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Interagency Issues *John S. Dierna*

The Presentence Report, Probation Officer Accountability, and
Recruitment Practices: Some Influences of Guideline Sentencing *Harry Joe Jaffe*

Prison "Boot Camps" Do Not Measure Up *Dale K. Sechrest*

The Greatest Correctional Myth: Winning the War on Crime Through
Incarceration *Joseph W. Rogers*

Probation and Parole Malpractice in a Noninstitutional Setting: A Contemporary
Analysis *John C. Watkins, Jr.*

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Justice *Mark S. Umbreit*

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This Issue in Brief ^{ACQUISITIONS}

Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues.—The recent decision by the U.S. Supreme Court to uphold the constitutionality of the sentencing guidelines system has provided the impetus for further legitimization of the Federal probation profession; yet problematic issues and difficult guideline decisions confront probation officers as they carry out the guideline presentence investigation. This article by U.S. probation officer John S. Dierna focuses on the important, challenging responsibilities placed upon the Federal probation officer conducting guideline presentence investigations and introduces a three-step process to assist probation officers assigned to these investigations.

The Presentence Report, Probation Officer Accountability, and Recruitment Practices.—Under guideline sentencing, the probation officer has become the “fixer of punishment,” according to Federal probation officer Harry J. Jaffe. This new role affects the drafting of the presentence report, heightens the degree of accountability, and argues for a change in the hiring protocol of new officers. As punisher, the probation officer must now function as an evaluator of knowledge rather than as a presenter of simple facts. This untraditional role requires a diversity of analytical skills and competencies, extending beyond the vistas of the social sciences.

Prison “Boot Camps” Do Not Measure Up.—This article by Dale K. Sechrest is about prison “boot camps,” or shock incarceration programs, which are proliferating in the United States and have generated great interest from the public and media. Typical programs provide a 90- to 120-day period of military-style recruit training designed to instill discipline and improve the self-respect of the individual participants, thus leading to improved future behavior.

System goals include reducing prison populations, reducing costs, and perhaps reducing recidivism rates for these offenders. Recidivism evidence to date, however, shows little improvement over national norms for these offenders. In fact, they may be doing worse.

The Greatest Correctional Myth: Winning the War on Crime Through Incarceration.—Reiteration of the futility of trying to win the Nation’s war on crime through overreliance on incarceration is essential, asserts author Joseph W. Rogers. Taken to extremes, the imprisonment solution has become

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The Presentence Report, Probation Officer Accountability, and Recruitment Practices

SOME INFLUENCES OF GUIDELINE SENTENCING

BY HARRY JOE JAFFE

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THE AFFIRMATION by the United States Supreme Court of guideline sentencing in the local Federal district courts impacts on the United States Probation System in three critical areas: preparation of the presentence investigation report, accountability to the United States Sentencing Commission, and recruitment of new probation officers.

Guideline Sentencing and the Presentence Report

Probation officers of the 95 Federal judicial districts will, under the sentencing guidelines and soon-to-be-issued policy statements from the Sentencing Commission, fix sentences according to a national format. This national pattern of setting sentences is best exemplified by the stylistic and contextual changes in the format of the presentence report. Once a social diagnostic tool, the presentence report, prepared under the strictures of the guidelines has been transformed into a piece of legal or technical prose. The enabling legislation, the Comprehensive Crime Control Act of 1984, makes patently clear that it is inappropriate for a sentencing court to consider "the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."¹

The *Federal Rules of Criminal Procedure* sets forth with great specificity, however, the information considered essential to the imposition of sentence:

- (1) Probation officer's determination of the applicable guideline category
- (2) Probation officer's summary of any pertinent policy statements issued by the Sentencing Commission
- (3) Probation officer's advice regarding the availability, nature, and extent of any noncustodial programs, if the guidelines permit probation²

This new prescriptivism in sentencing casts the probation officer into a different and, some would argue, an uncomfortable role: punisher. As punisher,

the probation officer must apply and, in many instances, internalize a whole new set of reasoning skills to calculate correctly the items of criminal liability that affect the pronouncement of sentence.

At one time, the probation officer as presentence writer could function adequately as a dull cataloguer of data: collecting education records here, verifying employment there, gathering medical records here, talking to family there. With guideline sentencing, however, these bits of social data bear not one iota on the calculation of sentence; so, such anecdotal material as what the defendant's mother's neighbor's best friend says about a defendant has no place in today's presentence report.

Guideline sentencing, with its numerical quantification of such abstractions as relevant conduct, obstructionism, and degrees of culpability, demands of the presentence writer sophisticated reasoning powers. Analyses must be made, inferences must be drawn, and options must be selected—all within the confines of a somewhat complex instructional manual whose text ranges from the translucent to the opaque. To be really good, therefore, at this task of presentence writing, the probation officer will need to employ a new kind of reasoning—syllogistic—heretofore foreign to probation work.

The guidelines are presented in the style of the ancient Greek tradition of formal logic—the syllogism, a premise followed by a conclusion:

[If . . . [condition stated]. . . [consequence/conclusion]

For this reason, the probation officer, in selecting the applicable guideline as well as any subsequent adjustments for such features as mitigation, aggravation, obstruction, and acceptance of responsibility, must first employ a close analytical scrutiny of the material facts, i.e., the "conditions stated." Only after this analytical process has been concluded can the probation officer then deduce the necessary conclusions. Once the deductive reasoning process has been completed, the probation officer can then draft the presentence report with an above-average feeling of confidence.

To paraphrase former U.S. Sentencing Commissioner Paul H. Robinson, the probation officer in his new role as decisionmaker must make some terribly difficult judgments on the basis of minimal guidance.³ For illustration, Robinson cites the

¹ Comprehensive Crime Control Act of 1984, Pub. L. No. 84-473, 98 Stat. 2200 (1984).

² Fed.R.C.R.P. 32(c) (2).

³ Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 Harv. J. on Legis. 393 (1988).

hypothetical case of a national bank employee convicted of forging a check on another person's account in order to purchase an expensive automobile and then falsified the bank records to conceal the transaction. The available guideline possibilities for an appropriate base offense level include sections 2B5.1, 2B5.2, 2B1.1, and 2F1.1

To find the applicable guideline, the probation officer must employ a kind of Solomonic wisdom, especially in such instances where the instructional manual either defines terms in conceptual language or gives little guidance:

If more than one guideline is referenced for the particular statute, select the guideline *most appropriate* [my italics] for the conduct of which the defendant was convicted.⁴

Having chosen an appropriate guideline, the probation officer, Robinson observes, referring to the example of the bank employee, is now called upon to make further decisions regarding any necessary adjustments to the base offense level, since the offense not only involved a taking of a sum but also concerned a breach of a fiduciary responsibility, further aggravated by a falsification of bank records to conceal the initial taking.

The point here is that, though probation officers may not be able to plug up all foreseeable loopholes, eliminate wrong interpretations, and, in general, take care of all contingencies, they can, nevertheless, make every effort to construct presentence reports that reflect the elementary processes of sound deductive logic reinforced by clarity and accuracy in presentation.⁵

The following illustration from case law demonstrates the degree of precision expected from presentence writers.

A defendant appealed his guideline sentence under the provision of appellate review in situations where there may have been an incorrect application of the guidelines. The circumstances of the case were that the defendant ignited a newspaper and placed it into a mail collection box, causing the mail inside to catch fire. The defendant later admitted setting the fire, claiming that he had started the fire in order to destroy a tasteless letter that he had written to his girlfriend.

The probation officer increased the defendant's base offense level by seven levels to level eleven on the ground that Section 2K1.4(b)(4) was applicable. Under Section 2K1.4(b)(4), a defendant's offense level must be increased by seven levels: "[i]f [he] used fire or an explosive to commit another offense that is a felony under federal law, or [he] carried explosives during the commission of an offense that is a felony under federal law (i.e., the defendant is convicted under 18 U.S.C. Section 844(h)."

The defendant successfully argued that this guideline does not apply because its use of the parenthetical construction "(i.e., the defendant is convicted under 18 U.S.C. Section 844(h)," expressly

limits its application to situations where defendants have, in fact, been convicted of Section 844(h). The appellate court held that the abbreviation *i.e.* (Latin *id est* "that is") may not be interpreted as *e.g.* (Latin *exempli gratia* "for example") because the derivational morphology reflects that these terms have carried diachronically separate and distinct meanings.⁶

Accountability to the Sentencing Commission

While it may sound like preaching to the saved, probation officers should understand that they owe a dual loyalty: to the district court and to the Sentencing Commission. The Sentencing Commission has, no doubt, painted a different and difficult world for the probation officer. The Sentencing Commission has called on probation officers to perform formal analyses, to draw inferences from evidence, and to grapple with such elusive conceptual terms as "minor" and "minimal." While the sentencing judge may well quarrel with our conclusions, implications, deductions, and interpretations, the Sentencing Commission has mandated that we make them.

The premise of guideline sentencing holds that through this analytical and, sometimes, adversarial process a kind of "truth" will emerge which will, in turn, promote greater equity in judgment. And to the probation officer in the traditional role of *amicus curiae* falls this important task of presenting the status of a criminal matter preparatory to the imposition of that judgment. Probation officers should be awed by the substantial *ethical* responsibility placed before them.

Guideline Sentencing and Recruitment Practices

The national education requirement for Federal probation officer candidates is an undergraduate degree from an accredited institution in one of the social sciences. Sentencing by prescriptive guidelines suggests, however, revision of this requisite. Syllogistic reasoning, the kind demanded of probation officers who function as explicators of the guidelines, can be found disproportionately among graduates from such varied academic disciplines as mathematics, geology, chemistry, physics, business administration, as well as law. For this reason, the social sciences should no longer serve as the sole academic well from which to draw future Federal probation officers.

The Federal Bureau of Investigation has, for example, followed a multidisciplinary approach to recruitment of new agents. And a look at the Bureau's recruitment practices in this day of guideline sentencing carries significance for the Federal Probation System.

Only a handful of FBI agents hold academic degrees in either criminology or law enforcement; fewer still held previous employment with state or local police agencies. The reason is that the FBI, besides wishing to train its own, seeks individuals

⁴ U.S. Sentencing Commission Guidelines Manual, section 1B1.1(a).

⁵ *Interim Sentencing Advocacy and Case Settlement Policy under the New Sentencing Guidelines* (Nov. 3, 1987), a memorandum from the Office of the Associate Attorney General to all United States attorneys, states the following: "It is particularly important that pre-sentence reports be as complete and accurate as possible. Government prosecutors are to be as cooperative as legally permissible in providing information to probation officers and giving them access to materials in the case file."

⁶ *U.S. v. King*, 849 F.2d 1259 (9th Cir. 1988).

who have a knack for putting pieces of a puzzle together—syllogistic reasoners. These individuals are precisely the same kind of Talmudic reasoners that the complex protocol of guideline sentencing requires.

The Bureau has discovered that the best syllogistic reasoners come from such diverse academic specialties as mathematics, physics, chemistry, geology, linguistics, as well as the traditional law and accounting. This hiring protocol is particularly followed in the selection of new agents assigned to the most intellectually demanding sections within the Bureau—foreign counterintelligence and white-collar crime. And who can deny the rigorous intellectual gymnastics required of the guideline presentence writer?

For these reasons, selection of new probation officers solely from candidates holding social science degrees and groomed by a previous tour of duty with a state or local probation department may, with the complexities of guideline sentencing, impede rather than promote effective judicial decisionmaking.

Conclusion

Under guideline sentencing, probation officers' duties have become more bureaucratic. But that term is used descriptively, not pejoratively, since most Federal employees perform a bureaucratic function. An employee of the Social Security Administration, for example, makes a bureaucratic decision every time a determination is made on a claimant's application for disability benefits. The Social Security

bureaucrat interviews the claimant, gathers the necessary documentation and, similar to the probation officer, after consulting a *guidelines manual*, fixes a determination of disability—full, partial, none. How similar to the probation officer's task of fixing the punishment—jail, probation, fine.

Probation officers operate today in a world of ever greater legality. That world, as it relates to guideline sentencing, requires the probation officer to present the status of a criminal matter—from the initial selection of a base offense level to the calculation of the criminal history to the penultimate application of the career offender provision—in as flawless a manner as possible. To do anything less creates a serious ethical disorientation, since the premise of the guidelines system holds that similar offenders convicted of similar crimes shall be treated similarly—no matter in which of the 95 Federal judicial districts judgment is passed.

Since Federal guideline sentencing has passed constitutional muster, the old verities of what constitutes "probation work" have been torn apart. Senior U.S. District Judge Stanley A. Weigel observes:

Overall, the Guidelines clearly impose new and heavy burdens upon already overworked probation officers.

Unless the United States Probation Office [*sic*] obtains sufficient resources to fulfill the expanded responsibilities of probation officers and offices, the sentencing process is bound to be both flawed and delayed.⁷

The Federal Probation System must prepare its officers for their new role as fixers of punishment so that they can continue to execute their unchangeable mission: the promotion of sound judicial decision-making.

⁷ Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. Rev. 96 (1988).