University of Baltimore Law Review

Volume 3
Issue 2 *Spring 1974*

Article 8

1974

Recent Developments: Criminal Law—the Application of the Federal Probation Act to the Corporate Entity. United States v. Atlantic Richfield, 465 F.2d 58 (1972)

Rignal W. Baldwin
University of Baltimore School of Law

RECENT DEVELOPMENTS

CRIMINAL LAW—THE APPLICATION OF THE FEDERAL PROBATION ACT TO THE CORPORATE ENTITY. *UNITED STATES V. ATLANTIC RICHFIELD, 465 F.2d 58 (1972).*

Corporate liability for criminal activity and the extent to which a convicted corporation may be punished are issues of increasing relevance. With the rapid growth of the corporate entity and the effect which its activities have on our society, there has developed a greater concern for the manner in which this complex structure seemingly avoids the sanctions of criminal law.

United States v. Atlantic Richfield Company,[1] addresses itself to the question of criminal punishment of corporations through the use of the Federal Probation Act,[2] and enlarges upon the penalties which are available for such crimes. In March, 1971, the U.S. Coast Guard observed the discharge of oil into the Chicago Sanitary and Ship Canal from Atlantic Richfield's Stickney, Illinois dock facility. The United States Attorney subsequently filed a criminal information against Atlantic Richfield for violation of sections 407 and 411 of Title 33, United States Code, 1964.[3] The defendant pleaded *nolo contendere* to the charge of discharging refuse into navigable waters. From a conviction and the imposition of probation in lieu of the statutorily proscribed penalty,[4] the defendant filed a motion to vacate and correct the sentence. The defendant alleged that the Act did not apply to corporations, that the conditions of probation imposed upon it were not authorized by law or by statute, and that it could not be placed on probation against its desires.

On appeal, the defendant-corporation asserted that the references to "he," "him" or "defendant" in the Act, in addition to the frequent association of probation with youthful or first-time offenders, indicates the legislative intent that probation be imposed only upon natural persons.[5] Atlantic Richfield further argued that since the inception of the Federal Probation Act, it had been applied only to persons. Therefore, by negative inference, a corporate entity is precluded from the purview of the Act. This reasoning has for many years represented corporate resistance to the applicability of any criminal statutes, an argument which is regarded as archaic by more recent court decisions.[6]

---

1. 465 F.2d 58 (7th Cir. 1972).
2. Federal Probation Act, 18 U.S.C. §§ 3651-56 (1970) (hereinafter cited as The Act).
3. River and Harbors Act of 1899.
4. The statutory sentence proscribes a fine for corporations of not less than $500 nor more than $2500. For natural persons the statutory penalty is the fine and/or imprisonment for not more than 1 year nor less than 30 days. *Id.* § 411 (1964).
5. 465 F.2d at 60.
6. "The whole argument . . . that corporations are immune from the sanctions afforded by the Criminal Code is based upon doctrines which have been entirely outgrown by the modern corporation and have long been obsolete." New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 488 (1909); *accord*, United States v. Union Supply Co., 215 U.S. 50,

Although the court did find that the conditions of probation were onerous and remanded the case with the direction to reframe those conditions,[7] the lower court's opinion that a corporation is a proper subject for probation was affirmed. On remand, the lower court reapplied the probation in more definitive terms but then discharged the defendant from this status because of its good faith efforts to abate further illegal discharge.[8] For the first time since the Federal Probation Act was enacted in 1925, a corporation was subjected to the broad discretion of court-imposed conditions and supervision available through the suspension of sentence.[9] Rather than imposing a relatively nominal fine[10] and risking the possibility of continued criminal activity by the defendant, the court action made a positive attempt to coerce the offending corporation into compliance with regulatory statutes.

The court based its determination that the defendant could be subjected to probation upon two conclusions: (1) many provisions of the federal criminal code make it clear that the term "defendant" is intended to include corporate parties[11] and (2) the language of the Probation Act expressly applies to criminal offenses for which only a fine may be appropriate.[12] Since the primary purpose of the Act is to facilitate rehabilitation of the offender and to provide restitution for the victim(s),[13] the court found no inconsistency in applying the Federal Probation Act to the corporate defendant. The court refuted

---

54-55 (1909). *Cf.* Standard Oil Co. of Texas v. United States, 307 F.2d 120, 127 (5th Cir. 1962) (knowledge by corporation necessary for conviction); United States v. S.S. Mormacsaga, 204 F.Supp. 701, 702 (E.D. Pa. 1962) (not necessary to show scienter for conviction under § 411); *accord*, United States v. U.S. Steel Corp., 328 F.Supp. 354, 356 (Ind. 1970).

7. 465 F.2d at 61.

8. On Sept. 9, 1972, Judge Parsons of the District Court of Illinois, Eastern Division, issued the following minute order (cause No. 71 CR 524):

> Imposition of sentence suspended and deft. Atlantic Richfield Co. is ordered placed on probation for a period of two (2) yrs. A condition of probation being that adequate facilities be installed to eliminate pollution, the pollution complained of in the information and to prevent any further pollution of the same order. The court this date being satisfied and convinced that the condition heretofore pronounced nunc pro tunc June 25, 1971 has been met and that further probation will serve no useful purpose, enters its orders discharging Atlantic Richfield.

The court's satisfaction that the conditions had been met in the interim, was the result of Atlantic Richfield's $140,000 installation of a new sewage and pumping system, and an eleven foot deep "bentonite" curtain into the soil to abate further seepage into the water (telephone conversation with Robert E. Ackerberg, partner with Schiff, Hardin & Waite, Chicago, Illinois, Mar. 7, 1974).

9. Prior to The Act, corporations were held not subject to a suspended sentence. State *ex rel.* Howell County v. West Plains Tel. Co., 232 Mo. 579, 135 S.W. 20 (1911).

10. *Cf.* Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir. 1963); United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972).

11. "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations . . . as well as individuals . . . ." 1 U.S.C. § 1 (1970).

12. Frank v. United States, 395 U.S. 147, 150-51 (1969); United States v. Beacon Piece Dyeing & Finishing Co., 455 F.2d 216 (2d Cir. 1972); United States v. Berger, 145 F.2d 888, 890 (2d Cir. 1944), *cert. denied*, 324 U.S. 847 (1945).

13. 18 U.S.C. § 3651 (1964). The legislative history is based on 18 U.S.C. § 724 (1940).

the argument that probation is merely a means of dealing with youthful or first offenders and cannot be applied to other criminals.[14] The court noted that the Federal Probation Act has always received a construction that is consistent with the emphasis in modern criminal theory on providing the sentencing court with the opportunity to "analyze and evaluate the character, qualities, and possibilities of each offender"[15] in order to effect individualized treatment. But to misconstrue this individualized treatment as solely an act of grace or clemency was noted in *United States v. Durkin*[16] as a failure to recognize that probation is primarily for the benefit of society, which is the victim of criminal activity, and only of incidental benefit to the accused.

The consideration of the public good and the recognition that courts need a more flexible penalty were the motivating factors in Congress' passage of an Act which would allow courts to suspend imposition of execution of sentence in order to apply a more effective remedy.[17] Throughout the Act's ten-year legislative history, the intent of liberal construction[18] and court determination of applicability and administration continued as the goal of Congress.[19] After two years of drawing up the first Federal Probation Act, Congress passed it, but the bill was vetoed by the President in 1917.[20] The subject of Congressional disagree-

14. United States v. Johnson, 56 F.2d 658, 659 (9th Cir. 1932).

15. Legislation should be construed in conformity with its purpose. S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943); United States v. Banks, 108 F. Supp. 14, 15 (D. Minn. 1952). Because the Probation Act is of a remedial nature, it has been consistently held that the Act should be liberally construed. Reeves v. United States, 14 F.2d 5, 7 (4th Cir. 1926), *cert. denied*, 273 U.S. 719 (1926). *See also* textual quote of the Federal Probation Act, *infra*.

16. 153 F.2d 919 (7th Cir. 1946); State *ex rel.* Caldwell v. Skinner, 59 S.D. 68, 73, 238 N.W. 149, 152 (1931) states:

> Laws permitting probation . . . are manifestations of a comparatively modern shift in criminological theory: the trend being away from the 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 board or body, 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 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 is incidental.

17. Roberts v. United States, 320 U.S. 264, 272 (1943).

18. Even greater latitude must be recognized where Congress grants broad discretionary powers to courts, for the constitutional functional role of courts necessarily requires the frequent application of judgment in the exercise of discretion. United States v. Baker, 429 F.2d 1344, 1347 (7th Cir. 1970). *See* Yin-Shing Woo v. United States, 288 F.2d 434, 435 (2d Cir. 1961).

19. United States v. Baker, 429 F.2d 1344, 1347 (7th Cir. 1970). "Probation may be granted whether the offense is punishable by fine or imprisonment or both." 18 U.S.C. § 3651 (1970).

20. *Hearings on S. 1092 Before the Subcomm. of the Senate Comm. on the Judiciary*, 64th Cong., 1st Sess. at 5, 6 (1916).

ment was the constitutional issue of whether the court could be granted the broader power to impose a sentence and then suspend its execution. The conflicting views continually reiterated the legislative purpose of probation, to contribute to the proper and uniform administration of criminal justice and to empower the courts with greater latitude in determining the appropriate penalty for a criminal.[21] Despite the consideration of young or first-time offenders, the foremost Congressional motive was a need for a flexible and remedial penalty that would encourage criminal reform. The Act was therefore not exclusive and only general guidelines were established for its use. When the Probation Act finally became law in 1925, it neither stated nor implied any stipulation as to "who" was *not* the subject of the court's new power. This gave the courts the broad discretion which they exercise in determining probation.

Applying these guidelines of statutory construction, the *Atlantic Richfield* court relied upon section 3651 of the Federal Probation Act:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States *when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby*, may suspend the imposition or execution of sentence and place the defendant on *probation for such terms and conditions as the court deems best.*[22]

As a federal statute, the Probation Act must be compatible with the federal criminal code and with the principle of corporate criminal liability. The former expressly applies to corporations[23] and the latter is well settled law.[24] The court therefore reasoned that sections 407 and 411 of the Federal Probation Act should be applied to the corporate entity.

The significance of this conclusion, however, is diminished by the court's finding that the conditions of probation imposed by the lower court were onerous and go "beyond what was intended by the drafters of the Probation Act."[25] In a cursory explanation, the court failed to

---

21. Federal Probation Act, 18 U.S.C. §§ 3651-56 (1970).
22. 465 F.2d at 60; 18 U.S.C. § 3651 (1970) (emphasis added).
23. *See* note 9 *supra*.
24. It is impossible to believe that corporations were intentionally excluded. They are as much within the mischief aimed at as private persons, and as capable of a "wilful" breach of the law.... And if we free our minds from the notion that criminal statutes must be construed by some artifical and conventional rule, the natural inference, when a statute prescribes two independent penalities, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape.

    United States v. Union Supply Co., 215 U.S. 50, 54-55 (1909); New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492-493 (1909); Standard Oil Co. of Texas v. United States, 307 F.2d 120 (5th Cir. 1962).
25. 465 F.2d at 61.

establish proper guidelines by which the lower court could reframe the conditions on remand.[26] Without specifically addressing itself to the terms of the probation, the court expressed the limitation that they could not be "unreasonable standards to the extent that the probationer may not know when they are satisfied."[27] Despite the merit of this statement, it seems inapplicable to the terms imposed upon Atlantic Richfield by the district court.

The terms of Atlantic Richfield's probation were: (1) that Atlantic Richfield set up and complete a program within forty-five (45) days to handle[28] oil spillage into the soil and/or stream; and (2) if the first condition was not fulfilled, a Special Probation Officer would be appointed.[29] In essence, Atlantic Richfield was capable of ending its probation at will be merely establishing an approved program. Even if the terms were determined to be unduly severe in respect to the time limit, there does not appear to be the vague or indeterminable requirements to which the appellate court alludes. Rather, the purpose seems to be within the spirit of making the corporate probationer "subject to surveillance, and to such restrictions as the court may impose,"[30] as long as these conditions are sufficiently definite to be enforceable.[31] It is not unduly burdensome, therefore, to require Atlantic Richfield to cease its violation of a criminal statute by directing it to find some means of disposing of oil other than discharging it into navigable waters. To require a wrongdoer to cease his criminal activity is certainly not a condition of a more onerous nature than the Congress or constitutional safeguards of due process and equal protection[32] would permit. In fact, the Act further provides that, while on probation, the defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . ."[33] If any specific injury to property or person had been determined in the instant case this aspect of probation

---

26. *Id.*
27. *Id.*
28. The inference of the Atlantic Richfield court's use of the phrase "set up a program . . . to handle" is that the Atlantic Richfield Co. is required to complete an affirmative act in order to abide by the terms of probation.
29. Upon the defendant's motion to correct the sentence, the lower court amended the conditions as follows:
    (1) the period of compliance is to be extended from 45 days to 60 days and may be further extended by the court upon request of the Probation Officer.
    (2) If the Probation Officer reports to the court that the defendant is not complying without undue delay, then as a condition upon a condition #(1) will come into effect.
    465 F.2d at 61.
30. Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937).
31. United States v. Koppelman, 53 F. Supp. 499, 500 (M.D. Pa. 1943).
32. Heinz, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483 (1962).
33. 18 U.S.C. § 3651 (1970). United States v. Buchanan, 340 F. Supp. 1285 (D. N.C. 1972); People v. E'Elia, 73 Cal. App. 2d 264, 167 P.2d 253, 255 (1946).

could have been implemented to repay aggrieved parties for actual damages or loss caused by the criminal offense.[34]

The broad discretionary powers which the Probation Act affords the court have been, on occasion, challenged as an unconstitutional failure of Congress to specify the standards of its application and administration.[35] The most recent opinion to refute this argument is found in *United States v. Baker*,[36] which reiterated the legislative intent to empower courts with the ability to consider the interests of society, the offense committed and the character of the criminal in determining the most appropriate means to curtail further crime and to encourage rehabilitation.[37] The constitutional parameters of probation require that the terms have a reasonable bearing on the prevention of future crimes by the accused and, if applicable, encourage restitution by the offender for injury that resulted from the illegal activity.[38] It would therefore appear that for the court to conclude that a condition is onerous and vague which requires a wrongdoer to stop his criminal activity represents a misinterpretation of the Probation Act. As a reforming discipline, the Act does not preclude coercion in administering terms and conditions. The reasonableness of such terms is to be measured by the relation they have to the crime committed.[39] For this reason the court has the continuing power to modify, revoke or impose conditions during the period of probation[40] and need not expressly state all conditions of probation in the sentence.[41]

Despite the *Atlantic Richfield* court's conclusion that the terms of probation do not fulfill the requirement of such ascertainable standards that the probationer may know when they are satisfied, the final determination of unreasonableness is not without merit. While the

---

34. 28 U.S.C. § 2255 (1970). *Cf.*, Freeman v. United States, 254 F.2d 352 (D.C. Cir. 1958) (reparation may be a proper restitutionary condition despite the use of the criminal process to collect a civil debt).
35. United States v. Baker, 429 F.2d 1344, 1346-47 (7th Cir. 1970) (defendant's contention rejected by the court).
36. *Id.* at 1347. Cunningham v. United States, 256 F.2d 467, 472-473 (5th Cir. 1958); *accord*, Nix v. James, 7 F.2d 590, 593 (9th Cir. 1925).
37. In assessing the judicial powers delegated by Probation Act, the Baker court quoted the following observation of Judge Learned Hand:

> Not infrequently a legislature means to leave to the judges the appraisal of some of the values at stake .... They require of the compromise that they think in accord with the general purposes of the measure as the community would understand it. We are of course aware of the resulting uncertainties involved in such an interpretation; but the alternative would be specifically to provide for each situation that can arise, a substitute utterly impractical in operation.

United States v. Baker, 429 F.2d 1344, 1347 (7th Cir. 1970).
38. 18 U.S.C. § 3651 (1970).
39. Whaley v. United States, 324 F.2d 356, 359 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1963), *reh. denied*, 376 U.S. 966 (1963).
40. 18 U.S.C. §§ 3651, 3653 (1964); United States v. Longknife, 258 F. Supp. 303, 306-307 (D. Hawaii 1966), *aff'd*, 381 F.2d 17 (9th Cir. 1967), *cert. denied*, 390 U.S. 926 (1967); United States v. Squillante, 144 F. Supp. 494, 495 (S.D.N.Y. 1956).
41. Yates v. United States, 308 F.2d 737, 739 (10th Cir. 1962); *accord*, Kaplan v. United States, 324 F.2d 345, 348-349 (8th Cir. 1956).

latitude which the Probation Act affords the judiciary in determining an appropriate penalty is extremely broad, it is not within the spirit of this power to impose punishment greater than that which is statutorily proscribed by law if suspension of sentence and probation were not granted.[42] The Rivers and Harbors Act of 1899,[43] under which Atlantic Richfield was convicted, provides for a penalty of not less than $500 nor more than $2500, a fine which at its maximum represents a nominal sum to a large public corporation. This is to be compared with the time consuming and expensive task of Atlantic Richfield in handling the discharge of oil in a manner other than by the pollution of navigable waters (probation condition #1).[44] As a practical matter, the latter imposes upon the offender a more stringent and inconvenient penalty than the statutorily proscribed fine. But if the premise of probation, to effect the best possible reform of the offender in consideration of the public good, is to be adhered to, it does not seem inconsistent to suspend sentence in order to coerce the convicted party into a cessation of illegal activity.[45] What does seem inconsistent with the Probation Act and with the entire criminal code is that a large public corporation, such as the defendant, might avoid the remedial intent of the penalty. As in *Atlantic Richfield*, a corporate criminal may effectively persuade a court that its compliance with the antipollution intention of the Rivers and Harbors Act is a condition of such an onerous and arbitrary nature as to deprive the criminal of constitutional due process and to exceed the congressional authority for probation in the federal judicial system. Since the law is replete with opinions that point to the need to deter and reform the criminal offender by whatever discipline is available to the court,[46] it does not appear that a convicted offender is unduly burdened by a requirement to reform.[47]

An analogy to the remedies available in a court of equity further

---

42. Whaley v. United States, 324 U.S. 356 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1963). The court cannot impose conditions that cannot be fulfilled within the probationary term.
43. 33 U.S.C. § 411 (1964).
44. *See* p. 298 *supra*.
45. Burns v. United States, 287 U.S. 216 (1932). The aura of "corporate crime" has traditionally evoked less repugnance and condemnation than similar activities of the individual criminal. Some of the reasons for this duplicity are:
    (1) The effect of a corporation's crime is diffuse in nature and frequently unapparent to the general public. A. ROSENTHAL, FEDERAL POWER TO PRESERVE THE ENVIRONMENT: ENFORCEMENT AND CONTROL TECHNIQUES IN ENVIRONMENTAL REGULATION: PRIORITIES, POLICIES AND THE LAW 235. (F. Grad, G. Rathgens, A. Rosenthal eds., 1971).
    (2) "Businessmen develop rationalizations which conceal the fact of crime." E. SUTHERLAND, WHITE-COLLAR CRIME 222, 225 (1949).
    (3) The complexity of the illegal activity in which corporations indulge is generally greater than the more publicized *mens rea* crimes. Geis, *Criminal Penalties for Corporate Crimes*, 8 CRIM. LAW BULL. 377-388 (1972).
46. Roberts v. Unites States, 320 U.S. 264 (1943); United States v. Banks, 108 F. Supp. 14 (D. Minn. 1952).
47. Porth v. Templar, 453 F.2d 330 (10th Cir. 1971); Buhler v. Pescor, 63 F. Supp. 632 (D. Mo. 1945).

supports a broader use of probationary conditons than the *Atlantic Richfield* court was willing to consider. Probation and injunctive relief are both remedial in nature, although the latter is seldom imposed in criminal actions. As such, they offer the court an opportunity to affix a condition of reform that is commensurate with the offense and the character of the offender. Injunctive relief serves as the swiftest and surest means of halting wrongdoing. An injunction to halt wrongdoing is not based upon the hardship and economic repercussions that may have to be endured by the enjoined party; rather, the nature of the wrongdoing act and injury to its victims are the primary considerations.[48] Such an intent is likewise manifested in the directive powers delegated to the court by the Probation Act through the broad and liberal construction it has consistently received.[49]

Another aspect the Act's application raised in *Atlantic Richfield* is the issue of a corporation's right to refuse probation. Despite the importance of this point, the court relied upon its determination that the terms of probation imposed by the lower court abused the spirit of the Probation Act and summarily excused itself from commenting on whether the defendant could demand sentence pursuant to the terms of the act violated: "[W]e find it unnecessary to decide whether or not the guilty party has the right to refuse probation and insist upon imposition of the statutorily proscribed sentence."[50] The necessity of addressing this question may not have confronted the *Atlantic Richfield* court; but some direction might have been offered to the lower court as the purpose of remand was an alteration of the probationary conditions.

In a few jurisdictions the defendant is given the right to refuse probation and accept the criminal penalties.[51] This right of rejection appears to be based on an interpretation of probation as exclusively an "act of grace or clemency"[52] rather than an alternative remedial sentence with which the defendant cannot bargain.[53] The Federal Probation Act makes no such distinction and neither states nor infers that a convicted criminal may refuse the terms of probation. The two

48. State *ex rel.* Valley Distributors, Inc. v. Oakley, 153 W.Va. 94, 168 S.E.2d 532 (1969) (sale of merchandise on Sunday enjoined despite adverse economic effect). Equity readily enjoins any nuisance that offends property rights and thereby causes injury. As to tne possibility of applying injunctive relief under certain sections of the River and Harbors Act, *see* Kramon, *Section 10 of the River and Harbors Act: The Emergence of a New Protection for Tidal Marshes*, 33 MD. L. REV. 229, 260-63 (1973).

49. Escoe v. Zerbst, 295 U.S. 490 (1935); United States v. Baker, 429 F.2d 1344 (7th Cir. 1970); 18 U.S.C. §§ 3651-56 (1970).

50. 465 F.2d at 61.

51. People v. Billingsley, 59 Cal. App. 2d 846, 139 P.2d 362 (1943); State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955). "The statutes [California] concerning probation contain no provision as to its acceptance or rejection. However, it is settled [in the jurisdiction of California] that a defendant has the right to refuse probation, for its conditions may appear more onerous than the sentence which might be imposed." *In re* Osslo, 51 Cal. 2d 371, 377, 334 P.2d 1, 8 (1958), *accord* People v. Caruso, 52 Cal. 2d 786, 345 P.2d 282 (1959).

52. People v. Caruso, 52 Cal.2d 786, 801, 345 P.2d 282, 296 (1959).

53. Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937).

views of probation, as purely a quasi-legal means of dealing with juveniles or first-time offenders, and the purpose of serving the best interest of public good as expressed by the Federal Probation Act, are distinguished in the local probation law of Maryland.

> [The courts] . . . before conviction of any person accused of crimes with the written consent of the person so accused, . . . whether a minor or an adult, *and after conviction of a plea of guilty or nolo contendere, without such consent*, are empowered to:
>
> (1) Suspend the imposition of sentence; or
> (2) Place such person on probation without finding a verdict; and
> (3) Make such conditions of suspension of sentence as the court may deem proper.[54]

Consent of the defendant only is required when a plea of "innocent" has been entered:[55] the court then may choose not to find guilt or innocence but place the accused on "probation without verdict." The statutory law of Maryland thus reflects an awareness of the complete legal fiction of a "sentence" without determining guilt and therefore requires the accused's consent to impose it.[56] In *Skinker v. State*,[57] the Court of Appeals of Maryland notes this quirk in the local administration of probation and takes care to mention that no such procedure exists on the federal level. "Avoidance of the stigma of a criminal record, indeed, is the *raison d'etre* of the procedure. There is, however, a singular lack of authority in the United States in regard to the scope, procedure, and nature of probation without verdict."[58] The right to refuse probation is recognized only when no plea or a plea of "innocent" has been entered and the court, in its wisdom, attempts to withhold the stigma of a verdict. Despite the good intentions of this accepted practice, an accused must be granted the appealable basis of a verdict if it is demanded.[59]

On the federal level, suspension of sentence is a prerequisite to the application of the Federal Probation Act. Under these conditions, the

---

54. MD. ANN. CODE art. 27, § 641 (1972) (emphasis added).
55. *Id.*
56. Skinker v. State, 239 Md. 234, 239, 242, 210 A.2d 716, 719, 721 (1965); *cf.* State v. Jacob, 234 Md. 454, 199 A.2d 803 (1964); Sutherland, *The Position in the United States with Regard to Probation and Conviction*, 19 CAN. BAR REV. 522, 523 (1941):
> It is necessary that the court be convinced that the defendant has engaged in criminal behaviour before probation can be ordered. Conviction is implicit in that finding and that order, and it is made explicit by the pronouncement of a few words. Consequently probation without conviction is a legal fiction.
57. 239 Md. 234, 210 A.2d 716 (1965).
58. *Id.* at 239, 210 A.2d at 719 (citation omitted). The Federal Probation Act presupposes a conviction. 18 U.S.C. § 3651 (1970) begins: "Upon entering a judgment of conviction . . . ."
59. Skinker v. State, 239 Md. 234, 242, 210 A.2d 716, 721 (1965).

Act "vests a discretion in the court, not a choice in the convict."[60] A plea of guilty, or *nolo contendere*, as in *Atlantic Richfield*, compels the defendant to submit to the court's discretion in choosing either the statutory proscription or the conditions of probation. The only requirement necessary to satisfy the defendant's right of due process is a "lawful trial to convict, *and a lawful conviction in order to sentence.*"[61] Atlantic Richfield's plea of *nolo contendere* is a complete submission to the court's power to sentence. It is a groundless assertion to suggest that any further right to bargain with the court or object to its discretion is retained by the defendant.

Although the Atlantic Richfield Company did not have the option to refuse probation and demand the fine, a subsequent disregard of probationary conditions would appear to create the same result. The exclusive statutory penalty upon revocation of probation is the execution of the suspended sentence.[62] Additional punishment of the probationer in excess of the suspended sentence pursuant to the original cause of action would be beyond the court's power and violative of due process guarantees.[63] Accordingly, a citation for the corporation's contempt of a court order (the conditions of probation) would be an illegal double punishment that cannot be used when the status of probation is revoked.[64] Rather than attempting to coerce the corporate entity into compliance, the *Atlantic Richfield* court might have held that in view of the prosecution and finding of guilt, the corporate officers most closely allied with the Stickney, Illinois, facility were put on actual notice of the illegal activity. Such an imputation of knowledge would enable the court to find individual responsibility if the discharge of oil continued after the reasonable time established by the probation. If the corporate officers had been directed by the court to oversee future compliance with sections 407 and 411 of the River and Harbors Act, their failure to abide by the court order would result in not only a revocation of the corporation's probation and imposition of the fine, but also a citation for contempt issued to the previously determined

---

60. Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937); *cf.* Birnbaum v. United States, 107 F.2d 885 (4th Cir. 1939).
61. Ruckle v. Warden, 335 F.2d 336, 338 (4th Cir. 1964) (emphasis added), *cert. denied* 379 U.S. 934 (1964).
62. Roberts v. United States, 320 U.S. 264, 266 n.2 (1943):

> At any time within the probation period the probation officer may arrest the probationer . . . or the court which has granted the probation may issue a warrant for his arrest, . . . [and] such probationer shall forthwith be taken before the court . . . . Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

63. United States v. Young, 17 F.2d 129 (N.D. Cal. 1927).
64. Despite its inapplicability to the revocation of probation, contempt has been used to cite a corporate entity for its failure to abide by a court order. United States v. Kormel, Inc., 230 F. Supp. 275 (D. Nev. 1964) (defiance of a temporary restraining order by means of misrepresentations of material facts on the sale of stocks).

responsible agents.[65] The guilty parties could then be imprisoned or heavily fined for their lack of diligence. The failure of the individual to display a good faith effort to alter the policy of illegal discharge creates the fundamental characteristic of the traditional *malum in se* offense.[66] The *Atlantic Richfield* court, even if it could not determine individual wrongdoing, could have "personalized" any further violation by placing the corporate officers on notice when the probationary conditions were framed.[67] This would not be beyond the general scope or purpose of the Federal Probation Act, nor would this ancillary directive to corporate officers place an onerous, arbitrary condition upon the corporate defendant.

Atlantic Richfield's disdain for the status of probation, an attitude which is reflected in the appeal, most certainly indicates an intent to ignore the final terms and requirements of probation. This attitude would appear to be the most sensible for corporations which are similarly sentenced and must choose either the expense of complying with the law or the nominal fine and possible reparations imposed for continued violation. As admitted by a corporate officer in *Reynolds Metals Co. v. Lampert*,[68] "[i]t's cheaper to pay claims than it is to control flourides."[69] This willful disregard of the law reflects a pragmatic approach that can be traced beyond the corporate entity and may be directly attributed to the officers who direct the operations of the company. When the opportunity to show good faith compliance with the law by means of probation is ignored and successive prosecution for the same act is considered, the involvement of individuals should not be overlooked. The purpose of determining individual, as well as corporate, liability is to impose a penalty severe enough to make compliance more advantageous than violation.[70]

---

65. *Id.* at 278. Criminal contempt of a corporation *and* of an individual of the corporation was noted by the *Kormel* court. *See* Gross v. United States, 228 F.2d 612 (8th Cir. 1956).

66. Despite the many proponents of greater liability for the individual corporate officers, their actual conviction remains the exception. *See generally* United States v. Dotterweich, 320 U.S. 277 (2d Cir. 1943).

    The argument that violation of § 411 and § 407 might be construed as an act of strict liability is derived from the inference that § 407 does not require scienter. Section 411 states that liability may be imputed to "[e]very person and every corporation . . . [that violates § 407] *or* that shall knowingly aid, abet, authorize or instigate a violation . . . ." 18 U.S.C. § 411 (1970) (emphasis added). Strict liability is supported by United States v. U.S. Steel Corp., 328 F. Supp. 354, 356 (N.D. Ind. 1970); United States v. Interlake Steel Corp., 97 F. Supp. 912 (N.D. Ill. 1969). But the prevailing view continues to be based on the condition that a person must have knowledge of the violation and the authority to remedy it. This comprises the guidelines of the Corps of Engineers, 33 C.F.R. § 209.170(4); *cf.* United States v. Georgetown Univ., 331 F. Supp. 69 (D.D.C. 1971).

67. *See* note 63 *supra*.

68. 324 F.2d 465 (9th Cir. 1963).

69. *Id.* at 466.

70. The stigma of personal guilt is generally more effective than an abstract finding of corporate crime. Geis, *Criminal Penalties for Corporate Criminals*, CRIM. LAW BULL. 377, 380 (1972): "The fact is that the corporate offender, brought up to be particularly responsive to other's opinions about him—others of the same social class, at least—is especially vulnerable to reform by threat of demeaning social sanctions."

As the *Atlantic Richfield* court found the original terms of probation requiring compliance with the standards of the River and Harbors Act to be in excess of the lower court's authority, it is unlikely that it would support the imposition of a collateral order of compliance upon officers. Likewise, conditions of restoration or restitution were not considered, presumably because they would have been viewed as requirements that exceed the severity of the $2,500 maximum penalty. Contrary to this narrow view of the Probation Act, several cases have upheld a broader and more affirmative use of probation.[71] This ambulatory character of the punishment provides a means to impose three types of conditions on the corporate probationer: (1) restorative,[72] (2) supervisory[73] and (3) rehabilitative.[74] The *Atlantic Richfield* court ignored this test in its determination that despite the purpose of the conditions they were "unreasonable standards to the extent that the probationer may not know when they are satisfied."[75] This conclusion seems to contravene the definite order of the lower court to Atlantic Richfield Company that it set up and complete a program within 45 days to handle the discharge of oil spillage into the soil and/or stream; and, a probation officer would be appointed in the event that the defendant failed to comply with the first condition. Such conditions are hardly arbitrary or capricious, since there is a genuine attempt to reform the offender by direction and supervision. The possible unfairness of such a purpose is to be compared with the corporate defiance of legal restrictions, the further damage wrought in the name of "convenience" and the unbridled prosperity of a large corporation at the expense of public resources. The wrongful act of the Atlantic Richfield Company and the fruits thereof cannot be denied by an adverse finding of "corporate crime" and the subsequent imposition of a fine as sentence.

The decision of *Atlantic Richfield* represents an inadequate interpretation of a potentially effective means of dealing with a class of white collar criminals that flaunt the law with alarming regularity and increasing openness. To view the Federal Probation Act as merely a passive statute of limited use is to ignore its well established liberal construction as a remedial means to reform and supervise a defendant of unusual character or circumstance.[76] The *Atlantic Richfield* court has

71. United States v. Berger, 145 F.2d 888 (2d Cir. 1944), *cert. denied* 324 U.S. 848 (1945); United States v. Coates & Gray, Crim. No. 72-0598 (D. Md. Apr. 4, 1973); United States v. Mentor, Crim. No. 52254 (W.D. Wash. Oct. 8, 1971). During the period of probation, a defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." 18 U.S.C. § 3651 (1970).

72. *See* note 68 *supra*.

73. *See* note 28 *supra*. As to a broader use of surveillance see Pound, *Visitorial Jurisdiction over the Corporation in Equity*, 49 HARV. L. REV. 369 (1936).

74. 18 U.S.C. § 3651 (1970).

75. 465 F.2d at 61.

76. United States v. Underwood, 344 F. Supp. 486, 494 (M.D. Fla. 1972): "The inadequancy of the criminal penalties provided by . . . . The River and Harbors Act is beyond dispute. [It] contains only meager monetary penalties."

taken a narrow view of the types of probationary conditions which are unduly harsh and has thereby effectively limited the lower court's discretion in determining a proper remedy. However, the determination that the Federal Probation Act is applicable to corporations remains as a previously unexplored means of dealing with a complex and unusual type of criminal. Although the *Atlantic Richfield* court dismissed with disappointing brevity the issues of probation conditions more onerous than sentence and a defendant's right to refuse probation, the use of probation to control the corporate entity is a significant idea worthy of further use and development by the judiciary. A comprehensive view of the Federal Probation Act which encompasses restitution by the criminal to aggrieved parties, supervision of the criminal by the courts, and the eventual reformation of the criminal into a positive member of society logically includes the violations of the corporate entity. As long as other means of dealing with the illegal acts of corporations remain ineffective, the use of probation deserves further development.

Rignal W. Baldwin

COPYRIGHT—EXTENSIVE PHOTODUPLICATION OF COPYRIGHTED SCIENTIFIC JOURNALS BY LIBRARIES DOES NOT CONSTITUTE COPYRIGHT INFRINGEMENT. *WILLIAMS & WILKINS CO. V. UNITED STATES*, 487 F.2d 1345 (1973).

The speed and ease of reproduction by modern photoduplication equipment has resulted in an increase in reproduction which has posed a problem to copyright holders. Photocopying diminishes the need for the original work and impairs the protection afforded the owner of the copyright. It poses a growing threat to the balance between the constitutional right of the people to the free dissemination of information[1] and the statutory right of the copyright holder to control the use of his work.[2] Unfortunately, the present copyright act[3] is vague

1. U.S. CONST. Art. I, § 8 provides:
   The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective writings and Discoveries.
2. 17 U.S.C. § 1(a) *et. seq.* (1970).
3. *Id.* The present Copyright Act was originally adopted in 1909. Since that time several attempts at revision have been made beginning with the amendments proposed before the Berne Convention in 1924. The Dallinger, Perkins and Vestal Bills were efforts to adhere to the Berne Convention, as a result of which copyright protection was extended to the motion picture industry. Following three more revisionary bills from 1931-39, and amendments in accord with the 1954 Universal Copyright Convention, the Copyright Act is still silent on what types and scope of copying, if any, do *not* constitute copyright infringement. For the legislative history of U.S. copyright law see SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 to 1954, S. Res. 53, Study No. 1, 86th Cong., 1st Sess. 1-19 (1960).