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CORPORATIONS AND THE FEDERAL PROBATION ACT—IS THE COMMUNITY AN AGGRIEVED PARTY?: *UNITED STATES V. WILLIAM ANDERSON CO.*

With the enactment of the Federal Probation Act (the Act),¹ Congress granted federal courts statutory authority to suspend the imposition² or execution of a criminal defendant's sentence and to

¹ Federal Probation Act, ch. 521, § 1, 43 Stat. 1259 (1925) (codified as amended at 18 U.S.C. § 3651 (1982)). The Act provides, in pertinent part:

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

. . . .

Probation may be granted whether the offense is punishable by a fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

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.

Id.

² A subtle distinction exists between the suspension of the imposition and the suspension of the execution of a sentence. Justice Black articulated the distinction in *Roberts v. United States*, 320 U.S. 264, 268 (1943):

Congress conferred upon the court a choice between imposing sentence before probation is awarded or after probation is revoked. . . . The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the defendant leaves the court with knowledge that a fixed sentence for a definite term of imprisonment hangs over him; under the second, he is made aware that no definite sentence has been imposed and that if his probation is revoked the court will at that time fix the term of his imprisonment.

Id.; see also G. KILLINGER, H. KERPER & P. CROMWELL, *PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM* 17-19 (1976).

grant probation.³ The primary purpose of the Act is to provide criminals who apparently are capable of rehabilitation time to reform when it is clear that actual service of their sentence would make rehabilitation unlikely.⁴ The grant of probation is a discretionary act of the trial court⁵ and may be conferred upon both individuals and corporations.⁶ A trial judge also has discretion to set

³ See *Frad v. Kelley*, 302 U.S. 312, 315 (1937) (“[t]he act was intended to cure the lack of power indefinitely to suspend a sentence, under which district courts labored prior to the enactment”). Prior to 1916, “the district courts exercised a form of probation either by suspending sentence or by placing the defendants under State probation officers or volunteers.” *United States v. Murray*, 275 U.S. 347, 354 (1928) (quoting H.R. REP. No. 1377, 68th Cong., 2d Sess. 4 (1925)). These informal practices frequently were resorted to by the United States courts “since errors occurring in trials and miscarriages of justice could not under the then-existing system be corrected by granting a new trial or by appeal.” See G. KILLINGER, H. KERPER & P. CROMWELL, *supra* note 2, at 19.

In 1916, the Supreme Court held that a federal judge was without power to suspend a sentence indefinitely. *Ex parte United States*, 242 U.S. 27, 42 (1916). Although the practice of granting probation had existed in some circuits for 60 years, *id.* at 50, the Court declined to uphold the constitutionality of the practice, *see id.* at 51-52. Indeed, the Court classified the practice of indefinitely suspending sentences as a “refusal by the judicial power to perform a duty resting upon it,” *id.* at 52, and called upon Congress to implement legislation that would give the federal courts power to suspend the imposition or execution of a sentence, *id.* Subsequently, two bills were introduced: one in 1917, which was passed by the House, and one in 1920, which was “never reached for definite action.” See *United States v. Murray*, 275 U.S. 347, 354 (1928) (quoting H.R. REP. No. 1377, 68th Cong., 2d Sess. 3-4 (1925)). The Federal Probation Act finally was enacted in 1925. Federal Probation Act, ch. 25, § 1, 43 Stat. 1259 (1925) (current version at 18 U.S.C. § 3651 (1982)).

⁴ See *Burns v. United States*, 287 U.S. 216, 220 (1932); *United States v. Murray*, 275 U.S. 347, 357 (1928). In *Murray*, Chief Justice Taft articulated the justifications for probation:

The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus poenitentiae* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. . . . Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence.

275 U.S. at 357-58; *see also* Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 809 (1963); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 181 (1967).

⁵ See, e.g., *Roberts v. United States*, 320 U.S. 264, 272 (1943); *Burns v. United States*, 287 U.S. 216, 220-21 (1932); *United States v. Consuelo-Gonzales*, 521 F.2d 259, 264 (9th Cir. 1975); *Porth v. Templar*, 453 F.2d 330, 333 (10th Cir. 1971); *see also* Note, *supra* note 4, at 185-86.

⁶ *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972). Although corporations only recently have been recognized as eligible for probation, *see id.*, their subjection to criminal liability is firmly established, *see* *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 488 (1909). In *New York Central*, the Court discounted the

conditions on probation,⁷ provided such conditions reasonably are related to the protection of the public and to the rehabilitation of the defendant.⁸ Notwithstanding a court's broad statutory authority to impose conditions, the Act enumerates five special conditions of probation.⁹ Although a trial judge would not be limited to selecting among these special conditions,¹⁰ it generally has been held that if a sentencing judge imposes a condition of probation that is specified in the Act, the imposed condition is subject to the limitations recited in the statute.¹¹ Recently, however, in *United*

plaintiff in error's argument that, as a corporation, it was not subject to criminal liability, stating that there is "no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act . . ." 212 U.S. at 495; see also *United States v. Union Supply Co.*, 215 U.S. 50, 54-55 (1909) (corporations are capable of wilful breaches of the law).

⁷ *United States v. Hayward*, 471 F.2d 388, 391 (7th Cir. 1972); *United States v. Smith*, 414 F.2d 630, 636 (5th Cir. 1969), *rev'd on other grounds sub nom. Schact v. United States*, 398 U.S. 58 (1970). Probation conditions are designed to restrict the liberty of the individual, and are a means by which the court is assured that the convicted defendant will make a substantial rehabilitative effort. See *Cooper v. United States*, 91 F.2d 195, 199 (5th Cir. 1937). It has been stated that "breach of any of the restrictions may lead to revocation of the limited grant of freedom and imposition of the more coercive penalty prescribed for the crime." See Note, *supra* note 4, at 181. Ideally, the conditions imposed by the trial court should be fashioned to assist the offender in his rehabilitative effort, but this often is not the practice. See *Best & Birzon*, *supra* note 4, at 810.

⁸ The "reasonably related" test was judicially formulated in *Porth v. Templar*, 453 F.2d 330, 333 (10th Cir. 1971). The *Porth* court emphasized the significance of the test by noting that the goal of probation is to reform the criminal as well as to protect the public. *Id.*

The Ninth Circuit refined the *Porth* rationale and constructed a test to aid courts in determining the constitutionality of a particular probation condition. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975). The *Consuelo* test requires an examination of: whether a reasonable relationship exists between the probation conditions and the purposes sought to be served by granting probation; the extent to which probationers are entitled to constitutional rights; and the extent to which the condition affects legitimate needs of law enforcement. *Id.*; *United States v. Pierce*, 561 F.2d 735, 739 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). The "reasonably related" test also has been enunciated by the American Bar Association in its *Standards Relating to Probation*, which provides the most concise definition of the test: "the conditions must achieve a balance between oppression and necessity, between interference and utility." STANDARDS RELATING TO PROBATION § 3.2(b) commentary at 48 (Approved Draft 1970).

⁹ See 18 U.S.C. § 3651 (1982). As a condition of probation, a court may require a defendant to do one or more of the following: pay a fine; "make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense"; "provide for the support of any persons, for whose support he is legally responsible"; participate in a program of a community treatment center; and participate in a community program. *Id.*

¹⁰ See *United States v. Prescon Corp.*, 695 F.2d 1236, 1242 (10th Cir. 1982); *United States v. Tonry*, 605 F.2d 144, 147 (5th Cir. 1979).

¹¹ *United States v. Vaughn*, 636 F.2d 921, 923 (4th Cir. 1980); see *Karrell v. United*

States v. William Anderson Co.,¹² the Court of Appeals for the Eighth Circuit held that although an order of probation may have been selected from among the special conditions of probation, a sentencing court is not required to comply with the language qualifying that condition.¹³

In *Anderson*, corporate defendants were charged with and convicted of bid-rigging in nine related antitrust prosecutions.¹⁴ The corporations were placed on probation with general and special conditions.¹⁵ The United States Government challenged the validity of the probation condition¹⁶ that provided that if certain installments of fines were paid at the appointed time to a named charitable institution or community service organization, part of the fine would be suspended.¹⁷ The court of appeals approved the probation conditions imposed by the district court,¹⁸ and analogized the conditions to those recently utilized by the Ninth Circuit in *United States v. Mitsubishi Int'l Corp.*,¹⁹ as well as to those

States, 181 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950); *see also* *United States v. Boswell*, 565 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962).

¹² 698 F.2d 911 (8th Cir. 1982).

¹³ *Id.* at 914.

¹⁴ *Id.* at 911.

¹⁵ *Id.* at 912.

¹⁶ *Id.* at 911. The Government did not object to the sentences imposed on the individual defendants. The sentences "included a brief period of incarceration, performance of community service work, and payment of fines ranging from \$5,000 to \$25,000." *Id.* at 911.

¹⁷ *Id.* at 912 (amount payable to the Government would be reduced by the part suspended after payment to the charity). Other restrictions placed on the corporation included relinquishment of control over the beneficiary organization's policy or use of the money, and a prohibition against the taking of a charitable deduction in the corporation's tax return. *Id.*

¹⁸ *Id.* at 913. The Eighth Circuit stated that the trial court's "sentencing objectives are in full accord with current penological philosophy and that [the trial judge's] carefully formulated scheme of sentences deserves the praise of being described as 'creative,' innovative, and imaginative . . ." *Id.*

¹⁹ 677 F.2d 785 (9th Cir. 1982). In *Mitsubishi*, the defendants pleaded guilty to numerous violations of the Elkins Act, 49 U.S.C. § 41(1) (1976) (codified as amended at 49 U.S.C. §§ 11903, 11905 (1976 & Supp. II 1978)). 677 F.2d at 786. The practices engaged in by the defendants resulted in special treatment for Mitsubishi on cargoes shipped by rail. *Id.* The district court sentenced each corporation to a maximum fine of \$20,000 on each of 27 counts. *Id.* The court suspended these fines and placed the defendant corporations on probation. *Id.* The conditions of probation were in compliance with all local, state and federal laws, and required the loan of a corporate executive to a community program for ex-offenders funded by a corporate payment of \$10,000 for each offense. *Id.* at 787. The Ninth Circuit affirmed, noting that corporate criminal defendants pose a special problem because they cannot be incarcerated and because their size and access to large amounts of capital enable them to "just write a check and walk away." *Id.* at 788.

employed by other courts in a variety of price-fixing cases.²⁰

The *Anderson* court noted that the clause in the Act authorizing a court to create probation conditions "upon such terms and conditions as the court deems best"²¹ supported the conditions chosen by the trial court.²² The Eighth Circuit rejected the Government's argument that a court's power to specify a condition requiring corporate defendants to make a payment of money was limited by the paragraph in the Act providing that as a condition of probation 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 the conviction was had."²³ The court concluded that the drafters of the Act specified certain terms as includable among the conditions of probation only to indicate the "propriety" of the enumerated terms.²⁴

It is submitted that by imposing a fine upon the corporate defendants to be paid to community service groups, the *Anderson* court ignored the fundamental differences between a fine and restitution and, more importantly, acted in excess of its statutory authority. Whereas a fine essentially is punitive in nature, restitution is compensatory.²⁵ It is suggested that by ordering a fine be paid to community service groups which were not injured by the defen-

²⁰ See *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1982). The court referred to the opinion of Judge Charles Renfrew in the "paper label cases," *United States v. Blankenheim*, No. Cr-74-436-CBR (N.D. Cal., filed Nov. 1, 1974) (on file with *Yale Law Journal*), and to the opinion of Judge Carl Muecke in the "milk price-fixing case," see 698 F.2d at 913. In the "paper label cases," the executives of the organization convicted of price fixing were required to make speeches to civic groups on the evils of price fixing, see Renfrew, *The Paper Label Sentences: An Evaluation*, 86 *YALE L.J.* 590, 590 (1977), and in the "milk price-fixing case," the corporate officers were "requested" to make charitable contributions of milk in lieu of criminal sanctions, see 698 F.2d at 913; Jaffe, *Probation With a Flair: A Look at Some Out-of-the-Ordinary Conditions*, 43 *FED. PROBATION* 25, 34-35 (1979).

²¹ 18 U.S.C. § 3651 (1982).

²² *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1982). The court opined that the "deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner." *Id.*

²³ *Id.* at 914 (quoting 18 U.S.C. § 3651 (1976 & Supp. II 1978)). The court discounted the Government's contention that corporations could not be subjected to conditions that were designed to promote rehabilitative behavior since corporations are legal fictions on which only payments of money properly may be imposed as a probation condition. 698 F.2d at 914.

²⁴ 698 F.2d at 914. In concluding that the specified terms were not exclusive, the court stated that "[t]he meaning is the same as if the familiar corporate draftsman's locution 'including but not limited to' had been used." *Id.*

²⁵ See *Best & Birzon*, *supra* note 4, at 821, 826.

dants' actions, the court, in effect has required the corporate defendants to make restitution to parties not within the contemplation of the Act.

Although the defendant may be required to provide restitution for his criminal acts,²⁶ a court is limited by the Act to ordering that such restitution be made only to parties aggrieved by the defendant's crime.²⁷ A clear line of federal case law indicates that the restrictions contained in the Act must strictly be adhered to if such conditions are imposed by federal courts. The first significant judicial interpretation of the enumerated conditions in the Act was *United States v. Follette*.²⁸ The *Follette* court broadened the interpretation of the term "aggrieved parties" to encompass not only the United States, but all individuals who have suffered direct financial harm as a result of the criminal acts of the defendant.²⁹ The *Follette* definition of "aggrieved parties," which was the foundation of subsequent judicial interpretation of the term,³⁰ was expanded by the Ninth Circuit in *Karrell v. United States*.³¹ The

²⁶ See *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981) ("primary purpose of restitution as a condition of probation is to foster . . . [the] defendant's . . . responsibility for his or her unlawful actions").

²⁷ See *infra* notes 28-38 and accompanying text; see also *United States v. Boswell*, 565 F.2d 1338, 1343 (5th Cir.) (restitution or reparation of losses may be required only for the amount of actual loss suffered by the victim of the crime), *cert. denied*, 439 U.S. 819 (1978).

²⁸ 32 F. Supp. 953 (E.D. Pa. 1940). In *Follette*, the defendant was indicted for the embezzlement and conversion of \$203.99 of United States postal funds. *Id.* The defendant pleaded guilty and was placed on probation for 2 years. *Id.* at 953-54. As a condition of probation, the court ordered the defendant to reimburse a surety who had paid \$466.28 to the Government. *Id.* at 954. The defendant, unable to fulfill the condition, petitioned the court for an extension of the probation term with the same condition. *Id.* The court, in granting the extension, held that a trial court was without power to order restitution in an amount greater than the amount of damages involved in the particular offense for which the defendant was convicted, and modified its order. *Id.* at 955.

²⁹ *Id.*

³⁰ Courts that have addressed the restitution issue in determining probation conditions invariably have followed the reasoning of *Follette*. See, e.g., *Phillips v. United States*, 679 F.2d 192, 194 (9th Cir. 1982); *United States v. Tiler*, 602 F.2d 30, 33 (2d Cir. 1979); *United States v. Stoehr*, 196 F.2d 276, 284 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952); *United States v. McLaughlin*, 512 F. Supp. 907, 910-12 (D. Md. 1981).

³¹ 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950). *Karrell* involved probation conditions placed on a defendant who had engaged in a series of fraudulent home loan transactions between veterans and the Veteran's Administration. *Id.* at 983-84. The defendant was convicted on six counts of a 17-count indictment. *Id.* at 986. The court suspended the fine and imprisonment and ordered that as a condition of her probation, the defendant was to make restitution to each of the 17 veterans named in the indictment and to one who was not represented in the indictment. *Id.* The circuit court affirmed, but remanded the case for modification of the probation conditions. *Id.* at 987.

Karrell court strictly interpreted the statutory language and limited a trial court's discretionary power to order restitution payments,³² holding that such payments can be made only to those individuals who were damaged or otherwise aggrieved "by the offense for which the conviction was had."³³

The enumerated conditions in the Act also were interpreted by the Tenth Circuit in *United States v. Prescon Corp.*,³⁴ which, like *Anderson*, involved corporate convictions on bid-rigging indictments.³⁵ In *Prescon*, the Government appealed from a district court order granting the corporate defendants probation on the condition they deposit certain sums with the court, to be disbursed to community agencies selected by the chief probation officer with the consent of the court.³⁶ On appeal, the Government argued that the Act did not authorize a judge to require a corporation to make contributions to parties not aggrieved by the corporate crime as an alternative to the payment of a fine.³⁷ The Tenth Circuit reversed,³⁸ noting that although the conditions of probation enumer-

³² *Id.* The Ninth Circuit stated that "[o]ur interpretation of Section 3651 is that Congress intended to restrict the scope of the restitution which could be ordered to the limitation contained in the specific provision . . ." *Id.* at 986. The court held that the trial court erred in ordering restitution for losses sustained by any veterans other than those directly involved in the crimes for which the defendant had been convicted. *Id.* at 987.

³³ 18 U.S.C. § 3651 (1976); *see* 181 F.2d at 987. One basis for the Ninth Circuit's decision was the "familiar rule of statutory interpretation that a specific provision will govern even though general provisions, if standing alone, would include the same subject." 181 F.2d at 986-87.

³⁴ 695 F.2d 1236 (10th Cir. 1982).

³⁵ *Id.* at 1238. *Prescon* and *VSL* each were charged with one count of bid rigging in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982), and two counts of mail fraud in connection with the submission of rigged bids in violation of 18 U.S.C. § 1341 (1982). 695 F.2d at 1238. The defendants' actions resulted in fixed, non-competitive price levels and restraints, and the suppression and elimination of free and open competition. *Id.* The mail fraud charges were based on the mailing of rigged bids. *Id.*

³⁶ 695 F.2d at 1238. *Prescon* and *VSL* were required to deposit \$50,000 and \$75,000 respectively. *Id.* The trial court stated that the fines not only would reimburse the community but also would decrease or otherwise affect crime in society. *Id.* at 1238-39.

³⁷ *Id.* at 1242.

³⁸ *Id.* The Tenth Circuit based its decision on *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389 (10th Cir. 1976). *See* 695 F.2d at 1242. In *Clovis*, the defendants pleaded *nolo contendere* to an indictment that charged violations of the Sherman Antitrust Act by fixing retail liquor prices. *See* 540 F.2d at 1389. The trial court imposed the maximum fine of \$50,000 on each defendant, and sentenced each individual defendant to 1 year in jail. *Id.* at 1390. The court reduced the sentences of certain individuals "to imprisonment for six months, [suspending the remainder] to probation for five years on condition that they pay certain sums as restitution and reparations to the Curry-Roosevelt County Council on Alcoholism, Inc." *Id.* (footnote omitted). The execution of the other defendants' sentences was reduced to probation for 5 years provided they too complied with

ated in the statute are not exclusive, the appropriateness of any condition that falls into one of the enumerated conditions must be tested by the limitations contained in the Act.³⁹

The *Anderson* court, however, interpreted the inclusion of special conditions of probation in the Act as merely the Legislature's desire to place the "propriety" of these conditions "beyond question," and not as a restriction on a court's ability to direct the payment of funds.⁴⁰ This statutory analysis is severely undermined by the observation in *Prescon* that "[i]t is a familiar rule of statutory interpretation that a specific provision [restitution may be directed only to aggrieved parties] will govern notwithstanding the fact that a general provision [probation may be granted upon conditions the court "deems best"] . . . may include the same subject matter."⁴¹ It is submitted, therefore, that if the *Anderson* court intended to impose restitution as a condition of probation, it should have required that reparation be made only to the parties aggrieved by the defendants' crime, if indeed such parties existed and were identifiable. It appears that the Eighth Circuit's liberal interpretation of a court's authority to fashion probation conditions under the Act is gaining increased, if not alarming, acceptance in the federal courts.⁴² Despite the *Anderson* court's disregard

the probation condition. *Id.* The net effect of the trial court's sentence was to provide the Council on Alcoholism with \$233,500. *Id.*

The Tenth Circuit reversed the district court's imposition of community restitution as a condition of probation because the community group that was to receive payment was not an "aggrieved party," *id.*, holding that the Act precluded disbursement of funds to those other than victims of the crime, *id.*

³⁹ *United States v. Prescon Corp.*, 695 F.2d 1236, 1243-44 (10th Cir. 1982); *see also* *United States v. Vaughn*, 636 F.2d 921, 923 (4th Cir. 1980) (citing *Karrell v. United States*, 181 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950) ("where a condition fits within a category enumerated in the statute, . . . its appropriateness must be tested by any limitations expressed in the statute")); *see also* *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962) (the wide latitude given to the district court in formulating probation conditions is subject to the limitations of the Act).

⁴⁰ 698 F.2d at 914.

⁴¹ *United States v. Prescon Corp.*, 695 F.2d 1236, 1243 (10th Cir. 1982); *see also* *Karrell v. United States*, 181 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950). The *Karrell* court relied on statutory evidence to support its conclusion that the enumerated conditions contained in the Act were intended by Congress to restrict a court's otherwise plenary power to impose probation conditions. 181 F.2d at 986-87. The court noted that, while section 3651 vests the judiciary with broad authority to place a defendant on probation "for such period . . . as the court deems best," the statute nevertheless specifically prohibits a probationary period in excess of 5 years. *Id.* at 986 n.7.

⁴² *See* *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 217 (D. Md. 1983); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1169-71 (S.D.N.Y. 1983); *Nebraska*

for the Act's limitations, the decision is valuable for its recognition of the difficulties that confront a court in the sentencing of a corporation and of the desirability and effectiveness of imposing restitution as a condition of probation, particularly when a corporate defendant is involved.⁴³ The balance of this Comment will explore the unique problems attendant to the imposition of probation conditions on corporate defendants and the inadequacy of fines as deterrents to corporate recidivism. The Comment then will advocate, as superior to the traditional fine, the viability and effectiveness of two types of restitution that may be imposed on a criminal corporation: community service orders and the utilization of what will be termed a "fluid recovery" type of probation condition.

Bid-Rigger Sentenced to Endow College Ethics Chair, N.Y. Times, July 29, 1983, at A1, col. 6.

In *Danilow*, six wholesale bakeries convicted of violations of the Sherman Antitrust Act were fined and placed on probation. 563 F. Supp. at 1164. As a condition of probation, the defendants were required to donate specified amounts of fresh baked goods to needy and charitable organizations. *Id.* at 1164-66. In response to the Government's objection that under the Act, only the parties aggrieved by the defendants' crime would be proper subjects of a restitution order, the court stated that requiring the corporate defendants to donate baked goods to various organizations was an order of *community service*, "designed primarily to deter future misconduct," and *not* an order of restitution. *Id.* at 1169. Nevertheless, the court acknowledged that the imposed community service order was, in essence, "symbolic restitution." *Id.* The *Danilow* court appears to have taken the *Anderson* construction of the Act one step further by implying that as long as a court's primary *intent* in fashioning a community service order is grounded in reasons other than providing redress to aggrieved parties, the limitations recited in the special restitution provision of the Act will not apply, even if the court's condition of probation virtually is identical to providing reparation to the community for the corporation's criminal acts. *See id.* at 1170. It is submitted that the *Danilow* court indulged in a semantic sidestepping of the restrictions placed on a federal court's power to construct probation conditions—a probation condition that is, in essence, restitution, cannot be transfigured simply by judicial assignment of a new appellation such as community service.

Paralleling the decision in *Danilow*, the *Wright* court also granted probation to a convicted corporate defendant on the condition that \$175,000 be paid to a specified charitable organization which, by the court's admission, had "no reasonable factual nexus to the specific offense defendant pled guilty to." 563 F. Supp. at 214. The court reasoned that since the purpose of the probation condition was to punish and deter, the restrictive language of the Act's restitution provision was not applicable. *Id.* It is submitted that the courts must look behind the name or form of any probation condition imposed to determine the condition's actual substance and effect.

⁴³ Judge Dumbauld, writing for the Eighth Circuit in *Anderson*, was aware of the peculiar difficulties that convicted corporations pose to sentencing courts. 698 F.2d at 914. Judge Dumbauld asserted that an effective means of handling a criminally convicted legal fiction—the corporate defendant—was to impose rehabilitative measures that would affect the decisionmaking process of those individuals responsible for the policies and decisions of the corporation. *See id.*

SENTENCING THE CRIMINAL CORPORATION

When corporate defendants are placed on probation, courts encounter difficulties that rarely arise in the sentencing of individuals. The corporation's status as a legal entity precludes the use and threat of the traditional criminal punishment of incarceration.⁴⁴ Thus, courts and legislatures, in attempting to sanction the criminal corporation, have utilized fines⁴⁵ and have vested private plaintiffs with the right to maintain treble damage actions.⁴⁶ These

⁴⁴ See *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 788 (9th Cir. 1982); Note, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 282 (1961) (punishment cannot meaningfully be imposed on a legal form). State punishment of criminals was the outgrowth of private retaliation efforts against the criminal actor. See WHARTON'S CRIMINAL LAW § 2, at 7-8 (C. Torcia 14th ed. 1978). Some commentators posit that criminal sanctions remain primarily retributive in nature. See *id.* at 8-9; see also *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) ("retribution is part of the nature of man and [utilizing] that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law"). The use of imprisonment as a deterrent to individual criminal conduct is well established. The Supreme Court articulated this view in *Pell v. Procunier*, 417 U.S. 817, 822 (1974):

An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses.

Id.

⁴⁵ See, e.g., *United States v. A & P Trucking Co.*, 358 U.S. 121, 127 (1958) (conviction of the corporate entity leads only to a fine levied on the corporate assets); *United States v. Hougland Barge Line, Inc.*, 387 F. Supp. 1110, 1114 (W.D. Pa. 1974) (statute calling for imprisonment is applicable to a corporate defendant, but only to the extent that it is required to pay the fine portion of the penalty); Sherman Antitrust Act, 15 U.S.C. § 2 (1982) (any person monopolizing or conspiring to monopolize shall be deemed guilty of a felony and subject to a fine not exceeding \$1,000,000); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(b)(1)(A) (Supp. I 1977) (domestic corporation attempting to influence foreign officials or political parties shall be fined not more than \$1,000,000); Note, *supra* note 44, at 284-87.

⁴⁶ See, e.g., *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir.), *reh'g denied*, 503 F.2d 1403 (5th Cir. 1974) (the principle purposes of the treble damage provision in 15 U.S.C. § 15 are to deter antitrust violations, to provide incentive to private plaintiffs, and to supplement Government law enforcement), *cert. denied*, 420 U.S. 929 (1975); *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974) (deterrence of violations), *cert. denied*, 420 U.S. 992 (1975); E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 3.01, at 11 (1965) (action granted to the private litigant to deter other violations and to supplement the Department of Justice in enforcing the antitrust laws); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 HARV. L. REV. 1566, 1566-67 (1967) (essential purposes are to deter violations, to encourage litigation, and to augment the lenient criminal remedies available to the Government); Note, *supra* note 44, at 284, 288-90.

sanctions, however, have proven ineffective both as deterrents to criminal conduct and as a means of punishing the convicted corporation.⁴⁷ As a result, corporate criminal activity and recidivism have increased dramatically in recent years.⁴⁸ It is suggested that

⁴⁷ There is agreement among commentators that the current use of fines as sanctions against corporations is entirely inadequate. See Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 407 (1981); Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353, 360 (1979) [hereinafter cited as *Structural Crime*]; Note, *supra* note 44, at 285, 287.

One commentator has discounted the effectiveness of the treble damage suit as a means of deterring corporate criminal behavior in antitrust cases. See Note, *supra* note 44, at 289. The author indicates that since the success of plaintiffs in such actions is marginal, corporate policy rarely is reformulated in reaction to such suits. *Id.*

Ironically, the most effective means of reformulating corporate policy—punishment of the guilty corporate official—has been the most difficult to implement. The inherent organizational complexity of large corporations impedes identification and thus the conviction of the responsible parties. See *Structural Crime, supra*, at 358. Corporate structural complexity has been identified as the primary obstacle to individual prosecutions. See Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 48-49 (1978). The policy formulator is, therefore, apparently able to act with anonymity and without fear of criminal prosecution. See *Structural Crime, supra*, at 358.

An additional obstacle to the conviction of a corporate policymaker is the reluctance on the part of juries to convict the individual corporate official notwithstanding the fact that liability may be readily apparent. Jurors tend to separate the conduct of the managing officials from the criminal activity of the corporation. See Comment, *supra*, at 49. Indeed, juries have acquitted corporate officials when criminal liability was undeniable. See *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963) (tax evasion); *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950, 953-54 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959) (conversion of government property). Several reasons have been posited by commentators for this general reluctance to convict the culpable corporate manager. Professor Sanford Kadish notes that crimes committed by corporations lack the moral reprehensibility that accompanies crimes committed by individuals. See Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425-26 (1963). The trier of fact often empathizes with the corporate official, judging him to be a person of high socio-economic status who would be unlikely to engage in criminal behavior. See M. CLINARD & P. YEAGER, *CORPORATE CRIME* 288-89 (1980); Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173, 179 (1979); See Comment, *supra*, at 42-43, 49.

⁴⁸ See M. CLINARD & P. YEAGER, *supra* note 47, at 112-23. Recidivism is common among corporate offenders. Indeed, the defendant in *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972), was charged with an offense for which it previously had been convicted. *Id.* at 59; see C. STONE, *WHERE THE LAW ENDS—THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 184 (1975); E. SUTHERLAND, *WHITE COLLAR CRIME* 25 (1961). Sutherland notes that 60% of the 70 largest corporations have an average of four convictions each, E. SUTHERLAND, *supra*, at 25, asserting that most corporations engage in illegal restraints of trade and that 50-75% of them do it with sufficient regularity to be classified "habitual criminals," *id.* at 61. Professor Posner indicates that 46 of the 320 largest corporations convicted of antitrust violations between 1964 and 1968 previously had been convicted. See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 394-95 (1970).

courts should impose probation conditions that will deter corporations from committing crimes and which concomitantly will permit those corporations to function effectively as profitmaking organizations.⁴⁹

In constructing probation conditions, courts must take into account the requirement that any condition imposed must satisfy the dual purposes of probation: rehabilitation of the defendant and protection of society.⁵⁰ Indeed, the Act expressly provides that "when satisfied that the . . . best interest of the public as well as the defendant will be served . . . [courts] may . . . [place] the defendant . . . upon such terms and conditions [of probation] as . . . deem[ed] best."⁵¹ In light of the shortcomings inherent in the imposition of fines as conditions of probation, it is suggested that courts should refrain from imposing probation conditions which either are not "reasonably related" to the crime charged⁵² or are so burdensome that the corporation, in an effort to compensate for lost profits, increases the prices of its products or services, thereby

⁴⁹ The viability of using probation as an effective deterrent mechanism has been recognized by several commentators. See Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 517 (1980); *Structural Crime*, *supra* note 47, at 364-65; Recent Developments, *Criminal Law—The Application of the Federal Probation Act to the Corporate Entity*: United States v. Atlantic Richfield, 465 F.2d 58 (1972), 3 U. BALT. L. REV. 294, 301 (1974). Professor Orland characterizes probation for corporations as:

[A] promising but massively underutilized sanction in corporate crime cases. Generally, corporate executives seek probation as a palatable alternative to prison, while corporations seek to avoid probation since it is a potentially powerful remedial device and, as such, far more threatening than a fine. For example, corporations can be ordered not to violate the criminal law, or to make restitution for harm caused by the criminal act. Thus, a probation order can become the instrument for prevention of future crime or redress of past harm. Yet judges are reluctant to impose probation on corporations and only a few courts have attempted to thrust probation on unwilling corporate defendants. As a result, the deterrent and rehabilitative potential for corporate probation has yet to be realized.

Orland, *supra*, at 517 (footnotes omitted).

⁵⁰ The ideals of rehabilitation and protection are fundamental to probation. One court has noted that:

[t]he only limitation [to the discretionary power of the trial court in formulating conditions] is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public. The object . . . is to produce a law abiding citizen and at the same time to protect the public against continued criminal or antisocial behavior.

Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971); see also *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975).

⁵¹ 18 U.S.C. § 3651 (1982).

⁵² See *supra* note 8 and accompanying text.

shifting the burden of the criminal penalty to the innocent consumer. Instead, courts should consider imposing the probation conditions described in the balance of this Comment, which meet the goals of restitution without the burdensome side effects of traditional sanctions.⁵³

ALTERNATIVE TYPES OF RESTITUTION

Community Service

Community service has been recognized by criminal law scholars as an effective sanction against the convicted individual defendant.⁵⁴ Several states provide for the imposition of community

⁵³ See Coffee, *supra* note 47, at 402. Professor Coffee has noted that trial courts must recognize that the sentences they impose may affect not only the individual defendant but also society in general. *Id.* at 401-02. Coffee warns of remedies that are "worse than the disease . . . which they were meant to cure." *Id.* at 403-04. This reasoning is applicable to probation conditions as well. Indeed, a court may impose a fine as a condition of probation equal to the fine imposed for the violation. See *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972) (conditions imposed by the court may not exceed the maximum penalty authorized by Congress). For example, since the maximum fine that may be assessed against a corporation for an antitrust violation may not exceed \$1,000,000, 15 U.S.C. § 1 (1982), the possibility of oppressive probation conditions becomes apparent when a corporate violator is convicted in a multi-count indictment. If a multimillion dollar criminal penalty were levied as a probation condition, corporations with limited amounts of capital may be forced to lay off employees or perhaps to go out of business. See *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1172 (S.D.N.Y. 1983). Such a result, it is submitted, would frustrate the objective of the protection of society.

The reluctance of courts to enforce onerous or vague probation conditions was evident in *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972). In *Atlantic Richfield*, a corporation was convicted of violating the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1152 (1899) (codified as amended at 33 U.S.C. §§ 407, 411 (1976)), which prohibits the discharge of refuse into navigable waters. 465 F.2d at 59. As a condition of probation, the corporation was required to devise a program to control oil spillage that polluted both land and stream. *Id.* The Seventh Circuit reversed the trial court's probation condition on the ground that the condition imposed unreasonable standards upon the probationer, since the corporation would not know when the condition was satisfied. *Id.* at 61. Thus, the probation conditions were deemed contrary to the purposes of the statute and the case was remanded for imposition of a condition within the statute's limits. *Id.*; see also *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980) (unnecessarily harsh probation conditions are impermissible).

⁵⁴ See, e.g., Fisse, *Community Service as a Sanction Against Corporations*, 1981 Wis. L. REV. 970, 1001-08; Harland, *Court-Ordered Community Service in Criminal Law: The Continuing Tyranny of Benevolence?*, 29 BUFFALO L. REV. 425, 425-31 (1980). Fisse asserts that although community service is a viable sanction against individuals, it is an inappropriate probation condition for corporations, see Fisse, *supra*, at 971-72, and distinguishes community service imposed as a sentence from community service imposed as a probation condition, *id.* at 971. Fisse asserts that when community service is ordered as a sentence, the policies of deterrence and retribution are attained; when imposed as a condition of proba-

service on individuals convicted of misdemeanors or felonies.⁵⁵ Notwithstanding the recognized utility of community service as a punitive sanction and as a probation condition for individual offenders,⁵⁶ this form of probation condition rarely has been ordered by courts as a condition of corporate probation.⁵⁷ Necessarily, an order of community service as a probation condition would be subject to the "reasonably related" test⁵⁸ and, therefore, the services rendered by the corporation would have to provide reparation to the segment of society whose rights were infringed on by the corporation's crime.⁵⁹ The criminal corporation would be obligated to perform the probation order or suffer reinstatement of the original

tion, a court's primary concern is rehabilitation. *Id.* at 971-72. It is submitted that this distinction is inaccurate, since deterring future corporate criminal conduct is inherent in the imposition of a corporate probation condition. *See supra* note 49.

⁵⁵ *See, e.g.*, ALASKA STAT. § 12.55.055(a) (1980) (court may order community work in addition to any fine or restitution ordered as a condition of a suspended sentence); CAL. PENAL CODE § 490.5(d) (West Supp. 1983) (community service appropriate when used in lieu of fines ranging from \$50 to \$1,000); DEL. CODE ANN. tit. 11, § 4105(a), (b) (Supp. 1982) (authorizing community service in lieu of fines or costs if defendant is unable to pay); N.Y. PENAL LAW § 65.10(2)(h) (McKinney Supp. 1982) (court may impose community service as probation condition for conviction of offense, violation, misdemeanor, or class D or E felony); OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(c) (West Supp. 1983) (at time of sentencing or at time during a suspended sentence court may order defendant to perform community service without compensation except in cases of third or subsequent felonies).

⁵⁶ *See, e.g.*, United States v. Restor, 679 F.2d 338, 340 (3d Cir. 1982); Higdon v. United States, 627 F.2d 893, 899-900 (9th Cir. 1980); United States v. Arthur, 602 F.2d 660, 664 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979).

⁵⁷ *See supra* note 54 and accompanying text. For a discussion of unreported impositions of community service upon individuals and corporations in the federal courts, see Jaffe, *supra* note 20, at 34.

⁵⁸ United States v. Restor, 679 F.2d 338, 340 (3d Cir. 1982); Higdon v. United States, 627 F.2d 893, 899-900 (9th Cir. 1980); *see supra* note 82. The *Higdon* court noted that community service, when imposed as a probation condition, satisfied the *Consuelo-Gonzalez* "reasonably related" test. 627 F.2d at 899 & n.14. The court stated that, when considering the imposition of community service as a probation condition, a court must evaluate the offender's physical, psychological, and financial condition and must not order a work schedule that significantly reduces time for paid employment or that substantially interferes with the maintenance of a normal family life. *Id.* at 899. It is suggested that when considering the imposition of community service upon a corporation, courts should entertain analogous considerations. The community service order should not drain the corporation of necessary capital or employee services to such an extent that the profit-making activities of that corporation will be curtailed unreasonably.

⁵⁹ New Hampshire expressly has provided that community service orders shall be reparative to the community for the interest that was adversely affected. *See* N.H. REV. STAT. ANN. § 651:2 (Supp. 1981) (nature of the community service imposed must be that which, in the judgment of the court, fosters respect for the interests violated by the defendant's conduct); Harland, *supra* note 54, at 432-39.

sentence.⁶⁰ The corporation, therefore, could be required to engage in socially advantageous acts throughout the maximum 5-year limitation period expressed in the Act.⁶¹ A community service order would serve a dual purpose: it would benefit society during the probation period and would deter recidivism.⁶²

Community service also would be an effective means of providing notice to the community whose interests had been damaged and would invite scrutiny from the general public. Indeed, community service may be valuable as a deterrent to future corporate crime since the publicity accompanying the community service would tend to detract from a business' goodwill, which is a valuable corporate asset.⁶³ The probation order would thus create public

⁶⁰ See *United States v. Rifin*, 634 F.2d 1142, 1144 (8th Cir. 1980); *United States v. Johns*, 625 F.2d 1175, 1176 (5th Cir. 1980); *United States v. McLeod*, 608 F.2d 1076, 1078 (5th Cir. 1979). Occasionally, a corporation may prefer to accept the original sentence rather than perform the community service order, particularly when such performance would detract from the corporation's public image. See *infra* note 64 and accompanying text.

⁶¹ See 18 U.S.C. § 3651 (1982). The period of probation imposed on the corporation necessarily would be restricted by the 5-year limitation specified in the statute. See *United States v. Workman*, 617 F.2d 48, 50 (4th Cir. 1980); *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978). It is submitted that this 5-year period will allow the probationer sufficient time to make reparation to the community for the offense committed.

⁶² See Fisse, *supra* note 54, at 995. Professor Fisse notes that when imposed as a sanction, the "community service order . . . require[s] the company to initiate and actively participate in a socially useful project extending over a number of years, thereby bringing punishment home to the company in a manner calculated to have a continuing deterrent effect." *Id.* Former Chief Judge Brown of the district court in Memphis, Tennessee summarized the value of community service as a probation condition:

- (1) [Requiring] the probationer . . . to do work without pay for good cause should have some therapeutic effect since [it] . . . would make him atone for his misdeed in a concrete and constructive way
- (2) The involved public and charitable agencies would receive valuable services from the probationer which they very much need
- (3) The imposition of work without pay would make probation more acceptable to the public in that the public would be more likely to feel that justice had been done
- (4) [T]he probationer would work for a designated agency which would in turn be in touch with his probation officer [allowing] the officer to have an additional handle on the probationer.

Brown, *Community Service as a Condition of Probation*, 41 FED. PROBATION 7, 7 (1977).

⁶³ See Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U.L. REV. 107, 127 (1971) (corporate image is a "composite of knowledge, feelings, ideas and beliefs" possessed by the community with respect to a company as a result of the totality of its activities). The use of publicity as a sanction against the criminal corporation has been advocated by several commentators. See M. CLINARD & P. YEAGER, *supra* note 47, at 318-22; Fisse, *supra*, at 144-50; see also *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1982) ("painful publicity is not relished by corporate ty-

awareness of the gravity of the crime and of the culpability of the corporation and its managing officers.⁶⁴ Moreover, it is suggested, notice to society will foster modification of internal corporate policy. Such modification may be accomplished by requiring that when the community service order calls for individual services, such services must be performed by those officers and directors responsible for the formulation of the illegal corporate policy.⁶⁵ It is

coons"). Clinard and Yeager suggest that publicity may be useful as a control of corporate criminal activity, not only because of its deterrent effect but also because publicity may warn consumers about deceptive advertising, defective products, and consumer fraud practices. See M. CLINARD & P. YEAGER, *supra* note 47, at 319.

⁶⁴ Publicity currently is used as a sanction against violators of the Food and Drug Act, 21 U.S.C. § 375(a) (1976). Such public notification has been determined to be an effective deterrent to subsequent corporate criminality. See Comment, *supra* note 47, at 52. The practice of notifying those affected by the crime for the purpose of deterring subsequent criminal conduct also is pervasive in the labor arena. *Id.* An employer found guilty of unfair labor practices must "publicize" his crime to his employees by posting the order of the Labor Relations Board and mailing a copy of it to individual employees. *Id.* The order has the effect of impressing upon the employee the seriousness of the employer's offense. *Id.*; J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304 (2d Cir.) (posting remedies the coercive practices engaged in by the corporation), *cert. denied*, 389 U.S. 1005 (1967).

Several commentators have stated that ordering a corporation to perform community service may not foster a general public awareness of the crime, since the general public is unable to understand the complexity of the corporation's illegal activity. See, e.g., M. CLINARD & P. YEAGER, *supra* note 47, at 321. It is suggested that publicity surrounding a corporation's conviction of industrial crimes would be of less interest to the general public than a report of corporate crime in the retail sector, and thus would fail to create the criminal stigma necessary to deter future crimes by the corporation. It is essential, therefore, that in addition to the aggrieved community in general, the community service be performed for that segment of the aggrieved society which best would understand the criminal activity. Those who comprehend the crime, "the opinion leaders," would then be able to disseminate this information to the general public. See Fisse, *supra* note 63, at 144.

There may be some concern that the criminal corporation performing community services would use the opportunity to foster its self-interest by publicly minimizing its involvement in the criminal activity. One commentator has suggested that the corporation might engage in "counter publicity" through affirmative advertising efforts discounting the criminality of the corporation's actions. See Fisse, *supra* note 63, at 135. A counterpublicity campaign would require a substantial capital investment to rebut the unfavorable image created by the publicity accompanying the community service order. *Id.* at 138-39. As a result, there would be a twofold drawing upon the capital reserves of the corporation for a single criminal offense: the performance of the community service order and the counterpublicity campaign. It is suggested that the potential increased capital disbursement necessary to stage such a counterpublicity campaign will provide additional deterrence to corporate recidivism. In addition, since the probationer is subject to the supervision of a probation officer, see Note, *supra* note 4, at 181, an effort by the corporation to subvert the community service order and manipulate it into a self-aggrandizing tactic will warrant notification to the court, revocation of the probationary status, and the imposition of the original sentence, *id.*

⁶⁵ See *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982). In *Mitsubishi*, the court imposed a probation condition requiring the corporations to provide a company executive to the National Alliance for Business for development of a community

suggested that the imposition of a community service order is more appropriate when a court is attempting to redress injuries suffered by a small number of individuals. When the crime committed by the corporation is one affecting a large sector of the community at large, however, as when *consumers* are injured, it is suggested that courts impose the probation condition that closely resembles the relief occasionally granted in consumer class actions—fluid recovery.

Fluid Recovery

Directing restitution to the section of society injured by corporate crime can be a viable probation condition provided the requisite elements of aggrieved-party status are present: sufficient identification⁶⁶ and ascertainable damages.⁶⁷ Within these confines, courts may construct probation conditions requiring a corporation to distribute to the aggrieved sector of society the damages assessed for the injury. It is suggested that courts should utilize the concept of fluid recovery to effectuate this distribution. Fluid recovery is a remedy generally employed in civil class actions that effects the compensation of an entire class of litigants by requiring the defendant to reduce the cost of its product or service—the sub-

action program. *Id.*

By becoming the means through which the corporation must perform its community service, the corporate official may fall into an unfavorable light among his peers. *See Coffee, supra* note 47, at 433. Coffee notes that the individual director might lose the respect of his fellow business associates, a loss that can be an effective deterrent for the middle class offender. *Id.*; *see also Renfrew, supra* note 20, at 594 (embarrassment attached to performance of community service work provides deterrent for corporate officers and directors to avoid future corporate wrongdoing).

⁶⁶ *See United States v. Roberts*, 619 F.2d 1, 2 (7th Cir. 1979); *United States v. Hoffman*, 415 F.2d 14, 22-23 (7th Cir.), *cert. denied*, 396 U.S. 958 (1969). In *Roberts*, the defendant was convicted on fifty counts of mail fraud, sentenced to imprisonment on counts one through forty-nine and placed on probation for 5 years on count fifty. 619 F.2d at 1-2. One of the conditions imposed on the defendant was that he make restitution of \$750,000. *Id.* at 2. Roberts claimed that the restitution order was unauthorized because the aggrieved class was not sufficiently identified so as to comport with the limits of the statute. *Id.* The court disagreed, noting that 34,135 names and addresses of aggrieved consumers had been established, representing approximately two-thirds of those harmed by the defendant. *Id.* Accordingly, the court held there was sufficient identification of consumers so that attempts could be made to contact the remainder of those not yet identified. *Id.*

⁶⁷ A probation order is inoperative if made for an undetermined sum. *See United States v. Hoffman*, 415 F.2d 14, 21 (7th Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962); *United States v. Stoehr*, 196 F.2d 276, 284 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952).

ject of the class action—for a specified period of time.⁶⁸ Compensation is distributed to the class as a whole in the form of reduced prices, since the injury suffered by an individual consumer who has purchased the product of a defendant adjudged guilty of price-fixing or misrepresentation usually is not substantial enough to prompt litigation.⁶⁹ The aggrieved sector of society, therefore, recovers its damages through a continued use of the product or service. It is suggested that the concept of fluid recovery can be utilized by sentencing courts when the defendant corporation's

⁶⁸ See *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 264 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005, 1018 (2d Cir.), *vacated and remanded on other grounds*, 417 U.S. 156 (1973); Note, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 GA. L. REV. 893, 894 n.10 (1975) (fluid recovery effectuates compensation by returning damages to consumers currently using defendant's products or services).

The seminal case involving the adjudication of fluid recovery as a damage distribution mechanism is *Eisen*. See Comment, *Due Process and Fluid Class Recovery*, 53 OR. L. REV. 225, 229 & n.20 (1974). *Eisen* involved an allegation of monopolization and price fixing of odd lot stock trading over a period of 4 years in violation of the antitrust laws, 52 F.R.D. at 256-58, and presented the issue of whether a large class action could be maintained under revised rule 23 of the Federal Rules of Civil Procedure, *id.* at 256. Eisen, an investor, sought to represent himself and similarly situated investors who had traded with Carlisle & Jacquelin and DeCoppet & Demorus, which were investment houses on the New York Stock Exchange, *id.* at 257, and represented a class of approximately six million traders of odd lots, and sought to recover between 20 and 60 million dollars, *id.* at 265. Judge Tyler observed that the situation presented an appropriate opportunity to exercise a fluid recovery distribution process. *Id.* at 264-65. On appeal, however, the fluid class recovery explicitly was rejected by the Second Circuit. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974). The court concluded that the magnitude of the class Eisen represented was unmanageable. *Id.* at 1018. The United States Supreme Court held that the plaintiff was obligated to notify those individuals who were easily ascertainable, 417 U.S. at 174, and required the plaintiff to bear the cost of financing the suit, *id.* at 178-79. The Court, however, did not address the appropriateness of the fluid recovery process, stating: "We therefore have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the court . . ." *Id.* at 172 n.10. Although the constitutionality of the fluid recovery was rejected by the Second Circuit, the remedy remains a viable distribution process. Indeed, the Eighth Circuit recently noted the variances among the circuits in the class-wide assessment and calculation of damages. See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1190 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The court noted that the "propriety of class-wide damage assessment, with or without a fluid recovery mechanism, should depend on whether it is consistent with the policies of the underlying cause of action." *Id.* The Second Circuit's opinion in *Eisen* has been criticized as "representing a mechanical and unsympathetic reading of Rule 23 and one that completely ignores the courts' discretion to fashion relief." See 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1784, at 110 (Supp. 1983) (footnote omitted).

⁶⁹ See *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981); *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 264 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973); Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 460 (1972).

criminal acts have resulted in increased prices for the individual consumer. The prices of the defendant's products or services could be lowered in an amount and for a period of time which, in the judgment of the court, would accomplish the redress of the aggrieved consumers.⁷⁰

CONCLUSION

Federal courts are vested with broad authority to fashion probation conditions to aid in a criminal defendant's rehabilitation and in the protection of society. Nevertheless, since this authority is purely statutory, the judiciary must respect any limitations the Legislature has deemed fit to impose on the courts' otherwise plenary power. The *Anderson* decision marks a departure from the well-settled principle that any order of probation conditioned on restitution must be directed to those aggrieved by the defendant's crime. Although the Eighth Circuit directed that the corporate defendants make payments to charitable organizations having no logical relationship to the defendants' antitrust violations, the decision brings attention to the difficulty of sentencing an entity for which incarceration is an impossibility. This Comment has suggested that as an alternative to the traditional and ineffective fine, courts require corporate defendants to redress the victims of their crimes through community service and a fluid recovery form of restitution. These conditions of probation can be constructed to effect restitution to the aggrieved parties and the rehabilitation of corporate defendants, while at the same time conforming to the restrictions of the Federal Probation Act.

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⁷⁰ See *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1169 n.20 (S.D.N.Y. 1983). As a condition of probation, the *Danilow* court required six corporate defendants to donate baked goods, the subject of the defendants' price fixing, to charitable organizations. *Id.* at 1167. The court considered the donations to New York charitable organizations to have met the requirements in the Act that restitution be made only to aggrieved parties. *Id.* It is submitted that the court's basic concept and acceptance of fluid recovery restitution is laudatory, and that this judicial approach to restitution should be continued, with the caveat that courts must ensure that those benefiting by a reduction in the price of a defendant's products in fact represent that group of consumers aggrieved by the corporate crime.