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Charitable Contributions as a Condition of Federal Probation for Corporate Defendants: A Controversial Sanction Under New Law

Corporate criminal defendants¹ pose unique sentencing problems.² Courts and commentators have struggled with sentencing these statutory entities that have "no soul to damn, no body to kick."³ Traditionally, courts have imposed fines,⁴ but this has been criticized as ineffective.⁵ When the fine is less than the revenue gained from the criminal violation, a corporation may regard it as a cost of doing business.⁶ When the fine is large enough to hurt, a corporation may pass it on to shareholders by reducing dividends or to consumers by increasing prices.⁷

Seeking alternative corporate sanctions, courts turned to probation.⁸ While probation has gained acceptance as a corporate

1 This note focuses on sentencing corporate entities found guilty of criminal conduct. Frequently, individual corporate directors, officers, or employees are joined as co-defendants in corporate criminal cases. The sentencing of these natural person defendants is beyond the scope of this note.

2 See generally Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981) [hereinafter cited as Coffee, "No Soul to Damn: No Body to Kick"]; Coffee, *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction*, 1 N. ILL. U.L. REV. 3 (1980) [hereinafter cited as Coffee, *Making the Punishment Fit the Corporation*]; McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative*, 46 CIN. L. REV. 989 (1977); Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40 (1978); Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353 (1979).

3 Coffee, "No Soul to Damn: No Body to Kick," *supra* note 2.

4 While a fine has been the traditional corporate sanction, commentators have suggested that it is possible to "imprison" or to "execute" organizational defendants. A corporate defendant could be "imprisoned" by suspending its right to engage in interstate or foreign commerce for a term. A corporate defendant could be "executed" by revoking its charter. Commentators recognize, however, that corporate "imprisonment" or "execution" is impracticable. See Comment, *supra* note 2, at 54; Note, *supra* note 2, at 373 n.119.

5 See Shaw, *Charity Beneficiary of Judge's Justice*, L.A. Times, Apr. 17, 1980, Part 1, at 4, col. 2 (U.S. District Judge Winner's rationale for ordering Eason Oil Co. to donate \$25,000 and "business counseling" service to a financially troubled Denver shelter for battered wives after Eason pleaded guilty to attempting to rig a lottery for federal oil and gas leases). See generally Note, *supra* note 2.

6 S. REP. NO. 225, 98th Cong., 1st Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 2, 79 [hereinafter cited as S. REP. NO. 225]; see also Coffee, "No Soul to Damn: No Body to Kick," *supra* note 2, at 449; Note, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 FORDHAM L. REV. 637, 639 (1984); Comment, *supra* note 2, at 48.

7 See Coffee, "No Soul to Damn: No Body to Kick," *supra* note 2, at 401-02; Comment, *United States v. William Anderson Co.: "Crime in the Suites" Alternative Sentencing of Corporate Defendants*, 16 CREIGHTON L. REV. 1025, 1029 (1983); Note, *supra* note 6, at 640; Comment, *supra* note 2, at 52, 58; Note, *supra* note 2, at 362-63.

8 Federal courts are empowered to grant probation solely by statute. United States v.

sanction, imposing charitable contributions⁹ as a condition of that probation has sparked debate.¹⁰ Can federal courts legally impose charitable contributions as a condition of probation for corporate defendants? If so, are there cases in which this may be a particu-

Cohen, 617 F.2d 56, 58, 59 (4th Cir.), *cert. denied*, 449 U.S. 845 (1980); *United States v. Ellenbogen*, 390 F.2d 537, 541 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968), *reh'g denied*, 399 U.S. 917 (1970); *see also Ex parte United States*, 242 U.S. 27 (1916).

Although the Federal Probation Act, 18 U.S.C. § 3651 (1982), did not explicitly state that corporate defendants were subject to probation, courts have held that corporate defendants can be placed on probation. *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States v. J.C. Ehrlich Co.*, 372 F. Supp. 768 (D. Md. 1974). In *Atlantic Richfield*, the corporate defendant illegally discharged oil from its Stickney, Illinois dock facility into the Chicago Sanitary and Ship Canal. Upon conviction for violating 33 U.S.C. §§ 407, 411 (1964), the defendant was fined and placed on probation for six months. The conditions of probation required the defendant to "set up and complete a program within [45] days to handle oil spillage into the soil and/or stream." 465 F.2d at 61. If the defendant failed to comply, the court would appoint a Special Probation Officer with powers of a trustee. The defendant appealed the sentence. The Court of Appeals for the Seventh Circuit affirmed placing the corporation on probation, but reversed the conditions of probation as unreasonable. 465 F.2d at 61. In *Ehrlich*, the corporate defendant pleaded *nolo contendere* to ten counts of violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-11 (1969). The court fined Ehrlich Co. and placed it on five years probation, conditioned on no further convictions for violating any federal preservation of wildlife statutes. *See generally* Recent Developments, *The Application of the Federal Probation Act to the Corporate Entity*. *United States v. Atlantic Richfield*, 465 F.2d 58 (1972), 3 U. BALT. L. REV. 294 (1974).

The Sentencing Reform Act of 1984 affirms this judicial interpretation by explicitly stating that organizations may be sentenced to probation. Sentencing Reform Act of 1984, Pub. L. No. 98-473, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1987, 1988 (to be codified at 18 U.S.C. § 3551(c)(1)) [hereinafter cited as Sentencing Reform Act].

9 The charitable contributions in question are those paid to charities that have not been directly harmed by the corporation's criminal conduct. A charity directly harmed by the corporation's conduct can be paid restitution under the Federal Probation Act. 18 U.S.C. § 3651 (1982). The Sentencing Reform Act of 1984, which repeals 18 U.S.C. § 3651, effective November 1, 1986, also allows restitution to victims of the offense. Sentencing Reform Act, *supra* note 8, at 1993 (to be codified at 18 U.S.C. § 3563(b)(3)).

This note distinguishes between a corporate defendant *funding* community service projects by contributing money and *performing* community service by contributing labor and materials. A court ordered charitable contributions of corporate defendants' labor and materials in a bakery industry Sherman Act price fixing case. *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1163-66 (S.D.N.Y. 1983); *cf. United States v. Borden*, 74 Crim. 0319 (D. Ariz. 1975) (court delayed sentencing, suggesting that milk companies guilty of price fixing donate milk to charities in order to mitigate amount of punishment to be imposed at subsequent sentencing date). Courts which have challenged monetary charitable contributions have explicitly stated that they do not question corporations performing community service as a condition of probation. *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 962-63 (3d Cir. 1984); *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1550 (8th Cir. 1984). *See* notes 22-23 *infra*. This note focuses on monetary charitable contributions.

10 *See generally* Comment, *supra* note 7; Note, *supra* note 6; Comment, *United States v. William Anderson Co.: Monetary Conditions of Probation Under the Federal Probation Act*, 69 IOWA L. REV. 1147 (1984); Note, *Corporate Contributions to Charity as a Condition of Probation Under the Federal Probation Act*, 9 J. CORP. L. 241 (1984); Comment, *Corporations and the Federal Probation Act—Is the Community an Aggrieved Party?*: *United States v. William Anderson Co.*, 58 ST. JOHN'S L. REV. 163 (1983).

larly appropriate sanction? Consider the hypothetical case of Conglomerate Corporation.

Conglomerate Corporation has been convicted of violating both the Federal Food, Drug, and Cosmetic Act and the Clean Air Act. Evidence at trial showed that the Foods Division of Conglomerate Corporation had used a compound to create a glittery surface on its star-shaped breakfast cereal in violation of the Federal Food, Drug, and Cosmetic Act. This compound had been used for two years to increase the product's appeal among its target market: children between the ages of three and thirteen. Further evidence revealed that Conglomerate Corporation had violated the Clean Air Act because the plant's particulate discharge exceeded the statutory limit. The Foods Division exhaust system had been inadequate to capture the residue of this compound before it escaped into the atmosphere. Medical evidence indicated that this compound is carcinogenic both when ingested and when inhaled.

Under the Sentencing Reform Act of 1984,¹¹ a federal judge faced with the difficult task of sentencing Conglomerate Corporation has several options.¹² The Act presumes restitution to victims,¹³ but how can the court ever accurately identify all those who had eaten the cereal or inhaled the plant's exhaust? How can the court provide compensation when that percentage of victims who will actually develop cancer may not exhibit symptoms for years? What sanction or combination of sanctions will meet the Act's goals of sentencing?¹⁴

Part I of this note takes an historic look at the debate on the legality of corporate charitable contributions as a condition of probation under the Federal Probation Act. Part II examines the legality of this sanction under the Sentencing Reform Act of 1984. Part III proposes guidelines for the appropriate use of this sanction.

11 The Sentencing Reform Act of 1984 is Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1976 (1984). See note 45 *infra* for the effective dates of pertinent portions of the Sentencing Reform Act.

12 The judge may sentence an organization convicted of a criminal offense to serve a term of probation (to be codified at 18 U.S.C. §§ 3561-66), to pay a fine (to be codified at 18 U.S.C. §§ 3571-74), to forfeit property (to be codified at 18 U.S.C. § 3554), to give notice of its conviction to victims (to be codified at 18 U.S.C. § 3555), to make restitution (to be codified at 18 U.S.C. § 3556), or any combination of the foregoing sanctions. S. REP. NO. 225, *supra* note 6, at 169.

13 Sentencing Reform Act, *supra* note 8, at 1990 (to be codified at 18 U.S.C. § 3553(c)) requires the sentencing court to give a reason whenever a sentence does not include an order of restitution.

14 The Act sets forth the goals of sentencing: just punishment, deterrence, incapacitation, and rehabilitation. *Id.* at 1989 (to be codified at 18 U.S.C. § 3553(a)(2)(A)-(D)). The legislative history indicates that while one purpose of sentencing may be more relevant in a particular case, a judge should consider each of the four purposes when imposing a sentence. S. REP. NO. 225, *supra* note 6, at 70-71.

Part IV concludes that under the Sentencing Reform Act of 1984 federal courts can legally impose charitable contributions for corporate criminal defendants as a condition of probation. Procedural aspects of the Act can provide any potentially necessary safeguards. In appropriate cases, these contributions may be a very effective corporate criminal sentence.

I. The Historical Debate

The debate on the legality of imposing corporate charitable contributions as a condition of probation has focused on the statutory interpretation of the Federal Probation Act.¹⁵ The minority position held that the permissive language of the statute¹⁶ indicated that the explicit conditions of probation within the Act were exemplary, not exclusive.¹⁷ Proponents of this position argued that three monetary conditions of probation were listed in the statute merely to establish beyond question that these specific conditions could be imposed.¹⁸ Because the statutory conditions were not lim-

15 18 U.S.C. § 3651 (1982). The relevant portions of the statute state:

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

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

16 Courts have considered the following phrases to be permissive language: "upon such terms and conditions as the court deems best," "among the conditions thereof," and "may be required." See, e.g., *United States v. William Anderson Co.*, 698 F.2d 911, 914 (8th Cir. 1982) *overruled by* *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984); *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 215-16 (D. Md. 1983), *rev'd*, 728 F.2d 648 (4th Cir. 1984).

17 *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1551 (8th Cir. 1984) (Gibson, C.J., concurring in result and dissenting); *United States v. William Anderson Co.*, 698 F.2d 911 (8th Cir. 1982) *overruled by* *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984).

Congressional approval of this view can be inferred. In the legislative history of the Sentencing Reform Act, Congress refers to the specific conditions of probation listed in the Federal Probation Act, stating: "These, however, in view of the broad general grant of statutory authority, have been viewed as examples of, rather than limitations on, the kinds of conditions that a court may place on probation." S. REP. NO. 225, *supra* note 6, at 96.

18 *United States v. William Anderson Co.*, 698 F.2d 911, 914 (8th Cir. 1982), *overruled by* *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984). In *Anderson*, corporate defendants were convicted in nine related antitrust prosecutions. The defendants had engaged in price fixing by bid-rigging in the Nebraska highway construction industry. Judge Urbom sentenced the defendants to probation. The probation conditions

iting, according to the minority position, a trial judge had discretion to impose corporate charitable contributions as a condition of probation.¹⁹ Indeed, district court judges have seen this as an effective means of punishing the defendant because it achieves deterrence and, at the same time, returns something to the community which has been harmed by the defendant's conduct.²⁰

included installment fines with the proviso that defendants could elect to pay part of the fine to the charitable organization for which its officers or employees had been ordered to perform community service work. If defendants so elected, their fines would be *pro tanto* reduced. The government appealed the corporations' charitable contribution option. (It should be noted that the government did not appeal an identical condition imposed upon the individual officer and employee defendants in the case although both individual probation and corporate probation are governed by the same statute: 18 U.S.C. § 3651 (1982)). The Court of Appeals for the Eighth Circuit affirmed the district court, finding Judge Urbom's "carefully formulated scheme of sentences deserv[ing of] praise." 698 F.2d 911, 913. Two years later, in *Missouri Valley*, a split court overruled *Anderson*, adopting the narrow statutory interpretation employed by other circuits. See note 23 *infra*.

19 *United States v. William Anderson Co.*, 698 F.2d 911 (8th Cir. 1982), *overruled by* *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984); *cf.* *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785 (9th Cir. 1982). Defendant corporations, Mitsubishi and two railroads, were convicted for violating freight tariffs, resulting in favorable treatment for Mitsubishi. The defendants were fined and given the option of probation. The probation conditions required the corporations to obey the law for three years, to pay a reduced fine, to loan an executive for one year to the National Alliance for Business and its Community Alliance Program for Ex-Offenders ("CAPE"), and to contribute \$10,000 for each offense to be used for the CAPE program. Mitsubishi challenged the legality of the sentence. The Court of Appeals for the Ninth Circuit affirmed the sentence. The court held that it did not need to consider objections to the probation conditions because the fine originally imposed was within the statutory limit and the probation conditions were merely an alternative Mitsubishi could elect to avoid paying that fine. 677 F.2d at 788-89.

20 For example, in *United States v. Wright Contracting Co.*, 563 F. Supp. 213 (D. Md. 1983), *rev'd*, 728 F.2d 648 (4th Cir. 1984), Wright pleaded guilty to Sherman Act bid-rigging. District Court Judge Young suspended a portion of the fine imposed and placed the defendant on three years probation. As one of the conditions of probation, the court required the defendant to contribute \$175,000 to Baltimore City Foundation, Inc. which provided a wide array of services to the disadvantaged in the city. Judge Young characterized this probation condition as "Corporate Penance." 563 F. Supp. at 214, 216.

In *United States v. Wright Contracting Co.*, 728 F.2d 648, 650 (4th Cir. 1984), the circuit court quoted Judge Miller's reasoning from the unreported district court opinion of the companion case, *United States v. Mid-Atlantic Paving Co.*, (D. Md.). In *Mid-Atlantic*, defendant pleaded guilty to bid-rigging highway repair and resurfacing contracts. The district court imposed a fine. The court then suspended a portion of the fine and placed Mid-Atlantic on probation, conditioned on payment of a contribution to a charitable organization within Howard or Anne Arundel County, Maryland. The Fourth Circuit vacated and remanded for resentencing. *Id.* at 654.

In *United States v. Prescon Corp.*, 695 F.2d 1236, 1238-39 (10th Cir. 1982), the court quoted Judge Weinshienk from the unreported district court opinion. In *Prescon*, the defendant corporations performed post-tensioning, adding tensile strength to concrete during construction of large structures. Defendants pleaded *nolo contendere* to Sherman Act bid-rigging and related mail fraud. Defendants' fines were suspended if, as a condition of probation, they paid reduced sums into the Registry of the Court to be disbursed by the Chief Probation Officer to crime fighting programs. The Court of Appeals for the Tenth Circuit reversed the district court sentence. *Id.* at 1244.

Some district court judges, convinced of the effectiveness of this sanction, have suc-

The majority view, followed by the federal courts of appeals,²¹ espoused a narrow statutory construction. According to this position, the explicit conditions of probation limited the general permissive language in the statute.²² While these courts also viewed the explicit conditions to be exemplary rather than exclusive as to all possible conditions of probation, they held that monetary conditions of probation were limited to one of the three types specified.²³

cessfully managed to "end-run" appellate review by suggesting the defendant "voluntarily" make certain types of contributions either before sentence is imposed or before the time when sentence will be reconsidered. See the cases collected at note 32 *infra*. Cf. *United States v. Borden*, 74 Crim. 0319 (D. Ariz. 1975) (donation of milk to charities as mitigation before sentencing). For insight into Judge Muecke's reasoning in *Borden*, see *White-Collar Justice: A BNA Special Report on White Collar Crime*, 44 U.S.L.W. Supreme Court pt. I, Apr. 13, 1976, pt. II, at 10 [hereinafter cited as *White-Collar Justice*].

21 The Third, Fourth, Eighth and Tenth Circuits have specifically addressed this issue. Each of these circuits follows the majority position at this time. See notes 22-23 *infra*. But cf. the holding in *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785 (9th Cir. 1982), *supra* note 19.

22 *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 964 (3d Cir. 1984). In *Scher*, concert promoters pleaded *nolo contendere* to violating the Sherman Act by allocating exclusive markets among themselves. Upon the court's request for sentencing memoranda from the parties, defendants suggested a three year term of probation during which they would contribute their "services and talents" to raise \$100,000 for charities approved by the Probation Department. The court, with slight modification, accepted defendants' suggestion. The government appealed. The Court of Appeals for the Third Circuit, reversing, held that this sanction exceeded the scope of the district court's discretion. *Id.*

23 See *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1547-48, 1550 (8th Cir. 1984); *United States v. Wright Contracting Co.*, 728 F.2d 648, 649 (4th Cir. 1984); *United States v. Prescon Corp.*, 695 F.2d 1236, 1242-43 (10th Cir. 1982).

In *Missouri Valley*, the defendant pleaded guilty to Sherman Act bid-rigging of highway construction contracts. During the case's complicated procedural history, defendant moved that the court consider an "alternative sentence" in which the corporation would make a contribution to the University of Nebraska Foundation as a condition of probation. 741 F.2d at 1545. The defendant-corporation suggested possible ways the funds could be used. In response to defendant's motion, the court suspended part of the fine imposed as sentence, placing the corporation on probation for five years. One condition of probation required that the defendant permanently endow and support a chair in ethics through the University of Nebraska Foundation. *Id.* at 1545-46. The government appealed this probation condition. The Court of Appeals for the Eighth Circuit, in a split opinion, reversed, holding that any monetary probation conditions must be one of the types enumerated in the statute. In doing so the court expressly overruled *United States v. William Anderson Co.*, 698 F.2d 911 (8th Cir. 1982). For a discussion of the facts of *Anderson*, see note 18 *supra*.

In *Wright*, the Court of Appeals for the Fourth Circuit stated that "the district court exceeded its statutory powers by imposing as a condition of probation the payment of a sum of money unrelated to any legally determined loss sustained, to an entity not aggrieved by the offense." 728 F.2d at 649. The Fourth Circuit emphasized that the district court was bound by what it considered to be the Probation Act's limitations on restitution despite "[t]he district court's disavowal of any reparative or restitutive purpose." *Id.* at 652.

In *Prescon*, the Court of Appeals for the Tenth Circuit stated that since the condition was restitutional in nature, it must meet the statutory criteria: "'to aggrieved parties for actual damages or loss caused by the offense for which conviction was had.'" 695 F.2d at 1243.

Cf. *United States v. Clovis Retail Liquor Dealers Trade Ass'n.*, 540 F.2d 1389, 1390 (10th Cir. 1976). In *Clovis*, defendants pleaded *nolo contendere* to violating the Sherman Act in connection with retail prices of liquor. The district court suspended sentence for the corporate defendants and placed them on probation for five years. The condition of proba-

The majority position reasoned that these charitable contributions were not fines because they were not paid to the government.²⁴ These payments were neither restitution nor reparation because the charity in question was not an aggrieved party that had suffered actual harm or loss due to the corporation's offense.²⁵ Nor could these payments be considered support because the corporate defendant was not legally responsible for the charity's support.²⁶ Thus, the majority position held that charitable contributions were outside the ambit of the Federal Probation Act and, accordingly, outside the power of the federal courts.

Believing that the Federal Probation Act did not grant courts the power to impose this sanction, the majority reasoned that courts which ordered these contributions usurped the legislature's power to disburse treasury funds.²⁷ In addition, courts following the majority position were apprehensive that this sanction would subject courts to public distrust and criticism.²⁸ These courts expressed concern that courts were "ill-equipped to pick and choose, among countless worthy causes."²⁹ They feared this charity selection process could subject judges to conflicts of interest.³⁰ The majority view was unwilling to take the risks they feared the charitable contribution sanction entailed because it had not been expressly authorized by Congress.³¹

Commentators have criticized charitable contributions as a condition of corporate probation on policy grounds. The critics suggest that corporate defendants receiving this sanction are "get-

tion required the corporate defendants to pay certain sums of money to the Curry-Roosevelt County Council on Alcoholism, Inc. The Tenth Circuit stated: "We are compelled to reverse the trial court's sentencing because we are unable to conclude that the Curry-Roosevelt County Council on Alcoholism, Inc. or persons which it helps or represents were 'aggrieved' in the amount of \$233,500 by 'the offense for which conviction was had.'" *Id.* at 1390. The language quoted within the quote tracks the language of the Federal Probation Act, 18 U.S.C. § 3651 (1982).

24 See Comment, *United States v. William Anderson Co.: Monetary Conditions of Probation Under the Federal Probation Act*, 69 IOWA L. REV. 1147, 1153 (1984).

25 *Id.*

26 *Id.*

27 See, e.g., *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1549-50 (8th Cir. 1984). The court noted that appropriation of federal treasury funds is a legislative function. It reasoned that when a judge imposed a fine and then suspended that sentence, he was in effect transferring funds from the federal treasury. The court stated the judge was empowered by the Federal Probation Act to transfer those funds to the aggrieved parties or to the defendant's legal dependents. The court implied that ordering the payment of money to any other party as a condition of probation was outside the legislative delegation of authority in 18 U.S.C. § 3651 and therefore usurped the legislature's power to disburse treasury funds.

28 See, e.g., *United States v. Wright Contracting Co.*, 728 F.2d 648, 653 (4th Cir. 1984).

29 741 F.2d at 1550.

30 *Id.*

31 *Id.*

ting off easy”³² or are receiving a tax “break.”³³ They also feel that the government is being deprived of revenue when this sanction is imposed.³⁴

Although the holdings of the courts of appeals which have addressed this issue are in agreement, circuit court judges have not unanimously adopted the majority view. For example, in *United States v. Missouri Valley Construction Co.*,³⁵ the majority held that all monetary payments must meet the criteria set forth in the specific provisions of the Federal Probation Act.³⁶ Two judges, however,

32 See Stone, *A Slap on the Wrist for the Kepone Mob*, 22 BUS. & SOC. REV. 4 (1977). In *United States v. Allied Chem. Corp.*, [1976] 7 ENV'T REP. (BNA) 844, Allied pleaded nolo contendere to charges of violating the Federal Water Pollution Control Act by discharging Kepone and other chemical wastes into the James River in Virginia. Judge Merhige fined Allied \$13.2 million, but said he might reduce the fine if Allied made “a voluntary effort to allieviate the suffering that [had] resulted from the contamination of the James River.” 7 ENV'T REP. at 844. The corporation donated \$8 million to set up the Virginia Environmental Endowment which funds a variety of conservation projects. Judge Merhige subsequently lowered the fine by a similar amount. See Zim, *Allied Chemical's \$20-Million Ordeal with Kepone*, FORTUNE, Sept. 11, 1978, at 82, 88-89.

See also Tomasson, *Olin's Arms Penalty: 'Donation' Plus Fine*, N.Y. Times, June 2, 1978, at D1, col. 4; Editorial, *Let the Charity Fit the Crime?*, N.Y. Times, Apr. 5, 1978, at 28. In *United States v. Olin Corp.*, N-78-30 (D. Conn., filed June 1, 1978), Olin Corp. was convicted of illegal arms sales to South Africa. Judge Zampano fined Olin Corp. \$45,000 after the corporation “voluntarily” established a \$500,000 New Haven Community Betterment Fund at the judge's suggestion.

33 Fisse, *Community Service as a Sanction Against Corporations*, 1981 WIS. L. REV. 970, 975; Zim, *supra* note 32, at 89; Tomasson, *supra* note 32, at D1, col. 5.

Under I.R.C. § 162(f) (1984), corporations may not deduct money paid “for any fine or similar penalty paid to a government for the violation of any law.” Corporate charitable contributions, however, may be deducted within the limits imposed by I.R.C. § 170 (1984). Therefore critics reason that suspending a fine and placing defendants on probation, conditioned on a charitable contribution, “rewards” the violator with a reduction in income taxes.

Despite the wording of I.R.C. § 162(f) (1984) that only penalties paid to a government are not tax deductible, Richard Blumenthal, United States Attorney for Connecticut, has speculated that the Internal Revenue Service may have discretion to disallow a deduction for this type of charitable contribution. See Tomasson, *supra* note 32, at D1, col. 6. Moreover, this policy concern can be removed by the sentencing court stating that the probation condition charitable contribution is not tax deductible. See *Missouri Valley*, 741 F.2d at 1545-46.

34 See Editorial, *supra* note 32. Due to the current federal deficit, this criticism cannot be lightly dismissed. It must be noted, however, that the sentencing judge might not order a high fine even in the absence of a charitable contribution probation condition. Furthermore, a judge may order both a fine and a charitable contribution as conditions of probation. As a general rule, judges, utilizing the charitable contribution sanction, should also be encouraged to require defendants to pay a fine to compensate the government for costs incurred in prosecuting the defendant. Moreover, since prosecution of corporate crime is increasing, total government revenues from corporate criminal fines may not decrease due to the use of this charitable contribution sanction in appropriate cases. See Coffee, “No Soul to Damn: No Body to Kick,” *supra* note 2, at 386; White-Collar Justice, *supra* note 20, at 3; Note, *supra* note 2, at 367 (citing Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229).

35 741 F.2d 1542 (8th Cir. 1984).

36 *Id.* at 1550.

wrote opinions concurring in result but dissenting as to holding that charitable contributions were a per se invalid condition of probation. Judge Heaney stated that he would sustain payments to charitable or educational institutions under certain guidelines.³⁷ He noted that similar effective probation conditions are used frequently for individual defendants³⁸ and criticized the court for "shutting the door on probationary conditions of this nature for corporate defendants."³⁹ Judge Gibson⁴⁰ urged that the majority erred in overruling *United States v. William Anderson Co.*,⁴¹ in which the Eighth Circuit had affirmed charitable contributions as a condition of probation. He criticized the majority's statutory interpretation⁴² and distinguished *Anderson* from *Missouri Valley* and other cases upon which the majority relied.⁴³ Judge Gibson argued that charitable contributions could play a "valuable role . . . in corporate probation."⁴⁴

As this debate on the validity of charitable contributions as a condition of corporate probation continued, Congress passed the Sentencing Reform Act of 1984.

II. The Sentencing Reform Act of 1984

The Sentencing Reform Act of 1984 is part of the Comprehensive Crime Control Act of 1984.⁴⁵ It repealed the Federal Probation Act.⁴⁶ New provisions for probation were integrated

37 *Id.* at 1551. According to Judge Heaney, the judge must carefully avoid any conflicts of interest. When establishing an endowed chair, the court must ensure that posterity will understand the chair was established to punish illegal conduct. *Id.* (Heaney, C.J., concurring and dissenting).

38 *Id.*

39 *Id.* Judge Heaney stated that the statute did not require these limitations. He felt the majority was motivated by "a shortsighted effort to protect government revenues . . . and . . . out of an inordinate fear that our district court judges will not have the wisdom to avoid possible conflicts of interest." *Id.*

40 Judge Heaney joined in Judge Gibson's opinion.

41 698 F.2d 911 (8th Cir. 1982); see note 18 *supra*.

42 Judge Gibson stated that the permissive language of the statute dictated a broad interpretation. 741 F.2d at 1551-53 (Gibson, C.J., concurring and dissenting).

43 Judge Gibson found *Anderson* distinguishable because in *Anderson*, unlike *Missouri Valley*, the corporate defendants were making their payments to charities for which their officers and employees had been sentenced to perform community service. He suggested that funding may be the way corporations perform community service. See *id.* at 1553-54. Judge Gibson stated it was an abuse of discretion to allow the corporate defendant to choose a favorite charity to receive the probation condition funds. *Id.* at 1554-55.

44 *Id.* at 1554.

45 See note 11 *supra*. The Act was passed on October 12, 1984. All pertinent portions of the Act, with the exception of those portions regarding the Sentencing Commission, will take effect on November 1, 1986. That portion of the Act establishing the Sentencing Commission took effect on the date of enactment, October 12, 1984. The guidelines and policy statements of the Commission will take effect within 2 years of the enactment date, pending congressional review. Sentencing Reform Act, *supra* note 8, § 235 (98 Stat.), at 2031-33.

46 *Id.* § 212(2) (98 Stat.), at 1987.

throughout the Sentencing Act⁴⁷ which explicitly states that organizational defendants may be sentenced⁴⁸ to probation.⁴⁹

In deciding whether to sentence a defendant to probation and what probation conditions to require, courts must consider the nature and circumstances of the offense, the history and characteristics of the offender, and the purposes of sentencing.⁵⁰ The statute divides the conditions of probation to be imposed into mandatory and discretionary conditions.⁵¹ At least one of the following discretionary conditions must be imposed if the defendant is convicted of

47 The main probation provisions are in Chapter 227, subchapter B. *Id.* at 1992-95 (to be codified at 18 U.S.C. §§ 3561-66).

48 Under the Sentencing Reform Act, probation constitutes a sentence. Under the Federal Probation Act, probation was imposed by the court after it had suspended sentence. S. REP. NO. 225, *supra* note 6, at 160.

The fact that probation now constitutes a sentence instead of a sanction imposed after suspension of sentence may help mitigate the impression that corporate defendants ordered to pay a charitable contribution are "getting off easy." See note 32 *supra* and accompanying text. Eliminating this impression is important because in order to be effective, criminal sentencing must not only be fair, it must also appear fair. See *White-Collar Justice*, *supra* note 20, at 6. Of course to erase this impression of "getting off easy," courts must emphasize that the charitable contribution sanction constitutes a sentence and either impose it in addition to other sanctions or require the amount of the contribution to be comparable to the fine that would be imposed in the case.

In addition, since the court, under the Sentencing Reform Act, now orders the charitable contribution sanction without first suspending a previously imposed fine, the argument that the court is usurping the legislature's authority to disburse treasury funds is considerably weakened. See note 27 *supra* and accompanying text. One can argue that if a fine was never imposed and then suspended, funds were never, in effect, put into the treasury and subsequently transferred elsewhere.

Moreover, because Congress has given courts the authority to impose a charitable contribution probation condition by statute (Sentencing Reform Act, *supra* note 8, at 1993-94 (to be codified, at 18 U.S.C. §§ 3563(b)(13) and 20)), the issue of courts usurping the legislature's power to disburse treasury funds does not arise. See notes 55-60 *infra* and accompanying text.

49 Sentencing Reform Act, *supra* note 8, at 1988 (to be codified at 18 U.S.C. § 3551(c)(1)).

50 *Id.* at 1989 (to be codified at 18 U.S.C. § 3553(a) (1)-(2)). The Act states:

The Court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

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

(B) to afford adequate deterrence to criminal conduct;

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

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

51 *Id.* at 1993-94 (to be codified at 18 U.S.C. § 3563(a), (b)). The provision states:

(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

(b) **DISCRETIONARY CONDITIONS.**—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(1) support his dependents and meet other family responsibilities;

(2) pay a fine imposed pursuant to the provisions of subchapter C;

(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

(13) work in community service as directed by the court;

(14) reside in a specified place or area, or refrain from residing in a specified place or area;

(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(16) report to a probation officer as directed by the court or the probation officer;

(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

(20) satisfy such other conditions as the court may impose.

a felony:⁵² "pay a fine," "make restitution," or "work in community service as directed by the court."⁵³ Considering the characteristics of corporate defendants, one method, perhaps the most effective method,⁵⁴ by which corporations can "work in community service" is by funding projects. Charitable contributions can be a means for corporations to meet this probation condition.⁵⁵

Moreover, the widely expanded list of conditions, including "other conditions as the court may impose,"⁵⁶ clearly indicates the list is exemplary not exclusive. The legislative history repeatedly emphasizes that courts have authority to impose *any* other probation conditions which may be appropriate for a particular offender.⁵⁷ Courts should allow the facts of the particular case to suggest probation conditions that will foster the goals of sentencing: just punishment, deterrence, incapacitation, and rehabilitation.⁵⁸ Charitable contributions can help meet these goals for corporate defendants. A court-ordered payment to charity should be as effective as a fine in punishing the corporate offender and deterring future violations by that offender and other corporations.⁵⁹ If the charitable contribution in some way serves to focus

52 *Id.* at 1993 (to be codified at 18 U.S.C. § 3563(a)(2)).

53 *Id.* at 1993 (to be codified at 18 U.S.C. § 3563(b)(2), (3), (13)).

54 Corporations may perform community service most effectively by funding in those instances where corporate personnel lack the skills or the corporation lacks the materials needed by the community service project chosen by the court.

The legislative history of the Act indicates Congress did not intend courts to manage organizations as a part of probation supervision. S. REP. NO. 225, *supra* note 6, at 102. This suggests that it may be preferable for corporations to perform community service by contributing assets rather than contributing labor and materials because the former would require less court supervision than the latter. See Coffee, "No Soul to Damn: No Body to Kick," *supra* note 2, at 453.

55 Following this line of reasoning, charitable contributions could be imposed under the Sentencing Reform Act, *supra* note 8, at 1993 (to be codified at 18 U.S.C. § 3563(b)(13)).

56 *Id.* at 1994 (to be codified at 18 U.S.C. § 3563(b)(20)).

57 S. REP. NO. 225, *supra* note 6, at 96.

The list is not exhaustive, and it is not intended at all to limit the court's options—conditions of a nature very similar to, or very different from, those set forth may also be imposed. . . . The conditions . . . are simply designed to provide the trial court with a suggested listing of some of the available alternatives which might be desirable in the sentencing of a particular offender. [footnote omitted] It is anticipated that . . . the court will review the listed examples in light of the Sentencing Commission's guidelines and policy statements, weigh other possibilities suggested by the case, and, after evaluation, impose those that appear to be appropriate under all the circumstances.

Id. at 98.

58 Sentencing Reform Act, *supra* note 8, at 1989 (to be codified at 18 U.S.C. § 3553(a)(2)).

59 Some commentators have criticized corporate charitable contributions as having the same drawbacks as fines in that corporations can pass the cost on to shareholders or consumers. See note 7 *supra* and accompanying text. Prof. Coffee has proposed that courts require corporations to pay equity fines, transferring corporate equity instruments instead

the corporation on its wrongdoing and remedying that wrong, it may also promote rehabilitation. Under the Sentencing Reform Act of 1984, charitable contributions can be imposed as a condition of probation for corporate defendants.⁶⁰ In appropriate cases, they could be a very effective sanction.

Procedural provisions of the Sentencing Reform Act will prevent abuse of this sanction by ensuring that it is imposed only in appropriate cases. These procedural provisions include the presentence report, Sentencing Commission guidelines, and appellate review.

The Act requires preparation of a presentence report focusing on the unique characteristics of the defendant and the offense.⁶¹ This report can be dispensed with only when the court finds that the record contains sufficient information of this nature to enable it to exercise its sentencing authority meaningfully.⁶² The information in the presentence report will provide the grist for the trial judge's sentence selection mill. By focusing on the unique characteristics of the corporate defendant and its offense, a judge imposing a charitable contribution as a probation condition will be guided to those charities that have a rational nexus⁶³ to the of-

of cash. He argues that doing so would avoid or minimize the problem of a corporation passing on the cost of its crime. Coffee, *"No Soul to Damn: No Body to Kick,"* *supra* note 2, at 413-24; Coffee, *Making the Punishment Fit the Corporation,* *supra* note 2, at 14-21. This idea that corporations pay in equity instruments rather than cash could also be applied to the corporate charitable contribution sanction. A large block of blue chip stock would be as beneficial to a charitable organization as an equivalent cash contribution.

60 While it appears that courts can impose a charitable contribution as a condition of probation under the Sentencing Reform Act, the relevant portion of the Act does not take effect until November 1, 1986. In the interim courts are still governed by the Federal Probation Act, 18 U.S.C. § 3651 (1982). At this point, one can only speculate on whether a charitable contribution probation condition may be imposed during this interim period. Courts, which have held this sanction to be outside the Federal Probation Act, based their argument on inferred legislative intent that the statute be construed narrowly. *See* notes 21-26 *supra* and accompanying text. Congress, in passing the Sentencing Reform Act, has negated this inference. *See* note 57 *supra*. Courts, however, also declined to impose the charitable contribution sanction on policy grounds. *See* notes 27-31 *supra* and accompanying text. Procedural provisions of the Sentencing Reform Act can safeguard these policy concerns. *See* notes 61-77 *infra* and accompanying text. But neither the Sentencing Commission's guidelines and policy statements nor the appellate review provisions are in effect at this time. *See* note 45 *supra*. Therefore, courts may either continue to decline to impose this sanction under the Federal Probation Act or courts, emboldened by clarified congressional intent, may impose this sanction under the Federal Probation Act and build policy safeguards into the sanction when imposed.

61 Sentencing Reform Act, *supra* note 8, at 1988-89 (to be codified at 18 U.S.C. § 3552).

62 S. REP. NO. 225, *supra* note 6, at 160.

63 A rational nexus would exist if the charity helped the same class of people as those harmed by the corporation's offense, if the charity served to reverse the damage done by the defendant's conduct, or if a reasonable relationship existed between the charity and the corporation's illegal conduct. A similar test for beneficiaries of non-monetary community service was proposed in *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1171 (S.D.N.Y. 1983).

fender and the offense. This will minimize potential conflicts of interest for the sentencing judge.

Chapter 58 of the Act establishes the United States Sentencing Commission⁶⁴ and empowers it to promulgate sentencing guidelines and policy statements.⁶⁵ These guidelines and policy statements are intended to promote consistency and coherence in the federal sentencing system.⁶⁶ But Congress foresees that the guidelines will enhance rather than detract from individually tailored sentences.⁶⁷ By proposing guidelines⁶⁸ and policy statements⁶⁹ for the use of charitable contributions as a condition of probation for corporate defendants, the Sentencing Commission can safeguard⁷⁰ against potential judicial conflicts of interest and protect the courts from public distrust and criticism.

The Act provides for appellate review of a sentence at the request of either the defendant or the government.⁷¹ Furthermore, the Act facilitates this appellate review by requiring the sentencing judge to enter into the record his reasons for choosing a particular sentence and to state which particular goals of sentencing he expects the sentence to achieve.⁷² On review, the appellate court will

64 Sentencing Reform Act, *supra* note 8, at 2017 (to be codified at 28 U.S.C. ch. 58). The Commission shall be appointed by the President with the advice and consent of the Senate. It shall consist of seven voting members and one nonvoting member. At least three of the members shall be federal judges in regular active service. Not more than four members shall be of the same political party. The Attorney General or his designee shall be the nonvoting member. *Id.* § 991 (98 Stat.), at 2017-18. After the initial staggered terms, members will serve for six years. *Id.* § 992 (98 Stat.), at 2018.

65 *Id.* at 2019-24 (to be codified at 28 U.S.C. § 994). Among the powers of the Commission is the power to study the effectiveness of sentences imposed. *Id.* at 2025 (to be codified at 28 U.S.C. § 995(a)(16)). The results of such studies conducted on novel conditions of probation, such as court-ordered charitable contributions, can provide the impetus for improved guidelines and policy statements.

66 *Id.* at 2018 (to be codified at 28 U.S.C. § 991(b)(1)).

67 S. REP. NO. 225, *supra* note 6, at 54-56, 164.

68 The court is to be guided by these guidelines but, if the court feels aggravating or mitigating factors which the Sentencing Commission did not consider are present in the case at bar, the court is not bound by them. Sentencing Reform Act, *supra* note 8, at 1990 (to be codified at 18 U.S.C. § 3353(b)); *see also* S. REP. NO. 225, *supra* note 6, at 54-56, 153-54.

69 The policy statements are less binding on the court than the guidelines. *See* S. REP. NO. 225, *supra* note 6, at 54, 170-71. For a list of proposed policy statement topics regarding organizational defendant sentencing, *see id.* at 169.

70 Since the guidelines and policy statements are essentially advisory to the trial court, *see* notes 68-69 *supra*, and yet a criterion by which the appellate court will review sentences, Sentencing Reform Act, *supra* note 8, at 2012 (to be codified at 18 U.S.C. § 3742(d)(2)-(3)), the Commission will have to function for a few years before it is known exactly what force the guidelines and policy statements will have.

71 *Id.* at 2011-13 (to be codified at 18 U.S.C. § 3742). If the defendant feels the court has arbitrarily imposed an inappropriate charitable contribution, he can seek review. If the government feels the district court has been too lenient in imposing a charitable contribution or has abused its discretion in choosing the charity, the government can seek review.

72 *Id.* at 1990 (to be codified at 18 U.S.C. § 3553(c)).

evaluate discretionary conditions of probation under the following standard:⁷³ (1) The condition must be reasonably related to (a) the nature and circumstances of the offense, (b) the history and characteristics of the offender, and (c) the Act's goals of sentencing.⁷⁴ (2) If the condition involves deprivation of property, it must also be reasonably *necessary* (not merely reasonably related) to carry out the sentencing purposes.⁷⁵ (3) The condition should comply with any guidelines or policy statements issued by the Sentencing Commission for that particular condition of probation or type of offense.⁷⁶ Thus, appellate review can also ensure that charitable contributions as a condition of probation are only imposed in a rational manner in cases in which they further the goals of the criminal justice system. This should prevent any appearance of unfairness⁷⁷ in the use of this sanction and any concomitant criticism of the courts.

III. Proposed Guidelines

Although charitable contributions as a condition of probation can legally be imposed under the Sentencing Reform Act and procedural provisions of the Act can safeguard policy concerns, guidelines are necessary to determine cases in which this sanction may be appropriate. Today, there is increasing concern over corporate social responsibility, especially in regard to violations which threaten public health and safety.⁷⁸ As the introductory hypothetical of Conglomerate Corporation suggests, this is one context within which charitable contributions can most effectively be used as a condition of corporate probation.

When public health and safety violations occur, the overwhelming concern focuses on the victims. The Sentencing Reform Act presumes restitution for the victims of crime.⁷⁹ In corporate crimes, however, a victim often does not learn of his injury⁸⁰ or has

⁷³ See *Id.* at 2012 (to be codified at 18 U.S.C. § 3742(d)); see also S. REP. NO. 225, *supra* note 6, at 97, 157.

⁷⁴ See note 14 *supra*.

⁷⁵ *Id.*

⁷⁶ Appellate courts will not reverse sentences outside the guidelines if the sentencing judge gives valid reasons for imposing a sentence which differs, even radically, from the guidelines. See Sentencing Reform Act, *supra* note 8, at 1990 (to be codified at 18 U.S.C. §§ 3553(b),(c)(2)); *id.* at 2012 (to be codified at 3742(d)(3)); see also S. REP. NO. 225, *supra* note 6, at 54-56, 153-54.

⁷⁷ See S. REP. NO. 225, *supra* note 6, at 68; see also note 48 *supra*.

⁷⁸ Coffee, "No Soul to Damn: No Body to Kick," *supra* note 2, at 391, 450; Coffee, *Making the Punishment Fit the Corporation*, *supra* note 2, at 4.

⁷⁹ Sentencing Reform Act, *supra* note 8, at 1990 (to be codified at 18 U.S.C. § 3553(c)), requires the sentencing court to give a reason whenever a sentence does not include an order of restitution.

⁸⁰ See Coffee, "No Soul to Damn: No Body to Kick," *supra* note 2, at 390-91; Coffee, *Making the Punishment Fit the Corporation*, *supra* note 2, at 8; *White-Collar Justice*, *supra* note 20, at 3, 5;

difficulty proving he was directly injured by the corporation's offense.⁸¹ This is particularly true in cases, such as the hypothetical, in which victims are not readily identifiable.⁸² Victims may not be readily identifiable⁸³ due to the widespread nature of the harm,⁸⁴ a delay in the manifestation of injury,⁸⁵ or the fact that only a percentage of victims exposed to the danger will succumb to actual harm.⁸⁶

In addition, a charitable contribution may be an effective method of making restitution whenever victims of an offense will need ongoing services over time.⁸⁷ This sanction may also be advisable whenever an effective remedy for the corporate harm requires a greater expenditure of money, effort, knowledge, or materials than individual victims would acquire or could purchase with the share of restitution awarded to them by the court.⁸⁸ This would occur whenever the harm to each individual is slight but the aggregate harm to the community is great.⁸⁹ Moreover, a charitable contribution may be a way to indirectly compensate victims

Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 597 (1982).

81 See McAdams, *supra* note 2, at 995.

82 The legislative history has suggested that community service may be an especially useful condition of probation when restitution is inappropriate because "the victims cannot be readily identified." S. REP. NO. 225, *supra* note 6, at 101. As noted, a charitable contribution is one way a corporation can perform community service. See also *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1169 n.20 (S.D.N.Y. 1983).

83 In cases where some victims are identifiable and others are not, courts can order direct restitution to the identifiable victims and also order a contribution to an appropriate charity. The charitable contribution could serve as a "safety net" for the unidentifiable victims.

84 In the hypothetical problem, the harm from Conglomerate Corporation's conduct was widespread in that all persons who had eaten the cereal and all persons who had been in the geographical area of the Foods Division plant were exposed to the carcinogenic compound. Considering the two year duration of Conglomerate Corporation's violations, the number of people exposed to the substance was prodigious.

85 The people exposed to the carcinogen by Conglomerate Corporation's conduct may not exhibit symptoms for years.

86 Of all the people whom Conglomerate Corporation caused to be exposed to the carcinogen, only a percentage will eventually develop cancer. Other victims, having received the same exposure, may never develop cancer.

87 An example of this type of situation would be one in which a corporation exposed victims to a chemical which caused permanent kidney damage. These victims could require dialysis treatment for the rest of their lives. Another example would be miners suffering from Black Lung Disease due to the mining corporation's failure to provide adequate ventilation. These victims may require continuous inhalation therapy.

88 For example, if a corporation has caused widespread harm to the environment by dumping toxic wastes, the cleanup effort can most effectively be mounted when resources are amassed, mobilized and directed by one unit.

89 Cases in which corporate conduct has destroyed an ecosystem, such as marshland, illustrate this situation. By violating federal pollution laws, a corporation could destroy a waterfowl breeding area. Individual citizens of the community may not be able to prove specific harm, but the community as a whole would have lost a valuable resource.

when a corporation's *nolo contendere* plea makes collection of subsequent civil damages less likely.⁹⁰

In all of these cases, as long as a rational nexus exists between the offense and the charity selected,⁹¹ the charity can function as a conduit through which money passes from the corporate criminal defendant to the victim.⁹² In the Conglomerate Corporation hypothetical, for example, the sentencing judge, in addition to whatever other sanctions he decides to impose, should consider requiring Conglomerate Corporation to make a sizeable contribution to charities which support cancer research and medical care for cancer victims.⁹³ While a somewhat indirect method of aiding the victims, it appears to be a more equitable and efficient solution than requiring Conglomerate Corporation to pay equal sums to all people exposed to the carcinogenic compound through the corporation's offenses.⁹⁴ The charitable contribution sanction also avoids the

90 The Sentencing Reform Act empowers judges to order a criminal defendant convicted of an offense involving fraud or other intentionally deceptive practices to give reasonable notice and explanation of the conviction to the victims of the offense. Sentencing Reform Act, *supra* note 8, at 1991 (to be codified at 18 U.S.C. § 3555). The purpose behind this sanction is to enable victims, who otherwise may not know that they have been victimized, to bring subsequent civil suits against the defendant for injuries suffered. In these civil suits, defendant's prior criminal conviction would have collateral estoppel effect. *See, e.g.,* Wolfson v. Baker, 623 F.2d 1074 (5th Cir. 1980); United States v. Frank, 494 F.2d 145 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); Cardillo v. Zyla, 486 F.2d 473 (1st Cir. 1973); *see also* Note, *supra* note 34, at 1350-56.

Defendants at times thwart this collateral estoppel effect by pleading *nolo contendere*. Coffe, "No Soul to Damn: No Body to Kick," *supra* note 2, at 441-44; *White-Collar Justice*, *supra* note 20, at 12. At times a defendant's *nolo contendere* plea may effectively prevent victims from bringing a civil suit, either individually or as a class action. In these cases, courts could consider ordering a contribution to a charity which would aid the victims, thus achieving partial restitution.

Similarly, an order to pay a charitable contribution may be appropriate when victims either individually or as a class would have difficulty proving the kind of loss recoverable in a civil suit. *See* note 81 *supra* and accompanying text.

91 *See* note 63 *supra*. If a contribution appears appropriate and no current charity meets the rational nexus criterion, the court could order the corporation to endow a new foundation to meet the needs created by its offense.

92 A similar conduit function could be served by the Crime Victims Fund. *See* Victims of Crime Act of 1984, Pub. L. No. 98-473, ch. XIV, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2170. In some cases, however, a charity may be a more efficient conduit. *See* note 93 *infra*.

93 In this hypothetical, a fine would be paid into the Crime Victims Fund. *See* note 92 *supra*. This Fund could make a grant to an eligible crime victim compensation program. The program, in turn, could give money to those victims who could prove injury from the corporation's illegal conduct. But a charity which engaged in cancer research and care of cancer patients would be more accessible to victims since the charities aid all cancer patients. In addition, during the years between the court's ordering the contribution and the victim's developing cancer, perhaps the money could have facilitated finding a cure or improved treatment. The direct charitable contribution could also be a more efficient conduit because the transaction costs would be lower than in the Crime Victims Fund's multi-step process.

94 If the corporation were required to pay present restitution only in the amount of

administrative quagmire of attempting to identify all individuals who ingested or inhaled the compound due to Conglomerate Corporation's conduct.⁹⁵ Is a charitable contribution an ideal solution to widespread harm caused by corporate criminal conduct? No, but at least it is a step towards accomplishing the impossible.

IV. Conclusion

The Sentencing Reform Act of 1984 provides a comprehensive and cohesive federal sentencing system which will allow courts to impose charitable contributions as a condition of probation for corporate criminal defendants. The procedural requirements of the new federal sentencing system will prevent potential abuses of this sanction. This sanction will not be appropriate for every corporate criminal defendant. Nevertheless, in those cases where charitable contributions are an appropriate condition of probation, they may provide an effective means to achieve the goals of sentencing the corporate offender.⁹⁶

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harm caused, one can conjecture that the court may compute the dollar figure for each victim by multiplying a dollar value for the harm caused by getting cancer times the percentage chance that each person exposed will develop cancer. But trying to arrive at figures to plug into this equation would be a judicial nightmare.

Apart from the judicial nightmare of trying to identify all the people exposed to the carcinogen, to place a dollar figure on the damage of victims developing cancer, and to determine what percentage of the victims will develop cancer at some future time, compensating all victims equally would be neither equitable nor efficient. This would not be equitable because all victims have not suffered equal harm. Some victims, despite equal exposure to the carcinogen, are more predisposed to developing cancer. In effect, their exposure has caused them greater harm. This is analogous to the "eggshell skull" doctrine of tort law. *See* RESTATEMENT (SECOND) OF TORTS § 16(1) comment 1, illustration 1 (1965). In addition, compensating all victims equally would not be efficient. Victims who actually develop cancer in the future would suffer losses greater than the amount of compensation they had received. Dollars paid to those who never developed cancer could better compensate for the corporation's violations if paid to the former group.

95 This proposed sanction admits the impossibility of the task. By ordering the charitable contribution, the court abandons attempts to compensate particular victims and settles for compensating the class of victims who have suffered like harm from whatever source. In effect, for these special cases, the court acknowledges the impracticability of victim restitution and orders community restitution as a means of promoting the rehabilitative goal of sentencing. *See* note 96 *infra*.

96 This sanction can meet the sentencing goals of just punishment, deterrence, and rehabilitation. If the amount of the contribution adequately reflects the severity of the defendant's offense, just punishment would be achieved. (If this sanction is imposed in addition to other sanctions, such as a fine, the amount of the contribution could be correspondingly reduced.) Because this sentence would cause the defendant to pay out assets, either in cash or equity instruments, *see* note 59 *supra*, both specific and general deterrence could be achieved. Furthermore, while fines focus the defendant's attention on its prosecutor, the government, court-ordered charitable contributions focus the defendant's attention on its victim, that segment of the community which its illegal conduct has harmed. This shift of focus may help to rehabilitate the corporate offender.