CRIMINAL LAW II

UNITED STATES v. WILLIAM ANDERSON CO.: "CRIME IN THE SUITES" ALTERNATIVE SENTENCING OF CORPORATE DEFENDANTS

INTRODUCTION

Rarely has a case cut so piercingly to the core of the criminal justice system as did United States v. William Anderson Co., a decision handed down December 10, 1982 by the United States Court of Appeals for the Eighth Circuit. The issues raised in Anderson cover the gamut of punishment philosophy, morality and practicality. In Anderson, the United States challenged the discretion of the trial judge in the formulation and conditional suspension of sentences for corporate defendants. The objections raised were aimed at the unique and controversial method of “alternative sentencing” employed.

This article discusses the underlying problems which have given rise to the concept of alternative sentencing; the conflict which is raging over current sentencing philosophy and innovations; and the Eighth Circuit holding and analysis in Anderson.

FACTS AND HOLDING

Throughout 1982, sentences were imposed by the United States District Court for the District of Nebraska upon corporations and their officials in nine related prosecutions involving price fixing in the form of bid-rigging in the Nebraska highway construction industry. The corporate activities constituted mail fraud and violations of section 1 of the Sherman Act.

The corporate defendants and the individual officials had pleaded guilty to the charges and recommended alternative

1. United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982).
2. Id. at 913-14.
3. Id. at 2. The case was a consolidated appeal brought by the United States from the final judgments of sentences entered by the United States District Court for the District of Nebraska against nine corporate defendants, all of whom pleaded guilty to indictments under the Sherman Antitrust Act. Id. at 1.
5. William Anderson Co., 698 F.2d at 911.
sentences to the court. Judge Urbom considered the various recommendations and imposed fines upon each of the corporate defendants. Thereafter, the judge suspended the sentences and placed all defendants on probation. The terms of probation required that each corporation make a contribution to a specified public or charitable organization in lieu of the fines imposed. For the most part, the donees were the organizations for whom the convicted officials were required to work as a part of their individual sentences. Furthermore, the required contributions were equal to the amount of the original fines levied. The United States appealed only the corporate sentences and contended that such sentencing conditions were not authorized by the Federal Probation Act, and that the sentencing discretion of the trial judge did not include the power to require payment of money to any party other than to the United States Treasury.

The Eighth Circuit affirmed the judgment of the district court. The court held that the sentences conformed with “current penological philosophy” and that the Federal Probation Act gives broad general authority to the sentencing judge to construct appropriate conditions of probation.

BACKGROUND

White Collar Crime

Accompanying the rapid growth of the corporate entity has been the emergence of a “corporate crime wave” evidenced by an increasing numbers of white collar convictions and organizational wrongdoing. “Crime in the suites” is not only the subject of esca-
lating attention in the 1980's,21 but is also a source of mounting controversy and confusion with regard to formulating appropriate sanctions for these crimes.22

Charges have been levelled that sentencing for white collar crimes23 has been disparate from those generally levied for traditional crimes.24 Although studies support the positions of both proponents25 and critics,26 the charges are valid.27 One explanation for the perceived disparity is the social attitude regarding the severity of these types of offenses.28 Further, the criminal justice system is having a growing impact on white collar offenders.29 However, while the public's perception of the seriousness of white collar crime is increasing the public has not yet come to view white collar crime to be as alarming as other forms of illegality.30

23. Corporate crime is a subcategory of white collar crime involving "managerial direction, participation or acquiescence in illegal business acts." Conyers, supra note 21, at 287 n.1.
25. Hagan & Nagel, White-Collar Crime, White-Collar Time, 20 AM. CRIM. L. REV. 259 (1982). An analysis of 18,289 cases of defendants convicted from 1963 to 1976 in the United States District Court for the Southern District of New York, a district which emphasized prosecution of white-collar crime during the period, supports the perception that white-collar criminals are treated with leniency. Judges added probation or fines to sentences in an attempt to compensate for shorter prison terms. Fines were given to twice as many convicted white-collar criminals than to other persons. Id. at 270-72.
26. Nagel & Hagan, The Sentencing of White-Collar Criminals in Federal Courts, supra note 24, at 1451. An analysis of 6,518 offenders sentenced in 10 federal districts over a period from 1974 to 1977 led the research team to conclude that traditional "white-collar" offenders were not sentenced more leniently than "common" criminals. Id. at 1444-45.
28. See, e.g., Note, Sherman Act Sentencing, 71 J. CRIM. L. & CRIMINOLOGY 244 (1980). "Antitrust crime has rarely been seen as being as morally serious as other crime." Id. at 248. One reason for this perception is that the Sherman Act regulates self-interest in business and approves the pursuit of interest individually but disapproves of it when engaged in with competitors. The line is thus legal, not carrying any moral opprobrium. Id.
29. Id. at 254.
30. Cullen, Link, & Polanzi, The Seriousness of Crime Revisited, 20 CRIMINOLOGY 83, 99 (1982). A random sample in rural Illinois supported the results of 1974 research analysis by Rossi of Baltimore residents. Id. at 92-93. The Illinois study showed: (1) that the public's seriousness rating of "business crime" had increased but remained lower than for other types of crimes; (2) that rankings of crime did not depend on the characteristics of sample groups questioned; and (3) that among white-collar crimes, there were considerable discrepancies in seriousness attributed to the various sub-types. Id. at 97-99. Schrager & Short, How Serious a Crime?, cited in 13 G. Geis & E. StotLab, WHITE-COLLAR CRIME 14 (1980). Although there
importantly, the perceived disparity in sentencing results from the inability of the criminal justice system to adapt conventional forms of sentencing to fit the novel characteristics and circumstances of the organizational criminal, as well as the nature of its crime, while continuing to fulfill the goals of penological philosophy.\(^3\) The law has responded to the growth of corporate crimes by simply transferring penal theories and sanctions to corporations that were once applied to individuals.\(^3\)

Initially, the law favored the premise that a corporation could not incur criminal liability.\(^3\) Corporate criminal liability was imposed first in 1890 under the Sherman Act;\(^4\) however, prior to the 1970s, sentencing was lenient.\(^3\) The development of punishment "progressed" from pillory, lash, gallows and exile, to the use of incarceration as the routine sanction in the justice system,\(^3\) yet each of these penalties focused on the individual as the defendant.\(^3\) Because of the artificial, inanimate nature of corporations, it is questionable as to whether the application of criminal sanctions is feasible.\(^3\)

Increasingly, reliance has been placed on the criminal justice system to shape corporate behavior.\(^3\) As a result, under present law, a corporation can be found guilty of most, if not all, crimes.\(^4\) Corporations may be convicted of crimes including: conspiracy in restraint of trade,\(^4\) bribery and corruption,\(^4\) extortion,\(^4\) food

is low reprobation toward many economic organizational offenses, there is a high degree of public concern for illegal actions with physical impact. Id. at 27. In addition, corporations contribute to the failure of public support for business-policing agencies by manipulating information about harmful impacts of organizational activity. Id. at 28.

32. Id. at 354 n.8.
35. Note, supra note 28, at 244-45. (Study showed that until 1969 only 536 criminally convicted "Sherman" offenders were subjected to incarceration and only 26 actually served).
37. Comment, supra note 18, at 1230.
38. Id.
39. See, Note, supra note 31, at 354. See also Note, Decisionmaking Models and the Control of Corporate Crime, 85 YALE L.J. 1091 (1976) (Models or corporate decision making are explored to elucidate how corporate law breaking takes place and how it can be controlled by the criminal justice system).
40. Mueller, supra note 33, at 22.
adulteration, environmental pollution price fixing, making false statements on government forms, and even manslaughter. However, the problems encountered in applying criminal 
sanctions to a collective corporate entity remain considerable. Inability to imprison an organization has led virtually to exclu-
sive reliance on fines as the primary sanction available for con-
icted corporations. This is problematic, for moderate fines do 
not seem to have an impact. However, more severe penalties, 
such as those provided for in the Procedures and Penalties Act of 
1974, flow through the corporation and have a greater effect on 
relatively blameless shareholders or consumers. Further, the 
criminal fine is inherently unsuited for the role of forcing corpora-
tions to disgorge illegal profits acquired through criminal activity. The challenge which remains is that of fashioning effective sanc-
tions to meet the demands of novel crimes committed by corporate 
entities while achieving the aims underlying criminal punishment.

Sentencing Philosophy As Applied To White Collar Crime

Criminal sentences aim at achieving four important goals—in-
capacitation, deterrence, rehabilitation, and retribution. The re-
tributivist justification for punishment is derived from a notion of 
moral culpability or "just deserts." The other three justifications 
can be seen as consequentialist in nature, with the aim of punish-
ment viewed as a means of obtaining certain social ends in the fu-

47. United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976).
48. See, e.g., State v. Lehigh Valley R.R. Co., 87 N.J. Eq. 7, —, 103 A. 685, 686 
(1917), aff'd, 92 N.J.L. 261, 106 A. 23 (1919).
49. Comment, supra note 18, at 1229-30.
52. The Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 
(1974), was implemented to toughen Sherman Act fines.
53. Coffee, supra note 51, at 386-87.
54. Note, Increasing Community Control over Corporate Crime, 71 Yale L.J. 
55. See, e.g., H. Hart, Punishment and Responsibility 1-28 (1968); S. Kadish & 
M. Paulsen, Criminal Law and Its Process 1-69 (3rd ed. 1975) (introduction to 
punishment philosophy); E. Van den Haag, Punishing Criminals (1975).
56. See, e.g., J. Feinberg & H. Gross, Philosophy of Law 500-514 (1975); A. Von 
Although seemingly in conflict, many commentators have harmonized retributivist and consequentialist goals. They recognize that the retributivist requirement of moral culpability limits the imposition of punishment to those who are deserving, while the effort to attain consequentialist benefits justifies the imposition of penal sanctions.

Incapacitation, as a consequentialist justification, seeks to prevent an allegedly dangerous criminal from engaging in predicted criminal conduct through preventive confinement. Deterrence seeks to inhibit criminal activity by providing detailed information of the penalties involved for violations of specific laws in an effort to transmit the message that criminal sanctions are not empty threats. The goals of retribution and deterrence are easily re-defined to apply to corporate defendants. Deterrence of corporate criminal behavior is the aim of statutory sanctions seeking to insure that the burdens of punishment are sufficiently unpleasant and certain to outweigh incentives to criminal behavior. Retribution, by requiring culpability, facilitates the selection of entities deserving of punishment.

Translating the goal of rehabilitation to fit corporate defendants presents a most novel and challenging task. The nature of the corporate entity renders it unamenable to traditional connotations of rehabilitation, which are seen as psychological and therapeutic in goal-orientation. The core concept of rehabilitation, however,—that of changing the character, attitudes and behavior of the convicted offender in an effort to rid society of such unwanted behavior—identifies the crucial objective of applying sanctions to corporate defendants. Still, rehabilitating a corporation presents an awesome and confusing task in light of the internal organization and operations which initially facilitated the commis-

57. Comment, supra note 18, at 1231.
58. Id. at 1232-33. See also, A. Von Hirsch, supra note 56, at 66-76 (imposing a penalty proportional to the offense requires an approximate determination of the gravity of blameworthiness of the offense).
64. Note, supra note 31, at 361.
sion of illegal corporate behavior.\textsuperscript{68}

\textit{The Federal Probation Act}

In enacting the Federal Probation Act\textsuperscript{69} (the Act),\textsuperscript{70} Congress recognized the need for greater latitude in determining appropriate criminal penalties.\textsuperscript{71} Congress was motivated by the need for a flexible vehicle that would allow individualized penalties and encourage criminal reform.\textsuperscript{72} Although the objective of the Act may have been rehabilitation,\textsuperscript{73} the expression of the goal is primarily for the benefit of society and only incidentally for the benefit of the accused.\textsuperscript{74}

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\item \textsuperscript{68} Note, supra note 31, at 361.
\item \textsuperscript{69} 18 U.S.C. § 3651 (Supp. 1982).
\item \textsuperscript{70} It has been posited that the roots of probation began in the Middle Ages where the benefit of clergy or the law of sanctuary provided a means of avoiding or postponing punishment. It is more likely that probation did not develop continuously or linearly, although various forerunners, such as judicial reprieve or releasing a prisoner on his own recognizance, can be traced throughout English and American judicial history as means of conditionally suspending sentences. John Augustus is credited with the first use of the term probation, when he befriended violators, bailed them out of jail, and provided them with supervision as early as 1841. In 1878, Massachusetts passed the first probation law. In 1880, the power of probation, previously held only by the mayor of Boston, was extended to the entire state and, in 1891, the law was extended to criminal courts. In 1900, only five states, Massachusetts, Missouri, Rhode Island, New Jersey and Vermont, had probation laws. However, by 1933 every state but Wyoming had juvenile probation laws and all but 13 states had adult probation laws. By 1950, only five states were without adult probation laws. Diana, \textit{What is Probation?}, cited in R. CARTER & L. WILKINS, PROBATION AND PAROLE 39-40 (1970). The first probation efforts were made on behalf of the young. For further information, see Chute, \textit{The Development of Probation in the United States}, cited in S. GLUECK, CRIMINAL JUSTICE IN AMERICA 225-37 (1933).
\item \textsuperscript{71} Note, supra note 18, at 296-97.
\item \textsuperscript{72} Roberts v. United States, 320 U.S. 264, 272 (1943); Burns v. United States, 287 U.S. 216, 220 (1932); United States v. Fultz, 482 F.2d 1, 3-4 (8th Cir. 1973).
\item \textsuperscript{73} Roberts v. United States, 320 U.S. 264, 272 (1943); Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980); United States v. Fultz, 482 F.2d 1, 2-3 (8th Cir. 1973); United States v. Ellenbogen, 390 F.2d 537, 543 (2nd Cir.), \textit{cert. denied}, 393 U.S. 918 (1968). \textit{See also} Korematsu v. United States, 391 U.S. 432, 435 (1943).
\item \textsuperscript{74} State \textit{ex rel.} Korematsu v. Skinner, 59 S.D. 68, 238 N.W. 149 (1931). The court stated: Laws permitting probation . . . are manifestations of a comparatively modern shift in criminological theory; the trend being away from the rule of so-called "strict law" which demanded a fixed and positive penalty for every crime and the infliction thereof in every case to which it might be applicable, and toward the theory that some degree of discretion should be vested in a judge, probation officer, or other body or board, permitting an adjustment of the penalty to the character of the particular criminal and the circumstances of his individual case. This latter method has come to be known to criminologists as "individualization of punishment," and its real foundation lies, not in the desire to deal kindly or charitably with an individual defendant, not in humanitarianism or sympathy, but primarily in the belief that the welfare of the state and of organized society will be better
The Act has a broad scope of authority. It grants the courts wide discretion in imposing probation and permits liberal construction of that power. This broad discretion extends to imposing various conditions of probation, thus enabling individualization of punishment and effectuation of the purposes of probation. The Act authorizes fines, restitution to the victims of a crime, and support for the dependants of the criminal as conditions of probation.

**ANALYSIS**

In *Anderson*, the government raised three issues in its appeal to the Eighth Circuit. First, the government argued that the conditions of probation listed in the Act are exclusive and thus a limitation on conditions which sentencing courts may impose. Second, it argued that the channeling of funds to private donees by the court was an unconstitutional infringement of executive powers. Finally, the government argued that there was an abuse of judicial discretion in imposing the conditions of probation because of the impossibility of rehabilitating corporate defendants.

**The Probation Act And Its Application To Corporate Entities**

The government argued that the conditions of probation listed in the Act are exclusive. The court, in *Anderson*, held that the terms enumerated by the Probation Act are not a limitation on proper probationary conditions, but a statutory attempt to eliminate doubt regarding the propriety of those terms particularly specified. The court based its interpretation on the language of the Act: "While on probation and among the conditions thereof, served by adjusting the treatment of the criminal to his character and the circumstances of his crime rather than to the mere nature and classification of the crime itself. Benefit to the individual criminal is incidental. It is a mere means to an end. The chief end is the welfare of society.

*Id.* at 73, 238 N.W. at 51.


77. *See, e.g.*, United States v. Chapel, 428 F.2d 472, 474 (9th Cir. 1970) (stating that a sentencing judge "is afforded the widest latitude in the imposition of condition."). *See also* United States v. Stine, 646 F.2d 839, 842 (3rd Cir. 1981); United States v. Merritt, 639 F.2d 254, 256 (5th Cir. 1981).


80. *William Anderson Co.*, 698 F.2d at 914.


82. *William Anderson Co.*, 689 F.2d at 914.

83. *Id.*
the defendant—may be required to..." Moreover, the court’s position is substantiated by case law which supports the proposition that the Act "lists some of the permissible conditions of probation, but it does not purport to create an exclusive catalogue." Conditions as unusual as banning the defendant from a particular avocation, forbidding a defendant from participating in any Irish organization, and requiring a defendant not to associate with known homosexuals, have been upheld as valid.

*United States v. Atlantic Richfield Co.* was the first case in which a corporation was subjected to the broad probationary powers of the federal criminal court system and where conditions of probation exceeded the enumerated provisions of the Act. As a condition of probation, the court demanded that the defendant implement and complete a program to handle oil spillage. In the event that the condition was not complied with, a special probation officer with the powers of a trustee would act under supervision of the court. The Seventh Circuit upheld the application of the Act to the corporate entity. The court based its opinion on: (1) the fact that other provisions of the criminal code make it clear that "defendant" may include corporations; and (2) that the Act applies to offenses for which "if suspension of the imposition of a fine to enable an individual to make restitution is appropriate...a similar suspension may well be suitable for corporate defendants in

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84. *Id.* at 913 (citing 18 U.S.C. § 3651 (Supp. 1982)).
86. United States v. Villarin Gerena, 553 F.2d 723, 727 (1st Cir. 1977) (requiring the defendant to resign from the police force); Malone v. United States, 502 F.2d 554, 555 (9th Cir. 1974) (defendant was convicted of unlawful exportation of firearms to the United Kingdom), *cert. denied*, 419 U.S. 1124 (1975); United States v. Kohlberg, 472 F.2d 1189, 1190 (9th Cir. 1973) (the defendant was convicted of mailing obscene matter). See also Note, *Limitations Upon Trial Court Discretion In Imposing Conditions of Probation*, 8 GA. L. REV. 466, 477-81 (1974); Note, *supra* note 85, at 181 (conditions of probation may lead to harsh restrictions of liberties cherished in a free society). See United States v. Smith, 618 F.2d 280, 282 (5th Cir.) (concluding that conditions must be reasonably related to defendant's rehabilitation), *cert. denied*, 449 U.S. 868 (1980).
87. 465 F.2d 58 (7th Cir. 1972).
89. 465 F.2d at 61.
90. *Id.* in *Richfield*, the court considered three issues: (1) whether the Act applied to corporations; (2) whether a defendant has the right to refuse probation and demand that sentence be imposed; and (3) whether the terms of probation imposed by the lower court were proper. The Seventh Circuit failed to resolve the second issue, but held the Act applicable to corporations. The court remanded the case, however, finding that the defendants would “not know when [the conditions] were satisfied.” *Id.*
appropriate cases as well." Following Atlantic Richfield courts have continued to sentence corporations, using the Federal Probation Act as a basis to do so.\footnote{91} The Tenth Circuit considered the sentencing of corporate defendants and the use of the Federal Probation Act in United States v. Prescon Corp.\footnote{93} The lower court sentenced the defendants to unsupervised probation, and ordered payment of fines. The fines were suspended under the Act on the condition that each defendant deposit sums of money into the court registry.\footnote{94} These amounts were appreciably less than the fines originally levied.\footnote{95} The deposited funds were to be disbursed "to such community agencies as selected by the Chief Probation Officer with the approval of the Court."\footnote{96} The court characterized the payments as "reimbursing money that this community is out."\footnote{97}

The government contended that the conditions of probation were not authorized by the Act.\footnote{98} The Tenth Circuit agreed. The court reasoned that the conditions were within the enumerated condition of restitution in the Act, and therefore had to be tested by the limitations on restitution which are stated in the Act.\footnote{99} According to the stated limitations, restitution is to be made to "aggrieved parties for actual damages or loss caused by the offense for which the conviction was had."\footnote{100} The court, relying on United States v. Clovis Retail Liquor Dealer’s Trade Association,\footnote{101} held that since payments were not made to victims and the recipients had no relationship to the crime committed, the conditions were invalid.\footnote{102} The court limited its discussion to the condition of restitution.\footnote{103} The court also stated that its opinion did not suggest

\begin{itemize}
  \item \footnote{91} Id.
  \item \footnote{94} Id. slip op. at 3.
  \item \footnote{95} Id.
  \item \footnote{96} Id.
  \item \footnote{97} Id.
  \item \footnote{98} Id. at 11.
  \item \footnote{99} Id. at 13.
  \item \footnote{100} 18 U.S.C. § 3651 (Supp. 1981).
  \item \footnote{101} 540 F.2d 1389 (10th Cir. 1976).
  \item \footnote{102} Prescon Corp., No. 82-1807, slip. op. at 13-16.
  \item \footnote{103} Id. at 12.
\end{itemize}
"that a sentencing judge does not otherwise have broad discretion reasonably related to protecting the public and rehabilitating the defendant."\textsuperscript{104}

Although the court in \textit{Prescon} failed to state directly whether its opinion denied the legality of all court-directed payments or only those made as restitution, the lower court chose the confining condition of restitution under which to impose the probationary terms.\textsuperscript{105} The court did not name recipients; rather, the money was deposited with the registry and was then designated for recipients to be named at a later date.\textsuperscript{106}

It should be noted that the district court's action in \textit{Anderson} differed significantly from that in \textit{Prescon}. The court in \textit{Prescon} employed the specific restitutious provision of the Probation Act, whereas the trial court in \textit{Anderson} did not. Furthermore, the court in \textit{Prescon} did not specify recipients in its sentencing, whereas the \textit{Anderson} Court did.

\textbf{The Constitutionality of Discretionary Power}

The government in \textit{Anderson} further argued that allowing federal district judges to "select donees for financial contributions"\textsuperscript{107} unconstitutionally infringed on the distribution of the "funds function" vested in the Executive Branch.\textsuperscript{108} The \textit{Anderson} court dismissed this argument summarily, holding that the constitutional questions raised by the government were without merit.\textsuperscript{109} The argument had been rejected previously in \textit{Nix v. James}\textsuperscript{110} and \textit{United States v. Baker}.

A constitutional attack on the broad discretionary powers afforded the courts by the Probation Act was first refuted in \textit{Nix v. James}.

\textit{In Nix}, the Ninth Circuit found that the Act was a remedial statute, and that "[i]n view of the liberal construction to which the statute is entitled, we cannot read into it a limitation on the power granted not written there by Congress."\textsuperscript{113}
United States v. Baker\textsuperscript{114} is the most recent decision to address the constitutionality of the broad probationary powers of sentencing courts. The Seventh Circuit reiterated the legislative intent embodied in the Act. The congressional intent places within the courts the "responsibility for balancing the competing interests of society and the individual offender, and determining which mode of correction will best accomplish the objectives of the Act."\textsuperscript{115} Congressional intent underlying the sentencing scheme guided the court, and in so doing fulfilled the constitutional requirements.\textsuperscript{116}

In Lichter v. United States,\textsuperscript{117} the Supreme Court noted that the delegation of broad discretion to administrative agencies may be necessary to effectuate congressional intent.\textsuperscript{118} Greater latitude is recognized where Congress grants to the courts broad discretionary power in the exercise of their constitutional roles.\textsuperscript{119} As Judge Learned Hand observed in Ying-Shing Woo v. United States,\textsuperscript{120} the legislature frequently intends to defer to the judiciary the appraisal of values at stake.\textsuperscript{121} The alternative to allowing and upholding the exercise of such broad discretion is the unfeasible task of requiring specificity for every contingency and every possible exercise of the court's discretionary authority.\textsuperscript{122}

In exercising their power to suspend sentencing, the courts have always utilized discretion in formulating conditions of probation. Setting probationary terms often has required the court to make independent decisions regarding the award of benefits.\textsuperscript{123}

\begin{footnotes}
\item 114. 429 F.2d 1344 (7th Cir. 1970).
\item 115. Id. at 1347.
\item 116. Id.
\item 117. 334 U.S. 742 (1948).
\item 118. Id. at 785:
\begin{quote}
It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. 'If Congress shall lay down by legislative act an intelligible principle... such legislative action is not a forbidden delegation of legislative power.'
\end{quote}
\item 119. 429 F.2d at 1347.
\item 120. 288 F.2d 434 (2d Cir. 1961).
\item 121. Id. at 435.
\item 122. Id. See also Sam v. United States, 385 F.2d 213, 215 (10th Cir. 1967) (upholding a statute attacked as an improper delegation to the judiciary of legislative power); Briggs v. United States, 226 F.2d 350, 352 (D.C. Cir. 1955) (upholding a law argued void for lack of standards).
\item 123. See, e.g., William Anderson Co., 698 F.2d at 911-12. See Brief for Appellant, supra note 8, at 8-9, where sentences of individuals found guilty of violating the Sherman Act were suspended and the defendants were required to donate time, money and services to charitable or public organizations. As noted in the Anderson opinion, the government did not object to these sentences where equally "arbi-
Judicial Discretion and Its Limitations

The government questioned the authority of the court to extend its discretion so far as to require defendants to pay money to entities selected by the defendants and approved by the court rather than to pay a fine to the United States Treasury. Further, the government charged that the alternate payment of money to a third party could not possibly serve to rehabilitate the defendant corporations. The Eighth Circuit held that the district court's terms were "in full accord with current penological philosophy," and that the carefully constructed sentences were not only valid but laudatory.

It is an understatement to say that the trial court has broad discretionary power to determine appropriate sentences for convicted criminals. Upon judgment, the trial court may suspend the imposition or the execution of a sentence. The discretion, however, is not derived from a common law power indefinitely to suspend a sentence. In Ex Parte United States (The Killits Case), the United States Supreme Court laid

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124. Brief for Appellant, supra note 8, at 12.
125. Id.
126. William Anderson Co., 698 F.2d at 913.
127. Id.
130. Ex parte United States, 242 U.S. 27, 44 (1916) (The Killits Case). Until The Killits Case in 1916, courts in different jurisdictions had adopted contradictory points of view on the question of an inherent common law judicial power to indefinitely suspend sentences. Those courts that adhered to the view of the existence of this power did so on the basis of the common law precedent of judicial reprieve. Courts rejecting this view did so arguing that indefinite suspension of sentences by the court constituted an encroachment on the Executive's prerogative of pardon and reprieve, and thus violated the separation of powers doctrine. United Nations, The Legal Origins of Probation, cited in R. Carter & L. Wilkins, Probation and Parole 3-10 (1970).
131. 242 U.S. 27 (1916). The accused pleaded guilty to an indictment for several counts of embezzling from a national bank of which he was an officer. The defendant was sentenced to five years imprisonment, the shortest term available under the statute. Thereafter, the court suspended the execution of sentence permanently, stating that the right to refuse to impose or execute statutorily-fixed sentences was an inherent discretionary judicial power. Id. at 37. The Supreme Court decisively refused recognition of inherent "probationary" powers on the basis that conceding the power would result in the destruction of the legislative power to fix punishment and the executive power to grant pardon or reprieve from punishment. Id. at 32.
to rest the then prevalent notion that judicial power inherently extended to set aside "plain legislative commands fixing a specific punishment for crime." This rejection by the Supreme Court of the common law power to suspend sentences indefinitely served as a stimulus to the enactment of statutes which expressly grant discretionary authority to the courts to suspend sentences and impose probation.

The Eighth Circuit, in Anderson, noted that the probationary authority of the courts is entirely statutory. The court relied on United States v. Fultz. In that case, the defendant's three year probation was revoked for a violation of its conditions, and the defendant was sentenced to a five year prison term. The defendant sought a correction of the prison term arguing that the probation term was a sentence, and thus resentencing violated the double jeopardy clause of the fifth amendment. The court rejected the defendant's argument and held that placing a defendant on probation clearly was not a sentence.

In Fultz, the Eighth Circuit differentiated between the imposition of traditional sentence terms and probation, where the sentence is suspended. The Anderson opinion clearly distinguished the charity provisions imposed by the lower court as terms of probation and not as sentences. The Eighth Circuit in Anderson upheld the sentencing court's broad general discretion and recognized the distinction between probation and sentencing.

The constitutional parameters of probation do require limitations upon the broad discretion of the court. The court, in Anderson, held that the standard for appellate review is abuse of discretion, and relied upon as authority for this proposition United States v. Alarik. In Alarik, the Eighth Circuit held that the granting of probation was within the trial court's discretion, and thus reviewable only upon abuse of that discretion. The test to

132. Id. at 42.
133. United Nations, supra note 130, at 10.
134. 698 F.2d at 912.
135. 482 F.2d 1 (8th Cir. 1973).
136. Id. at 2.
137. Id.
138. Id.
140. 698 F.2d at 913.
141. Id.
143. 698 F.2d at 912.
144. 439 F.2d 1349 (8th Cir. 1971).
145. Id. at 1351.
determine if probationary conditions are within the range of judicial discretion is whether the conditions are “reasonably related to rehabilitation of the offender and protection of the public.” Punishment is not to be the primary purpose of probation, although probationary conditions may have an incidental punitive effect.

In *Higdon v. United States*, the Ninth Circuit articulated a two-step process in applying the test for abuse of judicial discretion. The first step requires the court to enunciate that it imposed the conditions of probation to effectuate the goal of the Act, which is rehabilitation of the offender and protection of the public. In *Anderson*, the district court in its Sentencing Memorandum expressed its purpose of rehabilitation and deterrence.

The second step of the test requires a reasonable relation between the condition of probation and the rehabilitative purpose of the Act. This requirement is applied to determine whether the conditions are needlessly harsh, unduly restrictive of the defendant’s freedoms, or vaguely structured, lacking ascertainable

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147. Korematsu v. United States, 319 U.S. 432, 435 (1943); *Higdon v. United States*, 627 F.2d 893, 898 n.8 (9th Cir. 1980); United States v. Consuelo-Gonzalez, 521 F.2d 259, 266-67 (9th Cir. 1975); Copoer v. United States, 91 F.2d 195, 199 (5th Cir. 1973). *See also* United States v. Lancer, 508 F.2d 719, 731 (3rd Cir. 1975) (en banc).

148. 627 F.2d 893 (9th Cir. 1980).

149. *Id.* at 897.

150. *Id.*


Retribution, deterrence, incapacitation, and rehabilitation are the usually stated reasons for punishment. As applied to the cases before me, I accept the views . . . that rehabilitation is to be sought in reforming whatever been rationalized and militarized the practice of bidrigging to be acceptable behavior . . . . Several factors should be and have been explored in each case—the nature of the offense, the background and nature of the particular defendant, the probable (or possible) effect on each of the kind of people who will be touched by the sentence, and the likely efficacy of different kinds of sentences in reaching the appropriate purposes of sentencing . . . . The alternative sentences will be designed to be firm, specific, unpleasant for the defendants and constructive for them and others . . . . [They] will be tailored to the defendant’s culpability and financial condition, care being taken to preserve the ability of each individual or corporate defendant to continue as a viable participant in the business community. No monetary restitution to the State of Nebraska is likely to be within the sentences, because no agreement exists as to the exact amount of loss by the state.

*Id.*

152. *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980).

153. United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978); Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971); Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945).
standards to allow the probationer to know when the terms are satisfied.154

The government questioned the existence of the required nexus.155 The objection challenged the relation between the conditions and the goal of rehabilitation.156 The brief submitted by the government contended that:

The district court's belief that contributions to a charity or other persons or groups might be more rehabilitative for a corporate defendant than a fine is irrelevant ... a financial contribution, at least with respect to a corporation, is not more rehabilitative than a fine. A corporation is, of course, a legal fiction. It possesses no moral or ethical values. ... As a business entity it seeks to maximize its profits and pursues whatever policies it believes might satisfy this objective. ... Whether the corporation pays the money to the Treasury in the form of a fine, or to a local charity in the form of a contribution, the only effect on the corporation will be the depletion of its treasury.157

In Anderson, the court's response to the government's charge that the conditions of probation imposed by the district court were ineffectual in reforming corporate defendants was that the sentence illustrated the effectiveness of dramatic punishment.158 Sentences imposing public disgrace were noted by the court to have been an historically useful method of deterrence.159 The district court's sentencing was held by the Eighth Circuit to have had a deterrent effect on the corporate defendants because of the "painful publicity" which they had received.160 Moreover, the court held that the contention that the corporate entities were incapable of rehabilitation "smacks of medieval antiquarianism" in that it ignores the fact that the decision making processes are made through human agents. The court determined that these processes can be effectively affected. Insistence on the fiction of a corporation as a bloodless entity was held by the court to be a fiction in itself.161

155. See generally Brief for Appellant, supra note 8, at 12.
156. Id. at 22-23.
157. Id.
158. 698 F.2d at 913.
159. Id. Old time punishments such as ducking stools, pillories, stocks, whipping posts, scarlet letters, "wearing papers," and public penance in a white sheet were punishments which the court noted might seem cruel today, but were effective means of deterring further criminal activity. Id.
160. Id.
161. Id. at 914.
The government's position in *Anderson* was surprising in light of its stance in *United States v. Mitsubishi International Corp.*\(^{162}\) In *Mitsubishi*, three corporate defendants were indicted and pled guilty to numerous counts of violating the Elkins Act.\(^{163}\) The maximum fine was imposed as a penalty on each defendant, but thereafter, all but one thousand dollars of the fine for each count was suspended, and each defendant was placed on probation for three years.\(^{164}\) The terms of probation required that each corporation loan a company executive for one year to the National Alliance for Business in its Community Alliance Program for Ex-Offenders (CAPE), and make a contribution of ten thousand dollars for each offense to be used for that program.\(^{165}\) The brief submitted by the government in *Mitsubishi* strongly supported both conditions, stating:

To suggest, as do defendants, that community service would be of no rehabilitative or deterrent value, is quite presumptuous. That suggestion would be valid, we suggest, only if defendants were conclusively proven not to be in need of rehabilitation or if it was unreasonable to assume that corporate concern for compliance with the law would be encouraged by corporate community service. The sentencing court's determination against defendants on those points was not an abuse of discretion.\(^{166}\)

Although the issues raised in *Mitsubishi* and *Anderson* were identical, the government's argument in *Anderson* directly contradicted its position in the earlier *Mitsubishi* case.\(^{167}\) The central issue in both the *Mitsubishi* and *Anderson* cases was whether a corporate defendant is amenable to rehabilitation.\(^{168}\) It was with regard to this crucial issue that the government's change of position was most notable.

**CONCLUSION**

The *Anderson* court wholeheartedly supported the novel approach taken by the district court to stem the growing and difficult
problem of corporate criminality. The ability of the criminal justice system to adapt conventional sentencing tools to the "new" organizational defendant while fulfilling the goals of penological philosophy was lauded by the Eighth Circuit as "creative, innovative, and imaginative." Most interestingly, the court staunchly supported the sentencing judge's position that the corporate entity was capable of rehabilitation. The court accepted the position maintained by Judge Urbom and by the defendants that a corporation is an association of people capable of being changed.

Controversy has raged over the "rehabilitativeness" of the corporation and the ability of the criminal justice system to deal with corporate crime. One position is exemplified by the stance of Judge Urbom and accepted by the Anderson court. Proponents of the use of "alternative" sentencing for corporations often admit honestly the dilemma which they face in trying and sentencing regulatory offenses which are not common law crimes. The chief problem is that the guilt or innocence of a defendant corporation can often only be sorted out through a search of a melee of complicated expert testimony of economists. The criminal justice system did not develop from experiences with sophisticated regulatory concepts, and thus the sentencing judge is faced with a difficult case. In further support of "alternative" sentencing is the view that the fear of public disclosure, indictment, prosecution, and the cost of defending against the charges is the most effective deterrent in corporate criminal cases. These basic assumptions have already led to the wide use of alternatives to the incarceration of individual defendants, such as community service.

169. 698 F.2d at 913.
170. Id.
171. Id. at 914.
172. Brief for Appellant, supra note 8, at 11.
173. See generally Comment, supra note 18 at 1227; Note, supra note 18, at 294; Mueller Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21 (1957). See also Note, supra note 31 at 353; Note, Decisionmaking Models and Corporate Crime, 85 Yale L.J. 1091 (1976).
174. Parsons, Sentencing in Antitrust Cases, 47 Antitrust L.J. 717, 718-21 (1978) (Judge Parsons, the chief judge in the Alton Box Board case, 1977-1 Trade Cas. (CCH) ¶ 61, at 336 (N.D. Ill.), speaking in a panel discussion at the 26th annual meeting of the Section of Antitrust Law of the American Bar Association of the concerns and possible solutions of a judge faced with trying and sentencing antitrust violators).
175. Parsons, supra note 174, at 719.
176. Id.
178. Although a discussion of alternative sentencing of individual white collar criminals is beyond the scope of this article, its expanded use has been one of the most widely used and discussed reforms in the criminal justice system in the past.
Various new methods of punishment for corporations have been suggested by commentaries, including the equity fine, judicially mandated restructuring of internal corporate processes, civil fines imposed on a strict liability or negligence basis and percentage fines. These proposed reforms, however, generally require legislative action.

Use of probation to impose a "publicity sanction" is a novel solution capable of being implemented by the courts alone, based, as is alternative sentencing for individuals, on the widely accepted view that stigmatization and adverse publicity are shunned by the corporate defendant. In imposing publicity sanctions, the sentencing court is required to walk a fine line through complex legal issues, because orders to contribute to charities or give community restitution may be of doubtful validity. The courts can and have, however, as they did in Anderson and Mitsubishi through the use of the Probation Act, induce or accept charitable contributions by convicted corporations as an alternative to severe cash fines. Again, the central issue of the controversy arises—how effective are these sanctions in rehabilitating a corporate entity?

The contrary position stands in stark relief to the opinion of the Anderson court. This position vehemently denies the efficacy of these measures and points to empirical evidence of cost-benefit analysis of criminality engaged in by some corporations as proof that legal entities are unaffected, in the main, by criminal sanctions in whatever form.
There is no concrete data to support either position regarding the "rehabilitativeness" of the corporate entity. The controversy remains centered at a basic level where there is divergence between a hopeful view of corporations as conglomerates of responsive individuals amenable to the forceful hand of publicity, and a cynical outlook on the corporation as a bloodless, profit-maximizing entity incapable of response to any but monetary stimuli in a dollar-for-dollar decision making analysis.

The issues the Eighth Circuit addressed in *Anderson* focused on fundamental assumptions inherent in the criminal justice system. Those issues questioned the philosophy of punishment, the system of penal sanctions, and the reach of the courts in fashioning sentencing. The *Anderson* court, with simple clarity, affirmed the district court's notion that principles of punishment, whose birth and growth contemplated individual defendants, were flexible and appropriate when applied to corporate wrongdoers.

The central issue of this case and the crux of the current controversy—the "rehabilitativeness" of corporations—was resolved positively in *Anderson*. The Eighth Circuit voiced its support of the district court's imposition of novel probation conditions on corporate defendants, thereby accepting the assumption that corporations can indeed be rehabilitated.

*Priscilla J. Gottsch—’84*