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Arne R. Johnson

RECENT DEVELOPMENTS IN THE LAW OF PROBATION

ARNE R. JOHNSON

The author is an attorney in a corporate law department in New York City. A Harvard Law School graduate, he was engaged in the practice of law in New Haven, Connecticut, prior to moving to New York.

In a study published in 1933, Professor Sam Bass Warner described probation as a "newcomer" to the law. Using the Warner study as a starting point, Mr. Johnson in the following article describes the law of probation as it has developed over the last three decades. He reviews the history of probation law, describes the types of statutory and non-statutory powers to grant probation held by the courts, and discusses the problems which have developed in the law of probation with respect to such matters as the split sentence, void suspension of sentence, procedural matters, conditions and revocation of probation, appellate review, and the due process rights of the probationer. He presents a critical analysis of the decisions and statutes, pointing out the need for a judicial and legislative reappraisal of certain portions of the law of probation as it stands today.—EDITOR.

INTRODUCTION

Definition of the Problem

Probation has become firmly rooted in our American legal system. Today it is recognized as a legitimate and useful tool in the judge's exercise of the sentencing power. Speaking before the American Bar Association, Chief Justice Warren recently said:

> "I have dealt with the subject of probation at some length because its importance is too often lost sight of in the welter of our social and legal problems. The public and even our own profession know altogether too little about it as a factor in the administration of criminal justice."[1]

This paper attempts to analyze the growing jurisprudence of what we may call the American law of probation. We shall be primarily concerned with the legal aspects of the probation statutes, rather than with the effectiveness of probation as a "penal-correctional" device.

The starting point of this analysis is a similar study conducted by Professor Sam Bass Warner in 1933. He wrote:

> "Many of our legal doctrines have been developing for centuries, but probation is a newcomer to the law.... One result of this newness of probation is that the hundreds of questions involved in the interpretation of the various probation acts and the dividing line between probation and the other dispositions of offenders, have not had time to be worked out by the courts. There is thus no well-defined law of probation, but only a few cases on scattered problems; often not even enough to furnish a reliable indication of the direction in which the law is developing."[2]

Brief History of Probation in the United States

Probation as we now know it is generally regarded as the invention of John Augustus of Massachusetts and dates from about 1831.[3] There were in England, prior to that time, devices such as benefit of clergy, judicial reprieve, and right of sanctuary, which were akin to probation in that they suspended the imposition or execution of the sentence.[4] Augustus, however, appears to have been the first concerned with helping convicted persons rehabilitate themselves by means of supervision.

The first statute regarding probation was passed in Massachusetts in 1878.[5] It is to be noted, however, as Professor Timasheff tells us, that "probation originated in the common law."[6] An apparently widespread use of common law probation prevailed in the federal courts (as well as in some state courts) until 1916, when the United States Supreme Court held that federal courts had no inherent common law power to suspend either

[1] Warren, *Probation in the Federal System of Criminal Justice*, 19 FED. PROB. 3 (1955).

[2] WARNER, PROBATION AND CRIMINAL JUSTICE 23 (S. Glueck ed. 1933).

[3] Timasheff, *Probation in Contemporary Law*, 1 CONTEMP. LAW PAMPHLETS (1941).

[4] Webster, *The Evolution of Probation in American Law*, 1 BUFFALO L. REV. 249, 251 (1952).

[5] Timasheff, *supra* note 3, at 2.

[6] *Ibid.*

the imposition or execution of sentence.[7] Following this decision the National Probation Association and other advocates of probation began to agitate for a federal probation act.[8] In 1925 the first national statute was enacted.[9]

Power To Suspend Sentence Without Probation

For the most part, probation law in the United States today derives from statutes which authorize trial judges to grant convicted persons a period of probation under supervision. Like the federal courts, most state courts do not recognize an inherent common law power to suspend either the imposition or execution of sentence;[10] a few state courts, however, do recognize such a power.[11]

It is interesting to note, too, that New York and Texas have statutes which allow suspended sentence without probation,[12] in addition to statutes authorizing probation. The Texas Court of Criminal Appeals has held that the two statutes are unrelated, and that the trial judge has an option to use either statute in a particular case.[13]

In practical effect, both common law and statutory suspension of sentence without probation circumvent the techniques of probation and the aim of supervised rehabilitation. It is submitted that the federal and majority of states' practice of limiting suspension of sentence to that authorized under the probation statutes is more in line with sound correctional theory.

Statutory Probation in the United States

Power to Grant Probation

(1) *Constitutional Objections.* The constitutionality of the probation statutes has been attacked on the ground that judicial suspension of sentence encroaches upon the executive powers of parole and pardon; however the federal courts and the great majority of state courts have long upheld the constitutionality of probation statutes.[14]

(2) *Two Types of Sentence Suspension.* Historically two distinct methods of suspending sentence have been employed. The first is suspension of the *imposition* of sentence, whereby the court does not pass sentence at all after conviction. The second is suspension of the *execution* of sentence, whereby the court passes sentence but does not execute it during the probationary period.

In the federal probation system the courts may employ either method of suspending sentence.[15] In some of the state systems, however, only one method is allowed;[16] the result is that a premium is sometimes placed on the difference between suspension of the *imposition* of sentence and suspension of the *execution* of sentence.

In Pennsylvania, for example, the probation statute grants only the power to suspend imposition of sentence. The Superior Court of Pennsylvania, faced with a situation where the trial court had first imposed sentence and then suspended its execution, held that the trial judge could not place the defendants on probation.[17] Similarly, the Superior Court of Delaware held that the court had to grant probation before imposing sentence at all; otherwise probation could not be granted.[18]

In these cases the harsh results of depriving the courts of power to grant probation appear to be forced by the statutes themselves. A draftsman taking note of this would do well to include both suspension techniques in his scheme, as was done in the federal system.

The Supreme Court in *Korematsu v. United States*[19] wisely disregarded the technical distinction between imposition and execution of sentence. There the court held that suspension of imposition was a "final decision" for purposes of appeal.[20]

[7] *Ex parte* United States, 242 U.S. 27 (1916).

[8] Meyer, *A Half Century of Federal Probation and Parole*, 42 J. Crim. L., C. & P.S. 707 (1952).

[9] Probation Act 1925, Comp. Stat. 10564½–10564½ C.

[10] People v. Sidwell, 27 Cal.2d 121, 162 P.2d 913 (1945).

[11] See *Ex parte* Samber, 13 N.J. Super. 410, 80 A.2d 487 (1951); *Ex parte* Kuney, 68 Misc. 285, 5 N.Y.S.2d 644 (1938).

[12] Tex. Code Crim. Proc. § 776–81 (1948). See People v. Moore, 184 Misc. 444, 53 N.Y.S.2d 189 (Sup. Ct. 1945) and *Ex parte* Kuney, 68 Misc. 285, 5 N.Y.S.2d 644 (Sup. Ct. 1938).

[13] *Ex parte* Pittman, 157 Tex. Crim. 301, 248 S.W.2d 159 (1952).

[14] See Nix v. James, 7 F.2d 590 (9th Cir. 1925); Chappell, *The Courts Interpret the Federal Probation Act*, 29 J. Crim. L. & C. 708 (1939).

[15] Riggs v. United States, 14 F.2d 5 (4th Cir. 1926).

[16] See Epstein, *A Survey of the Law of Probation and Parole in Pennsylvania*, 30 Temp. L. Q. 309 (1957).

[17] Commonwealth v. Denson, 40 A.2d 895 (Super. Ct. Pa. 1936). This statute has also given the Pennsylvania courts difficulty with regard to appeal. The traditional doctrine that a defendant can only appeal from a *final* judgement has had to be fudged in regard to allowing an appeal from the imposition of sentence suspension. See Commonwealth v. Trunk, 311 Pa. 555, 167 Atl. 333 (1933).

[18] Frabizzio v. State, 44 Del. 395, 59 A.2d 452 (1948).

[19] 319 U.S. 432 (1943).

[20] Mr. Justice Black, speaking for the court, de-

It is to be hoped that the probation statutes of the several states and the courts interpreting these statutes will de-emphasize the technical difference between the modes of suspending sentence, so as not to hamper unduly the administration of criminal justice in the important area of probation.

(3) *Partial Granting of Probation.* When the court may impose a fine with or without imprisonment, it may be faced with special problems. No reason is readily apparent why a court may not grant probation of a fine, where that is the only penalty involved, and it was held in *United States v. Berger*[21] that the court may grant probation upon a sentence of a fine alone.

When the sentence is both a fine and imprisonment, some courts have more difficulty. *In Shewmaker v. State*[22] the Criminal Court of Appeals of Oklahoma struck down an order of the trial judge sentencing the defendant to pay a $500 fine but suspending sentence with probation as to the imprisonment penalty.

Other courts run into trouble with fine and probation under statutes which allow only the suspension of imposition of sentence and not the suspension of the execution thereof. In this situation if the court imposes a fine but suspends imposition of imprisonment and grants probation, the probation is void because a sentence, i.e., the fine, has already been imposed.[23]

These difficulties regarding fine and probation are unfortunate and in most cases appear unnecessary. There seems to be no logical reason why a court should be unable to grant probation of a prison term while still imposing a fine. Courts are allowed to accomplish practically the same result by imposing restitution as a condition of probation. Perhaps there is a policy question for the court to consider as to the desirability of granting probation as to only one portion of a sentence; this policy factor, however, should not be confused with the courts' power to suspend part of a sentence.

(4) *Courts' Power to Grant Probation Where Defendant is Convicted of Several Counts.* When a defendant has been convicted on several counts or on several indictments, the question arises whether the court may grant probation as to certain counts while sentencing the defendant to prison on other counts. The federal courts have long struggled with this problem. When the court sentences the defendant to imprisonment on one count and puts the defendant on probation with respect to a second *consecutive* count *before custody has begun at all*, the courts are in agreement that the sentence is valid.[24] If the defendant has already begun serving sentence on one count, however, can he subsequently be granted probation on counts not yet served?

In *United States v. Murray*[25] the Supreme Court held that once a man has begun to serve his sentence, the District Court loses all power to grant probation. The rationale behind the Court's reasoning was that the purpose of probation is to save the criminal from the ill effects of first imprisonment and that once imprisonment has begun the court should refrain from interfering with the executive's administration of parole.

It is important to note, however, that the *Murray* case dealt with a single crime and did not pass on the situation where successive counts are involved. The Courts of Appeals, faced with the several counts issue, proceeded to go separate ways. On the one hand, the Court of Appeals for the Eighth Circuit, in *Phillips v. United States*,[26] decided to extend the *Murray* doctrine and held that the court could not grant probation on a successive count while the defendant was serving time on the first.[27] On the other hand the Court of Appeals for the Ninth Circuit in *Kirk v. United States*[28] concluded that the court may grant probation in this situation. The Supreme Court settled the question in *Affronti v. United States*,[29] approving the *Murray* case and disapproving of *Kirk*.

It is submitted that the *Phillips* and *Affronti* decisions fail to distinguish the policy question from that of judicial authority to suspend sentence and grant probation. As previously noted,

clared: "The difference to the probationer between imposition of sentence followed by probation . . . and suspension of the imposition of sentence is one of trifling degree." 319 U.S. at 435.

[21] 145 F.2d 888 (2d Cir. 1944).

[22] 329 P.2d 858 (Okla. Crim. 1958).

[23] Frabizzio v. State, 44 Del. 395, 59 A.2d 452 (1948).

[21] Frad v. Kelley, 302 U.S. 312 (1937); Cosman v. United States, 303 U.S. 617 (1938).

[25] 275 U.S. 347 (1927).

[26] 212 F.2d 327 (8th Cir. 1954).

[27] The editors of the *Yale Law Journal* explain *Phillips* thus: "Although Murray involved only a single sentence, the Eighth Circuit felt that it controlled Phillips because the consequences of imprisonment in terms of hardening influence and overlapping jurisdiction were the same in both cases." 64 YALE L. J. 260, 261 (1955).

[28] 185 F.2d 185 (9th Cir. 1950).

[29] 350 U.S. 79 (1955).

the granting of probation on a successive count, where the sentence on the first count has not yet begun, is clearly within the authority of the district courts.[30] If the Supreme Court wanted to forbid such a practice on "penal correctional" policy grounds or indeed on statutory grounds, it should have gone the whole way and outlawed the practice altogether.[31]

Cogent policy arguments can be urged for allowing courts flexibility regarding the use of probation when several counts are involved. In addition, such a decision with regard to the granting of probation on successive counts seems more properly left to Congress than to the courts. The present statute[32] gives the trial judge broad power to suspend sentence and grant probation. In light of this grant the Supreme Court might have better followed *Kirk v. United States*, leaving statutory restrictions of federal probation up to Congress.

(5) *Courts' Power to Grant Probation With Imprisonment: The Split Sentence.* May a judge impose a period of imprisonment as a condition of probation? This is a separate problem from that involving the separate count. Here, only one crime is involved, and the issue is whether the court can "split" the sentence between imprisonment and probation. As a policy matter it has been seriously questioned whether the use of the split sentence is advisable.[33] The important point for purposes of this discussion, however, is whether the courts have power to grant a split sentence.

In 1933 Professor Warner concluded that the federal judge could not impose such a sentence, reasoning that to grant a split sentence would encroach upon the power of the executive to pardon.[34] The federal courts have agreed with this view.[35] This rule appears consistent with the rule that after a sentence of imprisonment has commenced the court loses jurisdiction to the parole board. In the several count situation, however, the court has not lost jurisdiction over the second count, as no imprisonment has yet started.

Turning to the state courts, we find a difference of opinion. Under the general probation statutes, a majority of those states which have passed on the question hold with Warner and the federal courts.[36] At least one state, South Carolina, dissents and interprets the ordinary probation statute as including authority to split the sentence.[37]

Where a specific statutory sanction of the split sentence is made, the courts have recognized the power to impose a period of imprisonment as a condition of probation. An example of this is Michigan, which denied the court power under the general probation statute[38] but upheld it under specific statutory grant.[39]

In conclusion, most states will not allow a judge to grant a split sentence unless the legislature has provided explicit statutory power to do so. While many authorities raise serious questions as to the advisability of splitting a sentence, there appears to be little doubt as to the constitutional power to enact such statutes.

(6) *When Probation May Be Granted.* The outer limit of time within which the judge may place the defendant on probation is the commencement of the execution of the sentence. *United States v. Murray* clearly establishes this rule, which is generally followed by the states.[40]

But what about various stages in the judicial process up to the beginning of execution of sentence? The federal rule today is that the court may grant probation after appeal as well as after expiration of the term of court of original conviction, as long as execution of sentence has not commenced.[41] This rule appears sound.

Most courts agree that the trial judge should be allowed a reasonable time in which to have a

[30] The Supreme Court itself allowed the granting of probation on one count, coupled with imprisonment on another count, where no custody had begun. Frad v. Kelley, 302 U.S. 312 (1937).

[31] This, indeed, is the view advocated by a *Harvard Law Review* note. 55 HARV. L. REV. 1210 (1941).

[32] 43 Stat. 1259, as amended, 18 U.S.C.A. 3651 (1952).

[33] See 29 J. CRIM. L. & C. 427, 432 (1938); 23 FED. PROB. 12 (1959).

[34] WARNER, *op.cit. supra* note 2, at 37.

[35] United States v. Greenhaus, 85 F.2d 116 (2d Cir. 1936).

[36] See Annot., 147 A.L.R. 656 (1943).

[37] Moore v. Patterson, 203 S.C. 90, 26 S.E.2d 319 (1943).

[38] People v. Robinson, 253 Mich. 507, 235 N.W. 236 (1931).

[39] People v. Sarnoff, 302 Mich. 266, 4 N.W.2d 544 (1942).

[40] United States v. Murray, 275 U.S. 347 (1927); State v. McKelvey, 30 Ariz. 265, 246 Pac. 550 (1926).

[41] Mintie v. Biddle, 288 U.S. 206 (1933). Such a view, however, was not originally adopted by all federal courts. The Court of Appeals for the Eighth Circuit held in *Mintie v. Biddle*, 15 F.2d 931 (8th Cir. 1926), that the trial court lost jurisdiction of the defendant with the expiration of the term of court at which defendant had been convicted. *Rosenwinkel v. Hall*, 61 F.2d 724 (7th Cir. 1931), held to the contrary.

probation report prepared.[42] Beyond this, however, the state decisions go off on local grounds. Thus the Court of Appeals of Ohio in the case of *Ex parte Steinmetz* stated:

> "In the absence of a permissive statute the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term and is in effect a discharge of the prisoner. . . ."[43]

Such a result, of course, would not be possible in the federal system, the court having no power indefinitely to suspend sentence without probation. It is to be hoped that the states will adopt the federal rule as being more consistent with the objectives of probation.

(7) *Effect of Void Suspension of Sentence.* If the trial court does not possess authority to suspend sentence and grant probation, what is the result of an abortive attempt to do so? When the trial court becomes aware of its error may it impose or execute sentence without probation, in other words, send the defendant to prison?

Here again it is necessary to distinguish between imposition and execution of sentence. Where the court has imposed sentence but suspended execution, the overwhelming weight of authority allows the court to carry out the sentence as originally imposed.[44] This rule allows the sentence to be executed after the term at which it was imposed. The rationale of the courts is that where a valid sentence has been imposed, the suspension of which was a mere nullity, the original sentence is still in force.

When the court has not imposed sentence, however, but has suspended the imposition thereof, the courts disagree as to the effects of a void suspension. The prevailing federal rule allows the trial court to impose sentence just as if the void suspension had never taken place.[45] Some states follow the federal view.[46] Many other states, however, deny the trial court power to impose a sentence after a void order of suspension of *imposition* of sentence.[47] These cases appear to turn on the proposition that it is unfair later to sentence a defendant who has never been sentenced. Some courts will allow a later sentence if imposed at the same term of court as the conviction.[48]

The rule allowing enforcement of sentence at a later period if *execution* was suspended, and the rule denying power later to impose sentence if the original *imposition* of sentence was suspended both appear subject to criticism. There appears to be no statute of limitations regarding void execution. In addition, a void suspension of imposition appears to result in a loss of jurisdiction to sentence the defendant. The net result is that no matter how long after a void suspension of execution, a court may send a defendant to prison, but presumably a court could not sentence a defendant even shortly after a void suspension of imposition.

A better view might be to abolish the distinction for this purpose between imposition and execution of sentence and adopt the federal rule, allowing enforcement after a void suspension of either type. Coupled with this, however, should be some judicial laches[49] or a statute of limitations to ensure that a defendant is protected from execution of sentence long after a void suspension.

Procedures in Granting Probation

(1) *Who May Be Granted Probation?* Not everyone convicted of a crime may obtain probation. Such, apparently, is not the case in Great Britain.[50] In the United States, however, the statutes generally limit the offenses to which probation may be applied as well as the type of offenders who may qualify.[51] Typically, probation may not be granted to a person previously "convicted of a felony" or to "persons accused of murder, rape and first degree arson."[52]

Undoubtedly there are policy reasons for denying probation to certain offenders. The probation statutes, however, and the courts interpreting them, have brought about a morass of confusion and such weird results as denying probation to prisoner X because he carried a gun in a robbery, while allowing probation to Y, who employed a different weapon. There is need for a careful redrafting of probation statutes to

[42] See 24 C.J.S. 1618 (1941).
[43] 35 Ohio App. 491, 172 N.E. 623 (1930).
[44] Dawson v. Sisk, 231 Iowa 1291, 4 N.W.2d 272 (1942); Morgan v. Adams, 226 Fed. 719 (8th Cir. 1915).
[45] Miller v. Aderhold, 288 U.S. 206 (1933).
[46] See Paige v. Smith, 130 Pa. Super. 536, 198 Atl. 812 (1938).
[47] See Annot., 141 A.L.R. 1226 (1942).
[48] Dawson v. Sapp, 87 Kan. 740, 125 Pac. 78 (1912).
[49] For cases pointing in this direction see *Ex parte* Bugg, 163 Mo. App. 44, 145 S.W. 831 (1909); *Ex parte* Brown, 297 S.W. 445 (Mo. Ct. of Appeals, 1927).
[50] GLOVER, PROBATION AND RE-EDUCATION 2 (1956).
[51] See COSULICH, ADULT PROBATION LAWS OF THE UNITED STATES, 22 *et seq.* (1940); NAT'L PROBATION AND PAROLE ASS'N, STANDARD PROBATION AND PAROLE ACT 1–45 (1955).
[52] 7 WYO. L.J. 104 (1952).

develop some rhyme or reason for excluding probation at the *threshold* to some while granting it to others.

(2) *Application for and Refusal of Probation.* While many states merely provide that the judge shall conside probation in each appropriate case, some states require a defendant to make formal application for probation.[53] The federal statute does not require that defendant make application for probation.[54] In the federal system and in those states not requiring formal application, probation is left to the discretion of the trial judge, as one of a number of sentencing possibilities. Where formal application is required, the defendant must ask for probation or the court is powerless to grant it.[55]

If the defendant does submit a timely application for probation the court must consider it, i.e., exercise its discretion.[56] In Texas the defendant's right to apply for probation is protected by statute, and the defendant is entitled to counsel, appointed by the court if necessary, to present his "case" for probation.[57]

A serious policy question is raised regarding the desirability of formal application. Although the Texas practice safeguards the defendant in seeing to it that his application is formally considered, it perhaps goes too far in tying up the administration of sentencing by the court. The federal practice of routine consideration of probation in all cases seems preferable to formal application.

It is settled that no defendant has a *right* to be placed on probation.[58] Once it is clear that the court has exercised its discretion and denied probation, the defendant may not force a court to grant it. Whether the defendant may refuse probation and demand that the court impose statutory sentence is another matter.

Cooper v. United States[59] is still regarded as a leading federal authority on this question. In that case the Court of Appeals for the Fifth Circuit held that the defendant could not refuse probation. In contrast, *Persall v. State*,[60] decided by the Court of Appeals of Alabama, points out that the overwhelming weight of authority is in favor of allowing the defendant to refuse probation and take his statutory medicine, as it were. The court in *Persall* notes that other federal courts have questioned the *Cooper* holding.[61] In addition, the court notes that the purpose of probation is non-penal in character and that a prisoner forced to undergo probation will hardly be susceptible to the rehabilitation offered.

That this question is far from academic can be seen from the number of adjudications on the point. Apparently it is often raised where a defendant considers the conditions of probation imposed by the court to be too harsh and would rather serve time than endure the conditions. In this situation *Persall* seems to follow the better rule. The defendant should be allowed his choice; otherwise, the court is permitted to force non-statutory terms of sentence upon him. If the United States Supreme Court considers this point under the federal statute, it is hoped that the Court will overrule *Cooper v. United States.*

(3) *Use of Probation Officers' Report in Granting or Denying Probation.* The trend in the law of probation is toward a mandatory requirement that the probation department conduct an investigation and prepare a report for the sentencing judge in every case in which the court has the power to grant probation.[62] In some jurisdictions the court need not order a report[63] if the judge feels the crime committed was so serious or defendant's reputation so bad that the court would not be justified in granting probation.

The court is usually required to consider the probation report, but it is not bound thereby.[64]

[53] See McMurray v. State, 119 Tex. Crim. 74, 45 S.W.2d 217 (1932).

[54] 18 U.S.C.A. 3651 (1948).

[55] The Supreme Court of Illinois has stated: "When probation is not asked, the court has no discretion as to the extent of the punishment. In such cases the indeterminate sentence fixed by statute must be imposed." People v. Donovan, 376 Ill. 602, 35 N.E.2d 54 (1941).

[56] State v. Boston, 233 Iowa 1294, 11 N.W.2d 407 (1943).

[57] Arsola v. State, 138 Tex. Crim. 1, 33 S.W.2d 585 (1939).

[58] Berman v. United States, 302 U.S. 211 (1937); Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937).

[59] 91 F.2d 195 (5th Cir. 1937)

[60] 31 Ala. App. 309, 16 So. 2d 332 (1944).

[61] See Kaplan v. Hecht, 234 F.2d 664 (2d Cir. 1956).

[62] Federal Rule 32c states: "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. . . ." FED. R. CRIM. P. 32, 18 U.S.C.A. 350 (1946).

[63] A few states provide that the jury shall decide when defendant is to be granted probation; fortunately the states are turning away from this practice, and only a few now use it. See 24 C.J.S. 1571 (1941). Consequently, few points are litigated in appellate courts regarding the jury's granting of probation. In an examination of over 400 cases the author rarely came across the point in an appellate report.

[64] People v. Johnson, 106 Cal. App. 815, 236 P.2d 190 (1951).

Thus, the court may not delegate to the probation officer the duty of fixing conditions of probation, but may incorporate into a sentence the recommendations of the probation department.[65]

A mandatory provision requiring the court to have a probation report prepared in every case appears to be founded on good sense. If probation is to become a full partner with other more traditional modes of sentencing, such a report would seem necessary in each case, no matter what the final outcome is.

The use of a probation report raises some serious due process issues: must the court, for example, permit the defendant to view the report, to cross examine the probation officer, or to offer evidence on his own behalf? Some courts consider that the defendant has substantial constitutional rights in this area. The Supreme Court of Appeals of Virginia has concluded that it is error for a court to refuse defendant an opportunity to cross examine the contents of the probation report.[66]

The defendant's constitutional rights with regard to sentencing were considered by the United States Supreme Court in *Williams v. New York*.[67] In that case Williams had been convicted of first degree murder and sentenced by the court to death, despite a recommendation for life imprisonment by the jury. In determining the sentence, the trial judge considered reports containing a good deal of out of court information regarding the defendant's past history. The defendant was denied the right to cross examine these reports as well as the persons who prepared them. Mr. Justice Black, in a considered opinion, concluded that due process does not demand that a defendant be permitted to cross examine witnesses and reports used by the judge in determining sentence.[68] Mr. Justice Murphy dissented, stating:

> "The record before us indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting of evidence that would have been inadmissable at the trial. . . . I am forced to conclude that the high commands of due process were not obeyed."[69]

The decision exemplifies the central problem of balancing the requirements of due process with intelligent sentencing procedures in the orderly administration of criminal justice. Many facets of this question are still open, especially in the state courts. The author favors Mr. Justice Black's views in *Williams v. New York*, but feels these difficult constitutional issues must await more adjudication before the line between the legitimate requirements of probation administration and those of due process can be pricked out.[70]

Conditions of Probation

(1) *Statutory Conditions.* In most jurisdictions the statutory conditions of probation are neither mandatory nor all-inclusive.[71] Thus, the federal statute states that certain conditions are "*among* the conditions" that "the defendant *may* be required" to observe.[72] One statutory condition often imposed requires that the defendant remain on "good behavior" during the probationary period. What constitutes "good behavior" has been litigated.[73]

State v. Gordon[74] concerned a statutory definition of "good behavior" specifying that the offender shall not be convicted "of any other crime." The probationer was convicted of a federal offense, and the Louisiana Supreme Court ruled

[65] Whitehead v. United States, 155 F.2d 460 (6th Cir. 1946).

[66] Linton v. Commonwealth, 192 Va. 437, 65 S.E.2d 534 (1951). A somewhat lesser right was allowed by a California court in *People v. Loeber*, the court concluding: "If appellant believed the report to be insufficient, vague or indefinite, he was entitled to present witnesses to testify in mitigation of his punishment at the time of his hearing on application for probation." 138 Cal. App. 730, 323 P.2d 136, 140 (1958).

[67] 337 U.S. 241 (1949).

[68] Mr. Justice Black wrote at 337 U.S. 246: "We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination."

[69] 337 U.S. at 253.

[70] With regard to the reasons why courts grant or refuse probation, the situation is little different in 1960 than when Warner wrote in 1933. Very infrequently does one find a detailed analysis in the reports of why a court passed as it did on a particular probation application. For views on this point see Logan v. People, 138 Colo. 304, 332 P.2d 897 (1958); Morgan v. Foster, 208 Ga. 630, 68 S.E.2d 583 (1952); Murray, *Prison or Probation, Which and Why?* 47 J. CRIM. L., C. & P.S. 451 (1956).

[71] COSULICH, ADULT PROBATION LAWS OF THE UNITED STATES 28 (1940).

[72] 18 U.S.C.A. 3651 (1948). (Emphasis supplied.)

[73] The Supreme Court of North Carolina interprets the requirement as follows: "The term 'good behavior' used in the order means in obedience to and conformity with the laws of the state: the demeanor of a law abiding citizen. . .behavior such as will warrant a finding that a defendant has breached the conditions of suspension on good behavior must be conduct which constitutes a violation of some criminal law of the state." State v. Millner, 240 N.C. 602, 83 S.W.2d 46 (1954).

[74] 274 La. 822, 38 S.2d 794 (1949).

that conviction of "any other crime" included any conviction, whether local, federal, or foreign, and was not restricted to crimes punishable under the laws of Louisiana.

In some states all statutory conditions are made conditions of every probation. The Michigan Supreme Court has said that such mandatory conditions apply in each case; the defendant is bound to know them whether he has actual notice or not.[75]

(2) *Non-Statutory Conditions.* Conditions imposed by the judge under his discretionary power raise significant problems. A general statement often found is:

> "A condition of probation of course, must not be unmoral, illegal or impossible of performance. The probationer is entitled to fair treatment and is not to be made the victim of whim or caprice."[76]

A stricter standard sometimes voiced by courts was applied by the Arizona Supreme Court in *Redewill v. Supreme Court.*[77] In that case the trial judge placed the defendant on probation for non-support of a minor child. The court imposed as a condition that the defendant pay for the child's support and education until three years after the child reached majority age. The appellate court struck down this condition on the ground that it had no relation to the prevention of crime. It may be quite difficult, however, in a particular case, to define what conditions are aimed at prevention of the same crime.

One of the earliest conditions imposed was banishment from the locality or even from the state. The trend today is to hold such a condition void as a matter of public policy. In *State v. Doughtie* the Supreme Court of North Carolina declared: "It is not sound public policy to make other states a dumping ground for our criminals."[78]

Restitution for injury done to others as a condition has raised a number of questions. The courts appear to be wary of restitution as a condition. Although some probation statutes specifically allow restitution as a condition,[79] the courts scrutinize such provisions carefully. Thus, the amount must be liquidated[80] and reasonably related to the crime committed.[81] The Vermont Supreme Court invalidated a condition that defendant pay victims' medical bills, when the latter had not been tried out in a civil suit.[82] *In People v. Prell*[83] the court in a confused opinion said that statutory restitution does not authorize the judge to impose payment of civil damages as a condition of probation.

A study of the restitution cases in the probation area shows a definite need to bring order out of chaos. Restitution appears to be a legitimate aim of probation in encouraging the defendant to rehabilitate himself by becoming a responsible citizen. The cases show, however, that despite statutory authorization the unwary trial judge may find himself reversed because he did not frame his condition of restitution within the narrow technical limits set by the appellate courts. A careful legislative or adjudicative reform is needed in this area.

A number of other conditions of probation have been imposed by the trial courts from time to time. The Supreme Court of California upheld a condition, imposed on defendants convicted of crimes connected with unions, whereby defendants were forbidden to hold any union position during the probationary period.[84] Similarly, a federal court upheld a condition that defendants, convicted of crimes on interstate railroad cars, not return to interstate railroad employment during the probationary period.[85]

Other conditions have not been so successful. A New York court in an unclear opinion struck down as unreasonable a condition that defendant take out automobile insurance for sixty days following a traffic offense.[86] A most unusual condition was that imposed in *Springer v. United States*[87] when the trial court, after sentencing defendant for draft evasion, ordered that defendant donate a pint of blood to the Red Cross within

[75] People v. George, 318 Mich. 329, 28 N.W.2d 86 (1947).
[76] Basile v. United States, 38 A.2d 620, 622 (D.C. Mun. Ct. App. 1944).
[77] 43 Ariz. 68, 29 P.2d 475 (1934).
[78] 237 N.C. 368, 74 S.E.2d 922, 924 (1953).
[79] See 18 U.S.C.A. 3651 (1948).
[80] People v. Frink, 68 N.Y.S.2d 103 (N.Y. Sup. Ct. 1947).
[81] People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957).
[82] State v. Barnett, 110 Vt. 221, 3 A.2d 521 (1939).
[83] 299 Ill. App. 130, 19 N.E.2d 637 (1939); *Contra,* Freeman v. United States, 254 F.2d 352 (D.C. Cir. 1958).
[84] People v. Osslo, 50 Cal. 75, 323 P.2d 397 (1958).
[85] Stone v. United States, 153 F.2d 331 (9th Cir. 1946).
[86] City of Rochester v. Newton, 169 Misc. 726, 8 N.Y.S.2d 441 (N.Y. County Ct. 1938).
[87] 148 F.2d 411 (9th Cir. 1945).

thirty days! The court struck this down presumably as an unreasonable condition not within trial courts' discretion. Law review comment on this case points out there may well be a due process objection to such a condition.[88]

Now and then a question arises regarding the applicability of a condition under changed circumstances. A New Jersey court was faced with a situation where the defendant had become mentally ill during probation. The court held that such an illness was a "lawful excuse" for not adhering to a condition that defendant find employment.[89]

A special problem occurs with regard to partial imprisonment. The Court of Appeals for the Seventh Circuit allowed a condition whereby defendant had to surrender to a United States marshal once a week for twenty-four hours.[90] *Gray v. Graham* is a Kansas case where the court sustained a condition that defendant undergo hospitalization.[91] These cases are closely connected with a state's policy regarding a split sentence, discussed above. Perhaps hospitalization should be differentiated from partial imprisonment and allowed as a condition within the trial judge's discretion. A state revising its probation code would do well to differentiate hospitalization from split sentence.

It is difficult to generalize regarding appellate courts' treatment of conditions. There appears to be agreement regarding the undesirability of banishment as a condition. Much confusion, however, exists regarding restitution. In other situations trial courts have shown ingenuity in developing new conditions of probation to fit the particular case. Appellate courts on the whole appear sympathetic, but a more precise analysis must await new cases. One point may be emphasized: the legislature could help in this area by enumerating new statutory conditions which the court *may* impose in its discretion. This enumeration, however, should be permissive and not all-inclusive, so as to better the courts' use of probation as a flexible sentencing aid.

[88] 59 COLUM. L. REV. 317 (1959).

[89] State v. Moretti, 50 N.J. Super. 223, 141 A.2d 810 (1958); for a similar "frustration" case see State v. Robinson, 232 N.C. 418, 61 S.E.2d 107 (1950).

[90] United States v. Murphy, 217 F.2d 247 (7th Cir. 1954).

[91] 128 Kan. 434, 278 Pac. 14 (1929). *Contra, Ex parte* Funk, 79 Cal. App. 659, 250 Pac. 714 (1926).

Revocation of Probation

(1) *Statutory Authority to Revoke*

(a) *Who May Revoke?* Courts have power under the probation statutes to revoke probation.[92] A question has arisen, however, as to just who may exercise the power to revoke. Some courts have held that only the particular judge who sentenced the defendant can revoke his probation.[93] A much better view is that held by the federal and some state courts: the power to revoke is exercisable by any judge of the court in which sentence was imposed, and not only by the particular sentencing judge.[94]

(b) *Time When Probation May Be Revoked.* How long after the grant may probation be revoked? The federal rule is that probation may be revoked at any time within the probationary period (five years) or within the maximum period for which defendant might have been sentenced for his crime. Thus, where the original sentence could have been longer than the five year probationary period, the federal courts may revoke after the expiration of probation but within the time of maximum sentence.[95]

Some states allow revocation only within the period of probation.[96] In Ohio, however, there apparently is no limit on the time for revocation.[97] It appears that the technical differences between the states and federal practices regarding time of revocation do not matter very substantially. But the Ohio practice is open to serious question as to the wisdom of allowing revocation long after the term of probation has expired. It is hoped that all jurisdictions will adopt some time limitation concerning probation revocation.

(c) *Grounds for Revocation.* The federal rule as well as that followed by a majority of states is that there must be a violation of a condition in

[92] If probation is not revoked it expires at the end of the period. Whether it ends ipso facto or only by a formal release by the court no longer appears to be more than an academic question. See McBee v. State, 166 Tex. Crim. 562, 316 S.W.2d 748 (1958).

[93] *Ex parte* Smith, 232 Mo. App. 521, 119 S.W.2d 65 (1938).

[94] United States v. Greenhaus, 85 F.2d 116 (2d Cir. 1936); *Ex parte* Combs, 87 Okla. Crim. 164, 195 P.2d 772 (1948).

[95] Mason v. Zerbst, 74 F.2d 920 (10th Cir. 1935).

[96] Brooks v. State, 51 Ariz. 544, 78 P.2d 498 (1938); Annot. 117 A.L.R. 925 (1938).

[97] State v. Brewster, 75 Ohio App. 329, 62 N.E.2d 174 (1944).

order for the court to revoke probation.[98] California, however, follows a minority rule, and in the absence of a statutory restriction allows its trial judges to revoke probation without a violation of conditions.[99]

As a policy matter, limiting revocation to a violation of conditions seems a proper procedure as long as the court's discretion in revoking is not unduly fettered. The ordinary trial procedures are usually relaxed in revocation proceedings, so as to make revocation easier for the court.

(2) *Court's Power After Violation of Probation*

Upon violation of probation the court has several alternatives. The judge may continue the probation, perhaps warning the probationer to behave himself in the future, or the court may extend the probationary period. Under most probation statutes[100] the court may also change the conditions of probation, and even impose new conditions.

Far more drastic is the court's power to revoke probation and enforce sentence. The general rule is that the court upon revoking sentence may execute a sentence already imposed or impose any sentence which might have originally been given to the defendant.[101] Such procedures follow logically as a result of revocation. However, a more serious issue arises when the trial court attempts to alter the original sentence. This problem, of course, does not arise where the court has suspended the imposition of sentence. In that case the court is not changing the original sentence, since no sentence was in fact imposed originally.

Suppose, however, the original sentence was two years, but that execution was suspended. May the court upon revoking probation decrease the sentence to one year or increase it to three years? The federal courts have dealt with both situations. The rule is that the court may decrease the sentence.[102] The Supreme Court, however, struck down an attempted increase in sentence in *Roberts v. United States*[103] on double jeopardy grounds. Mr. Justice Frankfurter strongly dissented, pointing out that the practical effect of the *Roberts* decision was that a federal court can increase the sentence after revocation if the judge originally suspended imposition of sentence, but not if he suspended execution of sentence. The dissenting justices refused to hang a constitutional decision on so thin a distinction. This minority view seems to be the stronger one.[104]

(3) *Defendant's Rights with Regard to Revocation*

(a) *Arrest, Warrant.* When the court or its probation officer concludes that there is some cause to review defendant's probationary conduct, certain questions may arise. The first is whether a probationer may be arrested for cause without a warrant by the probation officer. The federal statute and some state statutes specifically allow arrest for cause without a warrant in this situation.[105] While this point is debatable, it seems legitimate to allow arrest for cause without a warrant in the case of a probationer in order to carry out the purposes of probation effectively.

(b) *Hearing.* An important question is whether the defendant has a right to a hearing on the issue of revocation. If he does have such a right, what are its nature and scope?[106] Where defendant is accorded a statutory hearing, the courts usually construe the scope of that hearing in accord with the statute. Nevertheless, all aspects of the hearing procedure are not spelled out in the statute. The result is that in those states not having statutory hearing and to some extent in those that do, constitutional due process issues are often litigated.

In *Ascoe v. Zerbst*[107] the United States Supreme Court held that a hearing must be held before revocation. The Court was quick to point out that the federal hearing was a statutory and not a constitutional right. This view also prevails among the states. A number of states, however, have held that there is a constitutional right to a hearing on revocation.[108]

The writer submits that the federal view of not giving a full constitutional hearing in a probation revocation is the correct one. This is a matter best governed by statute, not by strict constitutional standards. It may be that the minimum

[98] Manning v. United States, 161 F.2d 827 (5th Cir. 1947). But see Buhler v. Pescor, 63 F. Supp. 632 (W.D. Mo. 1945), where a district judge refused to follow the prevailing rule.

[99] People v. Martin, 58 Cal. App. 2d 677, 137 P.2d 468 (1943).

[100] See 18 U.S.C.A. 3651 (1948).

[101] Scalia v. United States, 62 F.2d 220 (1st Cir. 1932). Some states so provide by statute, see COLO. REV. STAT. ANN. §39-16-91 (1953).

[102] United States v. Benz, 282 U.S. 304 (1931).

[103] 320 U.S. 264 (1943).

[104] For a criticism of the majority holding see 59 COLUM. L. REV. 311 (1959).

[105] 18 U.S.C.A. 3652 (1948).

[106] About half of the states and the federal system provide a hearing by statute. 59 YALE L.J. 1521, 1522 (1950).

[107] 295 U.S. 490 (1935).

[108] 51 Ariz. 64, 74 P.2d 569 (1937).

requirements of constitutional due process should be applied in a case such as *Ex parte Dearo*,[109] where California went so far as to permit ex parte revocation while a man was in jail serving another sentence. But a full constitutional hearing should not be required.[110]

If defendant is to be afforded a statutory or constitutional hearing with regard to probation revocation, subsidiary questions arise as to the proper procedure for such a hearing. It seems essential that some form of notice be given the defendant of the intention to revoke and for what alleged violation of probation. Some statutes require such notice, and those states holding that defendant has a constitutional right to a hearing naturally extend constitutional protection to notice and other procedural safeguards.[111]

Right to counsel at a probation hearing is more controversial than notice. Some courts deny any right to counsel at all. A better view would be at least to allow defendant to have counsel present at his own expense. In contrast, some courts require counsel as a constitutional matter.[112] Where one comes out on the issue of right to counsel at a probation hearing is necessarily tied up with one's notion of the nature and purpose of the hearing itself, discussed above.

Many other problems are becoming important with regard to probation hearings. Questions arise as to the rules of evidence to be employed in such proceedings, and whether defendant should have a chance to view the probation officer's report.[113] The precise procedures to be employed in a probation hearing are just beginning to develop in the law of probation and must await further adjudication and statutory clarification.

Problems of Appeal

(1) *Procedure.* The introduction of probation into American law has raised certain problems regarding appellate procedure. One of these concerns statutes allowing appeal only from a "final judgement." Is a grant of probation a "final judgement" and therefore appealable? The Court of Appeals for the Fourth Circuit in *Birnbaum v. United States*[114] refused to allow a defendant to appeal where probation had been granted following the suspension of the imposition of sentence. The Supreme Court, in a better reasoned opinion, later held, however, that both an order suspending execution of sentence and an order suspending imposition of sentence are "final decisions" and thus appealable.[115] Some state courts, nevertheless, have continued to harbor these procedural traps for the defendant and deny a right to appeal once probation has been granted.[116]

The next question is whether a trial court may grant probation after appeal and affirmance of the conviction itself. No logical reason appears to deny the court such power, as the appeal is concerned with only substantive matters of the trial and not with the sentencing process at all. The United States Court of Appeals for the District of Columbia has so reasoned, allowing probation after appeal.[117]

The Texas courts, however, hold that where defendant appeals from a conviction, the trial court loses jurisdiction to grant probation.[118] It is hoped that future draftsmen and courts will follow the federal practice and allow probation after appeal.

Turning to another point, we note that even if probation is a final decision, the defendant may be barred from appeal on the ground of waiver. The theory of this rule as laid down by the Arizona Supreme Court[119] is that defendant should not be allowed to have the benefits of probation and later be allowed to challenge errors at the trial. But query, why prevent a defendant from later attempting to cure trial defects, providing usual time for appeal has not run? Perhaps this waiver of appeal after probation rule needs further examination by the courts.

(2) *Scope of Appellate Review.* The scope of appellate court review is very limited with regard to the granting of probation. The great weight of authority is in favor of allowing the trial court great discretion in granting or denying probation.[120]

With regard to revocation, however, appellate

[109] 96 Cal. App. 2d 141, 214 P.2d 585 (1950).
[110] See *Ex parte* Boyd, 73 Okla. Crim. 441, 22 P.2d 162, 172 (1942).
[111] See 59 COLUM. L. REV. 327 (1959).
[112] *Ibid.*
[113] *Ibid.*
[114] 107 F.2d 885 (4th Cir. 1939).
[115] Korematsu v. United States, 319 U.S. 432 (1943).
[116] See State v. Farmer, 39 Wash. 675, 237 P.2d 734 (1951).
[117] Gatson v. United States, 143 F.2d 10 (D.C. Cir. 1941).
[118] State v. Klein, 154 Tex. Crim. 31, 224 S.W.2d 250 (1949), 28 TEX. L. REV. 986 (1950).
[119] Brooks v. State, 51 Ariz. 544, 78 P.2d 498 (1938).
[120] People v. Racine, 201 Ark. 542, 1 N.E.2d 63 (1936).

courts tend to scrutinize the trial courts' action much more closely. Outwardly the scope of review is the same regarding revocation and the grant itself, namely, whether the trial court has abused its discretion.

In examining appellate cases, nevertheless, one finds surprisingly detailed rehashing of the trial courts' reasons for revoking probation.[121] Perhaps some appellate courts engage in such a broad scope of review due to their states' giving a revocation hearing as a matter of constitutional right. That is not the case, however, in many states and in the federal system. It is submitted that either appellate courts ought to respect the trial judge's discretion regarding revocation, as they respect it in connection with the grant itself, or they ought to change the test of the scope of review.

To the extent that the probation system is grounded on a notion that the trial judge is trained in the difficult art of sentencing, appellate courts should have only a narrow scope of review. They are once removed from the probation hearing. The whole area of appellate review of probation is one for future study and analysis.

Summary

The law of probation has developed considerably in the last three decades, and in the process a number of problems have also developed. A reappraisal is needed. Suggestions are offered herein with regard to specific solutions in the problem areas.

In general, this paper has favored the federal probation practice as that most in line with the broad purposes of probation. Thus, the federal rule with regard to time when probation may be granted appears sound. As long as execution of sentence has not begun, there is no apparent reason to refuse a court power to grant probation. Similarly, the federal practice of allowing a court to enforce a sentence after a void suspension of sentence of either type would seem the preferable approach, as long as some statute of limitations or laches is applied.

With regard to revocation of probation, the federal approach granting the defendant a hearing suggests itself as a model for the states. Certainly some minimum due process should attach requiring notice to the defendant and a right to be heard. Whether a full trial-type of constitutional hearing should be required is another matter. This commentator does not mean to suggest that defendant's rights should be narrowed with regard to the various legal problems of probation. What is put forth is that, except for minimum safeguards, defendant's rights can best be served by statutory and not by constitutional restrictions. This conclusion is based on the notion that in order to have an effective probation system, we must not tie the hands of the sentencing judge. Instead, we should give the court every possible modern sentencing aid unhampered by unnecessary legal technicalities.

In some other respects the federal practice should be modified. The federal rule denying defendant the right to refuse probation should be overruled, not on the grounds of lack of power in the courts to enforce a sentence, but as a policy decision against forcing a defendant to be subject to probation. In addition, the federal cases concerning probation where more than one count is involved and with regard to probation and a fine are needlessly restrictive.

The thin distinction of *Roberts v. United States*[122] regarding increase of sentence after revocation should be disregarded, as Mr. Justice Frankfurter argues in his strong dissent.

Certain undesirable state practices, differing from the federal scheme, appear to turn upon either faulty drafting of probation statutes or upon judicial grafting of legal technicalities upon those statutes. Thus, in connection with appeal state distinctions between suspension of imposition and suspension of execution of sentence are highly undesirable. Similarly, the rule that only the sentencing judge may revoke probation should be abandoned. The Ohio practice of placing no time limit on revocation clearly should not be encouraged elsewhere.

Several problems common to both federal and state systems require attention. The first concerns who may be granted probation. This is a problem for the legislature in redefining the areas in which probation is available according to some rational scheme. Another problem is that of the confused case law concerning restitution as a condition of probation. This area especially calls for clarification. One more problem is the need for a reexamination of the scope of appellate review with regard to probation revocation.

[121] See State v. White, 232 N.C. 385, 61 S.E.2d 754 (1950); United States v. Van Riper, 92 F.2d 1020 (2d Cir. 1938).

[122] 320 U.S. 264 (1943).

The highlighting of these problems is meant not as criticism of the historical trends in the law of probation, but as illustration of the continuing need for reclarification as the law of probation develops. The reader may readily take issue with the conclusions reached herein; nevertheless, it is hoped that he will see the need for present day modifications in the law of probation. In this regard Dean Roscoe Pound recently wrote:

> "Although it is clearly indicated how much remains to be done to make probation achieve all that it should, as I look back to 1890 when I was admitted to the bar . . . I cannot but be encouraged by reflecting how far we have progressed in the face of great difficulties in not more than a generation."[123]

The time is at hand to capitalize upon these assets of the law of probation. Solution of the problems now coming to the fore can turn a rapidly developing probation system into a mature body of law.

[123] POUND, CRIME, COURTS AND PROBATION (Introduction) (1941).