

COMMENTARY

THE PROPOSED
ORGANIZATIONAL
SANCTIONS GUIDELINES
AND THE
ISSUE OF CORPORATE
PROBATION

By Ronald F. Wright

The United States Sentencing Commission will soon decide on guidelines for sentencing organizations, usually corporations, convicted of crimes. That choice, perhaps more than anything the Commission has done up until now, will show how much or how little the Commission values the input of judges in developing the law of sentencing. This comment focuses on proposals regarding probation as a sanction for organizational defendants.

The Commission distributed "Discussion Materials on Organizational Sanctions" in July that contained two sets of draft guidelines relating to probation. One proposal, developed by several members of the Commission's staff, covers all aspects of corporate sentencing. A second proposal, submitted at the request of several Commission members by Professors John Coffee, Richard Gruner and Christopher Stone, only covers probation.

The Commission, which has not endorsed either draft, held a hearing October 11 in New York and will soon hold another in Los Angeles. It has not announced when it intends

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to promulgate guidelines on this subject, but could send guidelines to Congress early next year.

The staff draft places stringent limits on the use of probation for corporate defendants. It allows a sentence of probation in two situations: (1) where probation is necessary to enforce a sentence of restitution, forfeiture, fine or notice, and (2) where the criminal history of the organization justifies probation as a means of preventing future offenses. This second option takes effect only where the offense is a felony that senior management encouraged or carried out, and only when it is similar to a felony for which the organization has previously been convicted. Before imposing probation under the second option, the judge must also determine that probation is both a necessary and effective way of preventing further violations, taking into account any available civil or administrative procedures.¹

The "general principles" section of the staff draft recommends that courts use the criminal history basis for probation with caution because of the "obvious costs of judicial oversight of private business operations."² The commentary to the draft directs courts to consider the limitations on probation appearing at 18 U.S.C. § 3563(b)(6), which in most cases block a court from prohibiting an organization from engaging in a particular business. It also quotes from legislative history to the effect that courts should not "manage organizations as a part of probation supervision."³

The Coffee/Gruner/Stone (CGS) draft would allow probation under a broader set of circumstances. Like the staff draft, it rejects the use of probation as a lesser alternative to some other sanction, and instead views probation as a "supplementary sanction" to enhance a financial sanction. However, the CGS draft states

that the court should sentence an organization to probation for all serious crimes (either a felony or a misdemeanor that threatened life or health or that was part of a pattern of criminal behavior) whenever one of the following conditions is met: (1) management policies or practices contributed to the offense or delayed detection and still remain uncorrected, (2) circumstances surrounding the offense remain unclear enough to hinder internal accountability or otherwise to harm the public interest, (3) restitution is desirable but not authorized by statute, (4) restitution is not feasible or adequate and the organization can provide community service for the benefit of the victims, or (5) the organization cannot pay its fine or carry out other aspects of its sentence.⁴

This draft draws heavily on the efforts of the Securities and Exchange Commission to improve the internal monitoring and auditing controls of organizations that violate the securities laws. It also relies on devices used by federal courts in fashioning civil injunctions against corporations.⁵ The authors argue that probation will allow the court to de-emphasize variables used in setting fines under the staff draft, including the expected gain or loss from a crime and the likelihood of apprehension, variables that courts cannot estimate with any accuracy.⁶

The two drafts also diverge on the conditions of probation that they specify. The staff draft requires two conditions in the case of a defendant sentenced to probation because of a criminal history: the defendant must develop and obtain court approval of a plan for avoiding a recurrence of the offense, and it must submit periodic reports to the court regarding its efforts to implement the approved plan and to avoid further violations of the criminal law. The guideline requires the court to accept any

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plan "reasonably calculated" to avoid recurrence.⁷

The CGS draft guideline requires only the conditions of probation specified by statute and recommends several others by way of a policy statement. Those conditions include (1) providing the court access to information as needed to monitor compliance, (2) creating a compliance plan (the draft recommends several items that the plan could cover), (3) conducting an internal investigation, and (4) paying restitution or providing community service for victims.⁸ The CGS draft also cautions against any probation conditions that will constrain the legitimate business discretion of management.⁹

Finally, the drafts differ in the provisions they make for administering corporate probation. The CGS draft provides for appointment of special probation officers and describes their qualifications and duties, whereas the staff does not address how probation would be administered. Presumably, it relies on probation officers to develop whatever expertise is necessary. Each draft contemplates that probation would be enforced through the court's contempt power.

This brief summary of the two drafts makes it plain that the staff draft evidences a profound distrust of probation while the CGS draft is more optimistic about its effectiveness as a sanction. But it may be more meaningful to summarize the differences between the two drafts in this way: only the CGS draft leaves open any real possibility of building on the experience of judges as they use probation as an organizational sanction. This conclusion becomes clearer after a quick review of prior judicial experience with corporate sentences in general and corporate probation in particular.

Corporations are most often convicted of antitrust, fraud and tax offenses, but also are convicted of environmental, food

and drug, export control, and other regulatory offenses. These crimes result in serious losses to the public, and some even threaten public health and national security. Yet corporate defendants appear in federal court for sentencing relatively infrequently when compared to individuals.¹⁰

Federal judges have uneven experience with corporate probation. In a draft report on organizational sentences in federal court during 1984-87, Commission staff members compiled data for 974 organizational defendants convicted on non-antitrust charges. That report indicated that courts imposed probation without a fine in seven percent of the cases and made payment of a fine a condition of probation in another eleven percent of the cases.¹¹

The report does not provide any breakdown of the types of probation conditions imposed and the number of times different types were used. Such a breakdown would show, I believe, that even though probation of some form was imposed in about eighteen percent of the cases, courts use probation for relatively mundane purposes in all but a fraction of those cases. A quantitative study of corporate probation in federal court, if such a study existed, would likely show that where the court uses probation to enforce a fine, it rarely imposes other significant conditions of probation. It is also likely that probation sentences outside the context of routine fine enforcement usually contain nothing more than a boilerplate condition prohibiting the corporation from committing further crimes or conditions enforcing an order of restitution.

All of this remains guesswork because there are so few reported decisions dealing with corporate probation and so few sources of statistics to show how widespread different probation practices are. A handful of reported decisions illustrate probation conditions designed to prevent future

violations of law, and another small group shows how courts have used probation to require community service as a substitute sentence where the defendant cannot pay an adequate fine.¹²

There are reasons to think these are exceptional cases and that courts generally do not consider probation as a possibility for any purpose other than fine enforcement. After all, judges sentence corporations much less often than individual defendants. There has also traditionally been some doubt whether a court could impose probation without the consent of the corporate defendant.¹³ Most federal judges probably have not yet developed a sense of when and how to impose a sentence of probation on organizations.

This lack of visible judicial experience creates a dilemma for the Commission. When creating guidelines for individual sentences, the Commission was able to deflect some criticism by claiming that its guidelines for the most part simply followed the current practice among federal judges. But in the area of corporate probation, there is only an embryonic practice to follow. The Commission, it would appear, must make the primary policy choices here itself rather than adopt the choices of others.

One way around this difficulty might be to assert that Congress has already chosen to restrict the use of probation, so the Commission has only to follow that statutory command. This explains, I believe, why the staff draft attempts to portray 18 U.S.C. § 3563 as a serious limitation on the court's power to use probation.¹⁴ However, the Congress plainly did not limit the use of probation to the circumstances set out in the staff draft. The statute places virtually no limitations on whether probation should be imposed on a corporation: it simply asks that courts consider the general purposes of sentencing set out in Section 3553(a).¹⁵

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Moreover, the statute bars only one condition of probation. Courts usually may not restrict a corporate defendant from engaging in a particular line of business. Granted, the legislative history does state that courts should not use probation to "manage organizations" or to put legitimate firms out of business.¹⁶ But the same report says repeatedly that the statute creates "no presumption for or against probation" and that courts should impose probation whenever it is necessary and consistent with the purposes of sentencing.¹⁷

The Commission, therefore, must draft probation guidelines without much guidance from Congress. If the Commission chooses to place severe restrictions on probation, its rationale would presumably be based on the approach set out in a paper written by a Commission staff member, Jeffrey Parker.¹⁸ Parker argues that probation cannot be precisely scaled to the harm caused by a crime and is therefore an indeterminate form of sentencing. Indeterminate sentences are likely to become overly burdensome sentences because of an inevitable drift towards a model of "absolute deterrence."¹⁹

Of course, if a punishment must be "precisely scaled" to the harm caused by a crime, then fines also fall short of the mark. As the existing guideline for organizational defendants in antitrust cases shows, the measure of harm is often fairly arbitrary, even when assuming that economic harm is the only concern.²⁰ Similarly, the "multiplier" used in the staff draft to account for the difficulty of detecting an offense is admittedly a blunt tool.²¹ Any advocate understands that wildly differing figures can be made to sound equally plausible. Given a system of fact-finding where the court must rely on guesswork from time to time at sentencing, the judge will rarely have the luxury of calculating a fine based on unambiguous evidence.

Even if judges could set fines precisely equal to the harm caused by a crime, the same fine would have different deterrent effects on different organizations. Some corporations can absorb a given fine more easily than others; even corporations with the same net worth may have different liquidity. If, for the sake of deterrence and justice, defendants who commit the same crime should feel the same burden from a sentence, fines alone do not suffice. The need to impose truly comparable sentences on defendants with different resources calls for some systematic way to account for a defendant's ability to pay,²² or a device to supplement the fine, or both.

I do not mean to suggest that all corporate sentences are hopelessly indeterminate. The point is that even a system of fines alone would not keep judges from facing difficult fact-sensitive choices about how to make the punishment fit the crime and the criminal. A judge's decision to impose probation and the choice of appropriate probation terms is not fundamentally different from setting an appropriate fine. Mistakes are possible, perhaps inevitable, in the use of fines or probation, and the question in each case is whether the risk is worth taking.

For corporate probation, that question is certainly open for debate. Courts, prosecutors, defense counsel, and court observers only have limited experience that could tell us whether probation would often be the cheapest way to deter crime effectively or to reform a criminal organization. If there are times when that is true, we do not know exactly when it might be or whether those instances can be identified at all. Experience in the civil context provides only limited guidance: courts use the direct command of an injunction to reform institutions in some contexts and use the indirect incentives of fines in others, yet no one has

codified a completely satisfactory way of choosing between those remedies.²³

The Sentencing Commission provides criminal courts with an opportunity to improve on this choice among criminal sanctions (and perhaps to throw some indirect light on civil remedies as well). Guidelines could point out to a court that probation is available as a sanction for some defendants and could set out in a general way the types of situations where other courts have found probation to be effective. For instance, they might identify the sort of organizational criminals most likely to need direct court action to create or reinforce internal accountability. In short, guidelines could introduce an approach to sentencing that many courts have not fully considered. This would give them the benefit of selected courts' experience in the area, bringing out the best in the common law system.

The Commission can then take the process a step further. By requiring courts to focus on particular probation issues and collecting the outcomes in those decisions, the Commission can use judicial experience with probation to begin a systematic refinement. For example, the guidelines could require the court to make some estimate (on the record) of the defendant's cost in complying with probation. They might also direct the court to reject probation, even if otherwise warranted, where the costs would be disproportionate to the fine imposed (a requirement that gives more concrete form to the general concern of improper judicial interference with business discretion). The collective experience of the federal courts on matters such as this would allow a more informed judgment as to when probation is too costly.

This deliberate learning process cannot take place if the Commission decides at the outset that there is nothing

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much about organization probation that is worth learning from judges. If the Commission places too few restrictions on probation, experience and study will reveal the problem. If they place undue restrictions on probation at the outset, we may never know what we are missing.

FOOTNOTES

¹U.S. SENTENCING COMM'N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS, pt. 1, § 8D2.1 at 8.43 (1988) [hereinafter DISCUSSION MATERIALS].

²*Id.* at 8.5

³*Id.* at 8.44, quoting, S. REP. NO. 225, 98th Cong., 1st Sess. 99 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182 [hereinafter Senate Report].

⁴*Id.* at pt. 2, pp. 9-11.

⁵*Id.* at 7-8.

⁶*Id.* at 3-7.

⁷*Id.* at pt. 1, § 8D2.2(c), pp. 8.45-8.46.

⁸*Id.* at pt. 2, pp. 20-28.

⁹*Id.* at § 8D2.4(c)(2), p. 28.

¹⁰*Id.* at pt. 3, p. 13. Corporate defendants make up less than one percent of all criminal defendants in federal court.

¹¹*Id.* at pt. 3, p. 19. The percentages are based on 825 convictions, since data is not yet available for the remaining 149 cases.

¹²See *United States v. Danilow Pastry Co.*, 563 F.Supp 1159 (S.D.N.Y. 1983); *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972). Cf. *United States v. Allegheny Bottling Co.*, 55 Antitrust & Trade Reg. Rep. 715 (BNA) (E.D. Va. Oct. 7, 1988).

¹³See *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785 (9th Cir. 1982).

¹⁴See also DISCUSSION MATERIALS, *supra* note 1, at pt. 4, pp. 30-31.

¹⁵18 U.S.C. § 3562(a) (1984). Section 3561 also prohibits a

sentence of probation (1) for Class A or B felonies, (2) where defendant has been sentenced to prison, or (3) where otherwise specifically precluded.

¹⁶Senate Report, *supra* note 3 at 97, 99.

¹⁷*Id.* at 90-91, 99

¹⁸The paper is included as Part 4 of the Discussion Materials distributed by the Commission. It provides the theoretical underpinnings for the staff draft.

¹⁹DISCUSSION MATERIALS, *supra* note 1, at pt. 4, pp. 47-50.

²⁰U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2R1.1 at 2.133 (1987). The staff draft arguably ignores intangible harms such as the reduced respect for the law within the wrongdoer's industry and elsewhere that results from a crime. The authors of the draft claim to have accounted for this type of loss in the general principles section, but it is difficult to find any mention of loss unconnected with victims in the draft guidelines themselves. This question goes well beyond the issue of probation and is therefore beyond the scope of this Comment.

²¹DISCUSSION MATERIALS, *supra* note 1, at pt. 1, pp. 8.28-8.29, 8.4 ("multiplier" does not contemplate "scientific precision.")

²²Cf. Hillsman & Greene, "Tailoring Criminal Fines to the Financial Means of the Offender," 78 *Judicature* 38 (1988) (describing "day fine" system).

²³See generally P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

READER'S NOTES