Washington University Law Review

Volume 71
Issue 2 *Corporate Sentencing*

1993

Beyond Organizational Guidelines: Toward a Model Federal Corporate Criminal Code

Leonard Orland
University of Connecticut School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

Part of the Criminal Procedure Commons

Recommended Citation

Leonard Orland, *Beyond Organizational Guidelines: Toward a Model Federal Corporate Criminal Code*, 71 WASH. U. L. Q. 357 (1993).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol71/iss2/5

This F. Hodge O'Neal Corporate and Securities Law Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

BEYOND ORGANIZATIONAL GUIDELINES: TOWARD A MODEL FEDERAL CORPORATE CRIMINAL CODE

LEONARD ORLAND*

A rational sentencing system presupposes a rational system of criminal law. While refusing, after years of debate and study, to enact a federal penal code,[1] Congress enacted the Sentencing Reform Act of 1984,[2] which is essentially the sentencing provisions of the draft federal penal code. By putting the sentencing cart before the penal horse, Congress functionally isolated the sentencing scheme from an organized system of substantive law and made the Herculean task of organizing a fair guidelines system virtually impossible. Judge (and Commissioner) Steven Breyer has documented the difficulty the United States Sentencing Commission (the "Commission") faced in creating guidelines in a legislative vacuum, without the benefit of a substantive code.[3] Despite the diffi-

* Professor of Law; University of Connecticut School of Law. Copyright© 1993 by Leonard Orland. All rights reserved.

1. In 1975, the first Senate bill was introduced in the 93d Congress as S. 1, 93d Cong., 1st Sess. (1973). In ensuing congressional sessions, "children" of S. 1 were introduced and, in the 95th Congress, the "grandson" of S. 1, then designated as S. 1437, 95th Cong. 2d Sess. (1977), passed the Senate by a vote of 72 to 15, 124 CONG. REC. 1463 (1978), but failed in the House, H. REP. No. 29, 95th Cong., 2d Sess. (1979). "In the 1980s the steam went out of efforts to adopt a comprehensive criminal code." NORMAN ABRAMS, FEDERAL CRIMINAL LAW 67 (1986). For a brief history of the failure of federal criminal law reform in the 1970s, from the perspective of the Reporter of the National Commission on Reform of Federal Criminal Laws, see Louis B. Schwartz, *Criminal Law Reform: Current Issues in the United States*, 2 ENCYCLOPEDIA OF CRIME & JUST. 513, 515 (1983); Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 41 LAW & CONTEMP. PROBS. 1 (1977). The failure of codification from the perspective of the Justice Department is recounted in Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99 (1989).

2. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-413, 98 Stat. 1987 (1985). Despite its title, that statute was not "a comprehensive criminal law reform or codification statute." ABRAMS, *supra* note 1, at 67.

3. Stephen Breyer, The Sentencing Guidelines and Substantive Criminal Code Revision (Jan. 24, 1990) (paper presented to the Society for Reform of the Criminal Law, on file with the author). Recounting the substantial problems the Commission faced in its efforts to draft guidelines for individuals in the absence of substantive codification, Judge Breyer concluded:

> Prior legislative enactment of substantive criminal law would have helped the Commission in several ways. First, it would have provided an acceptable framework against which to measure appropriate punishment for particular kinds of criminal behavior. . . . Second, it would have helped to indicate the importance (or lack of importance) of particular aggra-

Washington University Open Scholarship

culty, all but the harshest of critics[4] of the United States Sentencing Guidelines for organizations (the "Sentencing Guidelines" or the "Guidelines") would have to admit that the Commission made some order out of the chaotic morass of existing federal penal law.

The difficulties that the Commission initially faced with the individual guidelines were relatively minor compared to the problems the Commission encountered several years later when it fashioned guidelines for corporate crime.[5] Here, in addition to a lack of substantive provisions, the Commission encountered an absence of general statutory provisions establishing corporate criminal liability,[6] and a congressional failure to consider systematically corporate aggravants, mitigants,[7] or sanctions.[8] These statutory failures led the Commission to devise corporate sentencing policy which is legislative in nature and resulted in organizational guidelines with virtually no statutory basis. The result is legislation by commission edict.[9]

> vating or mitigating features potentially present when offenders commit particular crimes. Third, it would have made certain aggravating features elements of specific crimes, thereby providing procedural safeguards for those accused of having engaged in them. . . . [P]erhaps most important, it would have diminished the areas of disagreement among Commissioners and thereby made some of the Commission's decisions politically more acceptable.

Id. at 56.

4. *See* Jeffrey S. Parker, *Rules Without. . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397 (1993).

5. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, ch. 8 (1992) [hereinafter U.S.S.G.].

6. Part of the effort at comprehensive criminal law codification included the drafting of statutory principles of corporate criminal liability, but that effort failed with the rejection of S. 1437 in the 95th Congress. *See supra* note 1 (discussing legislative history of S. 1437). In the United States, corporate criminal liability derives from a series of Supreme Court cases beginning with N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909) (upholding constitutionality of Elkins Act). The federal case law standard of vicarious corporate criminal liability has had a substantial impact on the states. *See* Kathleen F. Brickey, *Rethinking Corporate Criminal Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988). *See generally* Jenifer Moore, *Culpability Under Sentencing Guidelines*, 34 ARIZ. L. REV. 743 (1992); JED RAKOFF ET AL., CORPORATE GUIDELINES (1993).

7. The absence of clear statutory aggravants and mitigants, in other contexts, may invalidate a sanctioning system as unconstitutional. *Compare* Furman v. Georgia, 408 U.S. 238 (1972) (discretionary capital punishment, without clear aggravants and mitigants, held unconstitutional) *with* Gregg v. Georgia, 428 U.S. 153 (1976) (capital punishment constitutionally permissible if statute adequately structures aggravants and mitigants).

8. The Sentencing Reform Act does contain provisions which make the sanction of fines, probation, criminal forfeiture, notice to victims and restitution applicable to organizations. *See* 18 U.S.C. § 3551(c) (1985).

9. Professor Parker makes a broader attack on the Commission's corporate Guidelines: "[T]he Sentencing Guidelines are . . . rules . . . without any rational basis in coherent sentencing

https://openscholarship.wustl.edu/law_lawreview/vol71/iss2/5

In the absence of statutory authorization, for example, the Guidelines authorize confiscatory fines for "criminal purpose organizations."[10] Perhaps it is desirable and constitutional to define a "criminal purpose organization" and to confiscate the assets of such an organization when it is convicted of crime, but certainly Congress, not the Commission, should decide.[11] Again, in the absence of a statutory direction to do so, the Commission adopted a single fine policy for all organizations, large and small, profit and not-for-profit, and grouped these organizations with unions, pension funds, governments and political subdivisions.[12] I disagree with Commissioner Nagel's conclusion that the Commission's treatment of fines established a "theoretical foundation of consistency."[13] The Commission not only acted without a statutory mandate, but in the process it "treat[ed] unequals equally," and "created inequality."[14]

Finally, the Guidelines' provisions on fines array thirty-two gradations of fines ranging from $5000 to $72,500,000.[15] The enhancements and reductions in this thirty-two level gradation scheme, in form and function, constitute a series of complicated aggravants and mitigants. The

---

policy for their core structure; without statutory authority for many of their key features; and without constitutional validity to some of their more startling innovations." Parker, *supra* note 4, at 399.

10. U.S.S.G., *supra* note 5, § 8C1.1.

11. Professor Parker charges that

> the Commission's legislation of a "death penalty" for what it calls a "criminal purpose organization" . . . present a virtual encyclopedia of methods of government overreaching . . . [and] is inconsistent with the Sentencing Reform Act and unconstitutional. . . . [T]here is no statutory authority for this provision, and considerable evidence of legislative intent to the contrary.

Parker, *supra* note 4, at 434-35.

12. *Id.* § 8A1.1 (comment. (n.1)).

13. Ilene H. Nagel & Winthrop W. Swenson, *The Federal Sentencing Guidelines For Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 248-49. Explaining this rationale, Nagel and Swenson conclude:

> As a general proposition, size does not directly bear on the computation of a corporation's fine. The same rules apply whether the convicted company is a "Fortune Fifty" manufacturing conglomerate or a "mom and pop" dry cleaner. The way in which the seriousness of the offense is computed is not fundamentally influenced by size. Indeed, the Commission ultimately saw no logical way of proceeding other than measuring offense seriousness consistently. Any other approach would "capriciously overdeter[] and underdeter[] offenses by giving the less wealthy [organizations] incentives to commit more harmful offenses, and vice versa."

Id. at 249.

14. Leonard Orland, *Corporate Punishment by the U.S. Sentencing Commission*, 4 FED. SENTENCING REP., July-Aug. 1991, at 50, 51. Professor Schulhofer sees a similar problem in the Commission's treatment of individuals: "we now have a serious problem of *unwarranted similarity* in the treatment of substantially distinguishable cases." Stephen J. Schulhofer, *Excessive Uniformity and How to Fix It*, 5 FED. SENTENCING REP., Nov.-Dec. 1992, at 169.

15. U.S.S.G., *supra* note 5, § 8C2.4.

Washington University Open Scholarship

Commission devised this scheme once again acting without statutory support. Perhaps the presence of an effective corporate compliance program should mitigate a sentence, and the involvement of senior management should aggravate a sentence, as the Commission has decided, but Congress should decide these and other policy choices, not the Commission.

In an effort to stimulate discussion on the policy choices that Congress should have (but has not) made concerning corporate crime, and in an effort to underscore how deeply the Guidelines arrogate to the Commission basic policy matters that are more properly within the business of Congress, I propose a Model Federal Corporate Criminal Code (the "Model Code"). This Code is designed to function either independently of, or in conjunction with, a sentencing commission and is based on a number of explicit policy preferences.

1. Scope

As a general rule, in most industrialized nations, corporations are legally incapable of violating the criminal law.[16] The unique American rule of corporate criminal liability has as its theoretical base the notion that large profit-making organizations should not be permitted to profit from wrongdoing with immunity from criminal sanction, and that it is proper to hold the organization liable for what is, after all, organizational behavior.[17] Large publicly held, profit-making corporations fit within this model of organizational liability. Professor Brickey makes a powerful argument that large closely held profit-making corporations also fit the organizational liability model.[18] It is less clear that smaller partner-

---

16. *See* Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501 (1980).

17. *Id.*

18. I quite agree with Professor Brickey's conclusions:

> The premise that close corporations act more like individuals than organizations clearly applies to . . . [a] one person corporation. . . . But as the number of individuals involved in the venture, the complexity of its organization and operations, and the volume of business conducted in its name all increase, the characteristics that made its behavior analogous to individual behavior ultimately disappear . . . organizations that employ tens of thousands (or perhaps just thousands) of workers are bound to have layers of bureaucracy characteristic of large publicly held corporations. . . . [T]hese close corporations function much like their large, publicly held counterparts. . . . The reasons that support recognition of corporate criminal liability are wholly unrelated to the question of who owns the corporation. They are tied, instead, to the bureaucracy that makes personal accountability less likely. That bureaucracy will exist in large corporations whether they are publicly or closely held.

Kathleen F. Brickey, *Close Corporations and the Criminal Law: On "Mom and Pop" and a Curious Rule*, 71 WASH. U. L.Q. 189, 195 (1993).

https://openscholarship.wustl.edu/law_lawreview/vol71/iss2/5

ships, closely held corporations, non-profit organizations, pension funds, and unions fit the organizational liability model; as a matter of organizational theory, many of these smaller entities behave more like individuals than organizations.[19] For this reason, the Model Penal Code applies only to large corporations, whether publicly or privately held,[20] and utilizes a line of demarcation regarding the meaning of "large" drawn from commonly accepted distinctions in the law of corporate governance.

2. *Principles of Corporate Criminal Liability*

There is no existing federal statute which establishes general principles of corporate criminal liability. Professor Bucy argues that the current federal case law standard for corporate criminal liability is "not jurisprudentially sound" because it does not "require proof of intent as a prerequisite for corporate criminal liability."[21] I disagree, and the Model Code rests on the belief that the current federal case law standards are sound but would benefit from statutory elaboration. In S. 1,[22] and later in S. 1437,[23] the Senate articulated a statutory basis for corporate criminal liability that was intended, for the most part, to restate preexisting law. The Model Code adopts these formulations, along with a provision (also derived from S. 1437) which creates a new crime of reckless failure to supervise a corporate employee.

3. *Elimination of Corporate Probation and Creation of New Presumptive Sanctions*

The Sentencing Guidelines reflect multiple failures in the treatment of sanctions, including a failure to consider new corporate intermediate sanctions and a failure to escape preoccupation with fines. Furthermore, reliance on corporate probation, which the courts have addressed with

19. Barry D. Baysinger, *Organizational Theory and the Criminal Liability of Corporations*, 71 B.U. L. REV. 341 (1991).

20. My original draft had applied only to publicly held corporations. Having had the benefit of Professor Brickey's analysis of large closely held corporations, I modified the draft so that liability would not turn on the pattern of ownership.

21. Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 329 (1993). *See also* Pamela H. Bucy, *Corporate Ethos: A Standard For Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).

22. S. 1, 93d Cong., 1st Sess. (1973).

23. S. 1437, 95th Cong. 2d Sess. (1977).

Washington University Open Scholarship

some difficulty and hostility,[24] carries with it the self-evident problem of a lack of effective sanction in the event of corporate probation violation.[25] The Commission has ignored this problem.[26] In the process, the Commission has virtually ignored some of the fresh approaches articulated by the American Bar Association (ABA) in its most recent Standards for Sentencing and Sentencing Alternatives.[27] The Commission has also overlooked the emerging penological literature on the importance of intermediate sanctions in a rational sentencing scheme.[28]

The Model Code proceeds on the assumption that it is preferable and more appropriate to array a range of intermediate sanctions to corporate crime than a simplistic, sharply graded fine grid. Thus, utilizing the ABA Standards, the Model Code proposes that sentencing courts impose mandatory sentences of acknowledgement of wrongdoing[29] and compli-

---

24. *See* John C. Coffee, Jr. et al., *Standards for Organizational Probation: A Proposal for the United States Sentencing Commission*, 10 WHITTIER L. REV. 77 (1988). Professor Gruner accurately summarizes the advantages of corporate probation as well as "some of the problems attendant to using corporate probation as a sentencing tool." Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 302 (1993).

25. Professor Gruner, in my judgment, overestimates the availability of corporate probation violation sanctions when he concludes:

> A variety of sanctions can be imposed for probation violations. A corporate probationer found to have violated a term of probation can either be continued on probation under enhanced probation terms or have its probation revoked and be resentenced to any sanction that was available at its original sentencing. Individuals having notice of a sentencing court's order imposing probation terms who (1) willfully violate these terms, (2) prevent, obstruct, impede, or interfere with compliance with these terms by others, or (3) intentionally hinder or delay the communication of any probation violation to a court or probation officer, will be subject to contempt sanctions and individual criminal liability.

Gruner, *supra* note 24, at 301. The two statutes referred to by Professor Gruner, 18 U.S.C. §§ 1509 and 1512, do not deal with probation, let alone corporate probation; § 1509, the general obstruction of court order statute and § 1512, the general witness tampering statute, have never, to my knowledge, been applied to individuals in a corporate probation violation setting. I think it unlikely that they ever would.

26. *See* Orland, *supra* note 14, at 50.

27. AMERICAN BAR ASSOCIATION STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES (3d ed. 1993).

28. *See* NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990). The Commission's failure to address intermediate sanctions is also a glaring defect of the individual guidelines. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1706 (1992). Professor Gruner makes a convincing case for the use of intermediate sanctions under the Guidelines for organizations; I think his objectives can be better realized under the Model Code, which utilizes intermediate sanctions as free standing judicial orders not tied to corporate probation.

29. *See generally* BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983).

https://openscholarship.wustl.edu/law_lawreview/vol71/iss2/5

ance programs and discretionary sentences of community service and notice to victims[30] for all felony convictions of publicly held companies. These sanctions would serve as free-standing judicial orders in a criminal case, independent of probation, and would be fully capable of enforcement by the contempt sanction.

4. *Gradation*

Congressional failure to enact a federal criminal code has perpetuated an array of federal criminal statutes enacted over the course of a century. These criminal statutes fail to differentiate properly among crimes. The Sentencing Guidelines finesse the problem of gradation by engrafting the gradation of seriousness of individual offenses from the *individual* guidelines onto the *organizational* guidelines. The Commission fails to articulate a justification for this problematic approach.[31]

The need for gradation in a criminal code is tied to sanctions.[32] For example, the American Law Institute's Model Penal Code adopted felony categories that relate to the length of prison time—the higher the degree of the felony, the higher the authorized maximum term of imprisonment. In contrast, there is no imprisonment in corporate sanctioning,

30. *See generally* Brent Fisse, *Community Service as a Sanction Against Corporations*, 1981 WIS. L. REV. 970, 978-80.

31. Professor Parker describes the shortcomings of the offense level structure of the individual guidelines and their impact on the organizational guidelines in these terms:

> [T]he precise numbers assigned to the offense levels, and the rate of change between the numbers was chosen arbitrarily. . . . [I]n addition, the original offense level structure never was and cannot be a scale of "seriousness," because it was developed from entirely different considerations for entirely different purposes.
>
> In fact, the offense level structure of the original guidelines is purely an artifact of the empirical apporach used to develop those guidelines. The original guidelines' offense levels were, in essence, the coefficients found in multiple regression analysis of past *imprisonment* sentences; they are not derived from the "seriousness" of the underlying offense conduct, but are based upon the unique characteristics of imprisonment as a sanction, and have no rational application whatever to the determination of fines for organizations. Moreover, the offense level structure is not an arithmetic scale of any kind, because the underlying regression analyses were logarithmic. . . . This is why imprisonment sentences increase by about twelve percent per offense level. In other words, the sentencing table of the individual guidelines is, in effect, a compound interest table at a twelve percent interest rate.

Parker, *supra* note 4, at 405-06.

32. Professor Schwartz notes:

> A first step in any reform project is to select a set of categories into which all crimes will be classified. . . . The necessity of classifying offenses and matching penalties manifested itself first in the ancient distinction between felonies and misdemeanors. . . . A major task for the reformer is to select the appropriate ladder of punishment to correspond with the classification system.

Schwartz, *supra* note 1, at 518-19.

Washington University Open Scholarship

only fines and probation. The problems with imposing only fines is that their impact is mostly felt by innocent stockholders.[33] The problem with corporate probation is that a court has no effective threat available if a corporation violates a probation order.[34] In part for these reasons, the Model Code eliminates corporate probation and reduces the traditional paramount importance of the fine, characterized by Commissioner Nagel as "the centerpiece of the Sentencing Guidelines structure."[35] This approach reduces the need for Congress to undertake the difficult task of redefining and grading all felonies.

5. Aggravants and Mitigants

The absence of statutory aggravants and mitigants led the Commission to devise its own factors in the Sentencing Guidelines without statutory guidance. This approach is troublesome, not because of the Commission's particular policy choices, but because the Commission was unwilling to recognize that the Guidelines rest on important policy determinations that Congress has not made. The Model Code articulates aggravants and mitigants applicable to corporate conduct in order to focus upon the underlying policy issues and to permit discussion in the broader context of the legitimacy of the corporate aggravation and mitigation scheme. Many of the Model Code's aggravants and mitigants were derived in large part from the Commission's Guidelines.

6. Ancillary Provisions

At the present time, no centralized repository for information on corporate criminal convictions exists.[36] Thus, while corporate conviction records play a critically important role in calculating fine levels under the Commission's Guidelines, probation officers must gather this vital information either from the offender or from public sources.[37] To remedy this problem of a lack of centralized information, the Model Code requires corporations to report criminal convictions to the Securities and Ex-

33. *See* Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991).

34. Orland, *supra* note 14, at 50. *See generally* Gruner, *supra* note 24, at 304-25 (describing ways a sentencing court could resentence a convicted corporation which violated probation conditions).

35. Nagel & Swenson, *supra* note 13, at 210.

36. Orland, *supra* note 16, at 509.

37. *See* PRESENTENCE REPORT FOR AN ORGANIZATION: A RESOURCE GUIDE, ADMINISTRATIVE OFFICE OF U.S. COURTS (Feb. 1992).

https://openscholarship.wustl.edu/law_lawreview/vol71/iss2/5

change Commission. In addition, the Model Code directs the Federal Bureau of Investigation to maintain centralized criminal records on corporate offenders.

CONCLUSION

Conventional law review scholarship consists of exposition and footnotes not statutory drafts; but I believe that one can best understand the virtues of codification of corporate sanctions by the articulation and examination of a Model Code. This Article presents such a code below, in an effort to "produce some order in an area which has developed in a rather disorderly way, and to state some general principles around which a rational formulation can be constructed."[38] Perhaps the Model Code might also interest Congress and the Clinton administration as they begin to grapple with problems of criminal law reform.

MODEL FEDERAL CORPORATE CRIMINAL CODE

CHAPTER A. GENERAL PROVISIONS

§ 1 *Definitions and Applicability*

(a) *Definition of Corporation*: As used herein, "corporation" means an entity created under the corporation laws of a state that as of the record date for its annual shareholders' meeting when the offense occurred had at least $5 million or more of total assets.
[Derivation: American Law Institute Principles of Corporate Governance § 1.31-4 (Proposed Final Draft 1992), which, in turn, is derived from Securities Exchange Act § 12(g), Rule 12g-1 under that Act, and Federal Securities Code § 402(a).]
(b) *Applicability*: This statute is applicable only to the sentencing of corporations, as defined in subsection (a), for crimes classified as felonies under federal law.

38. Brickey, *supra* note 6, at 629 (quoting The American Law Institute Proceedings, 33d Annual Meeting, 172 (1956)) (discussion of Model Penal Code provisions on corporate criminal liability).

Washington University Open Scholarship