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OCCUPATIONAL DISQUALIFICATION OF CORPORATE EXECUTIVES: AN INNOVATIVE CONDITION OF PROBATION

I. INTRODUCTION

When Colonel Vanderbilt demanded one hundred years ago, "You don't suppose you can run a railway in accordance with the statutes, do you," he acknowledged that some businessmen are predisposed to pursue corporate affairs in ways which violate the law.¹ But theory and research of corporate crime were largely dormant until 1949, when Edwin Sutherland's seminal *White Collar Crime* brought "all known criminals within the purview of the discipline of criminology, not just those caught by the police."² In the past decade, many scholars have stressed the inadequacy of traditional legal regulation of the activities of complex and powerful business organizations.³ Paralleling this development in scholarship is media coverage of crimes committed by these organizations and the individuals who control them.⁴

A growing number of observers advocating reform of the inadequate network of criminal penalties for corporate offenders have suggested an innovative sanction—occupational disqualification. It is intended to penalize an executive officer or manager of a business organization who has been convicted of an offense committed in furtherance of the interests of the organization.⁵ Disqualification, imposed as a condition of probation for a limited period of time and under stated circumstances, would bar this person from post-conviction exercise of

¹ Quoted in E. SUTHERLAND, *WHITE COLLAR CRIME* 10 (1949).

² Cressey, *Forward* to *id.*, at iv.

³ See generally Braithwaite, *Challenging Just Deserts: Punishing White Collar Criminals*, 73 J. CRIM. L. & C. 723 (1982); *White-Collar Crime Symposium*, 17 AM. CRIM. L. REV. 271 (1980); Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & C. 40 (1978); *Symposium: Reflections on White-Collar Sentencing*, 86 YALE L.J. 589 (1977).

⁴ See, e.g., *Courts Impose More Jail Terms in White-Collar Criminal Cases*, N.Y. Times, May, 5, 1980, at 1, col. 1; Taubman, *U.S. Attack on Corporate Crime Yields Handful of Cases in 2 Years*, N.Y. Times, July 15, 1979, at 1, col. 5.

⁵ See R. NADER, M. GREEN & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* 249-50 (1976); C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 193 (1975); Braithwaite & Geis, *On Theory and Action For Corporate Crime Control*, 28 CRIME & DELINQUENCY 292, 305-07 (1982).

managerial functions bearing a reasonably direct relationship to the conduct constituting the offense.⁶

This comment will first explore the elements of organizational crime and the context in which the individuals involved operate. The need for disqualification will then be established in light of the failure of existing sanctions against convicted businessmen to achieve the aims of the criminal law. Next, disqualification will be shown to be an effective addition to the sentencing arsenal of the courts. Fourth, disqualification will be shown to be consistent with traditional sentencing concepts. Then, through a discussion of analogous sanctions, the practical implementation of occupational disqualification will be explored, with emphasis on guidelines and limitations on its use. Finally, the comment will evaluate the likelihood and propriety of judicial disqualification, absent explicit legislative approval, of executives.

II. THE NATURE AND EXTENT OF CORPORATE CRIME

Corporate crime is a particular form of white collar crime. Originally defined as a "crime committed by a person of respectability and high social status in the course of his occupation,"⁷ white-collar crime has subsequently been subdivided into two broad categories—occupational crime and organizational crime.⁸ Occupational crime is committed by an individual in connection with his occupation and for his personal benefit. Organizational crime, synonymous with corporate crime,⁹ encompasses crimes committed by businesses, their employees,

⁶ Disqualification is not a new concept. Over 40 years ago, Senator Mahoney summarized S.2719, 76th Cong., 1st Sess. (1973) as providing, in part:

Such officer or director [following conviction under the antitrust laws] may be enjoined from rendering any service, direct or indirect, to such corporation, permanently or for a period not less than 90 days in the discretion of the court, or from receiving any compensation or from engaging in competition with the company he is enjoined from serving.

To Amend the Antitrust Laws 1939: Hearings on S.2719 Before the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. (1939) 16. The provision was not enacted.

Fifteen years later, Representative Wright Patman of Texas offered an amendment on a House bill providing for additional penalties in antitrust cases. It called for a "court injunction against further activity in directing, managing, or advising any organization or business engaged in, or affiliated with anyone engaged in interstate commerce as punishment for a fourth [antitrust] offense." H.R. 3659, 84th Cong., 1st Sess., 101 CONG. REC. H3888-89 (1955).

⁷ E. SUTHERLAND, *supra* note 1, at 9.

⁸ M. CLINARD & P. YEAGER, *CORPORATE CRIME*, 17-18 (1980) [hereinafter cited as CLINARD & YEAGER]. Occupational crimes such as embezzlement victimize the corporation. Other occupational crimes—for example, receipt of a bribe to confer a benefit—do not.

⁹ Organizational (corporate) crime is said to involve "managerial direction, participation or acquiescence in illegal business acts." See Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 287 n.1 (1980).

By definition, corporate crimes take place in a setting of complex relationships and ex-

and their agents to further the primary, legitimate purposes of the organization.¹⁰ The sanction of disqualification is contemplated here for use against individuals committing organizational crimes by employing the corporate form for the immediate purpose of increasing corporate,¹¹ rather than personal, wealth.¹²

Corporate crime damages our society in obvious ways. Crimes which jeopardize public health, for example, include the knowing mislabelling of drugs and sale of contaminated food products, as well as criminal neglect of safety precautions and refusal to report unlawful emissions of hazardous wastes. Less obviously, economic offenses such as price fixing, overcharges, and fraudulent measurements distort the market and raise prices. Violations of the Internal Revenue Code shift tax burdens and thereby subvert legislative judgments about the distribution of income. Bribery of government officials also corrupts the political process and encourages unethical behavior as ethical businessmen struggle to compete with their dishonest peers.¹³

Corporate crime, often diffuse in its impact and concealed in the maze of thousands of legitimate business transactions, poses a serious challenge to government agencies charged with detecting, controlling, and prosecuting corporate misconduct. Because organizational crimes are committed to further corporate goals of accumulation of power and

pectations, involving power and trust, among directors and management. One commentator writes that in many white-collar crime cases, the defense presents character evidence to show that the corporate defendant is well-regarded both in the community and his occupation: "The only answer to the 'good character' defense is that the crime could not have been committed by a person of bad reputation." Ogren, *The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White Collar Crime*, 11 AM. CRIM. L. REV. 959, 969 n. 34 (1973). See also J. BRAITHWAITE, *INEQUALITY, CRIME AND PUBLIC POLICY* 186-87 (1979).

¹⁰ Examples of organizational crime include conspiracy to fix prices, bribery of custom's agents, use of false weights and measures, and tax fraud.

¹¹ Generally, corporations will not tolerate actions by their executives which victimize the corporation. A contrary incentive is at work when the executive is acting to benefit his corporation. Hence, it is thought that corporations will punish, through dismissals and demotions, executives who act to gain by victimizing their corporation.

¹² It is, of course, true that personal gain is a factor in illegal corporate activity:

[C]orporate policy formulators generally have direct and important personal interests—both financial and social—in an increase in the profits of the corporation. Greater dividends, salaries, incentive compensation, bonuses, promotions, security and prestige—all of which may flow from increased profits—are frequently the *ultimate* conscious motives behind the decision to employ the corporate form in an illegal fashion. But the *immediate* goal of these formulators—the method chosen to secure these ultimate ends—is an increase of *corporate* profits.

Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 282 (1961).

¹³ *White Collar Crime: Oversight Hearings on H.521-37 Before the House Judiciary Subcomm. on Crime to Examine the Characteristics, Scope and Ramifications of White Collar Crime and to Assess the Adequacy of Present Federal-State Enforcement Efforts*, 95th Cong., 2d Sess. 5-17 (1978) (statement of Herbert Edelhertz) [hereinafter cited as *Oversight Hearings*].

wealth, they are seldom reported by those most likely to be aware of their occurrence. On the other hand, occupational crimes such as embezzlement which injure the corporation are regarded as disloyal and therefore more likely to be reported to the authorities.¹⁴ Most commentators agree that the disparity between actual and recorded corporate crime exceeds that for conventional crime.¹⁵ While comprehensive data on corporate crime have not been collected,¹⁶ one thorough compilation of significant corporate offenders and offenses between 1970 and 1980 revealed that of the 1,043 major corporations studied, 117 (or eleven percent) committed at least one major offense.¹⁷ Some companies were multiple offenders. The study listed 163 separate offenses,¹⁸ but left unresolved whether corporate crime is increasing.¹⁹ Regardless, the frequency and diversity of the exposed illegalities reveal the significant economic impact of corporate wrongdoing.²⁰

The harms, however, are not merely monetary or environmental. Crimes committed by prominent businessmen "establish an example which tends to erode the moral base of the law and provide an opportunity for other kinds of offenders to rationalize their misconduct."²¹ On a less abstract plane, corporate offenses undermine the market system by

¹⁴ Executives who victimize their corporations are also more likely to encounter the "external" control of criminal sanctions. See Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 513 (1980) ("While the data are fragmentary and largely anecdotal, it would be reasonable to hypothesize that executive criminals are treated far less harshly when their corporation is a party to the crime than when their corporation is the victim of the crime.").

¹⁵ The prevailing view among criminologists is that the number of all crimes actually committed greatly exceeds the number officially reported. One commentator suggests that in the case of corporate crime, several factors account for an even greater discrepancy between reported and actual crime: the harm that results from many kinds of corporate crime is diffuse or not perceived, and enforcement is frequently sporadic. Orland, *supra* note 14, at 508-09.

¹⁶ According to some scholars, the FBI and Congress have until recently been lax in investigating and calculating the extent and impact of economic offenses. See, e.g., Orland *supra* note 14, at 509-10; see also CLINARD & YEAGER, *supra* note 8, at 300.

¹⁷ Ross, *How Lawless are Big Companies*, FORTUNE, Dec. 1, 1980, at 56-64. The compilation did not include foreign bribes or kickbacks.

¹⁸ Of these offenses, 98 were anti-trust violations, 28 kickbacks, bribes, or illegal rebates, 21 illegal political contributions, 11 frauds, and five tax evasions. *Id.* at 58-61.

¹⁹ "More wrongdoing was exposed because of the crack-down in the aftermath of Watergate. But there are no data to allow comparisons over time about the extent of corporate lawlessness." *Id.* at 64.

²⁰ See *Oversight Hearings*, *supra* note 13, at 7. See also Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 436 (1963). ("[I]t is possible to reason convincingly that the harms done to the economic order by violations of many of these regulatory laws are of a magnitude that dwarf in significance the lower-class property offenses."). For a discussion of the costs of white collar crime, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 103-04 (1967).

²¹ CLINARD & YEAGER, *supra* note 8, at 188.

attacking its fundamental postulates of fair competition and honest financial reporting.²²

III. THE AIMS OF THE LAW

Judges and legislators must select the optimal mix of criminal, civil, administrative, and private remedies for organizational crime. This initially requires a determination of which measures will best deter illegality, protect the public, and fulfill society's demands for justice. Whether criminal sanctions are appropriate to achieve these aims is a matter of great contention.

Some commentators argue that criminal punishment is inappropriate for most forms of organizational misconduct because the conduct prohibited by economic regulatory laws is often not immediately distinguishable from methods of business not regarded as ethically reprehensible.²³ Indeed, because many federal statutes prescribe civil remedies and criminal sanctions for the same conduct, the imposition of criminal liability may be a matter of discretion for government officials.²⁴ Despite possibilities of concurrent enforcement by government agencies, criminal penalties serve an important function in enforcement of regulations. Criminal sanctions are necessary as a "last resort to be used selec-

²² "If corporations are to obtain the funds needed to conduct and expand their operations the public must have confidence in them . . . ;" but "corporate violations have shaken public confidence in business and in the credibility of accountants and of auditors . . ." *Id.* at 188. See also Seymour, *Social and Ethical Considerations in Assessing White-Collar Crime*, 11 AM. CRIM. L. REV. 821-22, 825 (1973) ("The business and financial community will continue to suffer until something is done by its leaders to set a tone which makes it clear that illegal conduct will not be condoned, whether by street muggers or corporate executives The American economy depends on trust and good faith.").

²³ Kadish, *supra* note 19, distinguishes between traditional "culpable" offenses and newer regulatory offenses which are purely "economic" or "regulatory" in nature, and writes:

To the extent that the crucial distinguishing factor of the criminal sanction is 'the judgment of community condemnation which accompanies and justifies its imposition,' and to the extent that this characteristic contributes substantially to its effectiveness in influencing compliance with proscribed norms, the proliferation of convictions without grounds for condemnation tends in the long run to impair the identity of the criminal sanction and its ultimate effectiveness as a preventive sanction, both in the area of economic crimes and in the areas of its traditional application.

Id. at 444. But see Orland, *supra* note 14, at 519 ("Overcriminalization of corporate conduct demeans the seriousness of criminal convictions in the eyes of corporate executives, prosecutors, and judges. [However,] there is a range of serious, wrongful corporate conduct which is appropriately subject to criminal sanctions but which is substantially underprosecuted.").

²⁴ See, e.g., Mathews & Sullivan, *Criminal Liability for Violations of the Federal Securities Laws: The National Commission's Proposed Federal Criminal Code, S.1, and S.1400*, 11 AM. CRIM. L. REV. 883, 887 n.14 (1973): "The formal enforcement remedies pursued by the S.E.C. are not mutually exclusive. Simultaneous or successive administrative, civil and criminal enforcement proceedings involving identical or related facts may result from a single S.E.C. investigation."

tively and discriminatingly when other sanctions fail."²⁵ Generally, regulations providing for criminal as well as civil liability are criminally enforced only in cases involving willful or flagrant disregard for the law,²⁶ contrary to the fears of upper management that they will be prosecuted for violations occurring without their knowledge.²⁷ Furthermore, many forms of corporate misconduct cannot be dismissed as mere "regulatory" offenses that should be controlled by administrative remedies. Bribery, fraud, and tax evasion are intentional crimes constituting blameworthy behavior which would be condemned if committed by an individual acting on his own and which are generally deplored within the business community.²⁸

²⁵ Kadish, *supra* note 19, at 426. See also Solomon, *The Economist's Perspective of Economic Crime*, 14 AM. CRIM. L. REV. 641, 647 (1977).

²⁶ The Justice Department brings criminal antitrust charges only in cases involving well-defined types of trade restraints. Baker & Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 623-24 (1977) ("Where complex and novel issues of law are involved, or where there is clear evidence that the defendants did not appreciate the consequences of their actions, the [Antitrust] Division proceeds civilly."). See also Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 409 (1978): "[M]ost criminal antitrust cases involve hard-core price-fixing and market allocations in which the defendants have clear notice and the Department has no responsible choice except to proceed by criminal indictment (or information in a misdemeanor case)." Thus, from 1976 through 1979, the Justice Department brought 45 felony cases; in each, the Department charged at least price-fixing or bid-rigging. Comment, *Sherman Act Sentencing: An Empirical Study, 1971-1979*, 71 J. CRIM. L. & C. 244, 253 n.74 (1980).

In criminal prosecution of food adulteration, only those directly responsible are charged. When individuals were criminally prosecuted, the firms under their control had a history of prior sanitation problems and, in every case, some form of warning and follow-up inspection preceded prosecution. See O'Keefe & Shapiro, *Personal Liability Under the Federal Food, Drug, and Cosmetic Act—The Dotterweich Doctrine*, 30 FOOD DRUG COSMETIC L.J. 5, 28-30 (1977).

The Environmental Protection Agency and the Justice Department, when dealing with environmental abuse, bring criminal charges against corporate officials only when the Government believes that "(1) They [corporate officials] had actual knowledge that the corporation was violating a standard or order; and (2) They failed to correct the violation or to prevent it from reoccurring." Statement of James Noorman, former Ass't. Atty. Gen., Land and Natural Resources Div., Third Toxic Substances Control Conference (Dec. 5, 1978), 10-11, quoted in *White-Collar Crime: A Survey of the Law*, 18 AM. CRIM. L. REV. 169, 369 n.1718 (1980) [hereinafter cited as *White-Collar Crime: A Survey*]. See also *United States v. Park*, 421 U.S. 658, 672-73 (1975):

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them . . . [The Government has the] ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the [Federal Food, Drug and Cosmetic] Act, to prevent or correct the prohibited condition.

²⁷ See Comment, *Toward a Rational Theory of Criminal Liability for the Corporate Executive*, 69 J. CRIM. L. & C. 75, 88-89 (1978), where the author agrees that before holding a corporate executive criminally liable, the law should require (1) that he had power to prevent the violation, and (2) that he had knowledge of those conditions which resulted in the violation.

²⁸ Curnow, *Economic Crimes: A High Standard of Care*, 35 FED. B.J. 21, 29 (1976) ("One may

Even in those cases where corporate misconduct is flagrant, the government may for several reasons pursue only civil remedies or indict only the corporation. First, prosecutorial manpower and expertise are often lacking.²⁹ Second, regulatory agencies, though possessing the authority to issue administrative subpoenas for documents that may reasonably come under their jurisdiction, are often unaware of material corporate records.³⁰ Third, prosecutors are aware that juries often refuse to convict individual businessmen of crimes, even when convicting the defendant corporation.³¹ Finally, prosecutors confront the difficulty of locating criminal responsibility within a large corporation which has a complex organization and decentralized management.³² Thus, a decision to initiate a civil action, or a criminal action against only the corporation, may be inescapable, even when the government officials responsible for enforcement might also favor criminal prosecution of the corporate officers.³³

decry the evolution of the standards [of care] in white collar or economic crime cases, but it is a natural outgrowth of the incredibly sloppy business practices that have become commonplace in the United States in the last decade.”)

²⁹ See N.Y. Times, July 15, 1979, § 1, at 1, col. 5: “The Justice Department lacks the manpower, the expertise and, in some cases, the motivation to conduct successful criminal investigations and prosecutions against major corporations or their top executives . . .”

³⁰ See CLINARD & YEAGER, *supra* note 8, at 92.

³¹ See, e.g., *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963) (conviction of corporation for tax evasion is not inconsistent with acquittal of principal officers, directors and shareholders on the same charge); *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950, 953-54 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959). For a compilation of cases in which the corporation but not its agents were convicted, see Note, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 292 n.50 (1961).

³² In an era of finance capitalism, the manager responsible for operational and production decisions is increasingly separated by organization, language, goals, and experience, from the financial manager who today plans and directs the corporation's future. This tends both to insulate the upper echelon executive (who may well desire that the sordid details of ‘meeting the competition’ or ‘coping with the regulators’ not filter up to his attention) and to intensify the pressures on those below by denying them any form in which to explain the crises they face. This generalization helps to explain . . . the infrequency with which corporate misconduct can be traced to senior levels.

Coffee, *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 399-400 (1981). See also M. CLINARD, *ILLEGAL CORPORATE BEHAVIOR*, 209 (1979) (Corporations often are able to shield culpable executives from liability by trading a plea of guilty or *nolo contendere* as the price of avoiding naming responsible individual managers so that they are never tried.)

³³ CLINARD & YEAGER, *supra* note 8, at 281. The authors explain that the procedural safeguards in criminal cases can also be a key factor in the choice to proceed civilly. Because a corporation cannot be imprisoned, the same penalty in fines can be more easily achieved than in criminal actions. Clinard and Yeager also argue that civil damage suits often result in larger monetary penalties than criminal suits. The authors list various criteria employed by prosecutors in deciding whether to proceed civilly or criminally. *Id.* at 93. Of course, the Government may sometimes pursue parallel proceedings. See, e.g., *United States v. Kordel*, 397 U.S. 1, 11 (1970) (“It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forego recommendation of a criminal prosecution

Commentators, then, disagree on whether criminal sanctions should be directed at the corporation or at its employees when crimes are committed by individuals acting as agents for the enterprise. One school argues that where the source of wrongdoing is not easily attributable to an individual decisionmaker, but rather to institutional shortcomings—"flaws in the organization's formal and informal authority structure"—better policy dictates focusing on the enterprise.³⁴ Another school, while agreeing that corporate liability is desirable, contends that economic efficiency is maximized by confining criminal liability to the organization itself, because as profit-seekers corporations will respond appropriately to criminal sanctions by imposing their transgression costs on responsible employees.³⁵

The efficacy of directing criminal sanctions against the corporation alone is, however, founded on questionable assumptions about the market's ability to regulate all corporate behavior. It also assumes the likelihood and success of internal discipline within the firm. Furthermore, it does not take into account the possibility, or perhaps the ease, of lateral employment opportunities for dismissed executives. Accordingly, many observers believe that the government must, whenever possible, ascertain and prosecute individuals responsible for serious corporate misconduct.³⁶ This comment takes the position that to promote deterrence, to protect health and safety, and to do justice, those who command, authorize, or participate in corporate crime should be individually

once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.").

³⁴ Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980). The author argues that much of corporate misconduct "does not typically have, at its root, a particular agent so clearly 'to blame' that he or she merits either imprisonment or a monetary fine extracted in a public ceremony." *Id.* at 31.

³⁵ See, e.g., Posner, *Optimal Sentences for White-Collar Criminals*, 17 Am. Crim. L. Rev. 409, 417-18 (1980). But see Kadish, *supra* note 19, at 434-35 (effective policy also would depend upon the ability of the corporation to pass on its losses by means of altered pricing policies). See also, CLINARD & YEAGER, *supra* note 8, at 280-81 (many corporations view fines as merely a cost of doing business).

³⁶ See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 469-70 (1980), where Professor Coffee emphasizes the importance of focusing on the individual decision-maker. In a subsequent article, he argues that since the corporation and the individual defendants can be prosecuted on the basis of the same evidence and at the same trial, the Government can save time and money by joint indictment and trial. Coffee, *supra* note 30, at 387. See also Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CAL. L. REV. 1319, 1534-35 (1973) for the argument that for treble-damage actions to have effective deterrence value, they must deter the individuals responsible. Wheeler contends, however, that "potential antitrust violators have less cause to worry about their reputations, standing in the community, or ability to find jobs because of their violations than they would if they obtained the same personal benefit [high salaries, prestige, stock dividends] by embezzlement, pickpocketing or fraud." *Id.* at 1335.

punished.³⁷

IV. THE EFFECTIVENESS OF EXISTING CRIMINAL SANCTIONS DIRECTED AT INDIVIDUALS

When sentencing conventional criminals, judges assertedly weigh the particular attributes of the offender against four goals of punishment—deterrence, retribution, incapacitation, and rehabilitation—and assign the sanction best thought to implement some combination of these ends. But, as a recent survey of judicial attitudes and behavior indicates, when sentencing corporate criminals judges almost exclusively justify their sentences in terms of deterrence of potential offenders. Retribution, incapacitation, and rehabilitation are believed to be unnecessary or unachievable.³⁸ The study reveals that many judges believe that by the time of sentencing, sufficient punishment has already been inflicted on a convicted executive through apprehension, public indictment, prosecution, conviction, and damage to career and community status. This widespread belief operates in conjunction with other factors to reduce the likelihood of imprisonment.³⁹ One such factor is the concern judges recurrently expressed for the health and safety of middle-class and middle-aged convicts who would be incarcerated in a drastically alien setting. Some judges also cited the executives' personal back-

³⁷ *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1261 (1979) (emphasizes energetic prosecution for violations occurring under executive's supervision in order both to defer future violations and to provide an incentive to implement business practices which diminish their likelihood). See Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091, 1129 (1976) (as a general rule, penalties should be directed to corporate employees). See also Address by Benjamin R. Civiletti, former Att'y. Gen. of the United States, Senior Day Ceremony, Univ. of Mich. Law School (May 17, 1980). Concerning enforcement of pollution control laws, Mr. Civiletti said:

We will also emphasize personal responsibility. I do not view violations of pollution laws as simply the acts of corporations. It is self-evident that the work of corporations is carried out by individuals. Congress has specifically recognized this by including in the criminal provisions of the pollution control laws a definition of the term "person" that includes "responsible corporate officers." Thus, we shall attempt to identify the corporate officers responsible for corporate acts so that the law may be truly enforced and its real deterrent effect mobilized. Corporate officers will not be able to evade their responsibility by delegating compliance to a level that insulates management.

Quoted in *White Collar Crime: A Survey*, *supra* note 24, at 369-70 n.1719.

For a categorical rejection of the concept of corporate illegality, see L. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW*, 185-87 (1969). Leigh advocates increasing penalties for the individuals involved.

³⁸ Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 482 (1980) [hereinafter cited as Mann]. The authors concluded on the basis of a field study consisting of lengthy interviews with fifty-one federal district judges that judges were concerned predominantly with general deterrence.

³⁹ *Id.* at 483-84. For further explanation of these considerations, see Coffee, *supra* note 34, at 456-57.

grounds, which are typically exemplary or at least free of prior criminal convictions.⁴⁰ Other explanations for the judicial reluctance to incarcerate executives stress the lack of moral opprobrium accorded corporate offenses by some judges who believe that imprisonment is too harsh a sanction for non-violent corporate offenses. More skeptical critics attribute this phenomenon, at least in part, to class bias and sympathy for those of like community status, a factor which several judges surveyed acknowledged.⁴¹

The result, of course, is that imprisonment of corporate officers and managers is considerably less likely than for individuals convicted of non-violent common law crimes.⁴² Furthermore, judges are even more reluctant to impose prison terms when offenders have employed illegal means to further corporate goals rather than to pursue personal gain which often entails victimizing the corporation.⁴³ Moreover, corporate executives are treated more leniently than other white-collar offenders. For example, a major study of fifty-six executives convicted of federal crimes between 1977-1979 revealed that the average prison sentence resulted in actual incarceration of only a few days.⁴⁴ In contrast, other white-collar offenders such as investment operators and securities brokers received two to four years in prison in the majority of cases.⁴⁵

Observers agree that imprisonment is the most effective deterrent in cases of deliberate, calculated crimes prompted by avarice or the pursuit of power.⁴⁶ Thus, the virtual elimination of imprisonment as a credible threat to potential corporate offenders must be recognized and taken

⁴⁰ See Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 592-93 (1977). Judge Renfrew, who sentenced a group of price-fixers to make speeches in the community, stressed their high community status as a factor in the sentencing process.

⁴¹ Mann, *supra* note 36, at 487, quotes an anonymous federal judge: "I guess there is no getting away from the fact that the judge empathizes more with a white-collar person whose hardships you can understand, because a life style is more like his or her own, than someone whose life style you really can't understand."

⁴² A study of sentencing in the Southern District of New York revealed that white-collar criminals stood a lesser chance of going to prison than defendants convicted of non-violent common law crimes. *White-Collar Justice: A BNA Special Report on White-Collar Crime*, ANTI-TRUST & TRADE REG. REP. (BNA) No. 759, Pt. 2, at 10-11 (Apr. 13, 1976) [hereinafter cited as *BNA Special Report*]. See also Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 389 (1970). ("Imprisonment is a rarely used sanction [in antitrust cases]; it has been imposed in fewer than four percent of the [Justice] Department's criminal cases, and then mostly in cases involving either acts of violence or union misconduct."). For a more recent study of Sherman Act sentencing, see Comment, *supra* note 24, at 251-52 (from 1976-1979 judges imposed no jail sentences against 74.1% of misdemeanor offenders).

⁴³ See Orland, *supra* note 14, at 513.

⁴⁴ CLINARD & YEAGER, *supra* note 8, at 287.

⁴⁵ *Id.* at 295.

⁴⁶ See, e.g., *United States v. Paterno*, 375 F. Supp. 647, 649 (S.D.N.Y.), *cert. denied*, 419 U.S. 1106 (1974) ("So called crimes of passion are different [from white-collar crimes], of course, and raise problems of different orders.").

into account when evaluating the present enforcement scheme. In short, although desirable from a theoretical viewpoint, imprisonment is not now a realistic sanction for most corporate offenders.

The general absence of an incarceration threat means that other sanctions must be relied on to deter corporate crime. Many commentators believe that one alternative, fines, has negligible deterrent value. Fines, at least as presently administered, are generally passed on to the corporation which reimburses, compensates for, or fully insures against the costs of criminal litigation.⁴⁷ Section Five of the Model Business Corporation Act, for example, allows for indemnification of fines if the defendant was acting in the best interests of the corporation and without reasonable cause to believe his actions were illegal.⁴⁸ Moreover, the limitation on indemnification may be undermined in practice because the evaluation of the defendant's good faith is made by persons who may be sympathetic to, dominated by, or dependent upon the defendant seeking indemnification.⁴⁹ Thus, corporate and societal interests may conflict when the prospect of indemnification negates the fear of liability which could otherwise serve as an incentive for obeying the law.

The typical punishment for those convicted of organizational offenses, then, is primarily collateral in nature. It consists mainly of the inconvenience of litigation, the shame of conviction, and perhaps a brief probationary period. One scholar sums up the deterrent value of the present sentencing scheme:

[I]f even criminal fines are going to be passed on by executives to someone else, then short of a radical increase in imprisonment of executives—not too realistic a threat as regards most types of corporate wrongdoing—the strategies aimed at key individuals are yet to be of only limited deterrence value.⁵⁰

Executive disqualification offers promise as an innovative new strategy.

V. THE ROLE OF EXECUTIVE DISQUALIFICATION

When faced with a newly convicted corporate executive, many judges seek a compromise sanction which, without imposing the deprivations associated with incarceration, still offers the promise of general deterrence. These compromise measures have included amended sentences, in which a judge imposes a prison term and subsequently

⁴⁷ For an in-depth discussion of the "indemnification equilibrium," see Stone, *supra* note 32, at 45-65.

⁴⁸ MODEL BUSINESS CORP. ACT § 5(a) (1974). Of course, when a corporation cannot indemnify an executive directly through corporate insurance plans, the corporation can sometimes achieve de facto indemnification covertly by means of higher salaries or fringe benefits.

⁴⁹ Coffee, *supra* note 34, at 443.

⁵⁰ C. STONE, *supra* note 5, at 65. The extensive sentencing survey of federal judges by Mann, *supra* note 36, reveals judicial attitudes on this point.

reduces it prior to commencement, and various creative conditions of probation.⁵¹ These innovations have sometimes been criticized for their limited deterrent value and their selective use for an elite class of defendants.⁵²

One alternative sanction, for example, required as a special condition of probation that five convicted executives make oral presentations to twelve business and civic groups about the case.⁵³ A local attorney invited by the judge to respond to this sanction agreed with the judge's conclusions that *nolo contendere* pleas and monetary penalties are ineffective deterrents to crimes such as price-fixing. He also maintained that the judge's alternative sentence was insufficient, suggesting that in addition to charity service or community speeches courts should compel corporations to remove executive felons from their positions.⁵⁴

Many observers have lamented the seeming invulnerability of many executives from punishment. They argue that effective deterrence requires a credible, and serious, threat of punishment. Most business crimes are not spontaneous and managers as a rule are sensitive to changes in risk. Courts can presumably dissuade them, therefore, from employing the corporate form in an illegal manner if the personal objectives they seek to attain through illegality—increased prestige, wealth, and security—are sufficiently jeopardized by the deprivations levied upon them after conviction.⁵⁵

Disqualification penalizes the convicted executive in several ways. As a sanction which bars the offender from pursuing his chosen occupation, disqualification is tantamount to a fine because it imposes costs in terms of lost work opportunities. The equivalent of a monetary penalty consists of the difference between what the defendant would have earned in the occupation from which he is disqualified and his earnings in an alternative occupation.⁵⁶ Disqualification thus offers a way to ex-

⁵¹ See *infra* note 67 and accompanying text.

⁵² M. CLINARD, *supra* note 30, at 210, criticizes the use of innovative sanctions for only white-collar criminals. Community service as an alternative to punishment, the author points out, is offered to ordinary offenders in England. In another book, Clinard questions the deterrent value of such sentences. CLINARD & YEAGER, *supra* note 8, at 293-94.

⁵³ *United States v. Blankenheim*, No. CR-74-182-CBR (N.D. Cal. Nov. 1, 1974). The trial judge in this case, commonly referred to as the "paper label" case, was Judge Charles Renfrew.

⁵⁴ Renfrew, *supra* note 38, at 611.

⁵⁵ See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 356-57 (1968):

[T]he kind of conduct that runs afoul of economic regulation is neither happenstance nor impulsive: people who commit tax fraud or conspire to rig prices, or knowingly sell adulterated foods, have ample opportunity to calculate their courses of action, to weigh the risks against the advantages, and to take into account the possibility that their conduct will expose them to being branded as criminal.

⁵⁶ For an elaboration on this market-oriented approach, see Posner, *supra* note 33, at 412. The recent suspension of Former Illinois Attorney General William J. Scott's license to prac-

tract a fine from an executive who has, for whatever reasons, no present ability to pay a substantial fine.⁵⁷ It also presents a means of extracting a fine in those instances where corporate indemnification would reimburse executives for judicially-imposed fines.⁵⁸

Disqualification may additionally serve to prevent corporations from informally indemnifying a convicted executive through use of added benefits and bonuses. A probation condition which disqualifies the executive from corporate office will have the effect of making such legally gratuitous payments to a disqualified executive more difficult to implement than with an executive on simple probation who continues to perform his pre-conviction duties; a shareholder could claim in a derivative suit that the indemnification payments are unwarranted and, if successful, enjoin payments to the disqualified employee.⁵⁹ Moreover, because the media might spotlight an unusual corporate disclosure, such as an increased salary or benefit package to a disqualified executive, the risk of embarrassment may serve to prevent the corporation from shifting formally unindemnified fines of a disqualified employee over to the corporation.⁶⁰

Disqualification may also help change attitudes towards crime within the corporation. Vaguely perceived legal threats will not promote organizational re-evaluation of company policy, especially when the criminal actions were tacitly supported, or at least not strongly condemned, by the organization.⁶¹ Hence, corporations which retain in their prior managerial positions those convicted of culpable acts such as willful tax evasion or conspiracy to defraud the United States, convey the impression to others within the organization that such violations are regarded as purely technical. This reinforces the organization's rationalizations for the pursuit of profit through illegal means, typified by one

tice law provides an analogous example. Scott, who cannot now practice law, has been working as a consultant to insurance millionaire W. Clement Stone. Said Stone, "[a]s a lawyer, Scott has an expertise it would cost me a fortune to get." See *Scott's Law License Lifted by High Court*, Chicago Tribune, Oct. 16, 1981, § 1 at 3, col. 1.

⁵⁷ Disqualification also offers a way to impose a substantial fine on an individual who has a large earnings capacity but little present wealth. "The availability of these devices enables one to contemplate realistically the possibility of levying very large fines in lieu of the present prison sentence for white-collar crimes," Posner, *supra* note 33, at 412-13.

⁵⁸ See Coffee, *supra* note 34, at 444.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Gross, *Organization Structure and Organizational Crime*, in WHITE-COLLAR CRIME: THEORY AND RESEARCH 52, 64 (G. Geis & E. Stotland eds. 1980). See also Stone, *supra* note 32, at 66 ("In any social grouping, it is doubtful how effective legal threats can be as an instrument of social change, especially when the behavior to be changed has 'customary' support within the group, involves means condoned (or at least not strongly condemned) by the larger community, and does not result in injuries that the individual actors can clearly and vividly connect with their own behavior.").

instance in which corporate spokesmen cited a period of recession coupled with inflation as an excuse for price-fixing conspiracies.⁶² To counter such rationalizations the law must "transform the rules of the [intraorganizational] corporate bargaining game and thereby shape the conduct of corporate decision-makers."⁶³ Sanctions which diminish the authority of law-breaking actors increase the relative influence of law-abiding ones while simultaneously punishing lawbreakers by depriving them of wealth and other rewards derived from their exercise of power.⁶⁴ In this vein, forced exclusion from office dramatically reduces the authority of the convicted executive in a milieu where company loyalty may on occasion be regarded as a higher obligation than obedience to the law.⁶⁵

Deterrence, however, is not the only theory of punishment underlying disqualification. Society may justifiably protect itself by incapacitating those who have demonstrated their readiness to succumb to illegality. Despite the opportunity or even direct invitation to do so, most executives do not commit crimes. Those who do may reasonably be deemed unacceptable risk-takers,⁶⁶ and although no thorough studies exploring corporate recidivism exist, returning these persons immediately to an executive position entails dangers that society need not tolerate.⁶⁷ For example, in a case where corporate misconduct has endangered public health and safety the possibility of similar additional

⁶² Interviews with numerous corporate executives suggest that price-fixing agreements are more prevalent and overt in times of economic hardship when profits are squeezed. BUSINESS WEEK, June 2, 1975.

⁶³ See Note, *supra* note 35, at 1123.

⁶⁴ See, e.g., Geis, *The Heavy Electrical Equipment Antitrust Cases of 1961*, in WHITE-COLLAR CRIME 117, 123 (G. Geis & R. Meier eds. 1977): "For the most part, personal explanations for the [criminal] acts were sought in the structure of corporate pressures rather than in the avarice or lack of law abiding character of the man involved." Geis would assign blame both to pressures and the individuals involved.

⁶⁵ See, e.g., J. CONKLIN, ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA 82-88 (1977). As an example of a corporate environment which unduly emphasized company loyalty, Conklin cites the promotion of the employees of an airplane brake manufacturer who falsified test data, while two workers who notified officials of the dangerous situation were forced to resign. For a remedy to such forced resignations, see *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (an employee who is discharged for refusing to participate in an illegal scheme to fix retail gasoline prices may bring a tort action for wrongful discharge).

⁶⁶ M. CLINARD & R. QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 135 (1967) ("Persons appear to accept or reject opportunities for . . . [business] crime according to their orientations toward their roles and their attitudes towards general social values. Some of these factors are . . . the relative importance attached to a status symbol of money as compared with law obedience, and the relative importance attached to personal, family or business reputations.").

⁶⁷ One executive explained that in some industries, price-fixing indictments "actually promote conspiracy . . . There's a feeling that once you've been fined, you're clean, and nobody's going to touch you again. It's as though once you've been through a case, you're free

violations caused by a sluggish corporate response may require the court to remove from office the culpable individuals who are in positions of authority over that aspect of the business.⁶⁸

If locating criminal responsibility within the firm is difficult, imprisonment is rare, and fines are indemnified, then only indirect consequences—such as an executive's fear of losing his position or the tarnishing of his good reputation—comprise the main deterrents against executives. Yet, in many instances corporations fail to impose discipline when illegal acts of an executive are revealed. One scholar asserts, for example, that in the overwhelming majority of cases the corporate careers of executives convicted in the post-Watergate slush fund scandals of the mid-1970's were unimpaired by their felony convictions.⁶⁹

The lenient treatment by the Fruehauf Corporation of two of its officers convicted of crimes in 1975 is illustrative of the unwillingness of some corporations to discipline errant employees. Following the convictions of executives along with the corporation for evasion of 12.3 million dollars in federal corporate excise taxes between 1956 and 1965,⁷⁰ a special committee of the Fruehauf board of directors met to consider the case.⁷¹ On the advice of special counsel they proposed to return the two officers to active duty within the company, reasoning that the crime was committed in the service of the company and that general business practice authorized corporations to insulate this type of convicted executive from the adverse consequences of their loyal conduct.⁷²

to go ahead with the conspiracy." Donald Phillips, former vice-president and general sales manager at Baird's Bread Company, *quoted in* BUSINESS WEEK, June 2, 1975, at 48.

⁶⁸ One commentator notes the potential dangers involved in allowing those convicted of organizational crimes simply to return to work "where the offender receives no jail sentence, where probation controls are minimal, or where the regulatory systems fail to perform their prophylactic functions." Ogren, *supra* note 9, at 979.

⁶⁹ Orland, *supra* note 14, at 514. For an account of the post-conviction fates of various executives, see R. Nathan, *Coddled Criminals*, HARPERS, Jan., 1980, at 32-33.

⁷⁰ *United States v. Fruehauf Corp.*, 75-2 U.S. Tax Cas. (CCH) ¶ 16-207 (E.D. Mich. 1975), *aff'd*, 577 F.2d 1038 (6th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979). The corporation was fined \$10,000 and the two executives were sentenced to six months and one day, followed by a two-year period of unsupervised probation, and a \$10,000 fine. 577 F.2d at 1041. Following their unsuccessful appeals, District Judge Thomas Thornton suspended the prison sentences and ordered them to do community service. *See* Wall St. J., Jan. 4, 1979, at 4, col. 3.

⁷¹ *See* Nathan, *supra* note 66; Wall St. J. Apr. 11, 1979, at 16, col. 2, and June 1, 1979, at 29, col. 1.

⁷² Orland, *supra* note 14, at 514-15. For accounts of similar phenomena see *Amrep Says It Rehired Three Former Officers Who Did Time in 1977*, Wall St. J., Sept. 5, 1978, at 19, col. 1; *Technical Tape Officer Apparently Kept Getting Pay While Serving Jail Sentence*, Wall St. J., Dec. 27, 1978, at 4, col. 3.

Amrep, for example, re-employed three officers, each sentenced to six months imprisonment (later reduced) for their part in a mail fraud scheme. Finding their continued services to be "most necessary" to the company, Amrep rehired them at \$6,000-\$8,000 monthly compensation, "except while serving sentences."

The evidence thus indicates that the usual pattern is to reward, or at least not penalize, management fidelity to what are perceived as the company's interests.⁷³ Fines levied against the corporation itself following criminal conviction often do not result in discipline of the responsible executives, even when their actions did not redound to their firm's advantage.⁷⁴ One scholar offers several reasons for the absence of internal sanctions. First, the organization may fear that a dismissed employee will reveal related, or even unrelated, corporate misconduct in order to secure plea bargaining advantages. Second, to maintain morale the corporation may wish to protect its employees as a reward for their loyalty. Finally, the corporation may wish to avoid over-deterrence of those who may someday be called upon to act in the gray areas of the law or even to violate the law where chances of apprehension are regarded as minimal.⁷⁵

While the inadequacy of corporate internal sanctions indicates the need for external limitations on who may serve in a particular executive capacity, some critics argue that disqualification represents an unprecedented intrusion into the prerogatives of private sector business management.⁷⁶ Substantially all state corporation statutes, for example, assign to the corporation the right to decide what measures, if any, to take to ensure against future employee misconduct.⁷⁷ The concept of the invio-

⁷³ See Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 COLUM. L.R., 388, 389-90 n.10 (1977). Although no empirical studies exist, some observers posit that corporate executives convicted of crimes committed to further corporate goals who are dismissed (but do not retire) are hired in similar capacities by other corporations. See, e.g., Panel Discussion, *Punishing Price-Fixers: Evaluation of Sentencing Alternatives*, 46 ANTI-TRUST L.J. 538, 540-41 (1978) (remarks of Victor Kramer): "I think that there may be a lot of churning around, in which some corporations will hire the successful convicted price-fixer, and perhaps there will be exchanges. Corporation A in one industry will take the successful convicted price-fixer from another industry in exchange for the other way around." See also M. CLINARD, *supra* note 30, at 210-11.

⁷⁴ A corporation which violates the law may, even if convicted, benefit from its illegal activity. For example, a distributor of building materials commented on an out-of-court settlement for \$300,000 of a price-fixing suit brought by him against suppliers: "The penalty is nothing when balanced against that extra 10% or so profit guaranteed by price-fixing." Quoted in BUSINESS WEEK, June 2, 1975, at 46. In other cases, the corporation may, in the end, suffer for the misdeeds of its employees. Even so, it will often decline to discipline the responsible executives. See *supra* notes 63-70 and accompanying text.

⁷⁵ Coffee, *supra* note 34, at 458.

⁷⁶ Senator Robert Dole, for example, when questioning a witness who favored executive disqualification, asked, "[a]re you concerned about the federal court system encroaching on a traditionally private sector activity, namely, a company's power to hire its own employees?" The witness, Mark Green, responded that he did not consider disqualification to be an improper intrusion into corporate affairs. See *Reform of the Federal Criminal Laws: Hearings Before the Senate Comm. on the Judiciary on S. 1722-23, Pt. XIV*, 96th Cong., 1st Sess. 10935 (1979) [hereinafter cited as *Reform Hearings*, 1979].

⁷⁷ See Comment, *Court-Appointed Directors: Ancillary Relief in Federal Securities Law Enforcement Actions*, 64 GEO. L.J. 737, 766-67 (1976).

liability of business judgment, however, is no longer persuasive. Post New Deal society circumscribes corporate conduct in direct and indirect ways. As one commentator explains, federal and state regulatory agencies and statutes have wrought "abrupt, massive reallocation of corporate resources and priorities and, equally important, an equivalent reshaping of management policies and attitudes."⁷⁸

More directly, government regulations have required corporations to create new positions, modify existing posts, and hire personnel. Federal securities law enforcement actions, for example, have imposed specific obligations on management and have constrained managerial discretion in a manner analogous to disqualification.⁷⁹ The granting of civil ancillary relief in the form of court-appointed management and directors, though not entirely consistent with traditional deference either to state regulation of corporations or to the board of directors' right to manage the corporation, stems from the notion that inside management will pursue its ends lawfully if overseen by persons without personal or economic interests in the business.⁸⁰ In more serious cases, federal courts directly intervene to transfer decision-making authority from certain insiders.⁸¹ Furthermore, state courts possess the equitable power, independent of any statutory authority, to remove directors.⁸² These equitable remedies and civil consent decrees, although not directly supportive of disqualification—a criminal sanction—undermine the argument that a business possesses the unfettered right to dictate who controls the corporation.

Deterrence and incapacitation, however, are not the only goals of punishment which justify disqualification. Community values and expectations are also served by the imposition of punishment against executives who violate laws designating as criminal certain modes of business behavior.⁸³ As their sharply critical reaction demonstrates, the business

⁷⁸ Werner, *supra* note 70, at 415. Werner argues that regulatory agencies have restricted management prerogatives and discretion to an extent unthinkable only a generation ago. For a foreign perspective, see Fisse, *Responsibility, Prevention and Corporate Crime*, 5 N.Z.U. L. REV. 250, 251 (1973).

⁷⁹ See *infra* notes 88-95 and accompanying text.

⁸⁰ Sporkin, *SEC Developments in Litigation and the Molding of Remedies*, 29 BUS. LAW. 121 (Special Issue, March, 1974). Sporkin cites Clinton Oil (SEC Litigation Release Nos. 5693, 5798, and 5891) and Int'l Control Corp. (SEC Litigation Release No. 5643) in which the SEC settled for court-appointed directors and appointment of a special counsel whose duties were to investigate corporate affairs and bring civil actions against those persons indebted to the corporation because of their wrongdoing. In these cases, the SEC also "determined that certain of the principals had forfeited their right to manage a public company and required that they terminate their management positions." *Id.* at 123.

⁸¹ See Comment, *supra* note 74, at 766-67.

⁸² See *American Center for Educ., Inc. v. Cavnar*, 80 Cal. App. 3d 476, 499, 145 Cal. Rptr. 736, 750 (1978).

⁸³ The importance of taking community expectations into account when dealing with

community perceives disqualification to be effective punishment and not an innocuous remedy.⁸⁴

Many commentators have noted the pervasive public belief that businessmen are relatively immune from punishment.⁸⁵ One example of public dissatisfaction with the retention of executives in positions of prestige and power following felony convictions surfaced at the annual meeting of Fruehauf shareholders in 1979. In response to the reinstatement of several convicted corporate officers, a shareholder said: "What we're saying is that the American business system is rewarding criminal behavior. I think we are engaging in a violation of the public trust."⁸⁶ In sum, the loss that society conceivably suffers when a productive, but law-breaking, citizen is temporarily removed from his position of authority must be weighed against the less tangible injustice caused by special treatment of corporate offenders.

white-collar offenders is stressed in Liman, *The Paper Label Sentences: Critique*, 86 YALE L.J. 630, 632 (1977). Liman argues that even the appearance of preferential treatment can diminish cultural support for law enforcement. See also the statement of Prof. McMahon, teacher of business ethics at Loyola University in Chicago, in Chicago Tribune, Oct. 8, 1980, § 4, at 13, col. 4 ("People expect executives to set a higher moral standard than the man in the street.")

⁸⁴ See *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1788 (1972) (statement of the National Assoc. of Manufacturers) [hereinafter cited as *Reform Hearings, 1972*]. They referred to disqualification as a "drastic" sanction. At the same hearings, the Chairman of the Corporate Law Committee of the Virginia Bar Association said that disqualification "goes beyond traditional concepts of criminal sanction . . . [and] singles out the economic or business offender for punishment not given to the convicted murderer, arsonist or rapist. These traditional types of offenders can work on probation in any managerial capacity, provided they can convince the organization that they have been rehabilitated." *Id.* at 1654 (statement of Richard Hobson). See also *id.* at 1651 (statement of Charles Maddox); J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 81 (3d ed. 1978) ("In the American business code, nothing is so iniquitous as government interference in the *internal* affairs of the corporation.") (emphasis in original).

⁸⁵ See, e.g., Landauer, *When the Boss Gets in Trouble*, Wall St. J., July 31, 1975, § 1, at 8, col. 3:

Businessmen are forever asking why their reputations keep dropping in the eyes of the public. For part of the answer, they might look at what's been happening in the boardrooms and executive suites of Northrop Corp., Ashland Oil, Inc., and Phillips Petroleum Co.

The chief executive officers of these three large companies . . . have been found guilty . . . of unlawful use of company funds. The misconduct generally involved the creation and illegal disbursement of corporate slush funds for political purposes.

The law-breaking, in itself, is remarkable. Men of such stature might be assumed to have personal standards that would rule out illegality, particularly when it consists of efforts to subvert the American political process.

But what is perhaps more remarkable than the lawbreaking is the manner in which the boards of directors of the three companies have responded to it. Far from fining the men, the boards have issued expressions of support for the wrongdoers. Furthermore, directors of Phillips and Ashland even have sought to excuse the illegality by arguing that such practices were widespread or that the men didn't know the laws were being enforced.

⁸⁶ Nathan, *supra* note 66, at 35.

VI. PRECEDENTS FOR OCCUPATIONAL DISQUALIFICATION

Although some critics have attacked disqualification of executives as an unprecedented departure from traditional sentencing concepts,⁸⁷ this characterization is unsupportable. Disqualification has been used, both in civil and in criminal cases.

A. DISQUALIFICATION AS A CIVIL REMEDY

In civil cases, disqualification is primarily a prophylactic device. Under state law, courts may, at the request of a shareholder, remove a director or officer. This power is sometimes conferred by statute but courts generally assert that a similar result can be reached under exercise of their equitable power to protect shareholders. For example, in *Cooke v. Teleprompter Corp.*,⁸⁸ the board of directors had reiterated its support for an officer/director who was convicted of bribing municipal officials to secure a benefit for the company. The court explained that "the independent shareholders may well conclude that it is inappropriate for a publicly held corporation, which must deal on an almost daily basis with municipal officials . . . to be controlled directly or indirectly by a person whom a jury has found guilty of bribing such officials."⁸⁹ The court also noted that "in a civil action to disqualify a director . . . the quantum of proof will be less than that required to obtain a criminal conviction."⁹⁰

Disqualification was used in *Cooke* to protect a particular group of interested shareholders. The securities laws similarly intrude on managerial discretion, but the class of persons protected, investors, is more diffuse. For example, the Securities and Exchange Commission often issues decrees which either restructure management or relieve management of various aspects of control over corporate operations when the incumbent management has demonstrated its inability or unwillingness to obey securities regulations.⁹¹

These constraints take two forms: consent orders and prohibitions.

⁸⁷ See *supra* note 81 and accompanying text.

⁸⁸ 334 F. Supp. 467 (S.D.N.Y. 1971).

⁸⁹ *Id.* at 470-71. The board of directors explained to the court that the executive had acted in furtherance of teleprompter interests and did not seek personal gain. *Id.* at 472.

⁹⁰ *Id.* at 471. The judicial removal of management provides an added threat to misfeasant officers and directors, who are subject to removal by shareholder action. *But see* C. STONE, *supra* note 5, at 48 ("I am not aware of any serious sustained shareholder movement to oust a major corporation's management in the wake of *any* lawsuit—antitrust, environment, or bad product.")

⁹¹ See Treadway, *SEC Enforcement Techniques: Expanding and Exotic Forms of Ancillary Relief*, WASH. & LEE L. REV. 637, 652 (1975) ("[T]he logic behind the relief sought . . . [is] that mere injunctions against future violations are inadequate and that existing management must be replaced or restructured to prevent recurrences of the alleged violations.")

Consent orders are issued pursuant to either administrative proceedings or court actions and may be narrowly or broadly fashioned.⁹² Defendants have consented neither to serve on the board of directors nor to continue as an officer of a named corporation.⁹³ In another proceeding, the defendant agreed to refrain from exercising "control or influence over the affairs of [a corporation], except through participation in [court proceedings]."⁹⁴

Exercising its power to act without the consent of the defendant, the SEC also issues prohibitions of various types. One sanction permanently prohibited a defendant "from serving or acting as an employee, officer, director, member of an advisory board, investment adviser, or depositor of, or principal underwriter for, a registered investment company . . ."⁹⁵ In another action, the SEC barred the vice-president of a Chicago brokerage firm from serving as financial principal of any securities firm for two years, after which time he could apply to the SEC for permission to hold such a position.⁹⁶

The SEC will intervene when a prohibition or consent decree is violated. An Atlanta brokerage firm, for example, was recently charged with violating federal securities law by employing a salesman who was barred in 1972 from associating with any broker or dealer without SEC permission.⁹⁷ Significantly, these SEC decrees restrict professional activity in a manner similar to disqualification imposed as a condition of probation. The decrees may be of long duration and may be imposed after an administrative hearing rather than a criminal trial with its attendant panoply of rights.⁹⁸

In antitrust cases courts have also used broad equitable powers to protect the public interest. In *United States v. E. I. du Pont de Nemours & Co.*,⁹⁹ the Supreme Court, while discouraging the use of civil proceedings to punish defendants, nevertheless remarked that "courts are au-

⁹² See Jacobs, *Judicial and Administrative Remedies Available to the SEC for Breaches of Rule 10b-5*, 53 ST. JOHN'S L. REV. 397, 446 (1979).

⁹³ SEC v. Hurwitz, Litigation Release No. 7451 (June 16, 1976), 9 SEC Docket 923.

⁹⁴ SEC v. American Inst. Counselors, Inc., Litigation Release No. 7508 (Aug. 2, 1976), 10 SEC Docket 194.

⁹⁵ Financial Management Corp., Investment Adviser's Act Release No. 545 (Oct. 19, 1976), 10 SEC Docket 730, 731.

⁹⁶ Wall St. J., June 28, 1978, at 42, col. 3. A "financial principal" is a position similar to a treasurer.

⁹⁷ See *SEC Charges President of Broker in Atlanta Over Securities Sales*, Wall St. J., Oct. 12, 1981, at 14, col. 3.

⁹⁸ See Note, *The Securities and Exchange Commission: An Introduction to the Enforcement of the Federal Securities Laws*, 17 AM. CRIM. L. REV. 121, 124 n.18 (1979). The author notes that "[t]he SEC's jurisdiction is limited, however, and, in principle, there is no reason why remedies available to a civil court should be denied to a criminal court where the defendant has been found guilty under an even higher burden of proof."

⁹⁹ 366 U.S. 316 (1961).

thorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."¹⁰⁰ In *United States v. Grinnell Corp.*,¹⁰¹ decided several years after *du Pont*, the Supreme Court recognized that an effective decree in an antitrust case might include a court order barring civil antitrust defendants from employing the president of one of the defendants. The *Grinnell* Court held that "relief of that kind may be appropriate where the predatory conduct is conspicuous."¹⁰² In *Grinnell*, however, the Supreme Court found such relief unwarranted by the facts and reversed the district court, which had ordered the disqualification "to make certain that the general public is not further prejudiced by the continued management of defendant's by one who has demonstrated defiance of legal prohibitions,"¹⁰³ on the ground that egregious conduct was not sufficiently made out on the record.¹⁰⁴ Thus, the Supreme Court has acknowledged that disqualification can be used in the civil antitrust area to protect the general public, rather than simply to protect shareholders or the investing public. Like disqualification in the criminal context, it would be implemented only after a showing of clearly culpable misconduct.

The use of disqualification in civil cases does not directly support disqualification as a condition of probation after criminal conviction. Nevertheless, courts routinely impose remedies which, in effect, penalize violations of civil statutes to deter third parties from similar conduct, even though equity has traditionally forbidden forfeitures or imposition of decrees with penal purposes. Some observers have questioned the propriety of using civil enforcement provisions of laws such as the securities acts to punish or deter.¹⁰⁵ When used as part of a criminal sentence, however, disqualification represents not a departure from, but rather an innovation in, the traditional aims of the criminal law to deter, incapacitate, and punish offenders. Importantly, disqualification follows criminal proceedings, which have a higher standard of proof than civil actions, and also provide safeguards such as indictment and trial by jury.

B. STATUTORY POST-CONVICTION DISQUALIFICATION

Various federal statutes permit disqualification from positions

¹⁰⁰ *Id.* at 326.

¹⁰¹ 364 U.S. 563 (1966).

¹⁰² *Id.* at 579.

¹⁰³ *United States v. Grinnell Corp.*, 236 F. Supp. 244, 260 (D.R.I. 1964).

¹⁰⁴ 384 U.S. at 579.

¹⁰⁵ See Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779, 1808 (1976).

which are not public but infused with the public interest. The Federal Deposit Insurance Act of 1950 prohibits persons convicted of any criminal offense involving dishonesty or breach of trust from serving as a director, officer, or employee of a federally insured bank.¹⁰⁶ The Securities Exchange Act of 1934 allows suspension or revocation of the registration of any broker or dealer convicted of a felony or misdemeanor which arises out of the conduct of his business as broker, dealer, or investment adviser.¹⁰⁷

State and municipal ordinances also impose disabilities, some specifying that former criminals are permanently barred,¹⁰⁸ others permitting employment at a specified time after conviction.¹⁰⁹ Other statutes establish character standards that must be met to qualify for admission to an occupation, and felony convictions often constitute grounds for denial or revocation of licenses.¹¹⁰ When a license is refused or revoked on this basis, courts traditionally hesitate to disturb the determination of the licensing authority.¹¹¹ While these forms of disqualification can be very harsh, resulting in a permanent bar from an occupation, executive disqualification would be of limited duration. Like disqualification as a condition of probation, these statutory disabilities are infringements on private sector employment.

Under current law, many convicted persons are barred from holding public office as well as public employment.¹¹² Along these lines, one

¹⁰⁶ 12 U.S.C. § 1829 (1980).

¹⁰⁷ 15 U.S.C. §§ 78o(b)(4)(B) (1981). *See also* Mathews & Sullivan, *supra* note 22, at 928-29, n.213: "Under present law, a felony conviction triggers certain mandatory or discretionary statutory disqualifications from a person's association with a broker-dealer, investment advisor, or investment company. Such disqualifications may run for as long as ten years." The authors list the various disqualifying provisions of the 1934 Act, The Advisor's Act, and the 1940 Act.

¹⁰⁸ For a thorough explanation of various forms of disabilities imposed on the employment of ex-convicts, *see* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1009-12 (1970). *See also* Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967).

¹⁰⁹ Comment, *supra* note 104, at 1009-12.

¹¹⁰ *Id.* Corporate management is among the few professional occupations of high status which remains unlicensed.

¹¹¹ *See, e.g.*, *Barton Trucking Corp. v. O'Connell*, 7 N.Y.2d 299, 165 N.E.2d 163, 197 N.Y.S.2d 138 (1959) (denial of a public cart license upheld because of a felony conviction 20 years earlier). The court stressed that the petitioner's conviction had been for criminal activities linked to the business in which he sought to be licensed. *Id.* at 313, 165 N.E.2d at 170, 197 N.Y.S.2d at 145.

¹¹² For a collection of relevant federal statutes, *see* 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAW 1339-42 (1970). Examples include 18 U.S.C. § 2071 (1969) (concealment, removal or mutilation of public documents by official having custody thereof); 18 U.S.C. § 3281 (1969) (treason); 18 U.S.C. § 201 (1969) (bribery of public officials), imposes a \$20,000 fine (or three times the gain, whichever is greater) and up to fifteen years' imprisonment, but provides only that the offender may be disqualified from holding office.

federal court held:

The state has a legitimate interest in excluding from office those who would impair efficiency and honesty in government operations. . . . To achieve this end, conditions and penalties can be imposed even where they may involve the relinquishment of constitutional rights and privileges, so long as they bear a reasonable relation to the end sought to be achieved.¹¹³

When so used, disqualification is not intended to be punitive, but prophylactic. Its practical effect, of course, is the same as that of disqualification as a condition of probation.

It might be argued that government employment or elected office is a privilege and not a right, and therefore offers an unsuitable analogy for intrusions into the private sector. Such criticism, however, rests on an obsolete view of the corporation as an entity without capacity to do both extensive good and extensive harm. One scholar posits that "[u]ndoubtedly, the major corporation today functions in fact, if not in law, as a quasi-governmental body. Corporations deliver goods and services which in other societies are provided by the state. This fact, combined with the aggregation of capital, reinforces the perception that greater accountability is required of the corporation."¹¹⁴ In sum, executives managing corporations which greatly affect society are no less important than elected local or state officials, and should therefore be subject to similar restrictions following conviction for serious crimes.

C. DISQUALIFICATION AND LABOR LAW

Labor law also provides examples of disqualification, many of which are grounded in the Labor-Management Reporting and Disclosure Act of 1959.¹¹⁵ Section 504(a) of the LMRDA forbids convicted felons from holding union office or serving as a labor relations consultant during the five years following conviction for enumerated felonies involving "moral turpitude."¹¹⁶

¹¹³ *United States v. Warden of Walkill Prison*, 246 F. Supp. 72, 94 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966) (upholding constitutionality of statute providing that public contractors may be disqualified from receiving contracts for refusing to waive immunity before investigative bodies).

¹¹⁴ Moore, *Corporate Officer and Director Liability: Is Corporate Behavior Beyond the Control of Our Legal System?*, 10 CAP. L. REV. 69, 78 (1980).

¹¹⁵ 29 U.S.C. §§ 401-531 (1976).

¹¹⁶ 29 U.S.C. § 504(a) provides:

No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an

In *DeVeau v. Braisted*,¹¹⁷ the Supreme Court upheld a state provision, similar to § 504(a), which permanently barred convicted felons from holding union office. The Court rejected the plaintiff's due process argument and found that LMRDA § 504(a) did not pre-empt the state act.¹¹⁸ Citing the "wide utilization of disqualification of convicted felons for certain employments closely touching the public interest,"¹¹⁹ the Court upheld the bar as a "familiar legislative device to insure against corruption in specified vital areas."¹²⁰

Commentators cite § 504(a) as an example of unequal treatment of union and corporate officers.¹²¹ At a congressional hearing prior to passage of the provision, a disappointed labor representative protested, "[w]hat about unions having the same right as employers to select their own officers and employees?"¹²² Section 504(a) has a sweeping effect because it does not restrict the disqualifying felonies to those committed during the course of union duties or those directly bearing on ability to perform union duties in a trustworthy or legal manner. Referring to the *DeVeau* case in *United States v. Brown*,¹²³ Justice White noted that "[t]he legislature was permitted to disqualify all members of the class, rather than being required to delegate to the courts the responsibility of determining the character of each individual based on *all* relevant facts, including prior conviction."¹²⁴

Although union and corporate managements are selected by different means and attend to different concerns, sufficient similarities exist between the two types of organization to justify the extension of disqual-

employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment. . . .

¹¹⁷ 363 U.S. 144 (1960).

¹¹⁸ Section 8 of New York's Waterfront Commission Act of 1953, N.Y. UNCONSOL. LAWS § 8 (McKinney 1953).

¹¹⁹ 363 U.S. at 159.

¹²⁰ *Id.* at 158-59.

¹²¹ Christopher Stone, for example, notes that while union officers are disqualified from being union officers for five years after conviction, the law is unresponsive in this regard to the criminal record of corporate officers. "The union crook caught under Landrum-Griffin can turn around and swing a job with management." C. STONE, *supra* note 5, at 193.

¹²² *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 Before A Joint Subcomm. on Labor-Management Reform Legislation of the House Comm. on Education and Labor, 86th Cong., 1st Sess. 1981 (1959)* (statement of Sidney Zagri).

¹²³ 381 U.S. 437 (1965) (White, J., dissenting). *Brown* struck down the section of L.M.R.D.A. which prohibited former or present Communists from holding union office as an unconstitutional bill of attainder.

¹²⁴ *Id.* at 469 (emphasis added).

ification to corporate executives. The Court in *DeVeau v. Braisted* reasoned that disqualification was appropriate for union officials because unions affect the public interest.¹²⁵ Corporate conduct must also be viewed as a public concern. Modern corporations exercise vast control over exchanges of human and natural resources and influence the economy, the environment, and even international affairs.¹²⁶ The Court in *DeVeau* also noted congressional concern with union corruption. One need not endorse the view that a "corporate crime wave" is underway to find in present corporate misconduct grave threats to enforcement of the law.¹²⁷ One commentator writes that "[t]he lack of perceived internal checks on errant behavior by business corporations makes the corporate entity a ready target for the imposition of external constraints. Increasingly, the external constraint of first choice is the criminal law."¹²⁸ Significantly, the form of occupational disqualification suggested for corporate officers and managers would be used only in cases where the offense was committed by one acting in the course of business. This limited application contrasts with that of § 504(a), in which individuals may be disqualified from union office for committing felonies unrelated to their union duties. Furthermore, the decision to disqualify corporate wrongdoers would not be mandatory, as it is under § 504(a), but would be made on a case-by-case basis by a sentencing judge considering all relevant factors.

D. DISQUALIFICATION AS A SPECIAL CONDITION OF PROBATION

Section 504(a), of course, explicitly conferred on courts the power to disqualify convicted union officials. Presently, however, no such specific authority exists to disqualify executives. Nevertheless, courts invoke disqualification independently of any specific statutory authority. By imposing disqualification as a special condition of probation courts have broadened the use of disqualification from the civil into the criminal law.

Labor law has provided fertile ground for disqualification of union officials by state and federal courts acting only on the basis of general probation statutes. In one California case predating the LMRDA, three defendants were placed on ten-year probation, during which time they

¹²⁵ See *supra* notes 113-16 and accompanying text.

¹²⁶ See generally A. MILLER, *THE MODERN CORPORATE STATE* 223 (1976): "In terms of totality of assets, the largest corporations overshadow all save about a dozen of the nation-states of the planet. . . . Ever increasingly, significant decisions affecting people everywhere are made by corporate managers, not political officers."

¹²⁷ See *supra* notes 15-20 and accompanying text.

¹²⁸ Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 *NOTRE DAME LAW.* 173, 178 (1979).

could not hold union office, receive salary for any union services, or participate in union registrations.¹²⁹ In addition, the defendants were required to file an annual affidavit that all payments of fines were made from their own funds and that they continued to hold no union office. The California Supreme Court dismissed their claim that these conditions of probation exceeded the trial judge's probation power. "[S]ince it could be and presumably was found that these defendants are guilty of crimes growing out of union activities, it appears not improper that restrictions be placed upon such activities as a condition of probation."¹³⁰ The court added that a defendant who believes a grant of probation imposes unsatisfactory conditions may refuse it and instead serve the sentence which was suspended.¹³¹

In a similar case in federal court, a defendant was forbidden from holding union office but was not barred from membership in any labor organization.¹³² The Eighth Circuit deemed it anomalous that a person "should complain of such an order of probation when it was within the lawful authority of the trial court to have given a sentence of ten years imprisonment and \$10,000 [fine]."¹³³ The court declared the restriction to be lawful, citing the broad power of the trial court to "suspend the imposition or execution of sentence and place the defendant on probation for such period (not exceeding five years) and upon such terms and conditions as the court deems best."¹³⁴ In a more recent federal case, the defendant labor union official was convicted of illegally demanding money from an employer.¹³⁵ The court upheld suspension of the defendant's prison sentence and imposition of a five-year period of probation with the special condition that during the five years the defendant would neither seek nor accept employment with any labor union.¹³⁶

Outside of the labor field, courts have used special conditions of probation to restrict employment or limit professional activity. Thus, a doctor was ordered not to practice medicine during the five years he was on probation.¹³⁷ This sanction was imposed independently of any parallel license-revocation which may have occurred in a civil proceeding. In another case, a securities dealer convicted of devising a scheme to

¹²⁹ *People v. Osslo*, 50 Cal. 2d 75, 323 P.2d 397, *cert. denied*, 357 U.S. 907 (1958).

¹³⁰ *Id.* at 199, 323 P.2d at 413.

¹³¹ *Id.* It is not settled, however, that a convicted person always has the right to refuse probation and undergo imprisonment. *See Cooper v. U.S.*, 91 F.2d 195, 199 (5th Cir. 1937) (Federal Probation Act "vests a discretion in the Court, not a choice in the convict.").

¹³² *Berra v. United States*, 221 F.2d 590 (8th Cir. 1955), *aff'd*, 351 U.S. 131 (1956).

¹³³ *Id.* at 598.

¹³⁴ *Id.*

¹³⁵ *United States v. Barrasso*, 372 F.2d 136 (3d Cir. 1967).

¹³⁶ *Id.* at 137.

¹³⁷ *People v. Frank*, 94 Cal. App. 2d 740, 211 P.2d 350 (1949).

defraud through the mails was prohibited from participating in any capacity in any stock or bond sale.¹³⁸ Again, this sanction was imposed independently of any pending SEC civil proceeding similarly to limit his professional activity as a broker/dealer. In other cases, a lawfully-employed handicapper of race horses was ordered to cease frequenting race tracks;¹³⁹ a railroad dining car employee convicted of conspiracy to steal from passengers was denied the right to return to a job on trains;¹⁴⁰ and a lawyer convicted of forging a deed was restrained for one year from practicing law.¹⁴¹

In all of these cases restraining defendants from engaging in a particular occupation or profession, trial courts imposed conditions of probation not specifically mentioned in the probation statutes. The Federal Probation Act,¹⁴² like most state provisions, provides that upon entering judgment of conviction, the court has broad discretion to impose terms and conditions of probation for up to five years. Although disqualification is not included among the several conditions listed in the Federal Probation Act,¹⁴³ the specified conditions have been uniformly held not to be exclusive.¹⁴⁴ Accordingly, courts have exercised their sentencing discretion to fashion alternatives, including disqualification, to the simple command that the probationer obey the law upon release.

E. JUDICIAL REVIEW OF CONDITIONS OF PROBATION

Occupational disqualification has been challenged on various grounds. In *United States v. Villarin Gerena*,¹⁴⁵ the First Circuit found no abuse of trial court discretion in conditioning the probation of a policeman, convicted of criminal misuse of his position, upon his resignation from the police force for the duration of his two-year probationary period. The court dismissed without discussion the defendant's claim that the condition constituted cruel and unusual punishment.¹⁴⁶ While recognizing that resignation might result in hardship to the defendant's

¹³⁸ *United States v. Bishop*, 537 F.2d 1184 (4th Cir. 1976).

¹³⁹ *Stone v. United States*, 153 F.2d 331 (9th Cir. 1946).

¹⁴⁰ *United States v. Greenhaus*, 85 F.2d 116 (2d Cir. 1936).

¹⁴¹ *Yarborough v. State*, 119 Ga. App. 46, 166 S.E.2d 35 (1969). This penalty was imposed independently of any possible state disbarment proceedings.

¹⁴² 18 U.S.C. § 3651 (1976).

¹⁴³ Among the conditions listed in the Federal Probation Act are restitution and submission to community treatment. *Id.*

¹⁴⁴ *See, e.g., Whaley v. United States*, 324 F.2d 356 (9th Cir.), *cert. denied*, 376 U.S. 911 (1963). Here, the court found reasonable a special probation condition prohibiting the defendant, who had been found guilty of impersonating an FBI agent in a ruse in connection with his occupation as an automobile reposessor, from engaging in the repossession business. 324 F.2d at 359.

¹⁴⁵ 553 F.2d 723 (1st Cir. 1977).

¹⁴⁶ *Id.* at 727.

family, the court found these consequences to be the inevitable result of all sentencing and therefore upheld the disqualification from service for the two-year period.¹⁴⁷

A union corruption case helps to define the limits of judicial discretion in probation decisions. Applying the same standards used in cases challenging probation conditions, the federal court in *Hoffa v. Saxbe*¹⁴⁸ upheld a parole condition which restrained Jimmy Hoffa from participating in union activities for approximately eight years. The court reasoned that Hoffa had committed crimes directly related to his participation in union activities.¹⁴⁹ In light of Hoffa's corrupt activity, the government was free to use disqualification to safeguard the "integrity of unions inasmuch as unions exert great influence on the economic life of the nation and on the welfare of individual members of unions."¹⁵⁰ The court dismissed Hoffa's claim that the limitations on his right of association and right to pursue his chosen occupation were unconstitutional, holding that the governmental interest in preservation of the integrity of labor unions was "substantial."¹⁵¹ The court also held that this substantial government interest imposed only an incidental restraint on Hoffa's right of association and free speech:

We also find that the condition by its very term is directed towards Mr. Hoffa's "management" of union activities and not intended to restrain speech as such. It is true, however, that the condition at least partially restrains. . . [his] right of association. In this connection, both the right of association and plaintiff's Fifth Amendment right to pursue his chosen occupation merge. Such restrictions which in a sense "disqualify" an individual from pursuing specified professions have been widely used and sustained in the face of constitutional challenge.¹⁵²

Conditions of probation often serve to restrain association with certain individuals or situations thought undesirable for the probationer. In *Malone v. United States*,¹⁵³ the Ninth Circuit upheld a condition of probation which provided that a defendant, convicted of unlawful exportation of firearms, refrain from participating in any American Irish

¹⁴⁷ *Id.*

¹⁴⁸ 378 F. Supp. 1221 (D.D.C. 1974).

¹⁴⁹ *Id.* at 1238. James R. Hoffa, former Teamsters President, was sentenced to thirteen years in prison for obstruction of justice and conspiracy to defraud a Teamsters Pension fund. President Nixon commuted Hoffa's sentence to six and one-half years, conditioning his parole on his agreement not to engage in direct or indirect management of any labor organization prior to March 6, 1980. Upon his release Hoffa was offered a job as assistant to the president and business representative of the Teamsters. The lawsuit sought an order nullifying the condition and enjoining President Nixon from returning Hoffa to prison for seeking union office. Wall St. J., Mar. 14, 1974, at 20, col. 1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1240.

¹⁵² *Id.*

¹⁵³ 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975).

Republican Movement activities or accepting any employment that directly or indirectly involved him with any Irish organization.¹⁵⁴ Noting that these restrictions were reasonably related to the goals of probation and the accomplishment of public order and safety, the court said: "If the trial judge could only prohibit active association within a group having an illegal purpose, then the Court would be, in effect, restricted to the standard condition that the probationer obey the law."¹⁵⁵

Endorsing a more restrictive approach to occupational disqualification, the court in *United States v. Pastore*¹⁵⁶ struck down a probation condition which ordered the appellant's resignation from the bar following his conviction for filing a false income tax return. Because the crime was not committed against a client, the court held that the treatment of the defendant and the protection of the public were only tenuously connected in this instance.¹⁵⁷ The court was also disturbed by the indefinite duration of the disbarment and said that longstanding state disbarment procedures were a more appropriate forum for such proceedings.¹⁵⁸

The *Pastore* court did, however, accept the broad standard which requires that probation conditions bear a reasonable relationship to the treatment of the accused and the protection of the public. While calling for "careful scrutiny of an unusual and severe probation condition," the court recognized that broad judicial discretion in the design of probation conditions allows for case-by-case development of the contours of the sanction.¹⁵⁹ This accords with the Supreme Court's holding in *Burns v. United States*¹⁶⁰ which made broad discretion the first principle of probation: "To accomplish the purpose of the [probation] statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case . . . [C]omprehensive consideration to the particular situation of each offender . . . [is] possible only in

¹⁵⁴ 502 F.2d at 556.

¹⁵⁵ *Id.* The Federal Probation Act has withstood attacks on its constitutionality. See *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1970) (Probation Act is not unconstitutional delegation of power to the courts); *Cunningham v. United States*, 256 F.2d 467 (5th Cir. 1958).

¹⁵⁶ 537 F.2d 675 (2d Cir. 1976).

¹⁵⁷ *Id.* at 683.

¹⁵⁸ *Id.* at 682. *But see* Ogren, *supra* note 9, at 977:

Business and professional laws and regulations, which should mesh with the criminal law to limit repeat offenses, very frequently do not adequately accommodate criminal convictions. In some jurisdictions, for example, lawyers are not automatically disbarred following felony convictions. The lawyer is often entitled to a separate disbarment proceeding with a separate specification of charges, and may continue in practice pending the outcome. Frequently, economic regulations are a patchwork, covering some professions but leaving others unregulated.

¹⁵⁹ 537 F.2d at 681.

¹⁶⁰ 287 U.S. 216 (1932).

the exercise of a broad discretion."¹⁶¹

When reviewing challenges to occupational disqualifications, appellate courts focus on several factors to determine the validity of the probation condition imposed:¹⁶² (1) Is the prohibited occupational activity one in which the defendant was engaged when he committed the offense? (2) Is the condition a reasonable, if not the best, way to prevent similar offenses from reoccurring and therefore a reasonable way to protect the public? (3) Does the condition have a reasonable relationship to the treatment of the accused by preventing his exposure to the temptation to resume illegality?

The release of convicted executives under court-imposed disqualification serves these traditional ends of probation. As a rehabilitative and incapacitating device, disqualification reasonably limits access to those positions of authority which were abused by the defendant, without eliminating, as imprisonment does, his ability to make a living elsewhere. Because organizational pressures or rationalizations in the name of corporate loyalty may persist following a conviction of a corporation and its executives, summary reinstatement of those who have demonstrated willingness to engage in illegal conduct subjects society to unnecessary risks of future misconduct.¹⁶³

Deterrence and retribution are also served by the imposition of special conditions of probation.¹⁶⁴ The Ninth Circuit recently said, "[c]onditions which serve to protect the public from recidivism by the petitioner or to deter others by way of example are not contrary to the purposes of the [Probation] Act so long as all the conditions construed together serve substantially the purpose of rehabilitation."¹⁶⁵ Courts have also acknowledged the punitive aspect of probation. The court in *In re Buehrer*¹⁶⁶ stated: "Probation assumes the offender can be rehabilitated without serving the suspended jail sentence. But this is not to say that probation is meant to be painless. Probation has an inherent sting,

¹⁶¹ *Id.* at 220. Trial courts have exercised this discretion to formulate broad terms and conditions of probation. *See, e.g.*, *United States v. Miller*, 549 F.2d 105 (9th Cir. 1976) (affirming total abstinence from alcohol as a condition); *United States v. Frurukawa*, 596 F.2d 921 (9th Cir. 1979) (affirming condition of probation that defendant associate only with law-abiding persons and the subsequent order by the probation officer that the probationer refrain from associating with an individual who appeared to the probation officer to be involved in crime).

¹⁶² *See, e.g.*, *Whaley v. United States*, 324 F.2d 356, 359 (9th Cir. 1963).

¹⁶³ *See generally* C. STONE, *supra* note 5.

¹⁶⁴ The need for deterrence of white-collar crime is highlighted by an account of antitrust violations in BUS. WK. June 2, 1975, at 42: "With remarkable frankness, some price-fixers admit they consciously flout the law, balancing the risk of discovery against a dependable gain in sales or profits."

¹⁶⁵ *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 267 (9th Cir. 1975).

¹⁶⁶ *In re Buehrer*, 50 N.J. 501, 236 A.2d 592 (1967).

and restrictions placed upon the freedom of the probationer are realistically punitive in quality."¹⁶⁷

Courts do, on occasion, set aside extreme conditions of probation.¹⁶⁸ One commentator argues that probationers retain certain personal rights and that an individual's right to work might be violated in cases where an individual loses his right to secure any employment.¹⁶⁹ Disqualification of an executive is suggested as a condition of probation applying only to managerial functions bearing a direct relationship to the conduct constituting the offense. Accordingly, it would not eliminate the defendant's ability to work, but only curtail the scope of his employment responsibilities.

VII. STANDARDS FOR AND ADMINISTRATION OF DISQUALIFICATION

When recommending sentences, federal prosecutors have been urged to consider the value in certain cases of innovative probation conditions, including disqualification. A recent Justice Department publication states:

[I]n a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant desist from engaging in a particular type of business.¹⁷⁰

In evaluating such a recommendation, a court must identify the purposes which the suggested sanction aims to achieve and, if imposed, limit the scope and duration of the condition in accordance with these aims.

Accordingly, a court imposing disqualification should issue the offender a certificate stating which privileges are lost, the duration of the deprivation, and the reasons for the court's determination.¹⁷¹ These cer-

¹⁶⁷ *Id.* at 509, 236 A.2d at 596. Traditionally, probation was conceived of as a substitute for punishment. This view is no longer generally held. *See* S. REP. NO. 605, 95th Cong., 1st Sess. 899 (1977) ("In keeping with modern criminal justice philosophy, probation is stated as a Form of Sentence, rather than, as in current law, a suspension of the imposition or execution of sentence.").

¹⁶⁸ For cases setting aside extremely intrusive conditions of probation as unconstitutional, see Comment, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 197-207 (1967).

¹⁶⁹ *See* Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 834-36 (1936). The right to secure gainful employment has, at times, been endorsed by the Supreme Court although not in the probation context. *See, e.g.*, *Green v. McElroy*, 360 U.S. 474, 492 (1959) ("The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."). *But see* *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

¹⁷⁰ DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, Pt. G(3b), (pamphlet, July, 1980). *See generally* Comment, *Justice Department's Prosecution Guideline of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & C. 955 (1981).

¹⁷¹ *See* Special Project, *supra* note 104, at 1237. The authors suggest such a certificate in

tificates could be modeled after SEC orders.¹⁷² Examples of conditions which might be appropriately included in the certificate are: prohibiting a defendant from holding a position as an officer or director of a specific corporation;¹⁷³ forcing the offender's resignation as chief executive officer;¹⁷⁴ barring him from holding any position specifically responsible for overseeing previously mishandled duties or requiring any position held by the defendant to be one where major decisions are subject to review by experienced and independent counsel;¹⁷⁵ prohibiting him from rendering advice on financial matters;¹⁷⁶ and in cases of gross misconduct, prohibiting the defendant from undertaking to control or influence a specific corporation in any of its affairs.¹⁷⁷ Another possibility includes limiting the manner in which the defendant exercises shareholder voting rights. For instance, he might be ordered not to vote certain securities,¹⁷⁸ or not to nominate anyone to the corporation's board of directors for a period of time.¹⁷⁹

Although orders may be subject to challenge on grounds of vagueness or overbreadth, the imprecision of some of the conditions described above need not be fatal to the disqualification order. In *Hoffa v. Saxbe*,¹⁸⁰ for example, the court rejected Hoffa's argument that an order forbidding his "direct or indirect" participation in management of union activities imposed an inordinate risk of his engaging in impermissible indirect management and thereby violating his parole condition:

While we fully agree that the term "indirect" is of imprecise meaning, we must also recognize that the use of such terms are often necessary to include within the scope of the prohibition those activities which though obviously within the intended purpose of a prohibition are not amenable to easy categorization or enumeration.¹⁸¹

The possibility of a federal court removing executives as a condi-

cases involving civil occupational disqualifications. The concept is adaptable to probational disqualifications.

¹⁷² See *supra* notes 89-91 and accompanying text.

¹⁷³ SEC v. Generics Corp., Litigation Release No. 7270 (Feb. 10, 1976), 8 SEC Docket 1291.

¹⁷⁴ SEC v. TDA Indust., Inc., Litigation Release No. 7369 (Apr. 23, 1976), 9 SEC Docket 534.

¹⁷⁵ SEC v. Geo Dynamics Oil & Gas, Inc., Litigation Release No. 7423 (June 1, 1976), 9 SEC Docket 812.

¹⁷⁶ SEC v. Giant Stores Corp., Litigation Release No. 7546 (Sept. 2, 1976), 10 SEC Docket 400.

¹⁷⁷ SEC v. Am. Inst. Counselors, Inc., Litigation Release No. 7508 (Aug. 2, 1976), 10 SEC Docket 194.

¹⁷⁸ SEC v. TDA Indust., Inc., Litigation Release No. 7, 369 (Apr. 23, 1976), 9 SEC Docket 534.

¹⁷⁹ SEC v. OSEC Petroleum, S.A. [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,915, at 97,132 (D.D.C. 1974).

¹⁸⁰ 378 F. Supp. 1221 (D.D.C. 1974).

¹⁸¹ *Id.* at 1240.

tion of probation raises the issue of which forms of misconduct will warrant judicial intervention into the traditional realm of managerial discretion. It is suggested that disqualifying a convicted corporate official in only those situations where there is evidence of knowing or repetitive criminal conduct by the executive, or a material possibility of recurrent violations, limits the use of the sanction to those cases where the public interest is manifest.¹⁸²

Disqualification could be useful in two general situations. The first is when a sentencing judge concludes that some form of punishment, in addition to fines and the ordeal which accompanies indictment and conviction, is deserved, but that the defendant should not be imprisoned. In less serious cases, then, the executive might be excluded only from holding an authoritative position within a particular corporation—a kind of forced demotion. Disqualifying a corporate officer from a position, but allowing him to continue at the firm, will protect the public interest by limiting his access to inside formation, which one commentator deems essential to prevailing in decision-making and directing corporate activities.¹⁸³ Additionally, disqualification diminishes the offender's control of information—another important resource—and thereby reduces his formal authority within the firm.¹⁸⁴

A second situation when disqualification would be useful is where aggravating factors are present. A partial listing of these factors, none of which of itself necessarily demands disqualification, includes: predatory or coercive conduct such as threats and use of force or economic reprisals; prior convictions; the extent of the violation; the size of monetary loss to consumers, competitors, or government; whether unsafe products knowingly were marketed and actually reached or affected consumers; the defendant's recognition of the wrongfulness of his conduct and the sincerity of representations or assurances against future violations; and his level of responsibility.¹⁸⁵ In a case where these aggravating factors

¹⁸² The American Bar Association endorses the application of a disqualifying sanction in the following circumstances:

- (A) Where the criminal activity was engaged in by the defendant on behalf of the organization with knowledge of its illegality; and
- (B) Where the crime was repetitive or was part of a substantial criminal conspiracy of which the official was aware for a sustained period; or
- (C) Where the crime amounted to a serious breach of trust against the organization.

STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES § 18-2.8(iii) (2d ed. 1979) [hereinafter cited as ABA SENTENCING STANDARDS]. The situations posed in (A) and (B) above present the main threats to law enforcement. The crimes contemplated in (C) would most likely lead to dismissal by the corporation, making disqualification unnecessary in most such instances.

¹⁸³ See Jones, *Corporate Governance: Who Controls the Large Corporation*, 30 HAST. L.J. 1261, 1275 (1979).

¹⁸⁴ *Id.*

¹⁸⁵ Some of these factors are derived from a list of recommended prosecution guidelines for

combine to make a more severe punishment imperative, a court may choose to impose a split sentence comprised of a prison term of three to six months followed by a period of disqualification.¹⁸⁶ If the court completely bars the employment of the convicted official at a specific firm, disqualification amounts to dismissal. Alternatively, following incarceration the court might prohibit employment at a comparable level at any firm, to prevent lateral transfer which would eviscerate the prophylactic aspect of the sanction.¹⁸⁷

As with all sentences, the judge, the probation officer, and the Director of the Bureau of Prisons should use their flexible powers to investigate mitigating circumstances raised by the defendant.¹⁸⁸ Furthermore, as expressly provided in the Federal Probation Act, courts can revoke or modify conditions during the probationary period.¹⁸⁹ Also, the duration of disqualification will be subject to the five-year statutory limit specified for probation conditions generally.¹⁹⁰ Should the disqualified executive violate the terms of his probation, he is subject to arrest and revocation of probation, and the court "may impose any sentence which might originally have been imposed."¹⁹¹

VIII. THE ROLE OF LEGISLATION

Applicable federal statutes do not specifically authorize courts to restrict defendants from engaging in the business activities in which the

the Antitrust Division of the U.S. Justice Department. ANTITRUST & TRADE REG. REP. (BNA), No. 790, at AA-1, 2 (Nov. 23, 1976).

¹⁸⁶ A split sentence is a form of probation under the Federal Probation Act, 18 U.S.C. § 3651 (1976). When a court imposes a sentence in excess of six months, it can then confine the defendant in a prison or treatment facility for a period not to exceed six months. In such a case, the court then suspends the execution of the remainder of the sentence and places the defendant on probation. To qualify for a split sentence, the offense must carry a maximum punishment of greater than six months and imposition of sentence may not be suspended. Professor Coffee recommends a short sentence of three to six months as the "benchmark norm" for most willful organizational crimes. Coffee, *supra* note 34, at 470.

¹⁸⁷ *But see* ABA SENTENCING STANDARDS, *supra* note 178, § 18-2.8 comment, at 176. The ABA proposes limiting disqualification to apply only to the convicted person's corporation and not to corporations generally.

¹⁸⁸ *See* Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime*, in SEC ENFORCEMENT AND WHITE COLLAR CRIMES, 997, 1042 (A. Mathews ed. 1979). *See also* MODEL PENAL CODE § 7.07 (Proposed Official Draft 1966):

(3) The pre-sentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition. Family situation and background, economic status, education, occupation and personal habits and any other matters that the probation officer deems relevant or the court directs to be included.

¹⁸⁹ 18 U.S.C. § 3651 (1976).

¹⁹⁰ *Id.*

¹⁹¹ *Roberts v. United States*, 320 U.S. 264, 266 n.2 (1943). If the corporation were convicted along with the executive and then violated a probation order by rehiring him in an unauthorized position, the court could cite the corporation for contempt.

crimes occurred, but a substantial body of case law indicates that disqualification is presently within the discretionary sentencing power of federal judges.¹⁹² Many courts have held that the conditions listed in the Federal Probation Act are only advisory and do not preclude judicial experimentation with sentencing alternatives.¹⁹³

Indeed, federal judges currently impose conditions or sentences which have less precedential support and are arguably more intrusive than disqualification. One federal court, for example, ordered five dairy industry executives convicted of price-fixing to serve the poor, reasoning that newsmaking sentences carry greater deterrent effect than routine sentences.¹⁹⁴ Other federal courts have imposed conditions not specified in the Probation Act: convicted price-fixers were ordered to deliver community speeches explaining their crimes;¹⁹⁵ two meatpacking company executives were directed to perform 200 hours of voluntary charitable service, while the company was ordered to hire ex-convicts and train them as meat cutters;¹⁹⁶ a corporation convicted of dumping poisonous wastes into a river was placed under temporary supervision of an Environmental Protection Agency official;¹⁹⁷ and an oil company which pleaded *nolo contendere* to a charge of emitting refuse into navigable waters was ordered to devise within forty-five days an agenda to control oil spillage, or face appointment of a special probation officer.¹⁹⁸ These sanctions exemplify the innovation which judges currently employ to counter white-collar crime.

Another unique sentence was imposed in *United States v. Arthur*.¹⁹⁹ There a defendant convicted of misapplication of bank funds to bribe public officials was assigned probation on the condition that he accept full-time employment for two years at any charitable organization ap-

¹⁹² See *supra* notes 128-40 and accompanying text.

¹⁹³ See, e.g., *United States v. Bishop*, 537 F.2d 1184, 1186 (1976). See generally, Note, *The Application of the Federal Probation Act to the Corporate Entity*, 3 U. BALT. L. REV. 294, 305 (1974): "To view the Federal Probation Act as merely a passive statute of limited use is to ignore its well-established liberal construction as a remedial means to reform and supervise a defendant of unusual character or circumstance."

¹⁹⁴ *United States v. Borden, Inc.* Crim. No. 74-319 (D. Ariz. 1974). The case is discussed in *BNA Special Report*, *supra* note 40, at 10.

¹⁹⁵ *United States v. Blankenheim*, No. CR-74-182-CBR (N.D. Cal. 1974).

¹⁹⁶ *United States v. Kansas City Meat Co.*, No. Cr. 74-1728 (C.D. Cal. Mar. 20, 1975). The two individual co-defendants each received two-year probations, including 200 hours of voluntary service with a charitable organization. The company received a three-year probation, with the requirement that it employ three hard-core unemployable persons.

¹⁹⁷ *United States v. Cleveland Electric Illuminating Co.*, No. C.R. 71-279 (N.D. Ohio 1972).

¹⁹⁸ *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972) later overturned this condition, holding it unauthorized by the Federal Probation Act.

¹⁹⁹ 602 F.2d 660 (4th Cir. 1979), *cert. denied*, 444 U.S. 992 (1981).

proved by the Probation Department.²⁰⁰ This penalty is an indirect form of disqualification in that full-time charitable work virtually precludes high level banking employment. Although the sentence did not order the executive to terminate his bank employment, as disqualification would, forced long-term charitable work is arguably more intrusive than disqualification because it affirmatively demands an alternative occupation and provides that no compensation be accepted.

Some commentators, however, contend that such sentencing innovations are proper only when based on specific legislative enactments. They argue that traditional principles of criminal law dictate that potential offenders know the nature of the penalties to which they are subject, and that special conditions of probation constitute unforeseeable penalties.²⁰¹

Although statutory adoption of a special condition would indicate legislative countenance of alternative sentences, such approval is not necessary.²⁰² The Federal Probation Act expressly vests wide discretion in the judiciary, stating that a court may place a defendant on probation "upon such terms and conditions as the court deems best."²⁰³ In declining to list an exclusive set of probation conditions, Congress specified that fines, restitution and child support are only "among the conditions" which might be imposed.²⁰⁴ In fact, the enumeration of probation conditions—currently proposed in the Senate bill to reform the criminal code²⁰⁵—was prompted by the drafters' perceptions that courts were too seldom using their discretion to fashion alternatives to fines and imprisonment.²⁰⁶

Legislative specification of additional conditions may, for practical reasons, be well-advised. This would lessen the burden on judges, whose views on sentencing may not have changed over time, to design on their own initiative conditions such as disqualification. Not surprisingly, one

²⁰⁰ The court said that while such a condition may not be appropriate in every case, the "donation of charitable services to the community is both a *deterrent* to other potential offenders and a *symbolic* form of restitution to the public for having breached the criminal laws." 602 F.2d at 664 (emphasis added).

²⁰¹ See, e.g., Dershowitz, *Paper Label Sentences: Critique*, 86 YALE L.J. 626 (1977).

²⁰² See Best & Birzan, *supra* note 165, at 834. The authors argue for greater legislative control over the use of special conditions of probation, preferably by legislative enumeration of allowable conditions, but concede that the objectives of probation require some judicial discretion and flexibility.

²⁰³ 18 U.S.C. § 3651 (1976).

²⁰⁴ *Id.*

²⁰⁵ See Kennedy, *Commentary—The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. REV. 423, 424-27 (1980).

²⁰⁶ Senator Kennedy writes that "[e]xisting federal probation statutes suggest few possible probationary conditions and fail to provide wide ranging alternatives to all or part of a prison sentence." *Id.* at 241.

federal judge has expressed reservations about using disqualifying sanctions without the specific authorization of Congress.²⁰⁷ Additionally, legislation might be useful should Congress decide to provide funding for training special probation officers to monitor compliance with innovative conditions imposed on executives or corporations.²⁰⁸

While Congress has considered several bills listing disqualification among the various discretionary conditions available to a court, the outcome remains uncertain.²⁰⁹ The concept was supported by a number of commentators who testified before Congress²¹⁰ and opposition, though vociferous at first, has softened over time, as indicated by American Bar Association endorsement of occupational disqualification in its Sentencing Standards.²¹¹

Although a form of disqualification was written into law in Great

²⁰⁷ Writing for the court in *United States v. Pastore*, 537 F.2d 675 (2d Cir. 1976), Judge Feinberg said that

imprisonment, monetary impositions and community treatment programs are potent and possibly sufficient sanctions for a sentencing judge. Perhaps the suitability of a defendant for continuing in a particular job should not be determined in the sentencing process unless the legislature specifically authorizes it, but should be resolved in other ways and in other forums and guided when possible by the legislature."

Id. at 682. Judge Feinberg argued that in *Pastore*, disbarment was available as a "well-defined procedure." No such procedure exists to discipline corporate executives.

²⁰⁸ See *Reform Hearings, 1972*, *supra* note 81, at 1666 (statement of Alan Ruben). Professor Ruben suggested the use of specially trained probation officers in cases requiring supervision of the corporation itself. Such special training would also serve to effectuate disqualification of executives.

²⁰⁹ The concept originated in NATIONAL COMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE), § 405(2) (1970):

When an executive officer or other manager of an organization is convicted of an offense committed in furtherance of the affairs of the organization, the court may include in the sentence an order disqualifying him from exercising similar functions in the same or other organizations for a period not exceeding five years, if it finds the scope or willfulness of his illegal actions make it dangerous or inadvisable for such functions to be entrusted to him.

From the Study Draft, the proposal was accepted with minor changes in wording in the FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 3502 (1971). The concept was incorporated as a condition of probation into S. 1, 93d Cong., 1st Sess. § 1-4A3(b) (1973) ("Disqualification"), then into S. 1400, 93d Cong., 1st Sess. § 2103(b)(13) (1973) ("Probation-Discretionary Conditions"), and most recently into S. 1722, 96th Cong., 2nd Sess. § 2103(b)(6) (1980) ("refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances."). It was not in the House bill to reform the Federal Criminal Code. H.R. 6915, 96th Cong., 2d Sess. (1980). S. 1722 was reintroduced in the present Congress as S. 1630, the "Criminal Code Reform Act of 1981" with the disqualification provision still intact for individuals. S. 1630, 97th Cong., 1st Sess. § 2103(b)(6). See S. REP. NO. 307, 97th Cong., 1st Sess. 1013 (1981).

²¹⁰ See *Reform Hearings, 1979*, *supra* note 74, at 10141-42 (statement of Mark Green), 10029-30 (statement of ABA).

²¹¹ See ABA SENTENCING STANDARDS, *supra* note 178 and accompanying text.

Britain by the passage of the Companies Act of 1948,²¹² the concept has only recently been incorporated into American statutes. The criminal codes of two states added disqualification to the sentencing powers of the state courts, but the statutes have yet to be invoked.²¹³

IX. CONCLUSION

To believe that judges must impose meaningful sanctions on convicted executives is not to suggest that substantial imprisonment is always necessary. Disqualification, used in conjunction with a short prison term in egregious cases, or as part of a suspended sentence with probation and fines for less serious offenses, provides an alternative to lengthy incarceration. The need for disqualification is based on the potential for harm which can be inflicted on the public through abuse of occupational authority by executives seeking to benefit their corporations. Disqualification is a response to the inability of traditional penalties to punish and deter violations. To compensate for the failure of internal corporate controls, it invokes a measure of external control over hiring practices. Although disqualification is consistent with judicial interpretation of the present Probation Act, its inclusion by Congress in a statutory enumeration of alternatives to imprisonment would serve to further legitimate the sanction.

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²¹² Section 188 of the Companies Act, 1948, 11 & 12 Geo. 6, ch. 38, confers the "[p]ower to restrain fraudulent persons from managing companies." Broad in scope, the Companies Act also authorizes the disqualification of individuals found to have committed certain civil frauds while acting as company officers.

²¹³ UTAH CODE ANN. § 76-3-303 (1978):

(2) When an executive or high managerial officer of a corporation or association is convicted of an offense committed in furtherance of the affairs of the corporation or association, the court may include in the sentence an order disqualifying him from exercising similar functions in the same or other corporations or associations for a period of not exceeding five years if it finds the scope or willfulness of his illegal actions make it dangerous or inadvisable for such functions to be entrusted to him.

ME. REV. STAT. ANN. tit. 17A, § 1153 (1980):

(2) If a director, trustee or managerial agent of an organization is convicted of a class A or class B crime committed on its behalf, the court may include in the sentence an order disqualifying him from holding office in the same or other organizations for a period not exceeding five years, if it finds the scope or nature of his illegal actions make it dangerous or inadvisable for such office to be entrusted to him.

Comment—subsection 2 gives the court the flexibility to diminish the chances of any particular organization's agent engaging in similar criminal behavior in the future.