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CORPORATE PROBATION CONDITIONS: JUDICIAL CREATIVITY OR ABUSE OF DISCRETION?

INTRODUCTION

Corporate crime¹ pervades American business.² To alleviate this problem, law enforcement authorities must focus on both the corporate entity and the responsible corporate manager.³ The diffusion of control within the company often makes it difficult, however, to identify the culpable individual.⁴ Moreover, penalties against white-collar defendants historically have been too lenient to constitute an effective deterrent.⁵ This Note examines appropriate sanctions for corporate criminal activity. There is little agreement among commentators on the appropriate punishment for institutional criminal behavior.⁶ A corporation cannot be imprisoned;⁷ therefore, the only direct

1. Corporate crime may be defined as the "conduct of a corporation, or of individuals acting on behalf of a corporation, that is proscribed and punishable by law." Braithwaite & Geis, *On Theory and Action for Corporate Crime Control*, 28 *Crime & Delinquency* 292, 294 (1982).

2. R. Nader, M. Green & J. Seligman, *Taming the Giant Corporation* 30-32 (1976); Coffee, "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 *Mich. L. Rev.* 386, 386 n.3 (1981); Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 *Am. Crim. L. Rev.* 501, 501 n.4 (1980); Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 *Yale L.J.* 353, 353 (1979) [hereinafter cited as *Structural Crime*]; Ross, *How Lawless are Big Companies*, *Fortune*, Dec. 1, 1980, at 56, 57. The scope of corporate crime includes price fixing, food adulteration, conspiracy, bribery and pollution. Coffee, *supra*, at 386 n.3; *Structural Crime*, *supra*, at 354 n.6. The economic impact of corporate crime is far-reaching. Price fixing, for example, has been called a "common, everyday occurrence" that significantly affects the economy. Sims, *Antitrust Sentences—A Prosecutor's View*, 47 *Antitrust L.J.* 693, 695 (1978).

3. Coffee, *supra* note 2, at 387.

4. See H. Packer, *The Limits of the Criminal Sanction* 360 (1968); Braithwaite & Geis, *supra* note 1, at 298-99; *Structural Crime*, *supra* note 2, at 357-59; see also Sims, *supra* note 2, at 701 (antitrust crimes difficult to detect); Wheeler & Rothman, *The Organization as Weapon in White-Collar Crime*, 80 *Mich. L. Rev.* 1403, 1422 (1982) (ease with which executives hide behind the corporate entity).

5. See Orland, *supra* note 2, at 512-13 & n.69 (1980); Sims, *supra* note 2, at 697.

6. Compare Coffee, *supra* note 2, at 411-48 (issuing equity securities to a state victim compensation fund) with *Structural Crime*, *supra* note 2, at 364-74 (structural reorganization of corporate offenders) and Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 *Melb. U.L. Rev.* 107 *passim* (publicity sanction) [hereinafter cited as Fisse I]; cf. *Symposium: Sentencing in Criminal Antitrust Cases: Too Much or Too Little?*, 47 *Antitrust L.J.* 689-752 (1978) (five views on the sentencing of white collar criminals); H. Packer, *supra* note 4, at 364 (noting the dilemma of criminal sanctions); von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 *Md. L. Rev.* 6, 13-14 (1983) ("There has been no new affirmative consensus on what the rationale of a sentencing system should be.").

7. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 274 (1959). A corporation can be "executed" by dissolution. See Orland, *supra* note 2, at 502 & n.5. This is,

penal sanction available is a fine.⁸ There is, however, widespread criticism of the efficacy of fines to control corporate crime.⁹

The ineffectiveness of fines to control illegal corporate activity can be illustrated by the record of one company. In 1965, the Olin Corporation was fined \$30,000 for filing false statements to conceal kickback payments.¹⁰ In 1978, Olin was fined \$45,000 for filing false reports to hide the illegal shipment of arms to South Africa.¹¹ Again in 1979, Olin filed false statements to conceal the amount of mercury discharged into the Niagara River and was fined \$70,000.¹²

In response to the perceived inadequacy of fines to control corporate criminal behavior, some courts have used the Probation Act (Act)¹³ to fashion sentencing alternatives for corporate defendants.¹⁴ For example, courts have imposed probation conditions requiring bakeries convicted of price fixing to deliver bread to the poor¹⁵ and polluters to develop environmental clean-up programs.¹⁶ Corporate probation conditions developed under the Act, however, are constrained by the terms of the Act, its rehabilitative purpose, and the Constitution. In addition, there is a growing discomfort among members of Congress, judges, and scholars with the scope of judicial discretion in fashioning remedies.¹⁷

however, an extreme remedy that courts are unlikely to utilize. See C. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* 36 (1975); Braithwaite & Geis, *supra* note 1, at 307.

8. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 274 (1959).

9. Braithwaite & Geis, *supra* note 1, at 303; Coffee, *supra* note 2, at 386-87; Fisse I, *supra* note 6, at 107; Orland, *supra* note 2, at 516-17; *Structural Crime*, *supra* note 2, at 354-55; see Fisse, *Community Service as a Sanction Against Corporations*, 1981 Wis. L. Rev. 970, 970 [hereinafter cited as Fisse II].

10. Orland, *supra* note 2, at 518 & n.91 (citing *United States v. Olin-Mathieson Chem. Corp.*, No. 63-217 (S.D.N.Y. Sept. 23, 1965)).

11. *United States v. Olin Corp.*, No. 78-30, slip op. (D. Conn. June 1, 1978).

12. *United States v. Olin Corp.*, No. 78-38, slip op. (W.D.N.Y. Dec. 10, 1979).

13. Act of March 4, 1925, ch. 521, 43 Stat. 1259 (codified as amended at 18 U.S.C. §§ 3651-3656 (1982)).

14. See, e.g., *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982) (contribute funds and assign executive to community service organization); *United States v. William Anderson Co.*, 698 F.2d 911, 912 (8th Cir. 1982) (contribute funds to charitable organizations); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1164-65 (S.D.N.Y. 1983) (deliver baked goods to charitable organizations); *United States v. J.C. Ehrlich Co.*, 372 F. Supp. 768, 769 (D. Md. 1974) (not violate wildlife preservation laws).

15. *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1163 (S.D.N.Y. 1983).

16. *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 59 (7th Cir. 1972).

17. See *infra* note 114.

This Note examines judicial use of the Probation Act to curb the proliferation of corporate criminal activity and concludes that the proposed Comprehensive Crime Control Bill (Bill)¹⁸ is a more appropriate vehicle under which to sentence corporate offenders. The Bill expands the permissible goals of probation beyond rehabilitation to include deterrence and punishment.¹⁹ It also establishes a National Sentencing Commission to help courts choose the most effective probation conditions for corporate wrongdoers.²⁰

I. THE INADEQUACY OF FINES TO CONTROL CORPORATE CRIMINAL BEHAVIOR

Proponents of monetary sanctions view the corporation solely as a profit-motivated institution.²¹ Provided fines are high enough,²² a rational decisionmaker will recognize that the benefits of breaking the law do not exceed its costs.²³ As a result, the sentencing goals of deterrence and punishment are met by imposing a fine because a company either will not violate the law or will be financially punished if caught doing so.

Fines, however, are viewed by many corporate offenders as merely a cost of doing business.²⁴ Moreover, the current level of fines does little to diminish the value of treasured company assets, such as a corporation's reputation²⁵ and the satisfaction of its employees.²⁶ A fine large enough to threaten corporate viability might alter a company's decision to engage in criminal conduct. The constitutional prohibition against cruel and unusual punishment²⁷ and notions of fairness

18. S. 1762, 98th Cong., 1st Sess. (1983).

19. See *id.* §§ 3553(a), 3561, 3562. See *infra* note 153 and accompanying text.

20. S. 1762, 98th Cong., 1st Sess. §§ 991-998 (1983).

21. See K. Elzinga & W. Breit, *The Antitrust Penalties: A Study in Law and Economics* 117 (1976) ("[A]ntitrust violations will occur if the expected utility from anticompetitive behavior exceeds the expected utility from competing."); R. Posner, *Economic Analysis of Law* § 10.12 (2d ed. 1977) (logical remedy for antitrust violations is damages directed at the corporation that will then be forced to control illegal employee activity). *But cf.* C. Stone, *supra* note 7, at 36-39 (criticizing profit-maximization analysis); Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 *Am. Crim. L. Rev.* 419, 460 (1980) (criticizing fundamental premise of corporation as solely a profit-maximizer).

22. The lower the risk of apprehension, the higher the fines must be to have a deterrent effect. R. Posner, *supra* note 21, § 7.2, at 167; Coffee, *supra* note 2, at 389; Sims, *supra* note 2, at 701.

23. See K. Elzinga & W. Breit, *supra* note 21, at 117-18; R. Posner, *supra* note 21, § 7.2, at 164; Sims, *supra* note 2, at 701.

24. Orland, *supra* note 2, at 516.

25. See Braithwaite & Geis, *supra* note 1, at 301; Fisse I, *supra* note 6, at 107-08.

26. See C. Stone, *supra* note 7, at 38.

27. U.S. Const. amend. VIII; K. Elzinga & W. Breit, *supra* note 21, at 54.

in sentencing, however, establish a limit on how high a fine can be set for a particular offense.²⁸ In addition, some courts are reluctant to impose significant fines for white-collar crime because they view it as little more than "aggressive capitalism."²⁹ Unless imposition of larger penalties is mandatory,³⁰ it is unlikely that higher fines will be levied. Even if significant fines are imposed, however, other problems arise when monetary penalties are the sole sanction used to control corporate criminal behavior.

The real cost of fines may be borne not by the company, but by shareholders and consumers,³¹ parties with little control over corporate decisionmaking.³² Raising the level of fines will not prevent a corporation from passing along the penalty. Furthermore, the level of a fine is circumscribed by a company's wealth.³³ A penalty large enough to accurately reflect the seriousness of the crime often is not possible because of limited corporate assets.³⁴

Finally, profit maximization may not be an adequate explanation of corporate behavior.³⁵ An economic cost-benefit analysis of institu-

28. See K. Elzinga & W. Breit, *supra* note 21, at 54; H.L.A. Hart, *Punishment and Responsibility* 25 (1968); von Hirsch, *supra* note 6, at 23-25.

29. Orland, *supra* note 2, at 511; see H. Packer, *supra* note 4, at 359; Sims, *supra* note 2, at 694.

30. See K. Elzinga & W. Breit, *supra* note 21, at 134 (suggesting a mandatory penalty based on 25% of firm's profits).

31. Coffee, *supra* note 2, at 401-02; Orland, *supra* note 2, at 516; *Structural Crime*, *supra* note 2, at 362-63; see *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 60 (7th Cir. 1972). It has been argued that stockholders should bear the cost of fines because they benefit from corporate activity. Coffee, *supra* note 2, at 401.

32. See A. Beale & G. Means, *The Modern Corporation and Private Property* 78-84 (rev. ed. 1968); R. Posner, *supra* note 21, at 301; *Structural Crime*, *supra* note 2, at 355-57. The separation of ownership and control in the modern corporation led Justice Brandeis to comment:

[T]he lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power.

Liggett Co. v. Lee, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting).

33. Coffee, *supra* note 2, at 390. The varying sizes of companies are taken into account by the present system. If fines were set solely on the basis of the offense committed, the result would be patently unfair. Obviously, a fine that would bankrupt a small company might not have an effect on a large corporation. See K. Elzinga & W. Breit, *supra* note 21, at 132. Therefore, courts have discretion to set the level of the fine within a broad statutory range. See M. Frankel, *Criminal Sentences* 5 (1973).

34. See *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1166 (S.D.N.Y. 1983); cf. *Higdon v. United States*, 627 F.2d 893, 899 (9th Cir. 1980) (court must evaluate individual defendant's financial condition).

35. See C. Stone, *supra* note 7, at 36-38; Coffee, *supra* note 2, at 393; *Structural Crime*, *supra* note 2, at 364.

tional behavior is an incomplete interpretation of corporate activity. Diffusion of control in the large publicly-held company³⁶ brings other factors into the inquiry. For example, the career concerns of individuals and competition among discrete groups within the corporation³⁷ are critical motivational considerations.

Advocates of fines as the sole sanction assume that top management has control over those in middle-level management³⁸ who frequently commit the crime.³⁹ The upper echelon, however, is often insulated from wrongdoing either by choice or organizational structure.⁴⁰ As a result, those high in the corporate hierarchy, who are the most concerned with the corporation's financial health, are often unaware of the decision to act criminally. Middle-level officials, on the other hand, are concerned primarily with career advancement⁴¹ rather than the economic health of the corporate entity. Thus, the threat of a fine does little to deter their transgressions.

Fines alone do not sufficiently address the complexities of institutional crime. Although a monetary penalty is a useful tool of criminal sentencing, it is not adequate as a sole remedy to control corporate criminal activity. As a result of the ineffectiveness of fines, some courts have used the Probation Act to develop additional sentencing alternatives.

II. THE PROBATION ACT

The Probation Act grants courts the power to avoid statutory penal sanctions and impose conditions of probation on criminal defendants.⁴² After the Probation Act was passed in 1925, courts contem-

36. See C. Stone, *supra* note 7, at 43-44; Braithwaite & Geis, *supra* note 1, at 298-99; Coffee, *supra* note 2, at 399; *Structural Crime*, *supra* note 2, at 357-59.

37. See Coffee, *supra* note 2, at 393-400.

38. This conclusion is evident from the belief that fines imposed upon the corporate entity can control corporate crime. See K. Elzinga & W. Breit, *supra* note 21, at 132; R. Posner, *supra* note 21, at 236. This belief incorrectly assumes that upper-level management can and will control lower-level criminal activity. See *infra* notes 40-41 and accompanying text.

39. Coffee, *supra* note 2, at 397.

40. See C. Stone, *supra* note 7, at 60-62; Coffee, *supra* note 2, at 397-98; *Structural Crime*, *supra* note 2, at 357-58.

41. See Coffee, *supra* note 2, at 393-400.

42. 18 U.S.C. § 3651 (1982). In *Ex parte United States*, 242 U.S. 27 (1916), the Supreme Court held that a court has no authority at common law to suspend the imposition or execution of a criminal sentence. *Id.* at 44. The Court premised its holding on the principle of separation of powers. It is the legislative function to define crimes and set punishment. Although the judiciary has the power to conduct trials and impose punishment, courts cannot ignore the sanction fixed by Congress for the offense. *Id.* at 41-42; see *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (length of sentence is a matter of "legislative prerogative"); *United States v. Evans*, 333 U.S.

plated only natural defendants as proper subjects for probation.⁴³ In the last twelve years, however, courts have interpreted the word "defendant" in the Act to include corporations.⁴⁴

483, 486 (1948) (legislature defines crimes and sets penalties); *Morgan v. Devine*, 237 U.S. 632, 639 (1915) (Congress defines offenses); *United States v. Wiltberger*, 18 U.S. 76, 93, 5 Wheat. 76, 95 (1820) (same). The *Ex parte United States* holding stopped the common district court practice of placing defendants on probation. *United States v. Fultz*, 482 F.2d 1, 2 (8th Cir. 1973); *United States v. Ellenbogen*, 390 F.2d 537, 541 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). The Probation Act, therefore, is the only source of judicial authority to suspend imposition or execution of sentence and impose conditions of probation. *Roberts v. United States*, 320 U.S. 264, 265-66 (1943); *United States v. Beacon Piece Dyeing & Finishing Co.*, 455 F.2d 216, 216-17 (2d Cir. 1972).

43. *See, e.g.*, *Roberts v. United States*, 320 U.S. 264, 272 (1943) (The basic purpose of the Probation Act is "to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement."); *United States v. Murray*, 275 U.S. 347, 357 (1928) (purpose of Act is to give first-time offenders a chance to reform and escape contaminative influence of prison); *United States v. Johnson*, 56 F.2d 658, 659 (N.D. Cal. 1932) (same).

44. *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 60-61 (7th Cir. 1972); *United States v. J.C. Ehrlich Co.*, 372 F. Supp. 768, 769 (D. Md. 1974). Courts have defined the word "defendant" to include corporations in other criminal laws. *See, e.g.*, *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958) (dictum) (Motor Carrier Act of 1935); *New York C. & H.R.R.R. Co. v. United States*, 212 U.S. 481, 494-97 (1909) (Elkins Act); *Joplin Mercantile Co. v. United States*, 213 F. 926, 935-36 (8th Cir. 1914) (federal conspiracy law), *aff'd*, 236 U.S. 531 (1915). Criminal statutes that prescribe fines and imprisonment apply to corporations even though companies are subject to only one category of sanctions—fines. *See United States v. Union Supply Co.*, 215 U.S. 50, 54-55 (1909). The Probation Act applies to crimes even when a fine is the only available sanction. *United States v. Atlantic Richfield Co.*, 465 F.2d at 61.

Institutional responsibility for criminal activity corresponds to the theory of respondeat superior in tort liability. *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958); *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962); *United States v. Gibson Prods. Co.*, 426 F. Supp. 768, 770 (S.D. Tex. 1976). Under this theory, a company is criminally liable for the deeds of its employees acting within the scope of their employment. *New York C. & H.R.R.R. Co. v. United States*, 212 U.S. 481, 493-94 (1909); *United States v. Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979); *United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978). Liability attaches even if an act is contrary to express instructions, *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), as long as the deed was performed with the intent to benefit the company. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962); *Egan v. United States*, 137 F.2d 369, 379 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943). A corporate employer may be held liable for its employees' activities even when the statute does not specifically provide for such liability. *United States v. Armour & Co.*, 168 F.2d 342, 343 (3d Cir. 1948). The corporate entity can be convicted of a charge of which the corporate officers

The Probation Act is designed to grant the offender a reprieve from incarceration while promoting his rehabilitation under the supervision of the court.⁴⁵ The Act permits a court to place a convicted offender on probation under "such terms and conditions as the court deems best."⁴⁶ The statute also contains a non-exhaustive listing of probation conditions that a court may impose. These include the paying of fines, making restitution, meeting financial support obligations and residing in a community treatment or drug rehabilitation program.⁴⁷

Although the grant or denial of probation and the imposition of conditions are final decisions by the trial court,⁴⁸ such decisions may be overturned upon a showing that the court clearly abused its discretion.⁴⁹ Neither punishment nor the avoidance of statutory sentencing limits may be the primary purpose of a probation condition.⁵⁰ A probation condition is valid only if it is reasonably related to rehabilitation of the offender and protection of the public.⁵¹ Nevertheless, the opportunity for a probationary sentence is a matter of grace rather than a constitutional right.⁵² Thus, a court has broad discretion to

have been acquitted. *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963); *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950, 953 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959). *But see Pevely Dairy Co. v. United States*, 178 F.2d 363, 370-71 (8th Cir. 1949) (acquittal of corporate officers and conviction of corporation illogical), *cert. denied*, 339 U.S. 1942 (1950). Vicarious institutional liability is justified because a diffusion of control in most companies often makes it difficult for law enforcement authorities to identify the culpable actor. See *supra* note 4 and accompanying text. The corporation has more power than government authorities to identify and sanction its employees. Thus, holding the company liable will encourage it to take greater care to control employee activity. *Coffee, supra* note 2, at 407-08; see *United States v. A & P Trucking Co.*, 358 U.S. 121, 126 (1958).

45. *Roberts v. United States*, 320 U.S. 264, 272 (1943); *Burns v. United States*, 287 U.S. 216, 220 (1932).

46. 18 U.S.C. § 3651 (1982).

47. *Id.*

48. *Korematsu v. United States*, 319 U.S. 432, 433, 436 (1943).

49. *United States v. Alarik*, 439 F.2d 1349, 1351 (8th Cir. 1971).

50. *Higdon v. United States*, 627 F.2d 893, 897-98 (9th Cir. 1980).

51. *Id.*; *United States v. Tonry*, 605 F.2d 144, 147 (5th Cir. 1979); *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979); *United States v. Pierce*, 561 F.2d 735, 739 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 263-64 (9th Cir. 1975); see 66 Cong. Rec. 5201 (remarks of Rep. Upshaw); *id.* at 3891 (statement of Rep. Raker).

52. *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935); *Burns v. United States*, 287 U.S. 216, 220 (1932); *United States v. Alarik*, 439 F.2d 1349, 1351 (8th Cir. 1971); *United States v. Birnbaum*, 421 F.2d 993, 998 (2d Cir.), *cert. denied*, 397 U.S. 1044 (1970).

grant or deny probation⁵³ and to decide what probation conditions are appropriate for rehabilitation of a particular defendant.⁵⁴

III. THE LIMITS OF CORPORATE PROBATION CONDITIONS

The permissible conditions enumerated in the Probation Act and the Act's rehabilitative purpose are the only statutory sources of guidance for a trial court in setting probationary terms.⁵⁵ Although the Probation Act has been liberally construed to expand judicial sentencing discretion, a court's power to impose probation conditions is not unlimited. For example, the Act's restitution section may limit monetary conditions of probation, such as ordering the corporate offender

53. *Roberts v. United States*, 320 U.S. 264, 272 (1943); *Burns v. United States*, 287 U.S. 216, 220 (1932); *United States v. Alarik*, 439 F.2d 1349, 1351 (8th Cir. 1971).

54. *Roberts v. United States*, 320 U.S. 264, 272 (1943); *Burns v. United States*, 287 U.S. 216, 220-21 (1932); *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979); *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979); *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973) (*per curiam*) (quoting *United States v. Chapel*, 428 F.2d 472, 474 (9th Cir. 1970)); *Porth v. Templar*, 453 F.2d 330, 333 (10th Cir. 1971); *United States v. Alarik*, 439 F.2d 1349, 1351 (8th Cir. 1971); *United States v. Baker*, 429 F.2d 1344, 1347 (7th Cir. 1970); *United States v. Steiner*, 239 F.2d 660, 662 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957).

55. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975); 18 U.S.C. § 3651 (1982). The Probation Act contains certain procedural limitations on the granting of probation. A court must place the defendant on probation when not imposing the statutory sentence. *United States v. Lancer*, 508 F.2d 719, 735 n.48 (3d Cir.), *cert. denied*, 421 U.S. 989 (1975); *United States v. Sams*, 340 F.2d 1014, 1019-20 (3d Cir.), *cert. denied*, 380 U.S. 974 (1965); *United States v. ABC Freight Forwarding Corp.*, 112 F. Supp. 190, 191 (S.D.N.Y. 1953); see 18 U.S.C. § 3651 (1982). The court has the option, however, of imposing the sentence on conviction and suspending its execution, or imposing the sentence at the time of revocation of probation. *Roberts v. United States*, 320 U.S. 264, 267-68 (1943). Probation must be granted before service of a sentence commences. *Affronti v. United States*, 350 U.S. 79, 83 (1955); *United States v. Murray*, 275 U.S. 347, 358-59 (1928); *United States v. Beacon Piece Dyeing & Finishing Co.*, 455 F.2d 216, 217 (2d Cir. 1972). By the terms of the statute, a court also has the power to modify probation conditions or revoke probation entirely. 18 U.S.C. § 3651 (1982). The Supreme Court and courts of appeals have developed procedural due process guidelines for revocation of probation and parole. Although probationers do not have the full panoply of due process rights available in a criminal trial, they do have the right to an informal hearing. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935); *United States v. D'Amato*, 429 F.2d 1284, 1286 (3rd Cir. 1970); see also *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (right to counsel at combined probation revocation and sentencing hearing); *United States v. Dane*, 570 F.2d 840, 843 (9th Cir. 1977) (probationer must have notice of condition before revocation), *cert. denied*, 436 U.S. 959 (1978); *United States v. Chapel*, 428 F.2d 472, 474 (9th Cir. 1970) (same).

to donate money to a charity.⁵⁶ Non-monetary conditions must be reasonably related to rehabilitation of the offender, particularly when the terms of probation are extraordinary. In addition, all conditions must meet constitutional standards for probationers.

A. Monetary Conditions of Probation

The restitution section of the Act provides that one permissible term of probation is restitution to the victim of the crime.⁵⁷ Some courts have held that this section bars all monetary conditions of probation unless the recipient is directly victimized by the crime.⁵⁸ The Tenth Circuit, for example, has twice struck down probation conditions that

56. See, e.g., *United States v. William Anderson Co.*, 698 F.2d 911, 912 (8th Cir. 1982); *United States v. Prescon Corp.*, 695 F.2d 1236, 1238-39 (10th Cir. 1982); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976); *United States v. Missouri Valley Constr. Co.*, No. 82-L-01, slip op. at 1 (D. Neb. July 25, 1983), *appeal argued*, No. 83-2188 (8th Cir. Mar. 15, 1984); *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 214 (D. Md. 1983).

57. 18 U.S.C. § 3651 (1982). A narrow reading of the restitution provision limits a court's authority to order restitution to actual damages suffered by direct victims of a crime. E.g., *United States v. Jimenez*, 600 F.2d 1172, 1174 (5th Cir.), *cert. denied*, 444 U.S. 903 (1979); *United States v. Boswell*, 565 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978); *United States v. Buechler*, 557 F.2d 1002, 1007-08 (3d Cir. 1977); *United States v. Hoffman*, 415 F.2d 14, 21-22 (7th Cir.), *cert. denied*, 396 U.S. 958 (1969); *Karrell v. United States*, 181 F.2d 981, 987 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950); *United States v. Follette*, 32 F. Supp. 953, 954-55 (E.D. Pa. 1940); see *State v. Stalheim*, 275 Or. 683, 688, 552 P.2d 829, 832 (1976) (restitution not permitted to family of victim); see also *United States v. Gering*, No. 82-3072, slip op. at 4549 (9th Cir. Sept. 19, 1983) (restitution limited to damages alleged in the indictment); *United States v. Seest*, 631 F.2d 107, 110 (8th Cir. 1980) (restitution limited to actual damages); *United States v. Shelby*, 573 F.2d 971, 976 (7th Cir.) (restitution condition that gave authority to probation department to determine amount held too vague), *cert. denied*, 439 U.S. 841 (1978); *United States v. Mancuso*, 444 F.2d 691, 695 (5th Cir. 1971) (amount must be recited in court order). Even an expansive reading of the restitution section limits payment to victims of the offense to established amounts. See *United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir. 1982) (amount established by indictment, plea agreement and presentence proceedings); *United States v. Landay*, 513 F.2d 306, 308 (5th Cir. 1975) (amount established by consent judgement); *United States v. McLaughlin*, 512 F. Supp. 907, 908 (D. Md. 1981) (amount established by plea agreement). Some states, however, are more flexible in ordering restitution. E.g., *State v. Cummings*, 120 Ariz. 69, 71, 583 P.2d 1389, 1391 (1978) (restitution allowed on an uncharged burglary); *People v. Lent*, 15 Cal. 3d 481, 487, 541 P.2d 545, 549, 124 Cal. Rptr. 905, 909 (1975) (en banc) (restitution allowed on counts defendant was acquitted on because of additional information discovered in probation hearing).

58. *United States v. Prescon Corp.*, 695 F.2d 1236, 1243 (10th Cir. 1982); *United States v. Vaughn*, 636 F.2d 921, 923 (4th Cir. 1980); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976); *Karrell v. United States*, 181 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950).

compelled corporate offenders to contribute money to charitable organizations.⁵⁹ The court ruled that all monetary probation terms are governed by the restitution section of the Act.⁶⁰ Thus, unless a charitable organization is a direct victim of the crime, the organization cannot be a beneficiary of a monetary probation condition. The Eighth and Ninth Circuits, however, have ruled that the restitution section does not govern all other monetary conditions of probation.⁶¹ Corporate contributions to charitable organizations have been upheld under the Act's general grant of authority to prescribe probation conditions.

Historically, the Probation Act has afforded courts broad discretion to fashion appropriate conditions of probation for a particular offender.⁶² The enumeration of specific conditions in the Act does not hinder a court from imposing non-restitutionary monetary probation conditions.⁶³ The Act's use of the term "among" to introduce the list of conditions indicates that Congress did not intend the enumeration to be restrictive.⁶⁴ Furthermore, specific enumeration in a statute does not limit a general provision if "the members of the enumeration, although specific, are essentially diverse in character."⁶⁵ The conditions listed in the Act are diverse. The victim restitution provision, for example, is clearly distinguishable from the provision that provides for participation in community treatment programs.⁶⁶ Thus, the fact that the Act contains a provision for restitution should not limit the power

59. *United States v. Prescon Corp.*, 695 F.2d 1236, 1243 (10th Cir. 1982); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976).

60. *United States v. Prescon Corp.*, 695 F.2d 1236, 1242-43 (10th Cir. 1982); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976); *see* *United States v. Vaughn*, 636 F.2d 921, 923 (4th Cir. 1980); *Karrell v. United States*, 181 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950).

61. *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982); *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1982).

62. *See supra* note 54 and accompanying text.

63. *United States v. William Anderson Co.*, 698 F.2d 911, 914 (8th Cir. 1982); *United States v. Prescon Corp.*, 695 F.2d 1236, 1242 (10th Cir. 1982); *United States v. Vaughn*, 636 F.2d 921, 923 (4th Cir. 1980); *United States v. Tonry*, 605 F.2d 144, 147 (5th Cir. 1979); *see* *Porth v. Templar*, 453 F.2d 330, 333 (10th Cir. 1971).

64. As the court in *William Anderson* pointed out: "When specifying certain particular terms as includible 'among' the conditions of prohibition [sic], the statute simply wishes to put beyond question *per cautelam* the propriety of the particular terms specified. The meaning is the same as if the familiar corporate draftsman's locution 'including but not limited to' had been used." *William Anderson*, 698 F.2d at 914; *see* *United States v. Bishop*, 537 F.2d 1184, 1186 (4th Cir. 1976) (statute stated "among," therefore, conditions listed were not exclusive), *cert. denied*, 429 U.S. 1093 (1977).

65. 2A C. Sands, *Sutherland Statutory Construction* § 47.20 (4th ed. 1973).

66. 18 U.S.C. § 3651 (1982). *See supra* text accompanying note 47.

of courts to fashion monetary conditions of probation pursuant to the Act's general grant of authority.⁶⁷

The basis of victim restitution in the Probation Act is the belief that compensation of the victim has rehabilitative value for the criminal.⁶⁸ Therefore, whether a monetary probation condition is permissible depends upon the condition's rehabilitative effect on the offender. That is not to say, of course, that charitable contributions could not have such an impact. Congress apparently concluded, however, that rehabilitation can be better promoted by offender compensation of the victim rather than a charitable contribution to an organization unconnected to the crime.

Rather than proscribing all monetary probation conditions not directly benefiting victims, courts can remain consistent with the policy of the Act and preserve their flexibility by imposing such conditions in limited circumstances.⁶⁹ In cases when the victim is identifiable, any monetary probation condition should compensate the victim. If the victim cannot be ascertained,⁷⁰ or has already been made whole,⁷¹ the Act should not preclude a charitable contribution condition that the court determines would rehabilitate an offender.⁷²

67. See *supra* note 46 and accompanying text. In addition, whether specific terms in a statute limit the general grant of authority should be determined by reference to the legislative intent. 2A C. Sands, *supra* note 65, § 47.18, at 110. The Act is liberally construed to give courts flexibility in fashioning conditions of probation for an individual offender. See *supra* note 54 and accompanying text. Therefore, it is unlikely that the legislature meant to restrict courts by enumerating particular terms.

68. See *United States v. Buechler*, 557 F.2d 1002, 1007 (3d Cir. 1977); *United States v. McLaughlin*, 512 F. Supp. 907, 909, 912 (D. Md. 1981); *accord State v. Cummings*, 120 Ariz. 69, 71, 583 P.2d 1389, 1391 (1978); *People v. Richards*, 17 Cal. 3d 614, 622, 552 P.2d 97, 102, 131 Cal. Rptr. 537, 542 (1976); *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (1978); Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. Rev. 52, 124 & n.405 (1982).

69. One district court tried to resolve this issue by emphasizing that the monetary condition was not connected with restitution. The corporate defendant pleaded guilty to bid rigging and was placed on probation on the condition that it pay \$175,000 to Baltimore City Foundation, Inc. The court held the condition valid because there was no "factual nexus" between the charitable organization and the crime committed. The condition, therefore, did not fall within the restitution section of the Probation Act and thus was not circumscribed by that provision. *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 214, 217 (D. Md. 1983).

70. See *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1169 n.20 (S.D.N.Y. 1983) (large class of consumer victims; individual victims difficult to identify).

71. In *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983), although a class of the victims was identifiable, the court took into account private settlements with identifiable victims in fashioning the non-restitutionary probation conditions. *Id.* at 1167. Rehabilitation is not served by restitution to the victim for more than the injury suffered. See *State v. Stalheim*, 275 Or. 683, 688-89, 552 P.2d

B. Non-Monetary Probation Conditions: Extraordinary Terms and Constitutional Limitations

The scope of permissible non-monetary probation conditions is broad, but not unlimited. Extraordinary probation terms and conditions that impermissibly infringe upon constitutional rights have been struck down.

1. Extraordinary Probation Terms

Appellate review of probation conditions generally has been limited to cases of clear abuse of discretion.⁷³ Severe or unusual probation terms, however, demand appellate scrutiny to avoid isolated eccentricities.⁷⁴ Probation conditions "must be narrowly drawn to achieve rehabilitation and protection of the public without unnecessarily restricting the probationer's otherwise lawful activities."⁷⁵ Accordingly, there is a trend to scrutinize extraordinary probationary terms.⁷⁶ For example, a condition has been overturned that required the defendant to resign from his state bar association for filing a false income tax return.⁷⁷ Similarly, a condition was struck down that required the defendant to forfeit all his assets and work full-time without pay for a charity for three years.⁷⁸ In determining whether a probation condition is permissible, the degree of rehabilitation required to reform the offender should be balanced against the harshness of the condition imposed.⁷⁹

When an unusual condition serves a substantial rehabilitative purpose and is not disproportionate to the offense, the condition should be

829, 832 (1976). Recent passage of the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (codified in scattered sections of 18 U.S.C.), has alleviated any need for courts to use the Probation Act to compensate victims. The VWPA's provision for restitution is primarily aimed at compensation of the victim. Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507, 507-08 (1984).

72. A monetary probation condition, however, cannot exceed the statutory maximum fine for the offense. *Fiore v. United States*, 696 F.2d 205, 209 (2d Cir. 1982).

73. See *supra* note 49 and accompanying text.

74. *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980); *United States v. Pastore*, 537 F.2d 675, 681 (2d Cir. 1976).

75. *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980).

76. See, e.g., *United States v. Restor*, 679 F.2d 338, 340 (3d Cir. 1982); *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980); *United States v. Pastore*, 537 F.2d 675, 681 (2d Cir. 1976); *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972); see also *Springer v. United States*, 148 F.2d 411, 415-16 (9th Cir. 1945) (Denman & Stephens, J.J., concurring) (probation condition void that required a selective service violator to donate blood to the Red Cross).

77. *United States v. Pastore*, 537 F.2d 675, 682-83 (2d Cir. 1976).

78. *Higdon v. United States*, 627 F.2d 893, 899-900 (9th Cir. 1980).

79. *Id.* at 898-900.

sustained. For example, a probation condition that called for wholesale bakeries convicted of price fixing to deliver baked goods to community organizations⁸⁰ is consistent with the Act's intent. This condition was designed to rehabilitate the corporate offender by making company executives and workers, both of whom participate in complying with the condition, responsible for the corporation's past wrongdoing.⁸¹

In fashioning conditions of probation, the severity of the conditions imposed is balanced against the seriousness of the crimes and the defendants' need for rehabilitation. Courts, however, have different notions of where this balance should be struck. A condition that offends the Ninth Circuit's idea of justice may be acceptable to the Fourth Circuit.⁸² Therefore, this test does little to determine the types of conditions that serve a sufficient rehabilitative purpose and the narrowness with which such conditions must be fashioned.

2. Constitutional Limitations

Although the constitutional rights of probationers may be restricted,⁸³ probationers do not forfeit all constitutional protection.⁸⁴

80. *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1164-65 (S.D.N.Y. 1983).

81. *Id.* at 1167.

82. *Compare Higdon v. United States*, 627 F.2d 893, 899-900 (9th Cir. 1980) (striking charitable work and forfeiture of assets conditions) *with United States v. Arthur*, 602 F.2d 660, 661, 664 (4th Cir.) (upholding two-year charitable work requirement), *cert. denied*, 444 U.S. 992 (1979).

83. *Owens v. Kelley*, 681 F.2d 1362, 1366-67 (11th Cir. 1982); *United States v. Tony*, 605 F.2d 144, 148-50 (5th Cir. 1979); *Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971). Courts have upheld warrantless searches as conditions of probation. *E.g., Owens*, 681 F.2d at 1366-67; *United States v. Gordon*, 540 F.2d 452, 453 (9th Cir. 1976). *But see United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978) (revocation of probation based on information obtained by warrantless search violates probationer's fourth amendment rights); *United States v. Jeffers*, 573 F.2d 1074, 1075 (9th Cir. 1978) (warrantless search probation condition overbroad). A standard condition of probation that has been upheld is that the defendant associate only with law-abiding individuals. *United States v. Basso*, 632 F.2d 1007, 1010 (2d Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *United States v. Albanese*, 554 F.2d 543, 546-47 (2d Cir. 1977); *United States v. Adderly*, 529 F.2d 1182, 1183 (5th Cir. 1976). Some courts, however, have gone beyond this standard condition to restrict otherwise lawful associations. *E.g., United States v. Bishop*, 537 F.2d 1184, 1186 (4th Cir. 1976) (probationer not to frequent racetracks); *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974) (probationer not to associate with Irish organizations), *cert. denied*, 419 U.S. 1124 (1975); *United States v. Kohlberg*, 472 F.2d 1189, 1190 (9th Cir. 1973) (probationer not to associate with homosexuals); *Whaley v. United States*, 324 F.2d 356, 359 (9th Cir. 1963) (probationer not to engage in repossession business); *Berra v. United States*, 221 F.2d 590, 598 (8th Cir. 1955) (probationer not to hold office in a labor organization), *aff'd*, 351 U.S. 131 (1956).

84. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-67 (9th Cir. 1975). A probation condition that constituted an outright ban on speech has been struck

To determine whether a condition that restricts constitutionally-protected rights is valid, the degree of infringement must be balanced against the rehabilitative purposes to be served and the legitimate needs of law enforcement.⁸⁵

First amendment rights are retained by probationers.⁸⁶ Nonetheless, a condition was upheld that prohibited a corporate defendant, convicted of mailing obscene material, from engaging in the otherwise lawful distribution of pornography.⁸⁷ The degree of infringement on the probationer's first amendment rights was outweighed by the rehabilitative benefits of the condition.⁸⁸

The Tenth Circuit, on the other hand, has struck down a probation condition that restricted a probationer's right to speak or write about the constitutionality of taxation.⁸⁹ Although the probationer was an habitual violator of the tax laws,⁹⁰ his constitutional right to express an opinion outweighed the condition's rehabilitative value.⁹¹ Speech restrictions in non-commercial settings can be outweighed only by significant rehabilitative interests.⁹²

Less constitutional protection, however, is afforded to commercial than to non-commercial speech.⁹³ As a result, a court has more freedom to fashion probation conditions that affect a business corpora-

down. *See* Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971); *cf.* Sobell v. Reed, 327 F. Supp. 1294, 1304 (S.D.N.Y. 1971) (parole condition restricting speech invalid); Hyland v. Procnier, 311 F. Supp. 749, 750 (N.D. Cal. 1970) (same). *But see* United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979) (probation condition upheld that prohibited defendant from engaging in political activities). *See generally* Note, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 Colum. J.L. & Soc. Probs. 45 (1981) (review of constitutional restrictions on probationers).

85. *Owens v. Kelley*, 681 F.2d 1362, 1366 (11th Cir. 1982); *United States v. Pierce*, 561 F.2d 735, 739 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264-65 (9th Cir. 1975).

86. *See* Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971); *cf.* Sobell v. Reed, 327 F. Supp. 1294, 1304 (S.D.N.Y. 1971) (parole); Hyland v. Procnier, 311 F. Supp. 749, 750-51 (N.D. Cal. 1970) (same).

87. *United States v. Nu-Triumph, Inc.*, 500 F.2d 594, 596 (9th Cir. 1974).

88. *See id.*

89. Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971).

90. *Id.* at 332.

91. *See id.* at 334. The court, however, upheld the condition restricting speech to the extent it prohibited the probationer from encouraging others to violate the tax laws. *Id.*

92. *See id.*; *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264-65 (9th Cir. 1975).

93. *See* Breard v. Alexandria, 341 U.S. 622, 642 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); *SEC v. Lowe*, Nos. 83-6108, 83-6116, slip op. at 1105-07 (2d Cir. Jan. 18, 1984).

tion's, rather than a private individual's, first amendment rights.⁹⁴ Courts, however, are bound by the purpose of the Act and the measure of first amendment protection that is provided for the corporate entity.⁹⁵ Probation conditions that restrict commercial speech, therefore, should be substantially related to rehabilitation of the offender.⁹⁶

C. *The Establishment Clause*

There has been little attention paid to who can be a permissible recipient of corporate probation. Nonetheless, a first amendment issue may be raised when the charitable organizations designated as recipients of a monetary or non-monetary probation condition have religious affiliations.⁹⁷

The establishment clause of the first amendment prohibits government sponsorship of religion.⁹⁸ The clause, however, does not preclude all official contact with religious groups.⁹⁹ The Supreme Court has developed a three-prong test to determine whether church-state entanglement in a given case is impermissible.¹⁰⁰ The government involvement must have both a secular purpose and effect and cannot result in excessive entanglement with the religious group.¹⁰¹

The conditions specified by the federal district court in *United States v. Danilow Pastry Co.*¹⁰²—delivery of baked goods to religiously-affiliated community groups¹⁰³—would probably survive un-

94. Cf. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971) (upholding statutory ban on advertising of cigarettes), *aff'd mem. sub nom. Capital Broadcasting Co. v. Acting Att'y Gen.*, 405 U.S. 1000 (1972).

95. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978); see also *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980) (state public utility order that prohibited utility from inserting discussions of public policy in electric bills invalid). See generally Note, *Constitutional Rights of the Corporate Person*, 91 Yale L.J. 1641 (1982) (critique of theory underlying corporate constitutional rights).

96. See *supra* text accompanying note 88.

97. See *infra* notes 102-10 and accompanying text.

98. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

99. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-46 (1976); *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970).

100. *Wolman v. Walter*, 433 U.S. 229, 235-36 (1977); *Meek v. Pittenger*, 421 U.S. 349, 358 (1975); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

101. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

102. 563 F. Supp. 1159 (S.D.N.Y. 1983).

103. The recipient organizations designated by the court included: Catholic Charities of the Archdiocese of New York, Pleasantville Cottage School of the Jewish Child Care Association of the United Jewish Appeal—Federation of Jewish Philanthropies, Federation of Protestant Welfare Agencies, West Side Churches Service Alliance. *Id.* at 1165.

der the test. First, the conditions have a secular purpose¹⁰⁴—to promote rehabilitation of the corporate offenders.¹⁰⁵ Second, the conditions have a secular effect¹⁰⁶—feeding the community.¹⁰⁷ Third, the court is not excessively entangled with the religious groups.¹⁰⁸ The extent of government involvement with religious organizations is measured by the type of government aid and the relationship created between the government and the religious group.¹⁰⁹ Although the court and probation authorities supervise the performance of probation, the *Danilow* conditions involve the government in the group's secular rather than religious activities.¹¹⁰

A more difficult question would be presented if a monetary or non-monetary condition were used for religious purposes. The court in *United States v. Missouri Valley Construction Co.*,¹¹¹ for example, required a corporate defendant to establish an ethics chair at the University of Nebraska.¹¹² Had the money been donated to a religiously affiliated university, the condition might not survive an establishment clause test.¹¹³ This type of condition likely would transgress the boundaries set by the Supreme Court to guard against government establishment of religion.

IV. PROBLEMS WITH REMEDIES UNDER THE PROBATION ACT

Even when courts comply with the Probation Act and the Constitution, corporate probation may not be an effective sentencing tool. The scholarly consensus against broad judicial sentencing discretion¹¹⁴ militates against the use of the Probation Act to craft extraordinary

104. See *Meek v. Pittenger*, 421 U.S. 349, 358 (1975) (citing *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968)); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

105. *Danilow Pastry Co.*, 563 F. Supp. at 1166.

106. See *Meek v. Pittenger*, 421 U.S. 349, 358 (1975) (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223-26 (1963)); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

107. *Danilow Pastry Co.*, 563 F. Supp. at 1169 n.20, 1172.

108. See *Meek v. Pittenger*, 421 U.S. 349, 358 (1975) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970)); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

109. See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970).

110. *Danilow Pastry Co.*, 563 F. Supp. at 1164-65.

111. No. 82-L-01, slip op. (D. Neb. July 25, 1983), *appeal argued*, No. 83-2188 (8th Cir. Mar. 15, 1984).

112. *Id.* at 1.

113. See *Wolman v. Walter*, 433 U.S. 229, 250 (1977); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975).

114. See, e.g., S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983) [hereinafter cited as Senate Report]; M. Frankel, *supra* note 33, at 5 (1973); Dershowitz, *The Paper Label Sentences: Critiques*, 86 Yale L.J. 619, 629 (1977); Harland, *Court-Ordered Community Service in Criminal Law: The Continuing Tyranny of Benevolence?*, 29 Buff. L. Rev. 425, 444-45 (1980).

remedies.¹¹⁵ Moreover, rehabilitation may not be the best method of combatting corporate crime.

A. *Unguided Sentencing Discretion*

Courts are not institutionally capable of developing effective remedies for corporate criminal behavior without some guidance.¹¹⁶ Until recently,¹¹⁷ Congress had given little attention to the overall goals of criminal sanctions.¹¹⁸ Consequently, the judiciary has been left with almost unbridled discretion in sentencing.¹¹⁹ Judicial sentencing decisions are often based upon a particular judge's predilections and individual sentencing philosophy rather than coherent policy.¹²⁰

Nowhere is the confusion over sanctions more pronounced than in corporate criminal sentencing.¹²¹ Courts have made an effort to de-

115. See *United States v. Pastore*, 537 F.2d 675, 680-81 (2d Cir. 1976); *Dershowitz*, *supra* note 114, at 628.

116. See Frankel, *Lawlessness in Sentencing*, 41 U. Cinn. L. Rev. 1, 4-6 (1972).

117. Congress is currently considering a bill, S. 1762, 98th Cong., 1st Sess. (1983), that would make deterrence and punishment, as opposed to rehabilitation alone, legitimate goals of probation. See *infra* note 153.

118. M. Frankel, *supra* note 33, at 7; Sims, *supra* note 2, at 699.

119. *United States v. Pastore*, 537 F.2d 675, 681 (2d Cir. 1976); Senate Report, *supra* note 114, at 38; M. Frankel, *supra* note 33, at 7-8; *Dershowitz*, *supra* note 114, at 628; Sims, *supra* note 2, at 699; von Hirsch, *supra* note 6, at 8-9. Sentences within statutory limits are subject to only limited appellate review. See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *Blockburger v. United States*, 284 U.S. 299, 305 (1932); *United States v. Wylie*, 625 F.2d 1371, 1379 (9th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *United States v. Short*, 597 F.2d 1122, 1124 (8th Cir.), *cert. denied*, 444 U.S. 901 (1979). If a trial judge fails to exercise discretion, however, the sentence may be held invalid. *Woosley v. United States*, 478 F.2d 139, 143 (8th Cir. 1973); *United States v. Daniels*, 446 F.2d 967, 971-72 (6th Cir. 1971). If the sentence is based on false information it may also be held invalid. *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). There is usually no requirement that a court state the reasons for a particular sentence. *McGee v. United States*, 462 F.2d 243, 247 (2d Cir. 1972). If a higher sentence is imposed upon reconviction, however, the judge must state the reasons on the record. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969). Sentences under the Federal Youth Corrections Act, 18 U.S.C. § 5010(d) (1982), and criminal contempt statutes have been subject to a higher standard of review. See *Dorszynski*, 418 U.S. at 425-26 (explicit finding required that youth would not benefit from sentencing under the Youth Corrections Act); *Green v. United States*, 356 U.S. 165, 185 (1958) (higher standard of review of criminal contempt sentences because of the lack of statutory guidelines).

120. M. Frankel, *supra* note 33, at 7-8; see *United States v. Martell*, 335 F.2d 764, 767-68 (4th Cir. 1964); Senate Report, *supra* note 114, at 38; Sims, *supra* note 2, at 699.

121. See H. Packer, *supra* note 4, at 356; Coffee, *supra* note 2, at 386; see also Sims, *supra* note 2, at 701 (analysis of white-collar criminal sanctions termed "sketchy"). The confusion over appropriate corporate criminal sentences may stem from a lack of empirical evidence. See Orland, *supra* note 2, at 503 ("[T]he study of corporate crime remains a curiously neglected area of scholarship.").

velop alternatives to fines. Nonetheless, courts are using the Probation Act to fashion probation conditions that are almost indistinguishable from fines. Furthermore, the new probation conditions, which allow funds to be directed to private charities rather than to the public treasury, may give rise to charges of judicial impropriety. Finally, disparate sentences for similarly situated defendants offend the idea of a just sentencing system.

1. Monetary and Non-Monetary Probation Conditions Compared to Fines

The effect of a non-monetary condition of probation differs from that of a monetary condition only if there is a relationship among the particular condition, the crime and the offender. The trial court in *United States v. Mitsubishi International Corp.*,¹²² for example, combined monetary and community service conditions by requiring the corporate defendants to contribute money and furnish an executive to aid a community organization in developing its programs.¹²³ The rehabilitative value of this condition was limited because there was no relationship between the condition prescribed and the crime committed.¹²⁴ Moreover, the sanction was largely external. Although the company had to designate an executive to perform the condition, like the fine there was little internalization of the punishment throughout the corporation. In contrast, the *Danilow* conditions, which required the corporate entity to provide baked goods to community organizations,¹²⁵ forced many of the company's employees to take part in fulfilling the terms of the company's punishment.¹²⁶ Such participative conditions better achieve the rehabilitative purpose of the Probation Act.

Monetary conditions of probation also share the shortcomings of fines discussed in Part I of this Note. To many profitable companies, monetary conditions, like fines, are simply a cost of doing business.¹²⁷ The cost of monetary conditions can still be passed along to shareholders and consumers.¹²⁸ Moreover, monetary probation terms, like fines, have little effect on those in middle-level management who frequently commit the crime.¹²⁹

122. 677 F.2d 785 (9th Cir. 1982).

123. *Id.* at 787.

124. The corporate defendants committed violations of the Elkins Act, 49 U.S.C. §§ 11,903, 11,915 (1976 & Supp. V 1981), in connection with railroad freight tariffs. 677 F.2d at 786.

125. *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1165 (S.D.N.Y. 1983).

126. *Id.* at 1167.

127. See *supra* note 24 and accompanying text.

128. See *supra* notes 31-32 and accompanying text.

129. See *supra* notes 38-41 and accompanying text.

Furthermore, monetary conditions cannot be sufficiently distinguished from imposition of a fine to justify the diversion of money from the government to a charitable organization. Admittedly, the Probation Act is not an unconstitutional delegation of the legislative authority to fix penalties.¹³⁰ Although broad sentencing discretion is vested in the courts by the Act, Congress has sufficiently "expressed its policy behind the sentencing scheme and the basic values to be considered."¹³¹ The Constitution, however, gave the legislature the power to allocate government funds.¹³² The judiciary should not usurp this prerogative without congressional authority by ordering corporate contributions to charities in lieu of payment of fines to the Treasury.¹³³

2. Judicial Favoritism

There may also be a problem with judicial favoritism in using certain types of probation conditions.¹³⁴ If a judge is personally affiliated with an organization that is the beneficiary of corporate probation conditions, an erosion of public confidence in judicial integrity could result. The appearance of judicial impropriety could be avoided by authorizing another branch of government to designate the beneficiaries of charitable contribution conditions. The probation department, for example, frequently deals with community groups in moni-

130. *United States v. Baker*, 429 F.2d 1344, 1347 (7th Cir. 1970); *see Sam v. United States*, 385 F.2d 213, 215 (10th Cir. 1967) (judicial discretion in sentencing not unconstitutional delegation of legislative power); *Yin-Shing Woo v. United States*, 288 F.2d 434, 435 (2d Cir. 1961) (judicial interpretation of statutes in accordance with general congressional purpose not an unconstitutional delegation of legislative authority).

131. *United States v. Baker*, 429 F.2d 1344, 1347 (7th Cir. 1970).

132. U.S. Const. art. I, § 8, cls. 1, 18; *see J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law* 230 & n.1 (2d ed. 1983).

133. *See Let the Charity Fit the Crime?*, N.Y. Times, Apr. 5, 1978, at 28, col. 1; *cf. Dershowitz, supra* note 114, at 626-27 (legislative, not judicial, function to devise novel punishments).

134. *See Let the Charity Fit the Crime?*, N.Y. Times, Apr. 5, 1978, at 28, col. 1. Admittedly courts have tried to designate beneficiaries that are tangentially related to the offender's crime. *See, e.g., United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976) (reversing trial court's probation condition calling for retail liquor dealers convicted of price fixing to pay portion of fine to an alcoholism treatment center); *United States v. Missouri Valley Constr. Co.*, No. 82-L-01, slip op. at 1 (D. Neb. July 25, 1983) (probation condition calling for antitrust violators to set up ethics chair at state university), *appeal argued*, No. 83-2188 (8th Cir. Mar. 15, 1984). The asserted relationship between the crime and the beneficiary, however, is too tenuous to be cognizable. It is unclear why a particular neighborhood alcoholism center or university should benefit from judicially-imposed corporate contributions.

toring probation.¹³⁵ Therefore, it is better able to assess and designate a broad range of worthy recipients. Alternatively, courts could avoid charges of favoritism by relying on a pre-established list of charities.

3. Disparate Conditions

The current sentencing system provides little guidance to a trial judge in sentencing offenders. Any sentence within the broad statutory range set for a particular crime is valid.¹³⁶ Discretion in fixing penalties is premised on rehabilitation as the primary goal in sentencing.¹³⁷ Successful rehabilitation of a defendant requires that sentences fit the offender rather than the offense.¹³⁸ The resulting system produces wide-ranging disparities in sentences meted out to similarly situated offenders.¹³⁹ Thus, rather than adhering to a coherent sentencing policy, probation conditions often reflect a particular judge's sentencing philosophy. As one federal judge noted: "[M]any judges develop their own pet theories of crime control, some times displacing legitimate sentencing objectives."¹⁴⁰

The broad discretion accorded a trial court by the Probation Act in fashioning probation conditions¹⁴¹ exacerbates the problem of disparate sentences. Corporate probation conditions have ranged from charitable contributions¹⁴² to training ex-offenders in meat cutting techniques.¹⁴³ One judge may decide that assignment of a corporate executive to aid a community service group has rehabilitative value¹⁴⁴ while another judge directs all corporate officers with bidding responsibilities to attend seminars aimed at preventing further violations of

135. See Federal Judicial Conference, An Introduction to the Federal Probation System 7 (FJC No. 76-1).

136. *Dorszynski v. United States*, 418 U.S. 424, 431-32 (1974); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); see *Gore v. United States*, 357 U.S. 386, 393 (1958); *Blockburger v. United States*, 284 U.S. 299, 305 (1932).

137. See Senate Report, *supra* note 114, at 38; Lopez, *The Crime of Criminal Sentencing Based on Rehabilitation*, 11 Golden Gate U.L. Rev. 533, 539 (1981).

138. *United States v. Grayson*, 438 U.S. 41, 45-46 (1978); *Williams v. New York*, 337 U.S. 241, 247 (1949).

139. Senate Report, *supra* note 114, at 38, 41; M. Frankel, *supra* note 33, at 6-7; Dershowitz, *supra* note 114, at 628; Sims, *supra* note 2, at 699-700; see Harland, *supra* note 114, at 425; von Hirsch, *supra* note 6, at 12-13; *Symposium, Appellate Review of Sentences*, 32 F.R.D. 249, 267 (1962) (remarks of Sobeloff, J.) [hereinafter cited as *Symposium*].

140. *Symposium*, *supra* note 139, at 268 (remarks of Sobeloff, J.).

141. See *supra* note 54 and accompanying text.

142. See *supra* note 56 and accompanying text.

143. Jaffe, *Probation With a Flair: A Look at Some Out-of-the Ordinary Conditions*, Fed. Probation, Mar. 1979, at 25, 34.

144. See *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982).

antitrust laws.¹⁴⁵ Unusual probation conditions reflect an individual judge's idea of appropriate sentencing techniques,¹⁴⁶ yet there is little evidence that these remedies achieve sentencing goals.¹⁴⁷

B. *Rehabilitative Purpose of the Probation Act*

One of the major causes of disparate sentencing is the broad, almost undefined, scope of rehabilitative techniques. For this reason, and because of a general belief that rehabilitation does little to alleviate criminal behavior, there is serious doubt as to whether rehabilitation is a proper goal of criminal sentencing.¹⁴⁸ Studies show that programs aimed at rehabilitation have had little influence on recidivism among criminal offenders.¹⁴⁹ The focus of corporate sentencing, therefore, should be on punishment and deterrence of potential offenders.¹⁵⁰ The Probation Act, however, recognizes only rehabilitation as a proper goal of probation. Thus, the Act is not a panacea for corporate criminal activity.

V. THE COMPREHENSIVE CRIME CONTROL BILL OF 1983

A partial solution to the problem of corporate criminal sentencing may have taken shape in Congress in the form of certain provisions of the proposed Comprehensive Crime Control Bill (Bill).¹⁵¹ The Bill, which contains an amendment to the Probation Act,¹⁵² expands the

145. *United States v. Missouri Valley Constr. Co.*, No. 82-L-01, slip op. at 3 (D. Neb. July 25, 1983), *appeal argued*, No. 83-2188 (8th Cir. Mar. 15, 1984).

146. See Dershowitz, *supra* note 114, at 628; cf. Schmidt, *Rape Sentence: Castration or 30 Years*, N.Y. Times, Nov. 26, 1983, at 9, col. 1 (probation condition providing rapist with choice of castration or thirty-year prison sentence).

147. Cf. Liman, *The Paper Label Sentences: Critiques*, 86 Yale L.J. 619, 630 (1977) (questioning efficacy of probation condition that price-fixers give public speeches); Sims, *supra* note 2, at 703-04 (same).

148. Senate Report, *supra* note 114, at 38; Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 Clev. St. L. Rev. 147, 148 (1978); Allen, *The Law as a Path to the World*, 77 Mich. L. Rev. 157, 167 (1978); Harland, *supra* note 114, at 444-45; von Hirsch, *supra* note 6, at 7, 10-11.

149. Senate Report, *supra* note 114, at 40; von Hirsch, *supra* note 6, at 10-11.

150. H. Packer, *supra* note 4, at 356; Braithwaite & Geis, *supra* note 1, at 301-02; Sims, *supra* note 2, at 700; cf. Senate Report, *supra* note 114, at 50 (sentencing individuals).

151. S. 1762, 98th Cong., 1st Sess. § 3553, at 34-36, §§ 3561-3566, at 40-47, § 3571 (b)(2), at 48, § 3742, at 81-86, §§ 991-998, at 97-120 (1983). The Bill passed the Senate on February 2, 1984. Taylor, *Senate Approves An Anticrime Bill*, N.Y. Times, Feb. 3, 1984, at A1, col. 2. This Note expresses no opinion on the merits of the Bill's other provisions.

152. S. 1762, 98th Cong., 1st Sess. §§ 3561-3566, at 40-47 (1983).

purpose of probation¹⁵³ and provides guidance in sentencing.¹⁵⁴ The Bill makes deterrence and punishment proper objectives of probation.¹⁵⁵ Although some courts have been pursuing these goals under the Act,¹⁵⁶ the Bill gives courts that are currently reluctant to contravene the intent of Congress the statutory authority to consider punishment and deterrence as legitimate goals of probation.

At first impression, the Bill appears to grant courts license to devise more extraordinary remedies than have thus far been imposed. Along with the additional options courts have under the Bill, however, they have more guidance.¹⁵⁷ Courts must impose either fines, community service or restitution as a condition of probation.¹⁵⁸ The Bill also provides a non-exclusive list of probation conditions to give courts an indication of other remedies Congress thinks will be effective.¹⁵⁹ In addition, the Bill mandates higher fines for white-collar crime.¹⁶⁰ Congress makes clear that it considers fines an under-utilized remedy that is particularly effective when used in conjunction with other sanctions.¹⁶¹ As a result, courts may shed their reluctance to impose fines large enough to modify corporate criminal behavior.¹⁶² Although fines alone are not sufficient to control corporate crime, they can be effective when imposed along with other remedies.¹⁶³

153. See *id.* § 3561. Section 3561 provides that probation is a form of sentence rather than the suspension or execution of sentence. Senate Report, *supra* note 114, at 59. Proposed § 3562 requires that a judge, when deciding whether to grant probation and the conditions to be imposed, consider the factors set forth in proposed § 3553(a), at 34-35. Proposed § 3553(a)(2) includes punishment and deterrence as factors in sentencing. See Senate Report, *supra* note 114, at 75-76, 91-92.

154. Senate Report, *supra* note 114, at 51. See *infra* notes 164-76 and accompanying text.

155. See *supra* note 153.

156. *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 214 (D. Md. 1983); *cf.* *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982) (court seeking alternatives to fine through Probation Act).

157. See *infra* notes 164-76 and accompanying text.

158. S. 1762, 98th Cong., 1st Sess. § 3563(a)(2), at 42 (1983); Senate Report, *supra* note 114, at 93.

159. See S. 1762, 98th Cong., 1st Sess. § 3563(b), at 42-45 (1983); Senate Report, *supra* note 114, at 93. The conditions a court may impose include occupational restrictions, S. 1762, 98th Cong., 1st Sess. § 3563(b)(6), at 43 (1983), community service work, *id.* § 3563(b)(13), at 44, and residence restrictions, *id.* § 3563(b)(14), at 44.

160. See S. 1762, 98th Cong., 1st Sess. § 3571(b)(2), at 48 (1983). Fines for organizations are set at higher levels than those for individuals. See Senate Report, *supra* note 114, at 106-07. New Jersey has already enacted a statute providing for higher fines for corporations. N.J. Stat. Ann. § 2C:43-4 (West 1976).

161. Senate Report, *supra* note 114, at 103-07.

162. See K. Elzinga & W. Breit, *supra* note 21, at 129-30.

163. See Senate Report, *supra* note 114, at 103-07.

More importantly, the Bill provides for a National Sentencing Commission (Commission) to devise detailed guidelines to aid courts in choosing available sentencing options.¹⁶⁴ The Commission would analyze different types of offenders and the crimes they commit in order to develop sentencing guidelines.¹⁶⁵ Composed of federal judges and other presidential appointees,¹⁶⁶ the Commission will consider the relevance of a complex set of criteria in developing guidelines. These considerations include the grade of the offense,¹⁶⁷ mitigating circumstances,¹⁶⁸ the nature and degree of the harm caused,¹⁶⁹ the community view of the seriousness of the offense,¹⁷⁰ deterrence¹⁷¹ and a variety of offender characteristics.¹⁷² The guidelines would determine the most effective kinds of probation conditions for particular types of offenders.¹⁷³ This would provide expert guidance to courts in fashioning consistent probation conditions for corporate criminals.

Under the proposed Bill, courts would still be free to fashion their own conditions of probation.¹⁷⁴ In contrast to the present system, under which only clear abuses of discretion can be appealed,¹⁷⁵ the Bill allows all sentences outside of the guidelines to be reviewed by appellate courts.¹⁷⁶ Thus, the problem of inappropriate probation conditions can be minimized. Admittedly, review of sentencing decisions may dampen judicial eagerness to fashion creative probation terms. There must be a balance, however, between the need for individualized sentences and the injustice of disproportionate penalties and inappropriate sentences. The Bill strikes this balance by providing for the establishment of sentencing guidelines, but allowing for

164. S. 1762, 98th Cong., 1st Sess. §§ 991-998, at 97-120 (1983); see Senate Report, *supra* note 114, at 51-52.

165. See S. 1762, 98th Cong., 1st Sess. § 991(b), at 98-99 (1983); Senate Report, *supra* note 114, at 59-60.

166. S. 1762, 98th Cong., 1st Sess. § 991(a), at 97-98 (1983). The Commission would be a part of the judicial branch and consist of seven voting members appointed by the President with the consent of the Senate. Two of the commissioners must be federal judges; the other five members would be selected after consultation with criminal justice experts. *Id.*; Senate Report, *supra* note 114, at 159-60.

167. S. 1762, 98th Cong., 1st Sess. § 994(c)(1), at 103 (1983).

168. *Id.* § 994(c)(2), at 104.

169. *Id.* § 994(c)(3).

170. *Id.* § 994(c)(4).

171. *Id.* § 994(c)(6).

172. *Id.* § 994(d), at 104-05.

173. Senate Report, *supra* note 114, at 91.

174. *Id.* at 95.

175. See *supra* note 49 and accompanying text.

176. S. 1762, 98th Cong., 1st Sess. § 3742, at 81-86 (1983); Senate Report, *supra* note 114, at 52. In addition, the sentencing judge must state the reasons for imposition of a particular sentence. S. 1762, 98th Cong., 1st Sess. § 3553(c), at 36 (1983); Senate Report, *supra* note 114, at 60.

individualized sentences when a court determines that a sentence outside of the guidelines is appropriate. Appellate review is available only for those sentences that fall outside the guidelines.

The Commission could enlarge the scope of potential remedies by monitoring long-term probation conditions. Under the current system, courts and probation authorities are forced to retain jurisdiction in order to monitor long-term conditions.¹⁷⁷ Because of a lack of time or inclination to perform such tasks,¹⁷⁸ trial judges either do not impose such remedies or seek to force the corporate offender to fulfill the condition in such a short time that an appellate court overturns the condition. For example, a probation condition requiring a corporate polluter to develop and execute a program to handle oil spillage within forty-five days was overturned as unreasonable.¹⁷⁹

Under the system established by the Bill, corporate polluters could be required to develop long-term programs to protect the environment.¹⁸⁰ Corporations are more likely to minimize pollution if they are forced to bear the costs of such activities. A commission, specializing in the monitoring of long-term probation conditions, would be capable of handling such a program.¹⁸¹ Monitoring responsibilities would provide the Commission with valuable feedback on the effectiveness of various remedies and hopefully inspire it to develop new guidelines.¹⁸²

Another proposal that should be considered by the Commission in establishing guidelines for sentencing of corporate offenders is the publicity sanction.¹⁸³ A corporation's reputation is a valuable asset.¹⁸⁴ Media advertising of corporate criminal activity would aid in punish-

177. See 18 U.S.C. §§ 3651, 3653, 3655 (1982); Federal Judicial Center, Introduction to the Federal Probation System 7 (FJC No. 76-1).

178. Cf. Memorandum from Michael J. Luciano, Chief U.S. Probation and Pre-trial Services Officer to Hon. Constance B. Motley, Chief Judge, U.S. District Court, S.D.N.Y., *Victim Impact Statements* 9 (Nov. 28, 1983) (available in files of *Fordham Law Review*) (suggesting limitation on restitution payments to limit need for monitoring).

179. *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972).

180. See Fisse II, *supra* note 9, at 991-92.

181. Alternatively, special masters can be appointed to oversee performance of probation conditions. Cf. *City Stores Co. v. Ammerman*, 266 F. Supp. 766, 778 (D.D.C. 1967) (possibility of special master to oversee requirements of specific performance order), *aff'd per curiam*, 394 F.2d 950, 956 (D.C. Cir. 1968); Schwartz, *The Case for Specific Performance*, 89 Yale L.J. 271, 293-94 (1979) (same).

182. See Senate Report, *supra* note 114, at 51 ("The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity in the Federal system to look at sentencing patterns as a whole to assure that the sentences imposed are consistent with the purposes of sentencing.").

183. See H. Packer, *supra* note 4, at 362; Braithwaite & Geis, *supra* note 1, at 301; Fisse I, *supra* note 6, at 108.

184. See Braithwaite & Geis, *supra* note 1, at 302.

ment and deterrence of corporate crime due to the effect of publicity on a company's prestige.¹⁸⁵

An effective publicity sanction, however, must be precisely tailored. For example, a Maine statute utilizing this sanction provides that a corporation be its own publicizer.¹⁸⁶ Aside from the problems of judicial supervision, it is unlikely that a company will effectively be its own detractor. In *United States v. Blankenheim*,¹⁸⁷ five corporate executives convicted of conspiring to fix prices were placed on probation with the condition that they give individually prepared oral presentations about their crimes to civic groups.¹⁸⁸ The resulting speeches tended to be self-serving explanations of criminal behavior rather than embarrassing exercises that would punish the offenders and deter potential white-collar offenders.¹⁸⁹

An alternative to self-publicity would be to establish a branch of the Commission as the publicizer of corporate criminal behavior. Costs could be borne by the defendant companies. The method of publicity could be tailored to meet the requirements of the individual offender and its offense. In certain cases, such as violations of the securities laws, it would be appropriate to publicize the crime to the stockholders of the particular company through a simple mail campaign. In other cases, such as food adulteration, consumers may be notified using mass-media techniques. When the crime is one of pollution, it may be appropriate to target the community surrounding the offending plant. The scope and the nature of this sanction should reflect both the crime committed and the particular defendant.¹⁹⁰

CONCLUSION

Effective sanctions to control corporate criminal activity have yet to be developed. The present legislative system of fines does not punish or deter institutional crime. The dearth of statutory alternatives to

185. *Id.* at 301-03; see H. Packer, *supra* note 4, at 362; see also C. Stone, *supra* note 7, at 39 (prestige as a corporate goal).

186. Me. Rev. Stat. Ann. tit. 17-A, § 1153 (1964); cf. N.Y. Times, Feb. 14, 1984, at A16, col. 6 (judicial order that defendant confess from church pulpit that he helped sell stolen truck); N.Y. Times, Jan. 5, 1984, at A19, col. 1 (condition of probation that defendant post sign in front yard declaring he "is a thief").

187. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 Yale L.J. 590, 590 n.1 (1977) (citing unreported decision, *United States v. Blankenheim*, No. 74-182, (N.D. Cal. Nov. 1, 1974)).

188. *Id.* at 590.

189. See Liman, *supra* note 147, at 631-32 (1977); Sims, *supra* note 2, at 703-04.

190. Other proposed remedies include judicially ordered restructuring of internal corporate processes, *Structural Crime*, *supra* note 2, at 365, and limitation of a company's charter. Braithwaite & Geis, *supra* note 1, at 307. Alternatives to statutory fines include imposing a monetary penalty on the profits of the company, K. Elzinga & W. Breit, *supra* note 21, at 134-37, or requiring the corporation to issue equity securities to a state victim compensation fund. Coffee, *supra* note 2, at 413.

finer has led courts to use the Probation Act in an attempt to control institutional crime. The development of creative sanctions that comport with the Act and the Constitution has, however, eluded even the most intrepid of courts.

There is no agreement on effective sanctions for the control of corporate crime. Courts should not be eager to wield their discretionary powers in such an uncharted area. The consensus against the excessive scope of judicial sentencing discretion suggests that courts should not use the Act to develop and impose unusual probation conditions unless these conditions serve the rehabilitative goal of the Act. Courts that invoke the Act to expand their sentencing alternatives beyond rehabilitation are relying on an outmoded model of sentencing premised on discretion that is now recognized as having produced an incoherent and unfair sentencing system in the United States. Furthermore, the considerable doubt as to whether rehabilitation is a proper goal of sentencing makes use of the Probation Act to sentence corporate offenders inappropriate.

The proposed Comprehensive Crime Control Bill provides a firmer statutory basis for corporate probation than the current Probation Act. The modified Probation Act contained in the proposed Bill is tailored to meet the additional goals of deterrence and punishment. The Commission established by the Bill can be both a safeguard against inappropriate conditions and a filter through which creative ideas for corporate sentences can be developed and reviewed.

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