Charitable Contributions as a Condition of Probation for Convicted Corporations: Using Philanthropy to Combat Corporate Crime

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CHARITABLE CONTRIBUTIONS AS A CONDITION OF PROBATION FOR CONVICTED CORPORATIONS: USING PHILANTHROPY TO COMBAT CORPORATE CRIME

Pursuant to the discretion Congress granted the federal judiciary by enacting the Federal Probation Act, federal courts may impose charitable contributions as conditions of probation for individuals convicted of crimes. However, a majority of the circuit courts have rejected the use of such probationary terms in sentencing convicted corporations. In this Note, the author analyzes the legal and policy criticisms of punitive charitable contributions. The author concludes that imposing such terms is authorized by the Federal Probation Act and is in accord with public policy. Directing charitable contributions to the nonprofit sector as a term of probation for convicted corporations is more effective and beneficial to society than other traditional forms of punishment.

INTRODUCTION

THE SENTENCING OF convicted corporations poses a special problem for judges. Because corporations are "artificial, legally-created entities that owe their existence to a specific grant from the state,"¹ they cannot be treated like individuals for the purposes of sentencing. The impossibility of imprisonment² arguably makes a fine the only sanction available to punish a corporation for its commission of a crime.³

The primary rationale for punishing a corporation is deterrence;⁴ however, traditional remedies for white collar crimes are not

³. See Corporate Probation, supra note 2, at 638. Note, however, that "[a] corporation can be 'executed' by dissolution." Id. at 637 n.7. But cf. Note, Corporate Contributions to Charity As a Condition of Probation Under the Federal Probation Act, 9 J. CORP. L. 241, 243 (1984) [hereinafter Corporate Contributions] ("dissolution of the corporation is not a practical or effective sanction").
effective in addressing this concern. The structure of the corporation, designed in part to protect investors from personal liability for the corporation’s debts, also may shield individuals from responsibility for the corporation’s criminal acts. The “separation of ownership and control” or atomization of ownership which characterizes the large corporation frequently makes it “difficult to identify the individual responsible for the corporate misconduct.” Moreover, since “[f]ines . . . are viewed by many corporate offenders as merely a cost of doing business,” some commentators argue that it is impossible to stigmatize a corporation into avoiding further criminal activity. Finally, the amount of the fines themselves is usually not great enough to deter criminal activity, and even if it were, these penalties can be passed on to shareholders or consumers, minimizing the deterrent effect.

Since corporate crime is of particular concern to society, the

6. M. FREMONT-SMITH, supra note 1, at 4-5.
7. Punishing the Corporation, supra note 2, at 1069-70.
8. Id. at 1070 (citations omitted).
9. Corporate Probation, supra note 2, at 639.
10. “There is very little evidence to suggest that the stigma of criminality means anything very substantial in the life of a corporation.” H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 361 (1968) (cited in Punishing the Corporation, supra note 2, at 1084 n.111). Similarly, in United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982), overruled by United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984), the government, in challenging the legality of charitable contributions as a condition of probation, argued “that since a corporation is but a fiction existing in contemplation of law, it can do nothing but pay money, and hence can not be subjected to conditions designed to promote rehabilitative behavior.” William Anderson, 698 F.2d at 914. The court rejected the government’s argument:

[M]odern law regards the corporation as a normal and usual method of doing business. Corporations today likewise claim to be good “citizens” of the community in areas where they operate. They make contributions for charitable and educational purposes in the territories served by their business, especially for the promotion of research useful in their business. Their decision-making processes, acting through human agents, affect for weal or woe the daily life of many communities. That such decision-making processes can not be affected, in the area of collusive or monopolistic pricing or other illegal restraints of trade, by rehabilitative measures and punitive sanctions is an argument divorced from reality. Insistence upon the fiction theory of corporations is today itself a fiction.

Id.
12. Id. at 640.
13. See, e.g., White Collar and Corporate Crimes Require Creative Sentencing, N.Y. Times, Apr. 1, 1986, at A30, col. 4 (suggests use of creative sentencing to require convicted corporations to hire ombudsmen to “[work] within the corporation to prevent future criminal violations”). See also N.Y. Times, Apr. 13, 1986, § 4, at 24, col. 5 (“To permit corporate felons, whose products have killed and maimed scores of innocent people or polluted the
law has sought alternative methods to combat it. By passing the Federal Probation Act, Congress opened the door to “creative sentencing” by the judiciary. As a result, placing convicted corporations on probation, although problematic, has become an accepted means of punishment. Traditionally, the terms of probation have reduced fines payable to the federal treasury that were imposed by the sentence, and have required instead that the corporation make restitution to the aggrieved parties.

In an effort to deter a convicted corporation from committing further criminal acts, as well as to discourage similar criminal activity by others, some courts have constructed probation conditions that require the corporation to perform community service by donating funds, services, or both. In effect, by imposing these

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15. "As a result of the ineffectiveness of fines, some courts have used the Probation Act to develop additional sentencing alternatives." Corporate Probation, supra note 2, at 641.
16. See supra notes 1-12 and accompanying text.
17. See, e.g., United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982), where the court held that it would not question the legality of corporate probation in general.
18. See, e.g., United States v. Missouri Valley Constr. Co., 741 F.2d 1542, 1548 (8th Cir. 1984), in which the court stated:
The consistent strictness with which the courts have applied [§ 3651] leads us to conclude that the only monetary payments permissible as conditions of probation are those expressly authorized by the statute: payments to the treasury (fines), to persons for whose support the defendant is legally responsible, or to aggrieved parties who suffered actual damages or loss caused by the offense for which conviction was had, in the amount of such damage or loss.

Similarly, in Karrell v. United States, 181 F.2d 981, 987 (9th Cir.), cert. denied, 340 U.S. 891 (1950), the defendant was charged with crimes against several persons. The Ninth Circuit held that a court can only order the defendant to pay, as a condition of probation, those persons aggrieved by the precise acts for which the defendant was convicted.
19. See, e.g., United States v. Danilow Pastry Co., 563 F. Supp. 1159 (S.D.N.Y. 1983). The court upheld a condition of probation requiring defendants to donate baked goods to several local charities, since to limit probation conditions to restitution would curtail the court’s “ability to devise flexible sentences in the interests of justice.” Id. at 1171 (citing United States v. Mitsubishi Int’l Corp., 677 F.2d 785 (9th Cir. 1982)).
20. See, e.g., William Anderson, 698 F.2d at 912. In this case, one condition of probation for the corporation was the payment of funds in installments to charitable organizations not actually injured by the corporation’s criminal acts.
21. See, e.g., Danilow Pastry, 563 F. Supp. at 1163. The defendant was required to deliver $1200 worth of baked goods (to be valued at wholesale cost) each week for one year to charitable organizations to be specified by the court in a subsequent order.
22. See, e.g., United States v. Mitsubishi Int’l Corp., 677 F.2d 785, 787 (9th Cir. 1982) (defendant was required to loan an executive for one year to the National Alliance for Business in development of its Community Alliance Program for Ex-Offenders (CAPE) and to contribute $10,000 per violation to CAPE).
conditions of probation, the judiciary compels defendant corporations to support the nonprofit sector when such corporations elect to meet the terms of probation instead of serving the imposed sentence. Although courts lack the authority to select unilaterally the beneficiaries of a corporation's probationary terms, the Federal Probation Act grants broad discretion to control the disposition of a convicted corporation's "bounty."

This Note will focus on the legal and analytical problems that these probation conditions create for the corporate and charitable sectors. Part I will analyze judicial authority to place a corporate defendant on probation under the Federal Probation Act. Part II will address the split in the circuits engendered by the "permissive language" of the Federal Probation Act. Part III will examine the policy justifications for probation as applied to problems presented by the sentencing of corporations, and Part IV will continue the policy analysis by evaluating the effectiveness of probation for corporations in light of the concerns discussed in Part III. Part V

23. Some courts have required a nexus between the beneficiary of the charitable contribution and the crime for which the corporation was convicted. See Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971) ("The only limitation is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public."). After Porth, federal courts applied the "rational relation" test to conditions of corporate and individual probation. For further discussion of this point, see Punishing the Corporation, supra note 2, at 1075.

24. Although the rational relation test limits the court's authority to construct the terms of probation in a given case, the court maintains a great deal of flexibility. See Corporate Probation, supra note 2, at 643-44, which cites Roberts v. United States, 320 U.S. 264, 272 (1943) and Burns v. United States, 287 U.S. 216, 220-21 (1932), for the proposition that trial courts have "broad discretion to . . . decide what probation conditions are appropriate for rehabilitation of a particular defendant." For an example of this discretion, see Danilow Pastry, 563 F. Supp. at 1167-68, where the court required the defendant to contribute baked goods to local charities as a condition of probation. The court concluded that its selection of charitable organizations to receive the baked goods was not an abuse of discretion. The court reasoned:

To the extent that the subject sentences provide restitution, such restitution is in the nature of "symbolic restitution" designed primarily to deter future misconduct on the part of the defendants rather than to provide compensation to their victims . . . . Accordingly, the sentences are not limited by the requirements that any restitution be only to "aggrieved parties."

Id. at 1169. The court justified its conclusion by the fact that consumers in general suffered from the defendant's illegal price fixing, but there was no way to identify specifically the injured parties. The court further reasoned that the beneficiaries were actually injured by the defendant's wrongdoing, and the probation terms were related to the injury because they made the defendant's baked goods available to those most in need. Id. at 1169 & n.20.

25. See infra notes 32-44 and accompanying text.
26. See infra notes 45-59 and accompanying text.
27. See infra notes 60-69 and accompanying text.
28. See infra notes 70-87 and accompanying text.
will focus on the judiciary's institutional competency to require charitable contributions as a condition of probation for convicted corporations.\textsuperscript{29} Part VI will address the implications of such probation conditions on the nonprofit sector.\textsuperscript{30} Finally, this Note concludes that charitable contributions as conditions of probation for convicted corporations involve the nonprofit sector in the continuing fight against corporate crime in a way that is consistent with the nonprofit sector's traditional role in our society.\textsuperscript{31}

I. THE FEDERAL PROBATION ACT

The federal courts' power to place a defendant on probation is purely statutory. In \textit{Ex parte United States},\textsuperscript{32} the Supreme Court held that the authority to suspend sentence is inherently legislative.\textsuperscript{33} In response to the holding, Congress enacted the Federal Probation Act of 1925,\textsuperscript{34} which enables federal district court judges to impose upon a criminal offender, in lieu of a "statutory sentence,"\textsuperscript{35} the conditions of probation which "they deem best"\textsuperscript{36} under the circumstances. Furthermore, "the statute specifically

\begin{itemize}
\item \textsuperscript{29} See infra notes 88-98 and accompanying text.
\item \textsuperscript{30} See infra notes 99-106 and accompanying text.
\item \textsuperscript{31} See infra notes 107-08 and accompanying text.
\item \textsuperscript{32} 242 U.S. 27 (1916).
\item \textsuperscript{33} \textit{Id.} at 52. The court reasoned that "the authority to define and fix punishment for crime is legislative... and... the right to relieve from the punishment... belongs to the executive department." \textit{Id.} at 42. See Note, \textit{United States v. William Anderson Co.: Monetary Conditions of Probation Under the Federal Probation Act}, 69 \textit{Iowa L. Rev.} 1147, 1150 (1984) [hereinafter Monetary Conditions] ("The Court found that probation authority emanated solely from the legislature and that only congressional authorization would secure the future exercise of probationary powers by federal courts.") (citations omitted).
\item \textsuperscript{34} See supra note 14. See also \textit{United States v. Fultz}, 482 F.2d 1, 2 (8th Cir. 1973) (Congress enacted the Federal Probation Act, which vested the power to place defendants on probation in the district courts, in response to \textit{Ex Parte United States}, 242 U.S. 27 (1916)).
\item \textsuperscript{35} Monetary Conditions, supra note 33, at 1147. Section 3651 of the Federal Probation Act provides in relevant part:
\begin{quote}
Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
\end{quote}

\begin{itemize}
\item While on probation and among the conditions thereof, the defendant—
\item May be required to pay a fine in one or several sums; and
\item May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and
\item May be required to provide for the support of any persons, for whose support he is legally responsible.
\end{itemize}

\item \textsuperscript{36} Monetary Conditions, supra note 33, at 1147.
lists three monetary conditions of probation: [a]n offender may be required to pay a fine, to make restitution . . . to the aggrieved party, and to make support payments to legal dependents."\textsuperscript{37} The Act is rehabilitative in nature rather than punitive or deterrent.\textsuperscript{38}

Several subsequent circuit court opinions interpreted the Federal Probation Act as vesting federal district courts with the power to place a criminal defendant on probation.\textsuperscript{39} The phrase "criminal defendant" has been interpreted to include corporations as well as individuals.\textsuperscript{40}

More controversial, however, has been the issue succinctly stated in \textit{United States v. Missouri Valley Construction}:\textsuperscript{41} whether a district court may substitute for a fine the probationary condition that a corporation contribute funds to a charitable organization that has not been actually harmed\textsuperscript{42} by the corporation's criminal offense.\textsuperscript{43} Community service and charitable contributions are commonly accepted as terms of probation for individuals;\textsuperscript{44} however, the imposition of such conditions on corporations calls into ques-

\textsuperscript{37} Id.
\textsuperscript{38} See \textit{Corporate Probation}, supra note 2, at 638. See also \textit{Aggrieved Party}, supra note 4, at 164: "The primary purpose of the Act is to provide criminals who apparently are capable of rehabilitation time to reform when it is clear that actual service of their sentence would make rehabilitation unlikely."
\textsuperscript{39} See, e.g., \textit{United States v. Cohen}, 617 F.2d 56, 58 (4th Cir.), cert. denied, 449 U.S. 845 (1980) (the validity of probation conditions must be tested under the Federal Probation Act, because the district court lacks the inherent power to suspend sentence); \textit{United States v. Fultz}, 482 F.2d 1, 2 (8th Cir. 1973) (same); \textit{United States v. Atlantic Richfield Co.}, 465 F.2d 58, 60 (7th Cir. 1972) (same).
\textsuperscript{40} \textit{Corporate Probation}, supra note 2, at 642, citing \textit{United States v. Atlantic Richfield Co.}, 465 F.2d 58, 60-61 (7th Cir. 1972). The Seventh Circuit failed "to provide any rationale for placing corporations on probation . . . [T]he court simply looked to the federal criminal code . . . [and] reasoned that, because corporations are subject to the criminal code and because the Probation Act is part of that criminal code, corporations can be put on probation." \textit{Corporate Contributions, supra} note 3, at 244 (citations omitted).
\textsuperscript{41} 741 F.2d 1542 (8th Cir. 1984). See \textit{supra} note 10.
\textsuperscript{42} The Federal Probation Act expressly grants the court the authority to impose as a condition of probation the payment of restitution to parties actually harmed by the offense: "While on probation and among the conditions thereof, the defendant . . . May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . ." 18 U.S.C. § 3651 (1982).
\textsuperscript{43} \textit{Missouri Valley}, 741 F.2d at 1544.
\textsuperscript{44} In several cases in which both corporations and individuals were convicted and placed on probation, the government challenged the legality of the conditions of probation only as applied to the corporate defendants. The legality of community service and charitable contribution sanctions imposed on individual defendants was not questioned. See, e.g., \textit{William Anderson}, 698 F.2d 911 (8th Cir. 1982); \textit{Danilow Pastry}, 563 F. Supp. 1159, 1163 & n.7 (S.D.N.Y. 1983). See also Kahn, \textit{Charitable Contributions As Conditions of Probation}, 48 \textit{Fed. Probation} 80, 80 (Dec. 1984) ("the cases in which charitable contributions have been challenged principally involve corporate defendants").
tion the efficacy and desirability of charitable contributions in light of the unique characteristics possessed by corporate entities.

II. INTERPRETING THE FEDERAL PROBATION ACT IN THE CONTEXT OF CORPORATE PROBATION

The legality of imposing charitable contributions as a condition of probation on convicted corporations has engendered a split in the circuits, with a majority denying the validity of such action. The debate "has focused on the statutory interpretation of the Federal Probation Act." At the center of the controversy is the so-called "permissive" language of section 3651: "upon such terms and conditions as the court deems best," "among the conditions thereof," and "may be required." Unfortunately, the legislative history of the Federal Probation Act does little to resolve the ambiguity of the language that addresses acceptable conditions of probation. Moreover, most courts fail to provide their reasoning behind the probationary terms which they impose; those that do merely


46. Kahn, supra note 44, at 80. As a matter of fact, federal courts of appeal in seven circuits, namely, the Second, Third, Fourth, Seventh, Eighth, Ninth, and Tenth, have "consistently limited monetary conditions of probation to those specifically listed in the Probation Act." Monetary Conditions, supra note 33, at 1154-56. With respect to charitable contributions as a condition of probation, the Tenth, Fourth, Eighth and Third circuits have clearly rejected "the legality of this type of probation condition." Kahn, supra note 44, at 80. See United States v. Prescon Corp., 695 F.2d 1236, 1243 (10th Cir. 1982); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984); United States v. Missouri Valley Construction Co., 741 F.2d 1542 (8th Cir. 1984); United States v. John Scher Presents, Inc., 746 F.2d 959 (3d Cir. 1984). See also Corporate Probation, supra note 2, at 645-46.


48. See id. at 533 & n.16. The following courts have interpreted this language to permit district courts to impose charitable contributions on corporations as conditions of probation: William Anderson, 698 F.2d 911, 914 (8th Cir. 1982); United States v. Wright Contracting Co., 563 F. Supp. 213, 215-16 (D. Md. 1983), rev'd, 728 F.2d 648 (4th Cir. 1984); Danilow Pastry, 563 F. Supp. 1159 (S.D.N.Y. 1983).

49. 18 U.S.C. 3651 authorizes the imposition of probation "upon such terms and conditions as the court deems best." The section does not mandate the imposition of any condition of probation but does list several specific conditions which may be required, i.e., paying of a fine, making of restitution, supporting of dependents, submitting to treatment of addiction, or residing in or participating in the programs of a residential community treatment center. These, however, in view of the broad general grant of statutory authority, have been viewed as examples of, rather than limitations on, the kinds of conditions that a court may place on probation.

S. REP. NO. 225, 98th Cong., 2d Sess. 93, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3276. See also Punishing the Corporation, supra note 2, at 1076 n.54 (further discussion of ambiguity surrounding language of the statute).
comment that employing charitable contributions in probation "helps integrate defendants into the working environment" and fosters in them a "sense of social responsibility." Examination of recent decisions interpreting the language of the Federal Probation Act illustrates the legal problems that imposition of charitable activity on corporations as a condition of probation presents.

The approach adopted by the majority of the circuits interprets the Federal Probation Act as limiting the legally permissible probation conditions which a district court may impose on a defendant. These courts read the applicable language of section 3651 as exemplary, except that all fines imposed as a condition of probation must fall into one of the three types enumerated in the statute. Since contributions to charitable organizations not actually harmed by a corporation's transgressions do not fall within that language, the government has generally opposed such terms of probation.

50. In many cases community service sentences better serve the goals of the criminal justice system than mere fines or imprisonment. . . . Such sentences require that the defendant become personally involved—devoting both time and energy—in a project that serves the public interest, and thereby inculcate in the defendant a sense of social responsibility.

51. A number of circuits (namely, the Tenth, Fourth, Eighth and Third), have "ruled that all monetary probation terms are governed by the restitution section of the Act. Thus, unless a charitable organization is a direct victim of the crime, it cannot be a beneficiary of a monetary probation condition." Corporate Probation, supra note 2, at 646 (citations omitted). See also Kahn, supra note 44, at 80. For example, in John Scher, 746 F.2d 959, the corporation was convicted of antitrust violations. For one of the terms of its probation, the trial court ordered the corporation to promote a concert to raise and donate $100,000 to charities selected by the probation department. Id. at 960. The Third Circuit rejected the probation terms on appeal because it found that the terms did not involve a community service; rather, the terms just directed the corporation to conduct a normal business venture and donate the profits to charity. The court found no rehabilitative qualities in the probation, viewing it as mere payment of funds to a charity rather than to the government. Id. at 963. Similar arguments are found in Prescon (10th Cir.), Missouri Valley (8th Cir.), and Wright Contracting (4th Cir.).

52. See, e.g., Missouri Valley, 741 F.2d at 1547-48, 1550; Wright Contracting, 728 F.2d at 649; Prescon, 695 F.2d at 1242-43. See supra note 35 for the applicable language of section 3651.

53. See, e.g., Wright Contracting, 728 F.2d at 651. In Wright Contracting, the government opposed probation terms that required the corporation convicted of antitrust violations to contribute funds to a city jobs program. The court paraphrased the government's argument as follows:

[T]he condition imposed manifestly has essentially a restitutive or reparative purpose, albeit an avowedly "symbolic" one designed to deter and punish as well. Since the payment is not ordered to "aggrieved parties" and does not purport to reflect "actual damages or loss caused by the offense," it does not meet the statutory limitations and is illegal in the government's view."

Id. Furthermore, in Missouri Valley, the court stated:

The imposition of a fine for a violation of section 1 of the Sherman Act, and its
Proponents of the use of charitable contributions as terms of probation, in contrast, read the statutory language as completely unrestrictive. For example, the courts in United States v. William Anderson Co., 54 (although subsequently overruled), and United States v. Danilow Pastry Co., 55 concluded that section 3651 lists three conditions that unquestionably may legally be imposed as terms of probation. Both the William Anderson and Danilow Pastry courts ground their liberal interpretations of section 3651 on the broad purpose of the Federal Probation Act. 66 These courts also question the majority approach's differentiation between individual and corporate criminal defendants. They find this approach inconsistent in challenging probation conditions that require charitable contributions imposed on corporations yet acceding to the same terms when applied to individuals. 57 Although a rational relation-

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54. 698 F.2d 911 (8th Cir. 1982), overruled by United States v. Missouri Valley Constr. Co., 741 F.2d 1542 (8th Cir. 1984). Although it no longer has the force of law, the Anderson opinion presents some compelling analysis, as the Missouri Valley dissenters illustrate by referring to it. Missouri Valley, 741 F.2d at 1551-55 (Gibson, J., dissenting). See infra note 56 and accompanying text.


56. As the Court reasoned in Anderson..., corporations play a predominate role in our society, and their essence is far more than the legal fiction giving rise to their existence. Their management and functioning are intrinsically that of the individuals managing and controlling the organization. Insofar as the conditions of probation in Anderson affect the managers and decisionmakers and recognize the interrelationship between those individuals and the corporation, the Anderson conditions are in full accord with the purposes and goals of section 3651.

Missouri Valley, 741 F.2d at 1554 (Gibson, J., dissenting). See infra note 75. The Danilow Pastry court, espousing the same view, reasoned, "[T]he purpose of the Act, to give judges broad discretion in fashioning sentences suggests that implied exemptions from that authority ought to be narrowly construed." Danilow Pastry, 563 F. Supp. at 1171 (footnote omitted). The dissent in Missouri Valley also takes this approach:

The contribution of the corporation can and should be used to fund the public service activities of the individual defendants who are officers in that corporation. To conclude that such use of probation is prohibited by rules of construction based on a negative implication is simply to overlook both the purpose and broad language of section 3651.

Missouri Valley, 741 F.2d at 1553 (Gibson, J., dissenting).

57. William Anderson, 698 F.2d at 911; Danilow Pastry, 563 F. Supp. at 1163. But see United States v. Haile, 795 F.2d 489, 490-92 (5th Cir. 1986), in which an individual was convicted of conspiracy to violate the Sherman Act. The Fifth Circuit rejected the district court's attempt to reduce the amount of the fine if Haile chose to "'divert' [up to 25% of the fine] to an approved charitable organization." Id. at 490. The court held that without statutory authority a district court may not order a defendant to make a charitable contribution as a condition of probation. Id. at 492. The court reasoned that although the district court may
ship must exist between the probation and the offense whether the defendant is an individual or a corporation,\textsuperscript{58} strict adherence to the majority approach's reading of section 3651 would preclude all use of charitable and community service conditions of probation for both individuals and corporations, in contravention of current practice.\textsuperscript{59}

III. POLICY JUSTIFICATIONS FOR PROBATION

The majority approach prevents liberal employment of charitable contributions as a condition of probation for convicted corporations. Analysis of the policy considerations that underlie probation, however, indicates that such conditions are socially desirable. While the primary purpose of probation is rehabilitation,\textsuperscript{60} the chief rationale for punishing a convicted corporation is deterrence.\textsuperscript{61} These differing sentencing goals have created a tension in the area of corporate probation, leading to an analytically flawed judicial position.\textsuperscript{62}

"properly take note of the charitable spirit of a defendant, even a charitable spirit that has flowered only under the shadow of the jail wall", \textit{id.}, it lacks the authority to "compel charitable contributions." \textit{Id.} The court recognized the rehabilitative value of charitable contributions as conditions of probation and the fact that such contributions may benefit society more than fines paid to the federal treasury, but found that "[w]ithout a statutory footing . . . the [district] courts are not free to make these policy judgments." \textit{Id.} Ultimately, the court's holding rested on its characterization of the probation conditions in question as "improperly diverting funds away from the Treasury." \textit{Id.}

58. See, e.g., Fiore v. United States, 696 F.2d 205, 208 (2d Cir. 1982); United States v. Vaughn, 636 F.2d 921, 922-23 (4th Cir. 1980); Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980); United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975). See \textit{supra} note 23 and accompanying text.

59. See, e.g., Higdon v. United States, 627 F.2d 893 (9th Cir. 1980). Furthermore, in opposition to the "restitution" restriction adhered to by the majority approach, given the broad discretion traditionally granted to courts to devise conditions of probation, one can argue that "the fact that the [Federal Probation] Act contains a provision for restitution should not limit the power of courts to fashion monetary conditions of probation . . . ." \textit{Corporate Probation, supra} note 2, at 646-47.

60. See \textit{Punishing the Corporation, supra} note 2, at 1080-81. See also \textit{Corporate Probation, supra} note 2, at 657. See \textit{supra} note 38 and accompanying text. As one author explains, "[a]t the heart of the concept [of rehabilitation] . . . is the idea that the offender's behavior is changed so that he does not commit further offenses." \textit{Corporate Contributions, supra} note 3, at 261.

61. \textit{Corporate Contributions, supra} note 3, at 261.

62. See \textit{Corporate Probation, supra} note 2, at 637-39, 657-61 for a proposal of a “Comprehensive Crime Control Bill,” whose scheme includes the goals of deterrence and punishment in addition to that of rehabilitation.
A. **Charitable Contributions as a Condition of Probation for Individuals**

When the terms of probation require community service or charitable contributions, society benefits in many ways. These benefits are not attainable through sentences of imprisonment or fines paid to the federal treasury. Aside from the "therapeutic" effects which such probation may have on a defendant, society will save on prison expenses, benefit from the funds or services provided to charitable or community organizations, and enjoy a sense of vindication. These effects reflect the underlying purposes of probation in general. Therefore, they must be given serious consideration in the context of probation for corporations.

B. **Charitable Contributions as a Condition of Probation for Corporations**

The corporation is a powerful and highly visible entity in today's society. It is an institution that exists by a legal grant of authority, and one cannot ignore its presence and its intimate connection with natural persons.

Nevertheless, those who oppose the imposition of charitable contributions as a probational term for corporations continue to perceive the corporation in a "textbook" fashion. They argue that the corporation is a fictional entity, and that it is therefore impossible to rehabilitate. They persist in viewing the corporation as a profit generating machine devoid of conscience, even though people create, drive, and direct this engine of commerce. This reasoning leads them to conclude that the more significant advantages of probation do not apply to corporations.

Most of the justifications for probation for individuals, however, also support the use of probation in the corporate context. Admittedly, because a corporation is a non-physical entity which cannot be imprisoned, the argument that probation benefits society by reducing prison expenses does not apply. Rehabilitation, societal benefits, and vindication, however, do in fact justify probationary

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63. "The offender is 'treated' in a manner that is therapeutic. What constitutes therapeutic treatment, though, is unknown. Presumably, it is treatment that counteracts the causes of the offender's unlawful behavior." *Corporate Contributions, supra* note 3, at 261.

64. See *Punishing the Corporation, supra* note 2, at 1081.

65. See *supra* note 1 and accompanying text.

66. See *Punishing the Corporation, supra* note 2, at 1084.

67. See *id.* at 1081-85.

68. *Id.* at 1081.
sentencing of convicted corporations.\textsuperscript{69}

IV. CHARITABLE CONTRIBUTIONS AS EFFECTIVE SANCTIONS FOR CONVICTED CORPORATIONS

Those who criticize the use of charitable contributions as conditions of probation for convicted corporations argue that they lend themselves to "leniency . . . [and] susceptibility to corporate manipulation."\textsuperscript{70} As a result, they neither effectively punish, deter, or rehabilitate the corporation,\textsuperscript{71} nor do they satisfy society's need for a sense of vindication. However, upon examination of the effects of requiring a convicted corporation to contribute to charitable institutions or to perform community service work, one sees that these concerns do not provide sufficient justification to prevent courts from imposing such sanctions.

A. Getting Off Easy

Critics point out that the alternative to probation for the individual is incarceration, while the alternative to probation for the corporation is simply a fine.\textsuperscript{72} This circumstance lends an appearance of leniency on the corporations, since both sentences involve (merely) monetary payment as punishment. This argument may undermine the rationales in favor of corporate probation, for the corporation may not sense as greatly as a convicted individual that the court is giving it a second chance.\textsuperscript{73} Moreover, corporate probation may perpetuate a perception in the mind of the general public that the corporation is "getting off easy." In cases like Danilow Pastry,\textsuperscript{74} however, where the corporation operates in an economically depressed area, the corporation may not be able to bear the burden of paying a substantial fine while still conducting its operations.\textsuperscript{75} In such a case, probation involving charitable contributions

\textsuperscript{69} Id. at 1081-82.
\textsuperscript{70} Id. at 1083.
\textsuperscript{71} Id. at 1084-85.
\textsuperscript{72} Id. at 1081.
\textsuperscript{73} Burns v. United States, 287 U.S. 216, 220 (1932) ("Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract."). \textit{But see} United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979) ("[P]robation is not a favor of the court bestowed upon defendant as a relief from imprisonment that may be conditioned in any manner the trial judge sees fit, neither does a probationer have a right to be free from conditions that severely restrain his freedom of action. The judge may, in fact is obliged to, view probation as a substitute for imprisonment.").
\textsuperscript{75} [F]ines substantial enough to achieve the appropriate measure of deterrence would
of goods or services and reduced fines may be a welcome alternative. The institution will pay for its crimes, and the community will benefit both from the continued existence of the corporation, and from the court-ordered charitable contributions.

This first concern over the perception of leniency focuses on the deterrent value of charitable contributions as a condition of corporate probation. The purposes of probation, however, are to rehabilitate the convict, as well as to deter similar criminal conduct in the future. Although the dollar value of charitable contributions may not exceed the dollar value of fines payable to the government, and although the payment of charitable contributions may benefit the corporation in the public eye, probation is not intended to be a trivial sentence. It may very well rehabilitate a convicted corporation by allowing it to continue its business.

Proponents of using charitable contributions in probation for corporations contend that “[a] court-ordered payment to charity should be as effective as a fine in punishing the corporate offender and deterring future violations by that offender and other corpora-

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bankrupt the corporate defendants. Such a sentence would cause widespread unemployment among the bakeries’ employees, damage the economies of the communities in which the plants are located, and ironically, diminish competition. Hence, this is precisely the overly harsh sentence that the Probation Act was designed to avoid. 


The pastry company operated in an area with high unemployment and a disintegrating tax base. Had the court imposed the higher fines, the corporation would have been forced out of the area, ultimately imposing further burdens on the local consumers by costing many of them their jobs, and by depriving their community of much needed tax revenues. Id. at 1172. See also Corporate Probation, supra note 2, at 640.

76. See Punishing the Corporation, supra note 2, at 1082.

77. But see Corporate Contributions, supra note 3, where the author advocates the position that charitable contributions may cost the corporation more than the imposition of a fine and thereby will better serve the rehabilitative function of probation. He argues that since a corporation’s actions “are governed by human beings making decisions about corporate policy ... any attempt to rehabilitate the corporation will have to affect the people in charge of corporate decision-making.” Id. at 262. He goes on to point out “the voluntary aspects of probationary terms,” id. at 263, and states that the choices put to corporate decisionmakers with respect to selecting “which probation option to pursue will impinge upon and disrupt the decision-maker’s regular schedule and will therefore be more likely to impress upon him the costs of criminal violations. Furthermore, to the extent that the decision-making process involves a group, substantially more individuals will be made aware of the costs of criminality.” Id. (citations omitted).

Finally, there are two additional reasons for which charitable contributions serve to rehabilitate the corporation. “First, the payments to charity [can] generate publicity that in turn affects the decision-maker.” Id. at 263-64. Second, “[a] corporate decision-maker [might] react more positively to making payments to charity than to making payments to the government, because the government might be considered an adversary while the charity might not be so considered.” Id. at 264.
The sentencing judge in William Anderson justified his use of creative sentencing as follows:

The alternative sentences will be designed to be firm, specific, unpleasant for the defendants and constructive for them and others. They have the additional strength of being aimed in most instances at helping directly people who are in the criminal justice population or are prime candidates for it. If the community service features of the sentences are correctly devised they will not have decreased the amount of punishment, but will have increased the usefulness and decreased the expensiveness of it.

In his Missouri Valley dissent, Judge Gibson lauded the William Anderson court's use of charitable contributions as a probationary condition:

It is the conditions of probation which present the most likely avenue for bringing about corporate changes of behavior. In addition to imposing particular procedural and structural requirements on a corporation as terms of probation, the Anderson approach has the practical effect of tying together the probation of the individual and corporate defendants with at least as great a possibility of achieving the desired goals of probation as it is possible to reach in any case where probation is utilized.

Those who reject the extension of charitable contributions to organizations not directly injured by a corporation's crimes claim that they do so after examining the reality of the situation. They argue that courts impose corporate fines payable to the federal government purely to punish, and that fines paid to third parties are reparative or restitutional in nature. Therefore, the latter must only be made to aggrieved parties who are thus deserving of reparative or restitutional damages. This argument, though, overlooks the deterrent and rehabilitative purposes of probation. Courts that have supported using charitable contributions as a condition of corporate probation view them as a positive means of modifying corporate behavior, rather than as a method of compensation to injured third parties. These courts reason that "the beneficiaries need not be
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those directly aggrieved by the violations so long as there is a reason-
able relationship between them and the defendants' illegal con-
duct, and so long as the community service serves to reverse the
damage done by that conduct."84

B. Corporate Manipulation

Similarly, the concern that charitable contributions as condi-
tions of probation may be used by the corporation to its advantage
is not completely valid. At the core of this anxiety is the fear that a
corporation cannot be stigmatized. If corporations were truly im-
mune to stigma, it would be impossible to justify, on this basis, the
punishment of any corporation convicted of a criminal offense. In
any event, because corporations rely on their reputation to market
and sell their goods or services, they will suffer whenever their repu-
tations among potential consumers are tarnished.

A corporation on probation may publicize its charitable contri-
butions in order to to generate a positive public image, even when
such contributions are made in compliance with the terms of the
corporation's probation. This kind of manipulation, however, may
be prevented or its effects reversed by informing the public of the
probationary terms.85 An analogous concern is that a corporation

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85. Punishing the Corporation, supra note 2, at 1087 & nn.128-31. The court in Anderson also emphasized the role that publicity plays in creative sentencing:
The deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner. The arsenal of the sentencing judge should contain more than the traditional weapons of fine and imprisonment simpliciter. Some of the old time punishments (such as the pillory, stocks, whipping post, and ducking-stool) might seem "cruel and unusual" today, but painful publicity is not relished by corporate tycoons. Public opinion can be sharply focussed on culprits engaged in antisocial anti-competitive conduct by means of "creative" sentencing. Measures are effective which have the impact of the "scarlet letter" described by Nathaniel Hawthorne, or the English equivalent of "wearing papers" in the vicinity of Westminster Hall like a sandwich-man's sign describing the culprit's transgressions.
698 F.2d at 913 (footnote omitted).

In Danilow Pastry, the court stated that the probation requirements it imposed on the defendant included enough public exposure to enhance the effectiveness of charitable contrib-
butions in rehabilitating a corporation:
may enjoy a tax deduction for contributions made in compliance with the terms of its probation. However, the sentencing court may include in the corporation's probation a condition prohibiting the corporation from taking such a deduction.

V. INSTITUTIONAL COMPETENCY

Opponents of the use of charitable contributions as conditions of probation in the corporate context also question the institutional competency of the judiciary to impose such conditions. Charitable contributions, when made in lieu of payment of fines, divert funds from the federal treasury. Control over federal funds is inherently a legislative function, and subscribers to the majority view argue that, since the Federal Probation Act delegates to district courts the authority to award federal funds only to aggrieved parties or to a defendant's legal dependents, a court that imposes a charitable contribution on a corporation as a term of probation abuses its discretion.

In many of the cases in which the courts adhere to the majority rule, the government is the party challenging the terms of the corporation's probation. In light of the large sums of money that can be extracted from corporate defendants, the government's objection to the "payment of fine[s] to a party other than the government, the sentences require the corporations to perform community service by providing their products at no charge to needy members of the community. In this way the wrongdoings of these defendants are called to public attention, the public is made aware of the community service and symbolic restitution that these violators will make, punishment is increased beyond what fines could extract and yet the needs of the innocent employees, the customers, and the communities are secured.

563 F. Supp. at 1167.

86. A Controversial Sanction, supra note 35, at 536-37 & n.33.
87. See, e.g., William Anderson, 698 F.2d at 912 (sentence provided that if the defendant paid funds in specified installments to named charitable organization, it could not take a charitable tax deduction for the contributions). Although William Anderson was overruled by Missouri Valley, the latter court did not challenge or address this particular probation condition.
88. Missouri Valley, 741 F.2d at 1549-50. See also Kahn, supra note 44, at 80: The Missouri Valley court noted that "the effect of the monetary-payment conditions would be to transfer to a private entity designated by the district court a substantial sum of money that would otherwise likely have gone, in the form of a fine, to the federal treasury." Id. See also supra notes 32-34 and accompanying text.
89. Kahn, supra note 44, at 80. See also United States v. Haile, 795 F.2d 489, 492 (5th Cir. 1986) (judicial imposition of charitable contribution as condition of probation for individual without statutory authority characterized as "improperly diverting fines away from the Treasury" and therefore beyond the "limits of judicial authority").
90. This was the case in Missouri Valley and Wright Contracting as well as in United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982).
which serves no special correction purpose” may be largely fiscal. However, other objections focus on the relationship between the trial judge and the nonprofit sector.

Commentators have noted the extent to which trial judges are free to use their discretion in setting the terms of probation. Some argue that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” Among the concerns raised by the probationary power is the court’s competency to choose the beneficiaries of the charitable contribution which it will impose. The Missouri Valley court argued that “[t]he courts are ill-equipped to pick and choose, among countless worthy causes, which nonaggrieved charitable organizations should receive large sums of money that would otherwise be paid to the treasury as fines.” This concern is magnified when a court permits “the corporate defendant to choose a favorite beneficiary for the receipt of these funds.”

In addition, “[t]he involvement of the courts in the selection of the recipients of such benefits raises ... the prospect of conflicts of interest and unnecessary criticism of the courts.” This is especially true when charities that receive funds as a result of corporate probation are seen as beneficiaries “presumably acting in some way as ‘surrogates’ for the public as the actually ‘aggrieved party.’” Rivalry among potential surrogates is another possible problem. Moreover, because the public has no voice in the judicial process, the judge’s discretion in choosing a beneficiary may lead to public

91. John Scher, 746 F.2d at 962.
92. See, e.g., Corporate Probation, supra note 2, at 643-44.
93. Punishing the Corporation, supra note 2, at 1083-84 n.106 (quoting M. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER 5 (1972)).
94. Missouri Valley, 741 F.2d at 1550.
95. Id. at 1555 (Gibson, C.J., concurring in result and dissenting).
96. Id. at 1550.
97. Wright Contracting, 728 F.2d 648, 653 (4th Cir. 1984). Furthermore:

By this decision we do not hold that under no circumstances may avowedly restitutive or reparative payments be ordered as valid conditions of probation for persons convicted of crimes causing direct economic damage or loss to the public at large. . . . In this opinion we have held that . . . private charitable organizations [may not] be considered proper surrogates for the public at large as a party directly “aggrieved” by a criminal offense within the meaning of the statute. This does not foreclose all possibility that “actual damages” might be legally determined and a proper surrogate identified to act as direct conduit for restitutive payments to the affected public in an appropriate case. That case is not before us.

98. Id. at 653 n.2.
criticism of the use of charitable contributions as conditions of corporate probation.

Despite the validity of these arguments, the determination of a charitable purpose has been a traditional judicial function.99 The selection of a recipient of a court-ordered charitable contribution is consistent with this traditional role. Moreover, the positive effects that such charitable contributions have on both the convicted corporation and on society diminish the concern of these criticisms.

VI. IMPACT ON THE NONPROFIT SECTOR

When a court imposes a charitable contribution on a corporation as a condition of probation, the charity functions as a conduit between the corporation and the general public.100 In effect, the public is the ultimate beneficiary of this type of probation. Although the benefits flow indirectly to the community through the charitable organization, this method is highly effective in providing ongoing services to the attenuated victims of the corporate offense, or when the slight benefits provided by a direct award to individuals is substantially outweighed by the benefit that a large contribution to a local charitable organization would provide to the community as a whole.101 This function is quasi-governmental, and it is a legitimate function of the nonprofit sector.102 To deny the courts the opportunity to make such awards would certainly impair the ability of the nonprofit sector to proffer services to the public not provided by the government.

Critics oppose the payment of "government" funds to an entity

99. In charitable trust law, courts traditionally have had the power to determine the scope of charitable purpose. See, e.g., IV A. SCOTT, THE LAW OF TRUSTS § 368 (3d ed. 1967). When state legislatures address the validity or enforceability of charitable trusts, "[t]he statutes ... are often somewhat rambling in the choice of adjectives." Id. § 368 (3d ed. Supp. 1985). This suggests that courts are well-suited to choosing the beneficiaries of charitable contributions.

100. A Controversial Sanction, supra note 47, at 546.

101. A supermarket pricefixing case provides an excellent illustration of this point. In 1976, three large supermarket chains in the Greater Cleveland area were prosecuted for pricefixing. Two years later the United States District Court for the Northern District of Ohio entered a settlement order requiring them to reimburse the local citizens with $1.00 coupons; two per household redeemable per month. A contribution of perishable food items equal in value to the amount of the coupons not redeemed per month was to be given to the city's food bank. Clearly the locality realized a greater benefit as a whole from the contributions of food to the food bank than it did from the aggregate individual savings. See Cleveland Sun Press, March 20, 1986, at A1.

that has no specific "correctional purpose." 103 Although this is true, such a purpose is completely consistent with the role that non-
profit organizations have played in society. 104 "The sector ideally
should not compete with the government so much as complement it
and help humanize it . . . ." 105 The nonprofit sector is neither gov-
ernment nor business, but serves as a bridge between the two. 106 "Nonprofit organizations frequently serve to stimulate and coordi-
nate activities in which government or business or both interact
with voluntary groups to pursue public purposes . . . . The fact that
[they] have neither commercial interests to pursue nor official status
often makes them best suited to act as intermediary or coordinator
in activities involving government and business." 107 Therefore, the
beneficiaries of charitable contributions imposed on corporations as
conditions of probation are especially suited to oversee the rehabili-
tation of corporations that are convicted of corporate crimes.

VI. CONCLUSION

Generally, charitable contributions as conditions of probation
for a corporation cannot be considered fines because they are not
paid to the government. Neither can they be characterized as resti-
tution or reparation because the organization that receives them is
not injured by the corporation's offense. Moreover, they cannot be
deemed support because the corporation has no legal duty to fund
the charity. 108 Therefore, the majority of circuit courts hold that
these contributions are outside of a district court's authority to set
the terms of probation for a corporate defendant. 109 even though
such terms are acceptable conditions of probation for individual
offenders.

This majority approach, however, ignores the important deter-
rent, rehabilitative, and public benefit functions that such probation
arrangements can provide. Although judicial allocation of these
charitable contributions poses some valid institutional competency
concerns, the ramifications of eliminating this means of modifying

103. See supra note 79 and accompanying text.
104. See Filer Commission Report, supra note 98, at 38-49 for a description of functions
that the nonprofit sector has served to date, including research, public policy development,
and "furthering active citizenship and altruism." Id. at 49.
105. Id.
106. Id.
107. Id.
Sanction, supra note 47, at 536.
109. See, e.g., A Controversial Sanction, supra note 47, at 536.
corporate behavior cannot be ignored. The humanistic endeavors of nonprofit organizations have long served a vital function with respect to mitigating the capitalistic mentality engrained in today's society. Although it has no inherent power to do so, the charitable organization plays an important part in the rehabilitation of corporate criminals. This potential seems sufficient to justify the use of charitable contributions as a condition of probation for defendant corporations, even when the charitable beneficiaries of the contributions are not directly harmed by the corporation's offense.

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