

Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing

As corporate wrongdoing has emerged as a major problem in American society,¹ courts,² legislatures,³ and commentators⁴ have increasingly recognized that corporations may be held liable for committing virtually any crime.⁵ Companies have been convicted of a wide range of

1. See, e.g., R. NADER, M. GREEN, & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 30-32 (1976) (discussing statistical evidence of growing "corporate crime wave," including crimes committed by leading corporations in diverse industries); Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 40 (1978) (costs of corporate crime "staggering"); Taubman, *U.S. Attack on Corporate Crime Yields Handful of Cases in 2 Years*, N.Y. Times, July 15, 1979, at 1, 29 (government estimates total costs of corporate and white-collar crime exceed \$200 billion annually).

2. The Supreme Court first recognized the criminal liability of corporations in *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909). That case established the two elements necessary for the imposition of corporate liability: the acts incurring liability must have been done on behalf of the corporation, and they must have been done by an agent of the corporation acting within the scope of his authority. *Id.* at 494-95. Subsequently, standards of liability for corporate defendants have been variously phrased. See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1246-51 (1979) [hereinafter cited as *Developments*]; Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091, 1093-95 (1976). See generally L. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969) (discussing history and decline of conceptual and pragmatic barriers to corporate liability); Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957) (same).

3. Many current and proposed statutes explicitly provide for corporate criminal liability. See, e.g., DEL. CODE ANN. tit. 11, § 281 (1974); N.Y. PENAL LAW § 20.20 (McKinney 1975); MODEL PENAL CODE § 2.07 (P.O.D. 1962). Explicit provision for such liability is also made in the most widely discussed Senate version of the proposed Federal Criminal Code revision, the Criminal Code Reform Act of 1978, see S. 1437, 95th Cong., 2d Sess. § 402 (1978), reprinted in *XIII Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 9485-9792 (1977) [hereinafter cited as S. 1437], and in the House version of the bill, see H.R. 6869, 95th Cong., 1st Sess. § 402 (1977) [hereinafter cited as H.R. 6869]. See 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 214-15 (1970) (comparing provisions for corporate criminal liability in various current and proposed statutes) [hereinafter cited as WORKING PAPERS]. Corporate liability for any offense for which an individual may be held criminally liable under the current Federal Criminal Code is implicitly authorized by a provision defining "persons" as used throughout the Code to include "corporations, companies, associations," and others unless the context indicates otherwise. 1 U.S.C. § 1 (1976).

4. See, e.g., 1 WORKING PAPERS, *supra* note 3, at 167 (applicability of federal criminal statutes to inanimate legal entities such as corporations and partnerships well established); Mueller, *supra* note 2, at 22 ("[T]he law has rapidly moved to the stand that a corporation can be guilty of most, if not all, crimes.")

5. One of the few crimes for which there remains any doubt whether corporations may be held liable is manslaughter. Compare *State v. Lehigh Valley R.R. Co.*, 94 N.J.L.

serious criminal offenses in recent years,⁶ and government regulation of corporations has come to rely more and more on criminal prosecutions.⁷

Despite the growing importance of these prosecutions, neither courts, legislatures, nor commentators have seriously addressed the question of corporate sentencing.⁸ The sentences imposed in virtually all cases have been fines,⁹ and judges and critics alike have repeatedly asserted that a fine was the only sentence that could be imposed on a convicted corporation.¹⁰ Proposals for sentencing reform have centered exclusively on various means of imposing more severe fines.¹¹

This Note argues that fines fail to take account of the significant

171, 111 A. 257 (1920) (manslaughter indictment upheld, corporation fined upon plea of *nolo contendere*) with *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961) (manslaughter indictment quashed, corporation held not "person" within meaning of pertinent statute). There has been an increase in such prosecution in recent years. *See, e.g.*, *State v. Ford Motor Co.*, No. 5324 (Ind. Super. Ct., filed Sept. 13, 1978), *discussed in* N.Y. Times, Nov. 2, 1978, at 58 (Ford Motor Co. indicted for reckless homicide); N.Y. Times, July 10, 1979, § B, at 1 (indictment charging Warner-Lambert Co. with manslaughter and criminally negligent homicide reinstated by New York state appellate court). *See generally* Note, *Corporate Homicide: A New Assault on Corporate Decisionmaking*, 54 NOTRE DAME LAW. 911 (1979).

6. Crimes of which corporations have been convicted include food adulteration, *see, e.g.*, *United States v. Park*, 421 U.S. 658 (1975); environmental pollution, *see, e.g.*, *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); price fixing, *see, e.g.*, *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); bribery, *see, e.g.*, *United States v. Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975), *aff'd sub nom.* *United States v. Metro Management Corp.*, 541 F.2d 284 (7th Cir. 1976); conspiracy, *see, e.g.*, *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941); and making false statements on government forms, *see, e.g.*, *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976). *Cf.* I WORKING PAPERS, *supra* note 3, at 167-73 (collecting cases).

7. *Developments, supra* note 2, at 1229; *see* Taubman, *supra* note 1, at 1 (lack of manpower and expertise has hampered government's attempts to prosecute corporate crimes, particularly in cases involving large corporations).

8. *See* I WORKING PAPERS, *supra* note 3, at 184-85 (federal statutes authorizing corporate fines and judicial decisions applying them seem to be based on premise that corporation can be deterred or coerced just as individuals can); C. STONE, *WHERE THE LAW ENDS—THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 35-37 (1975) (law has responded to growth of corporations simply by transferring theories and sanctions previously applied to individuals to corporations).

9. The only exceptions appear to be six cases in which a corporation was placed on probation. *See* note 92 *infra*.

10. *See, e.g.*, *United States v. A & P Trucking Co.*, 358 U.S. 121, 127 (1958) ("As in the case of corporations, the conviction of the [partnership] entity can lead only to a fine levied on the firm's assets."); Hechtman, *Practice Commentary*, N.Y. PENAL LAW § 80.10 (McKinney 1975) ("When a corporation is convicted of an offense, the only penal sanction that can be used is a fine."); McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative*, 46 U. CIN. L. REV. 989, 993 (1977) ("the fine is virtually the only sanction which may be imposed against the entity itself"); Note, *supra* note 5, at 922 ("fines are the only possible penalty").

11. *See, e.g.*, Davids, *Penology and Corporate Crime*, 58 J. CRIM. L.C. & P.S. 524, 530 (1967); Note, *Increasing Community Control Over Corporate Crime: A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 291 (1961).

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novel qualities of institutional crime,¹² thereby frustrating the goals that corporate criminal liability is intended to serve. Part I identifies two organizational features central to the operation of large corporations, and derives from them a concept of "structural crime." Part II defines the goals that sentences imposed upon large corporations should serve, analyzing in particular the possibility of rehabilitating a complex organization, and argues that fines are inherently unsuited to achieving these objectives. Part III concludes that sentences ordering limited internal restructuring of the corporate processes whose failure led to a violation can often achieve these goals more efficiently, and proposes that such interventions be imposed in appropriate cases as conditions of a term of corporate probation.

I. The Unique Qualities of the Corporate Criminal

A corporation, to a lawyer, is an artificial entity possessing only those formal qualities prescribed by law. To a student of organizational behavior, by contrast, a corporation is a dynamic system of interacting processes, with an internal "life" that can exert a dramatic influence on its personnel. Each of these perspectives identifies different characteristics of a corporation that are of critical importance in understanding the nature of corporate crime and in determining appropriate legal responses to it.

A. *Legal Structure: The Separation of Ownership and Control*

In small or closely held companies, controlling stockholders exercise direct control over all significant operational decisions.¹³ In large,

12. This Note focuses on corporations because of the number and seriousness of criminal problems that their activities have generated, but its thesis applies in most respects to large institutions generally. First, institutions other than corporations may be held criminally liable. See *United States v. A & P Trucking Co.*, 358 U.S. 121, 123-27 (1958) (partnership may be held criminally liable); cf. 1 WORKING PAPERS, *supra* note 3, at 165-66, 173-76 (unincorporated associations, such as unions and trade associations, should be subject to same rules of criminal liability as corporations; government bodies and agencies might be exempted); MODEL PENAL CODE § 2.07(3)-(4) (P.O.D. 1962) (suggesting criteria for criminal liability of unincorporated associations). Second, many large noncorporate institutions share the formal and organizational characteristics that make possible the occurrence of structural crimes, primarily management by a separate, professional corps of managers and a complex and diffuse decisionmaking system. See pp. 356-59 *infra*; cf. 1 WORKING PAPERS, *supra* note 3, at 182 n.58 (defining "corporation" as used therein to include "all types of artificial entities, including partnerships and other unincorporated associations, in which ownership and operation are divided.")

13. See R. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 46-47 (1945); Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 1, 53-59 (1969).

publicly held companies, on the other hand, the power to control virtually every aspect of corporate operations is held by managers with little or no ownership interest in them,¹⁴ while stockholders are relatively powerless.¹⁵

Two results of this separation suggest that stockholders or market forces may be unable to provide effective controls on corporate acts and may be unable to prevent much corporate crime. First, those rights that stockholders can enforce relate almost entirely to intracorporate relationships,¹⁶ while the corporation's liability for criminal offenses is limited to acts committed in furtherance of the financial interests of the company as a whole.¹⁷ As a result, managers have virtually complete control over those decisions that might generate corporate criminal liability.¹⁸

Second, while stockholders have as their major interest the maximization of company profits, managers in large corporations make their decisions in response to a variety of other motivations as well.¹⁹ As a result, managers will be led to make decisions systematically at variance with stockholders' interests,²⁰ and stockholders will be unable

14. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* at XIX-XXX, 78-84 (rev. ed. 1968); R. GORDON, *supra* note 13, at 23.

15. See, e.g., 1 *The Role of the Shareholder in the Corporate World: Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 2 (1977) (statement of Sen. Metzenbaum) (of 111 shareholder proposals voted on by 80 corporations in first five months of 1977, none passed); 1 *WORKING PAPERS*, *supra* note 3, at 189 (shareholders in large companies cannot, in practice, control or influence managers); *Developments*, *supra* note 2, at 1242 ("[I]n any but small, closely held corporations, the average stockholder wields no actual influence over the decisions of even the highest-placed executives.").

16. See Eisenberg, *supra* note 13, at 11-13, 26 (stockholders entitled to vote only on matters of corporate structure). But see Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 *COLUM. L. REV.* 388, 398 (1977) (some of shareholders' legal rights within corporations have been made meaningful).

17. See *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962); *United States v. Gibson Products Co.*, 426 F. Supp. 768 (S.D. Tex. 1976).

18. Cf. 1 *WORKING PAPERS*, *supra* note 3, at 188-89 (shareholders almost never in position to participate in conduct constituting offense by corporation).

19. See, e.g., J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 116-18 (3d ed. 1978) (especially in corporations with some market power, corporate "technostructure" responds to many goals other than profit maximization); R. GORDON, *supra* note 13, at 305-07 (assumption of profit maximization at best an approximation; as competitive economic pressures lessen for large companies, executives' decisions depend increasingly on personal motivations and organizational dynamics). Commentators who assume that corporations "carefully" profit maximize and violate the law "only if it appears profitable," see *Developments*, *supra* note 2, at 1365, ignore these factors.

20. See C. STONE, *supra* note 8, at 36-39 (given "satisfactory" profits, managers seek personal security and benefits, and corporate expansion and prestige, rather than maximum profits); Note, *The Conflict Between Managers and Shareholders in Diversifying Acquisitions: A Portfolio Theory Approach*, 88 *YALE L.J.* 1238, 1239-44 (1979) (differences in risks and benefits between managers and stockholders lead to systematic conflicts of interest).

to control these decisions effectively. Not only are stockholder controls over management weak in general,²¹ but stockholders are unable to identify managers responsible for particular decisions.²²

B. *Organizational Structure: The Diffusion of Managerial Decisionmaking*

The corporation may also be viewed, not as a legal fiction, but as a sociological system that can critically influence the people who comprise it, particularly its decisionmakers.²³ Analysts of organizational behavior have repeatedly noted that bureaucratic forces, institutional routines, and group decisionmaking are critical to the management of large corporations.²⁴ Moreover, companies develop internal norms and goal structures that can shape the values and actions of their managerial personnel.²⁵

In addition to these sociological factors, large companies have an inherent organizational complexity that tends to diffuse and to obscure individual responsibility for corporate actions.²⁶ Two related corporate processes play a particularly crucial role in this diffusion. Internal control systems aim to ensure that plans established by senior officials are carried out according to instructions,²⁷ while internal communication systems are designed in part to ensure that information about the im-

21. See p. 356 *supra*.

22. See C. STONE, *supra* note 8, at 45; *Developments, supra* note 2, at 1368.

23. See H. SIMON, *ADMINISTRATIVE BEHAVIOR* 102-03 (1947) (organization influences decisions by specializing responsibilities and by establishing standard operating procedures); C. STONE, *supra* note 8, at 1-3 (corporation viewed as legal phenomenon has different implications for social policy from corporation viewed as sociological entity). See generally D. CHAMPION, *THE SOCIOLOGY OF ORGANIZATIONS* 24-59 (1975) (reviewing various models of organizational behavior); F. LUTHANS, *ORGANIZATIONAL BEHAVIOR* 113-87 (1973) (same).

24. R. GORDON, *supra* note 13, at 99 (prevalence of group, instead of individual, action a striking characteristic of management organization in large corporations); see, e.g., H. LEAVITT, *MANAGERIAL PSYCHOLOGY* 328-41 (4th ed. 1978) (organizational structure critically important in shaping behavior and decisions of managers); H. SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL* 241-73 (1957) (bureaucratic forces and institutional routines highly influential in organizational decisionmaking). Commentators who assume a unitary, wholly rational model in which corporations always "decide" or "choose" to violate the law, see, e.g., *Developments, supra* note 2, at 1365, fail to account for these realities.

25. See, e.g., M. CLINARD & R. QUINNEY, *CRIMINAL BEHAVIOR SYSTEMS* 213 (2d ed. 1973) ("Lawbreaking can become a normative pattern within certain corporations. . . ."); E. SUTHERLAND, *WHITE COLLAR CRIME* 234-56 (1949) (criminal behavior by corporate officials occurs in contexts in which attitudes and procedures encourage such actions).

26. Note, *supra* note 2, at 1091; see R. GORDON, *supra* note 13, at 46-47 (authority and decisionmaking divided many ways in large corporations); *Developments, supra* note 2, at 1243 (criminal acts of modern corporation result not from isolated acts of single agent, but from complex interactions of many agents in bureaucratic setting).

27. See F. LUTHANS, *supra* note 23, at 257-65 (discussing aims, elements, and means of evaluating internal corporate control systems).

plementation of programs returns to the planners.²⁸ Gaps in either of these two processes can make an ascription of responsibility for corporate acts to particular individuals difficult or impossible: the delegation of decisional or supervisory duties from higher management downward through several levels and outward across several divisions may fail to account for certain necessary responsibilities,²⁹ while the transmission of information back up through an equally complex hierarchy may fail to provide adequate processing of potentially critical information by appropriate officials.³⁰

This combination of organizational complexity and obscured individual responsibility gives rise to the possibility of a corporation committing what might be called "structural crimes,"³¹ instances in which a corporation commits a criminal offense but no criminally culpable individual can be identified.³²

28. Planners need information both to make initial decisions and to follow up on the implementation of decisions. See R. GORDON, *supra* note 13, at 75-76 (decisionmaking in large organizations involves both downward delegation of responsibility and upward transmission of information); H. SIMON, *supra* note 23, at 123-71 (organization transmits decisions downward through systems of authority and influence, and provides channels of communication in all directions to transmit information necessary to decisions).

29. See B. HODGE & H. JOHNSON, *MANAGEMENT AND ORGANIZATIONAL BEHAVIOR* 148-58 (1970) (importance of corporate communications system to effective decisionmaking); L. PORTER, E. LAWLER, & J. HACKMAN, *BEHAVIOR IN ORGANIZATIONS* 262-70 (1975) (potential for dysfunction persistent in organizational control structures).

30. See, e.g., J. LITTERER, *THE ANALYSIS OF ORGANIZATIONS* 498-502, 547-48 (2d ed. 1973) (discussing some major causes of "noise" or errors in organizational communication systems); C. STONE, *supra* note 8, at 199-227 (flaws in corporate "information net" and "decision process" crucial to occurrence of corporate offenses).

31. A concept similar to that of structural crime has been advanced in several recent analyses of the appropriate standard for holding a corporation criminally liable. Under one proposal, a corporation would be presumed liable for crimes committed on its behalf by agents acting within the scope of their authority, but could rebut that presumption by proving "that it, as an organization, exercised due diligence to prevent the crime," that is, that "reasonable safeguards designed to prevent corporate crimes had been developed and implemented, including regular procedures for evaluation, detection, and remedy." *Developments, supra* note 2, at 1257-58. Other approaches have focused on the importance of organizational factors in corporate decisionmaking, see Note, *supra* note 2, at 1100-05, or on the importance of holding corporate officials liable for failures in supervision, see 1 *WORKING PAPERS, supra* note 3, at 186-88.

However, none of these commentaries has recognized the implications of such an analysis for corporate sentencing: as standards for imposing liability on corporations move increasingly toward reliance on structural features, the number of instances in which it is desirable to have a sentence responding directly to internal failures will increase, and the importance of such reform in those cases will grow. Thus, when these analyses continue to urge exclusive reliance on fines as a sentence for convicted corporations, see, e.g., *Developments, supra* note 2, at 1366, they ignore at the remedy stage the very elements identified as critical at the liability stage. Furthermore, the fact that at least one of these analyses ignores the crucial role of organizational dynamics and managerial incentives in corporate decisionmaking, see notes 19 and 24 *supra* (criticizing *Developments* analysis), suggests that the kind of due diligence acceptable under such an analysis would fail to ensure that sufficiently reliable and extensive structural reform would be undertaken.

32. No culpable individual can be identified in many instances in which the criminal liability of the corporation is clear. See, e.g., *United States v. American Stevedores, Inc.*,

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The occurrence of a structural crime may reflect either of two underlying patterns. In one class of cases, no individual can be convicted because no one has acted or failed to act in such a manner that personal criminal liability is warranted.³³ These situations involve "good faith" failures: although there may be negligence on the part of some corporate officials, no individual has acted deliberately to further commission of an offense. In an organizationally complex corporation, with multiple divisions of responsibility and layers of authority, such cumulative individual inadvertence alone can generate criminal violations by the corporation.³⁴

In the second class of cases, no individual officials can be convicted despite elements of bad faith or intentional misconduct by some.³⁵ If after diligent investigation by prosecutorial authorities the guilt of such individuals cannot be demonstrated, it must be the case that structural elements in the company have permitted culpable parties to shield their guilt. As in the first class of cases, offenses of this type may occur because of deficiencies in the systems for transmitting information or for delegating responsibility in a large and complex company.³⁶

310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963) (conviction of corporation for tax evasion not inconsistent with acquittal of principal officers, directors, and shareholders on same charge); *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950, 953-54 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959) (conviction of corporation not precluded by acquittal of corporate president of same offense).

33. Under most current statutes, an individual must be found to have been actively responsible for the criminal acts of an organization in order to be held personally criminally liable. See 1 WORKING PAPERS, *supra* note 3, at 183-85. However, standards for imposing criminal liability on individual officials appear to be evolving toward greater imposition of affirmative obligations. See *United States v. Park*, 421 U.S. 658, 670-73 (1975) (corporate president held criminally liable under statute imposing affirmative obligations); 1 WORKING PAPERS, *supra* note 3, at 186-88 (discussing recent statutes and proposals that impose individual liability for ratifying or failing to prevent corporate offenses). *But see Criminal Code Revisions Changed Under Business Lobby Pressures*, *Legal Times of Washington*, June 25, 1979, at 7 (provisions imposing liability for "reckless failure to supervise" likely to be dropped when proposed federal criminal code revision reintroduced in Congress).

34. Such negligence may occur in the design of the relevant corporate operating procedures, in a failure of oversight regarding procedures generating a potential for criminal offenses, or in a failure to respond adequately to danger signals in a particular factual situation. For an example of such a phenomenon in an incident that has not as of this writing led to any criminal proceedings, see *N.Y. Times*, July 20, 1979, at 1 (manufacturer's engineers all failed to take action on memoranda suggesting problems that eventually materialized at Three Mile Island nuclear facility, on assumption someone else would do so).

35. Juries sometimes convict a corporation and not individuals even when the guilt of the individuals seems at least as certain as that of the corporation. See, e.g., *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (corporation convicted; "We can not understand how the jury could have acquitted all of the individual defendants."); Note, *supra* note 2, at 1096 n.27 (citing cases). *But see United States v. Dotterweich*, 320 U.S. 277, 279 (1943) (upholding conviction of corporate president by jury that acquitted corporation of same offense).

36. See pp. 357-58 *supra*. Actual examples of this class of cases are difficult to identify, since the successful obfuscation of individual guilt makes these cases appear to be in-

Each of these structural features is inherent in the organization of a large corporation; thus, any attempt to prevent or respond to crimes committed by such companies must take account of them if it is to succeed.

II. A Critique of Current Sentences: The Inadequacy of Fines

Both the current approach to sentencing convicted corporations and proposals for sentencing reform have centered almost exclusively on fines. Assessing the effectiveness of fines requires first an analysis of the appropriate goals of corporate sentencing; measured against these objectives, fines are shown to be inadequate because of their failure to take any account of the unique structural qualities of convicted corporations.

A. *A Conceptual Framework: Sentencing Goals and the Corporation*

Criminal sentences are widely agreed to serve several important goals, including punishment of culpable parties, deterrence of potential criminals, and rehabilitation of offenders.³⁷ These goals, however, have traditionally been translated into specific sentencing policies only with respect to individual offenders.³⁸ An adequate response to corporate crime, by contrast, requires sentencing objectives that respond to the unique structural features of corporate crime.

Thus, these goals must be redefined to apply to corporations. First, since entities as such cannot be punished, retribution in the context of

stances of the first class. However, courts sometimes suggest that they believe a case to be of this latter class nonetheless. *See, e.g.,* Pevely Dairy Co. v. United States, 178 F.2d 363, 370-71 (8th Cir. 1949) (conviction of company combined with acquittal of all individuals calls into question correctness of verdict); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929) ("How an intelligent jury could have acquitted any of the [individual] defendants we cannot conceive.")

37. Goals essentially equivalent to retribution, deterrence, and rehabilitation are a central feature of proposed criminal code revisions. *See* S. 1437, *supra* note 3, at § 101(b); H.R. 6869, *supra* note 3, at § 101(b); *cf.* NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 2 (1971) (comment discussing goals of such statutes) [hereinafter cited as FINAL REPORT]. Many commentators have advocated the same goals. *See* P. O'DONNELL, M. CHURGIN, & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 43-49, 53-54 (1977); W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 61-63, 71-80 (7th ed. 1967); *cf.* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 401-02 (1958) (social purposes underlying system of criminal law necessarily complex and any single purpose taken alone would be inappropriate).

38. *See* C. STONE, *supra* note 8, at 1-2, 8-10; *cf.* *Developments*, *supra* note 2, at 1300 (sanctions used are decisive to effectiveness of any scheme of corporate regulation). For a general attempt to apply "consequentialist and retributive theories of punishment" to corporate crime, see *id.* at 1231-39.

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corporate sentencing must be directed only at individually culpable parties.³⁹ Second, deterrence of corporate crime requires that sentences impose burdens on those managers with responsibility for operations that may generate corporate crimes in the future,⁴⁰ and that these burdens be sufficiently unpleasant⁴¹ and certain⁴² to outweigh any incentives to perform acts that facilitate corporate crime.

Translating the third goal of the criminal law, rehabilitation, into corporate sentencing objectives presents the most novel and challenging task of redefinition,⁴³ in part because the concept of rehabilitation in traditional usage is heavily laden with psychological, therapeutic, and humanitarian connotations.⁴⁴ The core of the concept, however, identifies a goal that should be a crucial objective of all corporate sentences: changing an offender's behavior so as to reduce the probability of future violations by that offender.⁴⁵ Rehabilitating a corporation requires that its internal operations and procedures be restructured in such a way as to foster future compliance with the law; institutional elements that facilitated the commission of an offense must be modified so that they operate subsequently to prevent violations.⁴⁶

39. See Note, *supra* note 11, at 282 (punishment is peculiarly reserved for individuals, and cannot meaningfully be imposed on legal form).

40. "Deterrence" indicates here the attempt to discourage similar violations by other parties or in the society as a whole, sometimes referred to as "general deterrence". See F. ZIMRING & G. HAWKINS, *DETERRENCE* 158-60 (1973). "Specific deterrence," the prevention of future violations by a particular offender, is achievable in the corporate context as an element of corporate rehabilitation, or through a sentence requiring the suspension of particular corporate activities.

41. See C. BECCARIA, *ON CRIMES AND PUNISHMENT* 62-64 (1963); F. ZIMRING & G. HAWKINS, *supra* note 40, at 172-97.

42. See F. ZIMRING & G. HAWKINS, *supra* note 40, at 158-67; Antunes and Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN L. 145, 157-58 (1973).

43. See Comment, *Is Corporate Criminal Liability Really Necessary?* 29 Sw. L.J. 908, 919 (1975-76) ("rehabilitation" is not generally thought of in connection with corporations"); ABA Criminal Code Revision Committee, Report with Recommendations 16 (January 1979) (on file with *Yale Law Journal*) (many traditional aspects of rehabilitation difficult to apply to corporations).

44. See, e.g., K. MENNINGER, *THE CRIME OF PUNISHMENT* 253-66 (1968) (therapeutic attitudes and psychological motivations crucial to successful rehabilitation); Weihofen, *Punishment and Treatment*, in *THE LAW OF CRIMINAL CORRECTION* 665-67 (S. Rubin ed. 1963) (rehabilitative ideal motivated by humanitarian considerations, belief in human dignity, and similar factors).

45. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 53-58 (1968); see Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226, 226 (1959) (rehabilitative measures should be designed primarily to change offender's behavior in interest of societal protection).

46. See Fisse, *Responsibility, Prevention, and Corporate Crime*, 5 N.Z.U. L. REV. 250 (1973) (prevention of future offenses by corporation best served by court-ordered measures aimed at reforming activities that led to commission of offense).

B. *The Impact and Failure of Fines*

Despite the almost exclusive traditional reliance on fines as sentences for corporate defendants, for many years such fines represented merely nominal sanctions for large companies.⁴⁷ In recent years, however, both the maximum amounts permitted by statutes⁴⁸ and the average amount of fines actually imposed⁴⁹ have increased significantly, and fines in some cases have been dramatically large.⁵⁰ These increases have been justified and praised as having greater punitive and deterrent value.⁵¹ Proposals for reform, unanimously calling for even more substantial fines for corporations, have suggested that fines be set at a percentage of a corporation's assets or sales,⁵² or at an amount that would at least result in the disgorgement of any illegally obtained gain.⁵³

Fines imposed on a corporate entity may affect many different

47. See Kramer, *Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy*, 48 GEO. L. REV. 530, 532 n.9 (1960) (average fine imposed for Sherman Act convictions estimated to be \$2600 from 1946-53 and less than \$13,000 from 1955-60); Note, *supra* note 11, at 285-87 & nn.25-27 (fines levied against General Motors, duPont, General Electric, and other large companies convicted of antitrust violations amounted to minute percentages of assets or profits).

48. See, e.g., Antitrust Procedure and Penalties Act of 1974, 15 U.S.C. §§ 1-3 (1976) (increasing maximum fine for corporate defendant from \$50,000 to \$1,000,000); Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. § 78dd-2(b)(1)(A) (West Supp. 1978) (authorizing fines for corporate violators up to \$1,000,000).

49. Between 1977 and 1978 alone, for example, total fines imposed on all corporate defendants convicted under the antitrust laws jumped from \$2,642,000 to almost \$11,000,000. Address by Benjamin Civiletti, Deputy Attorney General, Oct. 21, 1978 (on file with *Yale Law Journal*).

50. In what appears to be the largest criminal fine ever imposed, the Allied Chemical Corporation was fined a total of \$13.2 million after pleading nolo contendere to 940 charges of violating the pollution control laws in connection with its Kepone waste disposal program. *United States v. Allied Chem. Corp.*, [1976] 7 ENVIR. REP. (BNA) 844.

51. See, e.g., S. REP. NO. 605, 95th Cong., 1st Sess. 914 (1977) (increased fines more effectively penalize and deter corporate crime); Address by Benjamin Civiletti, *supra* note 49 (Justice Department believes higher fines imposed under new antitrust felony provisions will help deter antitrust offenses).

52. See, e.g., Davids, *supra* note 11, at 530; Note, *supra* note 11, at 295.

53. Such proposals usually suggest that fines be set at amounts higher than those required for simple disgorgement to take into account both the probability of conviction and the degree of deterrence desired. See, e.g., FINAL REPORT, *supra* note 37, at 295, § 3301(2); *Developments*, *supra* note 2, at 1370-71; Note, *supra* note 11, at 298-300. Several state laws now authorize corporate fines set at twice the defendant's gain. See, e.g., DEL. CODE ANN. tit. 11, § 4208 (1974); N.Y. PENAL LAW § 80.00 (McKinney 1975); cf. S. 1437, *supra* note 2, at § 2201(c) (proposing same rule for federal law). Several recently enacted federal statutes require that penalties for violations take into account "the appropriateness of such penalty to the size of the business of the owner or operator charged." See, e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, 1321(b)(6) (1976). This criterion, while acknowledged to discriminate between defendants who are members of the same class, has been upheld against an equal protection challenge. See *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934, 941-42 (N.D. W.Va. 1975); accord, *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 489 (D.D.C. 1975), *aff'd*, 425 U.S. 927 (1976) (upholding constitutionality of similar provisions in National Traffic & Motor Vehicle Safety Act, 15 U.S.C. §§ 1381, 1398 (1976)).

parties, including stockholders, managers, nonmanagement employees, creditors, trade customers, and consumers;⁵⁴ the extent of the burden borne by each group is generally difficult to measure.⁵⁵ Although stockholders might appear to bear the direct burdens of corporate monetary penalties,⁵⁶ they apparently escape such burdens in many instances as companies pass their losses on to consumers.⁵⁷ Moreover, stockholders may suffer no overall economic burden from fines imposed on a company, in that the price they paid for their stock, and its current value, may reflect market expectations as to the estimated likelihood and amount of such fines.⁵⁸

The efficacy of fines in achieving corporate sentencing goals depends upon their impact on those managers who have responsibility for the decisions that might engender corporate crimes.⁵⁹ Corporate fines, however, do not impose any direct personal burdens on such managers⁶⁰ or provide any direct internal restructuring that could influence their behavior, thereby leaving implementation of necessary structural reforms wholly to the discretion of the corporation.⁶¹

The most efficient such reforms may not be adopted in response to a fine, however, for the same reasons they were not instituted initially; just as reliance on corporate fines as a threat rests on the assumption that companies will respond with the optimal strategy for preventing violations, so their imposition as a sanction rests on the premise that the company will act most efficiently to prevent a recur-

54. See COMM. FOR ECONOMIC DEVELOPMENT, SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS 18-20 (1971); R. GORDON, *supra* note 13, at 147-48; Eisenberg, *supra* note 13, at 16-21.

55. See Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* 25, 40-41 (E. Mason ed. 1959) (recognizing interests of constituencies in corporation not always easy); Butcher, *The Program Management Approach*, in *CORPORATE SOCIAL ACCOUNTING* 277-79 (M. Dieckes & R. Bauer eds. 1973) (discussing various measures attempting to assess impact of corporation's acts on its various constituencies).

56. See Davids, *supra* note 11, at 529-31; Comment, *supra* note 1, at 47-48.

57. See G. WILLIAMS, *CRIMINAL LAW* 685 (1953) (corporate fines are recouped by raising prices); Note, *supra* note 11, at 285 n.17 (passing on probably occurs frequently, but may be limited by market forces). *But see Developments, supra* note 2, at 1372 n.37 (assuming that fines against one company cannot be passed on because of competition).

58. See 1 *WORKING PAPERS, supra* note 3, at 189 n.77 (risks of criminal fine at least theoretically reflected in price of stock); *Developments, supra* note 2, at 1372 n.27 (shareholders assume risks of fines, and are not penalized if fine simply forces company to disgorge illicit profits).

59. See pp. 355-56 *supra*.

60. See, e.g., Wilson, *The Lawyer and the Community*, 35 *REPORTS OF THE ABA* 427 (1910) (fines imposed on corporation "fall upon the wrong persons," upon those who knew nothing about the transaction rather than those who originated and implemented it); cf. Note, *supra* note 11, at 292 (sanctions imposed upon company felt directly by policy formulators only in small, closely held corporations).

61. See Fisse, *supra* note 46, at 251 (all currently used corporate sanctions leave corporation to decide for itself what measures, if any, to take to guard against future violations).

rence of offenses in the future.⁶² As noted, however, this assumption is often invalid in the case of large corporations: the fact that relevant decisions in such companies are made by managers⁶³ who respond to many factors other than profit maximization render them at best imperfectly responsive to monetary sanctions.⁶⁴ In addition, managers may particularly undervalue the threat of legal sanctions.⁶⁵

The force of the inadequacies suggested by these conceptual factors is demonstrated by the failure of fines to achieve the desired effects. Not only does the overall level of corporate crime remain high,⁶⁶ but many large companies violate the law repeatedly,⁶⁷ and do so despite the removal of any individually culpable executives who can be identified.⁶⁸ In addition, managers in positions to exercise general responsibility for inadequate corporate control systems involved are not likely to be punished, and in fact may well be rewarded.⁶⁹

III. An Alternative Sentence: Judicial Intervention Through Corporate Probation

In cases involving the special features of structural corporate crime, judicially ordered restructuring of limited, discrete corporate decision-

62. See C. STONE, *supra* note 8, at 36-39. For one analysis that relies crucially but uncritically on that assumption, see *Developments*, *supra* note 2, at 1365 (corporations "choose to violate the law only if it appears profitable. Profit-maximizing decisions are carefully based upon the probability and amount of potential profit. . . .")

63. See pp. 355-57 *supra*.

64. See C. STONE, *supra* note 8, at 36-39 (in practice, many corporations do not respond to economic threats in accordance with classical profit-maximization theory); Fisse, *supra* note 46, at 251 (same).

65. See C. STONE, *supra* note 8, at 39-46 (factors contributing to this effect include relatively small scale of any legal sanction in overall corporate affairs, lack of "loss of face" involved in legal as opposed to business losses, prevailing sense that legal standards are incomprehensible as guides to action, and noncentral role of legal staff as opposed to other staffs in corporate planning).

66. See note 1 *supra*.

67. In one study of the 70 largest corporations in the United States, 60% were classified as "habitual criminals" (four or more criminal convictions, most of which were within 10-year period), see E. SUTHERLAND, *supra* note 25, at 25, and 97% were classified as "recidivists" (two or more decisions that corporation had committed crime), see *id.* at 218. For specific instances of this phenomenon, see Brief for United States at 2, *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972), discussed in C. STONE, *supra* note 8, at 184 (Atlantic Richfield had already been convicted of same offense for which it was convicted again); Galdston, *Hooker Chemical's Nightmarish Pollution Record*, 30 Bus. & Soc. Rev. 25 (1979) (nation's tenth largest chemical company involved in repeated pollution violations).

68. See C. STONE, *supra* note 8, at 65-66; Davids, *supra* note 11, at 527.

69. See C. STONE, *supra* note 8, at 47-48 (following corporate conviction, managers often appear to improve their position rather than suffering any negative consequences); Werner, *supra* note 16, at 389 n.10 (usual pattern for managers involved in practices of questionable corporate legality is to be rewarded, or at least not penalized); cf. Wall St. J., Dec. 27, 1978, at 4 (chief executive officer of publicly traded company received full salary while in prison for role in corporate crime and was given raise for following year).

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making procedures can better achieve the goals of corporate criminal prosecutions than can fines. Such restructuring may be imposed, and its precise elements established, as conditions of a sentence of corporate probation.

A. *The Merits of Judicial Intervention*

Judicially mandated restructuring of internal corporate processes can provide a more efficient sanction than can a fine. First, because the costs of such reforms can be set at any level up to that of the maximum authorized fine,⁷⁰ and because a court may order a fine in addition to internal reform,⁷¹ whatever deterrent or retributive goals are served by compelled expenditures alone may be equally well achieved through a sentence that includes an order for structural reform.

Furthermore, such reforms can provide important additional benefits, thus necessarily providing greater efficiency. Most important, corporate restructuring can directly further rehabilitative goals by rectifying internal problems conducive to violations: the court redirects the authorized monetary sanctions from the general treasury to measures aimed at preventing future offenses. In addition, because corporate managers perceive compliance with outside supervision as an unpleasant task, such measures impose personal burdens that directly deter corporate managers who might play a part in future corporate offenses.⁷² Finally, because judicial intervention can achieve relevant objectives more efficiently than would fines, it lessens the burdens imposed on relatively innocent parties such as stockholders and consumers.⁷³

The potential effectiveness of such restructuring is similar to that of the extensive organizational reforms that courts have undertaken with respect to a number of public institutions in recent years.⁷⁴ While some critics have maintained that courts are inherently unsuited to

70. See pp. 368-69 *infra*.

71. A court may order payment of a fine together with any permissible conditions of probation. See, e.g., *Barnett v. Hopper*, 548 F.2d 550, 551 (5th Cir. 1977); *Bell v. United States*, 261 F. Supp. 594, 595-96 (E.D. Ill. 1966).

72. See J. GALBRAITH, *supra* note 19, at 81 ("In the American business code nothing is so iniquitous as government interference in the *internal* affairs of the corporation.") (emphasis in original); I. KRISTOL, *TWO CHEERS FOR CAPITALISM* 23 (1978) (corporate managers resent outside interference).

73. See p. 363 *supra* (stockholders and consumers bear primary burden of corporate fines).

74. See, e.g., *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *supplemented*, 377 F. Supp. 995 (S.D.N.Y.), *aff'd in part, remanded in part*, 507 F.2d 333 (2d Cir. 1974) (ordering reforms in operation of prison); Note, *Judicial Intervention and the Uses of Organization Theory: Changing the Processes and Policies of Public Bureaucracies*, 89 *YALE L.J.* (forthcoming January 1980) (collecting cases).

such tasks,⁷⁵ most commentators have concluded that the effort, properly managed, can be very successful.⁷⁶ The factors identified as maximizing the success of such interventions—including careful definition of the problem,⁷⁷ design of interventions tailored to the particular organizational systems involved,⁷⁸ narrow and discrete interventions,⁷⁹ and constant monitoring of implementation⁸⁰—all appear feasible in the corporate context.⁸¹

Internal restructuring of offending corporations may also be possible through injunctive relief rather than through probation, and such remedies have been ordered in a few cases brought by government agencies.⁸² However, there may be limits on the availability of such relief in certain cases,⁸³ on the willingness of agencies to seek such

75. See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 255-98 (1977).

76. See, e.g., Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-16 (1976); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 461-63 (1977); cf. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983, 995-99 (1979) (suggesting procedural reforms designed to increase effectiveness of such efforts).

77. See Note, *supra* note 74.

78. See *id.*; Note, "Mastering" Interventions in Prisons, 88 YALE L.J. 1062, 1063-68 (1979).

79. See, e.g., Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779, 1805-14 (1976); Note, *supra* note 76, at 457-61.

80. See, e.g., Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27 (1979); Note, *supra* note 76, at 440-45; Note, *supra* note 78, at 1089-91.

81. Indeed, structural reform could be expected to be even more successful in the case of corporations than in the case of public institutions. While in the latter the structure of the institution itself is the evil, see Fiss, *supra* note 80, at 2, only certain aspects of corporate structure are implicated in corporate crimes, suggesting that corporate reform will require less extensive and more workable interventions.

82. See, e.g., SEC v. Koenig, 469 F.2d 198 (2d Cir. 1972) (affirming appointment of "limited receiver" with power to supervise corporation's public disclosures, investigate certain transactions, and organize shareholders' meeting); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105 (2d Cir. 1972) (appointing trustee to oversee corporate financial decisions appropriate remedy in SEC action). For a case achieving limited reform through a shareholders' derivative suit, see Order of Court and Stipulation, Project on Corporate Responsibility v. Gulf Oil Corp., Civil Action No. 74-493 (D.D.C. June 27, 1974), discussed in Note, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 576-79 (1975).

83. Although the general rule that a court of equity has no jurisdiction over criminal sentences, see *In re Debs*, 158 U.S. 564, 593 (1895), has recognized exceptions for cases of national emergencies, public nuisances, and express statutory grants of injunctive power over crimes, see *id.*; *United States v. J alas*, 409 F.2d 358, 360 (7th Cir. 1969), the doctrine retains its vitality outside these exceptions, see *id.*; *Miller v. Mallery*, 410 F. Supp. 1283, 1287 (D. Or. 1976); *Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 346-47 (E.D. Tenn. 1971); cf. 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[3], at 191-97 (2d ed. 1979) (discussing policy justifications underlying doctrine). Since there may not be an independent civil ground for bringing an injunctive suit even after the occurrence of some crimes, such as those involving bribery, illegal arms sales, and foreign corrupt payments, structural flaws that led to such an offense might be remediable only as part of a criminal sanction. See *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1016-17 (1965) (some courts will issue injunction upon showing that criminal sanctions are trivial and would be ineffective; others require showing that repeated imposition of criminal punishment has not deterred defendant).

relief,⁸⁴ or on its effectiveness in achieving broader objectives served by criminal convictions.⁸⁵ Nonetheless, the development of corporate structural reform as a remedy in criminal cases should not serve to preclude or impede the continued development of parallel remedies in administrative injunctive proceedings.⁸⁶ Ultimately, it might simply be said that since criminal prosecutions of corporations appear likely to grow more frequent,⁸⁷ the development of an effective sentencing scheme for corporations is desirable independently of the possibility that similar results may also be available in other cases through injunctions.⁸⁸

B. *Implementing the Proposal: Corporate Probation*

Judicial restructuring may be imposed on a corporate criminal defendant by sentencing the corporation as an entity to a term of probation.⁸⁹ Such a sentence appears permissible under both federal⁹⁰

84. Perhaps because agencies develop close affinities with regulated companies, or perhaps because they are unwilling to test the limits of their authority, agencies have rarely requested such relief. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* 110 n.7 (1978); cf. Chayes, *supra* note 76, at 1310-11 (unlike agencies, judges are not subject to "capture" by regulated interests). The principal exception to this generalization is the Securities and Exchange Commission, which has increasingly requested and obtained structural modifications in injunctive proceedings. See, e.g., *SEC v. Koenig*, 469 F.2d 198 (2d Cir. 1972); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972).

85. For example, a conviction may aid in signifying that an offense is regarded as seriously wrong, in communicating community censure of the acts both to potential violators and to society at large, and thus in reinforcing collective moral standards and deterring future offenses. See F. ZIMRING & G. HAWKINS, *supra* note 40, at 141-57 (widespread awareness of legal threats necessary to effective general deterrence); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 *YALE L.J.* 1299, 1307-08 (1977) (fact that criminal convictions single adjudications out as peculiarly serious increases their deterrent effect); Andenaes, *General Prevention—Illusion or Reality?* 43 *J. CRIM. L.C. & P.S.* 176, 179-80 (1952) (punishments necessary to strengthen moral inhibitions against crime and encourage law-abiding generally). *But see Developments*, *supra* note 2, at 1301 (distinction between civil and criminal offenses "hazy," especially as regards corporations; effect of stigma "largely speculative").

86. Professor Fiss has developed a general theory of the role and value of "structural injunctions," injunctions used "to effectuate the reform of a social institution." O. FISS, *supra* note 84, at 9; Fiss, *supra* note 80. Fiss has limited his analysis to public institutions; the application of analogous remedies to corporate and other private institutional defendants could be spurred by the development of a model of structural offenses such as is proposed in this Note.

87. See *Developments*, *supra* note 2, at 1229.

88. *But cf.* ABA Criminal Code Revision Committee, *supra* note 43, at 17-18 (probation should not be used as substitute for injunctive relief in antitrust cases because of special problems involved in formulating antitrust remedial decrees).

89. *Cf.* S. REP. NO. 605, 95th Cong., 1st Sess. 899 (1977) ("In keeping with modern criminal justice philosophy, probation is stated as a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.")

90. The current federal probation statute does not mention corporate defendants explicitly; it provides generally that a judge may impose probation "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." 18 U.S.C. § 3651 (1976). Proposed revisions of the Federal Criminal Code provide

and state⁹¹ statutes, and has in fact been ordered in five reported cases.⁹²

1. *What Is Corporate Probation?*

As it does for individuals, a term of probation for a corporation principally requires that an offender comply for a specified period of time⁹³ with certain conditions established by the sentencing court. Conditions of probation must be reasonably related to the rehabilitation of the offender and the protection of society;⁹⁴ thus, internal corporate modifications ordered must address factors that caused an offense or that are likely to cause future offenses. The cost of complying

explicitly that organizations may be placed on probation, *see* S. 1437, *supra* note 3, at § 2001(c)(1); H.R. 6869, *supra* note 3, at § 2001(c)(1), and provide criteria to be considered by a court in determining whether to order probation, *see* S. 1437, *supra* note 3, at § 2102; H.R. 6869, *supra* note 3, at § 2102. Statutory authorization for such sentences is critical since courts have no nonstatutory authority to impose a sentence of probation. *United States v. Pregerson*, 448 F.2d 404, 406 (9th Cir. 1971).

91. Two state courts have reached opposite conclusions in construing state statutes on this question. *Compare* *State ex rel. Howell County v. West Plains Tel. Co.*, 232 Mo. 579, 135 S.W. 20 (1911) (apparent forerunner of contemporary probation statutes held inapplicable to corporate defendants) *with* *Borough of Roselle v. Santone Constr. Co.*, 119 N.J. Super. 314, 291 A.2d 385 (1972) (state probation statute held applicable to corporation).

In general, as most state probation statutes are similar in breadth of purpose to the federal statute, *see, e.g.*, DEL. CODE ANN. tit. 11, § 4204 (1974) (court may place offender on probation upon conviction for any offense other than designated class of felonies); N.Y. PENAL LAW § 65.00 (McKinney 1975) (criteria for ordering sentence of probation include, *inter alia*, that such disposition not be inconsistent with ends of justice), the reasoning of the federal courts, *see* note 92 *infra*, appears applicable.

92. *See* *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389 (10th Cir. 1976); *United States v. Nu-Triumph, Inc.*, 500 F.2d 594 (9th Cir. 1974); *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States v. J.C. Ehrlich Co.*, 372 F. Supp. 768 (D. Md. 1974); *cf.* note 108 *infra* (discussing case in which sentence of corporate probation was imposed and later rescinded).

Considerations of legislative history, statutory interpretation, and social policy support the validity of these sentences. *See* *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); Comment, *Criminal Law—The Application of the Federal Probation Act to the Corporate Entity*, 3 U. BALT. L. REV. 294 (1974) (*Atlantic Richfield* right as to validity of corporate probation, but wrong as to limitations it found necessary to such sentences); *cf.* Note, *supra* note 2, at 1108 n.67 (policy considerations support use of such sentences). *But see* ABA Criminal Code Revision Committee, *supra* note 43, at 16 (even though S. 1437 and H.R. 6869 provide that organizations may be placed on probation, conditions of probation indicate that probation is designed for human beings).

93. A term of probation ordered by a federal court may not exceed five years. 18 U.S.C. § 3651 (1976).

94. *See* *United States v. Dane*, 570 F.2d 840, 843 (9th Cir. 1977), *cert. denied*, 436 U.S. 959 (1978); *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975); ABA, STANDARDS RELATING TO PROBATION § 3.2(b) (1970). While a sentencing court has broad discretion as to probation conditions, such conditions are subject to appellate review. *See* *United States v. Pastore*, 537 F.2d 675, 679-83 (2d Cir. 1976); *People v. Lent*, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975).

with such conditions may equal any amount up to the maximum fine authorized for the crime for which the corporation was convicted.⁹⁵ Thus, a court can supersede the corporation's judgment as to the extent of measures necessary to ensure future compliance, but only up to a statutory maximum.⁹⁶

2. *When Is Corporate Probation Appropriate?*

Two criteria identify those corporate crimes for which judicially supervised restructuring, and thus sentences of corporate probation, are well-suited.⁹⁷

First, such sentences are most necessary in cases involving very dangerous or inherently wrongful crimes. Violations defined as criminal offenses generally involve such qualities,⁹⁸ and prosecutorial policies stress the same criteria.⁹⁹ But since it is nonetheless possible that a

95. See *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972) ("It is evident . . . that the conditions imposed by a court in connection with the suspension of sentence may not, at least if objected to by the defendant, exceed the maximum penalty authorized by Congress."). *But cf.* C. STONE, *supra* note 8, at 188 n. † (legality of probation costs in excess of maximum statutory fine uncertain under current law).

This principle justifies the prevailing rule that probation is a form of sentence and thus cannot be refused by an offender. See, e.g., *Cooper v. United States*, 91 F.2d 195, 199 (5th Cir. 1937) (Federal Probation Act "vests a discretion in the Court, not a choice in the convict"); Comment, *supra* note 92, at 301-03 (citing cases supporting rule). *But see In re Osslo*, 51 Cal. 2d 371, 377, 334 P.2d 1, 5 (1958) (under California law, defendant has right to refuse probation). In the one case in which this issue arose with respect to a corporate defendant, the court found it unnecessary to decide it. See *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972).

96. For this purpose, cost should be computed as the amount by which the total expense of implementing required conditions exceeds the minimum cost which the corporation would need to spend to ensure law-abiding behavior in the absence of a court order. Thus, the company would first be required to indicate the least expensive steps that it would have undertaken voluntarily. The court would review the reasonableness of this estimate, and would deduct that amount from the maximum cost of probation conditions it could impose if it were within the broad range typically afforded corporate officials on questions of business judgment. This method of calculation would avoid both the Scylla of a court having the power to order excessive punishments and the Charybdis of a company having the power to escape any burden by estimating its voluntary costs at zero.

97. A court might decide that such a sentence is appropriate on the basis of either evidence presented at trial or a presentence report. See 18 U.S.C. § 3577 (1976) (providing that no limitation be placed on information concerning convict's background, character, and conduct that court may consider in sentencing).

98. See Hart, *supra* note 37, at 404-05 ("crime" is act incurring moral condemnation).

99. See, e.g., ATTORNEY GENERAL'S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS, REPORT 349 (1955) (criminal prosecutions appropriate only when offenses are clear and flagrant); Fine, *The Philosophy of Enforcement*, 31 FOOD, DRUG & COSM. L.J. 324, 328 (1976) ("seriousness of violation" is first criterion for FDA decision to prosecute); cf. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 426 (1963) (conception of criminal sanction as last resort, to be used only when other sanctions fail, implicit in legislative scheme of economic regulation). *But see* Arnold, *Antitrust Law Enforcement, Past and Future*, 7

corporation could be convicted of a relatively trivial offense, a sentencing court must ultimately determine in its discretion whether an offense is sufficiently serious to warrant imposing a sanction of corporate probation.¹⁰⁰

Second, such sentences are potentially most effective in cases of "structural crime," that is, cases in which a corporate offense has resulted in large part from the effects of institutional forces rather than from the culpable acts of identifiable individuals. Structural reforms might be necessary even when one or more individual corporate officials can be convicted,¹⁰¹ however, since institutional forces may continue to encourage violations even after culpable officials are removed.¹⁰² One indication that such factors are important would be a recurrence of similar offenses by the same company involving different personnel.¹⁰³

Finally, a sentence of corporate probation may be appropriate, independently of the need for internal corporate restructuring, in cases in which the payment of restitution to victims is desirable as part of the resolution of a criminal proceeding. Restitution has been increasingly advocated as an appropriate objective of criminal prosecutions¹⁰⁴ and may be especially important in the case of convicted cor-

LAW & CONTEMP. PROB. 5, 16 (1940) (criminal prosecutions only effective deterrents to antitrust violations; civil suits useful only as supplements). Prosecution of the Ford Motor Co. for reckless homicide, for example, resulted from a decision that the alleged reckless design and manufacture of the Pinto involved "such a substantial deviation from the conduct required of an automobile manufacturer as to warrant a [criminal] prosecution. . . ." Note, *supra* note 5, at 911.

100. Cf. R. NADER, M. GREEN, & J. SELIGMAN, *supra* note 1, at 250-51 (sanction of subjecting company "to a SEC-supervised reorganization of existing management" reserved for companies with "more than three nontechnical violations of the [proposed] Federal Chartering Act within a three-year period.")

101. The light sentences that convicted corporate officials traditionally have received may undermine the value of their convictions. See, e.g., Baker & Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 623 n.16 (1977) (officials convicted of criminal antitrust offenses typically receive light sentences—small fines with little or no prison time imposed—although experience demonstrates that prison sentences are most effective deterrent); Liman, *id.* at 630, 630-31 (same). But see Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 593-99 (1977) (arguing that sentences requiring individual defendants to speak publicly about their experiences could maximize deterrence).

102. See p. 364 *supra*.

103. See note 67 *supra*.

104. Recent proposals for a revised Federal Criminal Code have suggested that a fine not be ordered, or its amount be limited, if it would hinder or prevent a defendant from paying restitution. See FINAL REPORT, *supra* note 37, at 994, § 3302; MODEL PENAL CODE § 7.02(3)(b) (P.O.D. 1962). Commentators have argued that victims have both a more immediate need for and a more compelling equitable claim to restitution than the government has regarding a fine. See M. FRY, ARMS OF THE LAW 124-26 (1951); Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 226-27 (1965).

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porations.¹⁰⁵ However, courts currently order payment of restitution in criminal cases only rarely,¹⁰⁶ in large part because such orders are generally not legislatively authorized as part of a criminal sentence except as a condition of probation.¹⁰⁷ When damages attributable to a corporate crime can be assessed,¹⁰⁸ the benefits attainable from an order of restitution¹⁰⁹ may provide a significant additional reason for imposing a sentence of corporate probation.

105. Two of the principal factors limiting the use of restitution orders with individuals are generally inapplicable to corporations. First, unlike many individual probationers, large corporations would be able to pay significant amounts of restitution. Indeed, restitution serves an important goal of corporate sentences by forcing defendants to disgorge their illegally obtained gain. *See* p. 362 *supra*. Second, courts have been reluctant to order restitution in cases involving violent crimes, in part because of perceived difficulties in valuing resulting injuries. *See* Jacob, *The Concept of Restitution: An Historical Overview*, in *RESTITUTION IN CRIMINAL JUSTICE* 45, 56 (J. Hudson & B. Galaway eds. 1977); Wolfgang, *supra* note 104, at 229. Since most corporate crimes involve property, financial, or other easily measurable damages, *see* Kadish, *supra* note 99, at 423-27, they present no such problem.

106. *See* Harland, *Compensating the Victims of Crime*, 14 *CRIM. L. REV.* 203, 215-17 (1978); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 *MINN. L. REV.* 243, 243-44 (1965). *But cf.* E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 318 (8th ed. 1970) (because of informal or negotiated agreements, restitution may be more common than official statistics indicate).

107. *See* 18 U.S.C. § 3651 (1976); MODEL PENAL CODE § 301.1(2)(b) (P.O.D. 1962); S. 1437, *supra* note 3, at § 2103(b)(3); *cf.* ABA STANDARDS RELATING TO PROBATION §§ 3.2(c) vii, (c)viii (1970) (advocating use of restitution as condition of probation); P. O'DONNELL, M. CHURGIN, & D. CURTIS, *supra* note 37, at 101 (same). *But see* S. 1437, *supra* note 3, at § 2006 (proposing sentence allowing court to order restitution, for any kind of damage caused, in conjunction with any other permissible sentence). At least one state has made restitution a mandatory condition of probation. *See* IOWA CODE ANN. § 907.12(3) (West 1978). For cases ordering defendants to pay restitution as a condition of probation, *see* *United States v. Segal*, 549 F.2d 1293, 1295 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977) (individual defendant); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976) (corporate and unincorporated defendants).

108. Restitution payments ordered in criminal cases must be limited to damages attributable to the crime. *United States v. Shelby*, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978); *United States v. Taylor*, 305 F.2d 183 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962) (amount must be so limited, but may be determined subsequent to order). In one case that appears to have exceeded this limit, *United States v. Olin Corp.*, N-77-30 (D. Conn., filed June 1, 1978), the court initially placed Olin on probation and ordered it to pay \$510,000 (equal to the maximum possible fine) to charitable organizations in the New Haven community as "reparations" for the harm done the community by the company's illegal arms sales to South Africa; this was apparently the only condition of probation. *See* N.Y. Times, March 31, 1978, at D1. However, after Olin announced that it would "voluntarily" establish a \$500,000 New Haven Community Betterment Fund, the court rescinded the term of probation and fined the company \$45,000. *See* N.Y. Times, June 2, 1978, at D1; *cf.* N.Y. Times, April 5, 1978, at 28 (editorial criticizing initial sentence).

109. An order of restitution can serve either to supplement a separate civil damage suit or to render one unnecessary. *See* *State v. Stalheim*, 275 Or. 683, 688 n.8, 552 P.2d 829, 832 n.8 (1976) (acceptance of restitution payments does not terminate victim's right to pursue civil remedies, but defendants may set off such payments against any civil award); Note, *Judicial Review of Probation Conditions*, 67 *COLUM. L. REV.* 181, 183 (1967) (same). Thus, such an order might be especially appropriate where victims have

3. *What Probation Conditions Should Be Imposed?*

Once a court determines that a term of probation is the proper sentence for a convicted corporation, it should impose conditions of probation that focus on the modification of those features of corporate organization that facilitated commission of the offense.¹¹⁰

To address the principal institutional causes of corporate offenses, probation conditions should require a corporation to institute procedures designed to evaluate and report data potentially relevant to the discovery or prevention of future violations, or to delineate explicitly the responsibilities of particular officials in response to such information.¹¹¹ Requiring specific information-processing measures would help ensure that offenses caused by officials' failure sufficiently to pursue facts suggestive of an incipient violation do not recur.¹¹² Similarly, clarifying the bases of officers' personal liability would preclude reliance on standard corporate operating procedures as a defense in the future, thus assuring that the gap in supervision that engendered the prior offense would not recur.¹¹³ Such measures are especially important in situations in which a single set of institutional processes may generate a variety of offenses.¹¹⁴

These probation conditions require little judicial involvement in complex substantive management decisions, providing an important

individual claims too small to sustain separate litigation expenses. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (costs of providing plaintiff class members with required notices must be prepaid by class representative even when such costs might exceed recovery); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 n.5, 67-70 (1933) (public welfare offenses involve large number of victims but each has slight individual damages).

110. *See* pp. 367-68 *supra* (discussing justifications for probation conditions).

111. Probation conditions should be as specific as possible, both to ensure maximum effectiveness, *see* Note, *supra* note 76, at 457-61, and to guarantee necessary fairness and notice to the defendant, *see* ABA STANDARDS RELATING TO PROBATION § 3.2(B) (1970).

112. *See* C. STONE, *supra* note 8, at 199-209 ("mending" corporate information net critical to prevention of offenses); *cf.* Note, *supra* note 78, at 1086 (effectiveness of master in prison reform litigation limited "because he has neither the tools nor the mandate to restructure the patterns of decisionmaking and behavior that perpetuate" conditions leading to intervention).

113. *See* Fisse, *supra* note 46, at 272 (requiring company to specify internal lines of responsibility facilitates future prosecutions of culpable officers); *cf.* C. STONE, *supra* note 8, at 203 (discussing employment discrimination consent decree that "pins down on particular officers exactly what their responsibility is to be in the maintenance and monitoring of the system").

114. Certain corporate activities involve a single procedure that generates repeated potential for the occurrence of similar offenses. A company that produces drugs, for example, might employ the same system of testing and evaluating each of hundreds of new drugs. Because a single gap in such a system could generate potential offenses in the production of each drug, internal reform measures would be especially important.

ease of monitoring.¹¹⁵ In some cases, a court might require only that a corporation undertake one discrete action—for example, appointing an independent committee to audit specified records—which would then itself serve to maintain compliance on an on-going basis.¹¹⁶ In more complex cases, a court might appoint a consultant experienced in a relevant field to investigate the situation, recommend appropriate probation conditions, and then monitor their implementation.¹¹⁷

Whatever the nature of the modifications ordered, their extensiveness should be calibrated to the level and complexity of the institutional malfunction involved.¹¹⁸ For example, if an offense stemmed from a failure of lower-level managers adequately to supervise non-managerial activities (such as clerical or scientific work), probation conditions might require the company to institute explicit reporting systems and supervisory responsibilities at that level. Similarly, if an offense stemmed from a failure on the part of upper-level managers adequately to investigate or review facts indicating a possible incipient offense, a court might appoint a corporate-level audit committee with responsibilities for monitoring their decisions. In some cases, a court might find that a certain area of corporate operations was so pervasively susceptible to criminal violations that prevention of future offenses required termination of those operations.¹¹⁹

115. See Note, *supra* note 76, at 440-45 (monitoring institution's conduct essential to effective judicial oversight).

116. See, e.g., *SEC v. Mattel, Inc.*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,754 (D.D.C. 1974) (ordering, *inter alia*, that company establish committee to review accounting procedures and controls and financial reports).

117. For example, a health scientist, antitrust lawyer, or specialist in information systems or organizational behavior might be an appropriate corporate probation officer in a particular case. See C. STONE, *supra* note 8, at 185 (suggesting such use of sanitation engineer for pollution violations). See generally Note, *supra* note 78, at 1068-72 (use of special masters crucial to success of institutional reform litigation involving prisons).

118. Cf. Jeffries and Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1376 (1979) ("proportionality" of penal sanctions to crimes a fundamental constraint on criminal sentences).

119. See *United States v. Nu-Triumph, Inc.* 500 F.2d 594 (9th Cir. 1974) (as condition of probation, corporation convicted of interstate transportation of obscene materials prohibited from engaging in distribution of related materials in future); S. 1437, *supra* note 3, at § 2103(b)(6) (specifically authorizing order that defendant refrain from certain occupation or business as condition of probation). Courts have held most such conditions permissible but others impermissible as applied to individuals. Compare *Whaley v. United States*, 324 F.2d 356, 359 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964) (upholding probation condition barring probationer from engaging in repossession business, in course of which he had committed criminal fraud) with *United States v. Polk*, 556 F.2d 803 (6th Cir.), *cert. denied*, 434 U.S. 862 (1977) (holding probation condition requiring lawyer to surrender license to practice law abuse of sentencing court's discretion). See generally *United States v. Pastore*, 537 F.2d 675, 682 (2d Cir. 1976) (discussing limits on appropriate probation conditions).

Probation conditions of this kind can be both more effective and less disruptive than a

As this emphasis on articulating explicit intracorporate lines of responsibility suggests, the ultimate mechanism for ensuring corporate compliance with probation conditions is the potential personal liability of individual officials for unexcused failures to carry out their assigned duties.¹²⁰ Imposition of such liability, however, should be necessary in only a minority of cases. When noncompliance results from factors beyond the control of any individual, perhaps reflecting the effects of still unreconstructed corporate processes, a court should first attempt to bring the corporation into compliance by adjusting the conditions ordered or by increasing their specificity.¹²¹

Conclusion

Achieving the goals of the criminal law with respect to corporate offenders requires a new type of corporate sentence, one responsive to institutional processes that facilitate corporate offenses. By providing a framework within which a court can in appropriate cases require

sentence dissolving or revoking the charter of a corporation. While dissolution is sometimes suggested as an effective sanction, *see* 1 WORKING PAPERS, *supra* note 3, at 193; Davids, *supra* note 11, at 530, it is less feasible for several reasons. First, a court of one jurisdiction will lack authority to revoke the charter of a corporation chartered under the laws of another. Second, as to small or closely held companies, dissolution alone does not prevent the controlling parties from simply regrouping in new form. *See* Fisse, *supra* note 46, at 252 (deterrent impact of dissolution wholly subject to vagaries of reorganization). Finally, as to large corporations, the socially disruptive effects of dissolution of a whole company would generally be so great as to outweigh its benefits. *See* C. STONE, *supra* note 8, at 36.

120. *See* Fisse, *supra* note 46, at 272-73 (preventive orders provide means for imposing individual liability if offenses recur); Note, *supra* note 78, at 1079 (noting importance of threat of individual liability in judicially supervised prison reform); Note, *supra* note 76, at 448-50 (contempt citations against individual officials are most conventional enforcement measure in cases attempting reform of public institutions). *But see id.* at 452 (courts may decline to issue contempt order when lack of institutional compliance was for reasons beyond any individual's control).

The general rule that a person who is not a party to a judicial proceeding may nevertheless be bound by it if he has either abetted a party or is legally identified with a party and has notice of the proceeding, *see, e.g.,* NLRB v. Sequoia Dist. Council of Carpenters, 568 F.2d 628, 633-34 (9th Cir. 1977); Backo v. Local 281, United Bhd. of Carpenters, 438 F.2d 176, 180-81 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971), has been specifically applied to hold corporate officials liable for the failure of their company to abide by court orders. *See* Wilson v. United States, 221 U.S. 361, 376 (1911) (failure to respond to subpoena duces tecum); United States v. Greyhound Corp., 363 F. Supp. 525, 571 (N.D. Ill. 1973), *supplemented*, 370 F. Supp. 881, *aff'd*, 508 F.2d 529 (7th Cir. 1974) (failure to comply with terms of injunction).

121. *See* Fisse, *supra* note 46, at 272-73 (orders of internal restructuring lend themselves readily to progressive pressures and modifications over time); Note, *supra* note 76 (modifying order to address institutional processes more precisely is both more effective and less antagonizing than imposing contempt sanctions).

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limited, administratively manageable internal reforms, a sentence of corporate probation can uniquely achieve these objectives. Such a sentence is permissible under present statutes and represents an appropriate and desirable use of judicial discretion as to sentencing.¹²²

122. Although the scheme proposed in this Note can be implemented by judges under current law, it also has implications for legislators drafting criminal codes. The appropriateness of probation as a sentence for corporate defendants should be clarified, *see* note 90 *supra*, permissible or desirable conditions of corporate probation should be articulated, *see* Stone, *Proposed Model Code for Corporate Rehabilitation*, reprinted in *Corporate Rights and Responsibilities: Hearings Before the Sen. Comm. on Commerce*, 94th Cong., 2d Sess. 297-301 (1976) (appendix to statement of Christopher D. Stone), and mechanisms for implementing such sentences, whether through existing probation boards or otherwise, should be established. The availability of a sentence of corporate probation might also influence a prosecutor deciding whether to prosecute a corporation, negotiating with corporate officials, or making recommendations as to sentencing.