Volume 23
Number 1 *Fall 1988*

*pp.*75-109

Fall 1988

The Sentencing Reform Act of 1984: New Hope for Substitute Victim Restitution?

Jeffrey C. Boulden

NOTES

THE SENTENCING REFORM ACT OF 1984: NEW HOPE FOR SUBSTITUTE VICTIM RESTITUTION?

Federal criminal law is on the verge of a dramatic reformation. The enactment of the Sentencing Reform Act of 1984[1] promises to bring profound fundamental changes to the federal criminal justice system.[2] One area of sentencing that has been dramatically affected by the Sentencing Reform Act is probation.[3] Under this new law even the very nature of probation has been changed.[4]

Probation has also been changed in regard to the conditions which may or must be imposed upon an offender. Under the Federal Probation Act,[5] district court judges were given broad discretion, but very little guidance, in their determination of probationary conditions.[6] In marked contrast, the Sentencing Reform Act sets forth both mandatory and discretionary condi-

---

1. 18 U.S.C. §§ 3551-3586 (1985). The Sentencing Reform Act of 1984 is contained in Chapter II of the Comprehensive Crime Control Act of 1984. Act of October 12, 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1976, [hereinafter the Sentencing Reform Act]. The Sentencing Reform Act was passed on October 12, 1984. All relevant portions of this Act took effect on November 1, 1987.

2. An example of the changes in the federal criminal justice system prompted by the Sentencing Reform Act is the rejection of rehabilitation as the primary goal of sentencing. *See infra* note 80.

3. The Sentencing Reform Act repeals the Federal Probation Act, 18 U.S.C. §§ 3651-3655. Act of October 12, 1984, Pub. L. 98-473, Title II, c. II § 212 (a)(1)-(2); 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1976, 1987.

4. Probation was defined as "a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." Burns v. United States, 287 U.S. 216, 220 (1932). However, probation is no longer a 'period of grace' in lieu of a sentence. Probation is now an actual sentence. *See infra* note 84 (discussing the change in probation under the Sentencing Reform Act).

5. 18 U.S.C. §§ 3651-3655 (1985).

6. See *infra* note 52 for the relevant text of the Federal Probation Act.

tions of probation.[7]

The list of discretionary conditions in the Sentencing Reform Act is particularly extensive.[8] The Sentencing Reform Act provides the district courts with a wide range of options to allow district judges the necessary flexibility with which to fashion appropriate sentences.[9] However, the list of discretionary conditions is not exclusive.[10] Thus, the district court judge benefits from the guidance provided by the list of conditions set out in the Sentencing Reform Act, yet retains the wide range of discretion he formerly had under the Federal Probation Act. Arguably, under the Sentencing Reform Act the district judge has even greater discretion.

The enactment of the Sentencing Reform Act of 1984 has reopened the debate over the legality of using charitable contributions[11] as conditions of probation.[12] Under the Federal Probation Act,[13] a considerable amount of controversy existed in both the courts[14] and the academic community[15]

---

7. 18 U.S.C. § 3563 (1985). See *infra* note 83 for the relevant text.

8. *See id.*

9. S. REP. No. 225, 98th Cong., 2nd Sess. 50, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3233. *See also infra* note 84 (discussing the use of probation to fulfill the goals of the Sentencing Reform Act).

10. *See* 18 U.S.C. § 3563(b)(20) (1985). The Sentencing Reform Act states that the court may provide that the defendant "satisfy such other conditions as the court may impose." *Id.* The legislative history of the Sentencing Reform Act further evidences the intent of Congress that the list of discretionary conditions not be interpreted as exclusive. "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." S. REP. No. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

11. The charitable contributions referred to are monetary payments to either charitable or community service organizations. These payments are ordered as conditions of probation to punish the offender for his criminal conduct and not as restitution for any specific harm caused by him. If an offender causes direct harm to such an organization, he can be ordered to make restitution to that organization under the Sentencing Reform Act. *See* 18 U.S.C. § 3563(b)(3) (1985). Likewise, an offender could have been ordered to make restitution to a community organization under the Federal Probation Act, if that organization had been directly harmed by the offender's conduct. *See* 18 U.S.C. § 3651 (1985).

12. Even before the Sentencing Reform Act took effect, one commentator stated that charitable contributions should be considered as a valid condition of probation for corporate offenders under the new law. *See* Note, *Charitable Contributions as a Condition of Federal Probation for Corporate Defendants: A Controversial Sanction Under New Law*, 60 N.D.L. REV. 530 (1985) [hereinafter Note, *Controversial Sanction*].

13. 18 U.S.C. §§ 3651-3655 (1985).

14. *See generally* United States v. John Scher Presents, Inc., 746 F.2d 959 (3rd Cir. 1984) (condition of probation that offender contribute $100,000 to charities to be named by probation department held to violate § 3651); United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984) (condition of probation that defendant contribute $1,475,000 to the University of Nebraska to endow a chair in business ethics held to violate § 3651), *overruling* United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982) (condition of probation that corporate defendant could elect to pay part of its fine to the charitable organizations for which its officers and employees had been ordered to perform community service work held

regarding the legality of charitable contributions. While the debate primarily involved the interpretation of the Federal Probation Act,[16] other con-

---

valid under § 3651); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984) (condition of probation that one defendant contribute $175,000 to a Baltimore jobs program and that another pay $10,000 to a charity named by the probation department held to violate § 3651); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982) (conditions of probation that defendants contribute $50,000 and $75,000 respectively, to community agencies selected by the chief probation officer with the approval of the court held to violate § 3651); United States v. Clovis Retail Liquor Dealers Trade Ass'n, 540 F.2d 1389 (10th Cir. 1976) (condition of probation that defendants pay a total of $233,500 to a community alcohol treatment center held to violate § 3651); United States v. Gustafson, 587 F. Supp. 548 (D. Minn. 1984) (offer by defendant to make substantial payments to community social service programs as a condition of probation, in lieu of incarceration, rejected by trial court as in violation of § 3651). *But cf.* United States v. Mitsubishi Int'l. Corp., 677 F.2d 785 (9th Cir. 1982) (the court declined to rule on the validity of condition of probation requiring the defendant to make a payment to a community program for ex-offenders in lieu of fine, stating that if offender objected to condition of probation, offender could elect to pay the statutory fine).

15. *See generally* Adair, *Looking at the Law: Charitable Contributions*, 50 FED. PROBATION 78 (Dec. 1986) [hereinafter Adair, *Charitable Contributions*] (discussing United States v. Haile); Kahn, *Looking at the Law: Charitable Contributions as Conditions of Probation*, 48 FED. PROBATION 80 (Dec. 1984) (concluding that charitable contributions are an improper condition of probation under the Federal Probation Act); Kahn, *Looking at the Law: Corporate Sentencing: Update on Creative Probation Conditions*, 47 FED. PROBATION 56 (Dec. 1983) (discussing creative probationary conditions, including charitable contributions, in federal sentencing); Kutcher, *Looking at the Law: The White Collar Criminal: Probation Conditions of Community Service and Charitable Contributions*, 45 FED. PROBATION 63 (Sept. 1981) (discussing the use of charitable contributions as a creative condition of probation for corporate offenders); Yeager, *Community Redress Against the Corporate Offender*, 21-22 CRIME AND SOCIAL JUSTICE 223 (1984) (advocating the use of charitable contributions for corporate offenders); Note, *Corporate Contributions to Charity as a Condition of Probation Under the Federal Probation Act*, 9 J. CORP. L. 241 (1984) [hereinafter Note, *Corporate Contributions*] (concluding that charitable contributions are valid conditions of probation under the Federal Probation Act); Note, *Punishing the Corporation: Charitable Contributions as a Condition of Probation*, 15 RUTGERS L.J. 1069 (1984) [hereinafter Note, *Punishing the Corporation*] (charitable contributions are valid under the Federal Probation Act, but not an effective deterrent to corporate crime); Comment, *United States v. William Anderson Co.: "Crime in the Suites" Alternative Sentencing of Corporate Defendants*, 16 CREIGHTON L. REV. 1025 (1983) [hereinafter Comment, *Crime in the Suites*] (discussing United States v. William Anderson Co.); Comment, *United States v. William Anderson Co.: Monetary Conditions of Probation Under the Federal Probation Act*, 69 IOWA L. REV. 1147 (1984) [hereinafter Comment, *Monetary Conditions*] (criticizing the 8th Circuit's reasoning in United States v. William Anderson Co., which held that charitable contributions are valid conditions of probation under the Federal Probation Act); 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) [hereinafter Comment, *Corporations and the Federal Probation Act*] (criticizing the 8th Circuit's decision in United States v. William Anderson Co.).

16. 18 U.S.C. §§ 3651-3655 (1985). The relevant portions of the statute are set out *infra* notes 39 and 52. Those who favored the idea of charitable contributions cited the permissive language in the statute as providing for wide discretion in the setting of probationary conditions. Specifically cited by some courts are the phrases "upon such terms and conditions as the court deems best," "among the conditions thereof," and "may be required." *See, e.g.*,

cerns were raised regarding the propriety of conditioning probation upon the offender making a contribution to a charitable organization.[17] Until the Sentencing Reform Act was passed, it did not appear as if the federal courts could require charitable contributions as conditions of probation.[18]

This note proposes that a condition of probation which requires an offender to make a charitable contribution can best be referred to as Substitute Victim Restitution (SVR). This note further proposes that as a condition of probation, SVR is an effective sentencing tool. In his article, *Community Redress Against the Corporate Offender*, Matthew Yeager first coined the term Substitute Victim Restitution.[19] Yeager used the term Substitute Victim Restitution to describe the condition of probation placed upon a corporate offender who was ordered to make a "donation" to a local

---

William Anderson Co., 698 F.2d at 914; United States v. Wright Contracting Co., 563 F. Supp. 213, 215-16 (D. Md. 1983), *rev'd*, 728 F.2d 648 (4th Cir. 1984).

Those who took the position that charitable contributions were not provided for by the Federal Probation Act did so on the basis of a narrow construction of the Act. It was argued that the specific conditions of probation listed in the statute necessarily restricted the general grant of discretionary authority. The Federal Probation Act specifically listed three monetary conditions of probation: a fine, restitution, and support. Therefore, other monetary conditions were arguably not permitted. *See John Scher Presents, Inc.*, 746 F.2d at 964 (condition of probation that offender contribute $100,000 to charities to be named by probation department held to violate § 3651); *Missouri Valley Constr. Co.*, 741 F.2d at 1549 (condition or probation that defendant contribute $1,475,000 to the University of Nebraska to endow a chair in business ethics held to violate § 3651); *Wright Contracting Co.*, 728 F.2d at 651-52 (condition of probation that one defendant contribute $175,000 to a city of Baltimore jobs program and that another pay $10,000 to a charity named by the probation department held to violate § 3651); *Prescon Corp.*, 695 F.2d at 1243 (conditions of probation that defendants contribute $50,000 and $75,000 respectively, to community agencies selected by the chief probation officer with the approval of the court held to violate § 3651); *Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d at 1390 (condition of probation that defendants pay a total of $235,000 to a community alcohol treatment center held to violate § 3651); *Gustafson*, 587 F. Supp. 548 (offer by defendant to make substantial payments to community social service programs as a condition of probation, in lieu of incarceration, rejected by trial court as in violation of § 3651).

17. One such concern involved the difficulty that trial courts would have in selecting the proper charitable organization. It was argued that courts are ill equipped for such a task. *Missouri Valley Constr. Co.*, 741 F.2d at 1550. Another potential problem cited was the possible appearance of impropriety on the part of the court when it orders a payment of money to someone other than the government or a victim of the crime. *Id.*

18. Prior to the enactment of the relevant sections of the Sentencing Reform Act on November 1, 1987, not a single circuit court had accepted the idea of using charitable contributions as conditions of probation under the Federal Probation Act. Indeed, four circuit courts had explicitly rejected the idea of charitable contributions. *See* United States v. John Scher Presents, Inc., 746 F.2d 959 (3rd Cir. 1984); United States v. Missouri Valley Constr. Co., 741 F.2d 1543 (8th Cir. 1984) *overruling* United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982). There are, as of this writing, no reported decisions involving the use of charitable contributions as conditions of probation under the Sentencing Reform Act.

19. Yeager, *supra* note 15, at 225.

community service organization.[20] Yeager took the position that Substitute Victim Restitution could be an excellent method of funding important community services.[21] However, Yeager's analysis of the nature of and potential uses for SVR was rather incomplete.[22]

The courts have also been incomplete in their analysis of charitable contributions. Each court has focused on only one or two of the relevant issues.[23] Yet each court has added something to the overall analysis. One of the purposes of this note is to fully develop the concept of Substitute Victim Restitution as a probationary condition.

Part I of this note briefly discusses the historical development of probation in the federal courts. Part II analyzes the debate regarding the use of charitable contributions as conditions of probation under the Federal Probation Act. This analysis focuses primarily on the reasoning of those courts that objected to the use of charitable contributions. Part III discusses how the changes provided for in the Sentencing Reform Act may have eliminated the objections raised to charitable contributions under the Federal Probation Act. This note proposes that, under the Sentencing Reform Act, a charitable contribution should be a valid condition of probation. Part IV develops the concept of Substitute Victim Restitution. This discussion compares and contrasts SVR with more traditional conditions of probation in order to elucidate the true characteristics of SVR. This note proposes that SVR can best be understood as a hybrid of these traditional probationary conditions. Further, this section proposes that SVR can be an effective tool in meeting the goals for sentencing as set out in the Sentencing Reform Act.[24] Lastly, Part V recommends guidelines for the effective use of SVR in the sentencing of individual offenders.[25]

---

20. *Id.*

21. *Id.* at 226.

22. Yeager focused primarily on the value of SVR in funding community programs. While Yeager briefly noted that SVR could serve punishment, deterrent, and reparative functions, Yeager did not address how SVR can achieve these sentencing goals. *See generally* Yeager, *supra* note 15. This note analyzes how SVR can serve punishment, deterrent, and reparative functions, as well as provide funding for important community programs.

23. For example, the Eighth Circuit relied primarily on the fact that charitable contributions act as a deterrent by focusing the attention of the community on the offender and his illegal conduct. United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982), *rev'd*, United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984). The court, however, failed to mention the potential value to the community of the use of SVR to fund important community services. *See generally* Yeager, *supra* note 15. Moreover, neither Yeager nor the courts have discussed the benefit that SVR offers by fostering the offender's sense of responsibility for the actual harm that his acts have caused the community. *See infra* notes 158-85 and accompanying text.

24. *See infra* note 80 (discussing the goals for sentencing in the Sentencing Reform Act).

25. Most of the case law under the Federal Probation Act regarding charitable contri-

I. PROBATION IN THE FEDERAL COURTS—AN HISTORICAL DEVELOPMENT

District court judges have not always had the option of probation in the sentencing of an offender. In 1916, the United States Supreme Court held, in *Ex parte United States* (*Killits*), that federal trial court judges did not have the authority to suspend a statutorily mandated sentence and place an offender on probation.[26] In *Killits*, Judge Melvin Killits sentenced a defendant, who had pleaded guilty to charges of embezzlement, to five years in prison.[27] Judge Killits then suspended the sentence "during the good behavior of the defendant."[28] When Judge Killits refused to reverse himself in the face of the government's objections, the United States sought a writ of mandamus from the Supreme Court to force the judge to do so.[29]

A unanimous Supreme Court, citing the distribution of power established by the Constitution, rejected Judge Killits' contention that the ability to suspend sentences was inherent in the judicial power.[30] The Court stated that the determination of appropriate punishments for crime is within the legislative authority.[31] Within this authority, the legislature has the power to determine the scope of judicial review in executing the statutorily mandated punishment.[32] The Court held that absent an express grant by the legislature, the district courts were without the authority to suspend a statutory sentence.[33]

The Court also stated that the separation of powers established by the Constitution provided that the authority to relieve an offender from a statutory sentence was within the executive branch.[34] Therefore, to allow the

---

butions as conditions of probation involved corporate defendants. *See supra* note 14. The academic writing regarding charitable contributions and the Federal Probation Act has also focused on corporations. *See supra* note 15. Further, one commentator has even suggested possible guidelines for the use of charitable contributions in the sentencing of corporate offenders under the Sentencing Reform Act. *See* Note, *Controversial Sanction*, *supra* note 12. However, Substitute Victim Restitution can be an effective probationary condition in the sentencing of certain types of individual offenders as well. *See infra* notes 200-27 (discussing guidelines for the use of SVR, specifically with offenders convicted of inherently economic crimes). For this reason this note will deal with SVR and the sentencing of individuals.

26. *Ex parte* United States, 242 U.S. 27 (1916) (*Killits*).

27. *Id.* at 37.

28. *Id.*

29. *Id.* at 39. *See also* Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 50-51 (1981) (discussing the *Killits* case).

30. *Ex parte* United States, 242 U.S. at 41-42.

31. *Id.* at 42.

32. *Id.*

33. *Id.*

34. *Id.* at 42.

courts to suspend legislatively mandated sentences would amount to a usurpation of the constitutional authority of the executive.[35] The Court concluded that Judge Killits had exceeded his sentencing authority by suspending a sentence and placing an offender on probation.[36] The Court further concluded that any possible recourse for the concept of allowing the district courts to suspend sentences would have to come from Congress.[37]

Such recourse arrived nine years later with the passage of the Federal Probation Act of 1925.[38] Under the Federal Probation Act, Congress granted to the district courts the authority to suspend the imposition of a statutory sentence.[39] The Federal Probation Act also authorized the district judge to place the offender on probation "upon such terms as the court deems best."[40] The primary policy behind the passage of the Act was to promote the rehabilitation of offenders.[41] Proponents of probation felt that the purpose of probation, especially for young offenders, was to provide a "period of grace in order to aid the rehabilitation of a penitent offender."[42] Some judges interpreted this policy of rehabilitation to be the only limitation on their discretionary authority in setting the terms of probation under the Federal Probation Act.[43]

II. CHARITABLE CONTRIBUTIONS AND THE FEDERAL PROBATION ACT

The debate over the legality of using charitable contributions as conditions of probation, under the Federal Probation Act, focused primarily on the interpretation of the Act.[44] The proponents of charitable contributions

---

35. *Id.*

36. *Id.* at 52.

37. *Id.*

38. Act of March 4, 1925, Pub. L. No. 68-596, 43 Stat. 1259 (most recent version codified at 18 U.S.C. §§ 3651-3655 (1985)) [hereinafter Federal Probation Act].

39. 18 U.S.C. § 3651 (1985). The Federal Probation Act provided that:

> 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 as the court deems best.

Id.

40. *Id.*

41. *See* Greenberg, *supra* note 29, at 52.

42. Burns v. United States, 287 U.S. 216, 220 (1932).

43. *See, e.g.*, Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971).

44. The Federal Probation Act provides the sole source of the district court's power to suspend a sentence and place an offender on probation. United States v. Cohen, 617 F.2d 56 (4th Cir.), *cert. denied*, 449 U.S. 845 (1980); United States v. Ellenbogen, 390 F.2d 537 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). *See also Ex parte* United States, 242 U.S. 27 (1916); *supra* notes 24-35 and accompanying text (discussing *Ex parte* United States).

were for the most part trial court judges faced with the task of meeting the goals of sentencing under the Federal Probation Act.[45] Dissatisfied with the traditional tools of sentencing, fines,[46] and imprisonment,[47] judges looked for alternative sanctions to achieve those goals.[48]

Some district court judges viewed charitable contributions as legitimate sentencing alternatives.[49] These judges saw the permissive language[50]

---

45. The primary goal of sentencing under the Federal Probation Act was the rehabilitation of offenders. *See supra* note 4. The theory of rehabilitation is based on the belief that human behavior is the product of identifiable antecedent causes. If these causes are properly treated, then behavior can be modified. Under this theory, the purpose of a criminal justice system is to provide the offender with the proper treatment so that he can return to society so reformed that he will not desire or need to commit further crimes. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW, at 24 (2d ed. 1986).

To be sure, other theories exist concerning the purpose of punishment in a criminal justice system. These include: general and specific deterrence, restraint or incapacitation, and retribution. *See generally Id.* at 22-29. However, for the better part of this century "the pendulum has been swinging away from retribution and deterrence and in the direction of rehabilitation as the chief goal of punishment." *Id.* at 28. Indeed, the United States Supreme Court, in Williams v. New York, 337 U.S. 241 (1949), stated that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* at 248.

46. A fine is defined as, "[t]o sentence a person convicted of an offense to pay a penalty in money." BLACK'S LAW DICTIONARY 569 (5th ed. 1979). Generally, the amount of money required of an offender is proportional to the gravity of his offense. *See* Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57, 60 (1975) [hereinafter Note, *Creative Punishment*]. Fines are essentially punitive in nature. *See* Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 821 (1963), *cited in* Comment, *Corporation and the Federal Probation Act*, *supra* note 15, at 167 n.25. Therefore, fines did not meet the primary goal of sentencing under the Federal Probation Act, which was rehabilitation. *See supra* note 45 (discussing the sentencing goals of the Federal Probation Act).

47. The general belief in the failure of imprisonment to rehabilitate offenders is exemplified in the legislative history of the Sentencing Reform Act. "[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting . . . ." S. REP. NO. 225, *supra* note 9, at 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3221.

48. The use of creativity in the fashioning of probationary conditions was approved of by one circuit court. United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982). "The arsenal of the sentencing judge should contain more than the traditional weapons of fine and imprisonment simpliciter." *Id.* at 913 (discussing the deterrent effect of charitable contributions).

49. *See, e.g.*, United States v. Wright Contracting Co., 728 F.2d 648, 650 (4th Cir. 1984). Charitable contributions would "put back into the immediate local community some of the illegal gains which have been achieved by the [offender] from that community, and it would serve as a deterrent as well as a . . . catharsis to help to expiate . . . guilt." *Id.* (quoting District Judge Young from an unpublished decision of the companion case, United States v. Mid-Atlantic Paving Co. (D. Md.)).

50. *See supra* note 39 and *infra* note 52, for the relevant text of the Federal Probation Act. The phrases "upon such terms and conditions as the court deems best," "among the conditions thereof," and "may be required" have been cited by some courts in support of the position that the statute grants the courts broad discretionary authority. *See, e.g., William*

of the Federal Probation Act as providing for a broad grant of judicial discretion in setting conditions of probation.[51] The three monetary conditions of probation[52] listed in the Federal Probation Act were seen merely as examples of the types of conditions that the courts were permitted to set.[53] Therefore, these district judges concluded that they could lawfully order charitable contributions as conditions of probation.

The circuit courts of appeals, however, interpreted the Federal Probation Act as prohibiting the district courts from ordering charitable contributions as conditions of probation.[54] The primary objection voiced by the courts of appeals was that charitable contributions exceeded the district courts' discretionary authority. Specifically, the circuit courts stated that

---

Anderson Co., 698 F.2d at 914. United States v. Wright Contracting Co., 563 F. Supp. 213, 215-16 (D. Md. 1983), *rev'd*, 728 F.2d 648 (4th Cir. 1984).

51. Historical support existed for the proposition that the Federal Probation Act granted the district courts a great deal of discretion in the setting of probationary conditions. *See* United States v. Arthur, 602 F.2d 660, 664 (4th Cir. 1979) ("sentencing court has very broad discretion in imposing conditions of probation, so long as conditions bear a reasonable relationship to treatment of the accused"); United States v. Tonry, 605 F.2d 144, 147 (5th Cir. 1979) (18 U.S.C. § 3651 lists some of the permissable conditions of probation but does not list all possible conditions); United States v. Pastore, 537 F.2d 675, 680 (2nd Cir. 1976) ("It would be hard to use more general words than 'upon such terms and conditions as the court deems best' "); United States v. Nu-Triumph, Inc., 500 F.2d 594, 596 (9th Cir. 1974) ("discretion in probation matters is limited only by the requirement that the terms and conditions thereof bear a reasonable relationship to the treatment of the accused and the protection of the public . . . .") (quoting Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971)); *Porth*, 453 F.2d at 333 ("The sentencing judge has a broad power to impose conditions designed to serve the accused and the community. The only limitation is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public."). Judge Gibson, in his dissent in *United States v. Missouri Valley Construction Co.*, agreed with this interpretation of the language in the Federal Probation Act. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1551-53 (8th Cir. 1984) (Gibson, J., concurring and dissenting).

52. 18 U.S.C. § 3651 (1985) provided, in part:

> . . .
> 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.

53. *See supra* note 51.

54. All but one of the circuit courts which have ruled on the legality of charitable contributions under the Federal Probation Act have held such conditions of probation invalid. *See* United States v. John Scher Presents, Inc., 746 F.2d 959 (3rd Cir. 1984); United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984) *overruling* United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982). *But see* United States v. Mitsubishi Int'l Corp., 677 F.2d 785 (9th Cir. 1982) (held that it need not consider the offender's objection to the conditions of probation because the offender could elect to pay the statutory fine instead).

the monetary conditions of probation listed in the Federal Probation Act limited the broad grant of discretionary authority in the statute.[55] In so ruling, the circuit courts generally relied upon the rule of statutory interpretation which states that "a specific provision will govern notwithstanding the fact that a general provision, standing alone, may include the same subject matter."[56] Since the Federal Probation Act explicitly provided for three monetary conditions of probation, but did not explicitly provide for charitable contributions, charitable contributions were held to be invalid.[57] Judges who ordered charitable contributions were viewed has having abused their judicial discretion.[58]

Another objection raised by the circuit courts was that charitable contributions were improper forms of restitution under the Federal Probation Act.[59] Some circuit courts stated that as monetary conditions of probation, charitable contributions were most like restitution.[60] However, these courts also pointed out that the Federal Probation Act provided for restitution to "aggrieved parties"[61] and for those "actual damages . . . caused by the offense for which conviction was had."[62] These courts applied a strict interpretation to the language of the statute and held that charitable contributions were an improper condition of probation under the Federal Probation Act.[63]

---

55. The Federal Probation Act provided for three monetary conditions of probation: a fine, restitution, and support. 18 U.S.C. § 3651 (1985). *See supra* note 52 for the relevant text.

56. *Prescon Corp.*, 695 F.2d at 1243. *See John Scher Presents, Inc.*, 746 F.2d at 963; *Missouri Valley Constr. Co.*, 741 F.2d at 1547; Karrell v. United States, 181 F.2d 981, 986-87 (9th Cir. 1950).

57. *See* cases cited *supra* note 56.

58. *See* cases cited *supra* note 56.

59. *See* United States v. John Scher Presents, Inc., 746 F.2d 959, 963-64 (3rd Cir. 1984); United States v. Wright Contracting Co., 728 F.2d 648, 653 (4th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236, 1243 (10th Cir. 1982).

60. *See* cases cited *supra* note 59.

61. 18 U.S.C. § 3651 (1985). *See supra* note 52 for the relevant text.

62. *Id.*

63. *See* cases cited *supra* note 59. There was an historical basis for a strict interpretation of the restitution clause in 18 U.S.C. § 3651. For example, the words "aggrieved parties" were interpreted only to mean those specific victims directly harmed by the offender's conduct. *See* Fiore v. United States, 696 F.2d 205, 209 (2d Cir. 1982) (community at large not an aggrieved party); United States v. Clovis Retail Liquor Dealers Trade Ass'n, 540 F.2d 1389, 1390 (10th Cir. 1976) (county council on alcoholism not an aggrieved party); United States v. Ramirez, 555 F. Supp. 736 (E.D. Cal. 1983) (restitution is not to be used by a court in lieu of a fine, but only to compensate persons who have been injured by the defendant's actions). These words have also been interpreted as meaning only those victims for whose harm conviction was had. *See, e.g.*, Karrell v. United States, 181 F.2d 981, 987 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950) (where defendant has been charged with crimes against several persons, but convicted on only some of the counts, the court may not order the defendant, as a condition of probation, to make payments to any persons who were not aggrieved by the precise acts charged in those counts on which conviction was had).

Probationary conditions which required the defendant to make charitable contributions were also held to be usurpations of Congress' appropriation power.[64] The Eighth Circuit Court of Appeals noted that district courts were not explicitly authorized to order charitable contributions as conditions of probation.[65] The court stated that those district courts which had suspended fines and then ordered charitable contributions had, in effect, ordered the disbursement of federal money.[66] The Eighth Circuit stated further that the Constitution explicitly granted the authority to appropriate federal funds to the legislative branch.[67] The court reasoned that those district courts which ordered charitable contributions had usurped Congress' power to appropriate federal funds.[68] The court concluded that district judges could only order an allocation of federal funds in those manners specifically set out in the Federal Probation Act.[69]

Under the Federal Probation Act, the ordering of a charitable contribution as a condition of probation was also viewed as creating the appearance of judicial impropriety.[70] In order for a court to order a charitable contribution as a condition of probation, a judge would have to choose from among a large number of legitimate organizations.[71] This selection process would bring upon the courts the potential for a great deal of criticism, as well as potential accusations of conflict of interest.[72] Indeed, one court con-

---

Likewise, the phrase "actual damages . . . for which conviction was had" has been interpreted narrowly. *See* United States v. Tiler, 602 F.2d 30, 33 (2d Cir. 1979). "The well settled construction of this langauge is that restitution may be ordered as a condition of probation only for actual damages flowing from the specific crime charged in the indictment of which the defendant is convicted after either a trial or plea of guilt." *Id. See also* United States v. Gering, 716 F.2d 615, 622-25 (9th Cir. 1983) (defendant who had been accused of embezzling or converting a large sum, but who pled guilty or had been convicted under an indictment alleging the embezzlement, or conversion, of only a smaller amount cannot be required, as a condition of probation, to make restitution of any sum greater than the amount specified in the particular counts on which conviction was had).

64. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1549-50 (8th Cir. 1984).

65. *Id.* at 1550.

66. *Id.*

67. *Id.*

68. *Missouri Valley Constr. Co.*, 741 F.2d at 1549-50. The court stated that the U.S. Constitution provides that Congress shall have the power to appropriate federal monies. *Id.* at 1550 (citing U.S. CONST., art. I, §§ 8 & 9). The court then reasoned that when a district judge suspends a fine and orders the offender to pay that money to a charity, the judge is in effect appropriating federal funds. *Id.* Absent a specific authorization by Congress, the district judge does not have the authority to disburse federal money. *Id.*

69. *Id.*

70. *See Missouri Valley Constr. Co.*, 741 F.2d at 1550; United States v. Wright Contracting Co., 728 F.2d 648, 653 (4th Cir. 1984).

71. *See Missouri Valley Constr. Co.*, 741 F.2d at 1550; *Wright Contracting Co.*, 728 F.2d at 653.

72. *Missouri Valley Constr. Co.*, 741 F.2d at 1550. The Model Code of Judicial Con-

cluded that any potential benefits of the ability to order charitable contributions would be outweighed by the potential problems.[73]

In spite of these decisions, a few district court judges, persuaded of the merits of charitable contributions as conditions of probation, have attempted to circumvent the various appellate rulings.[74] Some judges have been successful in "suggesting" to offenders that they "voluntarily" make charitable contributions prior to sentencing.[75] The Central District of California succeeded simply by virtue of the fact that offenders did not appeal the conditions of probation imposed upon them.[76] The Western District of Texas, however, was not as successful when it attempted to use its discretionary authority to reduce sentences to influence an offender to make a charitable contribution.[77] Yet, despite the fact that the Western District of

---

duct states:

Canon 2
A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Actions

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

MODEL CODE OF JUDICIAL CONDUCT, Canon 2(A) (1972).

73. *Wright Contracting Co.*, 728 F.2d at 653. "[T]he court exposes itself to possibly justifiable and unanswerable criticisms both in respect of the particular beneficiaries selected and the specific sums awarded them. The danger thereby created, without compensating benefit, for unnecessary involvement of the criminal justice system in peripheral controversy is obvious." *Id.*

74. *See* Note, *Controversial Sanction*, *supra* note 12, at 534-35 n.20, 537 n.32.

75. In *United States v. Allied Chemical Corp.*, for example, the district court judge fined the defendant $13.2 million after the defendant pleaded *nolo contendere* to charges of violating the Federal Water Pollution Control Act. United States v. Allied Chem. Corp., 7 Env't Rep. (BNA) 844 (1976). However, District Judge Merhige stated that he might reduce the fine if Allied made "a voluntary effort to alleviate the suffering that resulted [from Allied's acts]." *Id.* Allied thereafter spent $8 million in setting up an endowment to fund a variety of conservation projects. Judge Merhige, in turn, reduced Allied's fine by a similar amount. *See* Zim, *Allied Chemical's $20 Million Ordeal with Kepone*, Fortune, Sept. 11, 1978, 82, 88-89, *quoted in* Note, *Controversial Sanction*, *supra* note 12, at 537 n.32.

76. In October of 1981, the United States District for the Central District of California (Los Angeles) authorized the U.S. Probation Office to create a non-profit public benefit corporation named, "The Foundation for People." Yeager, *supra* note 15, at 225. Shortly thereafter, the Central District ordered a defendant convicted of bid-rigging to make a $100,000 donation to the Foundation for People in lieu of a $300,000 fine. United States v. Inryco, Inc., No. CR 80-0035 (C.D. Cal. Mar. 15, 1982), *cited in* Yeager, *supra* note 15, at 225. Subsequently, the Central District ordered other defendants to make donations as probationary conditions. *See also* United States v. Cook, No. CR 84-37 (C.D. Cal. April 3, 1984) (defendant convicted of dealing in counterfeit money ordered to make a charitable contribution to the Foundation for People), *cited in* Yeager, *supra* note 15, at 225; United States v. Automated Laboratory Servs., No. CR 83-104 (C.D. Cal. June 27, 1983) (defendant ordered to donate $120,000 to the Foundation for People to establish a training program for federal probationers and parolees), *cited in* Yeager, *supra* note 15, at 225-26.

77. Rule 35 of the Federal Rules of Criminal Procedure allowed a sentencing judge to

Texas was not successful, the Fifth Circuit expressed its sympathy for the district court's intentions.[78] The circuit court simply decided that the Western District was without the statutory footing, under the Federal Probation Act, to coerce a defendant to make a charitable contribution.[79] Under the Sentencing Reform Act, however, the district courts may have the requisite statutory footing.

III. CHARITABLE CONTRIBUTIONS AND THE SENTENCING REFORM ACT

The Sentencing Reform Act of 1984 brought sweeping changes to the federal criminal justice system.[80] In repealing the Federal Probation Act,[81]

---

consider a motion to reduce a sentence, or to reduce a sentence without a motion, within 120 days after the sentence was imposed. FED. R. CRIM. P. 35(b). In *United States v. Haile*, a defendant was sentenced to two years in prison and fined $50,000 for violating the Sherman Act. United States v. Haile, 795 F.2d 489, 490 (5th Cir. 1986). The United States District Court for the Western District of Texas then suspended the sentence and placed the defendant on probation subject to the condition that the defendant pay the fine within the 120 day period. *Id.* The court stated, however, that it would consider using Rule 35 to reduce the fine if the defendant wished to "divert" part of it (up to a maximum of 25% of the total fine) to an approved charity. *Id.* The United States objected to the sentence and appealed.

The Fifth Circuit agreed with the United States that the district court had abused its discretion. *Id.* at 491. The court held that to allow the district court to use Rule 35 in such a manner would in effect allow a judicial 'end-run' around Congress. *Id.* In spite of the court's holding, the Fifth Circuit gave its tacit approval to the type of "suggestion" used by Judge Merhige in *Allied Chemical. Id.* at 492; *See also supra* note 73 (discussing *Allied Chem.*). The Fifth Circuit stated that its decision did not limit the district judges' discretionary authority in tailoring conditions of probation. *Haile*, 795 F.2d at 492. The court merely decided that while a judge could consider a defendant's charity, even a "charitable spirit that has flowered only under the shadow of the jail wall," a judge could not compel an offender to make charitable acts through the use of the Federal Rules of Criminal Procedure. *Id. See also* Adair, *Charitable Contributions*, *supra* note 15 (discussing the *Haile* decision).

78. The Fifth Circuit Court of Appeals stated:

> It might be true that the rehabilitation of a person such as [the defendant] will be fostered by charitable gifts or by the response from the community that they provide. It might also be true that judicially approved charitable organizations can spend money, and thereby benefit the community, more intelligently than can the U.S. government.

Haile, 795 F.2d at 492.

79. *Id.*

80. With the passage of the Sentencing Reform Act, the fundamental focus of federal sentencing has been shifted away from the goal of rehabilitation. Sentencing Reform Act, *supra* note 1, at § 3553(a)(2); *see supra* note 45 (stating that the primary goal of sentencing under the Federal Probation Act was the rehabilitation of the offender). This shift in focus is due in large measure to the belief that the federal criminal justice system has failed to meet the goal of rehabilitation. The legislative history of the Sentencing Reform Act states that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting." S. REP. NO. 225, *supra* note 9, at 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3221. In support of the foregoing statement, the report cites several recent studies which suggest the failure of the rehabilitation approach. *Id.* at 40 n.16, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3223. The failure of the criminal justice system to rehabilitate offenders is blamed on a fundamental lack of understanding

the Sentencing Reform Act established new guidelines for setting conditions of probation.[82] The Sentencing Reform Act also sets out both mandatory and discretionary conditions of probation.[83] Thus, the district

---

about human behavior. *Id.* at 40, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3223. In turn, this lack of understanding makes it difficult, even impossible, to design sentencing programs which can be reasonably relied upon to rehabilitate the offender. *Id.* The report reaches the conclusion that "it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Id.*

The Sentencing Reform Act establishes a different set of goals for federal sentencing. In place of the failed rehabilitation model, the Sentencing Reform Act recognizes four purposes for sentencing in the federal criminal justice system. 18 U.S.C. § 3553(a)(2) (1985). These purposes are:

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

(B) [the need] to afford adequate deterrence to criminal conduct;

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

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

Id.

81. *See supra* note 3.

82. An example of such a guideline in the Sentencing Reform Act is the presumption that the offender should make restitution for his crime. 18 U.S.C. § 3553(c) (1985). The Sentencing Reform Act requires the district judge to state his reasons in writing in the event that the ordered sentence does not contain an order of restitution. *Id.*

83. 18 U.S.C. §§ 3563(a)-(b) states:

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

(1) for a felony, 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 sections 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 the victims 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 the stated degree or under stated circumstances;

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

judge can use the probationary conditions listed in the Sentencing Reform Act to fashion appropriate sentences of probation.[84]

---

(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.

18 U.S.C. §§ 3563(a)-(b) (1985).

84. The Federal Probation Act authorized the district courts to suspend a statutory sentence and place the offender on probation. *See supra* note 39. Under the Sentencing Reform Act, probation is now defined as a sentence. 18 U.S.C. § 3561 (1985). While the difference between defining probation as a sentence rather than the suspension of a sentence may appear to be merely semantical in nature, in fact this shift indicates a rather profound change in the philosophy of the federal criminal justice system. One commentator has stated that this change was made to mitigate the public perception that one who is placed on probation is "getting off easy" because his sentence was suspended. *See* Note, *Controversial Sanction*, *supra* note 12, at 539 n.48. However, this appears to be an inadequate analysis of the definitional change of probation.

The definition of probation was changed to reflect the current state of modern criminal justice philosophy. S. REP. NO. 225, *supra* note 9, at 88, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3271. A "sentence" was traditionally thought of as a period of imprisonment. *Id.* at 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3242. In actuality a sentence is a device which is used to achieve the goals of the criminal justice system. *Id.* It has been stated that imprisonment is considered a failure in achieving these goals. *Id.* at 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3221. In support of this statement, the legislative history of the Sentencing Reform Act cites several recent studies which suggest the failure of our prisons to effect the goals of the federal criminal justice system. *Id.* at 40 n.16, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3223. Yet, by defining "sentence" in terms of imprisonment, what has been achieved is an over reliance on a tool which does not

The list of discretionary conditions of probation in the Sentencing Reform Act, however, does not prohibit the district court judge from creating different conditions for probation.[85] Indeed, the legislative history of the Sentencing Reform Act makes it explicit that Congress intended that this list be interpreted as exemplary and not exclusive.[86] The report states that "[t]he list is not exhaustive, and it is not intended at all to limit the court's options . . . ."[87]

Further, the Sentencing Reform Act explicitly prohibits the use of the rule of statutory construction which states that specific provisions govern general provisions[88] in construing the new Act.[89] Congress has clearly authorized the district judges to set conditions of probation which are not included in the list of discretionary conditions set out in the Sentencing Reform Act.[90] Congress has also authorized district court judges to establish

---

work. *Id.* at 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3242. The Sentencing Reform Act, by expanding the definition of "sentence" to include probation, is explicitly authorizing district judges to use alternatives to imprisonment in order to be more effective in meeting the goals of sentencing. *Id.*

85. The Sentencing Reform Act provides that the defendant can be ordered, as a condition of probation, to "satisfy such other conditions as the court may impose." 18 U.S.C. § 3563(b)(20) (1985).

86. S. REP. NO. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

87. *Id.*

88. *See supra* notes 55-57 and accompanying text (discussing the use of the rule of statutory construction that the specific governs the general, under the Federal Probation Act).

89. *See supra* note 85.

90. *Id.* It should also be mentioned that the circuit courts' use of the rule of statutory construction which states that the specific governs the general, in interpreting the Federal Probation Act, has been criticized.

The circuit courts' reliance on cases which cite the rule that specific language governs broad langauge [hereinafter the Rule] is supported by the results of those cases alone. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1552-53 (8th Cir. 1984) (Gibson, J., concurring and dissenting). In his separate opinion in the Eighth Circuit's decision in *Missouri Valley Construction Co.*, Judge Gibson criticized the court's use of the rule in reaching its decision. *Id.* at 1551-53. Judge Gibson analyzed the history of the use of the Rule in the various circuit courts and found the courts' underlying reasoning wanting. *Id.* at 1553.

Judge Gibson specifically criticized the inconsistency of the Tenth Circuit's dictum in *United States v. Prescon Corp.* as an example of such shaky reasoning. *Missouri Valley Constr. Co.*, 741 F.2d at 1553. The Tenth Circuit cited the Rule in reaching its decision to invalidate a probationary condition because the condition required the defendants to contribute money to various community agencies. United States v. Prescon Corp., 695 F.2d 1236, 1243 (10th Cir. 1982). But, the Tenth Circuit also stated that, "[w]e do not suggest that the listing of the four specific conditions of probation 'closes the door' to other conditions." *Id.* at 1242-43, *quoted in Missouri Valley Constr. Co.*, 741 F.2d at 1553.

This type of inconsistency in the use of the Rule has been identified as an inherent weakness of the Rule. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 243 (1975), *quoted in Missouri Valley Constr. Co.*, 741 F.2d at 1552 n.1. Dickerson stated:

> [I]t is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds.

probationary conditions which are "of a nature very similar to, or very different from, those set forth . . . [in the Act] . . ."[91] Thus, while the Sentencing Reform Act provides for three monetary conditions of probation,[92] the sentencing judge is not limited to those three. It appears reasonable to conclude, therefore, that under the Sentencing Reform Act, charitable contributions are a proper monetary condition of probation.

Likewise, a charitable contribution does not appear to be an improper form of restitution under the Sentencing Reform Act. Under the Federal Probation Act, several circuit courts stated[93] that a charitable contribution, as a monetary condition of probation, was most like the restitution condi-

---

Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here.

Id. Judge Gibson stated that when examined in the context of the surrounding language in the statute, the specific provisions for probationary conditions in the Federal Probation Act should not have been read as prohibiting the use of charitable contributions. *Missouri Valley Constr. Co.*, 741 F.2d at 1553.

There is also some doubt about whether the Rule is actually a rule. The Rule is based on the Latin maxim, *expressio unius est esclusio alterius. Missouri Valley Constr. Co.*, 741 F.2d at 1551. Professor Dickerson stated that "[s]everal Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means." R. DICKERSON, *supra*, at 234, *quoted in Missouri Valley Constr. Co.*, 741 F.2d at 1552 n.1. Professor Dickerson also stated that *expressio unius* is probably the best example of this kind of problem. *Id.* Indeed, one court has exclaimed, in regard to these Latin maxims, that they are as helpful in interpreting statutes as "such vials of distilled wisdom of the ages contained in the phrases 'birds of a feather flock together' and 'man is known by the company he keeps'." Keystone Automobile Club v. Comm'r of Internal Revenue, 181 F.2d 402, 404 (3rd Cir. 1950). The court continued, stating that "[t]hrowing a vague phrase into law Latin does not make it anymore useful in construing a statute." *Id.* at 404-05. Thus it is a mistake to base a judicial decision upon a "rule" with such "insubstantial underpinning." *Missouri Valley Constr. Co.*, 741 F.2d at 1551-52 (Gibson, J., concurring and dissenting).

Lastly, the whole *genre* of rules for statutory interpretation have come under attack. S.E.C. v. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943). In *Joiner*, the U.S. Supreme Court stated:

> Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permit so as to carry out in particular cases the generally expressed legislative policy.

Id. In examining the overall purpose of the Federal Probation Act, Judge Gibson concluded that charitable contributions were consistent with the general legislative intent of the statute. *Missouri Valley*, 741 F.2d at 1553.

91. S. REP. NO. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

92. 18 U.S.C. §§ 3563(b)(1)-(3) (1985). *See supra* note 83 for the relevant text.

93. *See* cases cited *supra* note 59.

tion of probation provided for in the statute.[94] These circuit courts consistently held that a narrow interpretation of the restitution clause of the Federal Probation Act[95] prohibited the payment of restitution to anyone who was not an "aggrieved party."[96]

The language of the restitution clause of the Sentencing Reform Act[97] is similar to the language in the restitution clause of the Federal Probation Act. Congress, however, has explicitly stated that the Sentencing Reform Act is to be interpreted broadly.[98] The existence of a restitution clause in the Sentencing Reform Act does not prohibit the district court judge from setting a condition of probation that is similar to restitution.[99] Nor does the Sentencing Reform Act restrict the district court's interpretations of the words in that restitution clause.[100] Thus, it can reasonably be inferred that the argument that charitable contributions are not permissible because they are improper forms of restitution does not apply to the Sentencing Reform Act.

Similarly, the objection that a charitable contribution is a usurpation of Congress' power to appropriate federal funds does not seem to apply to the Sentencing Reform Act. Congress intended the Sentencing Reform Act to be interpreted broadly.[101] Therefore, the authorization to set conditions of probation "of a nature very similar to"[102] those conditions listed in the statute, should be read as not limiting the district judge in the types of monetary conditions of probation which he can set. Therefore, since Congress has authorized the district courts to exercise such broad authority, it cannot be said that a judge who orders a charitable contribution is usurping Congress' authority to appropriate federal monies.

Moreover, a charitable contribution may not be a usurpation of Congress' authority to appropriate federal monies because, under the Sentenc-

---

94. *See* cases cited *supra* note 59.

95. 18 U.S.C. § 3651 provided that the defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." 18 U.S.C. § 3651 (1985).

96. *See* cases cited *supra* note 59.

97. 18 U.S.C. § 3563(b)(3) provides that the defendant may, "make restitution to a victim of the offense . . . ." 18 U.S.C. § 3563(b)(3) (1985).

98. *See* S. REP. NO. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

99. *Id.* The Senate Report states that "conditions of a nature very similar to . . . those set forth may also be imposed." *Id.*

100. S. REP. NO. 225, *supra* note 9, at 95-96, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278-79. The Senate Report states that "the court could in an appropriate case order restitution not covered by paragraph (b)(3) under the general provisions of section (b)(20). *Id.*

101. *See* S. REP. NO. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

102. *Id.*

ing Reform Act, the district judge is not disbursing federal funds. Under the Federal Probation Act, district judges who attempted to set a probationary condition requiring a charitable contribution first sentenced the defendant to pay a fine.[103] The fine was then suspended and the offender was ordered to make a charitable contribution.[104] The suspension of the fine and the subsequent ordering of the contribution arguably transferred federal money into private hands.[105]

Pursuant to the Sentencing Reform Act, probation is a sentence in itself and not a condition placed upon an offender after the suspension of a sentence.[106] A charitable contribution is not ordered in lieu of a fine under the Sentencing Reform Act.[107] If a fine is never ordered and subsequently suspended, then such monies cannot be said to have been in the federal treasury; they were never federal funds.[108] Thus, the argument that charitable contributions usurp Congress' appropriation power is weakened, because the issue of district judges ordering the disbursement of federal funds never arises.[109] The district judge may now have the requisite "statutory footing"[110] to order charitable contributions as conditions of probation.

Lastly, the proper use[111] of a charitable contribution as a condition of probation should not create the appearance of judicial impropriety under the Sentencing Reform Act.[112] The Fourth Circuit Court of Appeals stated that a charitable contribution would involve the court in the process of choosing beneficiaries for potentially large sums of money.[113] Such a selection process could expose the court to unnecessary questioning and criticism.[114] The Eighth Circuit stated that such a process could also raise the specter of conflicts of interest.[115] These two circuit courts concluded that the potential benefits of charitable contributions were not worth the potential risks.[116]

This concern over the possible appearance of judicial impropriety has

---

103. *See supra* note 68.
104. *See supra* note 68.
105. *See supra* note 68.
106. *See supra* note 84.
107. *See* Note, *Controversial Sanction*, *supra* note 12, at 539 n.48.
108. *Id.*
109. *Id.*
110. United States v. Haile, 795 F.2d 489, 492 (5th Cir. 1986).
111. See *infra* notes 200-27 and accompanying text for guidelines for the use of SVR.
112. See *supra* note 72 for the relevant text of the A.B.A. Code of Judicial Conduct.
113. United States v. Wright Contracting Co., 728 F.2d 648, 653 (4th Cir. 1984).
114. *Id.*
115. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1550 (8th Cir. 1984).
116. *Missouri Valley Constr. Co.*, 741 F.2d at 1550; *Wright Contracting Co.*, 728 F.2d at 653.

been criticized.[117] In his dissenting opinion in *United States v. Missouri Valley Construction Co.*, Circuit Judge Heaney addressed this issue.[118] Judge Heaney admitted that a district judge would have to exercise care in the selection of a beneficiary of a charitable contribution.[119] However, Judge Heaney pointed out that district court judges are already given broad discretionary authority in a number of important matters.[120] The Judge concluded that the concern over judicial impropriety was the result of an inordinate fear that "our district court judges will not have the wisdom to avoid possible conflicts of interest."[121]

Another commentator has stated that a flat ban on charitable contributions, so as to avoid the appearance of judicial impropriety, would be overly broad.[122] While a prohibition on charitable contributions would prevent a judge from possibly abusing his discretion, it would also block payments which would otherwise be beneficial.[123] Less drastic checks on a judge's use of discretion are already built into the criminal justice system.[124] One prominent check on judicial discretion is the fact that the prosecutor has the right to appeal a probationary condition which the prosecutor feels is an abuse of judicial discretion.[125] With this procedural safeguard in place, a complete prohibition on charitable contributions seems unnecessary.[126]

---

117. *See Missouri Valley Constr. Co.*, 741 F.2d at 1551 (Heaney, J., concurring and dissenting); United States v. William Anderson Co., 698 F.2d 911, 914-15 (8th Cir. 1982).

118. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1551 (8th Cir. 1984).

119. *Id.*

120. *Id.* Judge Heaney pointed to a judge's discretionary authority regarding the scheduling and trying of cases, as well as a judge's discretion in the sentencing of individuals to terms of imprisonment. *Id.*

121. *Id. See* United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982). In *William Anderson Co.*, the court summarily dismissed this type of argument, stating that the concern over potential impropriety was "unmeritorious." *Id.* The court concluded by saying "[i]f ever such a question comes before me, I will endeavour to answer it." *Id.*, *quoting* Blackburn, J., in Hollins v. Fowler, 44 L.J. Rep. (N.S.) 169, 176 (H.L. 1875).

122. *See* Note, *Corporate Contributions*, *supra* note 15, at 259. The author points out that "[b]ecause judicial discretion is such a fundamental part of the probationary system, there should be clear and convincing reasons before the exercise of discretion is curtailed." *Id.*

123. *Id.*

124. *Id.*

125. *Id.* Under the Sentencing Reform Act, both the prosecutor and the offender can appeal a sentence. 18 U.S.C. §§ 3742(a)-(b) (1985).

126. *See* Note, *Corporate Contributions*, *supra* note 15, at 259. However, the concern over the appearance of judicial impropriety is not completely unfounded. Consider the case of *In re Storie* as an example. *In re* Storie, 574 S.W.2d 369 (Mo. 1978). In *Storie*, the Missouri Supreme Court suspended a magistrate for violations of Canon 2 of the Code of Judicial Conduct. *Id.* at 375. At the time that he was appointed to fill a vacancy in the Pulaski County Magistrate's office, Magistrate Storie was forced to deal with an office that was woefully ill-equipped to carry out the business of his office. *Id.* at 370. The record indicated that the courtroom was dilapidated and that there were no legal reference books or annotated statutes available for use by the magistrate and his staff. *Id.* Magistrate Storie sought funding to im-

Thus, a district judge should be able to order charitable contributions without the fear of creating an appearance of impropriety.

The Sentencing Reform Act eliminates the objections that were raised to charitable contributions under the Federal Probation Act. Further, the new Act grants to district judges a broad scope of discretion in the fashioning of probationary conditions to meet the goals of sentencing set out in the new Act.[127] It is suggested that charitable contributions as conditions of probation, or SVR payments, can be valuable tools to the district judge in meeting the goals for sentencing in the Sentencing Reform Act.

IV. SUBSTITUTE VICTIM RESTITUTION

Substitute Victim Restitution (SVR) is a discretionary condition of probation whereby the offender is ordered to make a payment to a charity or community service organization.[128] However, the discussions regarding the purposes and uses of SVR have to date been incomplete.[129] SVR can best be understood as a hybrid of three traditional conditions of probation:

---

prove the condition of this court, however the County Court's administrative judges repeatedly denied Storie's requests. *Id.*

The prosecuting attorney for Pulaski County, who was familiar with the conditions of the court, proposed a solution. *Id.* at 371. During the course of a plea negotiation, the prosecutor suggested to Magistrate Storie that, in exchange for a dismissal of the charge [minor traffic offense] the Magistrate should request a payment by the offender to a "Library Fund," in an amount of equal to the fine. *Id.* This incident led to a four year period in which, under the direction of the magistrate, use of the "Library Fund" expanded. *Id.* The fund was used to purchase books and furnishings for the courtroom and pay wages to part-time employees and a maintenance staff. *Id.* However, this situation changed when the Missouri Supreme Court received information about the "Library Fund." *Id.*

The Missouri Supreme Court admitted that it appeared as if Magistrate Storie had acted without "evil intent" in attempting to improve his court. *Id.* at 374. Nevertheless, the court stated that the magistrate's conduct had created an appearance of judicial impropriety. *Id.* at 374. Magistrate Storie's actions had created the impression that justice was for sale in his court. *Id.* at 375. The Missouri Supreme Court suspended the Magistrate for two months without pay. *Id.* at 375.

The danger of a judge creating an appearance of judicial impropriety when he orders a charitable contribution is always present. As Judge Heaney pointed out, a judge must exercise care in the selection of a beneficiary. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1551 (8th Cir. 1984) (Heaney, J., concurring and dissenting). A prosecutor has the right to appeal a condition of probation which he feels is an abuse of judicial discretion. Note, *Corporate Contributions*, *supra* note 15, at 259. While this is an important procedural safeguard, it is not infallible. *See In re* Storie, 574 S.W.2d 369 (Mo. 1978). Thus, guidelines are needed to aid the judge in avoiding the appearance of impropriety when ordering a charitable contribution as a condition of probation.

127. *See supra* note 80 (discussing the goals of sentencing under the Sentencing Reform Act).

128. *See supra* notes 19-21 and accompanying text (discussing the name Substitute Victim Restitution).

129. *See supra* notes 19-21 and accompanying text.

fines, restitution, and community service. More importantly, SVR can be effective in meeting the goals of sentencing mandated by the Sentencing Reform Act.

A. SVR and Fines

A fine is a sanction which deprives an offender of a certain amount of his property.[130] Fines are essentially punitive in nature.[131] Similarly, SVR[132] deprives the offender of a certain amount of his property because the court orders the offender to make a monetary payment to a charitable or community service organization.[133] Like a fine, SVR serves a punitive function because the offender is forced to endure some suffering, specifically a deprivation of his property.

A fine can also serve as a specific deterrent to future criminal conduct by the offender.[134] A fine serves the purpose of specific deterrence because it " 'quickens the sense of social responsibility' by making the offender undergo some tangible sacrifice."[135] Yet, fines are not always a successful deterrent to an offender's criminal activity.[136] Nor are fines necessarily effec-

---

130. *See supra* note 46.

131. Best & Birzon, *supra* note 46, at 821. However, the use of the word "punitive" is in dispute. Some writers, like Best and Birzon, define the word punitive in a narrow sense to mean the infliction of suffering upon the offender. *Id.* Other writers use the term "retribution" to mean the same thing. *See* W. LAFAVE & A. SCOTT, *supra* note 45, at 25-26. LaFave and Scott use the term "punishment" to incorporate all the various theories for the use of sanctions by a society. *See generally Id.* at 22-29 (discussing the nature of punishment as well as the various theories of punishment). Retribution is a theory of punishment whereby some sort of suffering is inflicted upon the offender. *Id.* at 25-26. It is imposed upon offenders under the belief that it is only fitting and just that one who has caused harm to others should himself suffer for it. *Id.* at 26. Retribution embodies the theory that man is a responsible moral agent to whom rewards are due when he makes correct moral choices, as socially defined, and to whom punishment is due when he makes wrong ones. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37-38 (1968).

132. SVR is not a fine within the meaning of federal law. All collections for fines must be deposited into official checking accounts with the Treasurer of the United States. *See* 28 U.S.C. § 751(e) (1985).

133. *See* Yeager, *supra* note 15, at 225.

134. This theory of punishment, called specific or particular deterrence, aims to alter criminal behavior by subjecting the individual to such an unpleasant experience that the offender will not wish to endure the experience again. W. LAFAVE & A. SCOTT, *supra* note 45, at 23 (discussing prevention).

135. Note, *Creative Punishment*, *supra* note 46, at 60 (quoting Best & Birzon, *supra* note 46, at 821).

136. *See* Kutcher, *supra* note 15, at 63. "The inadequacy of traditional sentences of fines . . . for white collar criminals is a vexing problem. Fines are rarely large enough to deter similar criminal offenses. The individual or the corporation may view a criminal fine as only 'a price of doing business.' " *Id.*

tive in deterring criminal activity in the community as a whole.[137] The primary criticism of fines, regarding their ability to deter crime, is that fines are rarely large enough[138] to be effective and they often go unnoticed by the general public.[139] "Once the payment is made to the Treasury, the public promptly forgets the transgression and the [defendant] continues on [his] way. . . ."[140]

Deterrence is fostered by the publicity of the sentence.[141] This is true of both specific and general deterrence. Specific deterrence depends upon the offender suffering in order to effect behavioral change.[142] The offender's suffering, however, can be "heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner."[143] By focusing public opinion on the offender and his punishment, a judge can intensify the offender's suffering.[144] This, in turn, increases the sanction's specific deterrent value.[145]

General deterrence depends upon the public being made aware of the offender's suffering.[146] By focusing public opinion on the offender's punishment, a judge can maximize the public's awareness of the offender's suffering.[147] This in turn increases the effectiveness of the punishment's general deterrence.[148] Public opinion can be sharply focused on the offender and his punishment through the use of creative sentencing.[149]

As an alternative probationary condition, SVR can be an effective tool in achieving deterrence to crime because of its highly public nature. When an offender is ordered to fund a chair in business ethics at a local univer-

---

137. This theory of punishment called general deterrence, is based on the notion that the suffering imposed on the offender will deter others from committing future crime, lest they suffer the same fate. W. LAFAVE & A. SCOTT, *supra* note 45, at 24-25.

138. *See supra* note 136.

139. *See* United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1551 (8th Cir. 1984) (Heaney, J., concurring and dissenting).

140. *Id.*

141. *See Id.*; United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982), *overruled by* United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984); United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1167 (S.D.N.Y. 1983).

142. *See supra* note 134.

143. *William Anderson Co.*, 698 F.2d at 913. This is especially true for those offenders, such as white-collar offenders, who may not truly suffer from the imposition of a fine. *See supra* note 134. However, not even "corporate tycoons" are immune to "painful publicity." *William Anderson Co.*, 698 F.2d at 913. "Any imaginative realization that one will be hissed off the social stage or suffer pain is bound to act as a strong deterrent." Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1015-16 (1940).

144. *William Anderson Co.*, 698 F.2d at 913.

145. *Id.*

146. *See supra* note 137.

147. *See* United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982).

148. *Id.*

149. *Id.*

sity[150] or support a local community service organization,[151] the public is made aware of the offender's criminal conduct and its consequences.[152] If properly selected,[153] an SVR payment can be a continual reminder of the offense to both the offender and the general public.[154] This longevity, in turn, maximizes the deterrent effect of SVR.

B. *SVR and Restitution*

Restitution[155] or reparation[156] payments by criminal offenders have traditionally been ordered to victims directly harmed by the offender's conduct.[157] Under the Federal Probation Act,[158] most of the circuit courts limited the payment of restitution to those victims of crimes whose injuries constituted the basis of a charge on which the offender was convicted.[159] By focusing on the recipient of the restitution payment, however, the circuit courts overlooked the fact that the primary focus of criminal restitution is on the offender.

The central rationale for the imposition of an order of restitution or reparation is the effect such a sanction will have upon the offender's future behavior.[160] The effect that restitution has on the offender is twofold. One purpose for restitution is to foster the defendant's sense of responsibility for his unlawful actions.[161] By ordering restitution, the court forces the offender

---

150. *See* United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984).

151. *See, e.g.*, United States v. Wright Contracting Co., 563 F. Supp. 213 (D. Md. 1983), *rev'd*, 728 F.2d 648 (4th Cir. 1984).

152. *William Anderson Co.*, 698 F.2d at 913; *Missouri Valley Constr. Co.*, 741 F.2d at 1551 (Heaney, J., concurring and dissenting).

153. See *infra* notes 200-27 and accompanying text for guidelines for the effective use of an SVR payment.

154. *Cf. supra* note 136 and accompanying text (discussing the limitations of a fine in effecting deterrence).

155. Restitution is defined as "the act of making good or giving equivalent for any loss, damage, or injury." BLACK'S LAW DICTIONARY 682 (5th ed. 1979).

156. Reparation is defined as payment or otherwise making amends for an injury or for damages that have been committed on or to another. BLACK'S LAW DICTIONARY 674 (5th ed. 1979).

157. Best & Birzon, *supra* note 46, at 826.

158. 18 U.S.C. § 3651 (1985). See *supra* note 52 for the text of the restitution clause of the Federal Probation Act.

159. *See, e.g.*, Karrell v. United States, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950). The defendant was charged with seventeen counts of fraud, but was convicted on only six of the counts. *Id.* at 982-83. The district court ordered the defendant, as a condition of probation, to make restitution payments to all the individuals who had suffered losses as a result of his actions. *Id.* at 983. The circuit court, however, held that the district judge had abused his discretion. *Id.* at 987. The court further ordered that restitution only be paid to those individuals concerned in the six counts upon which the offender was convicted. *Id.*

160. Best & Birzon, *supra* note 46, at 826.

161. United States v. McLaughlin, 512 F. Supp. 907, 909 (D. Md. 1981).

to recognize the extent to which his actions have harmed the victim. The second and primary effect that restitution has on the offender, however, is as a deterrent to future criminal conduct.[162] The suffering inflicted upon an offender by depriving him of his property is magnified by the public nature of the restitution payment. This maximizes the deterrent effect of the sanction.[163]

Yet, despite the usefulness of restitution as a deterrent to crime, the circuit courts sought to restrict its use through a narrow interpretation of the Federal Probation Act.[164] Like a charitable contribution, an SVR payment is not "restitution" within the narrow interpretation adopted by the circuit courts under the Federal Probation Act.[165] Restitution is a payment to a direct victim of a criminal act.[166] SVR is a payment to a symbolic victim, generally the community or an organization which serves the community.[167]

SVR is comparable to traditional restitution, however, because it affects the offender in a similar way. Both restitution and SVR foster the offender's sense of responsibility for his unlawful actions.[168] With SVR, the offender is forced to face the realization that his actions have caused a certain amount of harm to the local community.[169] SVR is also similar to restitution because it serves as a deterrent to future criminal conduct.[170] SVR

---

162. Best & Birzon, *supra* note 46, at 826.

163. *See supra* note 143 (discussing how increasing the public nature of a sanction heightens its deterrent effect).

164. See *supra* note 52 for the text of the restitution clause of the Federal Probation Act. *See also supra* notes 57-61 and accompanying text (discussing the development of a narrow interpretation of restitution under the Federal Probation Act in the circuit courts).

165. *See* cases cited *supra* note 59.

166. Best & Birzon, *supra* note 46, at 826.

167. *See* Yeager, *supra* note 15, at 225; United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1169 (S.D.N.Y. 1983). "To the extent that . . . [such] . . . sentences provide restitution, such restitution is in the nature of 'symbolic restitution' designed primarily to deter future misconduct on the part of the defendants rather than to provide compensation for their victims." *Id.*

168. The Sentencing Reform Act states that one purpose of sentencing is that it should reflect the seriousness of the offense. 18 U.S.C. § 3553(a)(2)(A).

169. In *Wright Contracting*, the Fourth Circuit Court of Appeals quoted the district court's reasoning from the unreported companion case *United States v. Mid-Atlantic Paving Co.*, (D. Md.). United States v. Wright Contracting Co., 728 F.2d 648, 650 (4th Cir. 1984). The district court stated that the payment it had ordered would "put back into the immediate local community some of the illegal gains which have been achieved by the [offenders] from that community . . . ." *Id.*

170. In *Wright Contracting*, the District Court for the District of Maryland called its order of SVR-type payments a form of "penance." United States v. Wright Contr. Co., 563 F. Supp. 213, 214 (D. Md. 1983). The court stated that one of its purposes behind ordering payments to local charities was "deterrence." *Id.* The payments were "not restitutional, reparative, or in any way connected with reimbursing anyone for losses sustained as a result of this specific crime. It is instead designed to punish defendant, specifically deter defendant and gen-

achieves this deterrent effect by imposing suffering on the offender in a very public fashion.[171] Further, SVR is especially useful when individual victims are not easily identifiable, or when the victims are so numerous as to make individual restitution impracticable. Because of its multi-faceted utility, SVR, like restitution, should be considered a viable probationary option.

C. *SVR and Community Service*

An offender who has been ordered by the court to perform community service[172] generally performs this service in the hours in which he is not employed. As a form of symbolic restitution,[173] the performance of community service fosters the offender's sense of responsibility for his unlawful actions.[174] Also, like restitution, community service serves as both a specific and general deterrent to crime.[175] Community service achieves this deterrent effect by imposing suffering upon the offender, specifically by depriving him of his leisure time. This suffering is heightened by the fact that such work is generally done within the public eye, thus maximizing the potential for specific deterrence. This, in turn, increases the public's awareness of the offender and his punishment and thereby provides a general deterrent effect as well.

Under the Federal Probation Act, community service was held to be a valid condition of probation.[176] The circuit courts, however, took a narrow view of what was acceptable community service. For example, a defendant ordered to accept full time employment without salary in a charitable organization was held valid.[177] But a district court judge, who ordered an offender to donate his services as a concert promoter to raise funds for a community organization, was seen as abusing his discretionary authority.[178]

---

erally deter other [defendants] contemplating similar criminal activity." *Id.*

171. *See supra* notes 141-49 and accompanying text (discussing the achievement of deterrence through the imposition of suffering in a public fashion).

172. Community service is unpaid work done for the community through an organization which serves that community. *See* Berman & Hoelter, *Client Specific Planning*, 45 FED. PROBATION 37, 39 (June 1981).

173. *See* Berman & Hoelter, *supra* note 172, at 39; United States v. Arthur, 602 F.2d 660, 664 (4th Cir. 1979); United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1167 (S.D.N.Y. 1983).

174. *See* Berman & Hoelter, *supra* note 172, at 39; United States v. John Scher Presents, Inc., 746 F.2d 959, 963 (3rd Cir. 1984).

175. *See* United States v. Arthur, 602 F.2d 660, 664 (4th Cir. 1979); United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1169 (S.D.N.Y. 1983). *See also supra* notes 162-63 and accompanying text (discussing how restitution effects deterrence to crime).

176. United States v. Arthur, 602 F.2d 660, 664 (4th Cir. 1979).

177. *Id.*

178. United States v. John Scher Presents, Inc., 746 F.2d 959 (3rd Cir. 1984). The court reasoned that the condition of probation imposed on the offenders would not have altered the offenders' behavior in any way. *Id.* at 963. The court stated:

Direct payments of money to charitable organizations were also not a valid form of community service under the Federal Probation Act.[179]

SVR is not community service within the narrow definition developed by the circuit courts under the Federal Probation Act.[180] The Third Circuit stated that community service should be strictly construed as actual labor performed for the community.[181] SVR, however, is monetary payment to an organization which serves the community.

Still, SVR is similar to community service in that SVR fulfills the same purposes of sentencing as does community service. Both community service and SVR can impress upon the offender a sense of responsibility for his unlawful actions. This sense of responsibility is fostered by forcing the offender to provide a valuable resource to the community. Thus, the offender is forced to contemplate the actual harm that his actions have caused to the community. Of equal importance to SVR's ability to foster responsibility is the fact that SVR payments can be useful in funding community service work.[182] In his dissent in *United States v. Missouri Valley Construction Co.*, Circuit Judge Gibson recognized the value of community service as a sentencing tool.[183] However, as Judge Gibson pointed out, community service organizations often require funding.[184] SVR payments can be an important source for this much needed funding.[185]

D. SVR and The Sentencing Reform Act

The Sentencing Reform Act has established a new set of goals for sentencing in the federal criminal justice system.[186] Under the new Act, judges have been granted broad discretion in the fashioning of probationary condi-

---

they would simply continue their normal business operations and promote concerts for profit. The probationary condition ordered by the district court merely requires the corporation to pay money. The only difference between this condition and a fine is that here the payee on the corporate checks would be a charitable organization rather than the United States Treasury.

Id. The court concluded that as the condition of probation was essentially monetary, it would have to fit within the three forms of monetary conditions listed in the Federal Probation Act. *Id.*

179. *See John Scher Presents*, 746 F.2d 959; United States v. Wright Contracting Co., 738 F.2d 648, 653 (4th Cir. 1984) (distinguishing its decision in *United States v. Arthur*).

180. *See John Scher Presents*, 746 F.2d at 962-63.

181. *Id.*

182. United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1553 (8th Cir. 1984) (Gibson, J., concurring and dissenting).

183. *Id.*

184. *Id.*

185. *See* Yeager, *supra* note 15, at 226.

186. *See supra* note 80 (discussing the goals of sentencing under the Sentencing Reform Act).

tions to meet those goals. One of the goals of sentencing under the Sentencing Reform Act is that a sanction provide "just punishment."[187] Read in the context of the other purposes of sentencing under the new Act, the words "just punishment" can be reasonably inferred to mean that Congress intended that a sentence be punitive.[188]

Like a fine,[189] SVR serves a punitive function because it imposes suffering on the offender. Because an SVR payment is more public in nature than a fine, SVR can heighten the offender's punishment. Thus, SVR is potentially more effective than a fine in providing "just punishment."

Deterrence is also an important goal for sentencing under the Sentencing Reform Act.[190] The Sentencing Reform Act states that a sentence should "afford adequate deterrence to criminal conduct."[191] Read in the context of the rest of the goals for sentencing set out in the new Act, it can reasonably be inferred that Congress intended "deterrence" to mean specific deterrence.[192] This inference appears stronger if one interprets the goal of sentencing, that a sanction "promote respect for the law,"[193] as meaning general deterrence.[194] Thus, the Sentencing Reform Act appears to mandate that sentences should act as both specific and general deterrents to crime.

Like restitution,[195] SVR serves as both a specific and a general deterrent to crime. SVR serves as a specific deterrent because it inflicts suffering on the offender by taking some of the offender's property. However, because

---

187. 18 U.S.C. § 3553(a)(2)(A) (1985). *See* S. REP. NO. 225, *supra* note 9, at 50, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3223.

188. *See supra* note 131 (discussing the punitive or retributive theory of punishment).

189. Under the Sentencing Reform Act, a district judge is authorized to order a fine as a condition of probation. 18 U.S.C. § 3563(b)(2) (1985). Indeed, if the offender has been convicted of a felony, the judge must order either a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2) (1985). The explicit authorization to order a fine does not preclude the district judge from ordering a condition of probation which is similar to a fine. *See* S. REP. NO. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

190. 18 U.S.C. §§ 3553(a)(A)-(B) (1985).

191. 18 U.S.C. § 3553(a)(2)(B) (1985).

192. For a discussion of the theory of specific deterrence, see *supra* note 134.

193. 18 U.S.C. § 3553(a)(2)(A) (1985).

194. See *supra* note 137 for a discussion of the theory of general deterrence.

195. The Sentencing Reform Act authorizes a district judge to order restitution as a condition of probation. 18 U.S.C. § 3563(b)(3) (1985). Restitution is one of the three conditions of probation, along with fines and community service, from which a district judge must choose when sentencing a convicted felon to probation. 18 U.S.C. § 3563(a)(2) (1985). This explicit authorization to order restitution does not prohibit a district judge from ordering conditions of probation which are similar to restitution. *See* S. REP. NO. 225, *supra* note 9, at 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278. Indeed, Congress has explicitly authorized the district courts to order restitution which is not covered in § 3563(b)(3), under the general provisions of § 3563(b)(20). *See* S. REP. No. 225, *supra* note 9, at 95-96, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3278.

an SVR payment is more public in nature, it heightens the suffering and therefore is more effective as a specific deterrent. Also, because of the greater degree of publicity surrounding an SVR payment, it is more effective than restitution in effecting a general deterrent to crime.

The Sentencing Reform Act also requires that sentences should "reflect the seriousness of the offense,"[196] apparently to impress upon the offender the reality of the harm that his act has wrought. This in turn tends to foster the offender's sense of responsibility for his acts and the subsequent harm caused by those acts. Like restitution and community service,[197] SVR payments foster the offender's sense of responsibility for his unlawful acts.

SVR fosters the offender's sense of responsibility for his unlawful conduct in two ways. By tying the size of the SVR payment to some determination of the amount of harm the offender has caused,[198] SVR tends to impress upon the offender the quantum of harm his acts have caused. Secondly, by directing the payment to a specific community service organization,[199] SVR forces the offender to recognize the fact that his crime caused harm to the local community. Increasing the offender's understanding of the ramifications of his unlawful conduct arguably fosters the offender's sense of responsibility for his criminal acts.

In sum, under the Sentencing Reform Act, Substitute Victim Restitution should be a permissible condition of probation. Further, SVR can be an effective sanction in meeting the goals of sentencing set out in the new Act. Specifically, an SVR payment can meet the goals of "just punishment" and specific and general deterrence, and can reflect the seriousness of the offense. However, to aid the district judge in the use of Substitute Victim Restitution, guidelines are needed for the effective use of SVR in the sentencing of individual offenders.

V. GUIDELINES

A. Inherently Economic Crime

For a court to justify the imposition of an SVR payment as a condition

196. 18 U.S.C. § 3553(a)(2)(A) (1985).

197. The Sentencing Reform Act explicitly authorizes a district judge to order an offender to work in community service. 18 U.S.C. § 3563(b)(13) (1985). In fact, a district judge sentencing a felony offender to probation must order the offender to either work in community service, make restitution, or pay a fine as a condition of his probation. 18 U.S.C. § 3563(a)(2) (1985).

198. See *infra* notes 200-27 and accompanying text for a discussion on guidelines for the use of SVR payments.

199. See *infra* notes 210-27 and accompanying text for a discussion on selecting a beneficiary for an SVR payment.

of probation, the offender must have profited economically from his crime. This requirement serves three purposes. Tying SVR with an offender's ill-gotten gain provides an equitable basis for SVR. Secondly, using SVR in the sentencing of offenders who have profited from their crime gives the court some framework for determining the amount of the SVR payment. Lastly, the use of SVR with unjustly enriched offenders ensures fairness in sentencing.

In equity, a court could impose a constructive trust whenever circumstances under which property was acquired made it unjust that it should be retained by the possessor.[200] By ordering an SVR payment, the court can be seen as creating a constructive trust on the offender's ill-gotten gain for the benefit of the community from which it was taken.[201] The offender is deprived of the unjust enrichment that he received through his unlawful conduct and the money is returned to the community.

Inherently economic crimes provide a basis for the determination of how large the SVR payment should be. A district judge who wishes to incorporate an SVR payment into a probation plan will need a guide for deciding how large a payment to order. An offender's illegal profits provide just such a guide. Also, by using illegal gains as a basis for an SVR order, the risk of a judge appearing arbitrary in his sentencing is reduced. This in turn reduces the potential that the district judge will create an appearance of impropriety.

Lastly, the requirement that SVR only be used for offenders convicted of inherently economic crimes ensures that all offenders are treated equally. For the purposes of SVR, all offenders will be reviewed on the basis of their crime, not on their financial status. This provides a sense of fairness to the sentencing process.[202]

B. Community Service

Whenever SVR is imposed on an offender it must be accompanied by a condition requiring the offender to perform community service. This community service should be performed by the offender for the organization which is benefiting from his SVR payment.[203] There are two reasons for

---

200. *See* 5 A. SCOTT, SCOTT ON TRUSTS § 462.2 (3rd ed. 1967).

201. *See* United States v. Wright Contracting Co., 728 F.2d 648, 650 (4th Cir. 1984) (quoting the district court's reasoning for ordering an SVR-type payment in the unreported decision of *United States v. Mid-Atlantic Paving Co.* (D. Md.)).

202. Fairness was a primary goal of the sentencing reform movement which culminated in the Sentencing Reform Act. *See* S. REP. NO. 225, *supra* note 9, at 52, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3235. *See also infra* note 205 (discussing sentencing discrepancies).

203. This was first recommended by Judge Gibson in his opinion in *Missouri Valley.*

this requirement.

First, by requiring that all offenders who make SVR payments also perform community service, fairness is maintained in the sentencing process.[204] If a judge determines that he must make a choice between SVR and community service, there may be a distinction between those offenders who can afford to make SVR payments and those who cannot.[205] Those who could make such payments would more likely be ordered to do so. Those who could not would more likely be ordered to work. If both SVR and community service must be ordered concurrently the possibility of such a distinction is eliminated. Also, by insisting that SVR be used in conjunction with community service, the appearance that the offender exchanged money for work is eliminated.[206] This limits the potential for the appearance of judicial impropriety.[207] Thus, requiring community service whenever SVR is ordered helps to insure fairness in sentencing and reduces the appearance of impropriety.

Community service also enhances the effectiveness of SVR to foster the offender's sense of responsibility for his unlawful conduct. Properly selected community service work[208] forces the offender to face the reality that his acts have caused harm to the local community. When community service is used in conjunction with SVR, the offender is given a firsthand look at how both his labor and his illegal profits are being used for the benefit of the community. This allows the sentence of probation to reflect the seriousness of the offense, one of the purposes of sentencing under the Sentencing Reform Act.[209]

United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1553 (8th Cir. 1984) (Gibson, J., concurring and dissenting).

204. *See supra* note 202 (discussing the importance of fairness in sentencing under the Sentencing Reform Act).

205. A similar situation occurs when a judge must choose between a fine and imprisonment. *See* Note, *Creative Punishment*, *supra* note 46, at 60. The United States Supreme Court has held that jailing an indigent offender for not paying a fine is a violation of equal protection. *See* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Note, *Creative Punishment*, *supra* note 46, at 60 n.26. These rulings, however, do not cure recurrent inequality when imprisonment is a legitimate statutory alternative to a fine. *Id.* at 60.

206. *See generally* United States v. Gustafson 587 F. Supp. 548 (D. Minn. 1984) (discussing the travesty upon the principle of 'equal justice for all' to permit offenders to trade charitable contributions for jail time).

207. *See supra* note 126.

208. *See infra* notes 210-27 and accompanying text (discussing the selection of a recipient for the SVR payment).

209. *See supra* note 80.

C. *Choosing the Beneficiary: Rational Nexus Revisited*

The use of the term "rational nexus" to describe a guideline for the selection of a beneficiary for a charitable contribution was first suggested in a law review note in 1985.[210] The suggested rational nexus test[211] is actually a derivation of the "reasonable relationship" standard which existed under the Federal Probation Act. The Tenth Circuit Court of Appeals, in *Porth v. Templar*, stated that the only limitation on the selection of probationary conditions was that they have "a reasonable relationship to the treatment of the accused and the protection of the public."[212]

The "reasonable relationship" standard was modified slightly in *United States v. Danilow Pastry Co.*.[213] In *Danilow*, the court stated that, in selecting a beneficiary for community service, all that was necessary was a "reasonable relationship between [the beneficiary] and the defendant's illegal conduct, and . . . [that] . . . the community service serves to reverse the damage done by that conduct."[214] The suggested rational nexus test merely adds to this standard the suggestion that the selected charity help the same class of people as harmed by the offender's conduct.[215]

The suggested rational nexus test is helpful in selecting proper beneficiaries for SVR payments. However, this note proposes a few additional modifications to the rational nexus test to make it more effective in meeting the goals of sentencing under the Sentencing Reform Act. The first modification is to include SVR payments which have an impact on preventing crimes similar to the defendant's offense within the penumbra of rational nexus.[216] Thus, an executive convicted of a Sherman Act violation could

---

210. *See* Note, *Controversial Sanction*, *supra* note 12, at 542 n.63 and accompanying text.

211. "A rational nexus would exist if the charity helped the same class of people as those harmed by the [offender'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 [offender's] illegal conduct." Note, *Controversial Sanction*, *supra* note 12, at 542 n.63. While this test has been suggested, as of this writing there has not been a decision in the federal courts concerning the use of charitable contributions (SVR) as conditions of probation.

212. Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971). *Accord* Fiore v. United States, 696 F.2d 205, 208 (2nd Cir. 1982); United States v. Vaughn, 636 F.2d 921, 922-23 (4th Cir. 1980); Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980); United States v. Pastore, 537 F.2d 675, 680-81 (2nd Cir. 1976); United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975).

213. United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1171 (S.D.N.Y. 1983).

214. *Id.*

215. Note, *Controversial Sanction*, *supra* note 12, at 542 n.63. See *supra* note 211, for the full text of the suggested rational nexus test.

216. Arguably, this part of the test could fall within the "reasonable relationship" category. *See supra* note 211. However, due to the historically narrow interpretation given to other facets of probation in the federal courts, it is prudent to be as explicit as possible.

fund a chair in business ethics at a local university.[217] Similarly, a person convicted of selling controlled substances could be ordered to fund an education program which attempts to teach youth the perils of drug abuse.[218] These types of SVR payments would not only act to deter future crime, but would also foster the offender's sense of responsibility for the harm his actions have caused the community.

Another modification of the rational nexus test is the requirement that the beneficiary and its programs be of a highly public nature.[219] As the court stated in *Danilow*,[220] beneficiaries should be chosen "in order to further the public awareness . . . of the punishment".[221] While most potential beneficiaries are likely to be of a public nature, the importance of publicity to the effectiveness of SVR makes it necessary to explicitly suggest this guideline. Similarly, while an SVR payment should be highly public, that publicity should leave no doubt that the SVR payment is a punishment for criminal conduct.[222] The district judge "must make sure that the [SVR payment] was established by court order to punish illegal and unethical conduct."[223] If the SVR payment fails to subject the offender to negative publicity, then its general and specific deterrent value is greatly diminished.[224]

The modified rational nexus test,[225] proposed by this note, helps ensure

---

217. *See* United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1545 (8th Cir. 1984). This type of probationary condition would be dependent on the offender also giving lectures on the same topic, at the same university. *See supra* notes 203-09 and accompanying text (discussing the importance of requiring both SVR and community service). *See also* Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590 (1977) (Judge Charles B. Renfrew discusses the conditions of probation he set in an unreported case which required defendants, convicted of Sherman Act violations, to make public speeches on the evils of price fixing).

218. This type of SVR payment would also require that the offender work for the anti-drug program as well. *See supra* notes 203-09 and accompanying text (discussing the importance of joint SVR-community service conditions).

219. *See supra* notes 141-49 and accompanying text (discussing the affect that publicity has on the deterrent effect of a sanction).

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

221. *Id.* at 1167.

222. *See* United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1551 (8th Cir. 1984) (Heaney, J., concurring and dissenting).

223. *Id.*

224. *See supra* notes 141-49 and accompanying text (discussing the positive effects publicity has on the deterrent effect of punishment).

225. A rational nexus would exist if the charity or community service organization either:

1. Helps the same class of people as those harmed by the offender's conduct, or
2. Serves to reverse the damage done by the offender's conduct or similar illegal conduct, or
3. Serves to prevent similar illegal conduct, or
4. There is a reasonable relationship between the offender, his offense, and the purpose

that an SVR payment meets the goals for sentencing as set out in the Sentencing Reform Act. The rational nexus test requires the SVR payment to have some logical connection with the offender's illegal conduct. Thus, the seriousness of the offense is reflected in the sentence. An SVR payment having a rational nexus to the crime will also be of a highly public nature, thereby increasing the general and specific deterrence of the sentence. Lastly, the rational nexus test reduces the potential for the appearance of judicial impropriety in sentencing. By restricting the district judge's choice of beneficiaries to those with a rational nexus to the offender,[226] there is less opportunity for an abuse of discretion.[227]

VI. CONCLUSION

The Sentencing Reform Act is a response to many of the inadequacies which existed in the federal criminal justice system. It has replaced antiquated purposes with new goals. To meet these new goals, the Sentencing Reform Act relies heavily on alternatives to the traditional sanctions of fines and imprisonment. Probation has taken on new meaning as a conduit for these alternatives. Thus, the Sentencing Reform Act has established new guidelines and greater discretion to increase the effectiveness of probation in meeting the goals of sentencing.

Within this broad authority, district court judges should be able to order Substitute Victim Restitution payments. The objections raised under the Federal Probation Act, which were primarily objections regarding statutory interpretation, no longer exist. In addition, this note suggests guidelines to prevent the shadow of impropriety from being cast over the judiciary. Therefore, there should not be any legal or ethical impediments to the use of SVR. More importantly, however, because SVR can be effective in

---

of the organization or its programs
and the organization and/or it programs are of a highly public nature and will insure that the SVR payment clearly leaves the impression that it was made as a punishment for illegal conduct.

226. Prior to sentencing, the Sentencing Reform Act requires that a United States probation officer prepare a presentence report and present it to the district judge. 18 U.S.C. § 3552 (1985). A district judge also has the option of ordering an additional study on the offender, if the judge requires information not normally included in the presentence report. 18 U.S.C. § 3552(b) (1985). It is suggested that the judge could, at his discretion, use this authority to order a preliminary investigation regarding possible SVR beneficiaries. This would help reduce any additional burden caused by the use of SVR as a probationary condition. Such a report would also lend legitimacy to the SVR order because it would appear less arbitrary. This in turn reduces the potential appearance of judicial impropriety. However, if the judge orders such a report, it is recommended that the person preparing the report apply the rational nexus test in the selection of possible beneficiaries.

227. *See* Note, *Controversial Sanction*, *supra* note 12, at 542-43. While possible conflicts with the 'establishment clause' may still exist, they are outside the scope of this note.

meeting the goals of sentencing under the Sentencing Reform Act, it is hoped that courts will make use of this valuable sentencing tool.

JEFFREY C. BOULDEN