individual sentencing provisions of the bill as excessive and likely to increase prison populations. An amendment proposed by Mathias directing the newly created United States Sentencing Commission to ensure that prison sentence lengths and aggregate prison populations did not increase was defeated 76 to 1.

The House had before it three different bills, one of which, H.R. 2013, included a special master provision. However, with strong backing from President Reagan, House Republicans led by Representative Fish (R-NY) appended H.R. 5963, a companion to S.1762, to the 1985 continuing appropriations resolution (House Joint Resolution 648). Forced to consider multi-chapter criminal code reform legislation under these circumstances, on September 25, 1984, the House voted 316-91 in support of H.R. 5963 (130 Congressional Record H10023). A week later, House Democrats proposed a new comprehensive crime control bill, H.R. 5690. Under a suspension of

House rules (Cohodas, 1984: 2473; 128 Congressional Record 32916), this bill passed by a vote of 406-16 on October 2, 1984. A joint conference committee was called to resolve the differences between the House and Senate bills. Their work was completed on October 11, 1984. With President Reagan's signature, the Comprehensive Crime Control Act of 1984 became law on October 12, 1984.

The Comprehensive Crime Control Act and Organizational Probation

Among the eighteen chapters of the Comprehensive Crime Control Act of 1984, each representing a separate criminal justice policy initiative, was the Sentencing Reform Act (SRA). Originally introduced and passed as S.668,[19] and later subsumed by the omnibus S.1762, the SRA created the United States Sentencing Commission and mandated that it promulgate sentencing guidelines and policy statements for individual and organizational offenders. The Sentencing Reform Act also superceded the Federal Probation Act, the governing probation statute since 1925. With the passage of the SRA, probation for the first time became a separate and distinct sentence, rather than a suspended sentence. This legislation further recommended that probation be among the sentencing alternatives available for organizations. These changes clearly strengthened the state's capacity to place organizations on probation. Contrary to

[19] The SRA was passed on February 2, 1984 by a vote of 85 to 3 (130 Congressional Record S328). Senators Mathias, Hatfield (R-OR) and Heflin (D-AL) voted against the bill on the grounds that it would increase sentence lengths and prison populations.

several House bills and consistent with the working agreement established in 1979, however, the SRA did not provide any probation conditions pertaining specifically to corporations.

It was thus left to the United States Sentencing Commission and the courts to determine how and when organizational probation could be implemented and whether it would remain an elaborate fine collection mechanism, as it was under the prevailing interpretation of the Federal Probation Act, or become an innovative and remedial sanction. Robert Blakey (1991), who was involved in the criminal code reform process since his work with the Brown Commission, described this situation from the perspective of Congress by stating:

> it was almost exactly like the Brown Commission. There was a staff decision to continue the availability of probation, with the hope that the Sentencing Commission will develop it: "we authorize it and we'll see what happens. We maximize peoples' options."

Whichever course the courts and the Sentencing Commission decided to take, organizational probation would be available in some form; the Sentencing Commission was not empowered to erase what had been done by Congress. It was the circumstances in which probation would be used, the conditions that would accompany its use, and, perhaps most importantly, whether the provisions outlining its usage would be advisory or mandatory, that would be debated.

State Capacity and Congressional Intent

The past use of organizational probation clearly indicated that without unambiguous and specific statutory authority the use of organizational probation would be limited. At the same time, the weakness of Congressional support and the pro-business political climate in which the Sentencing Commission would be deliberating limited prospects for future development of organizational probation. On the other hand, the creation of a sentencing commission provided a forum for future debate better insulated from political and business pressure than was Congress. This enhanced state autonomy and capacity. These conflicting circumstances led to sharp conflict when the Sentencing Commission took a broad view of its capacity to legislate organizational sentencing guidelines.

The key point to be made here is that the contributions of Congress to organizational sentencing reform, and to sentencing reform more generally, were primarily facilitative and procedural rather than substantive. Organizational sentencing was not often considered by members of Congress and even less often elevated to the level of public debate. Instead, Congress provided the Sentencing Commission and the courts expanded statutory capacity to develop organizational sanctions, but recommended only limited use of this capacity. Also, Congress did little in terms of specifying the size of fines or the means by which they should be calculated or the uses of probation and the conditions accompanying its use. Rather, though Congress clearly believed that existing fines were too small and that organizational probation should be available in some form (see U.S. Senate, 1983b), it also decided early in its efforts that it would be the responsibility of other legal policymakers to deal more fully with these issues (Blakey, 1991; Hutchison, 1991).

The range of statutorily permissible options that Congress sought to provide to the courts and the Sentencing Commission in its development of these sanctions was the subject of considerable debate during the deliberations of the Sentencing Commission. Increased fines and individual criminal liability were the preferred means of sanctioning organizational wrongdoing (U.S. Senate, 1983b). Related to this, there was explicit recognition by Congress that the size and resources of corporations, as well as the potential harms they could cause, required substantially increased fines. However, the Congressional record was less clear regarding how Congress wished the Sentencing Commission to proceed in the developing the uses and conditions of probation.

The probation provisions in the CCCA were written for individuals, and contain mandatory and discretionary provisions pertaining to both the imposition and the conditions of probation. There were no organization-specific circumstances for the imposition of probation and no organization-specific conditions of probation. The issues, then, were whether Congress wanted the Sentencing Commission to develop organization-specific provisions or leave it up to the courts to apply the existing provisions to organizations and whether, if the Sentencing Commission did develop provisions, they should be binding or policy statements. Regarding the first issue, Congress clearly authorized the Sentencing Commission to develop separate organizational sentencing guidelines, though it did not seem to mandate their development. Though some business representatives would later argue this point (Rogers, 1991), nowhere in its numerous statements to the effect that the purpose of the Commission was "the establishment of sentencing policies and practices for the federal criminal justice system" (U.S. Senate, 1983b: 161) was there any distinction between individuals and organizations.

Whether these policies should take the form of guidelines or policy statements was also difficult for the Sentencing Commission to discern, and was at the center of its clashes with business groups. Without going into the details of this debate as it occurred in the Sentencing Commission (see Chapters Five and Six), Congress favored reliance on policy statements for both the imposition and the conditions of probation. In support of this first point, Congress stated "[a]nother area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses" (U.S. Senate, 1983b: 166). Regarding the second point, the final Senate report on the Comprehensive Crime Control Act noted that given the range of sanctions available for use against corporations,

> the Committee believes that it would be appropriate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning ... the selection of conditions of probation involving judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case (U.S. Senate, 1983b: 166).

According to these interpretations, the imposition and conditions of organizational probation were intended to be mandatory, if at all, only when applied in a manner consistent with the mandatory provisions placed in the CCCA by Congress.

Another point which emerged from the final Congressional report was that Congress opposed remedial interventions into organizations through organizational probation (U.S. Senate, 1983b; Summitt, 1991), except in the most extreme cases. Congress clearly declared that "it is not the intent of the Committee that the courts manage organizations as part of probation supervision" (U.S. Senate, 1983b: 99). After reviewing Congress' consideration of organizational probation, Rush concluded that "Congress has tacitly rejected many invasive techniques while wholeheartedly adopting only noninvasive probation" (1986: 59). Again, however, these concerns about organizational sanctioning, and remedial probation in particular, did not take statutory form. They were found only in the text of Congressional reports.

Those who supported and those who opposed the development of organizational probation recognized the ambiguous situation in which they had been left by Congress. Interpreting this situation retrospectively, in light of the substantial development of organizational probation by the Sentencing Commission, Richard S. Gruner, a supporter of organizational probation, said

> I think that we're lucky that they [Congress] put in authorizing language, and the fact that they didn't come back with further clarification language as to what the

> general language really meant, was unfortunate but somewhat understandable given how big the task was at the time (Gruner, 1991).

Michael Gelacak, identified as less supportive of organizational probation than other members of the Sentencing Commission (Coffee, 1991; Rogers, 1991), expressed the same view of the CCCA, though from the opposing perspective. Speaking to a business audience on the eve of the implementation of the guidelines, Gelacak criticized business for failing to do more to oppose organizational probation in Congress. He argued that once the CCCA was passed, the Sentencing Commission was obligated to develop organizational sentences; "we can't ignore it. It's there by Congressional directive" (Gelacak, 1991). While this statement tended to historicize the work of the Sentencing Commission, ignoring the broad range of alternatives it had available, it did point out the incremental development of organizational probation and the role of law in enhancing state capacity and blunting opposition.

Without the benefit of hindsight, the Congressional criminal code reform debate, the CCCA, and the final Congressional report provided business a generally favorable view of its legal future. Especially within the context of the regulatory climate that had emerged in the early 1980s, there seemed to be little reason for business to be concerned about what the United States Sentencing Commission might do in developing organizational sanctions, particularly organizational probation. This sanction had not posed a threat in the past and did not appear to pose a threat for the future, particularly if the Sentencing Commission was attentive to the concerns of Congress.

Given these circumstances, the absence of concerted and insistent opposition to organizational probation by business during the Congressional debate can be seen as properly gauged to the level of threat posed by this sanction as it was understood at the time. Paul Summitt, Senate Counsel during this period, described the situation by stating about business,

> I think they didn't perceive it [probation] as a particular threat to their operation. I certainly think that those of us who were participating in the legislative process didn't consider this type of approach to be a big threat to business because it wouldn't be used very much (Summitt, 1991).

However, the United States Sentencing Commission would take a different approach to organizational probation, making full use of its capacity to extend the availability and uses of this sanction.

Conclusion: Constructing a Framework for Reform

In his research on the history of sentencing reform, Rothman (1983) describes the public as "silent, uninformed, and relatively passive when it comes to sentencing procedures. Perhaps, more important, it may be hopelessly confused, and with ample reason" (1983: 646; see also Travis, 1982). In the case of organizational probation, at least as detailed thus far, this description can be extended to almost every participant in the criminal code reform process. From the earliest work of the Brown Commission onward there was a failure to clarify the meaning and intended usage of organizational probation. Though made available in proposed legislation almost without exception, the circumstances of its use and the conditions to be imposed were not elaborated. Organizational probation remained a corporate sanction only in name. This seriously hindered the public debate on the merits, uses, and limitations of this sanction. Business and public interest groups were unsure what was at issue with organizational probation, and for this and other reasons focused most of their attention elsewhere. Supporters of probation within and outside the state, on the other hand, took steps to establish a legal framework in which the meaning and uses of probation could be further developed.

In the end, then, rather than fully reforming the federal criminal sentencing system, Congress created the framework for reform and left the hard task of specifying sentences to the newly created United States Sentencing Commission and to the federal courts. The ultimate success of organizational probation is due in part to this piecemeal development. Despite the criticisms of business by Gelacak (1991), the significance of each step in the development of organizational probation was not clearly obvious at the time. This reduced potential opposition to organizational probation while at the same time undercutting possibilities for future opposition by steadily strengthening the legal basis for change.

CRAFTING CORPORATE CRIME CONTROLS:

THE DEVELOPMENT OF ORGANIZATIONAL PROBATION

AND ITS IMPLICATIONS FOR CRIMINOLOGY

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Organizational sanctions is a real tough nut to crack. I think that is going to be a very difficult problem for this Commission to wrestle with. We have got so many different views from credible individuals about it.

William W. Wilkins, Jr.[1]

Chapter Five

ORGANIZATIONAL PROBATION AND THE UNITED STATES SENTENCING COMMISSION: INITIAL EFFORTS TO PROMULGATE GUIDELINES

In testimony before the United States Sentencing Commission, Joseph diGenova, a corporate defense attorney and consultant to the Sentencing Commission, characterized the state of corporate criminal sentencing by describing the effort to develop organizational sentencing guidelines as "laboring in a drought-ridden vineyard" (United States Sentencing Commission, 1990a: 70). Despite legislative and judicial efforts throughout the 1970s and 1980s, and the passage of the Sentencing Reform Act, corporate criminal sentencing law remained seriously underdeveloped. Organizational probation still lacked specificity in both the circumstances of its use and the conditions accompanying its use. Experience suggested that without

[1] Chairman of the United States Sentencing Commission. This statement was made to the House Criminal Justice Subcommittee on March 7, 1990, during oversight hearings on the performance of the Sentencing Commission.

this elaboration, a task delegated to the Sentencing Commission, judges and prosecutors would be less likely to employ this sanction, particularly in remedial ways.

This chapter begins examination of the efforts of the Sentencing Commission in developing organizational probation. It was here that organizational probation received its most sustained and detailed consideration. This discussion, which continues in Chapter Six, is organized around the probation provisions of each of the numerous proposals considered by the Sentencing Commission. The details of each of these proposals, as well as the forces that shaped them and the reactions to them, are examined. The framework provided by the logics of markets and politics is employed to demarcate shifts in the debate on organizational sentencing. At the same time, insights drawn from sociolegal theory are used to shape a theoretical framework through which these changes and the final organizational probation provisions are explained. Attention is focused on other issues, such as the fining provisions of the guidelines and on the Commission itself, to the extent that these issues are importantly linked to the development of organizational probation.

Emerging from case of lawmaking is the view that state capacity, aided at important points by entrepreneurial actions, was the central factor in the development of organizational probation. These issues have received most theoretical attention up to this point. As Chapter Four detailed, the Sentencing Commission was invested by Congress with substantial statutory protections from political influence. Though it was not anticipated that the Commission would give independent or extensive consideration to organizational sanctions, when it did so, its structural characteristics provided it defense against business and White House pressures. This raises a second set of theoretical issues for examination: determining why the Sentencing Commission broadly exercised its powers in the area of organizational sentencing, particularly organizational probation. As detailed in the next two chapters, the Sentencing Commission made extensive use of its powers in this area due to legitimacy considerations, an interest in maximizing its organizational powers, and a business strategy that largely ceded to advocates of organizational probation control over the details of its development.

United States Sentencing Commission: Structure and Mandate

Before considering the efforts of the Sentencing Commission, it is important to examine its structure and mandate, and consider the possible effects of these background characteristics on the lawmaking process. Similar in structure to an independent regulatory commission, the Sentencing Commission is a bipartisan, seven member, permanent Commission. Despite its lawmaking powers, it is officially located within the judicial branch. Commissioners are appointed by the President to six-year terms and may serve two terms, though five of the first seven members served initial terms of two or four years so as to stagger the appointment and service of subsequent

Commissioners. Service is full-time until 1993, when Commissioners become part-time. Also, the CCCA establishes that terms would not officially begin until after promulgation of the initial guidelines.

Three of the Commission's members are required to be judges, who retain their seats on the bench while at the Commission. There are no additional criteria for the selection of the other four Commissioners. To provide an extra measure of independence, the three judges are chosen by the President from a list of candidates drafted by the Judicial Conference of the United States. Six potential candidates are listed for each position. Additionally, two ex-officio members, one a representative of the Department of Justice appointed by the Attorney General, the other from the United States Parole Commission, have nonvoting seats on the Commission. Finally, Commissioners are subject to removal by the President "only for neglect of duty or malfeasance in office or for other good cause shown" (28 U.S.C. Section 991).

Independent regulatory commissions have been criticized (see Bernstein, 1955; Gellhorn, 1972) on the grounds that their independence from government restricts both public participation and the extent to which they can be protected from interference by business. A more recent and increasingly common view (see Wright, 1991) is that the independent regulatory commission structure provides essential independence from political influence. This view is supported by growing evidence of executive and legislative interference in regulatory activities (Waterman, 1989; Weingast and

Moran, 1983, 1986; Shute, 1991; but see Muris, 1986). In the present case, the independence of the Sentencing Commission is so substantial that the Commission has been described from the perspective of administrative law as "less politically accountable than virtually any other federal agency" (Wright, 1991: 5). Two reasons for this are the appointment criteria for Commissioners and the placement of the Commission within the judicial branch. The EPA, OSHA, and other newer regulatory agencies, on the other hand, are particularly subject to political influence because they are headed by a single individual who serves at the discretion of the President.

The structure of the United States Sentencing Commission was largely the result of Congressional interest in insulating the development of individual sentences, a highly charged political issue, from partisan conflict (Frankel and Orland, 1984; Schulhofer, 1980; Wright, 1991). That this same structure would also protect the deliberations of the Commission on organizational sentencing was not brought up during the Congressional debate, in keeping with the view that the Commission would not do much in this area. As the following discussion illustrates, when the Commission did more than anticipated in developing organizational sanctions, business did not have available to it some of its usual methods of influence.

The lawmaking capacity and autonomy of the Sentencing Commission also derived from the process established for reviewing the guidelines it developed. Under fire from business in the final days of its effort to promulgate organizational sentencing guidelines, it was here that the Sentencing Commission's independence was most important. Regulations developed by federal regulatory agencies, rather than by Congress, are subject to review within the executive branch. Both President Reagan and President Bush established regulatory review boards designed to diminish the regulatory burden on business by making changes in regulations proposed by various government agencies. These agencies, the Regulatory Relief Task Force, headed by Vice President Bush, and the Council on Competitiveness, headed by Vice President Quayle, served largely the same purposes (see Shute, 1991; Hilts, 1991b, 1991c). Both reduced the amount of regulation on business by imposing rigorous cost benefit criteria on regulatory agency proposals.

Legal products of the Sentencing Commission, on the other hand, are not subject to this or any similar review. Modification of its proposals takes much more than support from the White House. Its proposed guidelines and amendments are subject to six months of Congressional review, during which they may be rejected or altered only through the full legislative process: passage of legislation in both the Senate and the House and the signature of the President. This is a difficult legislative task due to the short time available. Also, this period is always from May to November, during which Congress spends a considerable amount of time in recess and in campaigning. The experience of California, where organizational probation legislation drafted by the legislature was vetoed by Governor Wilson as too tough on business (Gruner, 1991), is illustrative. Even after being stripped of its mandatory provisions (Franklin, 1990b), this legislation was rejected, further suggesting the importance of the statutory insulation provided the United States Sentencing Commission.

In the most general sense, the mandate of the Sentencing Commission was to fulfill the long-held goal of establishing a comprehensive law of sentencing and to do so within the broad frameworks of increasing fairness and reducing disparity. Toward these ends, Congress directed the Commission to develop specific sentencing guidelines for each of the alternative sentences available to judges. The Commission was created, in effect, to put the flesh and bones on the sentencing skeleton drafted by Congress by developing binding guidelines and advisory policy statements consistent with the principles and goals established by Congress. Though Congress determined that it was unable to develop specific sentences, the framework it created provided a solid foundation for the work of the Commission. Samuel Buffone, a member of the ABA's guidelines delegation, described sentencing "as the best thought out part of the CCCA" (Corporate Crime Reporter, 1988a: 8). Kenneth Feinberg, former Special Counsel to the Senate Judiciary Committee and consultant to the Sentencing Commission, described the sentencing provisions of the CCCA as "the foundation of the Congressional criminal code reform effort" (Feinberg and Schreiber, 1985: 265).

For organizational offenders, the responsibility of the Commission was, as the previous chapter detailed, to develop guidelines for the use of fines, restitution, notice to victims, publicity, and probation. Congress clearly stated that emphasis was to be placed on fines, with probation as the primary alternative. Congress was also clear in its concern that the probation provisions not lead to judicial management of corporations. Despite these limitations, the mandate left to the Sentencing Commission in the area of organizational probation was quite vague. Whether the authorizing circumstances and conditions of implementation for organizational probation should be distinguished from those for individual probation was not stated. Neither was it stated whether organizational probation should have mandatory uses and conditions. Overall, there were virtually no requirements that the Sentencing Commission do anything with organizational probation other than reproduce the minimal standards provided by Congress.

Early Efforts: The United States Sentencing Commission, 1985-1987

President Reagan waited nearly one year after signing the Comprehensive Crime Control Act, until September 10, 1985, before announcing his nominations to the Sentencing Commission. This delay immediately placed in doubt the ability of the Commission to meet the May 1986 deadline established by Congress for submission of sentencing guidelines. The reasons for this delay were concerns expressed by defense attorneys that the anticipated conservatism of the nominees would lead to excessively punitive individual sentences (Strasser, 1985b) and constitutional concerns related to the service of active federal judges as full-time, executive-appointed members of an independent commission with lawmaking powers (Strasser, 1985a).[2]

The Composition of the Sentencing Commission

Reflecting an effort on the part of the Reagan Administration to reward the chief sponsors of the CCCA, the nominee to chair the Commission was William W. Wilkins Jr., a Federal judge from the District Court of South Carolina[3] and a former aide to Senator Thurmond, chief Republican sponsor of the CCCA. Judge Stephen G. Breyer of the First Circuit Court of Appeals and a former aide to Senator Kennedy, chief Democratic sponsor of the CCCA, was also nominated to the Commission. The third judicial nominee was Senior Judge George E. MacKinnon of the District of Columbia Circuit Court. MacKinnon had been active in Minnesota Republican politics between 1934 and 1958, and was appointed to the federal bench in 1969. He served as corporate counsel in 1960s.

The other four nominees were Ilene Nagel, a professor of sociology and law from Indiana University, best known for her

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[2] The Judicial Conference of the United States, chaired by Chief Justice Warren E. Burger, first raised the separation of powers issue. The Department of Justice defended the provisions of the CCCA, noting that the Sentencing Commission was within the judicial branch. Ultimate settlement of this issue was only possible once a constitutional challenge was brought against the Commission and the guidelines (Mistretta v. U.S. 488 US 361).

[3] Judge Wilkins has since been elevated to the Fourth Circuit Court of Appeals.

methodological skills and research on sentencing;[4] Michael Block, a professor of law and economics at the University of Arizona, and former director of the Hoover Institute's Center for Econometric Studies of the Justice System; Helen Corrothers, a member of the United States Parole Commission and an expert in corrections; and Paul Robinson, a law professor from Rutgers and expert in criminal law reform. Wilkins and Nagel, both Republicans, were appointed to initial terms of six years. MacKinnon and Block, both Republicans, and Corrothers, an Independent, were appointed to four year initial terms. Breyer and Robinson, the Commission's lone Democrats, were appointed to two-year initial terms.

Though it is difficult to assess the extent to which organizational sentencing issues entered into the selection of these Commissioners, the emphasis on individual criminality and law and order themes by Congress and President Reagan, and the small part that corporations play in the overall picture of federal criminal sentencing, make it likely that organizational crime was a minor consideration. However, it is important to note that two of the nominees, Judge Breyer and Professor Block, were and remain well-known free market advocates. Judge Breyer has published extensively

[4] Though Nagel became the primary Commission supporter for increased organizational sanctions, her sentencing research has centered on individual offenders (Stryker, Nagel, and Hagan, 1983; Nagel, 1983), particularly white collar offenders (Hagan, Nagel, and Albonetti, 1980; Hagan and Bernstein, 1979). This research has consistently found that the status characteristics of offenders are not important in sentencing.

in the area of regulation and is an advocate of deregulation,[5] and Professor Block is a prominent advocate of law and economics, which places exclusive reliance on monetary sanctions in regulating corporate conduct. Whether or not it was planned, the choice of Breyer made excellent political use of one of only two Democratic seats. The selection of Block accorded with the law and economics focus of the Administration's economic advisors.

Confirmation hearings for Nagel, Block, and Robinson were held on October 2, 1985. Having been subject to Senate confirmation when nominated to the Federal judiciary, Wilkins, MacKinnon, and Breyer did not have to face Senate scrutiny again. Corrothers was similarly exempted due to her previous confirmation to the United Stated Parole Commission. Questioning of each nominee was cursory, and with the exception of Block focused entirely on individual criminality. In his answers, Block discussed white collar crime, and stated his belief that the function of punishment was "to minimize the social costs of crime and punishment" (United States Senate, 1985: 335). Each nominee was confirmed without dissent.

Swearing-in ceremonies for the first Commissioners of the United States Sentencing Commission were held on October 29, 1985. Later that same day, the Commission convened its first meeting, fully

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[5] His best known works in the area of regulatory policy are The Federal Power Commission and the Regulation of Energy (1974, with Paul MacAvoy); "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform" (1979); Administrative Law and Regulatory Policy (1979, with Richard Stewart); and Regulation and its Reform (1982).

one year after having been created and only six months prior to the deadline for submission of sentencing guidelines to Congress. In one of its first acts, the Sentencing Commission petitioned Congress for an extension on this deadline. An extension was granted (P.L. 99-217), providing the Commission an additional year, until May 1, 1987, to submit guidelines to Congress.

In its second major step, after several months of largely administrative work, on March 12, 1986 the Commission met and formed two research project teams to develop preliminary sentencing guidelines proposals. The Blameworthiness Model project, also referred to as the Just Deserts project, and the Efficient Crime Control project were the result. Commissioner Robinson was selected to head the research group drafting a sentencing scheme based on just deserts. Commissioners Block and Nagel were selected to head the Efficient Crime Control research team. Block immediately announced his intention to use corporate sentencing as the basis for his proposal, though it would also be applied to individual offenders. These project teams were requested to report on their progress periodically to the full Commission (United States Sentencing Commission, Minutes, 1986).

Preliminary Consideration of Organizational Sanctions

In an effort to initiate contact with interest groups and gather preliminary information, beginning in the spring of 1986 the Sentencing Commission held five topical hearings. Each covered in broad and preliminary ways subjects of central importance in the development of sentencing guidelines and was open to the public. On June 10, 1986, the third of these topical hearings, focusing on organizational sanctioning, was held in Washington, D.C.[6] This was the first occasion on which the Commission collectively examined this issue. It had not yet developed even a preliminary draft or statement of its position on organizational sentencing or formally determined the relationship between individual and organizational sentencing.

Plans for this meeting began in the early spring of 1986 with the Commission soliciting witnesses to testify. Those who agreed to appear included some of the most prominent people in the area of corporate crime control, including John C. Coffee, Jr., of Columbia Law School, and George C. Freeman, Jr., a private attorney and representative of the ABA's Corporation, Banking, and Business Law section. Both had been actively involved in the corporate sentencing debate for at least a decade, and had clashed over the issue of organizational probation in developing the ABA's Standards for Criminal Justice in the late 1970s. William Brodsky, also of the ABA, testified with Freeman. Additional witnesses were two representatives of the Department of Justice: Harvey Silets, a tax attorney at the United States Attorney's Office in Chicago, and Stephen Trott, Assistant Attorney General, Criminal Division. The last witness was Mark Crane, a prominent corporate defense attorney and antitrust

[6] The other four topical hearings focused on offense seriousness, prior criminal records, sentencing options, and plea agreements.

expert who had been actively involved in the Congressional criminal code reform debate on behalf of the ABA.

Business Non-Participation. Notably absent from this witness list were any representatives of the business community, though the two sections of the ABA scheduled to testify were led by corporate attorneys and were traditionally closely linked to the business community (Melone, 1977, 1985). Efforts to solicit input from the Business Roundtable, National Association of Manufacturers, Chamber of Commerce, and other segments of the business community were unsuccessful. Paul Martin, Communication Director of the Commission, explained to the Commissioners that representatives of the business community "had declined to participate since their organizations had no official policy on the subject" of organizational sentencing guidelines (United States Sentencing Commission, Minutes, May 27, 1986). The unwillingness of these groups to testify is seemingly difficult to understand given what was at issue and the substantial participation of business groups in the Congressional organizational sentencing reform debate.

However, there are several explanations for business nonparticipation that are consistent with their patterns of past and future involvement in sentencing reform and with the theoretical framework employed herein. Each of these explanations identifies an element of business' strategic response to organizational sentencing guidelines. First, there was a belief among business that the

Sentencing Commission could or would do little to add to the work of Congress on organizational sentencing. The Congressional mandate, the composition of the Commission, and the work it had done up to this point, gave little reason to think the Commission had the ideological or legal capacity to develop strong organizational sentencing guidelines. In fact, given the vagueness of the CCCA on the issue of organizational guidelines, it is entirely possible that business believed Congress had already spoken the last word on statutory organizational sentencing law. At most, then, the Commission would add advisory policy statements. This view was articulated by Michael Gelacak, who helped draft the CCCA as an aide to Senator Biden (Gelacak, 1991). Likewise, Commissioner Nagel reports that some members of the regulatory community initially had this perception (Nagel, 1991).

Second, the Sentencing Commission had yet to publish anything, even on individual sanctions. There was thus no specific proposal to which business could respond and no indication of the direction in which the Commission was moving with respect to organizational sentencing. Business had failed to respond to organizational probation under the same circumstances when first recommended by the Brown Commission and first discussed in the Senate. Rather, the agenda for the initial Sentencing Commission hearing was established by a series of broadly stated questions that the Commission had posed in advance to each witness. While the ABA was institutionally organized through its standing sections and its periodically revised Criminal Justice Standards toward the consideration of theoretical issues and the development of organizational positions, business groups continued to demonstrate a lack of foresight. Contrary to instrumentalist views of business rationality (Miliband, 1969; Domhoff, 1983, 1990), business groups generated their positions on sentencing in response to concrete proposals rather than through advancement of a set of principles.

Third, due to the paucity of organizational prosecutions, particularly relative to civil enforcement actions, the corporate criminal law was not an area of paramount concern to business (Clinard and Yeager, 1980). Despite growth in the corporate criminal law (Orland, 1980; Thornburg, 1991) during this period, there were approximately 400 organizations convicted in the Federal courts each year. Most of these were smaller organizations, and most sanctions were monetary (Cohen, Ho, Jones, and Schleich, 1988; Cohen, 1989; Cohen, 1991d). As a result, the large corporate interests that dominated business lobbying efforts continued to perceive their legal environment as dominated by regulatory and administrative law.

First Public Hearing on Organizational Sanctions. Without the focus provided by a proposal, the June 10, 1986 hearing was wide-ranging. It served mostly to interpret the meaning of the CCCA as it applied to organizational sentencing and to establish the direction of the Commission's initial consideration of this issue. The Corporation, Banking, and Business Law Section of the ABA (American

Bar Association, 1986; see also Crane, et al., 1986) essentially reiterated the positions it had taken throughout the Congressional hearings.[7] The ABA's Standards for Criminal Justice were recommended to the Commission as a basis for the guidelines. Consistent with these Standards, preference was expressed for individual criminal liability, corporate civil liability, and a substantial narrowing of the statutory applicability of the criminal law to corporations. Regarding this final point, Brodsky urged the Sentencing Commission "to recognize the fundamental reality that most regulatory offenses are essentially different from fraud, embezzlement, or other common law type crimes" (United States Sentencing Commission, 1986b: 16-17), and to not subject these offenders to the criminal law.

The ABA also expressed support for organizational fines limited to quantifiable losses or gains, whichever was greater. In the area of nonmonetary sanctions, the ABA voiced concern that Congress had not authorized and the Commission had not developed judicial oversight. This latter sanction was advocated as a market-based means to "protect the public while making organizational management more conscious of the risks and legal consequences of corporate criminality" (United States Sentencing Commission, 1986: 11). This would be accomplished through court-mandated internal audit and investigation procedures, the results of which would be available

[7] In fact, having established and brought to the attention of the Sentencing Commission its organizationally authorized standards on the issues at hand, the ABA played a less active role in the work of the Commission than it had during Congressional consideration of organizational crime.

to management for optional use in making organizational changes. Most importantly, judicial oversight would "not be used to impose penalties or affirmative duties in excess of those authorized by the legislature" (American Bar Association, 1986: 12), thereby prohibiting development by the Sentencing Commission or the courts of politics-based, remedial sanctions.

Further narrowing the remedial scope of judicial oversight, the ABA stated that this sanction would be used only where collateral civil remedies were unavailable and where the conduct was "serious, repetitive," and linked to organizational problems, or in cases of clear and present public dangers (American Bar Association, 1986: 12). At the same time, the ABA expressed "opposition to any provision that would permit a trial court to place a corporation on probation" (United States Sentencing Commission, 1986: 4), an inappropriate sanction which conjures up images of special masters and other "imaginary horrors that few, if any, would advocate" (American Bar Association, 1986: 21). Rather, organizational probation should be developed, if at all, to mirror judicial oversight.

The views of the Department of Justice on organizational probation were difficult to decipher, despite their discussion of this sanction in testimony to the Commission. Due to persisting uncertainty as to what was at stake with organizational probation, conflicts within and between the Antitrust and Criminal Divisions on organizational sanctions, and the absence at this early point of a department policy on this sanction, the DOJ did not clearly state its position on organizational probation. The DOJ had considerable experience with actual probation cases in the federal courts (see Chapter Three). From these experiences, it was understandably skeptical of this sanction, which it viewed primarily as a means to reduce the severity of already inadequate corporate sentences in exchange for possible, generally nonquantifiable, public benefits. Such efforts to "do good" (U.S. Department of Justice, 1986a: 15) were strongly opposed by Assistant Attorney General Stephen Trott.

On the other hand, neither was the DOJ comfortable with an intrusive, remedial model of probation. In a hearing held about the same time, Assistant Attorney General Ginsburg of the Antitrust Division expressed strong and unqualified opposition to organizational probation, in favor of reliance on market-based sanctions (U.S. Department of Justice, 1986b). Trott expressed support for a moderate use of organizational probation. Any remedial conditions, he argued, should be narrowly drawn and should be implemented with maximum business initiative. Negotiated compliance plans, appointment of special probation officers, and the establishment of reporting requirements were all acceptable because these measures "would not place the court in the position of managing the organization's affairs but of overseeing whether the organization's own management is directed toward lawfulness" (U.S. Department of Justice, 1986a: 15). Overall, however, reliance on substantially increased criminal fines was preferred.

Professor Coffee expressed strong support for organizational probation. In particular, he cited the experiences of the Securities and Exchange Commission with remedial injunctions in support of his view that legal interventions into corporations could be effectively implemented and that doing so through organizational probation did not represent a major regulatory development (United States Sentencing Commission, 1986b). However, at this preliminary stage, Coffee provided few details of the specific organizational probation provisions through which the experiences of the SEC could be transferred to the criminal law and no recommendations regarding the statutory steps that should be taken by the Commission.

Publication of the Initial Proposal

The first sentencing guidelines proposal developed by the Sentencing Commission was published for public review and comment in the Federal Register on October 1, 1986 (United States Sentencing Commission, 1986c). Provisions for individual sentencing dominated this draft. However, included as a supplement to these highly detailed draft guidelines were brief, speculative sections on the application of the just deserts and efficient crime control models to organizations. These sections were written as text rather than guidelines, indicating that the Commission had given only preliminary consideration to organizational sanctions and sought input.

In this supplementary section, the just deserts model proposed the development of punishment tables, in which different levels of offenses led to fines of varying severity and probation conditions of varying intrusiveness. No specific fines or probation conditions were mentioned. The efficient crime control model, based on law and economics, stressed market-based sanctions, reasoning that because "organizations are motivated almost entirely by economic self-interest, the obvious way to deter them from committing crimes is to make crime unprofitable" (United States Sentencing Commission, 1986c: 35129). Consistent with this theory, the proposed use of probation was quite limited. In fact, the draft suggested its use only as a means to remove through a disqualification condition culpable individuals from their positions in the organization. Finally, to facilitate future discussion, this proposal concluded with a series of questions for public comment. Among them, the Commission asked for "comment on the appropriate sentencing of organizational offenders" and comments on appropriate discretionary conditions (e.g. internal audits, charitable contributions, debarment from federal contracts, publicity) of organizational probation.

Public comments on the organizational sentencing provisions of this proposal were few. The Antitrust Section of the ABA filed comments essentially restating Crane's earlier testimony. The Business Roundtable (1986) also sent comments to the Commission. Like the ABA, with which the Roundtable stated it was in complete agreement, these comments focused exclusively on antitrust offenses. The BRT stated its concerns about the expansion and propriety of corporate criminal liability, its preference for individual criminal liability, and its belief in the appropriateness of civil sanctions over criminal sanctions in antitrust cases. Grounding its critique of organizational probation in the scant empirical record of corporate convictions, the BRT remarked that there was "no evidence that these novel probationary remedies are necessary" (1986: 12).

Instead, the BRT argued that existing treble damage fines, which are only available in antitrust cases, provided adequate deterrence and encouragement for internal "preventive and corrective" changes. Mandating these changes through probation would be "draconian" (1986: 13). As evidence of the adequacy of existing corporate criminal sanctions, the BRT commented that "the fact that there have been very few criminal antitrust actions against major corporations in the last decade strongly suggests that internal compliance programs are working" (1986: 12). The political and ideological roots of nonenforcement of the criminal law against corporations during this era, clearly seen in sharp reductions in both enforcement resources and new legislative initiatives (Schneider, 1982; Hawkins and Thomas, 1989; Coleman, 1985b; Goodman and Wrightson, 1987), were not mentioned. These were the last public comments on organizational sanctions filed with the Commission by any individual or organization until October 1988.

Getting Organized: The Significance of Insignificant Decisions

The minutes of the Commission meetings held subsequent to the June 1986 hearing and the publication of the initial proposal reveal no discussion of organizational sanctioning. However, sometime in late 1986 or early 1987, though the minutes do not disclose precisely when, the Commission took a second important step to assist it in meeting its Congressional deadline. Concluding that the one year extension it had received on the submission of guidelines to Congress still did not provide sufficient time to fully complete this task, the Commission decided to formally separate consideration of guidelines for individual adult offenders from guidelines for juveniles and organizations. The complexity of organizational sanctions, as made clear to the Commission at the June hearing, contributed to this decision (Wilkins, U.S. House of Representatives, 1990). This decision would expedite completion of guidelines for the great majority of offenders, enabling the Commission to meet its May 1987 deadline. Guidelines for juveniles and organizations would be developed later, and would be submitted to Congress as amendments, in the form of separate chapters, to the guidelines already in place.

The decision to separate consideration of individual and organizational sanctions was made by the Commissioners without controversy or even extended discussion. In fact, as described by Commissioner Robinson (1991),

> [t]here really was no decision that was really discussed. There was a large project facing the Commission, and the centerpiece for the task was the basic guidelines for the most typical offenses. And once that was in place the Commission could work on refinement issues, extending the guidelines to cover less common offenses; what were generally viewed as less central items. Sanctions for organizations were judged a less central item.

A similar scenario was provided by several other people associated with the Sentencing Commission (Nagel, 1991; Parker, 1991a; Gainer, 1991). This decision can be seen as insignificant in many ways, as merely pragmatic and expedient. It can also be viewed as another case in which corporate crime was relegated to secondary status, pushed aside in unspoken deference to corporate power and in favor of more politically attractive individual sanctions. It is suggested herein, however, that this decision had implications far beyond those realized at the time, and in a direction opposed by business.

Up to this point in the sentencing reform process, organizational sentencing had received little separate attention. Its development by the Brown Commission and Congress was largely the byproduct of the development of individual sentences and the rationalization and standardization of the criminal code. Little separate attention had been given to organizational sanctions other than by staff personnel. This was particularly true for organizational probation. Though in the Comprehensive Crime Control Act the sentences available for imposition on individuals and organizations were listed separately, the circumstances in which they could be imposed and the conditions of imposition were listed together and were based solely on the model of individual offenders.

With the decision to separate consideration of individual and organizational sentences, the Commission created for itself the task of independently considering and developing organizational probation and organizational sanctions more generally. In so doing, it took a expansive view of its lawmaking capacity. A less ambitious approach of formally recognizing that individuals and organizations were subject to the range of Congressionally authorized sanctions, but not developing separate guidelines applying those sanctions to each type of offender, would have been possible. In fact, Michael Gelacak, who as an aide to Senator Biden was at the time in a position to have inside information about the intent of Congress, recently stated regarding the CCCA that "Congress never anticipated organizational sanctions. It was the farthest thing from their mind when they passed that law" (Gelacak, 1991).

In rather casually deciding to separate consideration of individual and organizational offenders, the Sentencing Commission did not seem to seriously consider the possibility of not legislating distinct organizational sentencing guidelines. Had they done so, and keeping in mind that up to this point the legal meaning and operation of organizational probation were still unsettled issues, it is entirely possible that organizational probation would have remained undeveloped and largely unused, particularly in a remedial fashion. Even after the decision to develop separate guidelines for individuals and organizations, however, the drafting of the organizational probation provisions remained to be done. That "meaningful" provisions would result was, as the following discussion details, far from a settled issue.

At this point, it should be noted that in developing a preliminary guidelines proposal, Commissioner Block assembled an

Efficient Crime Control project team that shared his support for law and economics and directed their attention from the beginning to organizational sanctions. Deputy Chief Counsel Jeffrey Parker, Deputy General Counsel Jeffrey Standen, and Chief Economist John Lott were key members of this team. Due to Block's influence over the research staff (Yost, 1989b, 1989c; Coffee, 1991a), when the Commission separated consideration of individual and organizational sentences, and placed Block in charge of research on organizational sentencing, an exclusively market-based approach prevailed. The just deserts approach was immediately abandoned, and consideration of other alternatives was forestalled. From the beginning, the development of organizational probation beyond the framework provided by Congress was in jeopardy. In fact, the few comments about organizational probation in the efficient crime control section of the October 1, 1986 draft suggested that even the Congressional standards would be resisted, and at best grudgingly imposed.

Individual Guidelines: Constitutionality, and Legitimacy

In April 1987, the United States Sentencing Commission submitted to Congress guidelines for individual offenders. After the statutorily mandated six months of Congressional review, during which no changes were made, these sentencing guidelines became law on November 2, 1987. Despite the completion of this task, organizational sanctions returned to the Commission's agenda only slowly. Commission meeting minutes reveal that during the summer and fall of 1987, the work of Commissioner Block and the research staff continued work on preliminary organizational sentencing guidelines. Though it faced no deadline on submission of these guidelines to Congress, since they were treated as amendments to existing guidelines,. the Commission hoped to have them completed by May 1988. As Block's research group continued its drafting efforts, the Commission was primarily occupied with the implementation of the individual guidelines. This involved providing training to court personnel, monitoring compliance with the guidelines, and collecting data on their implementation.

Further delaying the Commission's consideration of organizational sanctions were frequent challenges to the constitutionality of the individual guidelines and the Commission. These challenges had been anticipated since at least the controversy with the Judicial Conference over the appointment of sitting judges to the Commission (Strasser, 1985a). The punitiveness of the individual guidelines, which immediately became a source of controversy, increased the opposition of defendants and some judges to the guidelines. Prison terms were substantially increased over past practice (Champion, 1989; Tonry, 1991). The use of alternatives to imprisonment, particularly probation, decreased. Within six months of their implementation, eighty-five Federal District Court judges had ruled on the constitutionality of the guidelines, fifty-four of whom found them unconstitutional (Hockstader, 1988). With 40,000 federal defendants sentenced each year, this situation created tremendous uncertainty, noncompliance, and disparity throughout the Federal criminal justice system.

Mistretta v. U.S. The Reagan Administration asked the Supreme Court to expedite settlement of this constitutional question by hearing a district court case directly through a grant of certiorari, rather than waiting for an appellate court to rule on the constitutionality of the guidelines (Hockstader, 1988). The Supreme Court agreed, accepting the Administration's argument that this was a matter of "imperative public importance" (488 US 361, 371; Hockstader, 1988: A10) justifying this procedural irregularity. In October 1988, Mistretta v. U.S. (488 US 361, 1989), a drug case from Kansas City, was argued in the Supreme Court. Alan B. Morrison of the Public Citizen Litigation Group represented Mistretta. The Government's case was presented by Solicitor General Charles Fried.[8]

The two major issues in this case were whether Congress had provided the Sentencing Commission adequate guidance in exercising its power, the traditional standard of review in the delegation of lawmaking authority to regulatory agencies, and whether the Commission's structure as a judiciary-based lawmaking body violated the separation of powers clause. On January 18, 1989, in an 8 to 1 vote, the Supreme Court upheld the constitutionality of the

[8] The United States Sentencing Commission presented an amicus curiae brief. Among those assisting Paul M. Bator in this brief was Andrew L. Frey, an attorney with Mayer, Brown, and Platt, who would later lobby the Commission against the organizational guidelines on behalf of the Business Roundtable (see Frey, 1990, 1991).

Sentencing Commission and the guidelines. By then, more than 150 federal district judges had ruled the guidelines unconstitutional (Kamen, 1989). Despite the ruling in Mistretta, some judges continued to refuse to impose what they perceive to be excessive sentences (New York Times, 1991). One judge went so far as to resign to protest the harshness of the individual guidelines (New York Times, 1990).

Writing for the Court in Mistretta, Justice Harry Blackmun agreed that the Sentencing Commission, as a judiciary-based agency with lawmaking power, was "a peculiar institution within the framework of our government" (488 US 361, 384), but that this did not mean that it constituted a violation of the Constitutional principle of separation of powers. In recognition of the need for and benefits of interdependence among the branches of government, this separation was not required to be absolute (488 US 361, 380-384). Justice Blackmun also wrote that the legislation establishing the Sentencing Commission did not unduly delegate Congressional lawmaking power, a finding consistent with the Court's history of upholding all Congressional delegations of power that satisfied the "intelligible principle" (488 US 361, 371; Wright, 1991). Allowing an independent commission to make guidelines that had the force of law was permissible due to the extensive and intelligible guidance provided by Congress.[9] In fact, given the expertise of the Commission, such delegation of powers was deemed especially appropriate.

[9] See Frank and Lombness (1988: 21-34) for a discussion of regulatory rule-making and the position of the courts toward this delegation of power.

Justice Antonin Scalia dissented, characterizing the Commission as a "junior varsity Congress" (488 US 361, 427). Though accepting that the Sentencing Commission was politically desirable due to Congressional difficulties and limitations in resolving complex and detailed issues, its structure represented an unconstitutional delegation of Congressional lawmaking authority. Invoking the logic and the language that have made him an unyielding supporter of separation of powers (Smith, 1992) and a provocative justice, Scalia wrote that "in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous" (488 US 361, 427; see also Eskridge, 1990; Morrison, 1987; Wright, 1991).

Having survived constitutional challenge, the Commission now faced the task of developing organizational sentencing guidelines. The constitutionality controversy, the punitiveness of the individual guidelines, and the level of attention they generated, as it turned out, affected the legitimacy of the Commission and the development of organizational sanctions. The brief tenure of the Sentencing Commission was already checkered by internal conflict and external threats. As tensions escalated, so did the pressure on the Sentencing Commission to demonstrate its commitment to corporate crime control.

Drafting the Discussion Materials on Organizational Sanctions

After the Sentencing Commission promulgated individual sentencing guidelines and took those steps necessary to facilitate and monitor their implementation, work on organizational guidelines moved slowly to the forefront of its efforts. Under the leadership of Commissioner Block, with primary assistance from Deputy Chief Counsel Jeffrey Parker, a law and economics approach to organizational sanctions, limited almost entirely to fines, was developed. The imprint of law and economics on this draft was so pronounced that it was referred to as "the most ideological document to come from the Reagan administration" (Labaton, 1988: D1). The fining scheme involved a calculation of loss multiplied by the inverse likelihood of detection, based on the reasoning that this equation would produce the most precise or "efficient" deterrent. Organizational probation was relegated to a minor position, with conditions of imposition so difficult to satisfy that it is safe to say its use was precluded.

Concern about Law and Economics

When this proposal was first presented to the Sentencing Commission on February 9, 1988, alarm was immediately raised. The Commissioners viewed the law and economics approach as too narrow, too ideological, and inconsistent with its statutory mandate to develop several organizational sanctions and fulfill several sentencing goals. Reliance on this approach would "price" crime rather than seeking to eliminate it, undermining the full utility of the criminal law and giving the appearance of inadequate concern about organizational crime. To rectify these shortcomings, the Commission requested that the proposal be rewritten in broader, less theoretical terms and that greater use be made of the full range of sanctions provided by Congress.

Greater diversity of opinion was also sought. In an unusual move designed to gain input on issues not addressed by Block, Commissioner Nagel contacted John C. Coffee, Jr., of Columbia University School of Law. Based on his previous testimony to the Commission and his previous work in this area (Nagel, 1991; Coffee, 1991a), Nagel asked him to develop an organizational probation proposal for consideration by the Commission. Coffee in turn contacted Christopher D. Stone of the University of Southern California Law Center, a long-time supporter of organizational probation (see Stone, 1975, 1976b, 1977a) and Richard S. Gruner, a former student of both Coffee and Stone and a member of the faculty of the Whittier College School of Law, to assist in this effort. Though Nagel was originally a supporter of efficient crime control (Strasser, 1986), the narrowness of this approach when applied to organizations and the belief that market-based remedies were not adequate for controlling corporate crime (Nagel, 1991; United States Sentencing Commission, 1988b), led to her emergence as the key Commission supporter of organizational probation.

In July 1988, the Sentencing Commission collected these two proposals and additional materials into a volume entitled "Discussion Materials on Organizational Sanctions" and distributed them to interested parties to facilitate debate of organizational sentencing guidelines. Included in this collection of papers was a draft guidelines proposal, written primarily by Jeffrey S. Parker under the direction of Commissioner Block (hereafter referred to as the Parker proposal); a draft organizational probation proposal written by Professors Coffee, Gruner, and Stone (hereafter referred to as the CGS proposal); an empirical assessment of federal organizational sentencing practices from 1984-1987; a position paper written by Parker advocating a law and economics approach to organizational guidelines; and the organizational sentencing standards drafted by the ABA in 1979 as part of its Criminal Justice Standards (see Chapter Four). Neither the Parker proposal nor the CGS proposal was formally endorsed by the Commission, a fact the Commission went to considerable lengths to note by stamping a disclaimer on each page (Labaton, 1988) and by publishing and distributing these materials independently rather than through the Federal Register.

Examining the public debate on the Discussion Materials comprises the balance of this chapter. First, the probation provisions of the Parker and CGS proposals are detailed so as to make clear precisely what was and was not being proposed and to evaluate claims regarding the likelihood of application and intrusiveness of these proposals. As is shown, these two proposals represent opposing ends of the continuum of negotiative organizational probation. This assured considerable debate and controversy, providing the Commission a large middle ground within which to maneuver. After this overview, considerable attention is focused on the interest group and Commission reactions to these proposals. Though organizational probation went through considerable changes after these proposals, this emphasis is warranted as a result of the central role that these two very different proposals, and the reactions to them, played throughout the development of organizational probation.

The Parker Proposal

The Parker proposal began by asserting that corporations were "motivated primarily by monetary profit and loss" (Parker, 1988a: 1) and that as a result sanctioning should be based on the manipulation of financial disincentives. Consistent with this, the bulk of this proposal centered on a loss-based fining mechanism similar to the one criticized by the Commission when proposed earlier. In the Working Paper elaborating this proposal (United States Sentencing Commission, 1988a), only passing mention was made of organizational probation. This indicated a clear effort to disregard this sanction and limit or forestall its further development, despite its inclusion in the CCCA. The concern expressed by Parker in the Working Paper was that

> the application of non-monetary sanctions to business organizations strikes at the very heart of the competitive process ... by substituting centralized administration for a decentralized incentive system (United States Sentencing Commission, 1988a: 49).

Organizational probation, in this view, conflicted with the guiding rationality of business, and in so doing introduced inefficiency, diminished competitiveness, and steady growth of governmental power.

In the Parker proposal, organizational probation was available to judges as a discretionary alternative in three circumstances: to enforce monetary sanctions, to enforce notice of victims, and in limited "preventive" circumstances. More specifically, this proposal authorized preventive probation upon a showing that the present offense was a felony; the senior management of the organization participated in or encouraged the offense; the organization or its senior management had a criminal history of one or more felony convictions of the same or similar type as the instant offense; and the court determined both that the organization was unlikely to avoid a recurrence of the criminal behavior despite the imposition of a fine and probation was likely to prevent a recurrence of the criminal behavior in a cost-justified manner. The absence of any of these circumstances prohibited use of this sanction. Finally, the availability of organizational probation was conditioned on the finding that no existing civil or administrative procedures would have produced substantially equivalent results. Upon meeting these conditions, probation could be imposed, but was not mandated.

The only mandatory condition of probation contained in the Parker proposal was avoidance of all crimes during probation. This was in compliance with the minimal requirements for probation imposed on the Sentencing Commission by Congress. There was in this proposal an additional set of conditions for probation imposed for failure to pay fines. For "preventive" probation, the Parker proposal provided two discretionary conditions. One was development and implementation by the defendant, with the approval of the court, of a compliance plan designed to avoid recidivism. The second was a requirement to report periodically to a probation officer regarding law compliance and implementation of the compliance plan. Though these conditions included a potentially meaningful remedial component, the barriers to the imposition of probation undermined their practical utility.

The Coffee, Gruner, and Stone Proposal

The CGS proposal focused exclusively on organizational probation, providing far more detail on the circumstances and conditions of its usage than any past proposal inside or outside the Sentencing Commission. Expanding on the uses provided by Congress, several circumstances for the implementation of probation were recommended. However, strictly adhering to the Congressional call for policy statements rather than binding guidelines, probation was not mandatory under these or any other circumstances. Only later did the Commission introduce mandatory uses of probation, a step that went beyond elaboration of the Congressional guidelines and into the expansion of these guidelines. First, probation was made available for felonies and serious misdemeanors. The importance of extending organizational probation to misdemeanors was illustrated in comments to the Commission by the EPA regarding a case in which several people were killed as a result of exposure to a pesticide. The offense in this case was statutorily established as a misdemeanor (U.S. Environmental Protection Agency, 1988b: 2) despite its seriousness.

Accompanying this, for an organization to be placed on probation, the CGS proposal established that any one or more of five different circumstances must be found to exist by the court. First, management policies or practices, including inadequacies in internal controls, contributed to the crime or delayed its detection, and remained uncorrected. Second, the circumstances of the offense had not been adequately explored and explained, and the failure to obtain such clarification was likely to reduce respect for law, hamper internal accountability, or otherwise conflict with the public interest. Third, restitution was not otherwise required. Fourth, the defendant organization was able to provide as a condition of probation essential community service or interim relief to the victims of its crime, or to repair or restore specific harms or injuries. Fifth, the organization was unable to pay monetary sanctions within thirty days.

Following without substantial modification the standards provided by Congress, the mandatory conditions of probation provided in CGS were avoidance of all law violations within the relevant units of the organization and, for felonies, imposition of a fine, restitution, or community service. The discretionary conditions of probation were divided into general and special conditions. The general discretionary conditions were truthful, complete, and prompt written responses to all requests for information, financial data, or reports on business operations made by the court; immediate access to the defendant's offices, facilities, and other properties upon request of the court; prompt submission for examination when requested of any books, records, or other materials necessary to monitor compliance with any probation condition; and prompt reporting of all law violations, investigations, and prosecutions.

The special discretionary conditions of probation recommended in the CGS proposal pertained to compliance plans. It was here that the CGS proposal was most innovative and most influential on the subsequent development of organizational probation. In total, this section can be read as a comprehensive statement of the authors' view of the means to develop a noncriminogenic organizational structure. In cases in which management policies or practices were linked to the crime or delayed its detection, it was proposed that organizations be required to develop and gain court approval of a compliance plan. This plan would be required to detail the specific procedures to be implemented to correct such policies, practices, or inadequacies. Compliance with the plan was recommended as a condition of probation. To facilitate and monitor implementation of this plan, a number of steps were recommended. They included: periodic audits or other internal inspections; the appointment of special counsel and independent directors or other consultants; the adoption of new or revised information gathering procedures and the preservation and centralization of such records; the designation of a special compliance officer with responsibility for supervising organizational activities related to the criminal offense; and the revision or adoption of formal corporate compliance policies.

Finally, this proposal listed other discretionary conditions of probation. These included the completion of an investigation and written report by internal or external counsel of a factual account of the crime, the involvement of corporate personnel, and an evaluation of existing and possible internal control systems. Also recommended were restitution, community service, defendant payment of probation expenses, and court-imposed financial oversight in cases where the corporation was unable to meet financial penalties in a timely manner. Included as possible steps to satisfy this final condition were limits on payments of dividends, mergers, asset sales, reorganization, or other major financial transactions by the defendant organization.

Public Debate Begins: Responses to the Discussion Materials

With the publication of the Discussion Materials in July 1988, sustained public debate of the full range of issues associated with organizational sanctioning began. Overall, the first phase of the public debate on organizational sanctions was characterized by widespread opposition to law and economics; business, legal, and White House opposition to organizational probation; regulatory and academic support for probation; and the absence of public interest and labor involvement. Describing this debate, Christopher Stone stated that he was

> pretty familiar with the literature, and it is just marvelous to have so many really fundamental issues that have been buried in the Law Reviews over a period of

> years, moved out onto a public agenda, and so expertly (United States Sentencing Commission, 1988d: 96).

Stone went on to note that he was "really pleased to see that corporate probation, particularly corporate probation of a remedial sort, has gathered a considerable amount of support" (1988d: 97) among the witnesses and Commissioners.

To organize and encourage this debate, the Commission held public hearings on organizational sanctions on October 11, 1988 in New York City, and December 2, 1988 in Pasadena, California (see Appendix B). Witnesses and other parties interested in submitting comments to the Commission were requested to respond to a series of questions asked at the end of the Discussion Materials. Among these, commentators were asked to discuss the appropriate circumstances and conditions for use of organizational probation. In responding to this and other questions, the interest groups actively involved in the development of organizational sentencing guidelines - business groups, regulatory agencies, the Department of Justice, the American Bar Association, and academicians - staked out initial positions.

Because there was no Commission action on organizational sanctions between these two hearings the spoken and written comments from this period are considered together. The discussion of them is divided into four parts: the response to the law and economics approach; the reactions to probation; the position of business; and, finally, the responses of the Sentencing Commission to this debate. From this discussion emerged clear lines of division regarding organizational probation. Regulatory and academic witnesses strongly supported the CGS proposal. Business and legal witnesses sought a tightly circumscribed approach to organizational probation. Only the Sentencing Commission remained uncommitted at the end of this debate.

Debating the Parker Proposal

In describing the theoretical rationale of law and economics as applied to corporate crime, Jeffrey Parker asserted that

> the one driving force behind all of the activities of corporate America is profit-maximization, the bottom line, or stated more broadly, maximizing share value. Therefore, when we approached this situation, we thought that the appropriate way to go was to try to make the profit motivation work in favor of law enforcement (U.S. House of Representatives, 1990: 230).

Despite the clear market orientation of this approach, its protection of organizational autonomy, and its rational actor model of organizational decisionmaking, the response to the Parker proposal was vigorous and often negative.

The theoretical orientation of the Parker proposal was defended by an academic law and economist (Baker, 1988) and by two government policy advisory organizations, the United States International Trade Commission (ITC) and the Domestic Policy Council (DPC). Strong opposition came from regulatory agencies, particularly the EPA, FDA, and SEC, and numerous academicians. The business and legal communities took a decidedly pragmatic approach to the Parker proposal, rejecting its theoretical orientation and fining provisions while accepting its approach to organizational probation. The positions of these witnesses are explored below, and the implications of this debate for the development of organizational sentencing guidelines, particularly organizational probation, are suggested.

Support for Law and Economics. The strongest support for the Parker proposal came from the Domestic Policy Council,[10] an executive advisory agency associated with the Council of Economic Advisers. The DPC had created a Working Group on Corporate Sentencing in early 1988 in anticipation of the development of organizational sentencing guidelines. In its final report, "Principles of Corporate Sentencing," issued in April 1988, the DPC advocated strict reliance on market forces in sentencing organizations. In discussing this report in testimony before the Commission in October 1988, Thomas Moore, acting chair of the Council of Economic Advisers and chair of the Working Group on Corporate Sentencing (Domestic Policy Council, 1991), stated that it was "consistent with Administration policy that probation should be used primarily as a means of enforcing other court-imposed sanctions and not as an independent sanction" (United States Sentencing Commission, 1988c: 7).

[10] The Domestic Policy Council was established by President Reagan on April 11, 1985. It is a cabinet-level presidential advisory council composed of the President, who serves as chair; the Attorney General; the Secretaries of Energy, Education, Interior, Health and Human Services, and Housing and Urban Development; and the Directors of the Office of Management and Budget and the Environmental Protection Agency. Ex-officio members include the Vice President, Chief of Staff, and Assistant to the President for Policy Development.

This approach restricted use of organizational probation to market-based applications, similar to the manner it had been used in the federal courts under the FPA. Employing the terminology of law and economics, Moore provided the theoretical rationale for rejection of organizational probation;

> since firms are essentially rational economic actors, and their managers know better than anyone else how to direct their activities effectively, it makes much more sense to establish proper behavioral incentives through optimal fines, and then let firm managers respond to those incentives and devise and implement the proper measures to police firm agents adequately (United States Sentencing Commission, 1988c: 6).

Even in cases of recidivism, an area in which organizational probation was seen by many as particularly useful, Moore stated that higher fines were preferred. Recidivism, he argued, indicated only that previous fines were inadequately large to alter the behavioral calculus of rational actors.

Additional support for the Parker proposal came from another advisory organization. Ronald Cass, testifying on behalf of the United States International Trade Commission,[11] advocated a law and economics approach to organizational sentencing. In his testimony, Cass outlined the theoretical assumptions of the Parker proposal and stated the support of the ITC for these assumptions. Among these assumptions was that because corporations are profit-seeking, "the

[11] The International Trade Commission is an independent, bipartisan, quasi-judicial and fact finding government agency which provides advice to the President, Congress, other government agencies, and the public on international trade issues.

prospect of financial rewards principally governs the conduct of such organizations" (U.S. International Trade Commission, 1988: 2). He went on to detail two critical inferences that follow from this assumption. The first was that "the same basic incentives generally will inform both criminal behavior and socially desirable behavior in profit-seeking organizations." Second, Cass also stated that "preventing and correcting socially undesirable behavior by these organizations depends on changing the monetary returns to the organizations from legal and criminal conduct" (1988: 2). Accordingly, the best way to deter and sanction organizations was to encourage them through market mechanisms to internalize the costs they impose on others through crime.

Opposition to Law and Economics. Outside of these few supporters, criticism of the Parker proposal's fining provisions was nearly universal and quite forceful. This opposition was based on empirical, moral, theoretical, pragmatic, and administrative grounds. The empirical debate surrounding law and economics centered on the conviction of its adherents that "[c]rime prevention, as well as crime, is costly." As a result, it was reasoned, "society as a whole will suffer welfare losses if firms undertake internal crime prevention measures that are more costly than the crimes thereby prevented" (Domestic Policy Council, 1988: 5). This was a controversial position; suggesting that the level of crime could and should be balanced with other social policy considerations was not welcomed by regulatory personnel or the Sentencing Commission (nagel, 1991; Coffee, 1991a). In response to this assertion, opponents of law and economics made two primarily empirical points.

First, reliance on an economic calculation of the costs of crime "understated the fine necessary to respond to the panoply of costs that ought to be considered" (Saltzburg, quoted by Labaton, 1988: D5) by relying only on immediate and quantifiable losses. The calculations that were at issue in determining the full costs of crime and its control were not subject to precise measurement. Similarly, Coffee argued that empirical support for law and economics was weak because "the state of knowledge today is too incomplete, too imperfect, and too tentative for us to believe that we can measure and calibrate what the optimal financial sanction is" (Corporate Crime Reporter, 1988: 12). To think otherwise was an "academic fantasy" (Stone, quoted in Franklin, 1988: 6). Second, this approach overstated the threat and the impact of overdeterrence, an outcome that "would hardly appear to constitute a clear and present danger to the social system" (Stone, 1988: 5). In fact, "phobic" fear of overdeterrence ignored the social good that resulted from vigorous efforts by organizations to minimize social harms such as pollution, worker injuries, and unsafe products (Stone, 1988).

This same argument was sometimes presented in moral terms. In this case, the law and economics approach was criticized for taking a strict cost/benefit approach, wherein economic considerations supplanted moral considerations and quantifiable losses were the sole measure of the costs of organizational crime. This led to a "pricing" of crime rather than a recognition of the role of law as an expression of public morality that should be held above the market (Nagel, 1991; Corrothers, in United States Sentencing Commission, Minutes, 1989). Perhaps Coffee expressed this position best in stating,

> I am afraid the criminal law is at bottom a moral condemnation of conduct, not an effort to put an appropriate price on it. This attempt to be so careful at setting just the right price so that we cancel out the gain but never over-deter confuses the moral distinction between two types of error. We don't in principle want to over-deter many things but as between risking over-deterrence and risking under-deterrence, it is far worse to under-deter the crime and create victims than to over-deter these kinds of crimes and possibly cause people to invest a little too much in avoiding fraud, pollution, extortion, or whatever other misconduct is involved (Corporate Crime Reporter, 1988: 13).

Further, from the law and economics perspective proposed by Parker, to the extent losses were nonquantifiable or nonmonetary they were not redressed by law. The potential impact on public morality and state legitimacy of not applying legal sanctions in cases such as Watergate and the Exxon Valdez, as some argued should be the case (see Lombardero, 1991; Karpoff, 1991), was overlooked (Coffee, 1988).

Theoretical criticism of law and economics as a mechanism for corporate criminal sanctioning, and of fining more generally, was rooted in the debate between the rational actor and organizational process models of corporate conduct. Whether or not the costs of crime and its control could be properly calculated begged the question of the impact this had on organizations as actors. That organizations sought profitability was certainly true, but also banal. The issue was how this goal was translated into action. Law and economists testifying before the Commission assumed without question and often without empirical referents that organizations were rational, unitary, and maximizing actors, and therefore that action directly reflected goals. For example, Brent Thompson, a spokesperson for the NAM and participant in the development of the guidelines responded "is there an argument?" (Thompson, 1991) when questioned about the appropriateness of the rational actor foundations of his support for law and economics. He knew of no alternative conceptualization of organizational decisionmaking.

On the other hand, several witnesses (U.S. Securities and Exchange Commission, 1988; Coffee, 1988; Stone, 1988) pointed out that assumptions of pure market rationality were in conflict with the complexities associated with translating a broadly stated organizational goal into action at every level of the organization and in every instance. To the extent that this argument was correct, the ability of fines to influence organizational behavior was limited. As Harry First, professor of law at New York University, argued before the Commission in support of organizational probation:

> A corporation is not a person, nor is it a production function mechanically combining inputs in the way which will most efficiently produce outputs. A corporation is an organization, and the larger the corporation, the more complex its behavior. Under this view, corporate activities are not "rational acts." They are organizational outcomes, dependant on a complex interaction of corporate procedures, goals, and organizational structures (and even "corporate

> cultures"), in a setting where managers pursue potentially conflicting agendas of their own (First, 1988: 4).

From this organizational process perspective, the goals of the entire entity imperfectly translate into action, confounded by the goals and agendas of individual actors and organizational sub-units.

Business witnesses and commentators based their opposition to the Parker proposal largely on pragmatic considerations. In arguing against this proposal, Thomas Leary of the Business Roundtable stated, "it is, frankly, ridiculous to assume that most business people make a cold-blooded cost-benefit calculation when they decide whether to comply or not comply with the law" (Business Roundtable, 1988: 10-11). Despite Leary's implicit rejection of the rational actor model, he did not replace this model with any other theoretical conception of organizational behavior or corporate crime. However, subsequent comments revealed the opposition of the business community to corporate criminal liability.

Business focused most of its attention on the issue of culpability, through which it argued that organizational crime was a misnomer due to the impossibility of organizational mens rea. By failing to factor culpability into its fining equation, and by instead fully anthropomorphizing organizations, the Parker proposal did not provide a means by which the concerns of business could be adequately addressed through the guidelines. Thus, though business certainly favored a market model over a politics model, and shared the law and economists' vision of a corporate-centered society, its paramount concern was ends-based. Limiting corporate criminal liability in favor of individual criminal liability and corporate civil liability superceded concerns about the appropriate way to calculate fines or implement probation.

Finally, the administrative argument against law and economics was that by pursuing an almost exclusively fine-based approach, the Parker proposal excessively narrowed the mandate provided by Congress. Not only was it difficult to argue that the law and economics approach satisfied the four goals of sentencing, its inattention to organizational probation (see United States Sentencing Commission, 1986a) and its barriers to the use of this sanction were arguably so great that the statutory authorization for this sanction was circumvented. In fact, these barriers were argued to constitute a step backward not only from the CCCA but also from the FPA, a point brought to the attention of the Commission by regulatory and academic supporters of organizational probation. Sensitive to criticisms of the individual guidelines as excessively punitive, and still in constitutional limbo, the Sentencing Commission was certainly attentive to its statutory requirements and to these criticisms.

<u>The Business Response to the Discussion Materials</u>

In response to the publication of the Discussion Materials, the business community became actively involved in the debate on organizational sanctions. Leading this effort was the Business Roundtable, whose efforts largely precipitated and were closely linked to those of the National Association of Manufacturers, the Manufacturers' Alliance for Productivity and Innovation (MAPI), the American Corporate Counsel Association (ACCA), the U.S. Chamber of Commerce, and several of the member corporations of each of these organizations. General Electric, Atlantic Richfield, Exxon, and Dow Chemical were particularly active. Though the Business Roundtable did not testify at any of the Commission's five public hearings on organizational sanctioning, it educated, "energized" (Stocker, 1991), and organized the business community through lengthy and detailed comments to its members and to the Sentencing Commission. It also met frequently with the Commission and with individual commissioners.

It was from these comments and meetings that a standard business position, rarely deviated from by any corporation or business group regardless of size or type, emerged. Though such agreement and coordination are rare in the business community (Seider, 1974; Block, 1987; Skocpol, 1985, 1986-87), in this case a small, homogeneous, and elite group of business leaders drawn from major corporations (Useem, 1982, 1987) coordinated the business community's interactions with the Sentencing Commission. In practice, this coordination took the form of outlines of suggested comments provided to member firms and regular notice to members to lobby the Sentencing Commission. Though both the NAM and the Chamber of Commerce, whose stated orientations are toward small business, were actively involved in the guidelines debate, their lack of initiative led to the dominance of the BRT and the ABA, both of which are dominated by big business. As a result, the specific concerns of small business, traditionally the target of criminal prosecutions, were not given separate attention.

Among the concerns of small businesses, presumably, was organizational probation. Though this sanction has been used in approximately one-fifth of all federal organizational criminal convictions for the past several years, it has been used primarily against smaller organizations (Clark, 1991b; Cohen, 1991b, 1991d; Cohen, Ho, Jones, and Schleich, 1988). This does not necessarily provide support for corporate liberalist arguments (Weinstein, 1968; Kolko, 1963) that big business sought competitive advantage over small business through organizational probation. While it is generally agreed that the final guidelines will be hardest on small business (Gelacak, 1991; Coffee, 1991b), the applicability of this conclusion to organizational probation is questionable as a result of specific provisions of the final organizational probation guidelines directed at large businesses. Also, unlike regulatory policies, which are applied to all corporations in a given industry, criminal sanctions are applied on a case by case basis and relatively rarely. These considerations limit the advantage available through organizational probation to any sector of the business community.

<u>Preference for Policy Statements</u>. The primary argument advanced by business was that the Sentencing Commission should not promulgate binding sentencing guidelines, but rather should rely on

advisory policy statements. This position was in large part linked to their more fundamental arguments that Congress had not mandated or even anticipated the development of separate organizational sentencing guidelines and had not authorized binding application of sentencing standards to organizations. Any interpretations to the contrary were said to be inconsistent with Congressional intent.

Richard Rogers of Ford and the NAM took this position furthest;

> I don't think Congress even contemplated organizational sanctions. I don't even think they're authorized. Judge MacKinnon doesn't agree with me, and apparently no one else does. But Andrew Frey agrees totally with me, as does Tom Leary (Rogers, 1991).

Most other business witnesses took the less oppositional position that organizational guidelines were not required, not necessary, and potentially destructive (National Association of Manufacturers, 1990; Dow Chemical, 1991; PepsiCo, 1991), though their development was authorized by Congress.

The point at issue is quite significant, and one in which the business community invested substantial attention in an effort to maximize the use of policy statements in the determination of the appropriate sanction and the severity of the accompanying conditions. Policy statements do not require judicial observance. Rather, they serve as recommendations to judges, who are required only to observe mandatory sentencing standards. Though judges may adopt the recommendations of the Sentencing Commission, and are protected from appeal if they do so, these decisions are to be made on a case by case basis. This allows corporations in court to use their considerable resources to bargain for sentencing under policy statements. As described by Commissioner Nagel (1991), this was the biggest issue in the debate from the perspective of business because "if it's policy statements, they can go home and be happy."

Business argued that in addition to Congressional preference for policy statements, the absence of disparity in organizational sentencing undermined the need and the authority for guidelines (Business Roundtable, 1988; Manufacturers' Alliance for Productivity and Innovation, 1991). Sentencing disparity had been the primary concern of Congress in establishing the Sentencing Commission. Where it was lacking, binding guidelines limiting judicial discretion were argued to be inappropriate. Business also argued that the Commission lacked an adequate data base from which to develop guidelines. Congress had emphasized the importance of past practice and empirical research in developing guidelines. Without these data, the Commission should, it was argued, either delay consideration of organizational sentencing or promulgate policy statements from which a data base could be generated (Business Roundtable, 1988). Finally, in support of policy statements, business argued that existing sanctions were adequate, particularly in light of the increased fines in the Comprehensive Crime Control Act and the passage of the Criminal Fine Improvements Act of 1987 (P.L. 100-185, 101 Stat. 1279).[12]

[12] This statute establishes that in imposing fines on individual and organizational defendants, judges may choose from the relevant offense statute, the amount specified in this Act for the type of offense, or the amount allowed under a gain/loss formula also established in this Act.

In a statement summarizing these many points, Jon Heider, counsel for the Business Roundtable, stated it should be

> left to judges to sort things out. Don't mandate it by guidelines. That's what judges get paid to do, and they've been very good at it. We have had a system that hasn't been broken, so what is there to repair. What's the crying need to come up with these organizational sanctions. No one has been able to identify the need for all this. There's no body of evidence, in terms of organizational penalties, that suggests that things are out of whack (Heider, 1991).

The primacy of the issue of policy statements and the vigor with which this issue was debated suggest that business, or at least big business, viewed the courts as a generally favorable environment for resolution of its conflicts. By limiting the exercise of legislative state capacity, business believed it could substantially reduce its exposure to criminal liability and sanctioning in the courts.

There were several Commissioners who shared the view that the Commission should rely on policy statements for organizational offenders. Chairman Wilkins, for example, maintained that guidelines for organizations were authorized but not mandated, and that policy statements were the Congressionally-favored approach (U.S. House of Representatives, 1990: 175). Commissioners Block and Breyer also favored this approach. Commissioner MacKinnon, however, strongly advanced the view that the Commission was compelled by statute to develop guidelines for organizations, just as it had for individuals.

This conclusion derived from the Comprehensive Crime Control Act itself, rather than the Congressional report describing it. The CCCA states that "the Commission, in the guidelines ... shall, for each category of offense involving each category of defendant, establish a sentencing range" (28 U.S.C. Section 994 (b)(1)). No distinction is made between organizations and individuals. More importantly, it is a well established legal principle that the term "shall" in legislation creates a requirement. The Supreme Court addressed this issue in Escoe v. Zerbst (1935), ruling that "shall is the language of command" (295 US 490, 493). The Commission accepted MacKinnon's reasoning and in so doing substantially strengthened its lawmaking capacity.

Emphasis on Culpability. The second major argument advanced by business was that sanctions should be designed to reflect culpability. Their concern was that strict and vicarious liability masked the extent to which organizational crimes resulted from the actions of rogue employees, an argument which failed to consider organizational influences on employees (Coffee, 1991c). To a great extent, especially initially, this argument was a means by which business fundamentally rejected the appropriateness of corporate criminal liability and organizational mens rea. Despite references to the propriety of strict and vicarious liability, the frequency and forcefulness with which business stressed the issue of culpability indicated a clear desire to "personalize" corporate crime, a move opposite of that sought by advocates of organization-specific criminal law (Friedman, 1979; Fisse, 1983; Rourke, 1990). For example, when asked during an interview with the author whether organizational probation was appropriate in cases that did not involve traditional common law crimes, such as regulatory offenses, Heider responded "I think its absolutely insane to do anything" where there is no true individual culpability or immorality (Heider, 1991).

In this view, corporate crime existed only where individuals rationally planned and undertook common law felonies, such as fraud, for the benefit of their employers. Without planning there was no culpability. Without historical criminal status there was no immorality. In a fuller statement of this position during the same interview, Heider remarked that

> [t]he central theme that has always been in our mind is, can you not punish a corporation based on some measure of its true culpability, and I don't think the guidelines come up with a way to do that. That's far different from saying corporations shouldn't be punished, because we don't believe that. Those that are irresponsible and those that are indifferent to their responsibilities should be punished (Heider, 1991).

When combined with earlier statements rejecting the existence of such rationality, corporate criminal liability was left empty. As further evidence of this, no example of corporate conduct warranting criminal punishment was forthcoming in further questioning of Heider.

The NAM was similarly unable to provide examples that would lend empirical support to their position that they did not completely oppose organizational probation or organizational criminal liability. When asked to do so, Brent Thompson (1991), a supporter of law and economics and a representative of the NAM, stated that government "entanglements" in the operation of businesses must only be created "in the most extraordinary circumstances." He continued by stating, "I'm not sure I can think of such circumstances, except where it is a criminal organization. And there are better means of handling criminal organizations than probation" (Thompson, 1991).

As it became clear that the Sentencing Commission was going to promulgate guidelines and that these guidelines would include increased fines, business redirected its efforts. Rather than arguing that the issue of culpability fundamentally undermined corporate criminal liability, business took the position that culpability should be the primary mitigating factor to be considered in assessing fines. Along these same lines, business also argued that probation should be restricted to only the most serious offenses. Beginning with modifications made in the proposed guidelines in early 1990, the Sentencing Commission acceded to this pressure, at least in the fining provisions, through advocacy of an incentive-based carrot and stick approach to fining.

Opposition to Organizational Probation. The third major and recurrent argument of the business community was that organizational probation was inappropriate, except perhaps in the most extreme circumstances. It is difficult to determine precisely what these circumstances were since no examples were provided during recent interviews (Thompson, 1991; Heider, 1991; Rogers, 1991), even when directly requested. It was often accepted that repeated, knowing criminal conduct involving top management should possibly be subject to probation, though monetary sanctions would still be preferable and effective. Only cases in which organizational probation would be inappropriate, such as the Pinto and Exxon Valdez cases, were specifically identified.

While making these hypothetical concessions regarding the use of organizational probation, business portrayed this sanction as inappropriate because of the intrusions it would authorize, the inability of courts to manage such interventions, and the anticompetitive and unforeseeable business consequences of court intervention. These same arguments have been advanced by opponents of interventions into public bureaucracies (Horowitz, 1977; DeIulio, 1990). Consistent with the market model, business argued that it should retain full autonomy to make personnel and policy changes in cases of wrongdoing. Despite their opposition to organizational probation as proposed by the Sentencing Commission, conspicuously absent in the discussion of probation by business were any constructive alternatives to these proposals. This defensive, rejectionist approach to regulation on the part of business has been noted in the past and has been linked to the success of regulatory lawmaking efforts (Reich, 1981; McCaffrey, 1982). Though the Commission had clear statutory authority to develop organizational probation, business maintained virtually absolute opposition to it. This allowed the debate on organizational probation to be dominated by its supporters, and limited the options available to the Sentencing Commission in its lawmaking efforts.

Interest Group Responses to Organizational Probation

The considerable controversy regarding the appropriate theoretical and legal mechanisms for organizational fines was not evident in the debate on organizational probation. In the limited consideration of organizational sentencing to this point, loss-based, gain-based, and offense level-based fining proposals had been proposed. As the subsequent discussion elaborates, however, responses to organizational probation generated by the Discussion Materials fairly neatly divided into groups in favor of and opposed to this sanction, with little middle ground. Though there were some efforts by opponents and supporters of probation to qualify their positions, these qualifications were minor, as were the differences within each of these positions.

Regulatory, academic, and public interest supporters of organizational probation expressed strong support for the CGS proposal, establishing it as their referent for future discussions of this sanction. Throughout subsequent debates, these groups remained united in support of broadly available, compliance program-based, remedial organizational probation. As part of this position, the use of binding guidelines was supported and an organizational process model of corporate crime was often advanced. Several of these groups, particularly the EPA and academicians, were further united by their lack of confidence in fines and their general inattention to this sanction as an organizational crime control mechanism.

Business, legal, and governmental opponents of organizational probation, on the other hand, expressed strong support for the Parker proposal's approach to this sanction, despite common concerns about its other provisions. Its substantial barriers to the implementation of organizational probation and limited and highly discretionary remedial probation conditions became the model for their future discussion of this sanction. To the extent that a middle ground existed, it was occupied by the Department of Justice, which displayed considerable uncertainty and variation in its position on organizational probation.

Opponents of Organizational Probation. Representatives of the business and legal communities led the opposition to organizational probation. Academic and governmental law and economists were also prominent in opposition to organizational probation, particularly during the Reagan Administration. Though rejecting the Parker proposal's approach to fines, the Business Roundtable stated of its probation provisions,

> the draft Guidelines [Parker proposal] on non-monetary sanctions like probation are sound and appropriate. We share the reservations expressed in the Commentary and the Working Paper about the utility of probationary remedies in most cases. To the extent that the alternative Draft Proposal [CGS proposal] takes a more expansive view of the remedy, we urge that it be rejected (Business Roundtable, 1988: 17).

No modifications of any sort to the probation provisions of the Parker proposal were suggested by the BRT or other business commentators (Chevron Corporation, 1988; see United States Sentencing

Commission, 1988c, 1988d), even as the Sentencing Commission increased its willingness to develop organizational probation. In light of the insurmountable barriers to the implementation of probation in the Parker proposal, the business position amounted to de facto rejection of probation. Actually calling for removal of this sanction from consideration, the only more dispositive step, was foreclosed by its statutory establishment by Congress.

Legal interest groups, in this case referring exclusively to the ABA, based their response to the Discussion Materials on their Criminal Justice Standards drafted in 1979.[13] However, a close reading of their testimony, and an interview with their primary spokesperson (Buffone, 1991), reveals that the ABA's stated position on judicial oversight was narrower than the position provided by their Criminal Justice Standards. As a result, not only did the ABA oppose organizational probation, it apparently opposed, and continues to oppose, its own Criminal Justice Standards. Examining the next version of their Standards will be interesting in this regard. It is also apparent that organizational probation was an issue of considerable concern to the ABA. William Brodsky recently described remedial probation provisions as "probably the single most important and revolutionary aspect of the sentencing guidelines as far as entities are concerned" (quoted in Franklin, 1989: 6).

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[13] Laurie Robinson, Director of the Section of Criminal Justice of the ABA, indicated that the ABA is initiating consideration of a third version of its Sentencing Procedures and Alternatives. This is not expected to be completed earlier than summer 1992 (Robinson, 1991).

Recalling that the judicial oversight provisions developed by the ABA were the product of a compromise with probation advocates forced by the Section on Corporation, Banking, and Business Law in 1979, it is apparent that throughout the deliberations of the Sentencing Commission the business law element within the ABA was uncomfortable with even the minimal interventions provided for by their Standards. For example, in testimony before the Sentencing Commission, Samuel Buffone, a corporate defense attorney who testified on behalf of the ABA before the Commission several times, and who served on several Commission advisory panels, stated that, like Parker, "we concur in the rejection of any novel or untested corporate sanctions that involve excessive governmental intrusion into the corporate decision making process" (American Bar Association, 1988: 12). Buffone later stated regarding its own Standards that the judicial oversight provisions contained no remedial component, but were instead meant only to provide a check on those who failed to pay fines promptly (Buffone, 1991). In this view, no other type of oversight was ever contemplated by the ABA and no other type of oversight would be appropriate.

The Domestic Policy Council shared the concern about organizational probation expressed by business and legal witnesses, though it framed this concern in economic terms. Thomas G. Moore, now at the Hoover Institute, stated in testimony before the Commission that organizational probation would lead to increased inefficiency as a result of the changes it imposes on organizations, the difficulties in calculating the costs of such changes, and the limits imposed by the fact and the form of probation on the discretion of the organization in designing and implementing organizational changes. Given these problems, the DPC was pleased that the Parker proposal imposed sharp limits on the use of organizational probation (Domestic Policy Council, 1988: 7). Moore concluded his remarks by appealing to the Commission, and to Commissioner Breyer in particular, who "knows better than almost anybody here" (1988: 8) the dangers of regulation, to rely on fines and the powers of free markets. As he stated, "we better stay with fines. We know what they are going to be, and they can impose the right costs" (1988: 20-21).

In his discussion of organizational probation, Ronald Cass of the ITC remarked that his organization viewed the CGS proposal with "considerable skepticism" (U.S. International Trade Commission, 1988: 4). More specifically, he described organizational probation as non-optimal, overly intrusive, and inconsistent with prevailing views of organizational behavior. He did not elaborate or provide references for this final statement. Anticipating the argument of advocates of probation that organizations retain substantial discretion in the development of compliance plans, Cass stated that

> the caveat that the Corporate Governance approach really leaves this decision to the probationer is misleading; the monitor must know whether to accept or reject the probationer's suggestion and must direct the probationer in a direction that the probationary organization would not otherwise take (else, why have probation at all?) (U.S. International Trade Commission, 1988: 7).

The view of organizational probation presented in these comments was characterized by judicial creation and imposition of new corporate structures and processes and close court supervision of corporate affairs. For these reasons, Cass concluded, organizational probation should be rejected.

Supporters of Organizational Probation. State groups, particularly enforcement personnel from the EPA and the FDA, were most supportive of expanded and remedial use of organizational probation throughout its development. In testimony before the Commission late in 1988, both the EPA (1988b) and the FDA (1988) expressed strong support for organizational probation, a sanction each had made some use of in the past. Both encouraged the Commission to reject the Parker proposal in favor of the CGS proposal and both gave far more attention to organizational probation relative to other issues than did business and legal witnesses. Underlying their attention to organizational probation was, at least in part, its close relationship to the role of these agencies as monitors of organizational conduct. In addition to its theoretical linkage to organizational decisionmaking and its utility in controlling corporate crime, organizational probation provided regulatory agencies a vehicle to expand their monitoring role and resources.

The EPA first became active in the development of sentencing guidelines in 1986, when it commented on the environmental crimes provisions of the individual guidelines. Two years later, EPA

Administrator Lee M. Thomas, a member of the DPC, was involved in their Working Group on Corporate Sentencing. In the meetings and debates leading to the development of their position paper, Thomas

> strongly advocated that Federal Courts be encouraged to use creatively their probationary powers to structure conditions of probation that are designed to enhance future compliance with the law by the immediate corporate offender and by similarly situated members of the regulated community (U.S. Environmental Protection Agency, 1988a: 1).

Though the ultimate position taken by the DPC was in support of law and economics and opposed to organizational probation, Commissioner Nagel was informed of Thomas's support for organizational probation when she contacted the EPA in September 1988, soliciting its involvement in the organizational guidelines debate. This led to the EPA's entrance into the organizational sentencing reform debate.

In her letter to Thomas, which was similar to solicitations sent to a wide range of interest groups (Coffee, 1991a; Parker, 1991a), Nagel explained that the Commission was preparing to begin debate on organizational sentencing, and would like the EPA to review the Discussion Materials and develop its position so that it can participate in the debate. Nagel went on to indicate that in her view the work on organizational guidelines that had taken place up to this time, specifically the Parker proposal, was too narrow, and that expanded consideration should be given to probation. She wrote that

> [t]here is also a debate on the question of corporate probation, especially given the wide latitude for its use made available by the new statute. There are some who argue that corporate probation is particularly useful when assumptions about the market are ill informed or

> inapplicable, when corporations are repeat violators (albeit this might be their first criminal conviction), or, when the corporation has protected its management from imprisonment by obscuring the very evidence that would have led to the conviction of individual offenders (United States Sentencing Commission, 1988b: 1).

Nagel's references to theoretical and organizational considerations as the basis for her support of organizational probation set the stage for sharp conflict with Commissioner Block and the business and law and economics communities.

In addition to citing his work with the DPC, Thomas responded by expressing the intention of EPA to be actively involved in guidelines development and actively supportive of organizational probation (U.S. Environmental Protection Agency, 1988a). Thomas was also critical of the Parker proposal as "very restrictive" in both the criteria that had to be met to impose probation and the available probation conditions (1988a: 1). The EPA, Thomas stated, favored coupling financial and probationary sentences in an effort to actively alter corporate behavior. Corporations "should not be conceptually dealt with exclusively as inanimate entities. They should, to some extent, be treated as personalities that can be made responsive to behavioral sanctions" (1988a: 2). Anticipating the criticisms of this position, Thomas remarked that

> corporate probation is too quickly dismissed due to the perception that it would result in extensive judicial supervision of business enterprises. I wholeheartedly agree that a sentencing judge should not become an ex officio member of a corporate board of directors. However, there are a wide variety of conditions of probation that would not require more than minimal judicial monitoring (1988a:2).

Anticipating a second set of criticisms, Thomas also stated that reliance on regulatory remedial sanctions is an inadequate, inefficient, and unrealistic alternative to organizational probation.

Academicians, in addition to regulatory groups, were from the beginning of the Sentencing Commission's efforts strong proponents of organizational probation and active participants in the development of the guidelines.[14] Of those academicians publicly supportive of organizational probation, either in testimony or written comments, all but one were law professors. Despite considerable work on corporate crime by criminologists over the last several decades (Coleman, 1985b; Clinard and Yeager, 1980; Geis, 1967; Geis and Stotland, 1980; Wickman and Dailey, 1982), no criminologists shared their views on organizational sanctioning with the Sentencing Commission.

In contrast to the pragmatic grounds for support of organizational probation among regulatory agencies, academic supporters largely based or at least significantly buttressed their position on organizational theory. Citing the importance of the work of Herbert Simon, for example, Professor Leonard Orland, stated that the Parker proposal "totally ignored" organizational theory (United States Sentencing Commission, 1988: 211). Orland also suggested that

[14] Thirteen of the fifty-five witnesses who testified before the Commission were university faculty members. Three of these witnesses appeared twice, meaning that ten different academicians testified. Of them, Professors Coffee, Stone, Gruner, Etzioni, First, Mayer, and Orland, were supportive of remedial organizational probation.

because of the structural source of their offenses, probation should be the "sentence of choice" in cases involving large organizations. Similarly critical of the Parker proposal, Professor Gruner described its approach to probation as "a token reference to probation without any practical significance" (Gruner, 1991).

The Department of Justice's Position. No representative of the Department of Justice testified during either of the public hearings held to consider the Discussion Materials. Neither did it submit written comments to the Commission during this period. Apparently the DOJ was withholding its comments while it drafted its own organizational sentencing guidelines to be submitted for review to the Commission. This draft was presented to the Sentencing Commission during its bimonthly meeting on December 13, 1988 by Stephen Saltzburg, the Department of Justice's ex-officio representative to the Commission. Interestingly, this proposal did not even include organizational probation, a curious oversight regardless of the DOJ's view of this sanction given its inclusion in the CCCA. Because the DOJ has treated inquiries into the development of its positions on organizational sentencing guidelines as governed by the Freedom of Information Act, no official explanation of this is yet available. However, the exclusion of organizational probation from this proposal signified that the DOJ did not support, see the need for, or believe there was authorization for any development of organizational probation beyond the standards provided by Congress.

Though the Sentencing Commission had not yet developed an official position on organizational probation, at the same meeting at which Saltzburg presented the DOJ proposal, the Commission expressed the need for revisions to it to include expanded consideration of organizational probation (United States Sentencing Commission Minutes, December 13, 1988). This was necessary, at a minimum, to satisfy the sentencing provisions set forth in the CCCA. In later DOJ drafts, probation was included, and even came to provide for meaningful remedial interventions, though their lobbying efforts included only limited discussion of organizational probation.

This perception of the DOJ as lukewarm in support of organizational probation was widely held (Parker, 1991a; Coffee, 1991a; Gruner, 1991; Heider, 1991). It was generally attributed to their greater interest in encouraging the Commission to enact larger fines, for which the DOJ was the primary advocate. From an organizational perspective, larger fines were viewed by the DOJ as the most effective and even lucrative means to force plea bargains and gain convictions. As a prosecutorial agency, these are the primary functions of the DOJ and the means by which its success is evaluated. The DOJ has no monitoring powers. Regulatory agencies, on the other hand, lack criminal enforcement powers, instead referring cases for criminal prosecution to the DOJ. These agencies are organized to monitor corporations, and benefit organizationally to the extent that they are able to maximize their monitoring role and the resources that accompany it.

Public Interest Involvement. Finally, public interest and labor groups did not at this early point or at any subsequent point play an active or important role in the work of the Sentencing Commission. Ralph Nader was offered an invitation to testify during the first public hearing in 1986. He refused. His best known public interest organization, Public Citizen, was represented only once before the Commission, when Carl Mayer, a law professor at Hofstra University, appeared in February 1990. Labor and environmental groups played a similarly small role. In the late stages of the debate, the AFL-CIO (1990) and the Natural Resources Defense Council (1991) submitted comments to the Sentencing Commission, but did not play an active lobbying role. The noninvolvement of labor groups, which have been identified as an important constituency in some corporate control efforts (Weinstein, 1968), was the result of their concern that the guidelines could be applied to them, though this is extremely rare (Cohen, 1991a, 1991d). The contributions of the NRDC are discussed in Chapter Six.

Assessing the Arguments of Critics. A key issue to emerge from the opposing approaches to organizational probation identified in this section is the extent to which this sanction will lead to judicial management of defendant corporations. Business and legal commentators argue that court management will be extensive, interfering in business decisionmaking, introducing substantial costs and inefficiencies, and other anticompetitive side effects. Parker (1990: 445-446) took this position, asserting that

> [a]lthough proposals for probationary organizational sanctions typically are accompanied by disclaimers to the effect that courts should not get involved in "running businesses," in fact that is the inexorable tendency. The result is yet another huge edifice of government regulation of doubtful efficacy and even less expertise and responsiveness than the ordinary regulatory agency. Courts simply are not equipped to manage businesses, and they are not subject to the same oversight by the political branches as are the regulatory agencies. Furthermore, the predominant form suggested for a probationary sentence -- essentially forcing a court-approved "compliance program" on the offending organization -- strikes me as something akin to "shutting the barn door after the horse is out."

When asked whether organizational probation was likely to be as intrusive as he portrayed it, Frederick Stocker of MAPI was somewhat less oppositional, accepting that the development of compliance plans and organizational changes designed to decrease the likelihood of future law violations were good in the ideal. However, he argued that the ideal would seldom be realized in practice and that remedial organizational probation "may well kill business" in the effort to try to change it (Stocker, 1991).

It can be argued that organizational probation was intentionally mischaracterized by Parker, Stocker, and others. This argument was made by Commissioner Nagel (Nagel, 1991), who viewed much of the opposition to probation as an effort on the part of some attorneys to advance their professional interests by creating probation as an issue of concern to the business community and then representing their concern in lobbying the Commission. In this regard, Commissioner Nagel repeatedly referred to concern about organizational probation as "hype" (Nagel, 1991).

However, it seems more likely that the view of probation expressed by its opponents was genuinely held, even by those who went so far as to characterize it as "central planning" (Parker, 1990) and "collectivism" (Parker, 1991b). If any larger agenda underlied their efforts, that agenda was a general attack on the state (Block, 1987). This characterization is consistent with a strong market-based position and with traditional concern for the protection of organizational autonomy, even where the state is not particularly active in regulating markets (Galbraith, 1985; Vogel, 1978). Again, however, in taking a strongly oppositional or noncommittal approach to probation, the business and legal communities removed themselves from constructive discourse regarding the development of an alternative approach to this sanction. This strategy miscalculated the Commission's ultimate commitment to organizational probation, or at least to the fulfillment of its statutory mandate.

<u>The Response of the Sentencing Commission</u>

With the exceptions of Block and Nagel, it is difficult to determine from the public record the precise positions of the Commissioners toward organizational probation. Block clearly opposed probation, and was committed to establishing formidable barriers to its use. Commissioner Breyer was closest to Block on this and other issues related to organizational sanctioning. Commissioner Nagel, on the other hand, was widely recognized as the Commission's most forceful advocate for probation (Rogers, 1991; Coffee, 1991a; Nagel, 1991; Heider, 1991). Commissioners Corrothers and MacKinnon were generally aligned with Commissioner Nagel in support of organizational sanctions, though their positions on organizational probation were less clear.

It was Commissioner Nagel who, concerned that the Parker proposal overstated the effectiveness of the market as a location of corporate crime control, narrowed the statutory mandate of the Commission, and denied judges a potentially useful sanction, contacted Professor Coffee. In so doing, she assumed an entrepreneurial role, taking advantage of her position and the resources available to her to force Commission and public consideration of this sanction at a time when the other Commissioners "would have just as soon see probation go away" (Coffee, 1991a). Commissioner Nagel agreed that some of the other commissioners "vehemently disagree[d]" (quoted in Franklin, 1988: 31) with her position on organizational probation during the early deliberations of the Sentencing Commission, and that her efforts were central to the development of probation into a politics-based sanction.

By the end of this first phase of public discussion, other Commissioners stated their support for probation. Comments made by Commissioner Corrothers during questioning of witnesses indicated that she favored the use of organizational probation beyond the point advocated by the Parker proposal (United States Sentencing

Commission, 1988c). Commissioner Breyer also stated for the record his support of probation. After testimony by Jan Chatten-Brown of the Los Angeles County District Attorney's Office, who detailed the effective use of organizational probation her office had made in improving occupational safety conditions, Breyer declared, "there is no doubt in my mind that there should be terms of probation" (United States Sentencing Commission, 1988d: 50). His concern, however, was that this would create conflict with the mission of the Commission to reduce sentencing disparity. The positions of Commissioners MacKinnon and Wilkins cannot be ascertained from the record of the two hearings in 1988 (see also Corporate Crime Reporter, 1988b), though they have been reported to be moderately supportive of organizational probation (Nagel, 1991; Rogers, 1991).

In each case, however, the level of acumen and detail with which the Commissioners considered probation is at issue (Parker, 1991a). For some Commissioners, this sanction was undoubtedly viewed as a fine enforcement mechanism with few or no broader applications. For others, a more expansive use of probation was sought. Whatever the case, given the absence of strong support for organizational probation, with the exception of Nagel, it is interesting to consider the possibility that had a more moderate approach to probation been taken by Block and Parker or the business and legal communities, it would have been accepted by the Commission. An approach which at least met the minimal standards provided by CCCA and provided judges some opportunity for employing this sanction would almost certainly have been enacted, leading to provisions substantially narrower than those ultimately enacted into law.

It was clear from these two hearings that the Parker proposal's approach to organizational sentencing was unacceptable to the Commission and most witnesses. As Chairman Wilkins described it, this approach was too narrow, too complicated, too theoretical, and too lenient (U.S. House of Representatives, 1990). Moreover, it was "obsessively inattentive to legal concerns" (Nagel, 1991). In a particularly harsh assessment of the Parker proposal, Commissioner MacKinnon described a legal conference he attended at which it received "one of the most scathing criticisms of a legal proposal that I have ever heard" (U.S. House of Representatives, 1990: 278-279). As a participant in the development of the guidelines stated, in the conflict between the law and economics approach and its critics, "it was obvious who had won the hearts and minds of the Commission." More than three years after having begun its deliberations, the only investment the Commission had made in organizational sentencing was rejected by a vote of 6 to 1.

The Commission had thus far demonstrated a generally pragmatic orientation toward organizational sanctioning. This was an area in which they had little academic training and little or no professional experience. Their tendency was to maximize the options of prosecutors and judges (Nagel, 1991), resist ideology, and adhere to their mandate from Congress. The Commission had also shown that it took an expansive view of its lawmaking authority. How this authority would be translated into a specific organizational sentencing guidelines proposal remained to be seen. How the Commission would position itself between the vastly different approaches to organizational probation taken in the Parker and CGS proposals also remained to be seen.

The End of Phase I: Cracks in the Commission

The fallout from the consideration and rejection of the law and economics approach was substantial. Commissioner Block began an effort to discredit the Commission by challenging its methods, motives, and structure. One element of this effort was a proposal advanced within the Commission by Block to move the Commissioners from full-time to part-time status. The CCCA provided that the Commissioners would remain full-time until 1993 when, having presumably completed and overseen the initial implementation of guidelines for each type of offender, a full-time staff could manage the day to day activities of the Commission. Block believed that this point had been reached by 1988. This demonstrated an effort on his part to undermine development of organizational sentencing guidelines, particularly since his proposal had been rejected. More pointedly, Commissioner Block had returned to live in Arizona, commuting to the Commission for bi-monthly meetings, and believed that Commissioners Nagel and Corrothers, who spent the most time in Washington, D.C., were exerting excessive influence over the staff and their research (Yost, 1989b; Miller and Freed, 1990).

Joined by Commissioner Breyer, Block forced the Commission to formally consider his proposal to move to part-time status. A change in status was rejected by a vote of 4-2. This vote represented two important points. First, the Commission believed that the development of organizational sentencing guidelines was too important, both in practical and symbolic terms, to be done on a part-time basis. Second, the Commission was expressing its unwillingness to underutilize its lawmaking capacity. At numerous points throughout its development of sentencing guidelines, the Commission was confronted with the choice of narrowly or expansively interpreting its powers. It consistently chose an expansive interpretation, resulting in broader state capacity to legislate organizational sentencing standards than anticipated by Congress and participants in the guidelines development process.

In August 1989, after the failure of this proposal and a more general failure on the part of the political and business communities to mobilize in support of his econometric approach to organizational sentencing, as he had expected (Nagel, 1991), Commissioner Block resigned. Several staff members who had worked closely with Block, particularly Jeffrey Parker, David Lombardero, and John Lott, and who strongly supported law and economics, also resigned. Believing that the political climate had provided a unique opportunity for the success his approach to organizational sentencing, Block had placed a considerable personal and professional stake in the rejected proposal (Nagel, 1991; Coffee, 1991a). The proposal that would soon be published by the Commission contained few traces of law and economics. These resignations substantially changed the composition of the Commission staff, setting the stage for a less ideological approach to organizational sanctioning.

After resigning, Block mobilized his energies and those of the law and economics community against the Sentencing Commission. Their central argument was that in rejecting law and economics, the Commission rejected principled sentencing in favor of the personal and political interests of individual Commissioners (U.S. House of Representatives, 1990). This was a surprising claim to be made by Block and his supporters, given the substantial and admitted extent to which he crafted the original sentencing guidelines to suit his views. Chairman Wilkins described the development of these guidelines by remarking that Block "did acknowledge to us that he unabashedly pressed his own personal agenda in his research effort" (U.S. House of Representatives, 1990: 11).

Nonetheless, after their resignations, it was frequently claimed by former staff members that the Commission was acting arbitrarily in developing organizational sanctions. David Lombardero (quoted in Yost, 1989: A21), former Chief Counsel to the Commission, stated regarding the Commission:

> They are supposed to be semi-scientific; they are supposed to use knowledge and information and not just pick numbers on the basis of the passions of the individual commissioners or on the basis of what Congressmen or Senators come and tell them to do.

A Cato Institute symposium on corporate sentencing provided a platform for law and economists to criticize the Commission on the eve of the enactment of the organizational sentencing guidelines. At this symposium, John Lott, former Chief Economist at the Commission, suggested the arbitrariness of the Commission's work in reporting that he was once told by a Commissioner that organizational "penalties should be increased 100 fold over past practice" (Lott, 1991: 3). Other speakers (Standen, 1991; Parker, 1991b; Karpoff, 1991) characterized the Commission as unprincipled and political, with the result that organizational sentences would be greatly increased over past practice.

When he resigned, Commissioner Block made a similar point, alleging that "the Commission at this point lacks any real commitment to research as a basis for sentencing law. I have no problem suggesting high sentences so long as they can be supported by data" (quoted in Yost, 1989: A25). However, the data to which he and others referred, measurable losses and past fines, would almost certainly lead to fines far lower than those advocated by the Commission and the Department of Justice. Despite the often questionable motives of these critics, the legitimacy of the Sentencing Commission was undermined by the opposition of law and economists and the press reports (Coyle and Strasser, 1989; Labaton, 1988; Yost, 1989a, 1989b, 1989c) and Congressional concerns (U.S. House of Representatives, 1990) their opposition provoked. As Chapter Six details, the

Commission responded to these criticisms in a manner that strengthened organizational probation.

The guidelines submitted to Congress reflect a clear "victory" for those advocating organizational probation.[1]
Arthur N. Levine

Chapter Six

ORGANIZATIONAL PROBATION AND THE UNITED STATES SENTENCING COMMISSION: ESTABLISHING THE LAW OF CORPORATE CRIMINAL SENTENCING

The previous chapter detailed the first several years of the Sentencing Commission's consideration of organizational sanctions. During this time, debate centered on two widely divergent proposals. The Parker proposal sought to establish the market-based principles of law and economics as the basis for corporate sentencing. High barriers to the use of organizational probation were proposed. The Coffee, Gruner, and Stone (CGS) proposal, on the other hand, made probation available in a wide range of circumstances and emphasized the importance of politics-based efforts to remediate organizational structures associated with crime. Though it had rejected law and economics and shown a tendency to broadly define its lawmaking

[1] From a letter to the author (Levine, 1991). Mr. Levine is now a private attorney. As Deputy Chief Counsel for Litigation, Food and Drug Administration, through 1990, he was actively involved in the development of the organizational sentencing guidelines.

capacity, the Sentencing Commission had yet to endorse an organizational sentencing proposal. At the end of the debate of the Discussion Materials, no proposal was under consideration. Under these circumstances, the Commission sought additional input to guide its lawmaking efforts.

Interest group participants had established their positions on organizational sentencing through written comments and testimony before the Commission responding to the Discussion Materials. The business and legal communities favored the narrow approach to probation advanced in the Parker proposal. This amounted to tacit rejection of organizational probation. These groups also refused to engage in the broader debate regarding its development. Regulatory and academic witnesses expressed strong support for organizational probation as developed in the CGS proposal, and engaged in detailed debate on its uses and conditions. As this chapter details, these contrasting strategies placed regulatory agencies in a favorable position when entrepreneurial actions, legitimacy considerations, and a broad interpretation of its powers led the Sentencing Commission to develop organizational probation.

Looking for Direction: Draft Proposals on Organizational Sanctions

After reviewing the Parker and CGS proposals, and rejecting the former, the Sentencing Commission solicited draft organizational sentencing proposals from a number of sources to provide a foundation for its subsequent work. In early 1989, proposals were received from the Department of Justice, Professor Leonard Orland of the University of Connecticut School of Law, and the Attorney Working Group (AWG), an advisory group of corporate defense attorneys formed by the Sentencing Commission. This last group essentially served as a proxy for the business community (Coffee, 1991a; see Heinz and Laumann, 1978). A proposal was also developed internally by the Commission's research staff. The director of this in-house effort was Nolan Clark, Deputy General Counsel of the Sentencing Commission.

These four proposals can be divided into two groups in terms of their approaches to organizational probation. The Department of Justice (1989) and Orland (1989) proposals were quite similar, as were the AWG (1989) and Clark (United States Sentencing Commission, 1989a) proposals. In fact, in his proposal Orland stated that his treatment "of corporate probation is derived almost in its entirety from the Criminal Division Guidelines" (1989: 2). As a result, only the details of the DOJ and AWG proposals are presented herein. Each of these proposals represented more moderate approaches to probation than the Parker and CGS proposals. The more conservative proposals of Clark and the AWG provided for somewhat broader use of probation than the Parker proposal. The DOJ and Orland proposals, on the other hand, were somewhat less intrusive and less detailed than the CGS proposal.

Department of Justice: Increasing Support for Probation

The Department of Justice proposal, resubmitted with organizational probation provisions on January 31, 1989, took a generally supportive approach to probation. Several mandatory uses of probation were provided, in contrast to the discretionary provisions of the CGS proposal. On the other hand, remedial applications of probation were noticeably limited in both the binding and discretionary probation provisions. Nonetheless, this represented a substantial change in the six weeks that had passed since the DOJ's first proposal was presented to the Commission. In this latter proposal, probation was made mandatory where the fine was below the fine range; the criminal conduct was likely to recur; the organization or its senior management had a similar conviction within five previous years; monetary payments would not be completed within thirty days; or notice to victims was ordered. Imposition of probation was discretionary where internal controls were determined to be inadequate; the offense was part of a pattern of illegal conduct; unlawful activity was pervasive in the organization; probation was needed to impose restitution; redress of the effects of unlawful behavior (e.g. environmental clean-up, recall), was needed; or probation was needed to increase the likelihood of law compliance.

Consistent with the CCCA, mandatory probation conditions included avoidance of all law violations; full monetary payments where ordered; and notice to victims where ordered. The discretionary probation conditions were those determined by the court to be reasonably related to the offense conduct and to the purposes of sentencing, and which involved "only such deprivation of liberty or property as are reasonably necessary to effect the purposes of sentencing." Possible such conditions included reporting regularly to a probation officer and providing requested records; submitting to examination of facilities and records; complying with a court- or corporation-developed compliance plan; providing redress to victims; cooperating with investigators; reporting new offenses; and submitting to external financial oversight and control if unable to pay monetary penalties.

The changes in the DOJ's approach to probation between December 1988 and January 1989 were in part attributable to its effort to meet the minimum standards required by the CCCA and requested of it by the Commission. Beyond that, it is also notable that in the period between the first and second DOJ proposals, the Presidential administration had changed. Also, a new Attorney General had been appointed at the end of the Reagan administration. While neither the speed nor magnitude of the change in Administrations was substantial, there is some evidence that under Attorney General Thornburg the DOJ increased its commitment to prosecuting corporate crime (Thornburg, 1991) and decreased the ideological commitment of the Department to protecting and advancing free markets (Parker, U.S. House of Representatives, 1990). Thornburg, for example, was instrumental in the abolition of the DPC Working Group on Corporate Sentencing (Moore, 1991; Domestic Policy Council, 1991). Still, as the subsequent discussion details, the DOJ maintained a "split personality" (Corporate Crime Reporter, 1990a) with regard to on organizational sentencing, particularly nonmonetary sanctions.

Attorney Working Group: Cautious Application of Probation

In a proposal presented to the Commission on May 23, 1989, the Attorney Working Group on Organizational Sanctions, composed of Joseph diGenova, Bert Rein, Win Swenson, Justin Thornton, and Victoria Toensing,[2] took a much narrower approach to probation and to organizational sentencing guidelines than did the DOJ. The Sentencing Commission's draft, released one week after it received the AWG's recommendations, deviated little from these recommendations. The AWG began its proposal by calling for use of policy statements rather binding guidelines in all areas of organizational sentencing, citing the absence of data on past practice. Also, similar to the Parker proposal, the AWG called for loss-based fining and strict adherence to cost/benefit considerations in non-monetary sanctioning. Probation was provided to enforce another remedy or "to require an organization to change its operating structure or procedures."

Three preconditions for the use of supervisory probation, each of which must be satisfied, were established. These were that the offense was a felony or serious misdemeanor; that the offense characteristics indicated significant organizational structural or procedural problems, such as top management involvement or knowledge,

[2] Victoria Toensing was one of the most visible opponents of organizational probation. She published an article that was highly critical of probation (Toensing, 1988). On behalf of corporate clients, she submitted several comments to the Commission that were similarly critical of probation. She was also present at many Commission meetings in her role as an advisor to the Commission.

or absence of reasonable internal controls; and that probation appeared likely to remedy the existing problems. In this last case, if the problem had already been corrected, was likely to be corrected voluntarily, or could be redressed through non-criminal alternatives, probation was not authorized. No specific conditions of probation were provided. Rather, the AWG stated that the appropriate conditions should be clearly and narrowly drawn, and designed to prevent future law violations through the development by the corporation, with court approval, of a compliance plan. These provisions were only slightly more expansive than the Parker proposal's approach to probation, establishing high barriers to use of this sanction.

The First Public Proposal: Commission Support for Probation

No public comments were solicited or received in response to any of these proposals. Also, no public hearing was held after their submission. Rather, throughout the summer of 1989 the Commission worked privately in drafting a public proposal on organizational sentencing guidelines in an effort to publish a preliminary proposal in the fall. Leading this drafting effort was Julie Carnes, a federal prosecutor in Atlanta who was temporarily assigned as special counsel to the Commission and would later be nominated to serve as a Commissioner by President Bush. The minutes of the Sentencing Commission's meetings throughout this period reveal that the Commission was taking a cautious approach to the guidelines.

In fact, at two points during this period Commissioners registered on the record criticisms of this approach. Commissioner MacKinnon stated his concern over the deference being given to civil prosecutions, noting that civil proceedings could not be relied upon to provide sanctions not imposed in criminal proceedings. Moreover, because of resource limitations and other considerations, parallel civil proceedings could not even by relied upon to occur. As a result, there should be no presumption in favor of civil proceedings and no narrowing of the range of available criminal sanctions (United States Sentencing Commission, Minutes, June 14, 1989). Several months later, Commissioner Corrothers expressed her concerns that the guidelines were too timid in stating their goals and their authority to pursue these goals, too lenient, and would "price" crime (United States Sentencing Commission, Minutes, October 19, 1989).

The first Commission-endorsed public organizational sentencing guidelines proposal was published in the Federal Register on November 1, 1989 (United States Sentencing Commission, 1989b). Its publication was followed by a three and one-half month public comment period, which was concluded by a public hearing held in Washington, D.C. on February 14, 1990. This proposal publicly signified the Commission's rejection of law and economics. In it, the Commission moved toward a more moderate, less ideological approach to organizational sanctioning that included two fining mechanisms and a more developed probation scheme. As the foregoing indicates, in the probation provisions the Commission took an approach closer to that of the DOJ than the AWG. Widespread, mandatory use of organizational probation was authorized. Also, the conditions of probation indicated increased support for politics-based remedial uses. However, the most far reaching condition, which authorized close court supervision of financial transactions in cases of nonpayment of fines, was market-based. With the publication of these guidelines, business intensified its lobbying of the Commission.

Provisions of the Commission Proposal

In this proposal, judges were required to impose probation in four circumstances. First, probation was mandatory if necessary to enforce satisfaction of other sanctions, such as restitution or community service. Second, use of probation was required when the organization or a member of its high-level management had a criminal conviction in the past five years for similar conduct. Third, probation was mandatory if the court determined that the offense indicated a significant problem with the organization's policies or procedures for preventing crimes, as evidenced by high-level management involvement in or knowledge of the offense, inadequate internal accounting or monitoring controls, or a sustained or pervasive pattern of criminal behavior. As with the AWG proposal, this last condition was superceded by a finding that the problem had already been remedied, or that there was clear assurance that the problem would be remedied. Fourth, probation was mandatory if the court found that its use would significantly increase the likelihood of future compliance with the law.

All of the conditions of probation in this proposal were in the form of policy statements. In addition to requiring avoidance of all law violations during probation, the court was given the discretion to impose other conditions of probation that were reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing; and that involved only such deprivations of liberty or property as were necessary to effect the purposes of sentencing. Among these conditions in monetary cases was the power of the court to oversee and potentially control financial transactions in cases where monetary penalties had not been satisfied. Among the available conditions of probation in remedial cases were: the development and court approval of a compliance plan; notification of employees and shareholders of the criminal behavior and the compliance plan; and periodic reports to the court or probation officer regarding compliance plan implementation and avoidance of law violations.

Public Comments: Divergent Strategies

The public comment period held after the publication of this proposal provided a clear picture of the interest group coalitions and the dynamics of lawmaking in this particular case. This was no doubt clearest in contrasting the memoranda written by the EPA and the Business Roundtable. In each case, the common need to encourage colleagues to lobby the Sentencing Commission was made clear, as were the divergent strategies of these lobbying efforts. The EPA focused almost exclusively on supporting organizational probation and encouraging its further development. This included detailed statements on the provisions and operations of probation. Consistent with its strategy throughout this period, the BRT focused almost exclusively on minimizing the size and frequency of use of fines. It gave little constructive attention to organizational probation.

The EPA's Approach. On December 6, 1989, Paul R. Thompson of the Criminal Enforcement Division of the EPA sent a memo to each of the EPA's Regional Criminal Enforcement Counsels. This memo provided the details of the proposed guidelines and explained that the EPA had taken a leadership role in working with the Sentencing Commission in further developing organizational sentencing guidelines. In particular, Thompson stressed the central interest of the EPA in the development of organizational probation. He "strongly urged" the Commission to make frequent use of this sanction, "believing it important that organizations develop a scrupulous pattern of and internal structure to ensure continuous environmental compliance during a period of probation" (U.S. Environmental Protection Agency, 1989: 1). Thompson concluded by encouraging each regional office to submit comments to the Commission.

Among the points that the EPA encouraged its regional counsels to bring to the attention of the Commission were the successes of the EPA with the use of injunctive remedies and organizational probation in the past. Past criminal sentencing information was being collected by the Commission, but was not yet complete. Any information about the types and outcomes of past uses of organizational probation was viewed as important in overcoming resistance to the development of organizational probation by reducing the perception of its novelty and demonstrating that it did not lead to judicial management of private organizations. The Commission, particularly Commissioner Nagel, was receptive to this information, and encouraged regulatory agencies to provide details of their use of these sanctions.

The Business Roundtable's Approach. On January 3, 1990, Jon V. Heider, Counsel for the BRT and General Counsel for B.F. Goodrich, wrote a memo to General Counsels of member firms updating them on the development of organizational sentencing standards. In this memo (Business Roundtable, 1990a), Heider outlined the most serious problems with the draft guidelines. These were the dramatic increase in fines from past practice; the use of multiple fining mechanisms; inadequate fine mitigators for less culpable conduct; continued inclusion of probation, including the possibility of "ongoing judicial supervision of the corporation's ordinary business decisions" (1990a: 2); and diminished judicial discretion. Heider concluded by urging members to pay closer attention to the guidelines development process and submit their views to the Sentencing Commission as soon as possible.

Stressing the fining provisions of the proposed guidelines, Heider warned that inattention to the work of the Commission could be costly because of the increasing criminalization of corporate conduct, increased severity of sanctions, and reduced judicial discretion. No longer could business be "confident that judges would impose moderate fines" (1990a: 2) or that civil proceedings would be chosen over criminal proceedings. Attached to this memo were several items designed to assist General Counsels in writing their comments for the Commission. Among them was a copy of General Electric's comments to the Commission, presumably to serve as a model.

Another interesting attachment was the opinion from Roberts v. U.S. (320 US 264, 1943), a Supreme Court case interpreting the Federal Probation Act. At the time of this case, probation was a suspended sentence that had never been applied to an organization. Writing for the court, Justice Black wrote that the

> basic purpose of probation [is] ... to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement (320 US 264, 272).

This view was consistent with the use and understanding of probation until the work of the Brown Commission (see Gray, 1986), but had been rejected by Congress throughout the 1970s and superceded by the CCCA in 1984. The inclusion of this opinion in the packet of materials revealed both a concern about organizational probation on the part of the BRT and a continuing failure to confront this issue in the terms of the current debate. The Roberts standard was completely irrelevant to the post-CCCA understanding of probation, and therefore provided no constructive guidance to the Sentencing Commission. However, limited past use of this sanction and failure on the part of business to closely examine the CCCA and guidelines proposals contributed to persistent misunderstanding of organizational probation.

Several weeks later, the Business Roundtable sent a second memo to members urging them to file critical comments with the Commission. In this memo (Business Roundtable, 1990b), John D. Ong, Chairman of the Roundtable's Antitrust and Government Section, and Chief Executive Officer of B.F. Goodrich, informed members that in December 1989 the BRT had briefed about 20 major trade associations regarding the seriousness of the proposed organizational sentencing guidelines and urged them to file critical comments with the Sentencing Commission. However, more vigorous lobbying was needed; "this issue is too important for Roundtable companies to rely solely on comments by the Roundtable and other associations. I urge your company to send its own response directly to the Commission" (1990b: 1). Member firms were responsive to the BRT's request.

Finally, in comments submitted to the Commission to coincide with its February 14, 1990 public hearing, the BRT continued its three-pronged strategy. It asserted that guidelines were neither mandatory nor necessary, that the proposed fines were excessive, and that probation should be sharply limited to avoid excessive judicial management of corporations (Business Roundtable, 1990c). On this first and most important point, the BRT stated

> [i]n all candor, however, we feel compelled to reiterate certain fundamental concerns over and over again because no one seems to be paying any attention. To be even more blunt, we are compelled to state that the Commission has proposed guidelines that are unnecessary, inappropriate and potentially destructive (1990c: 1-2).

Linking this concern to the fining provisions, the BRT remarked that these guidelines would hurt innocent people, the business community, and American competitiveness. More attention should instead be given to fining provisions that encourage efforts by management to foster compliance and develop compliance plans through generous mitigators. Continued rejection of organizational probation by business commentators made clear their belief that the prerogatives of business to take these remedial steps should be fully protected.

In fact, on the issue of probation, the BRT favorably cited the Parker proposal for its recognition of the limited utility of this sanction. The organizational probation provisions of this proposal involved a "realistic recognition of the limited role that probation can play and the serious competitive problems that would be created if judges were encouraged to become regulators" (1990c: 14). Unfortunately, the BRT stated, "the proposed guidelines abruptly reverse this sensible policy recommendation, with no demonstration whatever of need, feasibility, or a Congressional mandate" (1990c: 14). Of primary concern was the breadth of the probation guidelines, particularly in allowing use of probation based on a showing of an increased likelihood of future law compliance. This provision was viewed as an invitation to judicial experimentation. In conclusion, the BRT suggested "with all due respect, that the Commission have the courage and the intellectual honesty to acknowledge" that it had not yet figured out how to sanction organizations, and thus start over rather than proposing fundamentally flawed guidelines (1990c: 15).[3]

Additional Discussion of Organizational Probation

The limited role for organizational probation to which the Business Roundtable was referring was further elaborated by other witnesses and commentators. Business and legal spokespersons generally stated that organizational probation should be used only in extreme or extraordinary cases. In its comments, PepsiCo stated that supervisory probation was a "potentially destructive" (PepsiCo, 1990: 5) sanction due to the extensive interventionist authority it gave to courts. As a result, it should be used only in the most "egregious" cases because "in such cases, survival of the firm is of less consequence" (PepsiCo, 1990). Again, no precise details or examples were forthcoming. Apparently, however, probation was seen as appropriate only in cases of serious and recurrent traditional criminal conduct in which management participated.

The ABA expressed these same concerns in its comments regarding the first Commission organizational sentencing proposal. In

[3] Attached to a copy of these comments provided to this author by the BRT was a list of 81 BRT members who had filed comments with the Commission and a request to all other members who had not done so to notify the BRT.

addition, it noted that mandatory implementation of probation was so common under the proposed guidelines that "it is likely that corporate probation would be ordered in all cases under the Guidelines" (American Bar Association, 1990: 14). This presented the troublesome possibility that "probation could become a normative organizational sentence rather than the extraordinary one that it is today" (1990: 15). In contrast to widespread, mandatory use, the ABA urged that organizational probation be used only in cases of serious, recidivist, and knowing criminal conduct involving upper-level management; and then only in cases where collateral civil sanctions were not available.

In its testimony at the February 14 public hearing, the NAM (National Association of Manufacturers, 1990) also expressed considerable concern about organizational probation. Speaking on behalf of the NAM, Earlyn Church noted that organizational probation should be sharply limited or eliminated because it constituted a "potential death sentence for small to medium size companies" (United States Sentencing Commission, 1990a: 33). This was one of the few references to organizational size throughout the discussion of probation. Church concluded by stating, "we can only observe that the present system is operating effectively and it is extremely dangerous to suggest to the courts a radical solution to a non-problem" (United States Sentencing Commission, 1990a: 39). Based on this conclusion, she urged the Commission "not to forward its present recommendations to Congress, but to reconsider its proposal in its entirety due to the questionable factual basis for its action" (United States Sentencing Commission, 1990a: 41).

Commissioner MacKinnon responded sharply to these final points, stating that the Commission had collected all available data on organizational sentencing in the federal courts and, pursuant to its Congressional mandate, was using these data in developing guidelines. He also stated that the Commission had every intention to go forward with binding guidelines and had clear authority to do so (United States Sentencing Commission, 1990a). James P. Carty of the NAM, appearing with Earlyn Church, sought to capitalize on this point by stating that the small number of cases in the Commission's comprehensive data base indicated that "obviously the system that was in place in the past was doing its job." Carty went on to state that

> the American business community realized if they violated the law they would be charged as criminals, they would be fined, and they would be put in a situation that would threaten their business. I think that accounts for why you have so few cases (United States Sentencing Commission, 1990a: 45).

Commissioners Corrothers and Wilkins joined MacKinnon in repudiating this claim, stating that it was prosecutorial discretion and the inadequacy of existing criminal sanctions that kept down the number of criminal prosecutions of corporations, not the effectiveness of existing criminal law (United States Sentencing Commission, 1990a).

Finally, in its testimony at the February 14, 1990 hearing, the EPA again made clear its priorities and concerns. Testifying for the EPA, James Strock stated that the EPA had no official position on fines, so long as they were increased. Rather, he stated, "the agency ... attaches greater importance to probation and restitution and remedial orders in the sentencing process" (United States Sentencing Commission, 1990a: 60). In explaining this, Bruce G. Bellin, who appeared with Strock at these hearings, later stated that

> personally, not as an agency, fines I look on as something passed on to the stockholders. I don't know that they have any effective punitive impact on the organization, except maybe on small companies .... For larger business entities, I don't know that fines will have a major impact (Bellin, 1991).

The EPA then complimented the Commission on its development of organizational probation, stating that it was appreciative that the Commission "responded positively to the position advanced by the Agency that the federal courts should be encouraged to creatively use their probationary powers to structure conditions of probation" (U.S. Environmental Protection Agency, 1990a: 2).

Business Lobbying Begins to Pay Off

The February 14, 1990 public hearing and the massive lobbying campaign directed by the BRT preceding it represented the turning point in the Commission's approach to organizational sentencing guidelines (U.S. House of Representatives, 1990; Etzioni, 1990c). Despite a letter of support from the Department of Justice, encouraging the Commission to maintain the strict fining provisions of the November 1989 proposal in the face of strong business opposition, business was successful in gaining fundamental modification of the approach to fines. On February 15, 1990, the

Sentencing Commission met and informally adopted the carrot and stick approach to fining, characterized by high presumptive fines and generous mitigators for less culpable conduct, post-offense self-reporting, and cooperation with law enforcement. As recorded in the Commission minutes from this meeting,

> Chairman Wilkins stated that the first goal of the guidelines should be to provide sufficient incentives so that self-policing becomes a reality .... The consensus of the Commissioners was that staff should develop draft guidelines to reflect self-policing through economic incentives as a possible alternative to the current options (United States Sentencing Commission, Minutes, February 15, 1990).

From this point forward, the fining proposals of successive drafts became substantially weaker as mitigators increased. However, business continued to oppose the proposed fines as excessive and the guidelines as unauthorized.

The role of business in bringing about this change in the fining provisions was openly acknowledged. Business witnesses interviewed after the final guidelines were submitted to Congress expressed partial satisfaction with this change, noting that it marked the first time the Commission was attentive to their concerns (Rogers, 1991; Heider, 1991; see also Business Roundtable, 1990d, 1991). Commissioner Nagel remarked that the reduction in the size of the fines was attributable "to the massive lobbying campaign on the part of the business community to convince individual Commissioners that the fines should follow the carrot and stick approach" (Nagel, 1991). Finally, Chairman Wilkins, responding to questions posed by

Representative Schumer, explained that the carrot and stick approach was drafted at his request due to concerns expressed by witnesses at the February 14, 1990 hearing (U.S. House of Representatives, 1990).

As the following discussion indicates, however, the probation provisions in subsequent drafts and proposals did not follow the same trajectory as the fines. In fact, after being seriously weakened in proposals circulated among the interest groups active in the organizational sentencing debate in the winter and spring of 1990 (Gruner, 1990b; American Corporate Counsel Association, 1990), the organizational probation provisions were consistently strengthened between the summer of 1990 and May 1991. As a result, the guidelines ultimately submitted to and accepted by Congress contained organizational probation guidelines stronger than any previously endorsed by the Sentencing Commission. This was particularly true of the remedial authority granted to the courts.

Organizational Disarray and Controversy at the Commission

In the winter and early spring of 1990, with the annual deadline for submission to Congress of amendments and additional guidelines approaching, the Sentencing Commission prepared its final organizational sentencing guidelines. As part of this process, draft proposals were regularly circulated among active interest groups. Throughout this period, the business community, with the support of the Practitioner's Advisory Group (PAG), had vigorously lobbied the Commission. It is difficult to know precisely how much these groups lobbied the Commission privately and individually, or the extent to which their efforts influenced the guidelines. However, their presence at Commission meetings constitutes the threshold criteria of influence (Melone, 1985). The great extent to which corporate attorneys were incorporated into Commission working groups, which was not matched by the inclusion of pro-probation voices, and the changes in draft proposals in the direction advocated by business, provide further evidence of the influence wielded by corporate interests.

In addition to formal adoption of the carrot and stick approach to fining (Strasser, 1990; Anderson, 1990, 1991; Franklin, 1990a), the probation provisions of the draft guidelines under consideration during this period were also substantially weakened. All mandatory uses of probation, including those for recidivists and for cases involving top level executives, were replaced by policy statements. The availability of remedial conditions, even in the form of policy statements, was also diminished (Gruner, 1990b). As a result, the probation provisions added only advisory recommendations to the CCCA. Business responded favorably to these changes, though again without lessening its demands for still further changes or altering its position that guidelines should not be promulgated (Wermeil and Cohen, 1990). Academicians (Etzioni, 1990b; Gruner, 1990a, 1990b), regulatory agencies (Franklin, 1990a), and the Department of Justice, on the other hand, expressed considerable concern regarding the softening of the fining and probation provisions of the proposed guidelines.

<u>Investigating the Sentencing Commission: Hearing on the GAO Report</u>

In response to concerns about the operations of the Sentencing Commission arising from press reports of the conflict over the full-time/part-time issue and of personnel problems more generally, Congress moved to exercise its oversight responsibilities. On July 14, 1989, Representatives Schumer (D-NY), Chair of the Criminal Justice Subcommittee, and Brooks (D-TX), Chair of the Judiciary Committee, directed the Government Accounting Office (GAO) to investigate the Sentencing Commission (see Yost, 1989b; Strasser, 1989a; Marcus, 1990; Miller and Freed, 1990). This investigation, though ultimately focusing little on the issue that provoked it, revealed "significant organizational disarray" (U.S. House of Representatives, 1990: 9).[4] More specifically, in findings disclosed in the winter of 1990, the Commission was criticized for lacking a clear agenda for future research, the active role of Commissioners in leading research projects, personnel management problems, the absence of clear lines of authority, high employee turnover rates, and numerous vacancies, among other concerns.

In response to this report, the House Criminal Justice Subcommittee held a hearing on March 7, 1990, at which Lowell Dodge, the GAO's Director of Administration of Justice Issues, elaborated

[4] The GAO report was not publicly released. Information about its findings is drawn from press reports and from the House hearing at which it was discussed.

these findings. Chairman Wilkins and Commissioner MacKinnon testified in support of the Commission, arguing that though the operations of the Commission were not flawless, the uniqueness and enormity of their task inevitably created conflict and uncertainty (U.S. House of Representatives, 1990a). Commissioner MacKinnon described the tasks mandated of the Commission as "revolutionary" (U.S. House of Representatives, 1990a: 262), and argued that monitoring compliance with the individual guidelines and developing organizational guidelines were too substantial to warrant a change to part-time status. In particular, MacKinnon asserted that the development of organizational guidelines "presents the most difficult and complex problem that this Commission has encountered. It is an area completely devoid of precedent" (1990a: 270). Completion of this task required considerable time and resources.

Former Commissioner Block, who since leaving the Commission had become an outspoken critic of its methods and proposals, and whose criticisms had precipitated this investigation, also testified. Rather than focusing on the full-time, part-time issue, and increasingly revealing this issue to be a pretext for his greater concerns about organizational sentencing, he centered his remarks on the direction of development of the organizational guidelines. In failing to accept his proposal, he accused the Commission of a "retreat from rationality" (1990a: 157). Its guidelines, Block argued, were "arbitrary," "inefficient," and a "destructive influence" that would seriously harm the American economy and the international competitiveness of American business (1990a: 158).

In addition to recommending greater attention to measurable losses in developing sanctions and the movement to part-time status, Block suggested that the Sentencing Reform Act be amended to require positive Congressional action before guidelines could become law. This change would force Congress to consider the Commission's proposals and would facilitate efforts to amend them. Such a requirement was also contrary to the effort to depoliticize sentencing, which was the founding principle of the Sentencing Commission. That these suggestions were made after individual guidelines were promulgated and just before organizational guidelines were to be submitted to Congress revealed a concern on the part of opponents of expanded organizational sanctioning with the statutory independence of the Commission. Changes such as those proposed by Block would have substantially reduced the capacity of the Commission to act relatively free of business and executive branch influence.

Withholding the Guidelines

In the midst of the controversies generated by the GAO report and the changes in recent draft proposals, the Commission remained intent on submitting guidelines to Congress by the annual May 1 deadline. Though these guidelines were in every respect clearly more lenient than any previous proposal or, as it turned out, the final guidelines, the business community continued to oppose them through an "all out lobbying effort" (Wermeil and Brannigan, 1990: B3). United under the leadership of the Business Roundtable, business introduced a new tactic into its lobbying efforts. Sometime in early March 1990, the BRT met with top White House aides requesting efforts on its behalf to delay submission of the organizational sentencing guidelines to Congress. The White House, in particular White House Counsel C. Boyden Gray,[5] in turn put pressure on the DOJ to withdraw its previously announced support for the guidelines.

On March 16, 1990, immediately after Gray contacted Attorney General Thornburg, Deputy Assistant Attorney General Donald Ayer sent a letter to the Commission formally withdrawing DOJ support for the organizational guidelines. He had written a letter of support less than three weeks earlier. In the first letter, written on February 26 to encourage the Commission to resist business lobbying, Ayer described the guidelines as "drafted, reviewed, and refined in a very deliberate and thoughtful manner over a two-year period" (quoted in Isikoff, 1990: A14). In the second letter, Ayer wrote, "as you are aware, these guidelines involve many complex issues, some of which are being addressed for the first time" (quoted in Isikoff, 1990: A14). On those grounds, he asked the Commission to further consider organizational sentencing before promulgating guidelines (Lewis,

[5] Gray was a former lobbyist for the Business Roundtable (Lewis, 1990b) and former counsel for the Regulatory Relief Task Force, created by President Reagan to oversee deregulation.

1990a; Corporate Crime Reporter, 1990a). Ayer resigned soon after this incident (Barrett and Wermeil, 1990; Anderson, 1990b).

This series of events became front page news (Isikoff, 1990) when, at the Sentencing Commission's regularly scheduled meeting on April 10, 1990, Commissioner MacKinnon declared his intention to abstain from voting on organizational sentencing guidelines. Because of the earlier resignations of Block and Robinson, and the departure of Commissioner Breyer,[6] MacKinnon's abstention left only three voting members, one short of the necessary quorum. In taking this step, MacKinnon placed into the record an explanation stating:

> The issuance of organizational sanctions is our most difficult task. It requires the Commission with no precedent to write guidelines on a completely new slate for every corporation in the nation. In my opinion such sentencing guidelines are much too important and far reaching to be adopted while there are three vacancies in our seven member Commission. I expressed this concern some weeks ago to representatives of the Justice Department and had hoped that the vacancies would be filled by now. However, this has not occurred. Accordingly, because of the extraordinary nationwide importance of the matter, and the three vacancies in the Commission, I will not vote to adopt any proposal for corporate sentences during the current amendment period (United States Sentencing Commission, Minutes, April 10, 1990).

[6] In addition to the resignation of Commissioner Block in August 1989, Commissioner Robinson had resigned in January 1988, due mostly to methodological differences with the Commission in the development of the individual guidelines. Commissioner Breyer left the Commission after his term expired on November 1, 1989. None of these vacancies had been filled by April 1990.

As a result of MacKinnon's actions, organizational sentencing guidelines could not be submitted to Congress until at least the next amendment cycle, in the spring of 1991.

When the Washington Post published a front page article on April 28 disclosing the Ayer letters and the dramatic change in position they revealed, and linking them to the Commission's decision to withhold organizational guidelines (Isikoff, 1990), a small scandal erupted. Representative Schumer, who had presided over the March 1990 oversight hearing and who is a prominent spokesperson for increased organizational sanctioning and organizational probation in particular (Goldberg, 1991; Nagel, 1991; U.S. House of Representatives, 1990b), declared his intention to make this issue the subject of a second House Oversight hearing on the performance of the Commission in developing organizational sentencing guidelines.

The Second Oversight Hearing: Allegations of Outside Influence

This second hearing was held on May 24, 1990. At this hearing, MacKinnon defended his actions and denied any influence from the Department of Justice or the White House in his decision to abstain from voting on the guidelines. Rather, MacKinnon stated that it was because of the importance of organizational guidelines, and the fact that these guidelines "were vigorously, if not viciously, opposed by corporations at practically every meeting we had" (U.S. House of Representatives, 1990a: 198), that he decided to force the Commission to wait until it had a full complement of Commissioners to promulgate organizational guidelines. He informed the House Oversight panel that he had been considering this action since well prior to the Ayer controversy. Delaying the guidelines, MacKinnon argued, would strengthen them against inevitable legal challenges. The statutory requirements that there be three judges on the Commission and a total of seven commissioners provided the basis for argument about the propriety of the Commission's actions if it promulgated guidelines. Any group as committed to derailing the work of the Commission as the business community would seize upon any available arguments, and should not be given additional opportunities to do so.

Professor Amitai Etzioni also testified before the House Oversight Committee regarding this controversy. He rejected MacKinnon's explanation in favor of the view that MacKinnon had in fact bowed to direct pressure from business and the White House in his decision not to vote on the guidelines. Though Etzioni apparently lacked any inside knowledge of the Commission, and had not been associated with the Commission other than testifying at its February 14, 1990 public hearing, he stated that the failure of MacKinnon or any one else to raise the issue of vacancies earlier made MacKinnon's explanation incredible. As he put it,

> any argument that the vacancies are the real issue, the reason, for stopping the Commission's work was unbeknownst to the business community until it was suggested recently by the judge (U.S. House of Representatives, 1990: 232).

The business community and White House had, in this view, obviously and seriously compromised the integrity of the Commission's work.

In defense of MacKinnon, it should be noted that months earlier business and legal witnesses had in fact expressed doubts about the legality and advisability of promulgating guidelines without the full complement of Commissioners (see Anderson, 1990a). In his January 1990 memo to member firms asking them to lobby the Commission, Jon Heider requested that in their written comments members point out that the lack of empirical data and the fact that only four commissioners were sitting should delay issuance of guidelines (Business Roundtable, 1990a). Also, in its February 14, 1990 comments to the Commission, the Business Roundtable commented that "there is no perceived emergency that requires this kind of precipitate action by a Commission that barely has a quorum today" (Business Roundtable, 1990c: 3). Further, Judge Edward R. Becker, Chair of the Judicial Conference Committee on Criminal Law and Probation, was on the record in March 1990 stating that the Commission should delay further action on organizational sentencing guidelines because of the legal challenge that would almost certainly result if guidelines were implemented without the mandated three judges on the Commission (Miller and Freed, 1990).

At the same oversight hearing, the Department of Justice was called to defend itself against charges of caving in to the White House and the business community. Paul Maloney, Assistant Attorney General, Criminal Division, and later ex-officio member of the Sentencing Commission testified. He stated that the DOJ changed its position on organizational sentencing guidelines as a result of the

Commission's adoption of the carrot and stick approach to fining. In the view of the DOJ, this approach excessively reduced potential fines, even making possible zero fines. This was in sharp contrast to the DOJ's long advocacy of substantially increased fines. As a result, Maloney indicated that Attorney General Thornburg wanted to personally review the most recent Commission proposal to ensure that it did not weaken the potential fines faced by convicted corporations. Also, according to Maloney, Ayer's first letter was sent without the appropriate internal review and authorization. Therefore, its withdrawal did not represent a change in the official position of the Department of Justice.

While it appears certain that MacKinnon acted independently when he decided to forestall the guidelines, the DOJ's explanation of its actions was less convincing. Though the DOJ both then and now favored higher fines for organizations than those proposed by the Commission, their actions in early 1990 were more political than principled. Rather than acting on orders from the Attorney General to keep the Sentencing Commission from authorizing inadequate fining provisions, the short time span between the call from the White House and the change in the DOJ's position seems to indicate that once alerted to the concerns of business and the White House, Thornburg acceded to their request to attempt to delay the guidelines.

Under intensive questioning from Representatives Schumer, Brooks, and Conyers, Maloney revealed that the White House had in fact contacted the DOJ, encouraging it to withdraw support for guidelines. Maloney also revealed that as Deputy Attorney General, Donald Ayer was authorized to issue comments without internal review, since his only superior was Thornburg, who had previously been uninvolved in Sentencing Commission matters (U.S. House of Representatives, 1990). This explanation is also consistent with the view of the DOJ as having a "split personality" on organizational sentencing, with conflicts between its politically attuned leaders and its prosecutorially oriented staff.

In the spring of 1990, the United States Sentencing Commission reached the nadir of its consistently controversial and troubled tenure. The Commission had been sharply criticized in the media due to internal personnel conflicts and allegations of undue Administration influence in the development of organizational sentencing guidelines (Yost, 1989a, 1989b, 1989c; Isikoff, 1990; Lewis, 1990a). On top of this, a GAO report found the Commission to be poorly administered and rudderless. Business lobbying was vigorous and increasing. Two House Oversight hearings had been held, and had indicated substantial concern about the quality and independence of the Commission's efforts. Only four Commissioners remained in place, and replacements had not been named. Numerous staff vacancies existed. The fining and probation provisions of the proposed guidelines had been made much more lenient than earlier provisions, and then had been withdrawn from consideration under questionable circumstances. Overall, the intensity of business lobbying and problems at the Commission gave reason to believe that the legitimacy of the Commission and the promulgation of organizational sentencing guidelines were imperiled. The political economic limits of lawmaking had been confronted, and lawmaking appeared to have lost.

The Reconstituted Commission and Organizational Sentencing

By May 1990, President Bush had nominated three new Commissioners, all Democrats, to fill the vacancies left by the departures of Commissioners Block, Breyer, and Robinson. Judge David Mazzone of the Federal District Court for Massachusetts was nominated to replace Judge Breyer. Julie Carnes, a federal prosecutor from Atlanta, and Michael Gelacak, former staff aide to Senator Biden and a practicing attorney in Washington, D.C. were nominated to fill the other two vacancies. Mazzone, having been approved by Congress after appointment to the Federal bench, was automatically approved for a seat on the Sentencing Commission. Carnes and Gelacak were confirmed by the Senate after hearings on June 15, 1990. Their confirmation hearings were brief and disclosed no meaningful information on their approaches to organizational sentencing (U.S. Senate, 1990). All three commissioners were sworn in on July 24, 1990.

Carnes had previously served as special counsel to the Commission. In this role, she led the effort to draft the first Commission-endorsed organizational sentencing guidelines. Gelacak came to the Commission from the Washington law firm McNair. Prior to that, as a senior aide to Senator Biden, Gelacak was involved in drafting the Comprehensive Crime Control Act. He thus had extensive knowledge of the Commission's enabling statute. Several people familiar with the Commission (Coffee, 1991a; R. Rogers, 1991) reported that Gelacak, through his law practice and his work for Biden, had close ties to the Business Roundtable. He was also reported to have been the most pro-business member of the Commission in the last stage of the development of organizational sentencing guidelines (see Strasser, 1990b). Gelacak's comments to the largely corporate audience of the Cato Institute's Conference on Corporate Sentencing support this view. During his discussion of the likely enforcement implications of the sentencing guidelines, Gelacak criticized business for not doing more to shape the CCCA. He concluded by opening his door to business in the future, stating "you have to help corporate America in every way you can" (Gelacak, 1991).

The Working Principles for Organizational Sentencing

In a lengthy memo issued on August 21, 1990, Chairman Wilkins declared that organizational sanctions were the top priority of the Sentencing Commission for the next submission cycle, and outlined the working assumptions on which organizational sentencing guidelines would be based. These assumptions indicated continued adherence to the carrot and stick fining approach as well as a commitment to remedial probation. Indicating that organizational probation might be developed more extensively than it had in the most recent drafts, Wilkins wrote that

> [o]rganizational probation is warranted when necessary (1) to ensure that a monetary penalty is paid; (2) to

> ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; and (3) to impose another remedy that can only be imposed as a condition of probation. Organizational probation may also be appropriate in other circumstances. (Because of the lack of judicial experience with organizational probation as an independent sanction, the Commission should identify the heartland areas in which probation is clearly appropriate) (United States Sentencing Commission, 1990c: 4).

This memo served as the foundation upon which guidelines were drafted, a process that was immediately restarted in an effort to publish a second public proposal by November 1990. Throughout this drafting period there was no public discussion of organizational sentencing. This discussion resumed after the publication of the Commission's next proposal.

In October 1990, Attorney General Thornburg sent a letter to Chairman Wilkins stating that the DOJ had undertaken a comprehensive review of organizational sentencing standards, including all existing proposals, public comments to the Commission, and academic materials (U.S. Department of Justice, 1990a; see Johnston, 1990). Based on this, the DOJ made a number of recommendations to the Commission. Among them, the Commission was encouraged to promulgate guidelines as quickly as possible. It was also noted that the withdrawal of guidelines in the spring of 1990, and the publicity surrounding this, created the appearance that organizational crime was not important. In conjunction with the punitiveness of the individual guidelines, this put pressure on the Sentencing Commission to draft guidelines reflecting the seriousness of organizational crime and the federal government's commitment to its control.

The DOJ also recommended the use of an offense-level based approach to fining. In particular, the Commission's November 1989 proposal, which authorized higher fines than any subsequent proposal, was cited as "fundamentally sound" in this regard (U.S. Department of Justice, 1990a: 1). The carrot and stick approach, on the other hand, was criticized for allowing excessively lenient fines. Thornburg also supported mandatory use of organizational probation to ensure payment of monetary penalties, impose restitution, in cases of organizational or management recidivism, and where necessary to ensure that changes were made to reduce the likelihood of reoffending. Recommended conditions of probation included reporting new offenses and investigations, unannounced inspections, and compliance plans.

The Sentencing Commission's Second Public Proposal

Pursuant to elaboration by Chairman Wilkins of the working principles on organizational sentencing and the recommendations of the DOJ, the Commission staff drafted a second public proposal. This draft gained the endorsement of the Commissioners and was published in the Federal Register on November 5, 1990 (United States Sentencing Commission, 1990b). Accompanying this proposal was a third proposal from the Department of Justice (U.S. Department of Justice, 1990b). The Commission proposal reflected the carrot and stick approach and more limited use of organizational probation than in their first proposal, indicating that the Commission sought to limit the scope of authorized organizational interventions. The DOJ retained the more punitive, offense level approach to fines earlier rejected by the Sentencing Commission, and moderate use of organizational probation.

In the Commission proposal, organizational probation was mandatory to enforce monetary sanctions or to ensure that changes would be made within the organization to reduce the likelihood of future criminal conduct. Unlike their previous proposal, no greater specificity was provided as to when organizations could or must be placed on probation. This made possible broad use of probation, since steps to reduce recidivism could be argued to be necessary in almost any case. However, again with reference to past practice, this lack of specificity would likely lead to limited use of organizational probation. Without clear guidance, judges had shown an unwillingness to venture into unfamiliar territory. As with the CCCA, the only mandatory condition of probation in this proposal was avoidance of future law violations. Continuing to place compliance plans at the center of organizational probation, possible discretionary conditions of probation included development and court approval of compliance plans to prevent and detect recurrence of criminal behavior.

Provisions authorizing the court to employ appropriate experts to assess the efficacy of a proposed compliance plan and to require that the experts be given access to all materials necessary to make this evaluation were also suggested. It was further provided that the defendant organization could be required to notify employees and shareholders of its criminal behavior, conviction, and the resulting compliance plan. Periodic reports to the court or probation officer regarding implementation of the compliance plan and all civil and criminal investigations or prosecutions were authorized, as were inspections of relevant facilities and records and questioning of knowledgeable employees by probation officers or court-appointed experts. Finally, publicity of the crime, conviction, and remedial steps taken were authorized. This publicity component was not included in the earlier Commission proposal.

The Department of Justice Proposal

The Department of Justice proposal expanded its earlier approach to organizational probation in the direction of the provisions contained in the Sentencing Commission's first public proposal. Most importantly, all applications of probation that were discretionary in their previous proposal were made mandatory. Organizational probation was mandatory if necessary to ensure satisfaction of monetary sanctions; in cases where high-level management was involved in the offense and had a prior record of criminal convictions for similar conduct; where the court determined that the organization had no program or an inadequate program for preventing and detecting law violations; or if the court determined that probation was necessary to ensure organizational changes to reduce the likelihood of future law violations. An inadequate compliance plan was characterized by high-level management involvement, encouragement, or countenance of the offense; inadequate internal accounting or monitoring practices; or a sustained pattern of criminal behavior that had not been remediated.

Avoidance of all future law violations was the only proposed mandatory condition of probation. Discretionary conditions included any conditions reasonably related to the law violation and not imposing undue deprivation of liberty or property of the defendant. Going beyond the early Commission proposal in its authorization for monitoring and inspection of organizations on probation, the DOJ recommended conditions involving development and court approval of a compliance plan, to be evaluated by court-appointed outside experts; notification of employees and shareholders of the crime, conviction, and compliance plan; periodic reports to the court or special probation officer regarding compliance efforts and new offenses or investigations; and periodic examinations of facilities and records, and interviews of employees by court or special probation officer.

Despite this endorsement of probation, the DOJ remained divided regarding organizational sanctions, and organizational probation in particular. Written correspondence between the DOJ and the EPA (U.S. Department of Justice, 1990c) and internal EPA memos (U.S. Environmental Protection Agency, 1990b, 1990d) from this time reveal that the DOJ took steps to "coordinate" its positions on organizational sentencing with those of the EPA so as to present a uniform position to the Sentencing Commission. As part of this effort, the DOJ encouraged the EPA to reduce its advocacy of probation, to withdraw its support for the establishment of trust funds to pay for future cleanup efforts in environmental cases, to withdraw its support for publicity as a condition of probation, and other steps (U.S. Environmental Protection Agency,. 1990b). While formally endorsing organizational probation, the DOJ did not publicly advocate its use and privately took steps to limit its development.

In their response, the EPA was critical of the DOJ for not voicing stronger support for organizational probation in its contacts with the Sentencing Commission, particularly during public hearings. Bruce Bellin described the EPA as "solidly endors[ing] the concept of probation to ensure a change in corporate attitudes and practices." On the other hand, Richard Stewart,[7] Assistant Attorney General, Environment and Natural Resources Division of the Department of Justice "was lukewarm in his endorsement of probation" in written comments submitted to the Commission accompanying his testimony (U.S. Environmental Protection Agency, 1990d: 2).

Given these differences, Bruce Bellin, who oversaw the EPA's contacts with the Sentencing Commission, compromised in part with the DOJ, but resisted any changes in the EPA's positions on probation, publicity, and trust funds (U.S. Environmental Protection Agency, 1990b). In describing this compromise in a memo to James Strock, EPA's Director of Enforcement, Bellin stated that

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[7] Stewart was coauthor, with Stephen Breyer (Breyer and Stewart, 1979), of a book supporting deregulation and free market policies.

> we deferred largely to Justice as far as the fining provisions of the guidelines, but as far as our environmental enforcement mission, the issues of probation, community service, restitution, we thought were particularly within our province of special interest, and we preserved our prerogative to deal directly with the Sentencing Commission on those issues (U.S. Environmental Protection Agency, 1990b).

These memoranda provide strong evidence that state actors took different, even opposing, positions on organizational sentencing, thereby necessitating separate consideration of their actions and motives. Regulatory agencies were the strongest supporters of organizational probation, and resisted efforts to weaken it.

The Fifth and Final Public Hearing on Organizational Sentencing

Following the publication of these proposals, the final hearing on organizational sanctions was held in Washington, D.C. on December 13, 1990. The most obvious characteristic of this hearing was that much more so than previous hearings, which drew witnesses from all segments of the organizational sentencing debate, the witness list was dominated by the heaviest hitters of the business community. Former Attorney General Griffin Bell began the hearing testifying on behalf of Martin Marietta. Other witnesses included representatives of the NAM, Chamber of Commerce, ACCA, ABA, and Rockwell International, as well as Andrew Frey, an attorney closely associated with the BRT. As they had in the past, these witnesses pursued the strategy of focusing mostly on the issues of policy statements versus binding guidelines and the maximization of fine mitigators. Three representatives of the Department of Justice also testified. None of the individuals or organizations most supportive of organizational probation testified.

Contributing to the emphasis of this hearing on fining, the "Specific Issues for Comment" section published with the November 1990 proposal included no references to organizational probation. Because these questions were circulated to witnesses in advance of their testimony and served as an informal agenda for hearings, this hearing included no discussion of organizational probation. Likewise, public comments received during this period mostly responded to the questions posed by the Commission, and therefore contained less discussion of probation than in the past. The significance of the absence of discussion of organizational probation was unclear. Nolan Clark, Deputy General Counsel of the Sentencing Commission, stated that this indicated only that the Commission did not need further information about organizational probation and had no particular questions about it (Clark, 1991a). This interpretation is consistent with the composition of the witness list and with subsequent Commission development of organizational probation.

Though organizational probation was not discussed at the hearing, public comments received during this period revealed the positions of the major interest groups on this component of the proposed guidelines. These comments showed a growing gap between the Commission's commitment to some form of compliance plan-based organizational probation and the continued oppositional approach of the business community. These comments also demonstrated that the

Sentencing Commission, in both general and specific ways, aligned its probation provisions with positions advocated by regulatory agencies. In fact, in draft guidelines distributed throughout this period and in the final guidelines, there were no detectable differences between the positions of the EPA, FDA, and the Sentencing Commission on organizational probation.

Opposition to Organizational Probation. In comments dated January 9, 1991, the NAM (1991a) argued that "supervision in the form of 'probation' should be viewed as an extraordinary step used only in the most intractable of circumstances" (1991a: 15). In those cases where minimal judicial supervision was warranted, it should take the form of a contempt citation or some other nonintrusive alternative to probation. Also, even in those cases warranting probation, conditions of probation should be narrowly drawn because "courts are institutionally incapable of undertaking the potentially extensive monitoring function posited" (1991a: 15-16). No examples of acceptable uses of organizational probation were provided, leaving the Sentencing Commission without constructive comments from business to assist their development of this sanction.

Drawing from Roberts v. U.S. (1943), just as the BRT had suggested, the NAM further emphasized the historical use of probation as a rehabilitative tool designed for lesser offenders. In making its case, the NAM asserted that the Commission "seems to view probation not as an alternative to punishment, but punishment itself, or as a means to facilitate additional punishment. We find this curious" (1991a: 15). On the one hand, it is difficult to imagine that this surprise was genuine. Organizational probation had been on the table for so long by this time that misunderstanding its legal basis and basic operations was unlikely. On the other hand, it is equally difficult to imagine that business groups intentionally misstated their understanding of this sanction, particularly given continued support for it on the part of the Sentencing Commission. Whatever the case, this approach on the part of business helped to explain their failure to undertake concerted and constructive efforts regarding organizational probation. Business groups apparently viewed organizational probation as too far removed from their experiences and concerns to require more systematic and thorough consideration of its operations and implications.

Perhaps the most interesting comments received during this period were those of the Business Roundtable. On December 21, 1990, the BRT filed its fifth set of written comments with the Commission (Business Roundtable, 1990d). In these comments, the BRT stated that the guidelines continued to improve, mostly in the area of expanded mitigators for less culpable conduct, as a result of business input. However, rather than stating its position on each of the proposed sanctions or each substantive issue, the BRT returned to the threshold issue by asserting that Congress did not mandate organizational guidelines and that the Sentencing Commission should not promulgate them. As evidence of Congress' intent, the BRT cited a passage in Title 18 stating that among the factors to be considered by judges in imposing sentences are "the kinds of sentence and the sentencing range established ... in the guidelines that are issued by the Sentencing Commission..." (1990d: 6). The BRT interpreted this to mean that if guidelines were drafted the courts must consider them, but that guidelines did not have to be issued.

The BRT then turned to the CCCA, which it found to be largely unconcerned with organizational sanctions. In the BRT's interpretation of this statute, Congress established that all organizational penalties were to be in the form of policy statements. As a result, the BRT argued that rather than promulgating binding guidelines, and in so doing risking a court challenge to its authority that it may lose, the Sentencing Commission should promulgate only policy statements for organizations. The BRT concluded these comments by stating that it would have offered more affirmative comments and suggested modifications in the proposed guidelines if the general guidelines framework was acceptable. However, the basic structure proposed by the Commission was "fundamentally inadequate" (1991d: 15), forcing the BRT into an entirely oppositional position. This strategy of non-debate, which business pursued most vigorously and consistently on the issue of organizational probation, continued to clash with the Commission's efforts to broadly interpret and implement its statutory mandate.

Support for Organizational Probation. In its comments on the November 1990 organizational sentencing proposal, the EPA (1990c) stated that it continued to be encouraged by the direction of changes in the proposed guidelines. In explaining this position, the EPA noted that it was primarily concerned in its enforcement efforts to "achieve individual accountability and to induce corporate corrective measures whenever it undertakes an environmental criminal action" (1990c: 2). Given these goals, it continued its practice of not commenting on fines, which it regarded as less important than organizational probation. On the other hand, the EPA strongly supported efforts "to encourage a sentencing court to use its probationary powers to ensure that necessary changes are made within an organization to reduce the likelihood" of recidivism (1990c: 3).

Organizational assurances of voluntary change and self-policing, often offered as an alternative to probation by opponents of politics-based sanctioning (Bardach and Kagan, 1982; see Braithwaite, 1982), were rejected by the EPA. As the EPA noted,

> at the time of sentencing, typically an organization is effusive as to the measures the organization has taken to improve or implement procedures to ensure that the criminal violation does not reoccur .... [P]robation is a testing period providing confirmation that the conditions giving rise to the violation have been permanently corrected (1990c: 3).

Voluntary efforts lacked the necessary element of state power in cases where organizations had not undertaken promised changes, a common outcome after the attention associated with criminal conviction faded.

As further support for this approach, the EPA cited its own experience, in which it observed that organizations on probation "find the means to be in scrupulous compliance with their environmental responsibilities and that such a corporate commitment to environmental compliance is often institutionalized" (1990c: 3) during probation. The EPA also stated its support for the role given by the Commission to regulatory agencies in approving and monitoring compliance plans, a role the EPA had long advocated. Finally, the EPA expressed its satisfaction with the inclusion of publicity as a condition of probation and with the use of trust funds. These were provisions that had been opposed by the DOJ, indicating the Commission's receptiveness to regulatory input.

The Food and Drug Administration, in comments dated December 10, 1990, was similarly supportive of organizational probation, particularly its remedial forms. After a series of comments suggesting minor modifications and noting points of importance in the organizational probation provisions, Arthur Levine (U.S. Food and Drug Administration, 1990) concluded with a comment that was ultimately of substantial importance to the work of the Commission;

> as a general matter, I believe the Commission should articulate, possibly in an application note, that the compliance plan ... should be designed and implemented so that a firm would qualify for the maximum number of mitigating factors. By anticipating and paralleling the mitigation factors, the compliance plan will serve one of the Commission's primary goals in organizational sanctions, namely, promoting crime control to the extent possible (1990: 10).

Until this time, the importance of compliance plans had been stressed in most probation proposals. However, the means to construct and evaluate these plans were unaddressed. As the final probation provisions, with their lengthy definition of a detailed compliance plan, reflect, the Commission adopted Levine's suggestion.

Finally, a group of environmental organizations, led by the Natural Resources Defense Council, also submitted comments during this final public comment period. In these comments (Natural Resources Defense Council, et al., 1991), primary attention was given to organizational probation. As with the EPA, fines were generally seen as of little value, due to their easy externalization by defendants, the general absence of consequent organizational reforms, and their failure to address the public harms resulting from organizational crimes. In support of these points, the NRDC referred to "studies [that] show that the corporate structure encourages group conformity and an ability within a group to ignore organizational costs" (1991: 5-6). As the NRDC went on to explain,

> punishment of a corporation by fines alone depends on the assumption that the market operates as a check on corporate behavior and that a corporation will respond with internal disciplinary action. No empirical evidence has ever supported these contentions (1991: 6).

Given these and other characteristics of organizations and markets, the authors of these comments asserted that reliance on non-market approaches was necessary. Mandatory organizational probation, in particular, was viewed as a valuable remedial sanction with important links to organizational theory.

Extent of Business Lobbying. The public comment period following the publication of the November 1990 proposal lasted until January 31, 1991. With the success of their lobbying efforts in the spring of 1990 and the clear intention of the Commission to go forward with promulgating guidelines, the BRT, NAM, and other business groups urged their members to again lobby the Commission in an effort to forestall the guidelines. Indicating the intensity of this effort, Sentencing Commission records reveal that it received 188 written comments between November 1, 1990 and January 31, 1991. Twelve were from law firms and other private legal organizations, mostly on behalf of corporate clients. Nine were from Federal government agencies. Two each were from academicians and environmental organizations. Three comments were received from private citizens. The remaining 159 comments were received from corporations and business groups. The positions taken by these last groups were nearly uniform; they sought a delay in the promulgation of the guidelines, lower fines, more mitigators, use of policy statements, and use of probation only in extreme circumstances. At the end of this public comment period, the Commission began revisions of its previous proposal.

The Final Push to Promulgate Guidelines

Throughout the winter and spring of 1991, several draft organizational sentencing proposals were circulated within the

Commission and among the usual witnesses. The fining provisions of these guidelines continued to be lenient compared to earlier proposals. The carrot and stick approach remained, and the mitigators accompanying fines increased as the aggravating factors decreased. The probation provisions, however, remained similar to or stricter than those in the November 1990 proposal. After a period of leniency beginning in the fall of 1989 and peaking with the movement to sole reliance on policy statements in the spring of 1990, the Commission returned to broad mandatory use of probation, some mandatory conditions of probation, and an emphasis on remedial programs.

These changes drew generally favorable comments from the academic and regulatory communities and criticism from business. In a Commission meeting on January 22, 1991, John Ong of the Business Roundtable urged the Commission "to revisit the issue of corporate probation because of the uncertainty of repercussions to a corporation" (United States Sentencing Commission, Minutes, 1991). In a letter to Chairman Wilkins, the NAM (1991b) stated this position more strongly, asserting that in the current proposal the Commission had exceeded its statutory authority by providing mandatory uses of probation in circumstances other than where a fine was not imposed. Sentences that did not include fines were the sole circumstance under which the CCCA mandated use of organizational probation.

In support of organizational probation, during a February 1991 meeting with the Commission, James Strock of the EPA's Criminal Enforcement Division expressed appreciation that "the Commission obviously concurs as to the merits of organizational probation" (U.S. Environmental Protection Agency, 1991a: 6), a sanction providing the

> key process to induce organizations to strengthen both internal mechanisms for deterring, detecting, and reporting violations and the corporate commitment to its environmental compliance responsibilities (1991a: 1-2).

The Criminal Enforcement Division carries out the EPA's compliance oversight responsibilities.

Debating the Definition of an Adequate Compliance Plan

Further strengthening the probation provisions, and demonstrating the Commission's receptiveness to regulatory input, it was during this period that the Commission introduced a lengthy and detailed definition of an adequate compliance plan (see Chapter One). In introducing this definition into the guidelines, the Commission was primarily interested in specifying the steps necessary to gain mitigation points and assure lower fines. However, this definition also had the effect of establishing a legal standard for compliance that will undoubtedly be employed to measure the adequacy of corporate efforts in this regard and guide development and assessment of compliance plans. This definition thus had the dual effects of telling corporations how to maximize fine mitigators and telling judges and prosecutors what to require of organizations on probation.

The linkage between these seemingly opposing ends was the Commission's interest in facilitating organizational self-policing. Those on the Commission most receptive to business concerns saw the compliance plan definition as a means to respond to those concerns.

Those interested in increasing the range and severity of organizational sanctions saw this negotiative approach as programmatically and pragmatically necessary to maximize compliance efforts in the face of business opposition. The detail provided in this definition established a high standard for evaluating compliance plans, including many of the elements of compliance plans introduced in the conditions of probation of the CGS proposal. Thus, though the CGS proposal was opposed by some as overly intrusive, many of its most remedial elements made it into the guidelines not as conditions of probation, as originally proposed, but as standards for evaluating business-drafted compliance plans. In this way, development of organizational probation involved modification of an individual criminal sanction beyond its traditional applications to the point that it represented a qualitative change in the legal landscape.

Business opposed this definition as potentially "unattainable" in practice. Elaborating this view, James Carty and Brent Thompson of the NAM wrote in an unpublished letter to the editor of the New York Times that the definition of an "effective program to prevent and detect violations of law" was so burdensome that though "it is true that many large corporations have some form of compliance program, a complete reevaluation and revamping will likely be necessary should the guidelines become law" (Carty and Thompson, 1991). In other comments (National Association of Manufacturers, 1991b), the NAM expressed concern that this definition would become a mechanically applied "checklist" (1991b: 2) in the hands of judges. The EPA, on the other hand, expressed its strong support for this "stringent" definition (U.S. Environmental Protection Agency, 1991b: 3) of a corporation's compliance responsibilities as an important and substantial strengthening of probation. The EPA further stated that this definition

> should ensure that an organization convicted of environmental crimes is either placed on probation or has already undertaken a considerable commitment to improving its compliance practices and procedures (1991b: 3).

Overall, the debate surrounding this definition illustrated the larger debate over organizational probation. Its precise meaning being unclear due to the absence of actual applications, each group constructed its meaning based on the ways in which it thought (or hoped) the courts would work. The key variables in this equation are the breadth with which courts will interpret the mandatory uses of probation and the extent to which courts will make use of policy statements. Preliminarily, it can be noted that though Congress sought to limit mandatory uses and conditions of probation and the use of organizational interventions, the Sentencing Commission debate placed compliance plans at the center of organizational probation, with the final guidelines compelling their development in large organizations and encouraging their widespread implementation.

Lobbying the Executive Branch

In yet another attempt to derail the guidelines as the deadline for their submission to Congress approached, on April 19, 1991, a group of business organizations led by the Business Roundtable sent letters to Vice President Quayle, Attorney General Thornburg, Secretary of Commerce Mosbacher, and Chair of the Council of Economic Advisers Boskin briefly outlining their concerns. Each letter was the same, and continued business' broad and fundamental opposition to organizational sentencing guidelines. Among their major points, they argued that the Sentencing Commission lacked a mandate for organizational guidelines, that the Department of Justice had taken a highly punitive approach, and that the available fine mitigators were inadequate. This letter (Business Roundtable, et al., 1991: 2) concluded by stating:

> If a mandatory and inflexible structure of corporate penalties is now added, as the Criminal Division of the Department of Justice advocates, U.S. corporations will bear even greater risks and burdens, and be further disadvantaged in competition in the international marketplace. World investors who can choose the locations where they will risk their capital will have an added incentive not to invest in this country.

In this case, however, the Administration did not respond to the pleas of business. The guidelines went forward as planned.

The Final Guidelines

On April 26, 1991, the Commission met to vote on proposed organizational sentencing guidelines. By a vote of 7 to 0, the Commission agreed to submit this proposal for Congressional scrutiny in time to meet the May 1 deadline. The Commissioners had earlier agreed that environmental and food and drug offenses would be excluded from the fining provisions of these guidelines (see Arkin, 1991, for a discussion of the fining provisions). More time was sought to determine how best to measure the losses and gains in such cases, which often involve long latency periods between detection of the offense and full manifestation of its impacts as well as physical and environmental harms not subject to precise quantification. These provisions will be promulgated as amendments to the guidelines, probably in May 1992. Environmental and food and drug offenses are subject to organizational probation.

The next day, before the guidelines were actually submitted to Congress, the Commission received a letter from Representative Brooks and signed by four other House Judiciary Committee members, asking that the organizational sentencing guidelines not be submitted to Congress during the current amendment cycle. Noting that "questions have been raised about the advisability of having binding vs. discretionary guidelines" (quoted in Strasser, 1991b), these Congressmen suggested that further review and consideration of the organizational sentencing guidelines was needed. This letter was sent at the request of the Business Roundtable. The Commission rejected it, and forwarded the final guidelines to Congress on May 1, 1991.

Unlike the previous proposals, this final proposal was not followed by a hearing or a public comment period. Rather, under a unique legislative review system established by Congress to govern the statutory output of the Sentencing Commission, Congress had 180 days to examine these guidelines. It was immediately rumored that Congressional hearings would be held to scrutinize and possibly modify the guidelines (Barrett and Stevens, 1991). However, these hearings never took place. Past practice indicated that Congress lacked the willingness or the ability to complete the review and modification procedure (Miller and Freed, 1990). Modification or rejection of proposed guidelines required passage of bills in both Houses of Congress and the signature of the President; this was an unlikely outcome given time constraints and divisions within Congress on organizational sentencing (Goldberg, 1991; Nagel, 1991). As a result, the organizational sentencing guidelines became law on November 1, 1991, without modification.

Assessing the Organizational Probation Provisions

In assessing the significance of the organizational probation provisions of the final guidelines, it is first necessary to consider the range of alternatives that was available to the Sentencing Commission when it began its deliberations. Congress established that organizations convicted of criminal offenses were subject to fines and probation, and listed general circumstances in which probation should be imposed. Congress also provided generic individual probation conditions and suggested that application of these and other conditions to organizations take the form of policy statements. Finally, Congress expressed concern that probation not be used as a means for courts to "manage" organizations. Within these limitations, the Sentencing Commission was free to develop organizational probation as it saw fit. What this left, it would seem, was a sanction that would be used infrequently, largely as a matter of judicial discretion rather than statutory compulsion, primarily in support of monetary sanctions, and with limited authority to direct organizational remediation.

The final product of the Sentencing Commission's deliberations on organizational probation, however, is, as detailed in Chapter One, a much more developed, potentially intrusive, and rehabilitative sanction than Congress foresaw. Organizational probation is mandatory in circumstances far broader and more numerous than those provided by Congress. Several of the circumstances, such as cases of recidivism and sentences not including a fine, are narrowly enough drawn to compel use of probation even where judges may be reluctant to impose it. Other circumstances, particularly those referring to the purposes of sentencing and where necessary to avoid recidivism, are expansive enough to allow probation in any circumstance. This point was not lost on business commentators.

Among the conditions of probation, avoidance of all law violations is mandatory. In addition to this provision, which has been mandatory since having been established as the only mandatory condition of probation for individuals or organizations by Congress in the CCCA, two other mandatory conditions of probation are provided. Most importantly, courts are authorized to impose any other conditions reasonably related to the instant offense and imposing no unnecessary deprivations of liberty or property. This condition was not mandatory in any previous proposal.

While it is too soon to state with certainty how this or any other provision will be interpreted in the courts, because it is binding this "catch-all condition" seems to provide protection to judges imposing remedial conditions against the argument of defendants that the condition is unauthorized. A broadly stated mandatory condition of probation can be read to subsume many specific discretionary conditions, thereby providing support for remedial probation within the binding conditions of probation. Several organization-specific provisions, linked largely to the standards and practices of non-criminogenic organizations, are also included as discretionary conditions of probation. These provide specific guidance to judges seeking to ensure remediation through compliance plans of organizational structures and practices linked to crime.

In addition to exceeding Congressional expectations, the organizational probation provisions ultimately developed by the Sentencing Commission went beyond what was proposed at any point during the Commission's deliberations. Even as late as April 1991, Commission drafts included few mandatory uses of probation. In fact, that organizational probation was developed at all, given the direction provided by Congress and the perilous position in which this sanction was sometimes placed as a result of business lobbying and indifference among much of the Commission, is somewhat surprising. Commissioner Nagel confirmed this point when, in response to the question of whether organizational probation was ever in jeopardy during its consideration by the Commission, she responded

"Yes. Do you mean was there a possibility that probation would get knocked off? Absolutely. I think there was a strong possibility for a long time" (Nagel, 1991).

In reflecting on the Sentencing Commission's consideration of organizational probation and the path traveled in its development, an active participant in the development of the guidelines from the regulatory community expressed surprise with the final provisions. Until the final months of consideration, the Sentencing Commission had taken a cautious approach to organizational probation. Close attention was given to the CCCA and its concerns about mandatory and interventionist probation. However, he noted,

> [w]ith the final guidelines, the Commission seems to have gone as far into the water as they ever have been. I see the final guidelines as an interesting consequence of all the movement along the spectrum. While people tend to deal with the spectrum and then usually end up in the middle, where they can build a consensus, my sense is that they [the Commission] were on a spectrum, and then ultimately drew a consensus very close to one end.

This end point is close to that established by the Coffee, Gruner, and Stone (1988) proposal, which provided more specific remedial provisions but which limited its provisions to policy statements. As elaborated in Chapter Seven, legitimacy concerns on the part of the Commission and strategic decisions by business best explain the size of this final step in the development of organizational probation.

Reactions to the Final Organizational Probation Provisions

Because there was no public comment period after the final guidelines were submitted to Congress and because Congress held no hearings on these guidelines during the six months in which they were available for review, no opportunity was provided for interest groups to articulate public positions on the final organizational sentencing guidelines. In fact, very few statements were made to the Commission or in other recorded media regarding specific guidelines provisions after the last public comment period ended in January 1991. As a result, many of the interest groups involved in crafting the organizational sentencing guidelines did not announce, or even develop, formal positions on these guidelines. This is unfortunate due to the considerable changes in the probation provisions in the final stages of the drafting effort. Nonetheless, based on internal documents supplied by various interest groups, written responses to requests for information from key figures in the drafting process, and interviews with participants in the organizational sentencing reform debate, the positions of these individuals and groups toward the final organizational probation provisions can be established.

Business Response: Opposition and Uncertainty. Jon Heider of the Business Roundtable expressed the view, shared by other business witnesses, that organizational probation was not a primary concern of theirs during the development of the sentencing guidelines due to their belief that it would be infrequently used. At the same time, he reacted strongly to the final probation provisions, describing the mandatory uses of probation, particularly in cases of recidivism, as a "straightjacket." He concluded this discussion by rhetorically noting, "this straightjacket on the major corporations of America, I question whether that is really in the public interest" (Heider, 1991). James Carty of the NAM was similarly critical of the organizational probation provisions, saying that they would lead judges into areas in which they were not trained and not competent (Overland, 1991).

Taking a somewhat more moderate tone, the Business Roundtable made several major points in a letter written to its members sometime after the submission of the final guidelines to Congress. On the issue of organizational probation, the BRT informed its members that use of this sanction was

> generally restricted to situations where it is necessary to ensure that there will be assets available to pay penalties or to ensure that remedial programs will be implemented. However, probation will also be imposed if the organization or a high-level person engaged in similar misconduct within a five year period prior to sentencing (Business Roundtable, 1991: 3).

In these comments, the threat posed by organizational probation was minimized by suggesting that its use would be rare, though its available uses were not accurately reported.

The somewhat contradictory tones of these comments reflected not a difference of opinion about the probation provisions themselves but rather differences between organizational probation in principle and in practice and in the audiences being addressed. The substantial threat of organizational probation in principle was diminished by its perceived remoteness in practice. Also, the second set of comments by the BRT was addressed to its members. As a representative of its members' interests, the BRT's legal counsel was interested in providing them with a favorable account of uncertain circumstances so as to most advantageously portray its lobbying efforts (see Flood, 1991). Whatever the case, the broad mandatory uses of probation make it difficult to avoid the conclusion that business miscalculated in lobbying the Sentencing Commission on organizational sanctions.

Samuel Buffone of the ABA also opposed the final probation provisions. When asked during an interview (Buffone, 1991) with the author why the Sentencing Commission had taken such an "activist" approach on probation, Buffone agreed that the Commission had done more with organizational probation than had been anticipated and stated that he was unsure as to why they had done so. Rather, he said, "much of what the Commission has done is inexplicable" to him. He also stated that the probation provisions promulgated by the Commission involved "social engineering of corporate behavior" that went "well beyond the mandate and expertise" of the Commission. This outcome was particularly surprising because "across the board, most witnesses have expressed general sentiment against intervention."

Support from the Enforcement Community. Widespread support for the probation provisions was expressed by representatives of the DOJ and regulatory agencies. As the primary constituents on the Sentencing Commission, who as investigators, prosecutors, monitors, and experts in different offense areas, will play a large role in recommending and overseeing use of this sanction, their support for organizational probation as drafted by the Sentencing Commission would seem to bode well for its future usage. The close relationship between the probation provisions and the recommendations of these groups also suggests prosecutorial and regulatory orientations on the part of the Sentencing Commission.

The EPA expressed great enthusiasm for the final probation provisions. In a memo to James Strock, his former supervisor at EPA who had since become an official in the California Office of Environmental Protection, Bruce Bellin described the impact of the guidelines on the EPA by stating that

> [i]f the Agency actively fulfills the responsibilities that the Commission envisions regulatory agencies serving not only in the sentencing process, but also in making probation a meaningful 'rehabilitative' sanction, the Guidelines could be a real turbocharger for the criminal enforcement program (U.S. Environmental Protection Agency, 1991b: 2).

This statement indicated both an interest in improving corporate compliance with environmental laws and a strong recognition of the extent to which organizational probation could provide enforcement resources to the EPA. These resources were seriously depleted in the 1980s and would assist the EPA in its plans to substantially expand its criminal enforcement efforts (Thornburg, 1991; Strock, 1991).

In elaborating on his view that the final probation provisions represented a "victory" for probation advocates (Levine, 1991), Arthur Levine of the FDA identified several particularly noteworthy features of these provisions. First, extensive use was made of mandatory probation in "circumstances having to do with preventing future violations." Second, several conditions of probation were binding, thereby providing statutory support for remedial interventions. Third, the list of conditions of probation included reporting and monitoring obligations and functions. As a result, compliance efforts could be closely monitored, supplying a coercive component important to regulatory relations. Fourth, regulatory agencies, which have greater experience than the courts, were given a substantial role in the monitoring process. Levine concluded his discussion of the final probation provisions by stating that "[t]he presence of these factors, rather than less aggressive alternatives, seems to reflect a consensus on the Commission for a fairly significant probation component to organizational sanctions" (Levine, 1991).

Paul Maloney of the Department of Justice stated of the final probation provisions that "[w]e believe that these probation provisions, although not identical to those we had proposed, are substantially similar and generally acceptable" (U.S. Department of Justice, 1991b). Vicki Portney, also of the Criminal Division, and also in regular attendance at Sentencing Commission meetings, took a similar position. Though noting that the absence of Congressional hearings after the submission of the guidelines gave no forum in which to state its formal position, she explained that the DOJ was opposed to the final fining provisions due to their leniency but "satisfied" with the final probation provisions. Portney also expressed surprise that the Sentencing Commission went as far as it did in developing mandatory and intrusive probation provisions (Portney, 1991).

Members of the academic community involved in the development of sentencing guidelines also expressed support for the final probation provisions. Professor Richard Gruner stated, "Frankly, I think that the probation provisions that came out in the ultimate standards are among the best they considered in the various drafts, as they evolved over several iterations" (Gruner, 1991). Speaking for Professors Stone and Coffee, Gruner further stated that "we were very heartened to see that they had come around finally to closer to our thinking about probation" (Gruner, 1991). John Coffee described the final probation provisions as a meaningful effort to develop a new and remedial sanction. In so doing, the Commission did much more than it was mandated to do by the CCCA (Coffee, 1991a). Professor Etzioni stated that the Sentencing Commission should be "especially congratulated on two highly innovative, imaginative, and productive measures - placing corporations on probation, and requiring culpable corporations to conduct community service" (Etzioni, 1990a: 7-8).

Conclusion: Explaining the Development of Organizational Probation

Throughout this dissertation, several state and sociolegal theories are employed to explain different phases and facets of the development of organizational probation. The final chapter brings together these theories in a comprehensive analysis of this unexpected legal outcome. The result is characterized primarily by a recognition of the importance of state autonomy and state capacity to legal outcomes opposed by business. At the same time, strategic and unintentional cracks within business' opposition to organizational sentencing guidelines provided conditions under which the state could develop organizational probation. Regulatory support for organizational probation and legitimacy concerns on the part of the Sentencing Commission provided the immediate impetus and the structure for this effort. Finally, entrepreneurial actions on the part of well placed legal policymakers aided the development of state capacity throughout this lawmaking effort.

After elaborating this theoretical structure, attention is turned in Chapter Seven to the prospects for organizational probation in the federal courts. It has been a common argument of academic and business commentators that organizational probation, like other corporate crime control measures, will not have much impact in the federal courts. Rather, the historical limits of law, which arise from business resistance, resource constraints, and political economic considerations, are viewed as fundamentally undermining corporate criminal law enforcement. While these limits are real and substantial, the concluding chapter identifies several theoretical and empirical reasons to believe that organizational probation will meaningfully impact corporate crime control efforts.

The operation of a nation's criminal justice system can only be as fair and effective as is permitted by the underlying statutory law itself.

Ronald Gainer[1]

Chapter Seven

ORGANIZATIONAL PROBATION: PROCESSES OF DEVELOPMENT AND PROSPECTS FOR IMPLEMENTATION

An effort has been made in this dissertation to illustrate with substantial elaboration and documentary support the forces that shaped the development of organizational probation from its earliest consideration. Frequent pauses have been taken to examine where organizational probation was and where it seemed to be going. The result is a far richer exploration of this sanction and of the organizational sentencing reform movement than elsewhere available. At the same time, however, such detail creates problems for theorizing because it tends to personalize and micro-politicize outcomes. Until linkages are drawn to existing theories, institutions, and patterns of interactions, particular outcomes seem

[1] Former Assistant Attorney General, Criminal Division, United States Department of Justice. This statement was made during testimony before the House Judiciary Committee in 1978.

unique and the roles of particular individuals become central to these outcomes. This brings to the surface the concern expressed by Kiser and Hechter (1991) that inductive theorizing has limited the development of general theory.

In discussing the theoretical issues associated with case studies, Joel Rogers states that there are "severe trade-offs between the comprehensiveness of theoretical accounts and their ability to predict outcomes in particular cases" (1991: 290). Detailed analysis of a particular case brings to light actions and motives that are difficult to account for in the broad sweep of single or general theories. At the same time, theoretical explanations of detailed case studies necessarily involve so many case-specific factors that the use of the theoretical framework developed to explain that case is limited in other contexts.

This dilemma is confronted in the present case, where the length and complexity of the development of organizational probation create the need for a multi-theoretical explanation. Heydebrand's (1990) point that large case studies may require sequential layering of state theories is particularly relevant. As state structures, the relationship between the state and sectors of civil society, and social condition change, different factors become important in lawmaking. In a complex, multi-issued case of lawmaking, the same complexity can be seen to exist horizontally, leading to the use of different theories to explain the interrelationships between contemporaneous actions. These theories are elaborated and interrelated in the following section.

Crafting Corporate Crime Controls: Overcoming the Limits of Law

Up to this point, the factors identified in Chapter Two as enabling challenges to the historically market-based limits of law in controlling corporate conduct have been identified as they have appeared in the development of organizational probation. The primary sources for this discussion have been the public and private records of the interest groups participating in the process of law creation and interviews with members of these interest groups. These written materials were created contemporaneous with the events to which they pertain, and thus provide insights into the positions of these groups unfettered by the biases or benefits of hindsight. The present section brings together and more fully elaborates the theoretical bases of the development of organizational probation through the use of materials drawn from interviews, correspondence, conferences, and the few published discussions pertaining to the development of organizational probation. These materials look back on the process of development from the perspective of the final statutory product, providing a historical and theoretical lens through which the forces that shaped law creation can be more fully discerned.

Four major theoretical themes emerge. Briefly stated, organizational probation developed at the confluence of four circumstances: (1) strategic considerations by business; (2)

substantial state capacity; (3) regulatory lobbying and entrepreneurial activity; and (4) organizational legitimacy concerns on the part of the Sentencing Commission. The intersection of these forces allowed the traditional statutory limits of corporate control laws to be transcended through the creation of a binding, politics-based corporate criminal sanction. Other commonly identified forces in law creation, such as public pressure, corporate liberalist efforts by big business to further its interests relative to small business, and straightforward interest group conflict between pro-sanctioning forces and business groups, did not contribute significantly to the development of organizational probation.

Regulatory Pressures and Entrepreneurial Actions

It is virtually an article of faith among sociolegal theorists that law and policy outcomes contrary to the interests of capitalists derive from public and labor pressures on policymakers too great to ignore (Hopkins, 1979; Snider, 1987; Cullen, Maakestad, and Cavender, 1987; Chambliss, 1986). The sources of pressures for law creation were somewhat different in this case. This suggests limitations to society-centered analyses, particularly pluralism (Dahl, 1956; Friedman, 1977), instrumentalism (Miliband, 1969; Domhoff, 1983) and corporate liberalism (Kolko, 1963; Weinstein, 1968), and the need to view state actors as potential sources of progressive legal changes. Both before and after organizational sentencing emerged as the focus of the Sentencing Commission's attention, support for sentencing reform was led by state groups and academicians. The traditional "public" constituencies of corporate regulatory and criminal lawmaking were not active. Despite its project of enhancing and rationalizing the sanctions through which offense statutes are enforced, labor, environmental, consumer, and other public interest groups were largely absent from and not influential in the sentencing reform debate.

In fact, labor's only involvement was to protect its own immediate interests. It did so in Congress by arguing against extension of the Hobbs Act to subject property losses to business during strikes to embezzlement prosecutions and in the Sentencing Commission by arguing against the extension of organizational sentencing guidelines to non-corporate organizations, such as unions (American Federation of Labor - Congress of Industrial Organizations, 1990). Public interest groups testified only once before the Sentencing Commission (Mayer, 1990). Environmental groups were similarly inactive, submitting comments once in 1990 and once in 1991, and only after pressure from Commissioner Nagel (Coffee, 1991a; Nagel, 1991). One commentator closely linked to the public interest community, speaking off the record in an interview with the author, attributed the inactivity of these groups to their resource limitations and their greater concern with enforcement activities. Lawmaking was perceived as too far removed from law enforcement to compel greater attention.

The countervailing powers in this case came primarily from the more immediate constituents of the criminal law: those who enforce it and those against whom it is enforced, as well as academic legal experts. Numerous state groups were involved in the development of organizational probation, some supportive and some opposed to this sanction. As a result, it cannot simply be said that state actors were important in this case of lawmaking. The state is not a monolithic entity (Schmitter, 1985); different state actors must be specifically identified. The state groups involved in this particular case were of four types: legislative, including the Brown Commission, Congress, and the Sentencing Commission; prosecutorial, referring to the Department of Justice; regulatory, particularly the Environmental Protection Agency and the Food and Drug Administration; and advisory, particularly the International Trade Commission and the Domestic Policy Council. In developing federal organizational sentencing guidelines, the differences between these types of organizations were central to their views of organizational probation.

Prosecutorial organizations favored an expansion of their prosecutorial powers, and supported new and strengthened sanctions toward this end. In practice, this led to strongest support for increased fines. Organizational probation received less support. Perhaps fearing that resistance to this sanction by business due to its novelty and interventionism would undermine efforts to gain negotiated convictions, and recognizing that the monitoring resources associated with organizational probation will not flow to the DOJ, it did not lobby in support of organizational probation. The ability of business groups to influence the actions of the DOJ also suggests an element of deference to the political economic concerns on the part of the DOJ.

Based in the executive branch, advisory organizations most closely represented and reflected the preferences of the administration. Under the Reagan Administration, which prominently featured law and economics scholars in regulatory policy positions, advisory organizations strongly opposed increased sanctions and supported an economistic approach to organizations (U.S. International Trade Commission, 1988; Domestic Policy Council, 1988). The Bush Administration took a less ideological approach to organizational sentencing (Moore, 1991), it was receptive to the concerns of business but not to law and economics. It is important to note that advisory organizations are staffed largely on the basis of political and ideological criteria and lack an independent power basis from which to act. As a result, their close ties to the position of the Administration in this case were not surprising.

Legal policymakers in the Brown Commission, Congress, and the Sentencing Commission responded to the lobbying efforts of state and societal groups while also reflecting their own structural characteristics and the interests of their members. In particular, individuals within these organizations played important entrepreneurial roles (Becker, 1963; Gusfield, 1963; Platt, 1969) in the development of organizational probation. Due to their close proximity to lawmaking and their resultant ability to manipulate the lawmaking process, these individuals were able to influence the reform agenda even in the absence of public or other pressure for change. In the case of organizational probation, this was particularly true of Commissioner Nagel. Her individual efforts assured that organizational probation remained on the reform agenda at times when the Commission was dominated by Commissioner Block's entrepreneurial efforts in the other direction.

Finally, regulatory agencies viewed organizational probation as a means to expand their oversight responsibilities and the resources supporting these responsibilities (Bellin, 1991; U.S. Food and Drug Administration, 1988), as well as an innovative corporate crime control measure. Organizational probation provided an opportunity to recoup some of the resources and responsibilities diverted from them during the deregulatory efforts of the 1980s. Acting more in the interests of expanding their own power and increasing agency effectiveness than as state managers with a larger rationalizing agenda (Block, 1987), regulatory agencies lobbied vigorously for a direct and substantial role in approving and monitoring organizational compliance plans. Overarching links between the state and capital, such as those described by structuralists (Block, 1977a, 1987; Chambliss and Seidman, 1982; Poulantzas, 1973), were not apparent in the development of organizational probation, though they may emerge during enforcement (Yeager, 1987, 1991; Szasz, 1986; Braithwaite, 1980). The Sentencing Commission was quite receptive to the concerns of regulatory agencies, more so than toward any other state group. The primary reasons for this were the close relationship between the proposals advanced by regulatory agencies and the Sentencing Commission's interpretation of its mandate, as well as the concerns on the part of the Commissioners about the inadequacy of market-based controls.

Legitimacy, Equity, and an Implicit Quid Pro Quo

Regulatory pressures for the development of organizational probation were supplemented and even enhanced by concerns on the part of the Sentencing Commission that its organizational legitimacy was in danger of being compromised. Without repeating the numerous controversies in which the Commission was embroiled at various times, as a result of the controversies surrounding Commissioner Block and the Ayer incident, in particular, the Sentencing Commission clearly had reason to be concerned about its image among politicians, interest groups, and the general public. Another important legitimacy consideration was that the individual guidelines it promulgated were substantially more punitive than previous individual sentences (Tonry, 1991), a situation which raised the specter of bias if the organizational guidelines were not similarly punitive.

One Commissioner (Robinson, 1986; Yost, 1989a) and a federal judge (New York Times, 1990) resigned in protest over the individual guidelines. In a discussion of the work of various state sentencing commissions and the United States Sentencing Commission, Tonry declared the federal individual sentencing guidelines "disastrous" due to excessive punitiveness, politicization, and an almost complete absence of support for the guidelines among interest group commentators (Tonry, 1991). On top of all this, the Commission was new, unique, and uncertain of its role within the federal government. However, due to vigorous lobbying from business, the Commission gave considerable ground on the fining provisions. This situation provoked strong opposition from the Department of Justice and made the disparity in treatment of individual and organizational offenders even more pronounced.

Given these legitimacy concerns, the Commission felt a need to justify itself, to protect itself against its critics, and to demonstrate its productivity (Hawkins and Thomas, 1989; Hawkins, 1984; Sabatier, 1977). When asked why the Commission had taken an "activist" approach to organizational probation, Parker, who had resigned because of the Commission's activism, cited several factors. Among them was a concern about its tenuous legal standing. This contributed to "the notion of 'well, let's try something new and show that we're a productive agency.' It's part of the natural inclination of an agency to show that they can produce something" (Parker, 1991a). As a novel and remedial sanction, the development of organizational probation demonstrated innovation as well as commitment to organizational crime control. Whatever concerns the Commission had about the extent and seriousness of corporate crime were certainly bolstered by recognition of the criticism awaiting the

Commission if it was perceived as inadequately committed to sanctioning organizations. As Commissioner Nagel remarked in this regard, "you can't justify imprisonment of indigents who stole small sums of money and lightly slap corporations that steal large sums" (quoted in Strasser, 1989).

Continuing in his efforts to explain the Commission's support for organizational probation, Parker identified another legitimacy issue. Speaking of the development of organizational probation, he remarked that "in a way it helped to deflect attention from other areas where, perhaps arguably, they were doing less than they were supposed to" (Parker, 1991a). Whether this took the form of a quid pro quo, in which leniency on organizational fines was traded for rigor on probation, is unclear. Certainly such a deal was never openly discussed. However, the strength of the final organizational probation provisions does help to maintain some level of equity in treatment of individuals and organizations and to mollify those Commissioners who sought tougher organizational sanctions. It may be that, having given considerable concessions to business on the fining provisions, the Sentencing Commission, or at least its most pro-sanctioning faction, was not directly confronted on this issue as part of an effort to establish an unspoken quid pro quo.

Some participants in the development of the guidelines entertained the prospect that this had occurred (Portney, 1991; Thompson, 1991). Most notably, when asked whether business lobbying against probation could have been effective, as it was with fines, Commissioner Nagel replied,

> Sure. I would have every reason to think so. Let me say something else, and I don't have any evidence of this. This is sort of a hypothesis. There was a perception on the part of some that there were some members of the Commission, myself included, who were very unhappy about the direction [of the guidelines]. We started out very tough. We got less tough, less tough, less tough. It may well have been that probation was a bone tossed to us. That is, it was a way of placating those of us who thought the fine structure was already indefensible. They knew it was important to us, that [eliminating organizational probation] probably would have been the last straw .... So, there may well have been a thought among some, "let's not destroy probation because we've gotten so much on lowering fines" (Nagel, 1991).

When asked who "they" were, Nagel replied "Whoever was worried about keeping the coalition together." She went on to note that some Commissioners sought to achieve consensus on the proposed guidelines due to the institutional benefits associated with such unanimity. Linking this to the legitimacy concerns of the Commission, Nagel stated that "there's a certain institutional loss from dissents that are critical [especially since] the Commission has been embroiled in controversy from the beginning" (Nagel, 1991).

Though he did not mention the possibility of a quid pro quo, Richard Gruner also identified "the extreme controversy over how the fines standards were set up" as a factor in the Commission's support for organizational probation (Gruner, 1991). In his view, the Commission sought to avoid another controversy by agreeing on probation provisions generally accepted as "reasonable" and leaving it up to the courts to work out the details of their implementation.

This view gains plausibility when it is recognized that the timing of the Commission's renewed support for organizational probation after it was nearly written out of existence in the spring of 1990 coincided with its formal adoption of the more lenient carrot and stick approach to fining.

State Capacity and the Effects of Law on Legal Policymakers

The development of organizational probation was also facilitated by the structurally-rooted capacities of the Sentencing Commission. Rather than accepting the society-centered assumptions of pluralist, instrumentalist, and, to a lesser extent, structuralist perspectives (Skocpol, 1985), each of which limit state independence by linking state action to the interests of societal actors, state actors are viewed as important independent actors. Empirical research has found this is particularly true where organizational and legal structures provide the capacity for autonomy on the part of state actors (Skocpol, 1985; Skocpol and Finegold, 1982). State actors provided structural protection from influence by societal actors are able to pursue policies that reflect their own ideals and interests.

Enhancing State Capacity. To a considerable extent, the ultimate shape of organizational probation is the cumulative impact of many smaller decisions made by the Brown Commission, Congress, and the Sentencing Commission, each so small and discrete that it did not receive much notice or provoke much concern at the time it was made. These steps contributed to the ultimate development of probation by gradually institutionalizing its foundations, strengthening state capacity, and in the process undermining the grounds for opposition to its subsequent development. In this way, law exerts independent effects on the range of perceived action and on the actions of all parties involved in lawmaking (Turkel and Lofquist, 1991). These smaller steps were not part of any plan. In fact, with few exceptions, the shape ultimately taken by organizational probation was not foreseen by early supporters or opponents of this sanction. Had this shape been more widely foreseen, it is likely that early steps would have been taken to limit the potential applications of organizational probation.

Included among these steps were the early decision to employ the term probation, thereby presenting an image of leniency and familiarity, and contributing to long-lasting confusion regarding the application of this sanction to organizations. Also important in minimizing attention and opposition to organizational probation were the early failures of the Brown Commission and Congress to develop distinct organizational probation conditions. The decision to make probation for both individual and organizational offenders a distinct and independent sanction was also important. Though taken to strengthen individual probation, and without regard to organizations, this action removed the primary obstacle to the use of organizational probation under the Federal Probation Act. As a consequence, there were no legal doubts that organizations could be placed on probation, even against their wishes, and that the conditions of probation could exceed the severity of the available fine.

Another key step, taken casually and without Congressional requirement by the Sentencing Commission, was to formally separate consideration of individual and organizational sanctions in the development of sentencing guidelines. This led the Commission to specifically and independently consider the circumstances under which organizations should be placed on probation and the conditions which should accompany such a sentence. Neither of these issues had received independent consideration in the past. Finally, and perhaps most importantly, the insistence by Commissioner MacKinnon that the Commission was mandated to develop binding sentences for organizations ensured that the final guidelines would be implemented in all federal organizational criminal convictions. Business and legal witnesses strongly opposed this interpretation of the Comprehensive Crime Control Act. The result of these steps was increased state capacity to legislate organizational sentencing standards within a hostile political environment.

Employing State Capacity. In support of these efforts, the Sentencing Commission had a great deal of discretion within its statutory mandate and a structurally protected position from which to carry out this mandate. As described by Wright in his comprehensive analysis of the Sentencing Commission from the perspective of administrative law, "Congress made an exceptional effort to insulate the Sentencing Commission from short-term political accountability" (Wright, 1991: 7-8). This was done by emphasizing empirical data, making the Commission permanent and nonpartisan, placing the Commission outside the executive branch, and requiring that the Commission consult with Federal criminal justice agencies (Wright, 1991). An additional component of the Commission's independence was the extent to which its guidelines were procedurally protected from modification by the requirement of formal and full Congressional consideration of the guidelines promulgated by the Commission.

Accompanying and protecting the Commission's capacity to legislate was a receptiveness on the part of the Commissioners to nonmarket proposals. In part, this reflected defensiveness regarding the Commission's mandate. In part, it reflected dissatisfaction with the limited range of existing organizational sanctions. The broad rejection of the Parker proposal provided the strongest evidence of the Commission's support for a multiple sanctioning strategy. Commissioner Nagel's comment that the Parker proposal was "too restrictive and limiting to meet all of the statutory goals of sentencing as set forth in the Sentencing Reform Act" (U.S. House of Representatives, 1990a: 429) illustrates this point. Commissioner Corrothers voiced similar concern about the narrowness of a draft proposal (United States Sentencing Commission, Minutes, 1989).

The characteristics of the individual Commissioners were also important in their support for nonmarket sanctions. Examining the views of each Commissioner toward organizational probation reveals a link between these views and their education and employment backgrounds. Though there are too few Commissioners to draw definitive conclusions, it appears that rather than being based on political party identification, those Commissioners most supportive of increasing the strength and scope of organizational sanctions were those educated and employed outside the market sphere, such as judges and criminal justice practitioners. Those opposed to increased interventions and supportive of monetary sanctions worked within the market sphere, such as economists and corporate lawyers.

The individual guidelines were most strongly supported by Republicans Nagel, Wilkins, Block, and MacKinnon, and opposed by Democrats Robinson and Breyer (Yost, 1989b). This is consistent with traditional party distinctions. With the organizational sentencing guidelines, however, expected links between party and policy preference were reversed. Republicans, usually identified as more pro-business and deregulatory than Democrats, were the most forceful advocates of tougher organizational sanctions, including probation. This was particularly true of Nagel and MacKinnon, the former a social scientist and the latter a judge, but not of Block. Democrats, particularly Breyer and Gelacak, led efforts to minimize corporate sanctioning and argued against organizational probation (Strasser, 1991b; Corporate Crime Reporter, 1990b). Breyer has focused his legal career on business regulation. Gelacak has experience in corporate law and close ties to the Business Roundtable.

Jon Heider of the Business Roundtable took this experiential approach in stating the positions of the Commissioners on organizational sanctions. Beginning with Commissioner Carnes;

> I don't know if she's down on business. I think she favors a strong economy. But she has no idea what goes on inside a corporation. Mike doesn't either. Nor does Helen, her experiences are totally different. Mazzone wants to understand, but as we talked to him, his comments were sort of "gee whiz, I never knew these kinds of things went on. My life has been totally different." I would have been happier, in terms of the process, if when they came to organizational sanctions they had someone there who had come out of an organization (Heider, 1991).

Richard Rogers of Ford made a similar point in noting the absence of business backgrounds among the Commissioners and suggesting that a business representative should be appointed to the Commission to balance its legalistic and prosecutorial orientation (Rogers, 1991).

A final consideration relating to the roles of the structure and operations of the Sentencing Commission in the development of organizational probation was that the organizational probation provisions in each draft were found at the end of the draft. Commissioner Nagel explained the possible significance of this in relation to the dynamics of meetings of the Commissioners in stating,

> in part, it benefitted from the fact that it was at the end, paginally. It came after the fine section. So if you understand the nature of the discussion, we would start with paragraph, page one, introduction. We must have debated that 200 times. We almost never got to the end. So there was probation, sitting there. It probably slipped through by virtue of inattention (Nagel, 1991).

Though organizational probation certainly did receive the scrutiny of each commissioner, it is likely that its ultimate status benefitted to some extent from the lesser amount of collective consideration it received relative to other organizational sentencing issues.

Strategic Calculations and Miscalculations by Business

Finally, the development of organizational probation can be linked to business responses to state efforts to legislate organizational sentencing guidelines. When asked about the relative inattention of business to organizational probation, a number of people closely involved in the development of the sentencing guidelines (Cohen, 1991b; Bellin, 1991; Portney, 1991; Lott, 1991; Levine, 1991; Gruner, 1991) expressed puzzlement. The novelty of this sanction and the threats to organizational autonomy it presented would seem to have provoked considerable concern among business groups. Such a view is consistent with the widespread perception (Galbraith, 1985; Silk and Vogel, 1976; Vogel, 1978; Lipset and Schneider, 1987) that organizations view protection of their autonomy as a paramount concern. However, this was not true for organizational probation. Rather, reflecting both informed strategic decisions and misunderstandings of both proposed legislation and the lawmaking environment more generally, business did not mount an organized effort to influence the development of organizational probation. Its strongest opposition was rhetorical. This contributed to a lawmaking environment in which already powerful state actors were able to develop intrusive, remedial organizational probation provisions.

The extent to which business is able to effectively understand and represent its interests in the political arena is a subject of considerable dispute. Instrumentalists, particularly corporate liberalists, have long argued that business groups are able to recognize their long term interests and advance them in the political arena in a unified and coherent fashion (Miliband, 1969; Domhoff, 1983, 1990). Critics of this position (Skocpol, 1980; Block, 1977a) argue that unity and foresight cannot so easily be assigned to business in general, or even sectors of the business community. As a result, business groups sometimes oppose measures consistent with their long term interests and fail to oppose threatening legislation. A closely related point is that business groups, even if unified to form an "inner circle" (Useem, 1982, 1987), may ineffectively advance their interests due to strategic miscalculations regarding the lawmaking environment (McCaffrey, 1982) or misunderstanding of the issues under consideration. In the present case, five different points are identified as strategic decisions on the part of business contributing to the development of organizational probation.

Attention to Threshold Issues. The first and most important point to be made in this regard is that business groups focused their attention on the threshold issues of whether organizational sentencing standards would be developed and whether they would take the form of guidelines or policy statements. Due to their interpretation of the legal and political environments, which they viewed as supportive of business interests and not strongly supportive of organizational sentencing guidelines, business groups reasoned that they could defeat efforts to legislate guidelines. At the rhetorical level, business expressed opposition to probation, and invoked the standard themes about judicial interventionism in presenting their opposition. Yet, at the level of action, larger goals were pursued. An opportunity to defeat or weaken organizational sentences was seen in the vague and ambiguous authorization for organizational guidelines themselves.

The absence of a mandate for binding guidelines and the advantages of policy statements were constant themes in business lobbying efforts. Just in the final two weeks before the guidelines were submitted to Congress, business made two efforts to solicit outside intervention to derail the guidelines (Business Roundtable, et al., 1991; Strasser, 1991b). However, legitimacy concerns and structural protections insulated the Commission from these efforts. In the end, though extensive attention to the threshold issues provided the possibility for complete "victory" by business, it also diverted business from debating the nuts and bolts of the guidelines. As a result, when the Sentencing Commission proved unwilling to underutilize its capacity to make binding sentencing law for organizations, business groups had missed the opportunity to challenge the content of these guidelines.

As Commissioner Nagel described business' actions in this regard, "[t]hey were right to recognize that the critical issue was policy statements versus guidelines." However, she went on to note that business groups

> probably played their hand wrong on that, because once they saw they didn't have the votes they should have moved on, and they spent too much time on that. If I were advising them I would have said, "You should have counted votes early on. You didn't have it. If there are going to be guidelines, make sure they're more consistent with what you want" (Nagel, 1991).

Some business witnesses agreed that the specific guidelines provisions, particularly probation, should have received more of their attention (Heider, 1991; R. Rogers, 1991). Because business failed to do so, the strength and unity of regulatory and academic support for remedial organizational probation went unchallenged at the programmatic level. Business advanced no alternative probation proposal that satisfied the standards provided by Congress. This oppositional and ultimately nonconstructive approach to regulation by business has been identified elsewhere (Reich, 1981) as contributing to the development of regulation.

Related to this strategy was a perception on the part of business that the Commission would not, in the end, go forward with sentencing guidelines any more expansive than those provided by Congress. Jeffrey Parker, perhaps the strongest critic of organizational probation throughout the history of its development, stated that business "just didn't consider this high on their agenda because they didn't think it would amount to anything" (Parker, 1991a). In part, this reflected their misunderstanding of the legal status and operational mechanisms of organizational probation. In part, the Congressional authorization for organizational sentencing guidelines was so unenthusiastic and so clearly secondary to its larger concerns, and the law enforcement environment encountered by business in the 1980s was so favorable, that meaningful organizational sentencing guidelines seemed unlikely.

Interpreting and Enforcing the Guidelines. Second, likely as a result of the dominance of business lobbying efforts by large corporations, there was a strong sense among business representatives that organizational probation would have little impact in practice, particularly on the type of organizations which they represented. Frederick Stocker, Counsel for the Manufacturers' Alliance for Productivity and Innovation (MAPI), for example, stated that organizational probation was not given more attention by the business community because it was "warranted in so few circumstances .... If it were a more common possibility it would be a greater concern" (Stocker, 1991). His key point was that probation was in and of itself of greater concern to business than were fines due to the intervention and oversight it authorized and the inability of the courts to manage such interventions. However, because of the belief that this sanction was rarely authorized by the guidelines and would rarely be employed by judges, greater attention was focused on fines.

In the view of Stocker and others, criminal convictions were primarily a matter of concern for smaller corporations, and a sanction such as organizational probation was viewed as applying only to the most serious offenses. The first of these points is empirically correct. Small corporations are disproportionately prosecuted and convicted of criminal offenses (Cohen, Ho, Jones, and Schleich, 1988; Cohen, 1991d), though legal changes over the past decade raise the possibility that this situation may change. As David Lombardero, former Chief Counsel to the Commission, pointed out,

> business probably failed to appreciate the increased importance that criminal sanctions would have for them. Previously, businesses and their employees were prosecuted infrequently and the penalties imposed were small (Lombardero, 1991: 9).

Despite substantial increases in the statutory authority for criminal prosecutions of organizations and increases in criminal prosecutions of corporate wrongdoing in recent years (see also Orland, 1980; Corporate Crime Reporter, 1990b; Thornburg, 1991), criminal enforcement has not yet become a major issue for corporations, particularly large corporations.

The second point made by Stocker is less defensible than the first. Though definitive conclusions await enforcement, organizational probation is broadly authorized in the guidelines. This suggests that statements like Stocker's reflect, at least in part, a failure to closely scrutinize the final guidelines, which differ from earlier proposals. An additional consideration is that dismissive statements by business represent ex post facto efforts to provide favorable accounts of legal outcomes that they underestimated or misunderstood (see Flood, 1991). Commissioner Nagel (1991), for example, stated that "the business people to this day have largely no idea about how the guidelines work or what they ever said."

This view is further supported by evidence from written comments to the Commission by business misinterpreting organizational probation (Business Roundtable, 1990a; National Association of Manufacturers, 1991a). Also, a recent report indicates that since becoming law on November 1, 1991, many businesses have not yet responded to the guidelines or are even fully aware of their implications (Hayes, 1991). Even some large corporations, which retain legal counsel in Washington, D.C., have not taken the kinds of preventive steps which would clearly reduce potential monetary and nonmonetary sanctions in the event of a criminal conviction.

Jon Heider of B.F. Goodrich and the Business Roundtable expressed the view that organizational probation would not be applied to corporations like his or those in the BRT. When asked whether the Commission intended for remedial interventions as part of organizational probation, Heider stated:

> I suspect that would be the case, but I think you're getting into flagrant acts and chronic offenders. When I look at the guidelines, I only have a particular class of corporations in mind, and that is those - most of the companies in America - who want to be good citizens. If they don't want to be good citizens, if they're indifferent, if they're intentional violators, then the Business Roundtable is not interested in protecting that corporation and can understand a very harsh penalty on it. So we didn't argue that point (Heider, 1991).

Instead, he stated, the Business Roundtable focused largely on culpability in an effort to insure the creation of a legal mechanism to include this consideration in sanctioning.

Richard Rogers, General Counsel for Ford, echoed the same themes in expressing concern about organizational probation;

> I guess what you're back to is that you really have to rely on the common sense of judges, and companies with long records of obeying the law and long records of having legal compliance programs, and I think we're one of those, are probably less at risk than someone who truly is an unprincipled son of a bitch running a business. I just can't see that happening to a major company, unless they had it coming, someone who had made conscious decisions to disregard some fairly serious law (Rogers, 1991).

Jeffrey Parker also suggested that the limits of law to which business was accustomed would emerge in the courts, when efforts were made to place corporations, particularly large corporations, on probation. Parker claimed that business "just didn't believe, and they probably still don't believe, that it's really going to happen." He continued by noting, "you can have guidelines and you can have the authority to do something. That doesn't mean you're going to do it" (Parker, 1991a). Though these arguments may be borne out in practice, the view that organizational probation is applicable only against small organizations in cases of serious offenses by rational actors is not supportable in the broad wording of the final guidelines.

Confidence in the Courts. Third, the organizational probation provisions of the sentencing guidelines provide substantial discretion to judges. This was intentional on the part of the

Commission, which sought "to give the court as many options as possible to fashion an appropriate remedy" (Nagel, 1991) through the provision of broadly stated mandatory probation conditions and detailed compliance plans. At least in the case of organizational probation, this discretion is also largely inevitable due to the different rehabilitative needs of each offender. As a result, that many of the conditions of probation are in the form of policy statements, which is also true for individuals, reflects only the necessary individualization of probationary sentences.

Nonetheless, this discretion also provides an opportunity for business defendants to lobby the courts for less intrusive conditions. The battleground is shifted from the Sentencing Commission to the courts in which particular cases are heard. As the preceding comments of Heider and Rogers indicate, business feels confident that it will have more success in advancing its views in the courtroom than it had with the Sentencing Commission. Jeffrey Parker agreed; "there is a lot of thinking that criminal sentencing, especially in the corporate sphere, is just political theatre. It's not reality at all; it's just designed to satisfy people" (Parker, 1991a). Richard Rogers took a more serious tone in discussing what may happen if a judge made an effort to subject Ford to remedial organizational probation, an effort he characterized as engaging in "some mischief." Though he regarded such an effort as unlikely, were it to happen, Rogers (1991) stated that Ford "may very well decide to go to war and hire Jim Neal," referring to the attorney hired by Ford when it was prosecuted for homicide in the Pinto case.

Concern about Self-Incrimination. Fourth, several participants pointed out that extensive lobbying by business groups and by individual businesses in particular, especially regarding the probation provisions, might have created the perception that these businesses had something to hide. As a result, corporations may have been reluctant to comment on particular sanctions. A closely related point is that in the current political climate, with punitiveness toward criminals spiralling upward, business found it difficult to lobby for leniency (Corporate Crime Reporter, 1990b). As a result, individual businesses were not as active in lobbying as were business associations, and all business representatives focused on the threshold issues of culpability and procedure.

Attention to threshold issues and even to fines did not carry the potential stigma associated with extensive attention to probation. Business could lobby vigorously against the fining provisions of the guidelines without at the same time presenting themselves as law violators, due to the widespread acceptance of the view that regulations were so widespread and so detailed that law compliance was impossible (Business Roundtable, 1986; Sethi and Katz, 1977). However, because of the conditions that must be met before invoking probation, and the perception of it as a sanction reserved for serious offenders, it was more difficult for business to actively lobby against this sanction without at the same time presenting itself as concerned about the possibility that it will be or has been involved in serious criminal conduct.

David Lombardero made this point in a paper discussing the development of the sentencing guidelines. Addressing business nonparticipation, he suggested that

> business probably did not want the publicity that would accompany their participation in the process. Many businesses may have feared that showing an interest in criminal sentencing policy would imply that they were frequent law violators (Lombardero, 1991: 9).

Jeffrey Parker, who was actively involved in efforts to solicit business witnesses to testify in support of the law and economics approach he developed with Commissioner Block, made the same point. He reported that the general reaction of business witnesses was "'hey, we're not going to send a guy down there because everyone will think we've got a problem.' When you approach people in individual firms that's the response you tend to get, which is understandable" from their point of view (Parker, 1991a).

<u>Limitations Imposed by State Capacity</u>. The fifth and final factor in business' response to the development of organizational probation was their view that the Sentencing Commission was not making new law but instead was only filling in the details of existing law. As a result, it was believed that the scope of change possible in particular provisions was limited. The Sentencing Reform Act had already provided explicit statutory support for use of

organizational probation. Heider (1991) made this point when discussing a meeting the Business Roundtable had with Commissioner Wilkins. In its efforts to persuade the Commission to modify some of the proposed guidelines, such as mandatory probation for recidivists, the BRT was told "that's already there with federal law, the guidelines couldn't change that." Efforts to alter conditions of probation met with a similar response. These provisions were said to be "compelled by statute, so the Commission really could not change them .... Once Congress has spoken - at least it was his argument and we accepted it - there was nothing he could do about it."

The Legislative Journey Ends: Theoretical Implications of This Case Study

The range of theories drawn upon in this dissertation to explain the development of organizational probation suggests several important points. The most important of these, revealed by the comprehensiveness of this case study, is that lawmaking takes place over such an extensive period of time, involves so many interest groups, and occurs within social, political, economic, and organizational contexts so complex that no single theoretical perspective is adequate (Heydebrand, 1990). Perhaps the development of organizational probation is somewhat unique due to its twenty-five year gestation period and the number of forums in which it has been considered. However, it is doubtful that any case of lawmaking is so limited in time and place that it fits neatly within a single theoretical perspective.

A second point concerns the rationality of organizational actors. It is a central tenet of the organizational approach to corporate crime that organizations are characterized by, among other things, complexity, diversity of interests and motives, and information shortages. These factors contribute to corporate crime by affecting the ability of employees to recognize, control, or assume responsibility for emerging organizational wrongdoing (Ermann, 1990). These same limitations on organizational rationality can be applied to those organizations involved in the development of organizational probation. This presents problems for theories of law creation that assume rationality. State and business witnesses were the most prominent participants in the present case. As the foregoing case study detailed, neither of these groups were fully informed, unified, or organized in their efforts.

Business witnesses lacked understanding of the mechanics of organizational probation and the legal foundations for its implementation, even in the final stages of its development. As a result, though big business dominated business lobbying and did not represent the separate interests of small business, corporate liberalist (Kolko, 1963; Weinstein, 1968; Sklar, 1988) explanations do not pertain. There is no evidence that big business recognized or sought competitive advantage in the development of organizational probation. Though such advantages may exist, particularly as a result of the increased likelihood that large corporations already have compliance plans in place and the decreased likelihood that they will be criminally prosecuted, these advantages did not influence business strategy. Big business may have been insensitive to the concerns of smaller corporations; it did not, however, exhibit the rationality to exploit these concerns to its advantage.

State witnesses also lacked internal, collective organization, or even a rudimentary plan for the development of corporate crime controls. Rather, different state groups and even individuals within these groups had different views of appropriate corporate criminal sanctions. Contrary to structuralist views of state managers as protectors and promoters of the long term interests of capitalists (Block, 1977a, 1977b) or of implicit unity between state actions and the interests of capitalists (Poulantzas, 1973), evidence suggests that state-based advocates of probation were pursuing their own interests. The lobbying efforts of regulatory agencies, the Department of Justice, and advisory organizations, and the responses of the Sentencing Commission, reflected pursuit and protection of resources and legitimacy. There was little or no coordination among these groups and little or no consideration of long-term macro-economic issues. Except for isolated individuals, neither the Brown Commission nor Congress had a plan for development of organizational probation. Their efforts were facilitative.

The apparent contrast between the absence of state rationality and the strength of organizational probation suggests that state capacity is not limited to or a function of the level of organization or power of state actors. Research by Skocpol and others (Skocpol, 1980; Skocpol and Finegold, 1982; Finegold and Skocpol, 1984; Skocpol, 1985) has primarily focused on state capacity as a product of the strength of historical ties between state and societal actors as well as the political power, unity, and strength of state actors. The present research indicates that state capacity also derives from legal arrangements that protect the lawmaking powers of the state. Though state actors lacked a shared view of organizational probation, and were in fact often in opposition regarding this sanction, legal arrangements provided the Sentencing Commission the ability to legislate organizational sentencing guidelines.

A third and closely related implication of this case study concerns the great diversity of state actors involved in lawmaking. This diversity will only increase as state capacity increases. As a result, sociolegal studies must recognize not only the importance of the state as an actor, but also the paradox pointed out by Schmitter (1985): that the diversity of state actors makes consideration of the independent role of the state problematic just at the time that the state is receiving increased attention. An additional point is that the gap between law in the books and law in action, at least where corporations are concerned, has become an area of such concern that statutory law is now widely discounted (Shover, Clelland, and Lynxwiler, 1986). Increased attention to statutory law and the way it can and does shape enforcement, as well as the extent to which assumptions about enforcement shape lawmaking, would help to inform our understanding of this gap, and perhaps narrow it.

In the end, it is clear that in the debate over organizational sentencing, the sanctions under consideration meant different things to different interest groups. To regulators, fines were viewed as easily paid, easily externalized, and ineffective in altering behavior. Perhaps more importantly, they were viewed as a simple exchange providing few regulatory resources. Probation was seen as a positive potential, a sentence that increased their power, increased control over corporate behavior, increased the range of sanctions available to judges, and compensated to some extent for declining regulatory resources and enforcement efforts. To business, probation was seen as a negative potential, an unwelcome intervention. However, the threat was perceived as remote. The final issue for consideration, then, is whether corporations appropriately gauged the threat they face in organizational probation. Ultimate resolution of this question awaits implementation of the sanction by the federal courts. Some preliminary observations are made in the final section of this dissertation.

Regardless of what occurs in the courts, what has been accomplished over the past twenty-five years with regard to sanctioning is a substantial and fundamental change in the legal landscape of corporate crime control. This will inevitably have some affect on corporations and on the courts. The creation of statutory law represents an increase in state power. This is particularly important where corporations are concerned due to the historical asymmetry of relations between individuals and organizations and the absence of countervailing powers to redress these inequalities. Organizational probation provides a statutory source of redress.

Organizational Probation in the Federal Courts: Prospects for Enforcement

The statutory law is the foundation for law-based crime control efforts. Where this foundation is inadequate, as when substantial social harms fall outside the purview of statutory law or when sanctions are not, as a matter of type or strength, suited to the offense statutes they support, enforcement efforts are substantially jeopardized before they begin. Though extra-legal considerations remain, adequate state capacity is fundamental to the success of law enforcement. Where state capacity is adequate, enforcement efforts are mostly a matter of politics and resources. These considerations provide little constraint in the case of street crime, where the quantity of law is substantial (Black, 1976), the ability of defendants to resist enforcement is limited, and law and order themes dominate the political debate on crime (Scheingold, 1984; Gordon, 1990).

Corporate crime presents a different set of circumstances. Statutory law pertaining to the actions of corporations has historically been weak, and sanctions have been limited to fines. Recent changes, including the development of federal organizational sentencing guidelines, have substantially strengthened available legal controls in this area. However, corporations have shown considerable ability to keep their disputes out of court (Heydebrand and Seron, 1990), particularly criminal court. There are a number of explanations for this. Corporate resources available to resist prosecution often exceed the prosecutorial resources of the state. Prosecutorial discretion is substantial and incentives often favor civil prosecutions. Also, vigorous law enforcement potentially threatens the stability of the economy (Yeager, 1987, 1991), providing structural limits on enforcement.

As a result, criminal prosecutions of organizations have generally been few. Those cases that have been pursued have targeted small corporations much more often than large ones (Yeager, 1987; Cohen, 1991c; Clark, 1991b), and have most often resulted in minor sanctions (Clinard and Yeager, 1980; Cohen, Ho, Jones, and Schleich, 1988; Cohen, 1989). On top of these considerations, Yeager notes that

> while true of law generally, the process of implementation is particularly dynamic and uncertain when the statutory guidance is culturally novel - threatening long-established patterns and relations (1991: 176).

This is precisely the threat posed by organizational probation. These reasons and others provide considerable uncertainty and skepticism about the enforcement of organizational probation.

Despite these limitations, the prospects for the implementation of organizational probation cannot be dismissed without examination. This is particularly true given the extent to which assumptions about enforcement influenced the lobbying efforts of the business community. This concluding discussion addresses issues associated with enforcement of the organizational probation provisions of the federal sentencing guidelines. The implications of organizational probation for corporate crime control and the relationship between statutory law and law enforcement are assessed. Examining the theoretical and empirical issues associated with enforcement also provides a foundation for future research on the use of organizational probation in the federal courts.

Three major issues are addressed in examining the prospects for enforcement of organizational probation. The first is the legal context of enforcement of organizational probation and the effect that the development of this sanction will have on enforcement efforts. Of particular interest is how the mandatory uses of probation in the guidelines and its distinctiveness as a new, politics-based alternative to fines will impact the decisions of prosecutors and judges to choose organizational probation. Also of interest is how broader changes in law-based state capacity in the area of corporate crime will affect the use of organizational probation. The second issue is the relationship between the form of organizational probation and empirical studies of regulatory enforcement policy. There are strong links between the negotiative approach to organizational probation taken by the Sentencing Commission and enforced self-regulation (Braithwaite, 1982). The third issue is the variability of the social context of law enforcement and its impact on future enforcement. Each of these issues is discussed in turn throughout the remainder of this chapter.

A key point to be drawn from this discussion is that the existence and the form of statutory law shape enforcement practices in ways that are independent of the expectations of the parties involved in law creation and not entirely derivative from past practice. As a result, the distinction between law creation and law enforcement is to some extent overdrawn, and attention only to the latter does not allow consideration of the relationship between these two issues. Though implementation of criminal justice policy, whether in the area of corporate crime, individual corrections, or any other area is, to borrow from Rothman (1980), to some extent always a triumph of convenience over conscience, this does not lessen the importance of statutory law as an issue for research and a source of social change.

<u>The Legal Context of Corporate Criminal Law Enforcement Efforts</u>

Business groups to a substantial degree premised their responses to organizational probation proposals on the assumption that this sanction would not present a serious threat in practice. However, it is important to remember, particularly for those most cynical about the prospects for effective enforcement of corporate criminal statutes, that the legal environment confronted by organizations is variable, has changed substantially in recent years, and is the product of the decisions of numerous independent individuals and agencies. Statutory corporate criminal sentencing law is itself a recent development. It is only within the time covered by this research that organizations have in practice become subject to criminal sanctions and that these sanctions have been made independent of those imposed on individuals. Now, mandatory and politics-based sanctions are available.

Statutory Law and State Capacity. Law is an expression of state capacity. It provides the basis for further strengthening and extending state power to the extent that it becomes institutionalized in statutory law and implemented in the courts. When directed against powerful defendants, state capacity is still further strengthened by specific and clearly stated law, which provides limited opportunities for unintended interpretations and appeals. As Snider (1990a: 3) notes in this regard, statutory law is the starting point for discussion of the effectiveness of corporate crime control;

> what the law says is a bottom line, because both regulators and regulated bargain within legislative parameters, and neither side wishes its position to be weakened or overturned by a court challenge.

Specificity is less important when directing law against those less able to resist prosecution. In the latter cases, court challenges to expansive interpretations of law are less likely. In fact, specificity can be argued to impose limits on law in such cases.

The use of organizational probation dating back to the ARCO case in 1971 illustrates the importance of clear statutory support for this sanction. As discussed in Chapter Three, the history of organizational probation under the Federal Probation Act makes clear how, over a period of years, challenges to the statutory foundations for the application of probation to corporations led to infrequent and unimaginative use of probation. This experience also illustrates the broader point that novel and potentially threatening legal remedies are particularly imperiled when their statutory basis is not firm. These weaknesses are addressed in the federal organizational sentencing guidelines. Despite the certainty of court challenges to the organizational sentencing guidelines (R. Rogers, 1991; Clark, 1991b), and despite the certainty that courts will differently interpret the discretion left to them by the Sentencing Commission, the guidelines do indeed provide a statutory bottom line. This bottom line allows for mandatory imposition of probation in a broad, perhaps unlimited, range of cases, mandatory conditions of probation, and clear support for judicially crafted remedial conditions.

A further consideration is that because of the latency and the variability of state capacity contained in written law, law is often observed to have effects in practice unanticipated by those involved in its construction. Law empowers otherwise disadvantaged actors, providing them institutionalized means to seek redress (Thompson, 1975; Auerbach, 1983). In so doing, law limits the power of elites, even when it can be shown to have been shaped by their lobbying efforts. The statutory development of organizational probation is an example of this process; through the modification of the concept of probation and expansive interpretations of the statutes in which it is contained, a politics-based, remedial, organizational sanction has developed. The capacity that the Sentencing Commission has in turn granted to the Federal courts and regulatory agencies, by providing for broad usage and regulatory monitoring of organizational probation and by providing explicit protection to compliance plans leaves room for similarly unexpected results in enforcement.

The history of the Occupational Safety and Health Act is illustrative of the unanticipated consequences for business of statutory legal changes. Originally introduced in the early 1970s in response to labor group pressure, this legislation was crafted in an effort to resolve the tension between labor and capitalists without at the same time providing for change in occupational safety and health conditions (Calavita, 1983; Donnelly, 1982). Despite these symbolic origins, Calavita concludes that after a decade on the books this legislation has in fact resulted in measurable and meaningful improvement in working conditions. Despite its statutory weakness, there had been "incremental change over time" (1983: 444), leading to the conclusion that "although OSHA began as a token gesture to labor, it ultimately provided a vehicle for real material and ideological gains on the safety and health front" (1983: 446). Though these reforms cannot be removed from their social context, the statutory strength of organizational probation provides a substantial latent capacity for reform.

Prosecutors, Judges, and Organizational Probation. The legal context of implementation of organizational probation is also shaped by a series of more immediate, micro-level influences on legal policymakers. First, the availability of corporate criminal liability has increased rapidly in the past two decades (Bernard, 1984; Brickey, 1986; Corporate Crime Reporter, 1989), provoking substantial concern among business and legal interests (Orland, 1980; American Law Institute, 1985; National Commission on Reform of Federal Criminal Laws, 1970a; Business Roundtable, 1988, 1990d; Parker, 1991b). In a recent article, former Attorney General Thornburg noted that "[t]wenty years ago, none of the major environmental laws in effect contained significant criminal enforcement provisions. Today, all do" (Thornburg, 1991: 776). The same can be said about other areas of regulatory law. Coupled with already substantial amounts of corporate wrongdoing (see Clinard and Yeager, 1980; Ross, 1980; Braithwaite and Pettit, 1990; Coleman, 1985b; Etzioni, 1990a) and regulatory commitments to criminal enforcement (Strock, 1991; Bellin, 1991; United States Food and Drug Administration, 1988, 1990), the breadth of corporate criminal liability provides the possibility for expanded criminal prosecutions.

Second, the final organizational probation provisions contain eight mandatory uses of probation. Though the discretion involved in determining whether the circumstances of a particular case compel use of probation provides an opportunity for judges to limit the use of this sanction, the breadth of mandatory uses makes it possible to argue that organizational probation is mandated in any case that comes before the court. Some judges will be uncomfortable with the interventionism of organizational probation and will narrowly construe its applications. Other judges, however, will welcome this power and will seek to use it more broadly. Also, because organizational probation is a federal criminal sanction, it is available to any regulatory agency, prosecutor, or judge for use against the whole range of regulatory offenses subject to criminal sanctions. Its use does not depend on support from any particular regulatory agency or even the Department of Justice. As a result of the multiplicity of decisionmaking personnel, organized nonenforcement of organizational probation is highly unlikely.

Third, and perhaps most importantly, more indirect evidence of the future utility of organizational probation can be found when the possible effects of the new federal organizational sentencing guidelines on prosecutors and judges are considered. Such effects must be considered because with the development of organizational probation the legal landscape has changed. Past practices of law enforcement and the courts cannot be taken as reliable indicators of future practices. In this regard, Mark Cohen (1991c) remarked that

> in terms of prosecutions, I expect these guidelines to open the floodgates for ambitious prosecutors who will bring criminal charges against large companies when the potential payoff (i.e. criminal sanction) is high.

This is consistent with Katz's (1980) findings that prosecutors base their decision as to whether to pursue civil or criminal charges at least in part on their own career considerations.

Richard Gruner, a key academic figure in the development of organizational probation, made a similar observation. When asked about the likely impact of this sanction on enforcement efforts, Gruner (1991) speculated:

> First, I think prosecutors will be responsive. One of the keys to having these probation sentences imposed is to get prosecutors to press for them. In the past, there wasn't much pressure in that regard because, with cases like ARCO and others, if prosecutors asked for a fairly restrictive probation sentence, the defendant could simply refuse it. So probation wasn't worth the candle in terms of the prosecutor's time. So, the first step that these guidelines will affect is the decision of the prosecutor to seek them. Once they're sought, I think in certain fields like environmental crimes and workplace safety, they should have a great effect. They address the concern that in certain areas there are systemic problems that often lead to the crime, and that the sentencing process ought to remove those systemic problems.
>
> Gruner also pointed out that though there are a limited number of corporate criminal convictions each year, prosecutors are most likely to pursue cases that "evidence a systemic problem" because these are generally the most serious and the best publicized cases.

It is these same cases in which organizational probation is most likely to be imposed.

John Coffee made a similar point in a recent interview when he noted that until recently prosecutors have lacked sufficient rationale for "prosecuting the corporation in a criminal proceeding because they are very well aware of the simple fact that you can't send an organization to prison" (<u>Corporate Crime Reporter</u>, 1988b:

12). The passage of the Comprehensive Crime Control Act and the development of organizational sentencing guidelines pursuant to this act, however, "have the potential to make the prosecutor's investment of time and effort in this much more meaningful" (1988b: 12) due to the stronger sanctions they provide. In the same interview, Coffee also noted that because organizational cases are a small fraction of federal criminal prosecutions, these cases "are anomalous to judges. They are not familiar with dealing with them, and are going to be interested in advice about what an appropriate sanction is" (1988b: 12). The clear and well developed guidance provided by the sentencing guidelines may thus encourage judges to impose sentences they had not considered in the past.

As a final point, it is important to contrast organizational probation with the previous regime of corporate criminal sanctioning, which in this case refers to pre-guidelines sentencing of organizations. In this regard, Metzger recently noted that in response "[t]o the assertion that the novelty of corporate probation renders its presumed advantages conjectural, only one answer is possible: More conventional approaches are woefully ineffective" (Metzger, 1984: 73). Linking this point to organizational theory, Metzger also noted that "probationary approaches appear more consistent with our knowledge of organizational reality and offer a realistic hope for corporate rehabilitation" (1984: 73). The result of this consideration of the effects of organizational probation on enforcement personnel is a view of the peculiar relationship between statutory law and law in action. Problems with enforcement, mostly political economic in origins, impose limits on the impact of statutory law at the same time that the statutory law provides the state capacity to overcome to some extent these same limits.

The Limits of Voluntarism. A final element of the legal context of enforcement of organizational probation relates to the responsiveness of convicted organizations to prosecution and sanctioning. There are numerous studies indicating that organizations rarely make organizational changes in response to market-based sanctions (United States Sentencing Commission, 1990d; Cohen, 1991b, 1991d) or professional and public pressures (Cressey and Moore, 1980; Engel, 1979; Mathews, 1989). Rather, a more interventionist, politics-based orientation on the part of the state is needed. In an examination of law-based social change efforts, Zimring and Hawkins (1971) discuss the difference between what is referred to herein as market-based and politics-based sanctions. Their conclusion is that "when the law is used as an instrument of social change, it is more likely that the achievement of acceptable rates of compliance will require an active reorientation of the values and behaviors" (1971: 36) of those subject to the law. Voluntarism is inadequate as a source of change.

Systematic investigation of the likely usage of organizational probation under the new guidelines has not been undertaken (Courlander, 1991; Cohen, 1991a), and "remains one of the big unanswered questions" (Cohen, 1991a) about the organizational sentencing guidelines. The discretion contained in the probation provisions limited the extent to which the Commission could apply past corporate crime fact scenarios to the guidelines in an effort to assess the likely frequency of use of probation. However, in addition to the frequency with which probation is mandatory in the new guidelines and the detailed and often remedial conditions provided to implement this sentence, findings from past sentencing practices suggest that organizational probation will receive more frequent and more remedial use than in the past.

Data collected by the United States Sentencing Commission indicate that organizations convicted of crimes rarely had a compliance plan in place at the time of the offense and rarely respond to prosecution by developing a compliance plan (United States Sentencing Commission, 1990d; Goldberg, 1991). Under the new guidelines, with their emphasis on compliance planning, the use of probation would be almost automatic in such cases. These data also indicate that between 1984 and 1987, organizational probation was imposed in 18% of all federal corporate criminal convictions, though mostly "to extend the period of time within which the defendant may make payments to satisfy the fine or restitution" (Cohen, Ho, Jones, and Schleich, 1988). This regular use of organizational probation, despite the fact that none of its past uses was statutorily mandated and that the statutory support for even discretionary uses was weak

(Gruner, 1988; Levin, 1984; Curran, 1986), provides a starting point for likely increased future use of probation.

Additional evidence for increased future use of organizational probation is found in Commission data on monetary sanctions. In analyzing 1988 data on organizational responses to criminal prosecutions and fines, the Commission's Working Group on Organizational Sanctions concluded that:

> In 45 instances, for example, organizational defendants cooperated [with prosecutors] and also pleaded guilty, but in 144 instances organizational defendants pleaded guilty and did not cooperate. In 75 instances, organizational defendants pleaded guilty and also made voluntary restitution or its equivalent, but in 213 instances organizational defendants pleaded guilty and did not make voluntary restitution or its equivalent. In 32 instances, organizational defendants pleaded guilty and also took action to prevent further similar offenses (aside from discipline), but in 165 instances organizational defendants pleaded guilty and did not take action to prevent similar offenses (aside from discipline). Finally, in 20 instances, organizational defendants pleaded guilty and also disciplined individuals responsible for the offense, but in 177 instances organizational defendants pleaded guilty and did not discipline individuals responsible for the offense (United States Sentencing Commission, 1990d: 23).

Recalling that probation is mandatory where compliance plans are not already in existence, as well as when "necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct," these data highlight the limits of voluntarism and provide grounds for use of organizational probation.

United States Sentencing Commission data from January 1989 through June 1990 provide further evidence of the extent of organizational nonresponsiveness to market-based sanctions. Of 446 corporations convicted during this period, only nine were known to have had compliance plans in advance. Twelve were found to have implemented a compliance plan subsequent to conviction and seven took steps to discipline employees. Additionally, only five of these corporations were known to have voluntarily disclosed the offense after internal detection of wrongdoing. Each of these circumstances are linked in the guidelines to the use of organizational probation, serving as mitigators when organizations respond to internal wrongdoing and as grounds for probation when they do not. Finally, 103 of these organizations were placed on probation (Cohen, 1991d).

Data from a recent program by the Department of Defense to prosecute contractor fraud cases also provides evidence of the inadequacy of existing sanctions. As part of Operation Ill Wind, thirty-four defense contractors were convicted of fraud between 1983 and 1990 (U.S. House of Representatives, 1990b). Thirty-two of these convictions resulted from guilty pleas, one from a nolo contendre plea, and one from a trial. In each case, the only corporate penalties were monetary, except for one case of debarment. In looking over this list of convictions, Representative Schumer noted that "despite clear authority at the Pentagon for such action, no major defense contractor has ever been debarred" (1990b: 12). Schumer then went on to state that organizational probation should be used in such cases because, unlike debarment, it allows the corporation to continue to work on the contract after conviction and sentencing.

Organizational Probation and Regulatory Enforcement Practices

The second major point regarding the enforcement prospects for organizational probation concerns the relationship between the form of organizational probation and regulatory enforcement practices. All too often, the primary distinction in regulatory enforcement is between more enforcement, favored by liberals, and less enforcement or deregulation, favored by conservatives. Former EPA Administrator William Ruckleshaus recently made this point. Discussing the deregulatory efforts of the early 1980s, he stated

> The public got the message by every kind of language - body language, everything else - that we were going to abandon the ends of clean air, clean water. That had the unfortunate result of discrediting the argument over means, which is where the debate ought to be (quoted in Harris and Milkis, 1989: 265).

As Ruckleshaus suggests, the importance and variability of the form of enforcement is lost in traditional approaches to regulation. The distinction used herein to distinguish forms of regulatory relations is between negotiative and adversarial relations, an approach which cuts across traditional party preferences. This distinction parallels the larger distinction between corporatism, which is characterized by cooperative, planning-oriented relations between business, labor, and the state (King, 1986; Panitch, 1980; Schmitter, 1974), and free market capitalism, which centers on competitive economic relations. Organizational probation thus represents a corporatist approach to crime control.

Judicial interventions into corporations may vary in terms of the range of discretion they leave for defendant organizations and the extent to which the defendant is involved in developing and monitoring the intervention (see Braithwaite and Fisse, 1985). The central issue here is the type of relationship maintained between the state and the defendant during probation. This relationship may be adversarial, as when the state imposes on the corporation externally determined conditions of probation and the structural changes deemed necessary to come into compliance with them; or negotiative, which involves state and business cooperation in developing a compliance plan for the defendant. As the final guidelines make clear, the United States Sentencing Commission has taken a negotiative approach. This section explores this issue and its implications for implementation of the organizational probation provisions developed by the Sentencing Commission.

Edwin Sutherland, the dean of American criminology and of the study of white-collar crime, stated that effective corporate criminal law enforcement

> calls for a clear-cut opposition between the public and the government, on the one side, and the businessmen who violate the law, on the other. This clear-cut opposition does not exist and the absence of this opposition is evidence of the lack of organization against white collar crime. What is, in theory, a war loses much of its conflict because of the fraternization between the two forces. White collar crimes continue because of this lack of organization on the part of the public (1983: 257).

Though the punitive, adversarial approach advocated by Sutherland is still common in regulatory and corporate criminal law enforcement

(Punch, 1990; Braithwaite, 1985a, 1986) and is still supported by some (Nader, Green and Seligman, 1976; Snider, 1987, 1990b; Pearce and Tombs, 1990), there is increasing evidence that this approach to state-business relations is contrary to effective law enforcement. This is in part attributable to the previously made point that the political economic limits of law are most visible when business actively resists law creation and enforcement efforts.

There is a sizable literature on the relationship between the form and the effectiveness of regulatory law enforcement (Frank, 1984a; Braithwaite, 1982; Snider, 1990b; Sigler and Murphy, 1988, 1991; Pearce and Tombs, 1990; Hawkins, 1990). Drawing from this literature, numerous empirical studies suggest that corporate compliance is most likely where state-business relations are negotiative and where corporations are actively involved in the creation and monitoring of compliance strategies (Bardach and Kagan, 1982; Braithwaite, 1984, 1985a; Shover, Clelland, and Lynxwiler, 1986; Braithwaite and Fisse, 1985). Under such circumstances, business resistance is minimized, state resource expenditures are reduced, and important business input is provided. Also, because corporations generally have greater resources than regulators (Frank and Lombness, 1988; Bardach and Kagan, 1982; DeVos, 1985), a cooperative approach combats information scarcity and resource imbalance. Absent from some of these discussions (Sigler and Murphy, 1988, 1991), however, is a state enforcement power in cases of continued noncompliance, such as that built into organizational probation. This oversight limits the effectiveness of negotiative efforts by ultimately relying on voluntarism.

Enforced Self-Regulation. In his theoretical and empirical work on what he terms "enforced self-regulation," Braithwaite has developed the most sophisticated view of negotiative regulatory relations (Braithwaite, 1982, 1985c, 1989b; Braithwaite and Fisse, 1985). His primary point is that cooperative regulatory relations, modeled on enforced self-regulation, are the most effective and realistic means to control corporate conduct. The policy implications of this approach are that corporations should be granted the power and the burden to develop compliance strategies for regulations, and that the adequacy and efficacy of these strategies should be approved and monitored by regulators. By "allowing each organization in advance to register principles of accountability consonant with its unique corporate culture" (Braithwaite and Fisse, 1985: 336), business input is maximized and subsequent business opposition is minimized. State oversight and approval of these plans increases the likelihood that they are good faith programs and that they will be implemented in a manner that results in organizational change.

Additionally, as developed by Braithwaite, effective compliance monitoring involves ensuring that internal compliance officials enjoy autonomy from production and marketing managers, receive mandatory periodic compliance reports, and conduct inspections. These inspections are limited in number and focus on education, persuasion, and open communications rather than on reporting violations and punishing violators. This approach reduces enforcement costs, establishes clear lines of responsibility for wrongdoing, tailors regulations to specific industries and firms, and increases company commitment to compliance. In the event of continued violations, Braithwaite proposes that escalating penalties be available to regulators. Application of these penalties, including individual criminal liability, fines, and structural reforms, is facilitated by the identification of lines of communication and locations of responsibility contained in the compliance plan. As a rule, however, persuasion should be the first regulatory approach; punishment being used only in cases of continued noncompliance.

Most recently, Braithwaite (1989a, 1989b) has elaborated the theoretical rationale for enforced self-regulation by drawing on the criminological literature. His theoretical starting point is with strain and opportunity theories: organizations and organizational sub-units seek to achieve their goals, and in the absence of legitimate means toward these goals may choose crime. What is next necessary is the availability of illegitimate opportunities as explained by subcultural theory. Blocked legitimate opportunities (i.e. economic recession) may lead to the development of intra-firm or intra-industry subcultures in which pro-crime norms are communicated. Traditional adversarial regulatory relations aggravate this situation by isolating and stigmatizing violators. Cooperative regulatory relations, on the other hand, provide for the possibility of educating, persuading, and reintegrating violators. Also, an enforced self-regulatory approach, by involving business in compliance planning, disperses responsibility for and increases commitment to law compliance throughout an organization. This capitalizes on the compliance-inducing powers of internal monitoring.

The empirical origins of enforced self-regulation are twin recognitions: that corporate crime is largely organizational in origins and that corporate crime control is a political endeavor. From this, Braithwaite develops a regulatory scheme that is both amenable to the "moral resources" of American society, which holds business in high regard and imposes sanctions on business only reluctantly (Lipset and Schneider, 1987; Hans and Lofquist, forthcoming) and consistent with the way organizations operate. Too often, justifiable outrage at the excesses of corporate conduct leads to impractical and likely ineffective control strategies. Large fines fall victim to the "deterrence trap" (Coffee, 1979-80) and punish the wrong parties; adversarial relations misuse limited resources, place punishment above restitution, remediation, and other community benefits that may be gained through negotiation, and create cultures of regulatory resistance (Bardach and Kagan, 1982; Braithwaite and Pettit, 1990); externally developed structural reforms may excessively impinge on business activity and foster strong opposition not only among business, but also within the courts (Braithwaite, 1982; Braithwaite and Fisse, 1985).

Despite understandable retributivist sentiments, crime control, in particular corporate crime control, is a fundamentally social activity which must, to be effective, conform to social conditions. Where business is strong and regulatory resources are limited, control efforts that emphasize negotiated remedies and maximize persuasion are more likely to influence organizational behavior. Punitive measures, necessary in cases of continued noncompliance, should be finely tuned to impact the corporation without excessively harming stakeholders. This is precisely the approach taken in the organizational probation provisions developed by the Sentencing Commission. Organizations are granted the power to develop compliance plans, but the development and implementation of this plan are monitored by the courts to assess its adequacy for the task at hand and to assure its meaningful implementation.

After having developed this approach, Braithwaite analyzed the pharmaceutical (1984) and coal mining (1985a) industries to evaluate the relative effectiveness of adversarial and negotiative regulatory strategies. In the coal mining industry, he found that adversarial regulatory efforts did not improve compliance rates. In fact, compliance and productivity were highest where nonadversarial regulatory relations predominated. Braithwaite explained this by noting that because enforcement resources are limited, punishments are easily absorbed and nonconstructive, and violations are not always intentional, an adversarial approach creates resistance among industry without providing the state adequate resources (material or political) to tightly control business.

He concluded that regulators should have the flexibility to choose between persuasion and punishment as the situation warrants. Through further research, Braithwaite (1985c) shows that law abiding corporations do not share a general compliance structure. Rather, they develop compliance systems based on their own culture, structure, environment, and personality. This provides evidence that effective compliance systems cannot be imposed externally by formula. Law abiding structures are better developed by the corporation and then approved externally.

Enforced Self-Regulation and Organizational Probation. Though developed by Braithwaite as a model for regulatory relations, the amenability of enforced self-regulation to organizational probation has been recognized by several commentators (Gruner, 1988a; Metzger, 1984; Green, 1990), including Braithwaite (1985c; Braithwaite and Fisse, 1985). However, this relationship has not been elaborated. Rather than being applied on a prospective, industry-wide basis, enforced self-regulation would, through organizational probation, be used retrospectively as a mechanism to rehabilitate offending corporations through corporate-designed, government approved and enforced structural changes intended to remedy particular criminogenic arrangements. Also, by providing closer supervision than available to regulators, organizational probation addresses the concerns of critics that enforced self-regulation is too easy on business (Snider, 1987, 1990) and that business will not adequately monitor or report its own behavior (Mokhiber, 1988).

The relationship between enforced self-regulation and organizational probation was also recognized within the Sentencing Commission. This is clearest in a statement by Commissioner Nagel, the primary Commission supporter of organizational probation. She described the Commission's approach to organizational probation:

> [u]nlike the case for individuals, with organizations the idea was to leave the courts greater flexibility to fashion an appropriate remedy. To the extent that the court had before it an organization that looked like it needed some sort of a special plan, it could say to the organization: "you come up with the plan, and then you monitor it and police it." That was our idea for organizational probation. Not that the court would ever fashion the plan, but that the corporation would come up with the plan, and then the court would insist that the corporation monitor. It was basically enforcing a self-policing system (Nagel, 1991).

In addition to the parallels between the Commission's approach and negotiative regulatory relations, the support of academic and regulatory witnesses for a negotiative approach to probation (Coffee, Gruner, and Stone, 1988; Gruner, 1991; Bellin, 1991) cautions against reading Nagel's statement as evidence of business success in reducing the forcefulness of organizational probation.

The Social Context of Law Enforcement

The final issue to be explored in assessing the prospects for organizational probation in practice is the relationship between social conditions and law enforcement efforts. As noted earlier, public pressures are often identified as fundamental to corporate crime control efforts (Snider, 1987; Cullen, Maakestad, and Cavender, 1987; Hopkins, 1979). Yeager (1991) points out that public pressures serve to identify the lower limits of law. Just as political economic pressures constrain aggressive enforcement efforts, public pressures compel enforcement in some cases. These pressures are variable, likely as a function of public confidence in business, the strength and legitimacy of institutionalized arrangements that protect business, public disclosures of business wrongdoing, and public perceptions of the adequacy of existing legal controls of business.

Given these circumstances, there is reason to believe that the recent scandals in the corporate world, most notably the savings and loan scandal, the Bank of Commerce & Credit International case, and the Salomon Brothers treasury bond fraud case, as well as earlier scandals in defense procurement and insider trading, will energize the public and prosecutors to pursue criminal sanctions. Kevin Phillips (1990) points out these scandals, as well as a more general recognition of and reaction against the upward redistribution of resources in the 1980s, may well lead to an anti-business backlash in the 1990s. Whatever the case, the important point in this regard is, as Yeager notes, that "the limits of law themselves evolve" (1991: 16). As social conditions change, opportunities to criminally prosecute and sanction corporations may increase. The now available statutory law provides improved prospects for meaningful outcomes in such cases.

Conclusion: Organizational Probation and Corporate Criminology

The vast majority of criminological theorizing and research on sentencing is conducted wholly within the context of individual offenders. For example, with the notable exception of Schlegel (1990), the entire debate over just deserts, the major debate in sentencing in the past fifteen years, has taken individuals as the sole objects of sentencing (von Hirsch, 1976, 1981; Travis, 1982). Criminological contributions to the sentencing guidelines debate have also focused almost exclusively on individual guidelines (Shane-DuBow, Brown, and Olsen, 1985; Forst, 1982; Blumstein, Cohen, Martin, and Tonry, 1983). Even major works on the United States Sentencing Commission have somehow failed to address its development of organizational sentencing guidelines (von Hirsch, Knapp, and Tonry, 1987; Champion, 1990; Tonry, 1991). Though it is true that the large majority of federal criminal sentences imposed each year are for individual defendants, to speak of the Sentencing Commission as having fulfilled its mandate with the promulgation of individual guidelines, as does Tonry (1991) and others, is to prematurely close inquiry on an important and underexamined topic. Similarly, it is problematic to proclaim the predominance of neo-classicism and the demise of rehabilitation without at least considering directions of organizational sanctioning.

Criminology has devoted the great majority of its attention to individual criminality. This has changed to some extent in the last decade, with the emergence of major criminologists and criminological works addressing organizational crime. However, rather than commenting on the appropriateness of the priorities of academic criminology, the more important point concerns the relationship between studies of individual and organizational criminality. Just as the individual criminal law provides a theoretically untenable foundation for the control of organizational behavior, individual criminology is untenable as a basis for understanding organizational crime. Though traditional criminology has made some contributions to understanding organizational crime (Braithwaite, 1989a, 1989b; Vaughan, 1983), what is needed is the development of an organizational criminology. The foregoing analysis of the development of organizational probation indicates that this project has begun.

Legal fictions notwithstanding, corporations are not individuals, and criminological insights developed in the context of the latter are often not directly applicable to organizations. These differences should not inhibit inquiry, but rather should be taken as the basis for inquiry. It is important to explore the differences and similarities between individuals and organizations in terms of lawmaking, law breaking, and law enforcement. The development of organizational probation, and the larger organizational sentencing reform effort of which it is a part, provide a foundation for this effort. The extensive, diverse, and well-constructed record created by the work of the Brown Commission, Congress, and the United States Sentencing Commission serves as a useful starting point for needed criminological debates on the causes of corporate crime, the application of criminal law to corporations, and alternative approaches to corporate crime control.

APPENDIX A

Congressional Hearings, Prints, and Reports: 1971-1984

Hearings

Hearing Title: Reform of the Federal Criminal Laws

Location: Parts I-XIII: Senate Subcommittee on Criminal Laws and Procedures; Parts XIV-XVI: Senate Judiciary Committee.

Bills Considered: Parts I-IV: Brown Commission Report; Parts V-XI: S.1 (1973), S.1400; Part XII: S.1 (1975); Part XIII: S.1437; Parts XIV-XV: S.1722, S.1723; Part XVI: S.1630.

Dates: Part I: Feb. 10, 1971; Part II: May 24, 25, Sept. 24, 1971; Part IIIA: Feb. 15, 16, 17, 1972; Part IIIB: March 21, 22, 23, 1972; Part IIIC: May 21, 1972; Part IIID: May 23, 24, 25, 1972; Part IV: Appendix; Part V: April 16, 1973; Part VI: May 2, 3, 23, 1973; Part VII: June 8, 12, 13, 14, 1973; Part VIII: July 18, 19, 1973; Part IX: July 25, 26, Sept. 27, 1973; Part X: May 9, 15, 16, 30, 1974; Part XI: June 13, 17, 19, 22, 1974; Part XII: April 17, 18, 1975; Part XIII: June 7, 8, 9, 20, 21, 1977; Parts XIV-XV: Sept. 11, 13, 18, 20, 25, Oct. 5, 1979; Part XVI: Sept. 28, Oct.1, 1981.

Hearing Title: Legislation to Revise and Recodify Federal Criminal Laws

Location: House Subcommittee on Criminal Justice

Bills Considered: H.R. 6869

Dates: Sept. 15, 1977, Feb. 21-22, 28, March 1, 6, 8, 13-14, 20-21,
April 4-6, 10-13, 17-20, 24, 1978.

Hearing Title: Revision of the Federal Criminal Code

Location: House Criminal Justice Subcommittee

Bills Considered: H.R. 13959; H.R. 6869; S.1437 .

Dates: Part I: Feb. 14, 15, 22, 27, Sept. 6, 7, 10, 11, 12, 1979; Part II: Sept. 13, 14, 17; Part III: Oct. 9, 11, 25, 1979; Parts IV-VI: Appendix

Hearing Title: Federal Criminal Law Revision

Location: House Judiciary Committee

Bills Considered: Part I: H.R. 1647, H.R. 4711, S.1630; Part II: H.R. 1647, H.R. 4711

Dates: Part I: October 28, 29, November 9, 10, 17, 18, December 8, 14, 1981, February 5, 1982; Part II: February 25, March 17, 25, 31, April 1, 22, 29, May 5, 12, 13, June 24, December 9, 1982

Hearing Title: Comprehensive Crime Control Act

Location: Senate Subcommittee on Criminal Laws and Procedures

Bills Considered: S.829, H.R. 2151 (companion bills)

Dates: May 4, 11, 18, 19, 23, 1983

Hearing Title: Federal Sentencing Revision

Location: House Subcommittee on Criminal Justice

Bills Considered: H.R. 4554, H.R. 4827

Dates: February 22, 29, March 21, April 4, 12, May 3, 9, 10, June 7, 1984

Prints

Print Title:	Criminal Justice Codification, Revision, and Reform Act of 1974
Print No.:	unnumbered
Reported by:	Senate Judiciary Committee
Date:	October 21, 1974, 93rd Congress 2nd Session
Bills Involved:	S.1 and S.1400

Print Title:	Report of the Subcommittee on Criminal Justice on Recodification of Federal Criminal Law
Print No.:	29
Reported by:	Subcommittee on Criminal Justice of House Judiciary Committee
Date:	December, 1978, 95th Congress 2nd Session
Bills involved:	S.1437, H.R. 13959

Commission and Committee Reports

Report Title:	Working Papers of the National Commission on Reform of Federal Criminal Laws
Reported by:	National Commission on Reform of Federal Criminal Laws
Date:	July 1970

Report Title:	Final Report of the National Commission on the Reform of Federal Criminal Laws
Reported by:	National Commission on Reform of Federal Criminal Laws
Date:	January 7, 1971

Report Title:	Criminal Code Reform Act of 1977
Reported by:	Senate Judiciary Committee
Bill Involved:	S.1437
Date:	November 15, 1977, 94th Congress 1st Session
Report No.:	95-605 (Serial Set)

Report Title:	Criminal Code Revision Act of 1980
Reported by:	House Judiciary Committee
Bill Involved:	H.R. 6915
Date:	September 25, 1980, 96th Congress 2nd Session
Report No.:	House Report 96-1396

Report Title: Criminal Code Reform Act of 1981
Reported by: Senate Judiciary Committee
Bill Involved: S.1630
Date: December 22, 1981, 97th Congress 1st Session
Report No.: Senate Report 97-307

Report Title: Sentencing Reform Act of 1983
Reported by: Senate Judiciary Committee
Bill Involved: S.668
Date: September 14, 1983, 98th Congress 1st Session
Report No: Senate Report 98-223

Report Title: Comprehensive Crime Control Act of 1983
Reported by: Senate Judiciary Committee
Bill Involved: S.1762
Date: September 14, 1983, 98th Congress 1st Session
Report No: Senate Report 98-225

Report Title: Sentencing Revision Act of 1984
Reported by: House Judiciary Committee
Bill Involved: H.R. 6012/H.R. 5690
Date: September 13, 1984, 98th Congress 2nd Session
Report No.: House Report 98-1017

APPENDIX B

Witnesses, United States Sentencing Commission Hearings

Public Hearing on Organizational Sanctions
June 10, 1986, Washington, D.C.

William M. Brodsky - Practicing Attorney and Vice Chairman, White Collar Crime Committee, Criminal Justice Section, American Bar Association.
George C. Freeman, Jr. - Practicing Attorney, Delegate, Corporation, Banking and Business Law Section, American Bar Association.
Harvey M. Silets - Chief Tax Attorney, United States Attorney's Office, Northern District of Illinois.
Stephen S. Trott - Associate Attorney General, Criminal Division, Department of Justice
Mark Crane - Corporate Defense Attorney, member, Antitrust Section, American Bar Association.
John C. Coffee, Jr. - Professor of Law, Columbia University

Public Hearing on Organizational Sanctions
October 11, 1988, New York City

Thomas G. Moore - President's Council of Economic Advisors, and Chair, Working Group on Corporate Sentencing, Domestic Policy Council.
Samuel Buffone with William Brodsky - Private Attorneys, Members, Committee on the United States Sentencing Commission, American Bar Association.
Gary Lynch - Director of Enforcement Division, Securities and Exchange Commission.
Ronald Cass - United States International Trade Commission.
Harry First - Professor of Law, New York University.
John C. Coffee, Jr. - Professor of Law, Columbia University.
Leonard Orland - Professor of Law, University of Connecticut.
Sheldon H. Elsen - Attorney, Orlan Elsen & Lupert, and Adjunct Law Faculty, Columbia University.
Jonathan Baker - Professor of Economics, Dartmouth.

Public Hearing on Organizational Sanctions
Pasadena, California, December 2, 1988

Paul Thompson - Deputy Assistant Administrator for Criminal Enforcement, Environmental Protection Agency.
Arthur N. Levine - Deputy Chief Counsel for Litigation, Food and Drug Administration
Jan Chatten-Brown - Special Assistant to District Attorney, Los Angeles County, California.
Robert M. Latta - Chief United States Probation Officer, Central District of California.
Robert A.G. Monks - President, Institutional Shareholders Services.
Christopher Stone - Professor of Law, University of Southern California Law Center.
Richard Gruner - Associate Professor of Law, Whittier College School of Law.
Charles B. Renfrew - Vice-President, Chevron Corporation.
Jerome Wilkenfeld - Health, Environment, and Safety Department, Occidental Petroleum.
Bruce Hochman - Attorney, Hochman, Salkin & DeRoy, Beverly Hills, California.
Ivan P'ng - Assistant Professor, University of California School of Management.
Eric Zolt - Professor of Law, UCLA School of Law.
Maygene Giari - Citizens United for the Reform of Errants (CURE).

Public Hearing on Organizational Sanctions
February 14, 1990, Washington, D.C.

Carl J. Mayer - Assistant Professor of Law, Hofstra University, on behalf of Public Citizen.
Morris B. Silverstein - Assistant Inspector General, Criminal Investigations Policy and Oversight, Department of Defense.
Earlyn Church and James P. Carty - National Association of Manufacturers.
James Strock - Assistant Administrator for Enforcement, Environmental Protection Agency, with Bruce Bellin.
Joseph diGenova - Attorney Working Group on Organizational Sanctions.
Sheldon H. Elsen - Attorney, Orans, Elsen & Lupert, New York.
Frank H. Menaker, Jr. - Vice-President, General Counsel, Martin Marietta, with Victoria Toensing.
Christopher Stone - Professor of Law, University of Southern California Law Center.
Amitai Etzioni - Professor of Sociology, George Washington University with Sally Simpson, Professor of Criminology, University of Maryland.

Frank McFadden - Senior Vice-President and General Counsel, Blount, Inc. on behalf of American Corporate Council Association.
Roger W. Langsdorf - Senior Counsel and Director of Antitrust Compliance, ITT, on behalf of U.S. Chamber of Commerce.
Samuel J. Buffone - Committee on Sentencing Guidelines, American Bar Association.
Richard Gruner - Associate Professor of Law, Whittier College School of Law.
Fred Garrick - General Counsel of BENK, on behalf of American Builders and Contractors.
Nell Minow - General Counsel, Institutional Shareholders Services.
John P. Borgwardt - Assistant General Counsel, Boise Cascade.

Public Hearing on Organizational Sanctions
December 13, 1990, Washington, D.C.

Griffin B. Bell - Former Attorney General, Attorney, King & Spaulding, on behalf of Martin Marietta.
Robert S. Mueller, III. - Assistant Attorney General, Criminal Division, Department of Justice with Joe B. Brown, United States Attorney, Nashville, TN.
Stephen S. Cowen - Attorney, Steptoe & Johnson.
Richard R. Rogers and James P. Carty - National Association of Manufacturers.
Richard B. Stewart - Assistant Attorney General, Environment and Natural Resources Division, Department of Justice.
Roger W. Langsdorf - Senior Counsel and Director of Antitrust Compliance, ITT, on behalf of U.S. Chamber of Commerce.
Samuel J. Buffone - Former Chair, Section of Criminal Justice, American Bar Association.
Charles H. Harff - Rockwell International.
James F. Rill - Assistant Attorney General, Antitrust Division, Department of Justice.
Kathleen F. Brickey - Washington University Law School, St. Louis.
Andrew L. Frey - Practicing Attorney, Mayer, Brown & Platt.
Jonathan C. Waller - American Corporate Counsel Association.

APPENDIX C

Interviews Conducted by Author

Bellin, Bruce G. Division of Enforcement, Environmental Protection Agency. July 18, 1991.

Blakey, G. Robert. Professor of Law, University of Notre Dame. Former Research Assistant to Brown Commission and Counsel of Senate Judiciary Committee. August 2, 1991.

Buffone, Samuel. Private Attorney. Former Chair, Section of Criminal Justice, American Bar Association. July 1, 1991.

Clark, Nolan. Counsel, United States Sentencing Commission. November 15, 1991.

Coffee, John C., Jr. Professor of Law, Columbia University. Former Reporter to American Bar Association Task Force on Sentencing Alternatives and Procedures, Former Consultant to United States Sentencing Commission. June 10, 1991.

Cohen, Mark S. Professor of Management, Vanderbilt University. Former Research Staff, United States Sentencing Commission. September 19, 1991.

Eisenstadt, Ernest. Attorney, Federal Trade Commission. November 30, 1990.

Gainer, Ronald. Private Attorney, Former Deputy Assistant Attorney General, Criminal Division. July 17, 1991.

Goldberg, Donald. Investigator, House Judiciary Committee. June 24, 1991.

Gruner, Richard S. Associate Professor of Law, Whittier College, and Former Consultant to United States Sentencing Commission. July 31, 1991.

Heider, Jon. Vice-President and General Counsel, B.F. Goodrich Company, and Business Roundtable. July 16, 1991.

Hutchison, Thomas, Federal Public Defender, Former Counsel to House Judiciary Committee. July 8, 1991.

Nagel, Ilene H. Commissioner, United States Sentencing Commission. August 6, 1991.

Parker, Jeffrey S. Professor of Law, George Mason University. Former Research Assistant, United States Sentencing Commission. August 14, 1991.

Portney, Vicky. Department of Justice, Criminal Division. Served as Representative to United States Sentencing Commission, 1989-1991. October 9, 1991.

Robinson, Paul. Professor of Law, Rutgers University. Former Commissioner, United States Sentencing Commission. August 14, 1991.

Robinson, Laurie. Director, Section of Criminal Justice, American Bar Association. July 29, 1991.

Rogers, Richard. Office of Legal Counsel, Ford Motor Company, and Spokesperson for National Association of Manufacturers. July 31, 1991.

Ruben, Alan Miles. Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. July 29, 1991.

Schwartz, Louis B. Professor of Law, Hastings College of the Law, Former Research Director, National Commission on Reform of Federal Criminal Laws. June 3, 1991.

Stocker, Frederick. Counsel, Manufacturers' Alliance for Productivity and Innovation. June 5, 1991.

Stone, Christopher D. Professor of Law, University of Southern California, Former Consultant to United States Sentencing Commission. November 20, 1990.

Summitt, Paul. Former Counsel, Senate Judiciary Committee. July 15, 1991.

Thompson, Brent. Corporate Governance Section, National Association of Manufacturers. July 1, 1991.

Four other interviews were conducted. At the request of the interviewee, the names of these individuals are being withheld.

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