

Probation in the Criminal Court of Baltimore City

H. B. Mutter

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

H. B. Mutter, *Probation in the Criminal Court of Baltimore City*, 17 Md. L. Rev. 309 (1957)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol17/iss4/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

PROBATION IN THE CRIMINAL COURT OF BALTIMORE CITY

By H. B. MUTTER*

Probation is an outgrowth of the common-law practice of the suspended sentence which, in turn, probably had its origin in some ancient and medieval practice of amnesty or grace; *e.g.*, "benefit of clergy", "right of sanctuary", and "judicial reprieve".¹ The institution of probation in our modern system of criminal jurisprudence implements our present day theory of correction. Management of a criminal has always posed a dilemma in regard to the ultimate end to be accomplished. "Correction" has taken on many motives throughout history, but it suffices to say that our present day thinking on the subject puts new emphasis on the redemption of the individual.² Underneath it all, society will eventually be the real beneficiary if the individual is benefited so that he becomes a useful member of society rather than an habitual criminal.³ Probation plays a most important role in the field of crime control and correction, and it can be said that probation is a non-punitive method of treating criminal offenders within the framework of a system, which, in general, is punitive.⁴ Statutory authorization for probation is a departure from strict adherence to law, since constitutionally, there is no right to probation, and a prisoner cannot insist on terms or strike a bargain.⁵ The granting of probation, aside from being an act of clemency extended to one who has committed a crime, is also in substance and effect a bargain made by the people, through legislation and courts, with the malefactor.⁶ A broader definition of probation might be stated as follows:

"Probation is the status of a convicted offender during a period of suspension of the sentence in which he is given liberty conditioned on his good behavior and in

* Probation Officer of the Supreme Bench of Baltimore City; B.S., University of Maryland, 1953; LL.B., University of Maryland, School of Law, 1957.

¹ BARNES AND TEETERS, *NEW HORIZONS IN CRIMINOLOGY* (1951), 758-775. Also see ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939), Volume 2, Ch. I.

² See TAPPAN, *CONTEMPORARY CORRECTION* (1951 ed.), 3-17; see also STRAHOEN, *PROBATION, PAROLE, AND LEGAL RULES OF GUILT*, 26 J. Cr. Law and Cr. (1935) 168.

³ *People v. Molz*, 415 Ill. 183, 113 N. E. 2d 314 (1953).

⁴ SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (4th ed.), 381-411.

⁵ *Supra*, n. 3.

⁶ *People v. Johnson*, 134 Cal. App. 2d 140, 285 P. 2d 74 (1955).

which the state by personal supervision attempts to assist him to maintain good behavior",⁷

or:

"[Probation is] to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the Court to impose institutional punishment for his original offense in the event that he abuse this opportunity."⁸

The terms *probation* and *parole*, although dealing in the same area, are not one and the same.⁹ There exists an important and definite distinction between the two, in that probation is afforded to an individual without his having to suffer incarceration, and parole is afforded to an individual who has suffered a period of incarceration; the former is a judicial power while the latter is an executive or administrative power. Both, however, are intended to be a means of restoring offenders who are good social risks to society and to afford the unfortunate another opportunity by clemency.¹⁰

The first probation law in this country was passed in Massachusetts in 1878, but the practice of probation was carried on informally much earlier. It is noted that as early as 1831, a member of the Boston judiciary, Judge Peter O. Thatcher, placed young offenders under supervision without incarceration. But perhaps probation as we know it can probably be attributed to John Augustus, a shoemaker in Boston who informally began probationary services.¹¹ Many other states soon followed the New England beginning and passed similar statutes. Maryland became the second state to adopt the principle and philosophy of probation.¹² In 1894, the Maryland legislature passed an act authorizing the Criminal Courts of the state to suspend sentence and release offenders upon such terms as the Court might deem proper.¹³ This act, however, created no probation department to oversee supervision of released offenders. Hence, judges were compelled to impose upon

⁷ *Supra*, n. 4.

⁸ *Roberts v. United States*, 320 U. S. 264, 272 (1943). Parenthetical material supplied.

⁹ See Strahorn, *supra*, n. 2.

¹⁰ *Korematsu v. United States*, 319 U. S. 432 (1943).

¹¹ *Op. cit.*, *supra*, n. 1.

¹² Stuckert, Report of the Probation Department of the Supreme Bench for the Decade: 1929-1938.

¹³ Ch. 402, Acts of 1894.

the hospitality and good offices of the Prisoners Aid Association to supervise the conduct of persons released on probation. However, in 1931, the Supreme Bench of Baltimore City recommended legislation to establish a probation department under the management of and responsible to the Supreme Bench; the recommended legislation was adopted by the passage of Chapter 132, Acts of 1931.¹⁴ Authorization for the Probation Department of the Supreme Bench of Baltimore City can presently be found in the Charter & Public Local Laws of Baltimore City (Flack, 1949), Sections 276-288. The department, headed by a Director of Probation, is administratively divided into two parts, consisting of the Domestic Relations Division — dealing with cases of non-support, bastardy, alimony, and the like, and the Criminal Division — dealing with general criminal cases in the narrow sense. This article is limited to a discussion of that latter division.

The Criminal Division of the Probation Department of the Supreme Bench of Baltimore City provides services for investigation and supervision of offenders appearing in the three parts of the Criminal Court of Baltimore City, with special emphasis on the Youth Court (Part III). Presently, the personnel of the Criminal Division consists of two court representatives, present throughout all Youth Court sessions, six investigating officers, and nine supervising officers, with offices located in the Baltimore City Court House. The staff of the department is appointed by the Supreme Bench, being selected after competitive examination.

Investigation, an essential and important function of any probation department, provides background material from which the judiciary may gain insight and better understanding of a criminal case, so as to permit "justice" under the circumstances. Embodied in all investigation reports is certain basic background data: *e.g.*, family history, employment record, educational achievements, previous criminal record, etc. The report also contains, as well as a narrative summary of the background data, circumstances of the instant offense and individual observations, concluding in a recommendation or suggestion as formulated by the investigating officer.¹⁵ Very often, in conjunction with probation investigations, the Medical Department of the Supreme Bench will submit psychiatric or general reports,

¹⁴ Report of the Supreme Bench of Baltimore City for the year ending January, 1931.

¹⁵ ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939), Chs. V and VI.

thus making more technical information available to the Court. Needless to say, this added service to the Court is of utmost importance, and rounds out the scope of investigational services.

Investigations are made only at the discretion of the Court and are not binding as to the judgment in a particular case.¹⁶ Formal written investigations are essentially divided into three types: Pre-Trial, Pre-sentence, and Post Sentence. It should be noted that the Pre-Trial Investigation is limited in use and only recommended in special circumstances;¹⁷ e.g., where agreement is made between defense counsel and the Court that a plea of guilty will be forthcoming; the basic reason, among others, for such limited use should be clear, for under our principles of criminal jurisprudence, the facts incidental to the commission of a crime have no bearing on the finding of a verdict. In some instances, investigations are done orally where the Court is desirous of a speedy disposition, and in such situations, the Court representatives of the probation department make an "on the spot" investigation, usually, the same day of the trial. This latter type of inquiry is necessarily quite limited in scope. From time to time, the Court may require information concerning some specific facts; e.g., a probation officer may be directed to investigate and report on the physical conditions of an area where an alleged crime has occurred.

To assist in the investigation of criminal cases, officers undertaking this duty can utilize legal processes, such as the *subpoena duces tecum*, to aid them in procuring information from sometimes reluctant sources. Completed investigations and, as a matter of fact, all information and records of the probation department, are given quasi-judicial protection by way of privilege.¹⁸

¹⁶ *People v. Molz*, 415 Ill. 183, 113 N. E. 2d 314 (1953).

¹⁷ In 1956, 12 Pre-Trial Investigations were made as compared to 340 Pre-Sentence Investigations and 55 Post Sentence Investigations.

¹⁸ §281 of the CHARTER AND P. L. L. OF BALTIMORE CITY (Flack, 1949), provides in part that:

"All information and data obtained in the discharge of official duty by any probation worker or appointee of the Supreme Bench serving in the Probation Department, from whatsoever source the same shall be obtained shall be privileged information and shall not be receivable as evidence in a tribunal or court . . . and shall not be disclosed directly or indirectly outside the membership of the Probation Department in the discharge of his official duties to any one other than to a member or members of the Supreme Bench of Baltimore City, unless and until otherwise ordered by the Supreme Bench of Baltimore City or by any member thereof."

It is the general opinion of members of the Supreme Bench that information in the possession of the probation department should not be used in any collateral issue.

The question of "Due Process of Law" in reference to probation investigation has often arisen,¹⁹ but probably the Supreme Court of the United States has cleared up this problem to a large extent by holding, in recent litigation, that a conviction is not void under the "Due Process" clause solely by reason of the fact that the Court before imposing sentence had considered additional information obtained through the Court's probation department and through other sources.²⁰ Justice Black, speaking for the majority, stated that under the practice of individualizing punishments investigational techniques have been given an important role. Probation workers making reports of their investigation have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess work and inadequate information. Justice Murphy, in the dissent, held that the lower court's decision had deprived a man of life in reliance on material made available to it on probation reports consisting almost entirely of evidence that would have been inadmissible at the trial — irrelevant facts, records of other crimes, and hearsay evidence, none of which had been subject to the scrutiny of the defendant. Authority also has it, that where the judge proceeds to fix a sentence in a criminal case, after a plea of guilty or verdict of guilty, his inquiry is not limited by the rules applicable to a jury trial, and he may consider circumstances that should effect a mitigation or aggravation of the penalty.²¹

The Maryland Court of Appeals has also ruled recently in this area and has held that after a conviction, the Court could exercise a broad discretion in the use of evidence to assist it in determining the kind and extent of punishment to impose within the limits fixed by law. Before imposing a sentence, a judge may consider information concerning a person's reputation, past offenses, health, habits, mental and moral propensities, social background, and any other matters that a judge ought to have before him in determining the kind of sentence that should be imposed. Also, information, which might influence the Court's judgment, obtained in a pre-sentence investigation but not received from the defendant himself or not given in his

¹⁹ See Rubin, *Probation & Due Process*, Focus Magazine, Vol. 31, No. 2 (1952).

²⁰ *Williams v. New York*, 337 U. S. 241 (1949).

²¹ 1 WIGMORE ON EVIDENCE (3rd ed.) 25, §4(8).

presence should be called to the accused's attention or to the attention of his counsel so that he may be afforded an opportunity to refute or discredit it. The procedure in the sentencing process is not the same as that in the trial process and the sentencing judge may consider information even though obtained outside the courtroom from persons whom the defendant has not been permitted to confront or cross examine.²² The Judges of the Baltimore City Criminal Court have made it a practice to make available to defense counsel investigation reports, although no copy is given.

The Baltimore City Criminal Court besides having the right to suspend a sentence generally, provides for probation under the following terms: probation before conviction (similar to probation without verdict),²³ conditional suspension of sentence, and probation in the ordinary sense. Probation before conviction is a relatively recent innovation intended to bring legal and social philosophy closer together in the area of rehabilitation of criminal offenders. The practice has been to provide the aforementioned type of probation to individuals whom the Court feels are deserving of some protection from the stigma of a criminal record. However, in receiving this probation, the individual "consents" to abide by such conditions as those imposed in probation in the ordinary course.²⁴ It is important to note that probation before conviction is not intended to be a compromise verdict.

The conditional suspension of sentence is utilized where no supervision *per se* is ordered other than the "supervised" collection of some financial obligation: *e.g.*, a fine, court costs, restitution, etc.²⁵ The manner of payment may be specifically set out in the order or left to the sound judgment of the probation department subject to judicial approval. It might be added that the probation department has an extensive collection and accounting department to facilitate such matters. The order conditionally suspending the sentence contains also the general proviso requiring of the defendant "good behavior". This is distinguished from what might be determined the ordinary rules of probation, where acts less than a conviction of a subsequent offense can amount to a violation of probation, while evidently, it

²² *Driver v. State*, 201 Md. 25, 92 A. 2d 570 (1952). The Court was concerned with a Pre-Sentence Medical Report, but the implication would appear to be the same for Pre-Sentence Probation Reports.

²³ *Supra*, n. 18, §277.

²⁴ *Ibid.*

²⁵ The conditional suspension of sentence can be provided for other purposes; *e.g.*, exile requirements, but they would not fall within the purview of the jurisdiction of the probation department.

would appear, only a subsequent offense could breach the "good behavior" clause.²⁶

Probation in the ordinary sense, as distinguished from probation before conviction, is received by an offender after a verdict or plea of guilty has been entered, and the imposition of sentence is suspended. The defendant is thereafter placed in the custody of the probation department for supervision during the term specified. There apparently exists no right to place a defendant under an order of an indefinite period of probation,²⁷ and in conformity with this rule, Section 279 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), provides that the period of probation shall not exceed the maximum sentence of imprisonment to which such person may be sentenced on any count of the indictment or charge with which he stands accused, or, in any case, the period of probation shall not exceed five years. Extensions of the original period of probation, also authorized by the aforementioned statute, may be accomplished by petitioning for such extension, with the reasons therefore set out in the petition. The practice for securing such an extension has been by the submission of a petition to the Court by a probation officer without requiring the appearance of the defendant. Some comment has been made that the defendant should be allowed to appear and represent his position on such an extension. But, in most instances, the extensions are applied for in behalf of the defendants; e.g., to provide for further time to enable compliance with an order requiring payment by way of restitution. However, the noted comment might be applicable where the extension is sought counter to the defendant's wishes.²⁸

The next question that presents itself concerns the period within which a Court may suspend a sentence and place a defendant on probation. In 1942, Judge Eugene O'Dunne wrote an extensive opinion, in the case of *State v.*

²⁶ See *State v. Hardin*, 183 N. C. 815, 112 S. E. 593 (1922), and cited in *State v. Millner*, 240 N. C. 602, 83 S. E. 2d 546 (1954).

²⁷ See *Horton v. United States*, 151 F. 2d 406 (5th Cir., 1945).

²⁸ §278 of the CHARTER & P. L. L. OF BALTIMORE CITY, *supra*, n. 18, provides that after notice to the probationer and the full opportunity to be heard, the Court may alter, enlarge, modify or change any condition of suspension of sentence or probation. §279 of the same act provides that the Court, from time to time may continue to extend the period of probation and suspension of sentence. This latter section makes no mention of the right to notice and a hearing when probation is extended.

However, from the reasoning in the case of *Palumbo v. Pepersack*, *The Daily Record*, Jan. 7, 1957, it could be implied that §278 is broad enough to provide authorization for notice and hearing upon application for a change in the original order of probation.

Pettis and Smith,²⁹ in justification of his reduction of a sentence after the term of Court in which such sentence had been rendered had expired. Eight years later, however, the Court of Appeals in *Czaplinski v. Warden*,³⁰ ruling on this problem, held that the power of a criminal court to modify its sentence expires at the end of the term of court in which rendered. In *dictum*, it was inferred that an attempt to modify a sentence after the term of court had expired would be an invasion of the parole power of the Executive.³¹ As a result of this decision, the Maryland legislature in 1951 passed a law (Sec. 277) providing that the judges in the Criminal Court of Baltimore City may at any time before the expiration of sentence *suspend such sentence* and provide for probation.³² A rule was proposed to the Court of Appeals in the same year and provided that a *criminal sentence may be reduced* within thirty days (changed to ninety days in 1952) after the sentence was imposed, but [by Sec. (d)] that such rule should not limit the power of the Criminal Court of Baltimore under Section 277 as amended by the Laws of 1951.³³ However, in adopting this rule, the Court of Appeals left out Section (d).³⁴ Even in the absence of the deleted provision, however, in accordance with generally accepted rules of construction, by holding that a suspension of sentence is not a reduction thereof, the two may be resolved to be not in conflict.

The problem then arises as to whether section 277 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), as amended by Chapter 529 of the laws of 1951, is

²⁹ *The Daily Record*, May 26, 1942.

³⁰ 196 Md. 654, 75 A. 2d 766 (1950).

³¹ Federal authority also has it that after a sentence has been imposed and a defendant has begun serving his sentence, he is under the control of the executive branch of the government and the judicial branch should thereafter not attempt to exercise power properly exercised by the parole board. *Mann v. United States*, 218 F. 2d 936 (4th Cir., 1955).

³² Md. LAWS 1951, Ch. 529, amending §277. The preamble to this statute stated as follows:

"WHEREAS, the Court of Appeals of Maryland recently held in the case of State ex rel. Czaplinski v. Warden, 75 A. (2) 766, that the power of a Criminal Court to modify sentence in criminal cases expires with the end of the term of court in which rendered, and the decision has cast doubt upon the authority of the Criminal Court of Baltimore City to suspend sentence and grant probation to offenders after the lapse of the term, and

"WHEREAS, it is desirable in the opinion of the legislature that the Judges of the Criminal Court of Baltimore shall have the power and authority . . ."

³³ See, Seventh Report of the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, June 12, 1951, and draft of Rule thereto attached.

³⁴ *The Daily Record*, July 2, 1952, now Maryland Rules of Procedure (1956), Rule 744(c).

violative of the principle of separation of powers, in light of the dictum in *Czaplinski v. Warden*.⁸⁵ In view of section 60 of Article III of the Maryland Constitution, the answer would appear to be in the negative.⁸⁶

The general rules governing the conduct of offenders placed on probation are of standard form as decided upon by the Supreme Bench of Baltimore City and are as follows:

1. The defendant shall report to his probation officer as directed.
2. The defendant shall not leave the City of Baltimore without consent of the Court, nor change his address within the city without first obtaining the approval of his probation officer.
3. The defendant shall maintain regular employment and (when applicable) adequately support his dependents.
4. The defendant shall conduct himself in a law-abiding manner and shall avoid places and associations of an undesirable character.
5. The defendant shall report in response to any notice served upon him by the probation department or the police department.
6. The defendant shall make the following payments (when applicable).⁸⁷

In addition to the above-stated general conditions, the Court has the authority to provide for additional requirements where and when necessary; e.g., abstinence from alcohol, psychiatric treatment, etc.⁸⁸ The Court may also alter, modify, or change any condition of the suspended sentence or probation during the course of supervision.⁸⁹

A criminal offender is not entitled to release on probation as a matter of right but such decision rests in the

⁸⁵ *Supra*, n. 30, 664.

⁸⁶ The constitutional provision is as follows:

"The General Assembly of Maryland shall have the power to provide by suitable general enactment (a) for the suspension of sentence by the Court in criminal cases; (b) for any form of the indeterminate sentence in criminal cases, and (c) for the release upon parole in whatever manner the General Assembly may prescribe, of convicts imprisoned under sentence of crimes."

⁸⁷ A fine, court costs, and restitution are examples of financial obligations collectible under the probation order.

⁸⁸ CHARTER AND P. L. L. OF BALTIMORE CITY (Flack, 1949), §277.

⁸⁹ *Ibid.*, §278.

sound discretion of the Court,⁴⁰ and refusal to suspend a sentence is not reviewable except in the case of arbitrary abuse of discretion.⁴¹ The Court in granting probation seeks to provide a deserving individual with another opportunity to adjust in his community, which is afforded with assistance through supervision. Suspension of sentence without supervision, from the theoretical point of view, is not probation.⁴² The supervision of a probationer is delegated to a probation officer, whose responsibility it becomes to aid the offender while seeing that the conditions of probation are fulfilled.⁴³ This is indeed a difficult and sometimes exacting task, requiring sufficient training and experience plus human understanding and tact. A probation officer may be called upon to assist, advise, or solve problems in a multitude of areas; e.g., domestic problems, financial crises, employment and educational problems, etc. He, the probation officer, generally follows a course of supervision best suited to individual circumstances. The expression of the Supreme Court of the United States that probation officers have not been trained to prosecute but to aid offenders,⁴⁴ is recognition from the highest court of the land of the task predominant in the minds of these officers. But, this predominant task must sometime give way to a further responsibility; i.e., protection of the community. By and large, a sufficient number of individuals profit from probation, and from a community's point of view, probation has paid for itself. There are those, however, who cannot adjust even with the opportunity of probation, and they must be proceeded against to protect the community.⁴⁵ It is on such an occasion that the probation officer must act as a "police agency" for the Court.

The Court, on written charges preferred under oath, of violation of any conditions of probation, may issue a warrant or notice requiring the traverser, probationer, or person accused to be brought before, or appear before said court, to answer such charges of violation.⁴⁶ Strikingly enough, there is a conflict among jurisdictions as to whether there exists a constitutional right to notice and hearing

⁴⁰ *People v. Marks*, 340 Mich. 495, 65 N. W. 2d 698 (1954), and *State ex rel. Stauffer v. Wright*, 192 Md. 715, 64 A. 2d 125 (1949).

⁴¹ *Mann v. United States*, *supra*, n. 31.

⁴² SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (4th ed.) 381-411.

⁴³ In 1956, 1,257 cases were under supervision and of this figure 700 were new cases received in that year. The 700 new cases were divided as follows: 355 Youths and 345 Adults.

⁴⁴ *Williams v. New York*, 337 U. S. 241, 249 (1949).

⁴⁵ In 1956, 83 bench warrants were issued, while 225 police notices were issued.

⁴⁶ *Supra*, n. 38, §279.

preceding revocation of probation or parole.⁴⁷ Justice Cardozo, speaking for the majority in *Escoe v. Zerbst*,⁴⁸ expressly rejected the contention that such a privilege has a basis in the Constitution, apart from any statute.

Also, the question of constitutional right to a hearing has had an uncertain course in Maryland. The Court of Appeals, in dealing with *Wright v. Herzog*,⁴⁹ stated that no right to a hearing existed under the statute or the state constitution, unless demanded by due process of law, and held that absent any allegation or showing of arbitrary action by the Governor (the parolee did not deny his violations) no constitutional violation existed. The Court indicated that arbitrary action, without hearing, could be challenged by *habeas corpus* upon allegation and proof of arbitrary and capricious action. Thereafter, in *Murray v. Swenson*,⁵⁰ the Court ruled that a defendant in a revocation of parole (and by implication, probation) proceeding must be afforded a reasonable opportunity to defend himself, and in *Swan v. State* and *Hite v. State*,⁵¹ the Court has flatly stated that a hearing is a requisite of "due process of law". In a very recent *nisi prius* case,⁵² Judge Michael J. Manley cited the annotation in 29 A. L. R. 2d 1074 at 1124 as stating that Maryland cases, "are in direct conflict in principle, as a result of the Court's failure in the *Swenson* case to distinguish between 'procedural' and 'substantive' due process".

It is possible that some of the difficulty is encountered because of the tendency to follow the traditional approach of revocation of license proceedings that no hearing is required for revocation of a "privilege" but is if a "right" is involved,⁵³ and at least an early tendency to think of conditional pardons, paroles, and probation as constituting only "privileges".⁵⁴ Actually, attempting to categorize between "rights" and "privileges" doesn't help unless it is approached from the two-fold angle of: (1) Is the claimed right or privilege of such personal or monetary value to the individual that fundamental requisites of fair play re-

⁴⁷ 29 A. L. R. (2d) 1074-1140.

⁴⁸ 295 U. S. 490 (1935).

⁴⁹ 182 Md. 316, 34 A. 2d 460 (1943).

⁵⁰ 196 Md. 222, 76 A. 2d 150 (1950).

⁵¹ 200 Md. 420, 90 A. 2d 690 (1952); 198 Md. 602, 84 A. 2d 899 (1951).

⁵² *Palumbo v. Pepersack*, *The Daily Record*, Jan. 7, 1957. The case arose under a *habeas corpus* proceeding for the denial of the parole board to allow the petitioner to be represented by counsel at a parole revocation hearing. Judge Manley held for the petitioner.

⁵³ DAVIS, ADMINISTRATIVE LAW (1951) 246-254.

⁵⁴ *Ibid.*, 249, *Wright v. Herzog*, *supra*, n. 49.

quire that it be not forfeited without a hearing (in which case it should be a "right") and (2) Should the scope of the hearing extend to all matters of law and of fact or only those matters which a trial type hearing may be particularly helpful in solving?⁵⁵ The Maryland Courts in the area of pardons, parole, and probation, would seem to have gotten the desirable result of requiring a hearing on the fact of breach of condition before revocation. This result can be supported most clearly and simply by reasoning which directly recognizes that whether labeled "rights" or "privileges" these several means of seeking to rehabilitate criminals involve vital interests of the criminal in every case, which should not be destroyed without affording the person involved the opportunity of a hearing, and that like all rights of substance they are entitled to constitutional protections as to fair hearing before forfeiture.

The practice in Baltimore City in revocation of probation proceedings has been to provide notice and hearing with the "right" to be represented by counsel. Judge Manley, in his opinion in the *Palumbo* case,⁵⁶ notes, as follows:

"... that in order to alter or modify or add to the conditions of probation, the probationer must be given an opportunity to be heard either in person or by counsel. There is no provision in Section 279 relating to the revocation of probation that specifically gives the probationer the right to have counsel, but it would hardly be contended by anyone that the probationer would not have such right even though none is provided for in the statute, and even though such a judicial proceeding is technically not a criminal prosecution."

Generally, in revocation proceedings in Baltimore City, notice is given by way of summons served by the Police Department, and these proceedings are commonly referred to as "Police Notice Hearings". Bench Warrants are issued where it is deemed necessary to retain a defendant in custody, prior to a hearing.⁵⁷ Although a defendant, in revocation proceedings, must be afforded a reasonable opportunity to defend himself against the charge that he has

⁵⁵ *Ibid.* And see particularly, *Brill v. State*, 159 Fla. 682, 32 So. 2d 607, 609 (1947); *Fleener v. Hammond*, 116 F. 2d 982, 132 A. L. R. 1241 (6th Cir., 1941). Also see, *Welhofen, Revoking Probation, Parole or Pardon Without Hearing*, 32 J. Crim. Law & Crim. 531, 532 (1942).

⁵⁶ *Supra*, n. 52.

⁵⁷ Where the circumstances require it, there is authority for allowing the retention and custody of a probationer prior to the issuance of a warrant. See *Ex parte Longoria*, 161 Tex. Cr. Rep. 142, 275 S. W. 2d 810 (1955).

violated his conditions of probation, he is not entitled to a trial in any strict or formal sense.⁵⁸ Such hearings are usually held before the presiding judge of Part III of the Criminal Court of Baltimore, and one day each week has been set aside for these proceedings, taking place before the regular assignment.⁵⁹ The manner and form of the proceedings for revocation of probation have been either formal or informal, at the discretion of the trial judge.⁶⁰

The issue of whether a defendant has the "right" to be represented by his own counsel has heretofore been considered; whether or not a defendant is entitled to counsel at the expense of the state is another problem. The answer to this would appear to be dependent upon what standards must be met in order to satisfy the substantive requirements of "due process of law".⁶¹

The rules of evidence in the aforementioned proceedings would appear not subject to the formal regulations required in the trial of a criminal offense, and this proposition can be supported by implication from the decisions in *Williams v. New York*⁶² and *Driver v. State*,⁶³ but, having the right to weigh any testimony, the Court still has a duty to preserve and protect the basic rights of an individual. The evidence presented need not establish guilt beyond a reasonable doubt as in criminal offenses, but all that is required is that the evidence be such as to reasonably satisfy the judge that the conduct of the probationer has not measured up to the standards required by the conditions of probation.⁶⁴

Testimony is begun by the presentation of the probation officer's report, and thereafter may be followed by the testimony of witnesses called to support the probation officer's evidence. The defendant is given the opportunity to cross

⁵⁸ *Murray v. Swenson*, *supra*, n. 50, 231, and *Jett v. Superintendent*, 209 Md. 633, 640, 120 A. 2d 580 (1956).

⁵⁹ However, probation can be revoked by any judge assigned to the Criminal Court of Baltimore. CHARTER & P. L. L. OF BALTIMORE CITY (Flack, 1949), §280.

⁶⁰ See *Murray v. Swenson*, *supra*, n. 50, and *People v. Molz*, 415 Ill. 183, 113 N. E. 2d 314 (1953), to the effect that mere informalities or irregularities in the proceedings which do not prejudice the defendant in any manner may be disregarded.

⁶¹ Counsel was appointed in a case where the defendant claimed a mental defect and there existed evidence thereof. The defendant had previously been released from custody after a hearing of a habeas corpus petition, alleging an unfair trial for not being represented by counsel. *State v. Bray*, Baltimore City Criminal Court, January Term, 1948. See also *United States v. Moore*, 101 F. 2d 56 (2nd Cir., 1939).

⁶² 337 U. S. 241 (1949).

⁶³ 201 Md. 25, 92 A. 2d 570 (1952).

⁶⁴ *Manning v. United States*, 161 F. 2d 827 (5th Cir., 1947).

examine all witnesses, including the probation officer. After the "state's case", the defendant may call any witness in his behalf and/or take the stand in his own defense. The Court, and in some instances the probation officer, directs examination of the witnesses. A representative of the State's Attorney's Office does not participate unless requested to do so by either the Court or the probation department.

The rules governing a probationer's conduct have been mentioned before, and the Court must find a violation of one or more of said rules to hold a defendant guilty of violating his probation. What amounts to a violation of these rules is largely a question of fact within the discretion of the trial judge,⁶⁵ and it has been held that probation can be revoked on the basis of a probation officer's report.⁶⁶ In reversing a trial court's finding of a violation of probation, the Court of Appeals of Maryland held that such a finding is reviewable not only as to the abuse of discretion, but also as to whether an erroneous construction has been placed by the trial judge on the condition on which the sentence was suspended.⁶⁷

If a verdict of not guilty is decided upon, naturally, the defendant continues on probation; but, if a verdict of guilty has been decided upon or guilt has been admitted, the Court may either impose the suspended sentence or, in a deserving case, continue the defendant on probation. The Court upon revoking probation may impose, under the specific authority of Section 279 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), any sentence which might have originally been imposed for the crime of which said probationer was convicted.⁶⁸ However, it could be argued that to impose a sentence greater than that which was originally passed, could in effect subject the defendant to "double jeopardy".⁶⁹ It is also unresolved whether the Court could at that point impose a reduced sentence consistent with Rule 744(c) of the Maryland Rules of Practice.⁷⁰

Quaere, what sentence, if any, can be imposed where an order granting probation before conviction has been revoked? Two views on this question are noted, one of them having held that probation before conviction is tantamount to a finding of guilty, and it therefore follows that upon its

⁶⁵ *Swann v. State*, 200 Md. 420, 425-6, 90 A. 2d 690 (1952).

⁶⁶ *People v. McClean*, 130 Cal. App. 2d 439, 279 P. 2d 87 (1955).

⁶⁷ *Supra*, n. 63.

⁶⁸ *Cf. Hite v. State*, 198 Md. 602, 607-8, 84 A. 2d 899 (1951).

⁶⁹ *Cf. Pollard v. United States*, . . . U. S. . . ., 77 S. Ct. 481 (1957).

⁷⁰ *Supra*, *circa*, n. 33.

revocation a sentence can be imposed.⁷¹ The remaining view holds that the finding of probation before conviction does not of itself record any verdict in a criminal case, and upon revocation a defendant must be retried in a different proceeding for his original offense before any sentence can be imposed.⁷²

In conclusion, the foregoing text has outlined the highlights of the probationary services of the Supreme Bench of Baltimore, with some historical background. As a final note, it should be observed that probation, as heretofore stated, is a relatively new process for handling the criminal offender. Treatment philosophy has progressed greatly since the common-law days of chopping off the hands of convicted pickpockets, and modern methods seek to provide earnest social adjustment and control to those in our community who have strayed from the path of social order. Presently, at least from the academic point of view, probation is but a mere fractional phase of the transition from common-law standards of punishment to the modern day philosophies of criminologists and sociologists. This should not be the extent of our progression. Probation points out a path and direction for future development of the control and treatment of the malefactor. It should be the responsibility of the legal profession, shared equally with the criminologist and sociologist, to discover new methods to overcome a social handicap.

⁷¹ See *State v. Palmer*, Baltimore City Criminal Court, September Term, 1953, also *State v. Stump*, Baltimore City Criminal Court, May Term, 1953.

⁷² See *State v. Primeaux*, Baltimore City Criminal Court, May Term, 1954.

When a rehearing of the original case is ordered, testimony previously obtained can be used in lieu of requiring former witnesses to appear, for in receiving probation before conviction, a defendant agrees in writing to the use of recorded testimony in subsequent hearings.