

Decriminalization of the Convicted: A Plea for More Effective Representation

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[T]here is a common notion among appointed defense lawyers that their responsibility ends with conviction; after that the defendant is a problem for the social worker or penologist.

. . . .

[But] counsel is the defendant's advocate. If the system is to be humanized and individualized—made to accommodate the needs of the defendant—then counsel must bring those needs to the attention of the court.

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Every election year incumbent district attorneys tout the high conviction rates achieved by their offices; yet, the defense bar needs

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1. Bazelon, *The Defective Assistance of Counsel*, 42 U. Ctn. L. Rev. 1, 41, 44 (1973).

little reminder that a vast majority of criminal defendants are ultimately convicted—either by plea or by trial.² The hard facts that most defendants are convicted and that they then enter the correctional system have resulted in an attitude in the legal community that the role of defense counsel is limited and hapless.³ Too often, the view “out of sight, out of mind” has been demonstrated by both society and the legal profession once the prison door is slammed shut behind another new inmate.⁴

While the 1960's witnessed a revolution in pretrial and trial criminal procedure,⁵ this decade has been marked by a judicial and social awakening to the plight of the convicted offender. The most obvious sign of this awakening is the 1969 United States Supreme Court case of *Johnson v. Avery*.⁶ As if to prime the pump for the flood

2. In one study, the Los Angeles County District Attorney's Office showed an overall conviction rate of 81 per cent. As evidence of the success of the defense bar, only 13 per cent of the felony complaints were dismissed at the preliminary examination stage and 6 per cent of the filings were reduced to misdemeanors. Out of the 33,000 defendants arraigned in the Los Angeles Superior Court in 1970, 8.2 per cent won dismissal on pretrial motions. Of the 11 per cent of cases that proceeded to trial, 62 per cent of the bench trials and 69 per cent of the jury trials resulted in conviction. GREENWOOD, WILDHORN, POGGIO, STRUMWASSER & DE LEON, PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE ix-x (1973).

3. Most popular, so-called practitioner's texts have merely a passing reference or no reference at all to the issue of post-conviction legal representation in other than an appeal or collateral attack by extraordinary writ, or proceedings to revoke probation or parole. See, e.g., AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (3d ed. 1974); CIPES & PENNY-PACKER, CRIMINAL DEFENSE TECHNIQUES (1969).

4. See, e.g., Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493 (1970); Wexler, *Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims*, 11 ARIZ. L. REV. 629 (1969); Comment, *Post Conviction Legal Aid in County Jails: A Model Law Student Counseling Program*, 4 GOLDEN GATE L. REV. 97 (1973).

5. See COX, THE WARREN COURT 71-91 (1968); Pye, *The Warren Court and Criminal Procedure*, in THE WARREN COURT: A CRITICAL ANALYSIS 58-77 (1969). An excellent collection of the Warren Court's cases on criminal law and procedure can be found in THE CRIMINAL LAW REPORTER, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH (1975).

6. 393 U.S. 483 (1969).

In its last full term of the decade, the Court handed down a number of decisions which significantly improved the lot of prisoners seeking post-conviction relief by way of habeas corpus. See *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Rodriguez v. United States*, 395 U.S. 327 (1969); *Kaufman v. United States*, 394 U.S. 217 (1969).

of post-conviction issues that would soon be pressed on the courts, the *Johnson* decision supported the right of incarcerated offenders to have access to legal assistance. Addressing itself to the problems of both the convicted and the pretrial inmate populace, the Court scrutinized a Tennessee prison regulation which prohibited legal assistance of one inmate to another.⁷ The Court, through Justice Fortas, ruled that the effect of such a ban, particularly "in the absence of any other source of assistance," was to prevent totally or functionally illiterate inmates from access to the courts.⁸ The regulation was therefore held unconstitutional. However, the Court failed to mandate any specific plan to insure inmates effective access to the courts.⁹

Free to seek out legal assistance, the incarcerated offender was heard with increased frequency. In 1970, the California Supreme Court took its first, faltering step in the field by reviewing claims by inmates at San Quentin and Folsom prisons.¹⁰ But a significant decision of the court was not handed down until five years later. In February, 1975, the court, in *Brown v. Pitchess*,¹¹ sustained a trial court injunction requiring the County

7. See Note, *Constitutional Law: Prison "No Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343 (an excellent discussion of the role of the jailhouse lawyer written before the *Johnson* case was decided by the Supreme Court). See also BOSTON UNIVERSITY CENTER FOR CRIMINAL JUSTICE, *PERSPECTIVES ON PRISON LEGAL SERVICES: NEEDS, IMPACT AND THE POTENTIAL LAW SCHOOL INVOLVEMENT* (1972).

8. 393 U.S. at 487.

Nearly thirty years earlier, in *Ex parte Hull*, 312 U.S. 546 (1941), the Supreme Court voided a prison regulation which prohibited a prisoner's direct access to the courts.

9. 393 U.S. at 489-90.

Pointing to a variety of experiments in other states offering post-conviction assistance, including expansion of public defender services, employment of law students, and voluntary bar association projects, the Court stated:

We express no judgment concerning these plans, but their existence indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates. *Id.*

See Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal Correctional Process*, 18 KAN. L. REV. 493, 589-613 (1970).

10. *In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

Utilizing a test that balanced the "extent of restriction" against the "need for restriction," the court struck down, as violative of *Johnson*, a regulation prohibiting one prisoner's legal material from being in the possession of another inmate. However, the court upheld regulations which prohibited jailhouse lawyers from communicating with prisoners at other facilities, interviewing prisoners in isolation, and reviewing disciplinary records. Additionally, the court upheld regulations that jailhouse lawyers were limited to assisting and not representing prisoners and that a jailhouse lawyer could keep only a limited number of law books in his cell at any one time.

11. 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975).

of Los Angeles to provide sentenced inmates in the local jail with an attorney to assist them in seeking post-conviction relief.¹² The central role of counsel in insuring access to the courts and representing the convicted on issues arising after the determination of guilt was thereby confirmed and sanctioned.¹³

In one sense, the *Brown* decision might be viewed as but a small segment of a larger revolution involving rights of both incarcerated and released offenders.¹⁴ Indeed, recent reform cases such as *Wolff v. McDonnell*,¹⁵ *Gagnon v. Scarpelli*,¹⁶ *Morrissey v. Brewer*,¹⁷ and in California, *In re Bye*,¹⁸ *In re Sturm*,¹⁹ and *Northern v. Nelson*,²⁰

12. *Id.* at 523-24, 531 P.2d at 777, 119 Cal. Rptr. at 209-10.

Subsequent to the supreme court opinion, the trial court denied application for permanent injunctive relief and dissolved the preliminary injunction. The class has been expanded, however, to include both pretrial and sentenced inmates, and the case is now set for trial. Telephone interview with Attorney Terry Smerling, counsel for inmate plaintiffs, Oct. 1, 1975.

13. See *McClain v. Manson*, 343 F. Supp. 382 (D. Conn. 1972); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971), *aff'd as modified and remanded*, 497 F.2d 809 (9th Cir. 1974), *modified and remanded on rehearing*, 510 F.2d 613 (9th Cir.), *cert. granted sub nom.*, *Enomoto v. Clutchette*, 95 S. Ct. 2414 (1975); *Allison v. Wilson*, 277 F. Supp. 271 (N.D. Cal. 1967).

14. See, e.g., *Preiser v. Newkirk*, 422 U.S. 395 (1975) (prisoner's non-disciplinary transfer); *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (availability of habeas corpus challenge after a plea of guilty); *Pell v. Procunier*, 417 U.S. 817 (1974) (prison mail censorship); *Procunier v. Martinez*, 416 U.S. 396 (1974) (access to defense investigators and law students); *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.*, *Younger v. Gilmore*, 404 U.S. 15 (1971) (access to prison libraries); *In re Jordan*, 12 Cal. 3d 575, 526 P.2d 523, 116 Cal. Rptr. 371 (1974) (attorney-client privilege for legal correspondence).

15. 418 U.S. 539 (1974) (procedural due process compelled in prison disciplinary actions). See *Baxter v. Palmigiano*, 44 U.S.L.W. 4487 (U.S. April 20, 1976).

See Note, *Procedural Due Process in Prison Disciplinary Proceedings—The Supreme Court Responds*, 53 N.C.L. Rev. 793 (1975).

16. 411 U.S. 778 (1973) (procedural due process compelled in probation revocation).

See Note, *Due Process Rights in Parole and Probation Revocations*, 6 CONN. L. REV. 559 (1974).

17. 408 U.S. 471 (1972) (procedural due process compelled in parole revocation).

See Cohen, *A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616 (1972).

18. 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382 (1974) (recommitment of narcotic outpatient).

19. 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974) (requirement of specification for denial of parole).

20. 315 F. Supp. 687 (N.D. Cal. 1970) (prisoner's right to receive religious literature).

clearly point to a new judicial consciousness of the need to define rights and remedies which have long been neglected. Yet, in a more specific sense, cases like *Brown* go beyond articulating abstract legal rights. The thrust of these decisions indicates that if voluntary, creative plans are not produced by custodial officials in and out of penal institutions, then implementation will occur by judicial fiat.²¹

In addition to legislative and judicial reform in the post-conviction realm, the practicing bar must play a central role in insuring that those who are convicted lose only those rights and privileges²² which are rationally related to the correctional process. Attorneys who recently have become sensitized to the expanded role of counsel at the sentencing stage in criminal cases²³ must also begin to focus their talents on more effective representation after their clients have been convicted and enter the correctional system.

The purpose of this article is to acquaint the practitioner and general legal community with the means available to an attorney in providing complete and on-going representation to his convicted client. Although the post-conviction revolution has seen the adjudication of grave issues of the highest constitutional order, many times in the context of a class action,²⁴ the need for effective representation of the individual client is pressing. Additionally, there is an important role for counsel to fill as the client exits the correctional system and re-enters society. The focus will be upon two of the most common client needs: modification of orders of probation and mitigation of criminal records—in effect, the decriminalization of the convicted client. Despite the natural role of counsel in serving these needs, it is the premise of this article that these areas are poorly understood and sorely neglected by counsel. Yet, both are areas in which counsel can assist the client in obtaining significant judicial relief.

What will not be discussed here, but is certainly of equal significance, is representation in government-initiated action occurring after conviction.²⁵ These actions include probation revocation pro-

21. See *Detainees v. Malcolm*, 520 F.2d 392 (2d Cir. 1975).

22. See Note, *Civil Death—A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988 (1970); Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924 (1969).

23. See DAWSON, SENTENCING, THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE (1969); Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUTGERS-CAMDEN L.J. 111 (1971).

24. See cases cited notes 14, 21 *supra*.

25. Also outside the scope of this article is a discussion of the central and creative role of counsel at the sentencing stage. Significant alternatives

ceedings,²⁶ commonly instituted by the probation department, parole revocation proceedings before the California Adult Authority,²⁷ and detainer-holds lodged by other jurisdictions that may result in rendition proceedings.²⁸

THE ROLE OF COUNSEL

A question now exists whether there is a real and substantial role for counsel to perform in the decriminalization of the convicted offender. Of course, the duty to provide active representation from the initiation of criminal proceeding on through to the termination of the correctional process has yet to be clarified. Nevertheless, as Judge Bazelon noted,²⁹ the tendency of defense counsel has

may be explored by counsel concerning the issues to be decided by the court, i.e., local jail custody versus state prison, formal or summary probation, fine and restitution in lieu of incarceration. See DAWSON, SENTENCING, THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE (1969). See generally ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968).

26. With regard to the law and procedure relating to probation revocation, see *Douglas v. Buder*, 412 U.S. 430 (1973); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); CAL. PENAL CODE § 1203.2 (West Supp. 1976); CAL. PENAL CODE §§ 1203.2(a), 1203.3 (West 1970).

27. General procedural guidelines can be found in DEPARTMENT OF CORRECTIONS, STATE OF CALIFORNIA, PAROLE REVOCATION PROCEDURES MANUAL (1975).

The *Morrissey* decision suggests appropriate situations for representation by counsel and establishes a two-step revocation process—probable cause hearing and determination hearing. Additionally, the probationer is entitled, as a matter of due process, to written notice, confrontation, presentation of favorable evidence, a hearing by a neutral body, and a written decision with findings of fact. See Lowenstein, *Bringing the Rule of Law to Parole*, 9 CLEARING HOUSE REV. 769 (1975); Singer, *Morrissey v. Brewer: Implications for the Future of Correctional Law*, 6 CLEARING HOUSE REV. 315 (1972). See also Cassov, *The Morrissey Maelstrom: Recent Developments in California Parole and Probation Revocation*, 9 U. SAN FRAN. L. REV. 43 (1974); Comment, *Parole Holds: Their Effect on the Rights of the Parolee and the Operation of the Parole System*, 19 U.C.L.A. L. REV. 759 (1972).

28. See, e.g., Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL. 669 (1971); Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 CRIM. L. BULL. 753 (1971); Yackle, *Taking Stock of Detainer Statutes*, 8 LOY. L.A. L. REV. 88 (1975).

29. Judge Bazelon of the District of Columbia Court of Appeals concluded that the duty of defense counsel in this regard may not be so much a legal or ethical obligation as a moral duty.

Counsel, as defendant's advocate, is the one who must prod the system's conscience to insure that the man is not lost for the crime.

been to surrender his client's fate into the hands of the social worker and penologist upon conviction. It is apparent that at least the "aspirational" standards existing in the area of criminal defense representation envisage and encourage an active and on-going role for counsel. The ABA *Standards* provide:

Counsel should be provided at *every stage* of the proceedings, including sentencing, appeal and post-conviction review. Counsel initially appointed should continue to represent the defendant *through all stages of the proceedings . . .*³⁰

Echoing a similar theme, Judge Bazelon has issued a plea for counsel to become "advocate of the whole man."³¹ To implement this admonition, the attorney should counsel the client throughout the entire criminal justice system.

The needs which should be brought to the court's attention are significant. Convicted offenders generally have their cases disposed of either by incarceration, probation, or a combination of the two. The decision concerning the appropriate disposition is often made either on sketchy, stale data concerning the defendant and his offense or on facts and conditions as they exist at sentencing. However a true rehabilitative and correctional process demands that treatment of offenders be subject to alteration if conditions change to the benefit or detriment of the convicted offender.³² Doubt-

. . . Such an expanded role may not be constitutionally mandated, but it may well be a moral imperative. It is the humane thing to do.

Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 46 (1973).

30. ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO PROVIDING DEFENSE SERVICES § 5.2, at 46 (Approved Draft 1967) (emphasis added). See also ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE DEFENSE FUNCTION §§ 1.1, at 171, 8.5, at 305 (Approved Draft 1971). But see JUDICIAL COUNCIL OF CALIFORNIA, COMPARATIVE ANALYSIS OF AMERICAN BAR ASSOCIATION MINIMUM STANDARDS FOR CRIMINAL JUSTICE WITH CALIFORNIA LAW 16, 17 (1974), which notes:

No state statute requires that the same attorney appointed to represent the defendant must continue such representation through the remainder of the proceedings.

31. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 45 (1973).

Of course, the phrase "whole man" will be construed in light of its intended meaning as referring to both sexes. Although males constitute the majority of the convicted offender populace, females are entering the criminal justice system in increasing numbers. The FBI's *Uniform Crime Reports* show that during the years from 1960 through 1972, the female arrest rate rose nearly three times faster than that for males. See Adler, *The Rise of the Female Crook*, PSYCHOLOGY TODAY, Nov., 1975, at 42.

32. See ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO PROBATION § 3.3, at 51 (Approved Draft 1970). See also ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 6.2, at

lessly, probation officers and prosecutors are vigilant in taking steps to impose *additional* restraints on offenders who are not responding to correctional efforts. But how diligent have defense counsels been in helping offenders remove restraints on freedom through obtaining sentence reductions or modifying conditions of probation when those offenders have responded favorably to rehabilitation? Responses from a sampling of California judges indicate that having a defense attorney initiate efforts to meet these types of client needs is indeed rare.³³ Similarly, while the probation officer may possess statutory authority³⁴ to aid the convicted offender in the mitigation of his criminal record, such aid is not common. Perhaps an enhanced understanding of the dimensions and mechanics of decriminalization procedures will serve to stimulate affirmative action in this sorely neglected domain of legal representation.³⁵

MODIFYING CONDITIONS OF PROBATION

The grant of a probationary period³⁶ in lieu of a jail or prison term has become a commonplace occurrence in California state courts. A 1965 national survey showed that slightly more than half of the offenders sentenced in that year were placed on probation, and the study predicted a substantial increase in this number over the next ten years.³⁷ The trend in California, however, has

280, 6.4, at 282 (Approved Draft 1968); MODEL PENAL CODE § 7.08 (Proposed Official Draft 1962).

33. Informal discussions with these judges indicate that such defense-initiated post-conviction proceedings occur in no more than 25 per cent of the appropriate cases.

34. See CAL. PENAL CODE § 1203.4 (West 1970).

35. Because of the unmanageability of this topic on a national scale, the comment which follows is based mainly on California law and procedures.

36. CAL. PENAL CODE § 1203 *et seq.* (West Supp. 1975).

All offenders, whether convicted of a misdemeanor or a felony, are eligible to receive a probationary sentence subject to the exceptions specified in CAL. PENAL CODE §§ 1203(d), 1203.06 and 1203.07 (West Supp. 1976). See generally Note, *Sentencing Under the Proposed California Criminal Code*, 19 U.C.L.A. L. REV. 526 (1972); Comment, *Denial of Probation—Whitfield v. United States*, 21 HAST. L.J. 1008 (1970).

For a full discussion of the development of probation and parole as correctional processes, see DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE*, (2d ed. 1969).

37. The 1965 data from the National Survey of Corrections revealed that 53 per cent of all sentenced offenders were placed on probation during that year. The prediction was that by 1975 this percentage would rise to approximately 58 per cent. THE PRESIDENT'S COMMISSION ON LAW EN-

far outstripped the national average. In 1970, slightly less than seventy per cent of all convicted felons received a probationary sentence, and this state-wide percentage is increasing.³⁸ When a court grants probation, it retains continuing jurisdiction over the defendant throughout the probationary period.³⁹ It is under these conditions that counsel can assume an active role in the continuing representation of the client.

However, when an offender is given a prison term,⁴⁰ the court order remanding the individual to the custody of the Department of Corrections divests the court of jurisdiction to effect any future modification of the term of incarceration.⁴¹ At this point, control over the offender rests solely with the California Adult Authority and the paroling processes.⁴² A concomitant loss of ability to assist the client is suffered by the attorney because all future release decisions are made by the administrative, quasi-judicial body. Until recently, this tribunal caused great difficulty for counsel by engaging in low visibility decision making. Nevertheless, it is in those vast majority of cases when probation or a term of local custody⁴³

FORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 27 (1967).

38. CALIFORNIA BUREAU OF CRIMINAL STATISTICS, FELONY DEFENDANTS DISPOSED OF IN CALIFORNIA COURTS (1970).

A 1972 study showed that somewhat more than 71 per cent of convicted felons were placed on probation. CALIFORNIA BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA: 1972, at 38 (1973). See generally STATE OF CALIFORNIA OFFICE OF CRIMINAL JUSTICE PLANNING, CALIFORNIA CORRECTIONAL SYSTEM INTAKE STUDY (July, 1974).

39. See CAL. PENAL CODE §§ 1203.1, 1203.2(b), 1203.3 (West Supp. 1975).

40. For a discussion of judicial considerations in imposing prison terms, see Murray, Ringer & Alarcon, *Prison Reform: Backward or Forward?*, 50 CAL. STATE. B.J. 356 (1975).

41. Such general divestment of jurisdiction is, however, subject to the exceptions set out in CAL. PENAL CODE § 1168 (West 1970); CAL. PENAL CODE § 1203.03 (West Supp. 1975). See *Holder v. Superior Court*, 1 Cal. 3d 779, 463 P.2d 705, 83 Cal. Rptr. 353 (1970). See also CAL. PENAL CODE § 1202(b) (West Supp. 1976) (young offender commitment).

42. See CAL. PENAL CODE § 3020 *et seq.* (West 1970). See generally Comment, *Cruel or Unusual Punishments in California: New Problems in Fitting Punishment to Crimes*, 12 SAN DIEGO L. REV. 359 (1975); Comment, *The Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U.C.D. L. REV. 360 (1972).

43. In this context, terms of "local custody" refer to incarceration in a central county jail and minimum security institutions called *honor camps*. These facilities may be administered by different agencies, as in the case of San Diego County, where the Sheriff's Department operates the jail and the County Probation Department administers the outlying camps. Inmates are placed in a custodial setting either as one of a series of "conditions" in a probation order (it is this type of commitment which is of direct interest herein) or by the so-called "straight sentence"; i.e., a commitment to the custody of the sheriff for a specific period of time, when probation has not been granted and no part of the sentence has been suspended.

is imposed as a condition of probation that the attorney can perform an effective adversarial function and provide continuing legal representation.

Courts have held that a term of probation is necessarily imposed whenever a judge either suspends any portion of a sentence or stays or suspends the imposition of a sentence.⁴⁴ Therefore, in cases in which the court does not wish to sentence an offender to an indeterminate term in the state prison system, and thus lose jurisdiction, the court will probably grant a "suspended sentence." Operationally, this means the court will opt for one of two possible orders:

1. Suspend *imposition* of sentence so that judgment of conviction is entered in the minutes of the court and all proceedings are suspended. Should probation be revoked, the court may sentence the defendant and enter a judgment as if it is his or her first appear-

In those cases where a straight sentence to a term of local custody is imposed, the defendant may come under the supervision of a county board of parole commissioners. CAL. PENAL CODE §§ 3075-84 (West 1970) empower each county to establish a Board of Parole Commissioners and a County Parole system. Where utilized, this Board has the power to grant releases to inmates in local custody and to impose up to a two-year parole term. See CAL. PENAL CODE § 3081 (West 1970); CAL. C.E.B., CALIFORNIA CRIMINAL LAW PRACTICE, vol. II, ch. 24 (1968).

In addition to the Board's power to grant parole releases to inmates serving straight sentences in local facilities, a recent amendment to CAL. PENAL CODE § 3076 (West Supp. 1976), grants the Board power to parole inmates in local custody as a condition of probation, unless the grant of probation specifically prohibits such a parole release.

44. See *Oster v. Municipal Court*, 45 Cal. 2d 134, 287 P.2d 755 (1955).

Under *Oster*, whenever the court suspends *any portion* of a sentence, whether or not custody is imposed as a condition of probation, the order is construed as an informal grant of probation. So construed, the court retains jurisdiction over the defendant as if probation had been formally granted. However, *Oster* mandates that no such informal grant will be found when the court has expressly denied probation and when a grant of probation was clearly not intended. *Id.* at 139, 287 P.2d at 759. Compare *Balkcom v. Gunn*, 206 Ga. 167, 56 S.E.2d 482 (1949).

Straight sentences which include a token suspended portion, e.g., 365 days in custody with one day suspended, give rise to legal complications for the court and the defendant when not accompanied by an explicit grant of probation. See RUBIN, LAW OF CRIMINAL CORRECTIONS 185-90 (2d ed. 1973) [hereinafter cited as RUBIN]. Unfortunately, many judges follow this practice in an effort to retain jurisdiction for possible future modification. This is particularly true in counties which have no parole system in operation and therefore have no tribunal or agency with the power to reduce sentences. See note 43 *supra*. Nevertheless, the use of both probation and suspended sentences has been strongly advocated. See RUBIN, 194-202.

ance; i.e., commit to state prison or local custody, reinstate probation with new conditions and/or impose a fine; or

2. Suspend *execution* of sentence—the effect of which is to pronounce judgment with a term of custody; i.e., either commitment for the statutory term to state prison or for a specific term in local custody and then stay the execution of the judgment and the commitment order. If probation is subsequently revoked, and the court refuses to reinstate it, the judgment previously entered must be executed.⁴⁵

Although the ABA *Standards*⁴⁶ create a virtual presumption in favor of probation as a sentencing disposition, and developing policy has promoted its ever-increasing use,⁴⁷ the grant of probation rests in the court's "sound discretion."⁴⁸ Even if probation is of-

45. See CAL. PENAL CODE § 1203.2(c) (West Supp. 1975); CAL. PENAL CODE § 1203.1 (West 1970). For a further discussion of the interplay between these two kinds of dispositions, see RUBIN 187-88.

In *Boles v. Superior Court*, 37 Cal. App. 3d 479, 112 Cal. Rptr. 286 (1974), the court noted the interplay of such alternate dispositions and their effect on the speedy trial/concurrent sentencing provisions of CAL. PENAL CODE § 1381 (West 1970). The court held that a defendant who has been sentenced with the execution of sentence suspended does not benefit from the guarantees of § 1381.

46. ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO PROBATION §§ 1.1, at 21, 1.2, at 27 (Approved Draft 1970).

47. See notes 37, 38 *supra*. See also RUBIN 203-52.

48. CAL. PENAL CODE § 1203 (West Supp. 1975) provides, in pertinent part:

If the court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be subserved by granting probation to the person, it may place him on probation.

See *People v. Ozene*, 27 Cal. App. 3d 905, 104 Cal. Rptr. 170 (1972). See also RUBIN 219-21; Hanscom, *Probation—The Quiet Revolution*, 50 CAL. STATE B.J. 182 (1975).

The power of the trial court to grant probation in the absence of a direct statutory prohibition (CAL. PENAL CODE §§ 1203(d), 1203.06, 1203.07 (West Supp. 1976)) is clear. In *People v. Arredondo*, 52 Cal. App. 3d 973, 125 Cal. Rptr. 419 (1975), the court upheld the trial court's order suspending the execution of sentence and granting probation after the jury had found the defendant guilty of violating CAL. PENAL CODE § 261.5 (West Supp. 1976) and recommended state prison. See CAL. PENAL CODE § 264 (West Supp. 1976).

Even though probation is the favored form of disposition, the courts adhere to the "ancient" doctrine of *Escoe v. Zerbst*, 295 U.S. 490 (1935), that probation is an act of "grace" to one convicted of a crime. "The granting of probation is entirely within the sound discretion of the trial court; a defendant has no right to probation . . ." *People v. Osslo*, 50 Cal. 2d 75, 103, 323 P.2d 397, 413 (1958). Further, absent a clear showing of abuse of discretion, a judge's order denying probation will not be disturbed on appeal. See *People v. Brasley*, 41 Cal. App. 3d 311, 115 Cal. Rptr. 910 (1974); *People v. Troyn*, 229 Cal. App. 2d 181, 39 Cal. Rptr. 924 (1964). But see ABA, STANDARDS FOR CRIMINAL JUSTICE RELATING TO APPELLATE REVIEW OF SENTENCES § 3.3(ii), at 1 (Approved Draft 1968); *People v. Edwards*, 55 Cal.

ferred to the defendant, he or she may refuse it.⁴⁹ However a refusal will probably annoy the court and result in some incarceration and perhaps a fine,⁵⁰ even though it is generally recognized that the defendant should not be penalized for his decision.⁵¹

Should the court decide to grant a defendant probation, it has a secondary issue to resolve—whether to order formal or summary probation and the extent or duration of the probationary term.⁵² Formal probation usually follows a pre-sentence interview and report filed by the Probation Department⁵³ and involves the assign-

App. 3d 615, 127 Cal. Rptr. 902 (1976) *hearing granted* (April 22, 1976) (whether a judge must support a denial of probation with a statement of reasons).

49. Although the language of § 1203 arguably intimates that the defendant's consent is unnecessary ("the court . . . may place him on probation"), the courts have upheld the defendant's right to refuse to accept a probationary sentence. "[H]e does have the right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo such sentence." *People v. Osslo*, 50 Cal. 2d 75, 103, 323 P.2d 397, 413 (1958). *Accord*, *People v. Caruso*, 174 Cal. App. 2d 624, 345 P.2d 282 (1959); *Lee v. Superior Court*, 89 Cal. App. 2d 716, 201 P.2d 882 (1949).

50. Such a refusal will undoubtedly be viewed by the court as basically a poor attitude requiring a stiffer penalty in order to achieve "rehabilitative goals." In *People v. Giminez*, 14 Cal. 3d 68, 534 P.2d 65, 120 Cal. Rptr. 577 (1975), the court found no abuse of discretion in the trial court's order imposing consecutive terms of imprisonment after the defendant refused to accept five years of unsupervised probation conditioned on a limited waiver of fourth amendment protections. *See also* *People v. Renzulli*, 39 Cal. App. 3d 675, 114 Cal. Rptr. 321 (1974); *People v. Billingsley*, 59 Cal. App. 2d Supp. 845, 139 P.2d 362 (App. Dep't Super. Ct., Los Angeles, 1943).

51. *See* *People v. Giminez*, 14 Cal. 3d 68, 73-81, 534 P.2d 65, 68-74, 120 Cal. Rptr. 577, 580-84 (1975) (Tobriner & Mosk, J.J., dissenting); RUBIN 212-14.

52. CAL. PENAL CODE § 1203.1 (West 1970) provides that the term of probation upon conviction of a misdemeanor or a felony which carries less than a three-year maximum sentence may not exceed three years. *See* *People v. Ottovich*, 41 Cal. App. 3d 532, 116 Cal. Rptr. 120 (1974); *People v. Schwartz*, 80 Cal. App. 2d 801, 183 P.2d 59 (1947). In the case of a felony conviction, the length of the probationary term cannot exceed the maximum possible term of incarceration prescribed for such an offense. Therefore, in appropriate cases, the court is within its discretion in ordering a life probation term. *See* *People v. Dyer*, 269 Cal. App. 2d 209, 74 Cal. Rptr. 764 (1969).

Pursuant to CAL. PENAL CODE § 1203.2 (West 1970), in the absence of a successful probationary performance, the court may place a defendant on probation even though the maximum term for probation has expired when, prior to such expiration, there has been a revocation of probation. Under this section, it is possible that a particular defendant could remain on probation indefinitely. *See* *People v. Jackson*, 53 Cal. App. 3d 1062, 126 Cal. Rptr. 217 (1975); *People v. Carter*, 233 Cal. App. 2d 260, 43 Cal. Rptr. 440 (1965).

53. After a felony conviction, CAL. PENAL CODE § 1203 (West 1970)

ment of a particular officer to supervise the probationer throughout the normally extensive (three to five year) term of probation. Formal probation is usually reserved for felony and serious misdemeanor offenders because of the desire for continuing supervision.⁵⁴ In contrast, summary probation involves no direct supervision by the probation office. It is therefore commonly referred to as "probation to the court" and is primarily employed in misdemeanor convictions.⁵⁵

The final decision relevant to the grant of probation regards the conditions imposed incident to the probationary order. The statute invests the trial court with wide discretion in tailoring the conditions of probation to meet the rehabilitative needs of the defendant. The impact of these conditions on the probationer can be substantial. Aside from setting the length of the probationary term, the court is empowered as a condition of probation to impose county jail time,⁵⁶ a fine,⁵⁷ restitution,⁵⁸ public work project perfor-

requires that the judge refer the case to the probation office for an investigation and report to the court. That same section makes reference to the probation office optional upon a misdemeanor conviction. *See generally* *People v. Beasley*, 5 Cal. App. 3d 617, 85 Cal. Rptr. 501 (1970); *People v. Lockwood*, 253 Cal. App. 2d 75, 61 Cal. Rptr. 131 (1967).

54. *See* RUBIN 235-38.

55. CAL. PENAL CODE § 1203(b) (West 1970) provides that in the case of a misdemeanor conviction, the trial court may either refer the matter to the probation office for an investigation and report, or summarily grant (or deny) probation.

56. CAL. PENAL CODE § 1203.1 (West 1970) would appear to permit the trial court to impose a custody condition for any period not exceeding the maximum term prescribed for the offense. However, CAL. PENAL CODE § 19a (West 1972) provides that the maximum term for commitment to a county jail or other county penal facility is one year for each separate offense. This limit applies to a commitment based on either a felony or misdemeanor conviction or a condition of probation. *See People v. Jackson*, 53 Cal. App. 3d 1062, 126 Cal. Rptr. 217 (1975).

A recent case, *People v. Williams*, 53 Cal. App. 3d 720, 125 Cal. Rptr. 901 (1975), held that upon revocation of probation, whether the probation order was originally based on a felony or misdemeanor conviction, the defendant must be given credit for time served as a condition of probation and that the revocation resulted in the execution of statutory sentence. *Cf.* CAL. PENAL CODE §§ 2900.5, 2900.6 (West Supp. 1970).

For a discussion of the imposition of custody as a condition of probation, *see* RUBIN 216-19.

57. A fine may not exceed the maximum amount prescribed by statute for a violation for which the defendant is convicted. CAL. PENAL CODE § 1203.1 (West 1970). For those offenses which may be either felonies or misdemeanors depending on the sentence imposed (*see* CAL. PENAL CODE § 17 (West Supp. 1976)), the maximum fine depends on the ultimate classification of the offense. *See* CAL. PENAL CODE § 692 (West 1970) (unless otherwise prescribed, the maximum fine for a misdemeanor is \$500 and for a felony, \$5000). *See, e.g., People v. Simon*, 227 Cal. App. 2d 849, 39 Cal. Rptr. 138 (1964).

58. Restitution is imposed to restore any loss suffered by the victim of

mance,⁵⁹ or a requirement to work to support dependents.⁶⁰ In addition, the court may impose

other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer⁶¹

In more tangible terms, the courts have moved under the empowering statute to impose, or attempt to impose, one or more of the following conditions of probation. The defendant must:

1. not drink and must stay out of bars and places where alcohol sales are the chief business interest;

the crime, which in certain cases may be the government (see *People v. Baker*, 39 Cal. App. 3d 550, 113 Cal. Rptr. 248 (1974)). See RUBIN 231-32. Whether the restitution imposed may go beyond the actual loss as established by the prosecution and as directly related to the convicted offense is in doubt. See *People v. Lent*, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975); *People v. Miller*, 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967); *People v. Collins*, 242 Cal. App. 2d 626, 51 Cal. Rptr. 604 (1966); Note, *Use of Restitution in the Criminal Process: People v. Miller*, 16 U.C.L.A. L. REV. 456 (1969). However, it is clear that restitution may not be imposed to reimburse the state for the cost of prosecution and probation. *People v. Baker*, 39 Cal. App. 3d 550, 113 Cal. Rptr. 248 (1974); *People v. Labarbera*, 89 Cal. App. 2d 639, 201 P.2d 584 (1949).

59. This condition would only be appropriate in those counties which have established road camps, public farms and works projects (see CAL. GOV. CODE § 25359 (West 1968)). If this condition is imposed, the probationer is normally remanded to the custody of county sheriff in accordance with the provisions of CAL. PENAL CODE § 4100 *et seq.* (West 1970). See 32 OPS. CAL. ATTY. GEN. 48 (1958).

60. This condition will normally be imposed upon conviction of failure to support. CAL. PENAL CODE § 270 (West Supp. 1975). See RUBIN 232.

61. CAL. PENAL CODE § 1203.1 (West 1970).

Generally, conditions of probation can be divided into three separate groups: pecuniary conditions (fines, restriction, and support of dependents); behavior conditions (observance of laws, limitations on travel and association, employment, *inter alia*); and supervision conditions (submission to drug testing, submission to warrantless searches by the probation officer, *inter alia*). See RUBIN 229-38.

In regard to pecuniary conditions, the ABA *Standards* strongly recommend that the imposition of such conditions should not go beyond the ability of the probationer to pay. ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 3.2(d), at 45, 49 (Approved Draft 1970). The ABA *Standards* further notes that behavioral and supervisory conditions should be related solely to rehabilitation in the sense of helping the probationer lead a law-abiding life. *Id.* § 3.2(b), at 44-45, 47-48.

2. not use any drugs and stay away from areas where addicts congregate;
3. not gamble or have any gambling paraphernalia;
4. not possess any dangerous weapon or be in any building or vehicle or in the presence of any place where such a weapon is;
5. not go into any area where homosexuals congregate;
6. not associate with certain people or classes of people who have some relation to the kind of offense for which the defendant was convicted (*e.g.*, drug users, in the case of a drug related offense; small children, in the case of some sexual offenses);
7. not cross the Mexican border or enter other foreign countries;
8. obtain additional rehabilitative services (*e.g.*, psychiatric care, educational, or vocational training);
9. seek and maintain regular employment;
10. submit to drug testing as ordered by the probation officer (normally imposed on heroin offenders);
11. submit his person and property to search by the probation officer or police officers on demand;
12. obey all laws, including orders of the probation officer.⁶²

The list set out above is not exhaustive inasmuch as the court is empowered to be creative in the formulation of probation conditions to meet the circumstances of each case.⁶³ Further, there is no intent to imply that all these conditions may be properly imposed and present no constitutional difficulties. Indeed, at least three limitations on the court's discretion in the formulation of conditions have been outlined. Under challenge, a condition will be held invalid if it:

1. has no relationship to the crime for which the offender was convicted;
2. relates to conduct which is not in itself criminal; or
3. requires or forbids conduct which is not reasonably related to future criminality.⁶⁴

However, these limitations⁶⁵ have been construed in favor of up-

62. See CAL. C.E.B., CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES' BENCHBOOKS, vol. 2, at 92 (1969); DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 100-41 (1969).

63. CAL. PENAL CODE § 1203.1 (West 1970).

64. See *In re Bushman*, 1 Cal. 3d 767, 777, 463 P.2d 727, 733, 83 Cal. Rptr. 375, 381 (1970); *People v. Dominguez*, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967). See also *People v. Lent*, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975); *People v. Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971); *In re Mannino*, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971). See generally Imlay & Glasheem, *See What Condition Your Conditions Are In*, 35 FED. PROB. 3 (June, 1971); Comment, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466 (1974).

65. These limitations, which were first formulated in *People v. Dominguez*, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967), and recently reaffirmed in *People v. Lent*, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975),

holding the validity of the condition, and except for a flurry of litigation in the area of first⁶⁶ and fourth⁶⁷ amendment rights, ap-

are, in comparison with the approach of other courts, quite stringent. See, e.g., *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965); *State v. Oyler*, 92 Idaho 43, 436 P.2d 709 (1968); *People v. Higgins*, 22 Mich. App. 479, 177 N.W.2d 716 (1970); *State v. Rhinehart*, 267 N.C. 470, 148 S.E.2d 651 (1966); *Loving v. Commonwealth*, 206 Va. 924, 147 S.E.2d 78 (1966). These later decisions held for a straight reasonableness test. See also *Tamez v. State*, 19 CRIM. L.R. 2026 (April 14, 1976).

66. The first amendment rights most often at the center of these controversies concerned freedom of expression and association. While past courts have been particularly unmoved by claims of free speech violations resulting from a probation condition (see, e.g., *Morris v. State*, 44 Ga. App. 765, 162 S.E. 879 (1932)), the modern trend recognizes that the condition which impedes freedom of expression must at least be "reasonable." See *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971); *In re Mannino*, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971); *Inman v. State*, 124 Ga. App. 190, 183 S.E.2d 413 (1971).

Attacks upon conditions restricting freedom of association have enjoyed even less success than "free speech" attacks. See *United States v. Smith*, 414 F.2d 630 (5th Cir. 1969), *rev'd on other grounds*, 398 U.S. 58 (1970); *People v. King*, 267 Cal. App. 2d 814, 73 Cal. Rptr. 440 (1968), *cert. denied*, 396 U.S. 1028 (1970). However in *In re Mannino*, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971), the court invalidated a condition prohibiting membership in radical political groups. In so holding the court suggested three guidelines for determining when a condition may validly infringe on first amendment freedoms: (1) when the condition reasonably relates to the purpose sought by the probation code sections; (2) when the value accruing to the public by imposition of the condition manifestly outweighs the right impaired; (3) when no alternative means less intrusive of constitutional rights exists (the least onerous alternative). *Id.* at 968, 92 Cal. Rptr. at 889.

67. The courts have generally upheld conditions that require the probationer to submit his person or property to search by the probation officer or the police without the necessity of a warrant. See *People v. Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971); *People v. Calais*, 37 Cal. App. 3d 898, 112 Cal. Rptr. 685 (1974); *Russi v. Superior Court*, 33 Cal. App. 3d 160, 108 Cal. Rptr. 716 (1973); *People v. Kern*, 264 Cal. App. 2d 962, 71 Cal. Rptr. 105 (1968). In *Mason*, the court found that this type of condition could pass the *Dominiguez* test (see text accompanying note 64 *supra*) and that a warrantless search conducted pursuant to this condition could be justified on the basis of the probationer's consent to the condition in accepting probation. See Note, 1 AM. J. CRIM. L. 235 (1972). However, the courts have insisted that the condition be reasonably related to the proven offense and aimed at deterring similar violations in the future. *People v. Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971); *People v. Kay*, 36 Cal. App. 3d 759, 111 Cal. Rptr. 894 (1973); *People v. Bremmer*, 30 Cal. App. 3d 1058, 106 Cal. Rptr. 797 (1973). See Note, 14 SANTA CLARA LAW. 153 (1973). Moreover, the courts have insisted that the probationer be given notice prior to the search. See *People v. Superior Court (Stevens)*, 12 Cal. 3d 858, 528 P.2d 41, 117 Cal. Rptr. 433 (1974).

pellate review has been generally supportive of the trial court's order.⁶⁸

The dynamic nature of the probation process demonstrates the need for continued vigilance on the part of defense counsel, beginning with the imposition of the conditions and continuing through to the expiration of the probation term.⁶⁹ A condition validly imposed can soon work severe hardship and become unreasonable because of a change in circumstances. Moreover, it may become apparent that the probationer will not be able to comply with a condition. In such a case, the probationer can be subjected to revocation of probation or to a detrimental modification of conditions by the probation officer or by the court's own motion.⁷⁰ The key to effective representation and decriminalization of the client on probation is the realization by counsel that although statutory author-

The future of such conditions, particularly because they permit police officers to search without a warrant, may be in doubt. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975).

68. See, e.g., *People v. Oaxaca*, 39 Cal. App. 3d 153, 114 Cal. Rptr. 178 (1974); *People v. Keefer*, 35 Cal. App. 3d 156, 110 Cal. Rptr. 597 (1973); *In re Peeler*, 266 Cal. App. 2d 483, 72 Cal. Rptr. 254 (1968).

After careful consideration of the facts of the case, the *Peeler* court upheld a probation condition that had the effect of forcing the defendant to live apart from her husband. *Id.* at 492-93, 72 Cal. Rptr. at 260-61.

While attacks on probation conditions have not been completely successful, counsel should not be deterred from challenging what is considered to be an unreasonable or illegal condition. In *In re Bushman*, 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970), the court invalidated a condition requiring psychiatric treatment when the record was totally devoid of any indication that it was needed or would serve rehabilitative goals. In *People v. Johnson*, 27 Cal. App. 3d 781, 104 Cal. Rptr. 75 (1972), the court struck down a condition that an "indigent" defendant reimburse the government for the costs of appointed counsel. *Contra*, *Fuller v. Oregon*, 417 U.S. 40 (1974).

69. The ABA *Standards* explicitly recognize the need for continued scrutiny of probation conditions. ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 3.3, at 50 (Approved Draft 1970). In the commentary to this section, the advisory committee noted

that conditions once fixed should not become frozen into an irrevocable pattern, but that the court should be able to respond to changes in the defendant's circumstances or simply to new ideas about how best to effect his reintegration into the normal life of the community.

Id. at 51.

70. CAL. PENAL CODE § 1203.2(b) (West Supp. 1975) provides that:

Upon its own motion or upon the petition of the probationer or the district attorney . . . , the court may modify, revoke or terminate the probation of the probationer

See also the recent discussion of the court's ability to revoke probation on a charge upon which the defendant has been acquitted. *In re Coughlin* — Cal. 3d —, 127 Cal. Rptr. 337 (1976).

ity exists to further entangle the probationer in the penal-correctional system,⁷¹ statutory authority also exists to alleviate the onus of the system. California Penal Code section 1203.3 provides that:

The court shall have authority at any time during the term of probation to revoke, modify or change its order of suspension of imposition or execution of sentence. It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held⁷²

It is clear from the language of this section that the sentencing court retains wide discretion subsequent to placing an offender on

71. *In re Coughlin*, — Cal. 3d —, 127 Cal. Rptr. 337 (1976).

72. CAL. PENAL CODE § 1203.3 (West 1970).

While both § 1203.3 and § 1203.2(b) contain provisions that could work either to the probationer's advantage or detriment, the tenor of § 1203.3 suggests that it was designed to be used for the probationer's advantage, and § 1203.2(b) appears designed to empower the imposition of penalties for unsuccessful probationary performance. See *Review of Selected 1970 California Legislation*, 2 PAC. L.J. 279, 387 (1971). Therefore, counsel, when moving on the probationer's behalf, should bring his motion pursuant to § 1203.3.

The broad discretion of the trial court during the term of probation based upon § 1203.2(b) and § 1203.3 is retained in the proposed revision of the California Penal Code. See STATE OF CALIFORNIA, JOINT COMMITTEE FOR REVISION OF THE PENAL CODE, THE CRIMINAL PROCEDURE CODE; PENAL CODE REVISION PROJECT (STAFF DRAFT § 11508 1974) [hereinafter cited as CRIMINAL PROCEDURE CODE (STAFF DRAFT)]. That section, designed to supplant §§ 1203.2 and 1203.3, and to conform with both *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *People v. Vickers*, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972), provides:

§ 11508 *Modification, revocation, or termination of probation or provisional release.*

(a) The court may revoke or modify probation or provisional release only after a hearing upon written notice to the defendant of the time and place of the hearing and the grounds upon which the revocation or modification is proposed.

(b) At the hearing the defendant shall have the right to hear and controvert the grounds upon which the revocation or modification is proposed, to offer evidence or other materials in his behalf, and to be represented by counsel.

(c) Upon a showing that it is warranted by the defendant's good conduct, the court may, upon motion of the defendant or the Director of the Department of Probation, terminate probation or provisional release and discharge the defendant.

This section has the added benefit of clarifying the role of the probation department in taking the initiative to secure early release and termination of probation.

probation. The court's power to modify, revoke, or terminate continues throughout the probationary period and is not limited even in cases in which a plea or sentence bargain has been accepted.⁷³ The court in *People v. Allen*⁷⁴ took special note of the inviolate power of the sentencing court to exercise continued supervision of the probationer. In that case, defense counsel had bargained for a sentencing recommendation by the prosecutor that included a lengthy term of probation and three consecutive one-year terms in the county jail as a condition of probation. One year after imposing this negotiated sentence, the court modified its order, reducing one of the one-year jail terms to nine months. In rejecting the People's appeal,⁷⁵ the court upheld the modification and found that the sentencing court did not abdicate its power to modify the probation order despite the negotiated plea. The court stated:

The susceptibility of any probation order to modification is well established and of vital importance to the purpose of this alternative to sentencing. Implicit, therefore, in any plea bargain . . . is the possibility that probation may later be modified, revoked or terminated.

. . . .

Penal Code section 1203.3 and the rehabilitative purpose of probation make the post-judgment status of a probationer a matter for the exclusive exercise of judicial power.⁷⁶

73. See CAL. PENAL CODE § 1192.5 (West Supp. 1975). Section 1192.5 provides that "plea bargains" may specify not only the charged offenses to which the defendant will plead guilty but also the sentence to be imposed by the court. However, many prosecuting offices refuse to enter into such negotiated pleas which fix sentences. The proposed criminal code in fact does not retain § 1192.5, for the drafters believed "that plea bargaining does not represent a step forward for criminal justice." CRIMINAL PROCEDURE CODE (STAFF DRAFT) vii.

74. 46 Cal. App. 3d 583, 120 Cal. Rptr. 127 (1975).

75. The prosecution brought its appeal on the basis of CAL. PENAL CODE § 1238(5) (West Supp. 1975), which permits the People to appeal from "an order made after judgment, affecting the substantial rights of the people." *Id.*

A defendant has the right to appeal from an order denying a petition to modify or reduce probation brought pursuant to § 1203.3 (West 1970). See CAL. PENAL CODE § 1237(2) (West 1970). See also *People v. Theobald*, 231 Cal. App. 2d 351, 41 Cal. Rptr. 758 (1964).

76. *People v. Allen*, 46 Cal. App. 3d 583, 589-91, 120 Cal. Rptr. 127, 130-31 (1975).

Another form of this post-conviction judicial power which can be of benefit to the probationer is set out in CAL. PENAL CODE § 1203.2(a) (West 1970). This section provides that whenever a person on probation is convicted of a subsequent offense and is thereupon sentenced to state prison, the probationer may obtain final disposition and sentence on the conviction underlying the probation order, provided that the court receives notice of this new commitment. The purpose of this statute is to permit a defendant to obtain the benefit of a concurrent sentence should the court decide to revoke probation (based on the subsequent conviction) and execute sentence for the

Having ascertained the legal parameters governing probation and the potential role for counsel, one must consider the procedure and factors surrounding a motion to modify or terminate probation. First, counsel must clearly define which changed circumstances⁷⁷ merit the court's reconsideration of its original probation order. The client may have made significant alterations in his or her lifestyle or opportunities may have become available which did not exist at the time of sentencing. For example, the probationer may have experienced a change in his or her family life. An opportunity for employment or re-employment may have materialized. The client may have taken advantage of rehabilitative services such as job training programs, formal education, or community-based rehabilitation programs.⁷⁸ In this respect, counsel can serve as a catalyst by becoming familiar with available opportunities, matching services with the client's need, and suggesting alternatives to the court. After evaluating the specifics of the changed conditions, counsel should formulate a theory justifying the request for modification. In this respect, the nature of the probation condition at issue (pecuniary, behavioral, supervisory, or custodial)⁷⁹ should be isolated and contrasted with the prevailing circumstances.

If incarceration has been imposed as a condition of probation,⁸⁰ the usual reasons are punishment and future deterrence. The court

initial offense. See *Hayes v. Superior Court*, 6 Cal. 3d 216, 490 P.2d 1137, 98 Cal. Rptr. 449 (1971); *People v. Ruster*, 40 Cal. App. 3d 865, 115 Cal. Rptr. 572 (1974). The statute can be invoked only by written notice from the defendant or his attorney, and, if the court fails to act within thirty days of receipt of the notice, the statute purports to divest the court of jurisdiction over the defendant. However, such divestment occurs infrequently, and reported cases exhibit an archaic "common law—strict construction" approach to the issue of the legal sufficiency of such notice. See *People v. Como*, 49 Cal. App. 3d 604, 123 Cal. Rptr. 86 (1975); *People v. Ruster*, 40 Cal. App. 3d 865, 115 Cal. Rptr. 572 (1974). *Contra*, *People v. Carr*, 43 Cal. App. 3d 441, 117 Cal. Rptr. 714 (1974). See also CAL. PENAL CODE § 1381 (West 1970), which provides an alternate and mostly duplicative procedure, but with a ninety-day time limit. The proposed revision to the penal code seeks to consolidate and clarify these existing provisions. CRIMINAL PROCEDURE CODE (STAFF DRAFT) §§ 10453, 11510.

77. See ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 3.3, at 50-51 (Approved Draft 1970).

78. The local probation department can provide counsel with a complete list of available community-based rehabilitation programs. See STATE OF CALIFORNIA, OFFICE OF CRIMINAL JUSTICE PLANNING, A GUIDE TO CORRECTIONS PLANNING IN CALIFORNIA (1975).

79. See note 61 *supra*.

80. More than half of all probationers in the State of California are in-

should be informed of changed conditions that make further incarceration counterproductive to the rehabilitative goals of probation. In addition, the mere passage of time may well convince the court that the punishment and deterrence objectives of the custody condition have been achieved and that prolonged incarceration would be pointless.⁸¹ With the incarcerated probationer, counsel might seek a number of modified conditions relating solely to custody. Most common is a request for modification of the custodial condition to that of time served, the effect of which is to obtain immediate release. As an alternative, a shortening of the custody term may be suggested to the court.

In addition to the term of custody, modifications of the nature of custody are available. The court has the statutory authority to order intermittent custody,⁸² and therefore the sentencing court may modify the condition to authorize service in custody on weekends. Counsel should ascertain whether the county in which he or she practices has utilized the provisions of Penal Code section 1208 and established a work furlough or education furlough program.⁸³ These programs shift custody to a more favorable work or education furlough center and permit release from custody while the individual is employed or is in school.⁸⁴ On a more modest

carcerated as a condition of probation. A 1973 survey showed the statewide percentage to be 52.4. STATE OF CALIFORNIA, BUREAU OF CRIMINAL STATISTICS, ADULT PROBATION IN CALIFORNIA, 1973, at 28 (1974). California exceeds all other jurisdictions in enforcing incarceration as a condition of probation (see RUBIN 216-17 n.61) despite the fact that this kind of condition has been called "a flagrant misconception or disregard of the underlying principles of the entire probation scheme." 2 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURE 249 (1970).

81. It has been the author's experience that most courts are not receptive to a motion to modify a custody condition of probation until the probationer has served at least one-half of the term imposed. However, in cases in which a term longer than ninety days has been imposed, a motion should be brought as a matter of course at the midway point in the term.

82. CAL. PENAL CODE § 1203.1 (West 1972).

83. CAL. PENAL CODE § 1208 (West 1970).

Section 1208 was enacted by the legislature in 1957 and empowers individual counties to establish both work and educational furlough programs upon determining that such programs are "feasible" based upon the availability of employment and education and appropriate institutional facilities. A replacement for the current § 1208 has already been passed by the legislature. Known as the Cobey Work Furlough Law, the new § 1208 will become effective on January 1, 1977. See CAL. PENAL CODE § 1208 (West Supp. 1976).

Pursuant to § 1208.5, inmates of Work Furlough Programs may be transferred to similar programs in other cooperating counties. CAL. PENAL CODE § 1208.5 (West 1970).

84. On the value of such programs to the offender and society, see Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assess-*

scale, counsel may contact the probation officer or sheriff and request a temporary, three-day release for the probationer within thirty days prior to the established release date.⁸⁵ Such a temporary release can aid the probationer's re-entry into the community.

Counsel should also consider possible modification of behavioral and supervisory conditions of probation, especially when these conditions have begun to work an unnecessary hardship on the probationer. It should be demonstrated to the court either that the good conduct of the probationer no longer requires imposition of the condition or that the continuance of the restriction is counterproductive to the rehabilitative process. A motion directed at these conditions may seek either modification or elimination of a particular condition or early termination of the probationary term, thus ending all forms of supervision and restriction. These requests are often successful when the client has established an unblemished record after a year of probation and shows positive signs of rejoining the mainstream of society. Counsel should be aware that some conditions of probation, after a period of successful performance, become of marginal utility to the court or the probation office. Thus, they can be modified or eliminated with little or no opposition.

The procedure for obtaining modification of a probation order is neither difficult nor time-consuming. At the outset counsel should contact the client's probation officer if formal probation has been imposed,⁸⁶ because recommendations of the probation department will carry significant weight with the judge who is being asked to modify the probation order. Counsel may be able to discover the attitude of the probation officer towards the client and the proposed modification. This discovery could have strategic significance as counsel prepares to petition the court. Finally, this contact pro-

ment of Its Effects on Recidivism and Social Cost, 65 J. CRIM. L.C. & P.S. 405 (1974); Rudoff & Esselstyn, *Evaluating Work Furlough: A Followup*, 37 FED. PROB. 48 (1973).

Unfortunately, utilization of the work and education furlough programs has not been as great as expected. In Los Angeles County, reports have indicated that as few as twelve per cent of the jail populace take advantage of the available programs. *Los Angeles Daily Journal*, Feb. 14, 1975, at 1.

85. See CAL. PENAL CODE § 4018.6 (West Supp. 1976); CAL. PENAL CODE § 1203.1a (West Supp. 1976).

86. See note 54 *supra*.

vides an opportunity for effective informal advocacy that may be inappropriate at a formal hearing.

The next step involves the preparation and calendaring of the motion for hearing.⁸⁷ Although some practitioners adhere to "oral motion" practice, a written notice and motion should be utilized.⁸⁸ The mere existence of written pleadings enhances counsel's credibility and makes the motion stand out and merit serious consideration. A written motion also serves as an effective advocacy device when filed in those courts which read and consider pleadings prior to the hearing.

Finally, as counsel approaches the hearing on the motion, he should be prepared to conduct a well-organized and documented presentation. Indeed, the analogy to a second sentencing hearing is appropriate, and counsel should be equipped with the same data and support that are used at sentencing.⁸⁹ In this respect, family, friends, employer, or counselors should be requested to attend the hearing and be prepared to speak on the client's behalf.

MITIGATING RECORDS OF ARREST AND CONVICTION

Even after an individual has exited the criminal justice system,

87. In all cases the Rules of Court and local rules should be consulted. See CALIFORNIA RULES OF COURT (West 1975).

In calendaring the motion, counsel should be sure to afford the probation department sufficient time to prepare and file a supplemental probation report. Of course, local conditions and the particular probation officer's caseload will determine the amount of notice required.

Finally, the question of the proper judicial officer to hear the motion may present difficulty in properly setting the matter for hearing. The statute authorizing modification merely refers to "the court" (CAL. PENAL CODE § 1203.3 (West 1970)) and does not specify whether such a motion must go before the original sentencing judge who imposed the conditions of probation. Some superior courts pursue a practice of setting the motion in the felony presiding department or the actual physical court and department in which the probationer appeared for sentencing. If possible, the motion should be brought before the judge who rendered the probation order. This judge will at least have some familiarity with the case, and continuity in treatment is therefore enhanced. Further, such practice avoids the possible reluctance of some judges to "second-guess" his or her brother judge.

88. Should written pleadings be used, counsel might consider the use of an "attorney's declaration" in support of the motion, detailing counsel's own evaluation of the probationer and suggesting alternative treatment. This declaration can be enhanced by attaching exhibits (e.g., letters of reference, offers of employment, letters of support from family members). If a memorandum of points and authorities is filed with the motion, it may be brief, focusing merely on the statutory authority for modification and perhaps pertinent ABA *Standards* (see note 69 *supra*) and reference works about the objectives of probation.

89. For guidance and suggestions concerning both tactics and the attorney's role in the sentencing hearing, see AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, §§ 460-71 (3d ed. 1974); JONES, CALIFORNIA CRIMINAL CLINICAL PRACTICE MANUAL chs. 9-10 (1975).

the effects of a misdemeanor or felony conviction, or even an arrest, can be significant.⁹⁰ These effects can be direct, as when greater punishment is imposed upon a subsequent conviction,⁹¹ or merely the result of social and institutional prejudice, as when a criminal record restricts or destroys employment opportunities.⁹² Regardless of the fact that the individual has paid his or her "debt to society" or has been rehabilitated, "so far as concerns the individual defendant, the act has been done, and no legal technicalities can change this fact."⁹³

In almost all cases, the collateral effects of a criminal conviction, whether real or imagined, can be traced directly to the existence

90. Although the Constitution specifically prohibits "bills of attainder" (U.S. CONST. art. I, § 9), both the laws and our social practices have perpetuated a system that imposes civil and proprietary disabilities on convicted offenders—in effect "attainder." See Cohen & Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROB. 19 (1971). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 88-92 (1967); *Special Project, The Collateral Consequences of Criminal Convictions*, 23 VAND. L. REV. 929 (1970); note 22 *supra*.

In recent years, convicted offenders, both in and out of the correctional system, have challenged the loss of rights occasioned by a criminal conviction. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (voting rights); *Seybold v. Milwaukee County Sheriff*, 276 F. Supp. 484 (E.D. Wis. 1967) (capacity to sue); *Bearden v. Industrial Comm'n*, 14 Ariz. App. 336, 483 P.2d 568 (1971) (right to workmen's compensation).

91. See, e.g., CAL. PENAL CODE §§ 644, 666, 667 (West 1970).

92. See *Taylor v. Civil Serv. Comm'n*, 374 F.2d 466 (9th Cir. 1967); *Thomas v. Evangeline Parish School Bd.*, 138 So. 2d 658 (La. App. 1962). But see *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970); *Mindel v. Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 75 (1967); Note, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403 (1975).

Note should be taken of a recent amendment (AB 255, ch. 1043 and AB 1277, ch. 1117 (1975)) to CAL. LABOR CODE § 432.7 (West Supp. 1976), which prohibits all employers, governmental and private, from asking applicants for information concerning arrests or detentions that do not result in convictions (see note 98 *infra*), from seeking such data by way of other sources, or from using such information as "a factor in determining any condition of employment including hiring, promotion or termination." Despite explicit enforcement provisions (\$200 to \$500 damages to aggrieved persons), the amendment establishes many exceptions which threaten to envelop the rule. See CAL. LABOR CODE § 432.7(d), (e) (West Supp. 1976).

93. *In re Paoli*, 49 F. Supp. 128, 130 (N.D. Cal. 1943).

of the criminal record.⁹⁴ Further, despite explicit statutory regulation concerning the dissemination of such records,⁹⁵ genuine concern is expressed by many clients that potential employers will learn of the existence and content of records held by the Justice Department's Bureau of Identification and Information (formerly C.I.I.).⁹⁶ Therefore, in spite of efforts designed to restore full liberty and opportunity to the convicted offender,⁹⁷ the need for the mitigation of criminal records through the assistance of diligent counsel is implicit in the decriminalization of the convicted client.

The collateral consequences resulting from a record may well be suffered even by those who have only superficial contact with the criminal justice system; i.e., those people who are arrested and released by the officer without further action.⁹⁸ While such cases seldom come to the attention of counsel, he should be aware that California Penal Code section 851.6 mandates that the officer issue the person a certificate describing the action as a detention.⁹⁹ This

94. California has an elaborate statutory framework for the reporting, compilation, examination and dissemination of criminal records. See CAL. PENAL CODE § 11075 *et seq.* (West Supp. 1975). On January 1, 1978, the Criminal Offender Record Information Act will go into effect. CAL. PENAL CODE §§ 13100 *et seq.* (West Supp. 1976). These new sections call for much more detail in the reporting of criminal actions. See, e.g., CAL. PENAL CODE § 13125 (West Supp. 1976).

The human side of this record compilation has been well documented.

See Comment, *Guilt by Record*, 1 CAL. WEST. L. REV. 126 (1965); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971).

Though a few jurisdictions have enacted statutes to mitigate the records of criminal convictions, some writers have argued that sealing or even expungement of records does not guarantee secrecy. See Kogan & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378 (1970). The authors contend that the order to seal or expunge itself provides a "track" into the existence of a criminal record and therefore the protective statutes are of little benefit. They conclude that society must begin to accept those with "blemished" backgrounds.

95. CAL. PENAL CODE § 11075 *et seq.* (West Supp. 1975).

96. A compelling narrative and record of some personal cases is set out in Comment, *Guilt by Record*, 1 CAL. WEST. L. REV. 126 (1965).

97. See cases cited note 90 *supra*; Cal. Penal Code §§ 2600, 2601 (West Supp. 1976).

In November, 1975, the California electorate strongly endorsed a constitutional amendment which restored the right to vote to convicted felons. See CAL. CONST. art. II, § 3. This approval by popular vote was in sharp contrast to the United States Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), which found no equal protection violation in the statutory scheme as it then existed. *But see Ramirez v. Brown*, 9 Cal. 3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973).

98. See CAL. PENAL CODE § 849(b) (West Supp. 1975). *But see generally* Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20 (1972).

99. See CAL. PENAL CODE § 851.6(a) (West Supp. 1976).

This requirement does not apply to those arrested and released pursuant to CAL. PENAL CODE § 849(b) (2) (West 1970).

section further requires that the records reflect that the action was a detention.¹⁰⁰ It is important to note that these same requirements apply when the person is arrested and no criminal charges are filed.¹⁰¹

If the person described above is a juvenile arrested for a misdemeanor, counsel may take affirmative action on the client's behalf to further mitigate the record. California Penal Code section 851.7 (a) (1)¹⁰² empowers a court, on petition of counsel, to order the record of detention sealed.¹⁰³ Current legislation has passed the state Assembly and Senate Judiciary Committee which would make section 851.7(a) (1) applicable to adults.¹⁰⁴

100. CAL. PENAL CODE § 851.6(a) (West Supp. 1976). See also CAL. PENAL CODE § 11115 (West Supp. 1976).

101. CAL. PENAL CODE § 851.6(b) (West Supp. 1976).

In these cases a higher probability exists that counsel will be aware of the action, for § 851.6(b) contemplates those cases in which the person is released on bail and the prosecuting agency, rather than the police, decides that the facts do not merit the filing of a criminal complaint.

102. CAL. PENAL CODE § 851.7 (West Supp. 1975).

It is important to note that this section may be utilized to mitigate the juvenile arrest record whether the petitioner is presently a minor or an adult.

103. The term *sealing* should be distinguished from *expungement*. The latter term denotes eradication or erasure of a record, i.e., a restoration of the *status quo ante*. See Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 149 (1966). See also Comment, *Criminal Procedure: Expunging the Arrest Records When There is No Conviction*, 28 OKLA. L. REV. 377 (1975); Note, *The Effect of Expungement on a Criminal Conviction*, 40 S. CAL. L. REV. 127 (1967). Despite the frequent use of the term *expungement* with regard to the California statutory scheme (see, e.g., Note, 40 S. CAL. L. REV. 127 (1967)), the term does not accurately describe the limited effect of sealing. While expungement contemplates destruction of the record, a sealed record continues to exist and may, by court order, be unsealed. See, e.g., CAL. PENAL CODE §§ 851.7(f), 1203.45(b) (West Supp. 1975).

The foremost benefit resulting from sealing is that the record is not available for official or public scrutiny and "thereafter such conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence." CAL. PENAL CODE §§ 851.7(b), 1203.45(a) (West Supp. 1975).

104. See The Los Angeles Daily Journal, Feb. 11, 1976, at 1, col. 5. The legislation is AB 491, sponsored by Assemblyman Willie Brown (D-San Francisco).

Proposed legislation (CRIMINAL PROCEDURE CODE (STAFF DRAFT) § 11601) would abolish the distinction between minors and adults for the purposes of obtaining a sealed record.

A recent decision, *People v. Municipal Court* (Blumenshine), 51 Cal. 3d 796, 124 Cal. Rptr. 484 (1975), *vacated, hearing granted*, Cal. Sup.

Should criminal charges be filed, two initial points of reference bearing on the mitigation of the record may become operable. If the client is charged with a narcotics related offense, counsel should determine whether diversion is available pursuant to California Penal Code section 1000.¹⁰⁵ In those cases in which diversion is applicable, and the diversion program is successfully completed, the record of the proceedings and arrest may be sealed.¹⁰⁶ If the charges involve offenses which may be treated as either a felony or a misdemeanor,¹⁰⁷ counsel should focus on the provisions of California Penal Code section 17(b).¹⁰⁸ The classification of an offense as either a felony or misdemeanor will have significant effects on

Ct. (Nov. 24, 1975), ordered an adult's arrest record sealed, finding the exclusion of adults from the benefits of sealing was a denial of equal protection. *Contra*, *Loder v. Municipal Court*, 117 Cal. Rptr. 533 (1974), *vacated, hearing granted*, Cal. Sup. Ct. (Feb. 13, 1975). Both *Blumenshine* and *Loder* raise the question of whether the courts possess any inherent authority outside statutory guidelines to order the sealing of records. See *People v. Pruett*, 51 Cal. App. 3d 329, 124 Cal. Rptr. 273 (1975); *McMahon v. Municipal Court*, 6 Cal. App. 3d 194, 85 Cal. Rptr. 782 (1970); *Sterling v. City of Oakland*, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); *Alexander & Waltz, Arrest Record Expungement in California: The Polishing of Sterling*, 9 U. SAN. FRAN. L. REV. 229 (1974); Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147 (1966). See also *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972); *Hammons v. Scott*, 9 CLEARING HOUSE REV. 109 (June, 1975) (case pending in the United States District Court for the Northern District of California seeking declaratory and injunctive relief barring dissemination of a record of arrest followed by a dismissal for lack of evidence).

105. CAL. PENAL CODE § 1000 *et seq.* (West Supp. 1976). See also Note, *Diversion and the Judicial Function*, 5 PAC. L.J. 764 (1975); Note, *The California Experience with Pre-Trial Diversion*, 7 SW. U.L. REV. 418 (1975).

106. CAL. PENAL CODE § 1000.5 (West Supp. 1976).

This section provides that the diversion proceedings and arrest record shall be sealed and deemed to have never occurred. The statute further prohibits the use of an arrest record for purposes of evaluating fitness for employment, benefits, a license or certificate after a successful diversion program.

It is unclear if the sealing of the record is automatic upon completion of the diversion program or if the divertee is required to petition for sealing.

Clearly relief afforded by § 1000.5 circumvents those provisions of CAL. PENAL CODE § 851.7(e)(2) (West Supp. 1975) and CAL. PENAL CODE § 1203.45(c) (West 1970), which prohibit sealing of records relating to narcotics offenses. See also *People v. Pruett*, 51 Cal. App. 3d 329, 124 Cal. Rptr. 273 (1975); *People v. Ryser*, 40 Cal. App. 3d 1, 114 Cal. Rptr. 668 (1974).

107. Those offenses which may be punished by either a commitment to state prison or by fine or commitment in the county jail (see, e.g., CAL. PENAL CODE § 461(2) (West Supp. 1975)) are classified as felonies or misdemeanors depending on the ultimate sentence imposed. CAL. PENAL CODE § 17(a), (b) (West Supp. 1975).

108. *Id.* § 17(b).

the later availability of record mitigation relief. Immediate attention to section 17(b) is necessary because the classification of the offense may be made at either the time the charges are filed,¹⁰⁹ at the preliminary examination,¹¹⁰ at sentencing,¹¹¹ or after probation has been granted.¹¹²

In those cases in which defense counsel is successful on the merits and the case is dismissed or the client is acquitted, the records of the case and the arrest may be sealed. If the client is a juvenile at the time the offense is committed and proceedings are dismissed or an "acquittal"¹¹³ is obtained, a petition to seal the records is appropriate.¹¹⁴ In the case of an adult who is acquitted and whom the trial court declares "factually innocent," the court may, on motion, order the case and arrest records sealed.¹¹⁵

Should the proceedings result in a conviction, the availability and extent of record mitigation relief hinge upon three factors: (1)

109. *Id.* § 17(b) (4).

This provision permits the prosecuting attorney to file an alternate felony-misdemeanor as a misdemeanor unless the defendant objects.

110. *Id.* § 17(b) (5).

At or before the preliminary examination the magistrate is empowered, pursuant to this section, to declare the offense a misdemeanor.

111. *Id.* §§ 17(b) (1), (2).

If the court imposes a punishment other than imprisonment in the state prison, or commits the defendant to the California Youth Authority (see CAL. WELF. & INST'NS CODE § 1731.5 (West 1972)), the offense is deemed a misdemeanor.

112. CAL. PENAL CODE § 17(b) (3) (West Supp. 1975).

In those cases in which the court grants probation without the imposition of sentence (see note 45 *supra*), the court may thereafter, on motion of the defendant or the probation officer, declare the offense a misdemeanor.

113. A juvenile is technically not acquitted; rather, the juvenile court is said to be without jurisdiction. See CAL. WELF. & INST'NS CODE § 602 (West Supp. 1975).

114. See CAL. PENAL CODE §§ 851.7(a) (2), (3) (West Supp. 1975).

Special note should be paid to those provisions of § 851.7 which carve out exceptions to the relief afforded by the section. See CAL. PENAL CODE § 851.7(d) (West Supp. 1975). But see *People v. Pruett*, 51 Cal. App. 3d 329, 124 Cal. Rptr. 273 (1975), declaring § 851.7(e) (2) unconstitutional in part.

115. CAL. PENAL CODE § 851.8 (West Supp. 1976). See also CAL. PENAL CODE §§ 11105.5, 11116 (West Supp. 1976).

Because § 851.8 has only recently taken effect, there are no reported cases construing the statute. However, it is clear that the section creates an intriguing concept—"factual innocence"—that might be the subject of much litigation. See U.S. CONST. amend. V; *In re Winship*, 397 U.S. 358 (1970).

whether probation is granted;¹¹⁶ (2) whether the offense is classified as a felony or misdemeanor;¹¹⁷ and (3) whether the status of the client is that of a minor or an adult.¹¹⁸ A client who has been convicted of a misdemeanor and denied probation or convicted of a felony or misdemeanor and granted probation is eligible for relief under California Penal Code sections 1203.4(a) and 1203.4, respectively. The qualifications for eligibility under these sections are substantially the same. In the main, the client must have successfully completed the sentence or term of probation and at that time not be incarcerated or on probation for another offense or facing criminal charges. The relief afforded by the two sections is identical.

The defendant shall . . . be permitted by the court to withdraw his plea of guilty or plea of *nolo contendere* and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted.¹¹⁹

In the case of a client who was under eighteen at the time the misdemeanor¹²⁰ was committed, the relief afforded by sections

116. See CAL. PENAL CODE § 1203.4 (West 1972).

117. See *id.* § 1203.4(a). See also notes 107-12 *supra*.

118. See CAL. PENAL CODE § 1203.45 (West Supp. 1975).

This section has specifically been held applicable only to a person who is under eighteen at the time of the commission of a misdemeanor. *Loder v. Municipal Court*, 117 Cal. Rptr. 533 (1974), *vacated, hearing granted*, Cal. Sup. Ct. (Feb. 13, 1975). However, a decision from the Supreme Court of California in the *Loder* case is forthcoming.

119. CAL. PENAL CODE § 1203.4 (West Supp. 1975). The relevant portion of § 1203.4(a) differs in only a few, inconsequential particulars.

Neither section affords relief to an individual convicted of violating subdivision (b) of section 42001 of the California Vehicle Code. See CAL. PENAL CODE §§ 1203.4(b), 1203.4(a) (b).

While the sections purport to release the defendant from "all penalties and disabilities resulting from the offense," both sections reserve the right to use the "prior" in a subsequent conviction, and § 1203.4 preserves the prohibition against felons possessing a handgun (*id.* § 12021). By judicial interpretation, § 1203.4 relief does not prevent enhanced punishment upon a subsequent conviction (*id.* § 3024). *People v. Dutton*, 9 Cal. 2d 505, 71 P.2d 218 (1937), *appeal dismissed*, 302 U.S. 656 (1937). Nor does it prevent use of a felony conviction to impeach in a subsequent prosecution. CAL. EVID. CODE § 788(c) (West 1966). See *People v. O'Brand*, 92 Cal. App. 2d 752, 207 P.2d 1083 (1949). In *People v. Sharman*, 17 Cal. App. 3d 550, 95 Cal. Rptr. 134 (1971), the court held that the statutes are directed only to those penalties and disabilities from which the state can release the offender but do not effect the revocation of a business or professional license or deportation. *Id.* at 552, 95 Cal. Rptr. at 135.

120. If the offense occurred prior to March 7, 1973, and the defendant was under twenty-one at that time, the relief afforded by § 1203.45 is available. CAL. PENAL CODE §§ 1203.45(e) (West Supp. 1975).

1203.4 and 1203.4(a) is available, and in addition, the record of arrest and conviction may be sealed pursuant to California Penal Code section 1203.45.¹²¹ The arrest and conviction are deemed not to have occurred, and the client may answer any question relating to the event accordingly.¹²²

Although no authority exists for the full mitigation of the records of an individual convicted of a felony and denied probation, counsel should be aware that action can be initiated to promote the legal, psychological, and social decriminalization of the convicted offender. It is within the power of the governor to grant pardons,¹²³ and a regular procedure is available for obtaining a pardon for a client who has been released from prison.¹²⁴ Upon the fulfillment of conditions demonstrating the offender's rehabilitation,¹²⁵ counsel¹²⁶ may petition the court for a declaration and certificate of rehabilitation.¹²⁷ If the court finds that the petitioner has demonstrated his or her rehabilitation, it shall issue a certificate of rehabilitation and forward the certificate to the governor with a recommendation for pardon.¹²⁸ If a pardon is granted, all rights, privileges and franchises are restored to the petitioner.¹²⁹ Whenever

121. *Id.* § 1203.45. Subdivision (b) of the section makes the relief available to those convicted before the effective date of § 1203.45. However, it is important to note those circumstances which make the section inapplicable. *Id.* §§ 1203.45(c), (d). *But see* *People v. Ryser*, 40 Cal. App. 3d 1, 114 Cal. Rptr. 668 (1974), declaring § 1203.45(c) unconstitutional in part.

122. *See* note 103 *supra*.

123. *See* CAL. CONST. art. V, § 8; CAL. PENAL CODE § 4800 (West 1970).

124. *See* CAL. PENAL CODE § 4852.01 *et seq.* (West Supp. 1975).

125. *See* CAL. PENAL CODE §§ 4852.03, 4852.05 (West 1970).

These sections require a specified period of residence in the state after release from prison or parole (§ 4852.03), and a showing of a law-abiding life (§ 4852.05).

126. The petitioner is entitled to the assistance of counsel throughout the proceedings, and if the petitioner is without counsel, the public defender is required to represent the offender. *See id.* §§ 4852.04, 4852.08; *Ligda v. Superior Court*, 5 Cal. App. 3d 811, 85 Cal. Rptr. 744 (1970).

127. CAL. PENAL CODE § 4852.06 (West Supp. 1975).

128. CAL. PENAL CODE § 4852.13 (West 1970).

129. *Id.* § 4853.

As with the relief afforded by §§ 1203.4 and 1203.4(a) (*see* note 119 *supra*), the effect of a pardon is limited. A pardon abolishes restrictions on liberty and restores civil rights. CAL. PENAL CODE § 4852.17 (West Supp. 1975); *Groseclose v. Plummer*, 106 F.2d 311 (9th Cir.), *cert. denied*, 308 U.S. 614 (1939).

a certificate of rehabilitation or pardon is granted, the action is reflected on the client's criminal record.¹³⁰

Finally, mention should be made of record mitigation relief afforded under California's reformed marijuana law.¹³¹ With this law, California takes its first step toward expunging¹³² a criminal record. The record of arrest and conviction for a violation involving simple possession of marijuana or transporting or giving away less than an ounce of marijuana will be automatically destroyed two years after the date of the arrest or conviction.¹³³ Of greater importance to counsel, however, is that provision¹³⁴ of the new law authorizing expungement of a record of arrest or conviction based on a violation of California Health and Safety Code section 11357 or a statutory predecessor,¹³⁵ occurring before January 1, 1976, the effective date of the new law.¹³⁶ To obtain this relief, the defendant must petition the court in the county of arrest or conviction and may be required to pay up to \$50.00 to cover the costs of destruction.¹³⁷ In addition to the obvious benefits of expungement, the new statute prohibits any public agency from denying, limiting, or revoking an opportunity, license, or permit based upon an arrest or conviction, the record of which has been destroyed.¹³⁸

CONCLUSION

This article has focused on two of the many aspects relating to the plight of the convicted offender and counsel's role in the con-

130. CAL. PENAL CODE § 4852.17 (West Supp. 1975).

131. CAL. HEALTH & SAFETY CODE § 11357 *et seq.* (West Supp. 1976).

See Uelman, *California's New Marijuana Law: A Sailing Guide for Uncharted Waters*, 51 CAL. STATE B.J. 27 (1976).

132. See note 103 *supra*.

133. CAL. HEALTH & SAFETY CODE §§ 11361.5(a), (c) (West Supp. 1976).

134. CAL. HEALTH & SAFETY CODE § 11361.5(b) (West Supp. 1976).

135. Prior to the enactment of the new marijuana legislation, § 11357 proscribed the possession of any quantity of marijuana, making it an alternative felony-misdemeanor upon the first conviction, and a felony thereafter. CAL. HEALTH & SAFETY CODE § 11357 (West Supp. 1976). Section 11357 was formerly § 11350. *Id.*

136. The Attorney General has issued an opinion which holds that § 11361.5(b) does not apply to those who are currently serving a sentence enhanced by a prior marijuana conviction. Further, the opinion construes the statute to include an implied limitation that the relief afforded by § 11361.5(b) will not be available until two years after the date of arrest or conviction for a violation under the old law. — OPS. CAL. ATTY. GEN. —, No. C.R. 75-50 (Jan. 16, 1976).

137. See note 134 *supra*.

138. CAL. HEALTH & SAFETY CODE § 11361.5(d) (West Supp. 1976).

For the effect of § 11361.5 on subsequent similar prosecutions, see — OPS. CAL. ATTY. GEN. —, No. C.R. 75-50 (Jan. 16, 1976). See also Uelman, *California's New Marijuana Law: A Sailing Guide for Uncharted Waters*, 51 CAL. STATE B.J. 27, 76 (1975).

tinued representation of a convicted client. The responsibilities described herein are doubtlessly applicable to the majority of clients represented by criminal law practitioners. And yet, even though there is evidence of a move to decriminalize many acts,¹³⁹ there remains a need for the decriminalization of the convicted offender.

Obviously, the dimensions of the appropriate role of counsel in providing continued representation after conviction remain to be precisely defined.¹⁴⁰ However, the individual practitioner must begin to explore his or her potential role and resolve what the effective assistance of counsel means to each criminal defendant represented. If a client unnecessarily suffers from a condition of probation capable of being modified, or from the effects of a "non-mitigated" criminal record, counsel's inactivity may result in serious professional liability. At least two commentators have projected that future criminal malpractice claims will not hinge on massive trial errors but rather on the failure to insure the client the fullest protection of the law.¹⁴¹ It is hoped that the issue of proper post-conviction representation will not be pushed into the malpractice arena and that, with the recognition of the potential role of counsel, there will be a voluntary and enthusiastic assumption of responsibility by counsel.

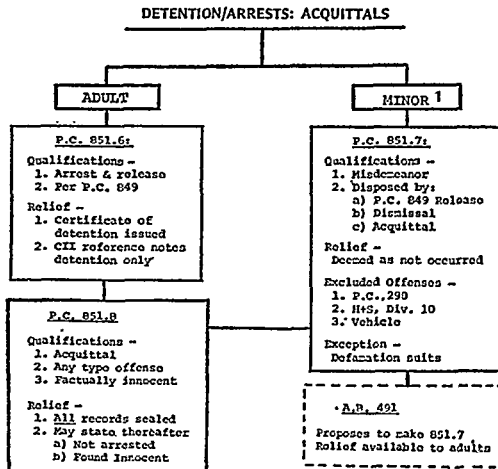
139. The new marijuana legislation (*see* note 131 *supra*) and the Consenting Adults Act (*see* Comment, 13 SAN DIEGO L. REV. 439 (1976)) are but two examples.

140. In *Keker v. Proconier*, 398 F. Supp. 756 (E.D. Cal. 1975), Judge MacBride denied a motion to dismiss a complaint brought by two attorneys pursuant to 42 U.S.C. § 1983 (1871) claiming that correctional officials interfered with their right to practice by the creation of conditions at Folsom prison. The two attorneys were representing an inmate at Folsom seeking post-conviction relief. The court elevated practice to a right guaranteed by the fourteenth amendment. 398 F. Supp. at 760.

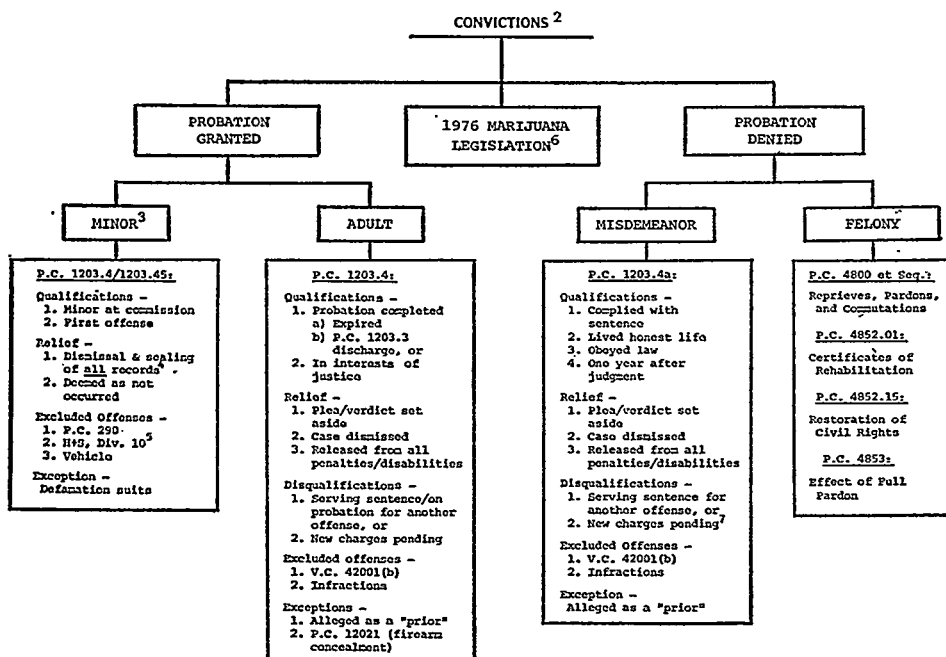
141. *See* Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on Criminal Malpractice*, 21 U.C.L.A. L. REV. 1191 (1974).

It [malpractice] is far more likely to be an asserted failure to utilize to the fullest the various procedural protections, constitutional and statutory, to which the client is entitled. *Id.* at 1230.

MITIGATING CRIMINAL RECORDS



1. Apparently defined as under twenty-one prior to March 14, 1972, and as under eighteen subsequent thereto. See CAL. CIV. CODE § 25.1 (West Supp. 1976).



2. See CAL. WELF. & INST'NS CODE § 781 (West Supp. 1976); CAL. WELF. & INST'NS CODE § 1179 (West 1972), regarding records of juvenile court dispositions.

3. CAL. PENAL CODE § 851.7 (West Supp. 1976), defines a minor as under twenty-one prior to March 7, 1973, and as under eighteen subsequent thereto.

4. Note that the scope of "sealing" relief sweeps in all related records regarding this first offense, including those covered by CAL. PENAL CODE § 851.7 (West Supp. 1976).

5. This particular limitation has been held unconstitutional in part. See cases cited note 121 *supra*.

6. See notes 131-38 and accompanying text *supra*.

7. By legislative omission, and unlike CAL. PENAL CODE § 1203.4 (West Supp. 1976), a petitioner here is not disqualified if presently on probation for another offense.