CRITICAL ISSUES IN ADULT PROBATION

TECHNICAL ISSUE PAPER ON PRESENTENCE INVESTIGATION REPORTS

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ON

PRESENTENCE INVESTIGATION REPORTS

REPORT #3

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TABLE OF CONTENTS

CONTENTS -- Continued

PREFACE

The first chapter of this paper discusses the historical development of the pre-sentence investigation report with a particular emphasis on the issue of disclosure. This section provides the background for the remainder of the report.

The second chapter will consider some of the differences in techniques and procedures associated with the development and usage of pre-sentence reports. Specifically, the following areas will be discussed: the differences between federal and state statutory requirements for the preparation and content of the pre-sentence report, the use of long form versus short form pre-sentence reports, the differences in techniques and procedures associated with individual probation officers, plea-bargaining and the pre-sentence report, and defense input at the sentencing stage.

The third chapter of this paper will look at diagnostic evaluations and information reporting, the two basic types of input into the pre-sentence investigation report, and survey the differences in expectations, and the problems associated with each.

The fourth chapter of this paper will discuss several areas concerning the role of the pre-sentence investigation and its impact on the sentencing judge's decision. Specifically, the following topics will be considered: the sentencing stage of the criminal process, the current debate about the judicial discretion involved in the sentencing decision, judicial attitudes toward sentencing, judicial attitudes toward pre-sentencing reports and probation officers, the "impact" of the pre-sentence report, and judicial characteristics and their relation to the sentencing decision.

Chapter five is a brief summary of the results of the evaluation studies which were reviewed for this work.

This paper was prepared by first conducting a national literature review to obtain resources from which to derive information for inclusion in the presentation and to discover relevant research which had been conducted in the area of pre-sentence reports. Studies were obtained from the General Contractor, Ohio State University's Program for the Study of Crime and Delinquency, and from resources discovered in the review process. Many more studies exist but were not obtained from the authors for a variety of reasons, primarily inability to locate the reports. All of the studies received were reviewed and abstracted in an identical manner with subject headings including Project Title, Definition of Target Population, Statement of Purpose, Sources of Data, Location, Project Level, Description of Research Design, Statement of Research Goals, Findings and Conclusions. Many of the studies reviewed in this section were descriptive in nature and many did not include all of the information set forth in the format adopted for this research.

CHAPTER I

THE HISTORICAL DEVELOPMENT OF THE PRE-SENTENCE INVESTIGATION REPORT AND THE ISSUE OF DISCLOSURE

Introduction

The concept of a pre-sentence investigation is first found with the development of the sentencing alternative known as "probation."[1] In 1925, Congress enacted a federal probation statute[2] which provided for the appointment of federal probation officers, and many judges began to use these probation officers to develop personal and background information on certain defendants about to be sentenced. This provided the sentencing judges with more complete information about the defendant and the opportunity to "individualize" the punishment. This was a logical development as it involved the judges, the defendants, and those who were to become the potential supervisors of the defendants, and enabled them collectively to confront the future of the defendant. It was from this use of the probation officer and his investigation that the predecessor of the pre-sentence investigation report arose. In 1943, the Probation Department formalized this method for federal sentencing. The impact of that decision has been substantial as 80-90 percent of federal criminal cases are resolved by guilty pleas, and the information contained in the pre-sentence report is often the only information that the judge has about the defendant and the crime at the time of sentencing.[3]

Historically, the development of the pre-sentence investigation and report has been the subject of some legal and academic controversy. One major issue which has emerged from its use centers upon the degree to

which the results of the investigation and the contents of the report should be disclosed to the defendant. This chapter will address the development of that issue.

1940 - 1959

The adoption of the first Federal Rules of Criminal Procedure for the Federal Courts in 1946 provided for the utilization of the Probation Service for the purpose of preparing pre-sentence reports to aid the court in sentencing, and required a pre-sentence report on every defendant unless the sentencing court directed otherwise. The provisions made no mention of "disclosure" of the pre-sentence report to the defendant. However, in 1944, the Advisory Committee to the Supreme Court had recommended the following language for Rule 32(C):

> (2) Report - The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentencing or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. After determination of the question of guilt the report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate.

The Supreme Court adopted the first part of the recommended rule, but rejected the portion which required disclosure of the pre-sentence report. The result was that after the promulgation of the Federal Rules of Criminal Procedure in 1946 "widely divergent disclosure practices developed in the district courts."[4] The variations in interpretation ranged from a holding that the report need not be disclosed to the defendant[5] to an interpretation that the rule was not a bar to disclosure.

The Supreme Court of the United States, in the late 1940's decided two cases which discussed the pre-sentence report and the sentencing pro-

cess but failed to clarify the issue of disclosure. In 1948, the case of Townsend v. Burke[7] was decided. At the time of that decision the right to counsel was not included in the concept of procedural due process, but the absence of counsel which resulted in a showing of overreaching or prejudice was considered a denial of due process.[8] The Court in Townsend had the following to say about sentencing based on inaccurate or untrue information:[9]

> We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.
>
> It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide that renders the proceedings lacking in due process.

It still appears open to question whether the result in Townsend was based on the misinformation used in sentencing or the lack of counsel at this juncture of the criminal process.

The decision in Townsend was followed in 1949 by Williams v. New York.[10] The setting for this decision involved a trial judge who disregarded the recommendation of the jury for a life sentence and imposed the sentence of death after considering information about the defendant brought to the court's attention by the pre-sentence report and other sources. The information which the trial judge considered was brought to the attention of the defendant and his counsel and was not challenged.

The Court, when considering the sentencing function of the trial judge, stated:[11]

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

The holding in Williams, following the decision in Townsend, had the effect of interpreting Townsend as not requiring disclosure to the defendant of information considered by the sentencing judge in imposing sentence.[12] The decisions of lower federal courts following these two decisions generally adhered to the view that the issue of disclosure was a decision to be made by the trial judge in the exercise of the judge's discretion. The decisions were varied on the times and circumstances when disclosure should occur.

1960 - 1969

In the early 1960's the reports compiled by the probation officers were not read in court or distributed to the defendant, and there was opposition by probation officers to general disclosure.[13] The decision as to whether to permit disclosure was made by the trial judge on a case-by-case basis. The Model Penal Code (1962 Approved Draft) and the 1963 Model Sentencing Act suggested requirements for the pre-sentence report in their respective provisions.

The Model Penal Code, Section 7.08 (1962 Approved Draft) advised that "before imposing sentence, the court shall advise the defendant of the factual contents and the conclusions of any pre-sentence investigation or

psychiatric examination, and afford fair opportunity, if the defendant requests, to controvert them. The sources of confidential information need not, however, be disclosed." In the comment to the disclosure provision the writers stated that the draft took the "middle position" on the issue of disclosure.

The Model Sentencing Act of 1963 provided for mandatory disclosure of the pre-sentence report to persons determined to be "dangerous" offenders. If the defendant was considered a "dangerous" offender, the judge was required to make the pre-sentence report, the report of the diagnostic center, and other diagnostic reports available to the attorney for the state, and to the defendant, or his counsel, or other representative, upon request. Furthermore, the Act entitled the defendant to cross-examine those who made reports to the court, subject to the control of the court. The Act left it to the discretion of the court whether to disclose the report or parts of it, or whether to conceal or identify persons who provided confidential information when "ordinary" felon offenders were involved.

Both the Model Penal Code and the draft of the Model Sentencing Act preceded the promulgation of the first proposed drafts to the Federal Rules of Criminal Procedure. In 1962, the first proposed draft of the amendment to Rule 32(C) provided that, on request of the defendant, the court "shall disclose" to the defense "a summary of the material contained in the report of the pre-sentence investigation" and afford opportunity for comment. It was further stated that the "sources of confidential information need not, however, be disclosed" and the Advisory Committee made it clear that the proposal would not compel disclosure of the entire report.

The indications from the district courts during this time were that the practice of disclosure was not widely accepted. A 1963 survey of district judges indicated that 56.8 percent of them never divulged any

information contained in the pre-sentence investigation report to the attorney for the defendant.[14] Other results from this survey included: (1) 35 percent always divulged information in the reports while 8.2 percent did either on a sometimes or rarely basis; (2) there existed a wide variance in practice as to disclosure within the same federal circuit and in many instances between judges sitting on the same bench; (3) the polls indicated that there were many jurisdictions that disclosed some of the contents of the report although the majority opposed disclosure; and (4) no judge who responded to the questionnaire from a jurisdiction which practiced disclosure complained that the sentencing process had become unduly protracted by an opportunity to take exception to and controvert data contained in the reports. The conclusion of the survey was that the practice of disclosure did not operate to emasculate the reports. The poll showed that the reports did not suffer appreciable deterioration in quality in those jurisdictions where the practice of disclosure prevailed.

The second proposed draft in 1964 provided that on request the court should permit the defense counsel to read the pre-sentence report itself, but that the names of any confidential sources should be excluded from the report, prior to the time of such reading. In the case of a defendant not represented by legal counsel, the court was directed to communicate to the defendant the "essential facts" in the pre-sentence report and give the defendant an opportunity for comment. In drafting both of these proposed amendments the Advisory Committee based its pro-disclosure position upon policy considerations and explicitly stated that defendants do not have a due process right to disclosure. The 1964 revised draft met with substantial opposition from the judiciary. A survey of district judges revealed that of the 270 judges who responded, only 18 favored the proposed rule.[15] The Judicial Conference Committee then

withdrew the proposed disclosure rule and submitted to the Supreme Court an amendment which codified the judicial discretionary power on the issue of disclosure. In 1965, it was estimated again that in over 50 percent of the cases the discretion of the courts was exercised against disclosure.[16]

The issue of disclosure was again discussed by the Supreme Court in 1966, just prior to the first amendments to the Federal Criminal Rules, in Kent v. United States.[17] In that case a juvenile court had waived jurisdiction of a case, and transferred it to the criminal court, without a hearing which was required by statute. The Supreme Court stated: "We conclude that as a condition to a valid order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation reports which presumably are considered by the court."[18] On the issue of disclosure the court further stated: "[T]he child is entitled to counsel in connection with a waiver proceeding and . . . counsel is entitled to see the child's social records. These rights are meaningless - an illusion, a mockery - unless counsel is given an opportunity to function."[19] When considering the reports presented for consideration by the court in making its decision on the waiver of the hearing the court stated:[20]

> [I]f the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matters. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision to waive is 'critically important' it is of equally 'critical importance' that the material submitted to the judge - which is protected by statute only against 'indiscriminate' inspection - be subjected . . . to examination, criticism and refutation.

Based on the holding in Kent, an argument could be developed that in criminal proceedings a defendant has a right to view the social records considered by the court in the decision-making process. However, the holding in Kent was limited by the promulgation of the 1966 amendments to the Federal Criminal Rules which were approved by the Supreme Court.

The 1966 amendment as finally adopted provided as follows:

Rule 32 Sentence and Judgment

(c) Pre-sentence Investigation

(2) Report. The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the pre-sentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

This amendment to the Rules was submitted to Congress over a strong dissent by Justice Douglas:

> The proposed amendment to Rule 32(c)(2) states that the trial judge 'may' disclose to the defendant or his counsel the contents of a pre-sentence report on which he is relying in fixing sentence. The imposition of sentence is of critical importance to a man convicted for crime. Trial judges need pre-sentence reports so that they may have at their disposal the fullest possible information . . . But while the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts --- perhaps very damaging to him --- on which the judge intends to rely. The pre-sentence report may be inaccurate, a flaw which may be of constitutional dimension. . . . It may exaggerate the gravity of the defendant's prior offense. The investigator may have made an incomplete investigation . . . There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge but how can a judge know whether or not the pre-sentence report calls for a reply by the defendant? Its faults may not appear on the face of the document. Some states require full disclosure of the report to the defense. The proposed Model Penal Code takes the middle ground and requires the sentencing judge to disclose to the defense the factual contents of the report so that there is an opportunity to reply. Whatever should be the rule for the federal courts, it ought not to be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply.

The Advisory Committee notes on the 1966 amendment indicated that the intention of the Committee was for increased disclosure to defendants of material contained in the pre-sentence report which would have significant impact on the (sentencing) decision and provide the defendant with an opportunity to challenge such information.

The vesting of discretion in the trial judge to determine when and if the contents of the report should be disclosed was supported by the case law interpreting the Rules and the earlier case law precedent.[21] However, one court did admit that ". . . the administration of justice would be improved by a liberal and general use of power to disclose."[22] The extent of the variations in practice can be more easily recognized by comparing the decisions of two courts and their statements about the disclosure of the pre-sentence reports. In United States v. Conway[23] the court stated:[24]

> It is sometimes suggested that presentence reports can be excerpted and revised to disclose certain data to the defendant. This is neither expeditious nor practical. There is neither time nor secretarial facilities available to carry out this enormous, unnecessary task that this would entail. . . .
>
> The Court is satisfied that disclosure of pre-sentence reports will not be consistent with the interests of justice, will lead to less informative and more boilerplate types of reports, and will result in numerous delays and supplementary proceedings.

A contrasting approach was taken in Baker v. United States[25] where the court set forth minimum standards for disclosure by stating:[26]

> Admittedly there are items in the report of which the defendant is rightfully entitled to be advised. The sentencing court should apprise him, orally from the bench, of at least such pivotal matters of public record as the convictions and charges of crime, with date and place, attributed to him in the report. . .
>
> The defendant should then be given an opportunity to refute or explain any record disparagement of his earlier deportment. Indeed, this is vital in any consideration of the report. . .

> No conviction or criminal charge should be included in the report, or considered by the court, unless referable to an official record. Of course, the defendant's general conduct and behavior, as well as his reputation in the community in regard to honesty, rectitude, and fulfillment of his civic and domestic responsibilities may be treated in the report. . . It is to be expected of the judge, however, that he winnow substance from gossip.

The debate on disclosure continued as the court began to address the sentencing stage of the criminal process more frequently. By 1967, the Supreme Court recognized the sentencing stage of the criminal process as a "critical stage" during which the defendant must be accorded procedural due process. The impact of the decision in Mempa v. Rhay[27] helped to focus more attention on the rights associated with the sentencing stage. In 1967, in Spect v. Patterson,[28] the Supreme Court found that where, prior to sentencing, a trial court had ordered a psychiatric examination, and had concluded on the basis of that report that the defendant would be sentenced under the state's sex offender statute, the due process requirements for such a "separate finding of fact" included ". . . [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him have the right to cross-examine and to offer evidence of his own."[29]

Some federal circuit decisions were also emphasizing the right to counsel at sentencing and the information used in the sentencing decision. In the case of United States v. Myers,[30] the Third Circuit held that although the defendant was represented by counsel at sentencing, the sentencing judge's mistaken interpretation of the defendant's prior criminal record required resentencing. The court stated:[31]

> [T]he Supreme Court saw the wrong incurred as careless or designed sentencing on the basis of materially untrue facts and assumed that such injustice would normally be precluded by the presence of counsel. [The court's interpretation of Townsend] This, of course, is premised upon the effective protection by counsel at this juncture, not merely his physical attendance.

The Ninth Circuit, in Verdugo v. United States[32] stated:[33]

> Since counsel is powerless to correct errors of which he is unaware, non-disclosure would appear to be equivalent, in practical effect, to lack of counsel. It would seem anomalous to hold that although a sentence based upon erroneous information which counsel could correct violates due process, counsel need not be given access to that information.

Most courts, however, have continued to leave the issue of disclosure within the discretion of the trial judge responsible for sentencing.

In the late 1960's, two more groups produced packages considering the criminal justice system and included recommendations for pre-sentence investigation reports.

The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) followed the Model Penal Code in providing for inspection of the report itself, but also found circumstances which would outweigh the defendant's interest, and provided for exceptions to the disclosure requirement. The report provided:

> In many cases information clearly could be disclosed without substantial likelihood of harm; yet there can be circumstances in which the particularly confidential nature of the source of the information may preclude its disclosure, or in which disclosure of a statement would be harmful to rehabilitation . . . social, welfare and juvenile agencies . . . might stop providing information if disclosure were compelled.

The President's Commission would have left these matters to the proper exercise of judicial discretion.

The American Bar Association in their Standards Relating to Sentencing Alternatives and Procedures (1968) provided:

> 4.4
>
> (a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.

(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself, if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the record which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that the information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review.

The trend in these proposals for model statutory provisions was toward more disclosure to the defendant of the contents of the pre-sentence investigation report and the opportunity for the defendant to challenge information which the report contained. In spite of these recommendations, however, disclosure did not appear to be the prevailing practice followed by the judiciary.

1970 - Present

The Rules Advisory Committee, in 1970, once again provided for compulsory disclosure in its preliminary draft of amendments to the Federal Criminal Rules. The second draft of the proposed amendment was only slightly revised in the final draft which was submitted to and approved by the Supreme Court. The 1970 recommendation read as follows:

(c) Disclosure.

(1) Before imposing sentence the court shall permit the defendant, and his counsel, if he is so represented, to read the report of the pre-sentence investigation unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(2) If the court is of the view that there is information in the pre-sentence report, disclosure of which would be harmful to the defendant or to other persons, the court

> in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

The Advisory Committee notes stated a concern for the accuracy of sentencing information and indicated that the best way to insure accuracy was through disclosure, with the defendant and his counsel afforded an opportunity to identify any "inaccurate, incomplete, or otherwise misleading" information contained in the report.

By 1972, a number of appellate courts had begun to require disclosure of the pre-sentence investigation report, or at least a part of it. Four approaches to the disclosure requirement appeared.[34] Some courts required partial disclosure or a summarization of allegations of prior criminal conduct. Others required disclosure only of conviction records.[35] All references to prior criminal activity were required to be disclosed by other courts,[36] while other courts placed the burden on the sentencing judge to justify non-disclosure.[37]

The Supreme Court again became involved in the debate in 1972 with the decision in United States v. Tucker.[38] In that case the defendant had admitted, and the judge had specifically referred to, three prior felony convictions at the time of imposing sentence. After sentencing, two of the three convictions were found to have been constitutionally invalid. The Court held that the defendant was entitled to re-sentencing. One author has interpreted the holding as follows:[39]

> The Court determined that the sentence was based 'at least in part upon misinformation of a constitutional magnitude'; and likened the situation to Townsend because each defendant 'was sentenced on the basis of assumptions concerning his criminal records which were materially untrue'.

At the time there were several cases which, on the basis of the Supreme Court's prior holding in Townsend, held that "misinformation or

misunderstanding that is materially untrue regarding a prior criminal record, or materially false assumptions as to any facts relevant at sentencing renders the entire sentencing procedure invalid as a violation of due process."[40] Courts have subsequently interpreted Tucker as holding that due process requires that a sentence may not properly be based upon "misinformation of a constitutional magnitude."[41]

The issue of disclosure was not laid to rest by the Supreme Court's ruling in Tucker, and in 1972 and 1973 two more presentations of recommendations for the criminal justice system pushed for more disclosure. In 1973, the National Advisory Committee on Criminal Justice Standards and Goals, Corrections (Standard 5.16) provided:[42]

> 1. The presentence report and all similar documents should be available to defense counsel and the prosecution.
>
> 2. The presentence report should be made available to both parties within a reasonable time, fixed by the court, prior to the date set for the sentencing hearing. After receipt of the report, the defense counsel may request:
>
> a. A presentence conference . . .
>
> b. A continuance of one week. . . The request for a continuance shall be granted only:
>
> (1) If defense counsel can demonstrate surprise at information in the report; and
>
> (2) If the defendant presently is incarcerated, he consents to the request.

The 1972 revision of the Model Sentencing Act prepared by the National Council on Crime and Delinquency provided:

> Section 4. Availability of Report to Defendant and Others
>
> The presentence investigation and any supporting reports, including diagnostic reports and the probation officer's recommendation where the judge has required or allowed a recommendation to be made, shall be made available to the attorney for the state and to the defendant and his attorney in advance of the hearing on the sentence, provided that, pursuant to the rules of the court the identity of the informant or information leading to his identity may be withheld if his security or the

security of a vital family relationship would be endangered by the disclosure.

The investigation and supporting reports shall be part of the record but shall be sealed and opened only on order of the court.

Proposed amendments to the Federal Criminal Rules were presented again in 1974, and included was a proposal to make disclosure of the pre-sentence report a mandatory requirement in most cases. In 1975, the Federal Rules were amended and the current Rule covering pre-sentence reports is as follows:

Rule 32.

Sentence and Judgment

(c) Presentence Investigation.

(1) When made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a pre-sentence report at any time.

(2) Report. The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which

> might seriously disrupt a program or rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or to other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.
>
> (B) If the court is of the view that there is information in the pre-sentence report which should not be disclosed under subdivision (c)(3)(a) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

Even with the promulgation of the 1975 amendments to the Federal Rules of Criminal Procedure the sentencing judge retains a significant amount of discretion on the issue of disclosure. The Rules, however, do prohibit a judge from adopting a uniform policy of non-disclosure.

Harkness' evaluation of the more recent federal cases involving the pre-sentence report covers several of the federal circuits and specific case holdings.[43] The case of United States v. Weston[44] is cited as the first tentative step toward reform on the issue of disclosure. In that case an accusation contained in the pre-sentence report, which charged the defendant with being a large-scale heroin dealer, had been made to the probation officer by a narcotics agent. The defendant, who was apprised of the accusation, denied it, and the court placed the burden on the defendant to overcome the allegations with proof, and indicated that if the defendant was unable to do so the court would consider the accusation when determining sentence. The confidential portion of the report containing the accusation was an unsworn memorandum from a federal agent to his superior.[45] The court stated:[46]

> In Townsend v. Burke . . . the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.

The decision in Weston did not directly address the issue of right to disclosure since the information had been disclosed to the defendant at the time of hearing.[47]

In United States v. Picard,[48] the trial judge permitted the defense attorney to see the pre-sentence investigation report, but would not permit counsel to disclose the contents to the defendant, nor permit him to discuss the information with him. The court stated:[49]

> On resentencing, the court should either identify for the record and disavow information not relied upon or disclose to the defendant and his counsel as much of the report as is consistent with its desire to protect either the defendant (e.g., diagnostic information may be withheld to the extent that its disclosure might impede rehabilitative efforts) or others.

The defendant would appear to have the right to inspect the report, or be informed orally of its contents, subject to the limitations of protecting confidential sources of information and protection of the defendant's rehabilitative prospects.[50] There was no indication in the decision as to the procedure or method that could be used to rebut the information contained in the pre-sentence investigation report which the defendant considered false or misleading.

The Tenth Circuit has decided two recent cases where a pre-sentence report was concerned, Johnson v. United States[51] and United States v. Green.[52] The view of this circuit seems to be that:[53]

> While holding that Tucker did not require that the defendant have access to the presentence report, the appellate court in each case did recognize that the trial court was required to disclose to the defendant that information in the report which the court is taking into consideration in pronouncing sentence.

The Seventh Circuit also has decided two cases[54] concerning the pre-sentence report. The results in these cases apparently provide that when a defendant challenges the information contained in the report, he will have a right to submit evidence on the issue challenged, but the parameters of the rebuttal, and the right to cross-examination of persons providing the information is still an unanswered question.[55]

The Fifth Circuit in United States v. Battaglia,[56] United States v. Espinoza,[57] and Shelton v. United States,[58] addressed the disclosure issue. The decisions here apparently require that a sentencing judge, when relying on specific information at sentencing, should provide the defendant with some opportunity to rebut that information, and inform the defendant of that information if a meaningful opportunity to rebut is to exist.[59]

The Fourth[60] and Sixth[61] Circuits appear to view the due process clause as requiring a defendant to be provided the opportunity to rebut derogatory information relied upon by the sentencing judge.[62]

The Second Circuit case of United States v. Rosner[63] presented a discussion of the rebuttal procedure when the defendant is challenging information being considered by the court.[64]

> [W]hile Rosner holds that a defendant must have a reasonable opportunity to rebut, including adequate time in advance of sentencing to prepare, the exact nature of the rebuttal hearing and the type and extent of evidence to be introduced is left to the discretion of the trial court. Also left unclear is whether or not the defendant will enjoy the right to confront and cross-examine those who have supplied the court with adverse information.

The position of the federal circuits on the issue of disclosure will undoubtedly be influenced in the future by the Supreme Court's most recent ruling[65] on sentencing and the pre-sentence investigation report. However, before considering that decision the pros and cons of the disclosure debate will be discussed.

The disclosure debate has centered around various arguments. Those in favor of disclosure argue that sentencing is a "critical stage" in the criminal process, during which the defendant must be accorded procedural due process. Their position is that fundamental fairness requires that all derogatory material considered by the court in deciding sentence should be disclosed to the defense and an opportunity should be granted to correct or comment upon that material.

The advocates of non-disclosure base their position on several arguments. One argument is that if the material which the report contains is revealed to the defendant, the source of information exploited by the probation department will evaporate. Probation officers believe that this would detract from the effectiveness of their work, and that close cooperation with other social service agencies might be impaired. The probation department also feels that release of information obtained from the defendant's former employers might alienate the probation department from those employers when it is seeking job placements for its other parolees and probationers. A second concern of the proponents of non-disclosure is that allowing the defense to inspect the report would entail fact-finding problems which might unduly protract the sentencing process. The delay in the sentencing process would further contribute to court congestion. A third argument is that since the sentencing court often considers information which is not contained in the report, revealing only information which is in the report would be an empty gesture for it would not insure that the defendant would not be sentenced on the basis of erroneous information. The real question is not the disclosure of the pre-sentence report, but rather whether the court should have to state on the record all of the facts it is taking into consideration in arriving at its decision.

The advocates for disclosure respond to these positions with the arguments that jurisdictions which have adopted some form of disclosure have not experienced the problems anticipated by its critics, particularly the loss of confidential sources. Any inconvenience resulting from permitting the defense to screen the report is balanced by the decrease in instances of misinformed sentencing which often go undetected when a policy of non-disclosure is followed, because the person who has access to the truth, the defendant, has no knowledge of what material was considered by the court. Disclosing the report to the defense does not necessarily impede the swift administration of criminal justice. Defense counsel is unlikely to risk antagonizing sentencing judges with dilatory tactics because it is not in their client's best interest. By placing all of the report's contents before the parties, the scope of argument can be confined to the issues at hand. Finally, it has been suggested that a policy of granting the defendant access to his pre-sentence report, rather than being psychologically harmful, may actually facilitate rehabilitation. This is because disclosure allows the defendant to participate in the judicial process of sentencing and enables him to understand the reasons for the court's disposition of his case.

The Supreme Court in Gardner v. Florida[66] involved a defendant who had been convicted of first-degree murder and sentenced to death. Upon imposition of the death sentence the trial judge stated that he was relying in part on information contained in the pre-sentence report. There were portions of the pre-sentence report which were not disclosed to the defendant. The Supreme Court held that the procedure utilized in this case did not satisfy the constitutional requirements of due process. Counsel in this case had made no request to examine the entire report or to be notified of the contents of the confidential portion of the report.

The court distinguished its holding in Williams by stating:[67]

> It is first significant that in Williams the material facts concerning the defendant's background which were contained in the pre-sentence report were described in detail by the trial judge in open court. . . In contrast, in the case before us, that trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material. There was, accordingly, no similar opportunity for petitioner's counsel to challenge the accuracy of materiality of any such information.
>
> It is also significant that Justice Black's opinion recognizes that the passage of time justifies a re-examination of capital sentencing procedures. . .
>
> Five members of the Court have now expressly recognized that death is a different kind of punishment than any other which may be imposed in this country. . .
>
> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128; Spect v. Patterson, 386 U.S. 605.

The state in the case of Gardner argued many of the points that are presented in the discussion of the pros and cons of disclosure. The Supreme Court addressed itself to some of the arguments on disclosures but always with the emphasis that the sentence imposed in this particular case was death. The Court stated:[68]

> [C]onsideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely. . . The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by sentencing judge, is manifest. . .

In response to the argument that undue delay would result in the sentencing process by the requirement of full disclosure the Court stated:

> We think the likelihood of significant delay is overstated because we must presume that reports prepared by professional officers . . . are generally reliable. In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material, or if the disputed material is of critical importance, the time invested in ascertaining the truth would

surely be well spent if it makes the difference between life and death.

In response to the argument that full disclosure could result in disrupting a rehabilitative program the Court stated:[70]

> The argument, if valid, would hardly justify withholding the report from defense counsel. Moreover, whatever force that argument may have in noncapital cases, it has absolutely no merit in a case in which the judge has decided to sentence the defendant to death. Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a State may legitimately impose.

The state also argued that trial judges can be trusted to exercise their discretion in a responsible manner even though they may base their decisions on secret information. The Supreme Court responded to this argument by stating:[71]

> [T]he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.
>
> Even if it were permissible to withhold a portion of the report from a defendant, and even from defense counsel, pursuant to an express finding of good cause for nondisclosure, it would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal. . . In this particular case, the only explanation for lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less than complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

In the words of the Court there was a denial of due process "when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[72]

The quoted portions of the decision come from the agreement of three Justices, Powell, Stewart, and Stevens. Justice White in his concurring opinion stated:[73]

> [A] procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the character and record of the individual offender fails to meet the 'need for reliability in the determination that death is the appropriate punishment' . . .

Justice White's conclusion was based on the Eighth Amendment and he saw "[n]o reason to address in this case the possible application to sentencing proceedings - in death or other cases - of the Due Process Clause, . . ."[74]

Justices Blackman and Brennan also concurred in the holding of the case. Brennan, however, viewed the death penalty as cruel and unusual punishment in all circumstances.[75]

Summary

With the holding in Gardner it now appears that when the death sentence is the punishment imposed at sentencing, due process will require that the defendant be made aware of the contents of the report and given an opportunity to refute any information contained in the report. The case does not indicate that the same requirements will be demanded in a non-capital case and the Federal Rules still provide a significant amount of discretion to the trial judge on the issue of disclosure. Except for very limited circumstances the issue of disclosure is still largly unresolved.

Footnotes

[1]Note, "The Pre-Sentence Reports: An Empirical Study of Its Use in the Federal Criminal Process," 58 Georgetown Law Journal 451 (1970).

[2]Act of March 4, 1925 ch. 521, 43 Stat. 1259, as amended, 18 U.S.C. 3654 (1964).

[3]Note, "The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process," 58 Georgetown Law Journal 451 (1970).

[4]Comment, "Disclosure of Pre-Sentence Reports in Federal Court: Due Process and Judicial Discretion," 26 Hastings Law Journal 1527 (1975).

[5]Comment, "Disclosure of Pre-Sentence Reports in Federal Court: Due Process and Judicial Discretion," 26 Hastings Law Journal 1527 (1975). Footnote 25, United States v. Durham, 181 F. Supp. 503 (D.D.C.), cert. denied, 364 U.S. 854 (1960)

[6]Comment, "Disclosure of Pre-Sentence Reports in Federal Court: Due Process and Judicial Discretion," 26 Hastings Law Journal 152, (1975). Shields v. United States, 237 F. Supp. 660 (D. Minn. 1965).

[7]Townsend v. Burke, 334 U.S. 736 (1948)

[8]Note, "Recent Developments in the Confidentiality of Pre-Sentence Reports," 40 Albany Law Review 619 at 627 (1976).

[9]Townsend v. Burke, 334 U.S. 736 at 740-41 (1948).

[10]Williams v. New York, 337 U.S. 241 (1949).

[11]Williams v. New York, 337 U.S. 241 at 247 (1949).

[12]Gray, "Post Trial Discovery: Disclosure of the Pre-Sentence Investigation Report," 4 University of Toledo Law Review 1 at 8 (1972).

[13]Evjen, "Some Guidelines in Preparing Pre-Sentence Reports," 37 Federal Rules Decisions 111 at 177 (1964).

[14]Higgins, "Confidentiality of Pre-Sentence Reports," 28 Albany Law Review 12 (1964).

[15]Comment, "Disclosure of Pre-Sentence Reports in Federal Court: Due Process and Judicial Discretion," 26 Hastings Law Journal 1527 (1975).

[16]Lehrich, "The Use and Disclosure of Pre-sentence Report in the United States," 47 Federal Rules Decisions 225 (1965).

[17]Kent v. United States, 383 U.S. 541 (1966).

[18]Kent v. United States, 383 U.S. 541 at 557 (1966).

[19]Kent v. United States, 383 U.S. 541 at 561 (1966).

[20]Kent v. United States, 383 U.S. 541 at 561 (1966).

[21]United States v. Virgo, 426 F.2d 1320 (2d Cir. 1970), cert. denied, 402 U.S. 930 (1971); United States v. Gross, 416 F.2d 120d (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970); United States v. Devore, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); United States v. Thomas, 435 F.2d 1303 (5th Cir. 1970); Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968).

[22]United States v. Fischer, 381 F.2d 509 (2d Cir. 1967).

[23]United States v. Conway, 296 F. Supp. 1284 (D.D.C. 1969).

[24]United States v. Conway, 296 F. Supp. 1284 at 1285 (D.D.C. 1969).

[25]Baker v. United States, 388 F.2d 931 (4th Cir. 1968).

[26]Baker v. United States, 388 F.2d 931 at 933-34 (4th Cir. 1968).

[27]Mempa v. Rhay, 389 U.S. 128 (1967).

[28]Spect v. Patterson, 386 U.S. 605 (1967).

[29]Spect v. Patterson, 386 U.S. 605 at 610 (1967).

[30]United States v. Myers, 374 F.2d 707 (3d Cir. 1967).

[31]United States v. Myers, 374 F.2d 707 at 710 (3d Cir. 1967).

[32]Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968).

[33]Verdugo v. United States, 402 F.2d 599 at 613 (9th Cir. 1968).

[34]Coffee, "The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice," 73 Michigan Law Review 1361 at 1423 (1975).

[35]United States v. Janiec, 464 F.2d 126 (3d Cir. 1972).

[36]United States v. Picard, 464 F.2d 215 (1st Cir. 1972).

[37]United States v. Brown, 470 F.2d 285 (2d Cir. 1972).

[38]United States v. Tucker, 404 U.S. 443 (1972).

[39]Note, "Recent Developments in the Confidentiality of Pre-Sentence Reports," 40 Albany Law Review 619 at 633 (1976).

[40]Comment, "Disclosure of Pre-Sentence Reports in Federal Court: Due Process and Judicial Discretion," 26 Hastings Law Journal 1527 at 1540. (1975).

[41]Comment, "Disclosure of Pre-Sentence Reports in Federal Court: Due Process and Judicial Discretion," 26 Hastings Law Journal 1527 at 1540 (1975).

[42]National Advisory Commission on Criminal Justice Standards and Goals, Corrections, 188 (1973).

[43]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 (1975).

[44]United States v. Weston, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972).

[45]Harkness,"Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 at 1078 (1975).

[46]United States v. Weston, 448 F.2d 626 at 634 (9th Cir. 1971).

[47]Harkness,"Due Process in Sentencing: A Right to Rebut to Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 to 1079 (1975).

[48]United States v. Picard, 464 F.2d 215 (1st Cir. 1972).

[49]United States v. Picard, 464 F.2d 215 at 220 (1st Cir. 1972).

[50]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly, 1065 at 1079-1080 (1975).

[51]Johnson v. United States, 485 F.2d 240 (10th Cir. 1973).

[52]United States v. Green, 483 F.2d 469 (10th Cir. 1973), cert. denied, 414 U.S. 1071 (1973).

[53]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 at 1080 (1975).

[54]United States v. Gordon, 495 F.2d 308 (7th Cir. 1974), cert. denied, 419 U.S. 833 (1974); United States v. Miller, 495 F.2d 362 (7th Cir. 1974).

[55]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 at 1081 (1975).

[56]United States v. Vattaglia, 478 F.2d 854 (5th Cir. 1972).

[57]United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973).

[58]Shelton v. United States, 497 F.2d 156 (5th Cir. 1974).

[59]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 at 1082 (1975).

[60]United States v. Powell, 487 F.2d 325 (4th Cir. 1973).

[61]Collins v. Buckhoe, 493 F.2d 343 (6th Cir. 1974).

[62]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1065 at 1083 (1975).

[63]United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974).

[64]Harkness, "Due Process in Sentencing: A Right to Rebut the Pre-Sentence Report," 2 Hastings Constitutional Law Quarterly 1064 to 1084 (1975).

[65]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275.

[66]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275.

[67]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4277.

[68]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4278.

[69]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4278.

[70]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4278.

[71]Gardner v. Florida, (1977)_____U.S._____, 45 U.S. Law Week 4275 at 4278.

[72]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4278.

[73]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4279.

[74]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4279.

[75]Gardner v. Florida, (1977) _____U.S._____, 45 U.S. Law Week 4275 at 4279.

CHAPTER II

DIFFERENCES IN TECHNIQUES AND PROCEDURES ASSOCIATED WITH THE DEVELOPMENT AND USAGE OF PRE-SENTENCE REPORTS

Introduction

Some of the differences in techniques and procedures associated with the development and usage of pre-sentence reports will be discussed in this paper. Consideration will be given to the following areas: 1) the differences between federal and state statutory requirements for the preparation and content of the pre-sentence report; 2) the use of long form versus short form pre-sentence reports; 3) the differences in techniques and procedures associated with individual probation officers; 4) plea bargaining and the pre-sentence report; and 5) defense input at the sentencing stage.

Differences Between Federal and State Statutory Requirements for the Preparation and Content of the Pre-Sentence Report

Rule 32(c) of the Federal Criminal Rules provides the following "method of performance" for the pre-sentence investigation report:

> (1) Pre-Sentence investigation. The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation...
>
> (2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

Jurisdictions vary both as to when a pre-sentence report will be required and what the contents of that report will be. The Federal statute requires that the report "shall" be prepared "before the imposition of sentence or the granting of probation", although in a report to Congress prepared by the Comptroller General of the United States: State and County Probation, Systems in Crisis which evaluated four counties in the nation indicated that in only 54 percent of the cases were pre-sentence reports actually prepared.[1] No other studies reviewed by this project provided data on the percentage of time pre-sentence reports are actually prepared.

In contrast to the federal guidelines, many states still leave the decision as to when a pre-sentence report will be required to the discretion of the sentencing judge. However, variations have arisen which make the report mandatory before the imposition of sentence. Some of these variations include requiring a pre-sentence report 1) before placing a defendant on probation; 2) when the potential punishment exceeds one year of imprisonment; 3) when specific offenses are involved; 4) in all felony cases; and 5) in all felony cases except capital offenses. The state statutes vary on the requirement for the pre-sentence report, but all statutes reviewed do provide in some manner for its use in the criminal justice process, and most provide that the probation officer is the person who will usually prepare the report.

Another variation on when the report will be prepared concerns the time for initiating the investigation, either pre- or post-adjudication of guilt. Generally the pre-sentence report is submitted to the trial court after a plea or finding of guilt.[2] The procedure of commencing the

investigation before the adjudication of guilt, or a plea of guilty, has been used in some jurisdictions, and in still others the judge has had access to the pre-sentence report during the plea bargaining process for use in determining whether or not to accept the plea agreement. This approach was supported by the President's Commission of Law Enforcement and Administration of Justice which urged that the pre-sentence investigation begin at an earlier stage of the proceedings than the plea or finding of guilt. Accepting the necessity of plea bargaining, the Commission regarded the early preparation of the report as a means of insuring that an informed decision, in line with the needs of the defendant, could be made by the prosecutor and the judge.[3]

A contrary view was expressed by the American Bar Association. The proposal to begin the pre-sentence investigation early in the proceedings was considered by the A.B.A. in its Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968). That report recommended that pre-sentence investigations not be undertaken until after a finding of guilt, unless the defendant had consented and adequate safeguards were instituted against the possibility of prejudicing the court. The A.B.A. objected to conducting an early investigation on the grounds that it might constitute an invasion of the defendant's right to privacy, as well as the right against self-incrimination. The A.B.A. was also of the opinion that the report might prejudice the court before guilt was determined and that it would be economically disadvantageous to compile a report that might never be used.[4] The one study reviewed dealing with the pre-adjudication process suggested that probation officers preferred a post-adjudication form.[5]

This study reported in 1975 was based on interviews with Massachusetts superior court judges, chiefs of probation in superior courts, superior court probation officers and review of copies of pre-sentence reports in felony cases prepared in every superior court probation office. The primary focus of this study was to determine if, given the amount and type of information the judges have about the offender, the offense, and the possible sentencing alternatives, whether the judges are able to individualize sentences in an informed and rational basis. A secondary focus of the study evaluated the probation officer's attitudes about the process.

In jurisdictions where the pre-sentence investigation is not permitted until after the finding of guilt or plea of guilty, the use of a "waiver" form has arisen to permit the investigation to proceed at an earlier stage. None of the studies reviewed indicated the frequency with which this "waiver" was utilized; and therefore, the effect of such procedure can only be hypothesized.

Discussion of Federal and State Requirements on "Contents" of the Report

In an effort to provide uniformity within the federal system in 1965, the Division of Probation for the Administrative Office of the United States Courts published a monograph entitled "The Pre-Sentence Investigation Report". This report set forth 15 sections which should be included in the narrative portion of the pre-sentence investigation report. They were: 1) offense; 2) defendant's version of the offense; 3) prior record; 4) family history; 5) marital history; 6) home and neighborhood; 7) education, 8) religion; 9) interest and leisure time activities; 10) health; 11) employment; 12) military service; 13) financial condition; 14) evaluative summary; and 15) recommendation.

The monograph recommended that the first page of the pre-sentence report would contain the following information: 1) date the pre-sentence report typed; 2) name of defendant; 3) address of defendant; 4) legal residence; 5) age and date of birth; 6) sex; 7) race; 8) citizenship; 9) education; 10) marital status; 11) dependents; 12) social security number; 13) FBI number; 14) docket number; 15) offense; 16) penalty; 17) plea; 18) verdict date; 19) custody; 20) assistant U.S. Attorney's name; 21) defense counsel's name and address; 22) detainers or charges pending; 23) codefendants' names; 24) disposition; 25) date of sentence; and 26) sentencing judge.

A survey of 147 agencies across the nation conducted by Robert M. Carter in 1976, revealed that 17 pieces of information appeared in more than one-half of the pre-sentence report cover sheets. Questionnaires were prepared and responses received from the 147 agencies involved with probation at the national, state, and local levels. These 17 pieces of information were: 1) name of defendant; 2) name of jurisdiction; 3) offense; 4) name of defense counsel; 5) docket number; 6) date of birth; 7) defendant's address; 8) name of sentencing judge; 9) defendant's age; 10) plea; 11) date of report; 12) sex; 13) custody or detention; 14) verdict; 15) date of disposition; 16) marital status; and 17) identifying numbers other than FBI and Social Security numbers. This same survey revealed that in the narrative portion of the report 13 "headings" appeared in more than one-half of the reports: 1) offense: official version; 2) social and family history; 3) prior records; 4) evaluative summary; 5) employment; 6) education; 7) offense: defendant's version; 8) marital history; 9) military service; 10) financial assets and obligations; 11) health: mental and emotional; 12) health: physical; and 13) recommendation.[6]

The conclusion which can be drawn is that the type of information which is contained in the pre-sentence report does not vary significantly regardless of location or whether state or federal guidelines apply.

The "Form" of the Pre-Sentence Report

The pre-sentence investigation has presented its information to the sentencing judge traditionally in the "long form". This form has provided information under required section headings and consumed numerous pages. The "short form" report has appeared as a method of furnishing the sentencing judge with valuable information without the volume required by the longer form. The debate over the most appropriate form of the pre-sentence investigation has been prompted in part by the suggestion that too much information does not aid the decision making process.[7] There does in fact exist a wide range of information on the defendant which is reproduced in the pre-sentence report. For this reason, and for the sake of efficiency, the short form pre-sentence report was developed. However, forms which contained checklists and "fill-in-the-blanks" did not receive favorable responses from probation officers or judges.[8] Graduations of reports have been recommended for use as a better method of developing information for sentencing. Shorter forms reduce the amount of time required by the probation officer in preparation and also may serve as a screening device to determine when a longer report is necessary. It is suggested that the shorter form may provide all the information necessary for sentencing particular offenders and result in more reports being prepared for sentencing judges.

One view as to graduations of pre-sentence reports is represented by the 1973 National Advisory Commission on Criminal Justice Standards and

Goals, Corrections (Standard 5.14) which provided

> 2. Graduations of pre-sentence reports should be developed between a full report and a short-form report for screening offenders to determine whether more information is desirable or for use when a full report is unnecessary.
>
> 3. A full pre-sentence report should be prepared where the court determines it to be necessary, and without exception in every case where incarceration for more than 5 years is a possible disposition. A short-form report should be prepared for all other cases.

Section 5 of the afore-mentioned standard lists the contents of the reports, and excludes from the short-form the following items: The offender's educational background; the offender's medical history and a psychological or psychiatric report; information about the environment to which the offender might return or to which he could be sent should a sentence of non-incarceration or community supervision be imposed; and, a full description of the defendant's criminal record, including his version of the offenses, and his explanations for them.[9] The Standard recommends that the short-form report include the following:

> a) Complete description of the situation surrounding the criminal activity with which the offender has been charged, including a full synopsis of the trial transcript, if any; the offender's version of the criminal act; and his explanation for the act.
>
> b) (omitted)
>
> c) The offender's employment background, including any military record, his present employment status, and capabilities.
>
> d) The offender's social history, including family relationships, marital status, interests and activities.
>
> e) Residence history of the offender.
>
> f) (omitted)

g) (omitted)

h) Information about any resources available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions, and similar programs.

i) Views of the person preparing the report as to the offender's motivations and ambitions, and an assessment of the offender's explanations for his criminal activity

j) (omitted)

k) A recommendation as to disposition.

The American Bar Association, Standards Relating to Probation (1970) also addressed the short-form report by specifying that "...(E)ach probation department should develop graduation of reports..." The content of the full report reflects the information set forth by the National Advisory Commission.

The Administrative Office of the United States Courts in Publication No. 104, "The Selective Pre-Sentence Investigation Report" (1974), states that "...guidelines can be established that allow greater efficiency in the development of purposeful information and reduce the amount of information reported and not used". The report also makes it clear that in general the use of fill-in-the-blank short forms or checklists has not been satisfactory to either judges or probation officers, but does provide a format for a more simplified pre-sentence form. The intent of the shortened form is not to reduce the adequacy of the report for its sentencing information purpose, but is based on the belief that, depending on the individual case, a short form will serve the sentencing function more efficiently than the use of only long-form reports. The probation

officer, after the initial interview, is the person who makes the determination as to whether a long- or short-form report should be prepared. Guidelines are established to aid in the decision of when the selective report or the more comprehensive long report are to be used. The first page of both the long- and short-form reports is the same with the 26 information requirements detailed in the discussion of contents. The narrative portion of the short form only includes 1) the official version of the offense; 2) defendant's version of the offense; 3) prior record; 4) personal history; 5) evaluative summary; and 6) recommendation. The format further provides that additional information may be included when it appears to be "pertinent" to the sentence selection. The categories provided for such additional information are: 1) personal and family history; 2) home and neighborhood; 3) education; 4) religion; 5) interests and leisure-time activities; 6) health; 7) employment; 8) military service; and 9) financial condition. This in effect provides for various gradations in the report content and length with potential for individualizing the report to the defendant.

The state statutory guidelines do not often speak of gradations of the pre-sentence report. Probation organizations and courts, however, by regulation or rule, may and do have impact on the form of the report. Rules of court have appeared in several states addressing the pre-sentence investigation. Among the states, several uses of the short-form report have emerged. Some make use of the shorter form in lower and municipal courts for misdemeanor sentencing and the report involves very limited and generally unverified data about the offense and offender. Others use the short form to assist the court where special offenses or offenders are involved and others have modified the long form to make better use of available resources.[10]

The studies investigating the use of short-form reports which were reviewed suggested that the short-form report could be used effectively and that there was a place in the system for its use.[11]

Probation Officers

Although it may appear significant that the same information is being presented to sentencing judges, it does not answer the question of whether the pre-sentence investigation makes a contribution to disparity in sentencing. Because the pre-sentence investigation is a sentencing tool which provides a wide array of information concerning the person about to be sentenced, and the sentencing hearing may be the only person-to-person contact between defendant and judge, the impact of that report has been investigated.

Generally, the probation officer is the person responsible for conducting the pre-sentence investigation and compiling the subsequent report. The percentage of the time that the probation officer recommends probation as the sentencing disposition appears to vary from jurisdiction to jurisdiction, and from officer to officer, even within the same jurisdiction.[12] Because the pre-sentence report sentencing recommendations vary so widely and the fact that there exists wide disparity in sentencing, the accusation has been made that "the probation officer in fact becomes the sentencer".[13] If judges regularly follow the recommendation for sentence contained in the report, then it would appear that the accusation is correct. However there are judges who prefer not to have the recommendation portion of the report filled in because they view the report only as an information delivery device. With or without recommendation, most judges view the report as an aid to sentencing.

The reasons for the variance in probation officer's recommendations when similar data are being considered has been studied. The educational level of the probation officer has been suggested as having an influence on the recommendations. The findings of one study conducted by Carter and Wilkins in 1967 focused primarily on probation officers and judges and indicated that probation officers with graduate training, or degrees in social work or social welfare, recommended probation for approximately 50 percent of their cases. A similar level of background in criminology resulted in recommendations for probation in 70 percent of the cases, while a background in sociology recommended probation in approximately 68 percent of the cases.[14] Another study which involved the reporting of an informal "bull session" among local probation officers meeting for the express purpose of looking into some of the less obvious factors which may influence a probation officer's recommendation to the court in a particular case, suggested that probation officers believe that new officers fresh out of school or training programs are inclined to recommend probation in every case that offers some hope that the defendant's behavior and attitude might be favorably modified by probation. More experienced officers on the other hand tended to be more concerned with the risk the defendant presented to the community, a situation which resulted in fewer recommendations for probation.[15]

Regardless of the effect of education or training on the probation officer's recommendation, what the probation officers themselves consider as important information necessary for making a recommendation appears to be rather uniform. However, it is interesting to note that some studies suggest that, as with judges, similar data do not always result in similar

recommendations.[16] Two items consistently appear as important factors to the probation officer in making his sentencing recommendation: the offense committed by the defendant and the defendant's prior criminal history.[17] Other items which are considered significant to probation officers include: the probation officer's perception of the offender;[18] probation officer's perception of the case;[19] the offender's education;[20] the severity of the legal penalty for the offense and the best interests of the community;[21] psychiatric or mental examination results, the defendant's statement, attitude, employment history, family history, and age;[22] military history;[23] and the sex of the offender.[24] Some research suggests that the probation officer's feelings about the defendant are the controlling factors influencing the recommendation.[25] Other studies suggest that certain offense categories produce recommendations for probation while other offense categories result in recommendations for imprisonment.[26] Studies also appear to demonstrate that defendants who are able to secure pre-trial release have a better chance of receiving a probation recommendation.[27]

Prior record and current offense, the two items of most important consideration, have been subject to investigation. At least one study which evaluated pre-sentence information in felony cases in the Massachusetts Superior Court has suggested that in a great many cases, arrest information is contained in the report without any indication of the disposition of the arrest. Furthermore in some cases the information about the current offense is not included at all or is simply the police report of the incident. The findings of this study were based on interviews with judges, chiefs of probation and court probation officers working in a system which began the preparation of the pre-sentence investigation prior to a plea of guilty or adjudication of guilt.[28] This type of problem

points out the need for the verification of accuracy of information included in the pre-sentence reports. Commentators and probation manuals generally advocate verification of accuracy in the preparation of pre-sentence reports. This same study suggests that prior record and educational information are not always verified and are sometimes inaccurate.[29] Another study, which evaluated "defense oriented" pre-sentence reports, found that these reports also contained misinformation.[30] The concern over accuracy and verification can be somewhat reduced by increasing the practice of disclosing the report contents to the defendant or counsel, which permits correction of any inaccurate or misleading information. Furthermore, probation organizations themselves appear concerned with the quality of the information presented in the reports, which assists in reducing the amount of error in information reporting.

Some studies have focused on the defendant to determine which attributes or situational characteristics affect the probation officer's recommendation. When the family history and marital status of defendants are observed, the chances for a recommendation for probation increase for both misdemeanants and felons, if the defendant was living with his wife. The number of dependents for which the defendant was responsible influences the type of recommendation contained in the report.[31] This study, conducted by Norris focused on the Alameda County Probation Department and the sample was limited to male adults referred to the department by the criminal courts for the purpose of obtaining a pre-sentence report and recommendation. A total sample of 387 cases for fourteen full-time investigators was used and each investigator was linked specifically with one of the courts, and, only reports he wrote for that particular court were counted. The selection of variables was based on the relevant research available, the type of

information routinely gathered by probation officers in Alameda County, the opinions of various staff members of the Alameda County Probation Department, the hunches of the author based on his experience in making pre-sentence recommendations, and information available in case folders and that which could be readily obtained from the deputies involved. Subjective opinions or feelings the personnel had about the defendant and the overall case or investigation were also polled. A Texas study, however, determined that marital status was not a statistically significant factor.[32] The sample for this study was collected in 1966. Information was gathered from twenty-seven courts located in nineteen Texas counties and was confined to an examination of felony offenses. The study's objectives were to 1) examine the Texas criminal process to define those factors that might influence the sentencing decision; 2) examine characteristics common to most offenders to determine the factors that generally might be considered in the sentencing decision; and 3) examine the predictable impact of the various sentencing factors upon severity of disposition to determine whether disparities exist in the Texas sentencing system in light of the possible need to eliminate sentence disparities.

The educational record of the defendant has been mentioned as impacting on the recommendations. The Norris study indicated that defendants "who had been forced to leave high school before graduating and who were single or had no dependents" practically never had a recommendation for straight probation.[33] The Texas study suggested, however, that education had no impact on sentence severity.[34]

The employment history of the defendant has also been suggested as one of the influencing factors in the probation officer's recommendation. The results of Norris's study suggested that whether the defendant was

employed had an impact on the type of recommendation received. Coupled with this, when a felon had no source of income, probation was an unlikely recommendation.[35]

This same study suggested that another factor which appears to influence the probation officer's recommendation is the relationship which evolves between the defendant and probation officer. This relationship is tempered by the probation officer's perception of the defendant, and the probation officer's perception of the defendant's attitude. Whether the defendant has admitted guilt to the probation officer, the expression of remorse, how cooperative the defendant was during the investigation, the desire and need for help, counseling or supervision, the value of incarceration, threat of the defendant to the community, and the influence of living companions, all appear to have impact on the recommendation made by the probation officer.[36]

The relationship between the probation officer and defendant increases in significance because of the discretion available to the officer. One commentator reflecting on the discretionary power of the probation officer in the gathering and reporting of information for the pre-sentence report stated:

> (A) study by sociologist Yona Cohn [Criteria for the Probation Officer's Recommendations to the Juvenile Court Judge, 9 Crime and Delinquency 262(1963)]of pre-sentence reports submitted in a New York Court illustrates both the inadequacy of the pre-sentence report as an instrument for the comparative evaluation of offenders and the discretion given the probation officer to introduce or withhold significant data. Cohn discovered that certain findings in the pre-sentence report, such as the probation officer's evaluation of the Offender's personality and his home life, were more important determinations of disposition than the severity of the actual offense. Yet, in a

> high proportion of the several hundred cases Cohn surveyed, the probation officer's report was silent on these factors. In summary, she found a general spotiness evident in the pre-sentence reports: a probation officer might focus on a sensitive factor in one case, and then ignore it altogether in the next. As a result, she concluded that the probation officer was unaware of the importance of the criteria he was actually using.[37]

As is readily apparent, a host of "factors" may have an influence on the probation officer's recommendations. Additionally, the organizational structure within which the particular probation officer works will undoubtedly affect his recommendations. Although the research incorporated in this paper did not address this import, the following variables could affect the probation officer and his recommendation: 1) whether the probation officer is the only person responsible for the final report or whether it is subject to approval; 2) the impact of "case review" boards which subject all reports to the scrutiny of others (much like a form of sentencing councils for judges); 3) variations in internal policy and structure of the various probation organizations; and 4) the "informal" input of the probation organization to the sentencing judge.

Plea Bargaining and the Pre-Sentence Report

Plea bargaining, with or without sanction, has become an integral part of our sentencing process. Because both the plea bargain and the pre-sentence report recommendations appear to influence the final sentencing disposition, the interrelationship of the two is discussed here.

One definition of plea bargaining has been stated as follows:

> (P)lea bargaining can be defined as the granting of certain concessions to the defendant in the event he pleads guilty. In contrast, the

> term 'plea discussions' can be defined as the conference or conferences between the prosecutor and defense counsel at which the concessions are made.[38]

Much debate has arisen from the concept and use of plea bargaining. One focus of debate is the proposition that the criminal justice system would grind to a halt if plea bargaining were abolished. Another argument centers on the role that the judge should play, if any, in plea bargaining. Furthermore, the question of the effect of plea bargaining on sentencing disposition has been debated.

Numerous commentators have reflected upon the advantages of plea bargaining. The defendant is given the opportunity to have the charges dismissed or reduced or he may also obtain a promise from the prosecutor for a specific sentence recommendation. The plea bargain may permit the defendant to obtain earlier release from confinement than would occur if the case were to go to trial. The advantages to the prosecution resulting from plea bargaining include a guaranty of conviction and time saved by not being required to go to trial. The judge also benefits because a plea of guilty, rather than a trial, increases the court's docket efficiency. Of course, there are also disadvantages associated with the plea bargaining system. The one most closely related to the pre-sentence investigation report is the concern that sentence is negotiated without adequately taking into account what will best serve as the rehabilitative program for the particular defendant. Further, there is concern that the plea bargaining system "coerces" innocent defendants to plead guilty, that it is not proper to exchange a promise or concession from the state for the defendant's right to trial, and that the "informal" atmosphere within which the plea bargaining system functions is inappropriate.

Some commentators feel that the plea bargaining system has become "necessary" for the smooth functioning of the criminal justice system, while others advocate abolishing it. However, both schools of thought must address the suggestion that the purposes of the pre-sentence investigation report are:

> (1) To aid the court in determining appropriate sentence,
>
> (2) To aid the probation officer in his rehabilitative efforts during probation and parole supervision,
>
> (3) To assist Bureau of Prison institutions in their classification and treatment programs and also in their release planning,
>
> (4) To furnish the Board of Parole with information pertinent to its consideration of parole,
>
> (5) To serve as a source of information for systematic research.[39]

If the plea bargaining system is in fact determining the ultimate sentencing disposition in many cases, then one of the purposes of the pre-sentence investigation report, "(1) To aid the court in determining appropriate sentence", may be unnecessary. It would appear in some cases that "plea discussions" or "plea bargaining" may be performing that function. At least one commentator has suggested that the benefit of the pre-sentence investigation report is diminished when plea bargaining is involved in determining the sentence.[40]

It has been reported that the majority of felony convictions are the result of plea bargaining between the prosecutor and defense counsel.[41] It has also been suggested that the promise of the prosecutor's recommendation for probation is one of the most common values given in exchange for a guilty plea.[42] Furthermore, studies concerning plea bargaining indicated

that probation officers who are aware of the results of a plea bargaining discussion, prior to the completion of the pre-sentence report, may reflect those results in their recommendation.

In order to gain a more definite idea of the relationship between the sentence bargained for and the sentence recommended, the Witzum study[43] tested the following hypotheses: 1) when a sentence promise had been made in return for a guilty plea, the pre-sentence report would have little or no effect on the actual sentence imposed; and 2) when the sentence promise was known to the probation officer before the report was completed, that knowledge would have a direct, although perhaps subtle, effect of the officer's recommendation, making his agreement with the sentence promised more likely. The study confirmed both hypotheses.[44]

The determination of final sentence is one area where the pre-sentence report and plea bargaining interrelate. Another influencing overlap may be the relationship between the probation officer, prosecutor, and defense counsel. None of the studies reviewed specifically addressed these questions, however, some discussion did consider the prosecutor and defense counsel individually.

Prosecutors

One study[45] suggested that there are several factors which assistant district attorneys consider in their sentence recommendations. Included in these are the nature of the crime, the prior record of the defendant, and the average sentence which a jury would impose. The strength of the state's case was not found to be a universal consideration. For some prosecutors, the age and personal background of the defendant were factors in the recommendation decision. It was also noted that the attitude of

of the defendant or the defendant's attorney affects the plea-bargaining process. Data for this study were procured from docket sheet records of cases filed in the Harris County District Clerk's office, Texas. Included in the design of the study were interviews with the ten judges concerned, the assistant district attorneys assigned as prosecutors in those courts, probation officers, and several attorneys who specialize in criminal defense practice.

The prosecutor, as an integral part of the sentencing process, cannot be ignored in assessing the use and development of the pre-sentence investigation process.

Defense Counsel

The role and function of defense counsel at the sentencing stage has been emphasized by the Supreme Court rule that a defendant, whether or not he can afford counsel, is entitled to the "effective assistance of counsel at every important stage of the criminal prosecution".[46] Very often sentencing is the most important stage in the criminal proceedings for the defendant since the majority of convictions are the result of a guilty plea.[47] One author states a view of the role defense counsel has to play at sentencing:[48]

> ...the presence of counsel may prevent the imposition of sentence on the basis of misinformation. Moreover, the mere presence of counsel in a sentencing proceeding is likely to encourage careful inquiry and procedural regularity in the conduct of the sentencing hearing, and is likely to make the plea bargaining process more efficient in the disposition of cases, more equitable to defendants, and less vulnerable to criticism and suspicion.

The type of legal representation and its impact on sentencing recommendations has been the subject of some research. The results of one study[49] indicated that a substantially more severe sentence might be predicted for offenders with appointed counsel than for those with retained counsel. However, the same study indicated that offenders with no counsel were treated even less severely than those with retained counsel. The sample for this study was gathered from twenty-seven courts located in nineteen Texas counties and was confined to an examination of felony offenses tried in 1966. The selected sample covered case dispositions over a twelve month period and a total of 1,720 cases contributed the data. Multiple linear regression analysis was used to measure the effect of variations within sentencing factors upon severity of sentence. A different study[50] suggested that one of the two factors which appeared to have a large influence on sentencing patterns was the type of counsel involved in the case. This evaluation of the Bronx Sentencing Project conducted by Lieberman, Schaffer and Martin addressed the effectiveness of the project in terms of three criteria: 1) Among cases serviced by the project, the actual sentences imposed by the judges correlate closely with the project's recommendations; 2) the presence of the project's pre-sentence report results in a rate of prison sentences which is significantly lower than the rate for comparable cases in which no pre-sentence report is prepared; and 3) the use of the project's pre-sentence reports has not resulted in undue added risk of recidivism. The second aim of the research was to examine each item contained in the sentencing guidelines to determine its value in influencing sentencing patterns and in estimating the defendant's likelihood of being re-arrested. An unmeasured variable is the effect of the interrelationships between defense counsel, prosecutor, and probation

officer which may exert an influence on the sentencing recommendation submitted to the court.

The active participation of defense counsel in the sentencing stage does not appear to be the general rule. Most defense counsel appear to view their job as completed after the plea bargaining or finding of guilt. Defense counsel, however, may serve as an additional information source at the sentencing stage. This view is reflected in The President's Commission on Law Enforcement and Administration of Justice Report, The Challenge of of Crime in a Free Society 45 (1967): "... he [defense counsel] should be involved wherever an intrusive disposition or significant penalty is likely. Counsel can assist in gathering information and formulating a treatment program; he can help persuade the prosecutor of the appropriateness of a non-criminal disposition".[51] One survey[52] conducted in 1964 suggested that defense counsel was not being effectively employed in this manner. The survey found that in approximately 48 percent of the responses, defense counsel was not solicited for information in preparing the presentence reports. The same survey reported that 75 percent of the federal judges indicated that it was not the practice of defense counsel to submit their own reports at the sentencing stage. This survey was an effort to determine actual practices with respect to the confidentiality of the presentence investigation report in the federal system. Questionnaires were used to elicit responses from the judges who elected to participate in the survey.

The role of defense counsel as a contribution to rehabilitative planning for defendants is not widely accepted by defense counsel. However, one study experimenting with defense-oriented reports said the following about defense participation at sentencing:[53]

> (T)he fact is, however, that defense counsel has a vital role to play in achieving the most appropriate disposition for his client. This role...extends the gathering and evaluation of facts relevant to sentencing and most important, to their presentation in court of the time of sentencing.

There are some problems associated with defense counsel's active participation at the sentencing stage where counsel is gathering information and attempting to formulate a rehabilitative plan which is in the best interests of the client. One of these problems arises when defense counsel either uncovers adverse client information or would recommend a more restrictive treatment program than the court. In either of these situations, defense counsel is forced to evaluate "the best interests of his client" so that he can decide what to do with that information or recommendation.

Coupled with the problem of information gathering and sentence recommendation, the defense counsel is faced with the problem of access to resources that will provide information required. Defense counsels' need for access to services which would supply information relative to sentencing has been recognized.[54] One project utilizing "defense" prepared reports outlined its main purposes as follows:[55]

> (1) It provides to Legal Aid Agency attorneys, to the Georgetown Legal Interns, and to some private, appointed counsel social reports on their clients for use at the pre-charge and plea negotiation stages and pre-sentence reports, known as "defendant studies", for use at the sentencing stage.
>
> (2) It develops rehabilitative plans, where appropriate, to divert defendants from the criminal process before charge, as well as to facilitate negotiated disposition, precharging, and other sentencing alternatives.

(3) It helps secure community-based social and rehabilitative services, when needed, for defendants and their families. These services may be part of the rehabilitation plan and may include physical or mental outpatient or inpatient treatment, vocational training, employment and educational assistance, public welfare service (including funds, food, and child care), birth-control advice and aid, family and individual counseling, and housing and consumer assistance.

In support of the defense attorney's role at the sentencing stage is the proposition that the adversary presentation, as opposed to the inquisitorial method, is the better way to counteract extreme or biased judgments.[56] This factor has resulted in support for a defense prepared pre-sentence study of the defendant.[57]

Some studies have observed differences in the reports which are "defense" oriented as compared with those prepared by probation officers. These differences suggest that "defense" oriented reports offer more lenient recommendations than probation officer reports, while they appear to provide more extensive background data on the defendant. Another variation concerns the working conditions of personnel who prepare the reports. Reports issued by special units or "defense" counsel are prepared by persons with a significantly lower case load than that handled by the average probation officer.

Defense counsel has the opportunity to make a significant contribution to the sentencing stage of the proceedings. The increased use of information from such persons will undoubtedly affect the pre-sentence investigation and reporting process.

Summary

Although not all jurisdictions require that a report be prepared in every case, pre-sentence investigation reports have been accepted as a useful sentencing aid. The actual contents of the reports appear to be generally uniform nationwide. In some jurisdictions, there is increasing development and use of a variety of report forms. These deviations from the traditional comprehensive "long form" do not appear to significantly detract from the purpose of the reports.

The decisions of the probation officer, like those of the judge, have been the subject of research. The results of studies suggest that recommendations of individual probation officers vary even when they are presented with similar data, not unlike the variations which occur between judges involved with sentencing. A large number of influencing factors appear to be operating on the probation officer which could affect both the investigation report and recommendation associated with it. Certain types of information are especially important to probation officers, such as the nature of the current offense and the prior record of the defendant. However, these factors are by no means exclusive, and a variety of others discussed in this paper also appear to influence the recommendation.

Plea bargaining, as an integral part of the sentencing phase, has an impact, though its extent is not known, on the recommendation contained in the pre-sentence report. Furthermore, input by defense counsel in the form of a defense oriented pre-sentence report would appear to affect the ultimate sentencing disposition by becoming an additional information source available to the sentencing judge.

Future Research

Since it is apparent that probation officers given similar data make different recommendations, more research should be directed at the development of procedures, such as probation organization case review boards, to minimize such disparity. Further research is also needed to identify the actual use of the recommendation contained in the pre-sentence investigation report, particularly in light of the fact that judges vary as to the significance placed upon such recommendations. In addition to the research on the recommendation section, there should be further study of what constitutes accurate predictive information which should be included in the report.

The input provided by the plea bargaining system and defense counsel should be the subjects of further research, as they both appear to affect the pre-sentence reporting process. The informal system of interaction among court personnel, including judges, probation officers, prosecutors, and defense counsel, should be given closer attention to the extent that it relates to sentencing.

Further comparison between probation organizations is required especially between organizations where probation officers both investigate and supervise probationers and those where the investigative and supervisory functions are separate.

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CHAPTER III

DIFFERENCES IN EXPECTATIONS ASSOCIATED WITH PRE-SENTENCE REPORTING (DIAGNOSTIC V. INFORMATION REPORTING)

Introduction

The pre-sentence investigation of the defendant has developed into a "far-reaching data-gathering" process.[1] This is in part because of the historical trend towards "individualizing" justice, which has resulted in a concern to present a "total picture" of the defendant to the sentencing judge. In order to present a "total picture" a wide range of information is included in the report. This paper will discuss the two basic types of information which are often included in the pre-sentence investigation report, or made in conjunction with it. Diagnostic information is usually included in the report when it is requested by the sentencing judge, and most often appears in the form of a psychiatric or mental examination of the defendant.

The role of psychiatric data, and whether it should be one of the factors included in the pre-sentence report, is the subject of some controversy.[2] Some commentators say that the concerns of the criminal justice system and the field of psychiatry are not the same.[3] Other writers claim that much of the problem lies in the over-estimation of the certainty and reliability of psychiatric information.[4] There is another group who feel that the use of psychiatrists to assess criminal responsibility involves

the psychiatrist in legal, philosophical and moral considerations which are clearly outside his scope of expertise.[5] However, there are those who feel that the psychiatrist can make his most important contribution at the sentencing stage after the determination of guilt.[6]

Some of the issues associated with diagnostic information and reports include: (1) the disagreements among psychiatrists and psychologists in evaluating similar data, (2) the phenomenon of "ready acceptance" by judges and probation officers of the clinical reports, (3) a general indication that those making the predictions have a tendency to over-predict anti-social behavior, (4) the lack of opportunity for a defendant to contradict the evaluations contained in a clinical report, (5) the fact that the diagnosis is based upon a brief encounter with the defendant, (6) that many times the individual making the evaluation does not know the specific purpose for which it is being conducted, (7) the inadequate definition of the concept of "dangerousness," (8) the general lack of familiarity on the part of judges and probation officers with the technical diagnostic terms used in the evaluations, (9) that the psychiatrist or psychologist making the evaluation is usually not required to appear at the sentencing hearing to defend the recommendation, and (10) use of psychiatric court clinics.

Information reporting, as opposed to diagnostic evaluation, has generally been a wide-ranging and all-inclusive process of assembling as much information as possible about the defendant, in order to aid the judge in making his sentencing decision. The type of information required varies from one jurisdiction to another. However, there are some items which appear in most jurisdictions and are generally included in a presentence report.

In each jurisdiction the guidelines for the type of information which is to be included in the pre-sentence report may be derived from statutory provisions or from the particular request for the report from the judge.

A survey conducted by Carter in 1976 found that there was considerable diversity between jurisdictions in the type of information included in the pre-sentence report. A survey questionnaire was sent to 735 agencies identified with probation across the United States at the local, state and national levels. There were 147 survey responses, and they indicated that there were significant variations in the requirements for presentence investigations and reports. Furthermore, the responses showed that the requirements were established by the probation organizations, with very little organized input from the other components of the criminal justice system.[7]

Some of the problems associated with information reporting include: (1) the accuracy and verification of the information reported, (2) lack of opportunity for defendant to correct inaccurate information in the report, (3) quantity of information available, (4) identifying factors which are reliable in predicting success on probation, (5) computerized information reporting, (6) state record keeping, and (7) discretion vested in compiler of pre-sentence investigation report.

This paper will look at diagnostic evaluations and information reporting, the two basic types of input into the pre-sentence investigation report, and survey the differences in expectations, and the problems associated with each. The differences in expectations between the probation officer and the sentencing judge relate to information bearing on the decision for or against probation as a sentencing alternative. The views of commentators and the findings of studies will be reviewed.

Diagnostic Reporting

Disagreements Among Psychiatrists and Psychologists in Evaluating Similar Data

Given the same clinical data it is quite possible for two honest and competent psychiatrists to reach different conclusions.[8] Therefore, the granting or denial of probation can be directly affected by which particular individual analyzes the clinical data. Furthermore, the result of the evaluation of the data may also be very much influenced by the school of thought with which the psychologist or psychiatrist is associated.[9]

> A number of schools of thought have developed in the field of psychiatry. Each school has its own theoretical underpinning for evaluating the mental status of a given person, as well as its own treatment approaches. Psychiatrists from different schools of thought may view a clinical problem in a different manner even though they base their conclusions on the same information. Thus it is clear that the manner in which a psychiatrist examines a patient or responds to questions may be dependent, to a large extent upon the school of thought to which he adheres . . . Psychiatrists disagree among themselves because of adherence to one or another school of thought.[10]

The fact that any two psychologists or psychiatrists could arrive at conflicting conclusions creates some questions as to the validity of any particular recommendation.

"Ready Acceptance" of Clinical Reports by Judges and Probation Officers

When it is available, psychiatric data appear to be given much weight by both judges and probation officers. Two studies[11] have revealed that when probation officers are selecting information to be included in making their recommendation they select psychiatric data in over 50 percent of the cases.

Carter and Wilkins conducted a study with U.S. Probation Officers in California utilizing a decision-making game evaluation. Five cases,

all previously referred for pre-sentence reports, were selected from the files of the U.S. Probation Office for the Northern District of California. These cases were subject to content analysis and the materials then classified under twenty-four subject headings. Each item of information was placed on a separate card. The probation officers were asked to utilize the information on the cards in making a recommendation as to disposition of the case. One finding was that the probation officers selected cards containing psychological and psychiatric data in order to make a recommendation in more than half the cases.

A replication of the Carter and Wilkins study was conducted at a seminar attended by probation and parole officers and supervisors. The decision-making game was again utilized and psychological and psychiatric data were again selected in over half the cases.

Judges also give strong consideration to the findings of psychiatrists and tend to accept the recommendations that they make in the pre-sentence report.[12] Judges seem reluctant to disregard an unfavorable psychiatrist's report and grant probation or a light sentence on the basis of a layman's opinion which is contrary to that of a psychiatrist.[13] This may be a function of political reality. A judge who will be up for re-election does not want to incur the risk of granting probation when a psychiatrist has recommended against it. Conversely, if the clinical report recommends probation, then the judge has someone else with whom to share the blame for any subsequent failure. Some commentators have gone so far as to observe that psychiatric recommendations are treated as conclusive by judges during the sentencing process.[14]

However, a study reported to the Congress by the Comptroller General of the United States, concluded that the inclusion of psychiatric reports at the sentencing stage is the exception rather than the rule. A sample of

over one thousand cases, from four counties in the nation, for which pre-sentence reports had been prepared, found that in 54 percent of the cases a pre-sentence report was prepared, and that in only 25 percent of those was there any professional diagnosis.[15]

Psychiatrists Tend to Over-Predict Anti-Social Behavior

Psychiatrists and psychologists tend to over-predict anti-social behavior. Several commentators maintain that psychiatric recommendations consistently err on the side of over-prediction.[16] Literature on the prediction of anti-social conduct found that very few studies had followed up psychiatric predictions of anti-social conduct.[17] Those few studies that did ". . . strongly suggest that psychiatrists are rather inaccurate predictors . . .", and that ". . . they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions. . ."[18]

One possible reason for this phenomenon is that the psychiatrist or psychologist is looking for something wrong and could probably find something negative even with most of the general population. Another reason is that the individual making the prediction is concerned about his or her reputation for making a successful probation prediction, and is aware that the judge may possibly place the blame for probation failures on his or her recommendation. When incarceration is recommended, there is no worry about any follow up which might reveal an inaccurate prediction. The prediction of "not successful on probation" cannot be tested because the offender is incarcerated. Since the predictor only has to worry about the mistakes of those he puts on probation, predictors are cautious about making the recommendation and incurring the attendant risks.

Lack of Opportunity for Defendant to Contradict Evaluations Contained in Clinical Report

The type of information which is supplied by a psychiatrist or psychologist in a pre-sentence or mental status report cannot be effectively controverted by anyone except another psychiatrist or psychologist.[19] Thus, even when the pre-sentence report is disclosed to the defendant or defense counsel, the only effective means of controverting any clinical data is to secure a second professional examination with a different conclusion. Often this alternative is not available. Therefore, the judge who is faced with the professional evaluation and recommendation, and a contradictory lay opinion put forward by the defendant on his own behalf, will almost certainly give greater weight to the former.[20]

A second problem is that the psychiatric report may provide insufficient information about the methodology utilized preparing the report to allow an adequate basis for contradiction. Similarly, if the "school of thought" followed by the psychiatrist is unknown it becomes extremely difficult to attack the report's findings.

The position of non-disclosure of psychiatric data has been supported by the argument that a defendant may be harmed, and any consequent rehabilitative effort greatly diminished, by exposing the defendant to the report's contents. However, at least one author has recommended disclosure of the report via a procedure to reduce the potential harm which might result. This procedure is based on the assumption that it is possible to write a psychiatric evaluation in terms which will not harm any defendant or any rehabilitative potential for that person.[21]

> A better procedure for the use of written psychiatric reports at disposition would be as follows. The psychiatrist would be required to write an initial report of his examination. The report should be designed to illuminate the defendant's personality by describing "his motives, his inner conflicts

> his capacity for self control, or his latent character assets, and also the question of his need for psychiatric treatment..." The report also should contain some basic information as to the interview procedure such as what unusual techniques, if any, were used, how many times the doctor saw the defendant, and what factors were considered most important in arriving at the psychiatrist's recommendation. This report which it is hoped would be in a form not harmful to the defendant, would be disclosed to the defendant and his attorney. Then, after examining the report, the attorney should be allowed to submit any questions which he has about the report, the degree of certainty of the diagnosis, the acceptability of any techniques used, and even the doctor's credentials. The psychiatrist would be allowed to submit written answers to the court. Thus, unless special conditions necessitated, the psychiatrist would not be forced to testify in open court. It is submitted that this procedure will protect the defendant's right to due process and also properly balance the rights of the defendant and society.

This procedure would alleviate in part the problems associated with vaguely written reports which tend to gloss over any shortcomings in technique, or the basis for the report's findings.

Diagnosis Based Upon Abbreviated Session with Defendant

In order for the clinical diagnosis to be accurate there should be a thorough examination. As there is usually only one psychiatrist involved in the determination of sentence,[22] it is important that the examination be as complete as possible. However, because of the pressures of caseloads and time, the examinations are often not as complete and accurate as would be desirable. It is the contention of some commentators that many of the examinations conducted by psychiatrists, and upon which their recommendations are based, are less than complete.[23]

Failure to Specify Purpose for Which Evaluation is Being Conducted

A clinical evaluation of a particular defendant is conducted most often when it has been requested by the sentencing court. Generally, there is neither request for specific information nor any explanation as to why the court wished to have the diagnostic evaluation.[24] As a result the psychologist or psychiatrist analyzing the defendant does not know what information the judge or probation officer really requires. Therefore, the materials and any recommendations contained in the report, may not address the particular concerns of

the sentencing court. Without specifying the purpose for the clinical data, the only way to insure that the desired information is included is to have a very comprehensive and long report.[25] Often this is not feasible because of the time pressures involved, therefore the alternative of being more specific would appear to be desirable.

One author's view of the communication which exists between the judge and psychiatrist is stated as follows:[26]

> Some judges consciously recognize communication problems between themselves and do try to alleviate them by speaking directly to the psychiatrists in certain situations. However, such contact is restricted to limited situations, or when the judge had a specific question to ask. Communications are most likely to be over the telephone. The pressures of their work mandate that judges and psychiatrists have little time to sit down together and share their disciplines in such a way as to make communication and understanding possible between them. More important, these two professional groups are very different in their ways of thinking, their training in problem-solving, and their positions in relation to the legal system.

This illustrates a variety of problems in the communication of psychiatric information between the judge and psychiatrist.

Inadequate Definition of "Dangerousness"

Commentators have concluded that psychiatrists cannot predict dangerousness with reasonable accuracy. One observer commented that "studies concerning prediction of dangerous behavior fall into two broad categories: those that tend to substantiate clinical predictions and those which demonstrate that such clinical predictions are unreliable..."[27]

One of the major problems is that the concept of "dangerous" is never specifically defined. One result is the observation that "I know of no reports in the scientific literature which are supported by valid clinical experience and statistical evidence that describes psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual."[28] As the "nature of danger" is not specified, it becomes difficult to predict dangerous behavior. The same commentator notes that "There seems to be no convincing

study to show that we can predict really dangerous behavior with any amount of acceptability."[29]

If there is no adequate definition of dangerousness, and correspondingly, no accuracy in predicting dangerous behavior, the question arises as to the role of the clinical diagnosis. Diamond suggests:[30]

> When appropriate legal authority has declared a person dangerous, upon the basis of evidence of demonstrated violent behavior, psychiatrists and other experts on human behavior may be called upon to give their opinion whether the dangerous behavior is a consequence of, or related to, the existence of mental or emotional illness. Such experts may also be called upon to give their opinions whether the so-called institutional or treatment program 'medical model' is appropriate for remedying the dangerous condition and protecting society against the danger. They should not be asked to do more.

Unfamiliarity of Judges and Probation Officers with Terminology Used in Psychiatric Evaluations

The reporting and evaluating of clinical data involves the utilization of many evaluative terms and concepts which are foreign to most judges or probation officers.[31] It is unlikely that the precise meaning of such terminology would be understood or questioned by every judge and probation officer. As an intelligent, independent judgment cannot always be made, the evaluation and recommendation is likely to be accepted without sufficient scrutiny or meaningful review. One author noted that[32]

> [A]ll too often the psychiatrist uses words and concepts that not only the layman is at a loss to understand, but which are unclear to other psychiatrists.

Individual Making Evaluation Is Not at Sentencing

The psychiatrist or psychologist who evaluated the defendant, and subsequently may have made a probation recommendation, is usually not required to attend the sentencing hearing to defend or explain the recommendation. It is difficult to contradict the report once it is written and be-

fore the court. The individual conducting the evaluation generally does not have to identify the methodology used in the process, nor the "school of thought" to which he or she adheres. The result is that the recommendation is generally accepted without adequate consideration.

Psychiatric Court Clinics

Some jurisdictions have systems which provide for the psychiatric information gathering to take place under the control of the court and located at or near the court. Several advantages are cited for this type of arrangement, including (1) the ease of access to psychiatric facilities, (2) the general educational influence on judges, and (3) the psychiatrist improves in forensic ability to exposure to legal proceedings.[33]

Information Reporting

Concern for the Accuracy and Verification of the Information Reported

The development of the concept of presenting a "total picture" of the defendant so as to individualize justice has resulted in an increasing amount of information being included in the pre-sentence investigation report. One of the concerns generated by this mass of data is whether it is accurate and reliable. At least one writer has observed that ". . . one of the least studied areas of the correctional process has been the quality of its informational inputs."[34]

In order to insure the quality of the pre-sentence report, the probation officer should have the opportunity to meet with the defendant more than once and should have sufficient time to compile and write the report. Furthermore, he should interview relevant persons other than the defendant, and when not able to do so, should indicate that fact in the report. The

probation officer should endeavor to verify all pertinent information and should not rely solely upon an FBI arrest record. In actual practice, the pressures of time and caseload dictate the procedures utilized. The President's Commission on Law Enforcement and the Administration of Justice reported that:[35]

> In most felony courts presentence reports are prepared, but they are of uneven quality and usefulness. One almost universal problem is that the probation officers who prepare them have more work than they can effectively do. They often have as many as 100 offenders on probation to supervise, besides preparing reports. Another problem is that the pay, recruitment, and training standards for probation officers are often low, and the officers are not equipped to evaluate the information they receive in the course of their investigations.

A report to the Congress by the Comptroller General of the United States, resulting from a survey of one hundred and eight judges, and over one thousand cases, from four counties within the country, confirmed this fact, and noted that much of the information in the reports is taken from statements by the offender and not verified due to lack of time.[36]

A sentencing judge must be sensitive to the quality of the pre-sentence investigation. Accurate, reliable, relevant information is the goal toward which the reports must strive.[37]

The court in United States v. Weston[38] relied upon the holding of Townsend v. Burke,[39] that information used in sentencing must meet standards of probable accuracy as well as be probative of charges against the defendant. In Weston the court stated that ". . . a rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."[40] That court indicated that a sentencing judge should not rely upon the information contained in the pre-sentence report unless it is amplified by information which persuasive of the validity of the charge there made.

In Verdugo v. United States[41] it was held that when evidence obtained in violation of constitutional rights was used in sentencing, the case would be remanded for resentencing without considering that evidence.

In United States v. Tucker[42] the Supreme Court held that in determining sentence a trial judge could not consider prior convictions where the defendant did not have access to counsel as the convictions would be invalid under the holding of Gideon v. Wainright.[43]

If there is question as to the accuracy of the information contained in the pre-sentence investigation report, the result is that the sentencing decision becomes suspect. Therefore, it is important that the information be verified whenever possible and that when it cannot be confirmed that the report indicate that fact. However, a survey conducted by Carter in 1976 by sending questionnaires to 735 agencies across the country identified with probation found that it was the exceptional report which indicated whether the data on the cover sheet or in the report itself had been verified.[44] This appears to be one area where the ideal procedure and actual practice are widely divergent.[45]

Opportunity for Defendant to Correct Inaccurate Information in Report

It is suggested that one way to verify the accuracy of pre-sentence report is to disclose the contents of the report to the defendant, or at least to defense counsel, so that there might be an opportunity to refute any erroneous material. However, as there are forceful arguments both for and against disclosure, it is generally left to judicial discretion to balance the inaccuracies in sentencing which result from non-disclosure, the need to protect confidential sources, and concern for negative effects on rehabilitation. A long controversy surrounding the issue of disclosure of the contents of the report is covered in detail in the chapter of this

entitled "Historical Development of the Pre-Sentence Investigation Report and the Issue of Disclosure."

Concern that Quantity of Information May Not Lead to a More Informed Decision

The probation officers compiling the pre-sentence investigation report are aided by the increasing availability of information which is recorded about an individual. However, there is some feeling that the large quantity of information available results in the over-simplification of the data, and allows for much exercise of discretion as to which information is included.[45] Some commentators question whether increased amounts of information actually do assist in analysis. "Presentence reports in many cases have come to include a great deal of material of doubtful relevance to disposition in most cases. . . Not only is preparation time-consuming but its inclusion may confuse decision-making."[46]

The pre-sentence report typically includes information identifying the defendant, the offense, the defendant's prior criminal record, his family, religion, education, employment, financial status, interests and activities, physical and mental health, personality, and attitudes. The Model Sentencing Act suggests that the pre-sentence investigation should cover ". . . the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community."[47] The section of the report relating to the offense may include an official version, the defendant's version, and even a statement of a co-defendant. Generally, the report concludes with the probation officer's recommendation or plan for the disposition of the defendant.

As indicated, there is a divergence in opinion as to the proper scope of the pre-sentence report. One view is that there should be a broad

inclusion of information so that the judge can adequately assess the defendant's situation and potential. The doctrine is well established that a sentencing court should have broad information from all sources and should not be restricted to legally admissible evidence.[48] The rationale for the inclusion of large amounts of information is that a more intelligent decision can be made by the sentencing court. A typical reflection of the position is: ". . . a sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the character and history of the man before [him].'"[49]

Those who advocate the inclusion of a broad range of information tend to also approve of the inclusion of subjective information relating to the defendant, such as his attitudes, feelings, and emotional reactions, as well as psychiatric and clinical information. One of the problems with the inclusion of this type of material is that it is derived from a subjective evaluation of the defendant, and is therefore subject to question as to reliability and factual accuracy. Furthermore, even when the information is disclosed to the defendant, it is very difficult for him to refute.

The advocates of a more narrow scope to the pre-sentence investigation assert that some of the material which is collected is irrelevant to the sentencing decision and should be eliminated so as to provide a shorter and more efficient tool for the judge's use. The utilization of a shorter form would also reduce the amount of investigation required by the probation officer and permit more concentrated efforts where needed. Proponents of the short form feel that the broader approach allows for the inclusion of much extraneous material which only clutters the report. Furthermore, a huge volume of information may only demonstrate that the

particular defendant was the subject of extensive record-keeping on the part of social agencies and law enforcement sources.[50] However, the difficulty with the narrower view lies in determining what material within the broad range provides adequate predictive information for the judiciary.

One example of an area in which the two views disagree is the early life history of the defendant. Numerous authorities, both psychiatrists and criminologists, feel that the early life history of the defendant, his family life and criminal history, can be used as predictive devices for recidivism.[51] Critics of this position feel that psychiatrists on the whole have a tendency to over-predict the chances of problems or abnormality in the defendants they examine.

The amount and scope of information to be included in a pre-sentence investigation report remains as an area of controversy. While the trend appears to be towards the inclusion of all available data, there is significant criticism of this approach.

Identifying Factors Which are Reliable in Predicting Success on Probation

It is obvious that the factors which are reliable in predicting success on probation have not yet been isolated and uniformly accepted. The result is that there is considerable diversity in the data which is found in the pre-sentence report and on its cover sheet. A survey was conducted by Carter in 1976 by sending questionnaires to agencies identified with probation across the country.[52] One finding was that 105 pre-sentence investigation report cover sheets reported that only one item, the name of the defendant, appeared on all of them. A total of 118 distinct data elements were identified from the cover sheets which were analyzed and only 17 of these pieces of information appeared on more than one-half of the cover sheets. They were the following:

1. Name of defendant
2. Name of jurisdiction or agency
3. Offense
4. Name of defense counsel
5. Docket number
6. Date of birth
7. Defendant's address
8. Name of sentencing judge
9. Defendant's age
10. Plea
11. Date of report
12. Sex
13. Custody or detention
14. Verdict
15. Date of disposition
16. Marital status
17. Other identifying numbers other than FBI and Social Security numbers

The same study found that in the narrative section of the report, the section headings which appeared most frequently were the following:

1. Offense: official version
2. Social and family history
3. Prior record
4. Evaluative summary
5. Employment
6. Education
7. Offense: defendant's version
8. Health: physical
9. Marital history
10. Military service
11. Financial assets and obligations
12. Health: mental and emotional
13. Recommendation

Therefore, while there are no uniformly accepted factors, there do appear to be several sources of data that are most frequently used in the compilation of the report. Perhaps this occurs because these sources are felt to be most reliable by judges and probation officers. These sources will continue to be consulted whether or not there is empirical proof that they are accurate predictions of future behavior.

The principle source of information is law enforcement records.[53] There are basically four categories of law enforcement records: conviction records, arrest records, investigative reports, and juvenile records.[54]

Conviction records

Although conviction records appear to be a generally reliable source of information, at least one court has held that there does not appear to be any consistent method employed for acquiring and verifying the information contained within these records.[55] Conviction information by itself provides no information as to the circumstances upon which the conviction was based.

Arrest records

Arrest records are also used in sentencing,[56] although their use has been criticized by some.[57] It is well known that a large percentage of arrests do not result in convictions. In some jurisdictions as many as forty percent of all prosecutions are dropped prior to trial.[58] This criticism stems in part from the fact that arrests not followed by conviction are not uniformly handled. For example, in 1973, the arrest records of the FBI showed that arrests not followed by conviction were reported in 38 percent of the cases.[59] A second criticism is the inaccuracy that results from more than one listing on a record for the same conviction, i.e., arrest, indictment, conviction, sentencing.[60] Still another problem with the utilization of arrest records is that there appears to be a wide variation in the style and extent of the records maintained by urban and rural police departments, and between middle-income and poverty-area police units.[61]

Another area of concern has to do with the consequences of an arrest record, no matter how serious. It has been noted that the decision to form an arrest record is highly discriminatory in that the status and demeanor of the subject are the critical variables.[62] Furthermore, the con-

tention is made that once an individual is labeled as a "criminal," the data on such individuals are interpreted to confirm and reinforce that label and the individual begins to perceive himself as labeled.[63] There have been some experimental findings to suggest that police records do play a determinative part in the process by which a marginal delinquent matures into a confirmed recidivist.[64]

Among the arguments for the continued use of arrest records are that an enlightened judge will give little weight to arrest-only entries in a pre-sentence report,[65] and that a lengthy arrest record does indicate that there is evidence of criminality.

Additional sources

Additional sources of data which may be included in the pre-sentence report are investigative and intelligence reports, juvenile records, and educational records.[66]

> While the school records of the offender do not appear to be consulted by probation officers with the same frequency as police records, probation manuals are unanimous in their insistence that the probation officer elicit the offender's 'student behavior record' and any related 'adjustment' data.

While the sources most often utilized to secure the information contained in the pre-sentence investigation report can be isolated, little can be said about factors which are reliable in predicting success on probation.

Computerized Information Reporting

The probation officers who compile pre-sentence investigation reports are aided by the increasing availability of recorded personal information. It has been noted that ". . . with growing caseloads and the increasing availability of centralized databanks, the probation officer has become

increasingly dependent on recorded information and increasingly able to delve deeper into the recorded aspects of the individual's prior life."[67] Computers are being used to develop the information on the defendant which is used in the pre-sentence report. The obvious advantage is the ease and efficiency with which such information can be obtained.[68] Non-computerized data banks are also being used.[69] Critics of this developing use of data banks feel that the increase the chance of misinformation being contained in the pre-sentence reports. Furthermore, the information is not expressed in complete terms but in cryptic phrases considered adequate to convey the "whole" person. Another area of concern is the use of computerized prediction tables. One commentator has stated:[70]

> I suggest that the human element in sentencing should not be replaced, and that a judge should consider the defendant in front of him as a human being who whould not be judged on the behavior of others. Nor should a judge be given computerized conclusions based upon subjective variables with which he may not agree, and which he cannot even identify without a careful analysis of the computer program.

While the use of computers in the processing of the mass of data associated with compiling pre-sentence reports may increase efficiency, they have important limitations which should serve to caution against total dependence upon them.

State Record Keeping

The information contained in the pre-sentence investigation report and recommendation must be accurate and up to date. Commentators have expressed fear that much of the data available for inclusion within the report provides an inaccurate picture of the defendant because it is old and not updated. Furthermore, some of the information may not have been initially assembled for use in the sentencing consideration and might not be reliable for that function.[71] The use of computers may aggravate this problem.

Probation Officer Discretion and the Pre-Sentence Investigation Report

The information to be included in every pre-sentence investigation report may be established by statutory guidelines, or specifically enumerated by a judge making a request for a report. In the majority of jurisdictions, however, the decision as to what information is included in the report is made by the probation organization responsible for compiling it.

Carter's 1976 study found that it was unusual for the court to outline for the probation agency the data it requires. It was concluded that the general practice was to leave the determination of the contents of the report up to the probation organization and its officers.[72] Therefore, it can be anticipated that there is a wide divergence in expectation as to what is included in the pre-sentence report between probation organizations in different jurisdictions and possibly between individual officers within jurisdictions. This is especially true in light of the format of the pre-sentence report which generally includes a cover sheet and a narrative section. While the cover sheet is generally an objective checklist, the narrative sections allow the individual compiling the report much scope to exercise discretion.

Summary

The "expectations" associated with the two types of information presented to the court at sentencing are somewhat different. The psychiatric or psychological report is the presentation of clinical data delving into the inner workings of the defendant's psychological make-up, is conducted by an "expert" in the field of human behavior and is accordingly assigned much significance when presented to the court or probation officer during the sentencing stage. The informational input provided by another "expert,"

the probation officer, may be more of a factual data input about the defendant's life and events which lend themselves to a historical presentation of the defendant's background. Although this information, like psychiatric data, is capable of varying interpretations, it appears to be less influential in its effect on the sentencing disposition. Most judges appear to be more comfortable in interpreting this type of data, and drawing conclusions from it that may differ from the preparer's interpretation, than they are in differing with psychiatric information and conclusions.

There appears to be little debate on the usefulness of both types of information at the sentencing stage and both are considered aids in the decision-making process. The debate concerns the reliability of psychiatric prediction of anti-social behavior and the difficulty in refuting such psychiatric data when presented at sentencing. The debate on informational reporting is concerned with the accuracy and verification of the information gathered and included in the pre-sentence report.

Future Research Needs

If the hypothesis is accepted that psychiatric evaluations and recommendations have a significant impact on the decision of whether or not to grant probation, then future research should be developed on the factors which are "good" indicators of "bad" performance and, as important, a conscientious effort should be made to define both the "good" and the "bad." There is a long standing and growing concern that research efforts vary both as to methodology and definition of criteria. The evaluation of these research efforts is hampered by the comparison of apples and oranges. Without more specific and universal guidelines in the conduct of research and the procedures necessary to ensure that they are followed, the research efforts will continue to be non-cumulative.

The reactions of judges to specific items in the psychiatric report, and the significance attached to them, has not been subject of any of the research considered in this paper, although the impact of the entire report has been considered by several studies.

Accurate predictors of performance of the probationer are needed. The research has identified the areas considered most important to the judges and probation officers in their decision-making process, but future research must determine which of these factors are really predictive of future behavior. The problem area is the fact that predictors which result in the imprisonment of the defendant, and factors which the judges or probation officers consider influencing a sentence or recommendation for imprisonment are not tested for their over-predictive capacity because the defendant is incarcerated. Other problems appear when it is recognized that factors other than "on-probation" success predictors are not the only considerations which the sentencing judge must consider when making the sentencing decision.

The trend toward disclosure of information contained in the pre-sentence reports will undoubtedly help solve some problems of inaccurate or misleading data contained in the report. Future research in the area of developing accurate "predictors" is needed. However, the potential abuse of "computerized" sentencing should be recognized. Future coordinated research should also be developed around the use of "treatment models" associated with the probationary status and the pre-sentence report. Finally, for the sake of research more emphasis should be placed on the accuracy of the record keeping processes.

[1]John C. Coffee, Jr., "The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice," 73 Michigan Law Review 1361 at 1363 (1975).

[2]Campbell, "Sentencing: The Use of Psychiatric Information and Pre-Sentence Reports," 60 Kentucky Law Journal 285 (1972); Leigh M. Roberts,"Some Observations on the Problems of the Forensic Psychiatrist," 1965 Wisconsin Law Review 240 (1965).

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CHAPTER IV

ROLE OF PRE-SENTENCE REPORTING PROCESS AND ITS IMPACT UPON JUDICIAL DECISION-MAKING

Introduction

This paper will discuss several areas concerning the role of the pre-sentence investigation and its impact on the sentencing judge's decision. The first section discusses the sentencing stage of the criminal process; the second section focuses on the current debate about the judicial discretion involved in the sentencing decision; the third section covers judicial attitudes toward sentencing; the fourth section investigates judicial attitudes about the pre-sentence reports and probation officers; the fifth section considers the "impact" of the pre-sentence report; and the final section discusses judicial characteristics and their relation to the sentencing decision.

The Sentencing Stage of the Criminal Process

For the judge, the sentencing stage of the criminal process is "one of his most important tasks." When a judge is faced with a guilty defendant the sentencing decision which will govern the defendant's future is fraught with countervailing forces which must be given consideration in the final disposition of the particular case. Numerous commentators have identified these considerations as deterrence from criminal conduct both special and general; protection of society from future criminal activity; rehabilitation of the defendant; promoting respect for the law; and punishment.

One of the questions which has arisen in the sentencing setting is whether individual judges assign the same importance and weight to each of the aforementioned considerations. Generally, the answer has been no. One study conducted by Somit, Tannehaus and Wilke in New York City and reported in 1960 evaluated reports of more than two million cases decided in the New York City Magistrates' Court over a fifteen year period. The study focused on judges who had handled more than 500 cases apiece annually for each type of offense evaluated. The project objectives included testing the validity of the following hypotheses about judicial behavior:

1) that considerable variability of sentencing behavior would be found among judges handling essentially similar cases and

2) that however the sentencing patterns of a judge may differ from those of his colleagues, his own behavior in a given type of case will remain generally self-consistent over any appreciable period of time.

One of the findings reported by this study was that judges differ greatly from one another in their sentencing practices, and that a large majority of the judges do not maintain any appreciable level of self-consistency when sentencing.[1] The fact that wide disparity in sentencing exists has prompted the search for its cause. Various other factors suggested as causing the problem include judicial characteristics and attitudes, probation officer reports, geographical considerations, and social and political pressures.

The Discretion Debate

Extensive access to information on the defendant, the use of indeterminate sentences, and the lack of appellate review, have resulted in a

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system where there is considerable judicial discretion involved in the sentencing process. The American Bar Association has noted that, "In no other area of our law does one man exercise such unrestricted power."[2] The Supreme Court, in the case of Williams v. New York,[3] expressed its position on the scope of the sentencing judge's discretion in the gathering information on the defendant:

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law...
>
> Highly relevant - if not essential - to his (sentencing judge) selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

The exercise of judicial discretion in sentencing does not cease at the point of gathering information on the defendant but extends to "the kind and extent of punishment to be imposed within limits fixed by law." Discretion covers the length of imprisonment if it is imposed, and the decision to release the defendant in the community.

Under our present system the discretion available to the sentencing judge is really quite remarkable. Recognizing that in some cases a trial judge could impose a prison sentence varying in length from one day to life helps bring into focus the vast discretionary power with which the sentencing judge is vested.

One author has described the various alternatives available to the sentencing judge in the federal system as follows:[5]

> [T]he breadth of this discretionary power is reflected in the sentencing alternatives which are open to him.
>
> First, in the case of violations punishable by fine, imprisonment, or both, the judge may impose a fine, or he may, if he chooses, impose up to five years probation. After selecting this option, the judge may then place virtually any condition on that probation. Second, a maximum sentence may be given. Under such a sentence a defendant becomes eligible for parole after serving one-third of his sentence. Third, a split-sentence may be levied, whereby the judge may specify both incarceration and probation periods from a single count conviction. Fourth, straight probation may be imposed up to a maximum of five years. Fifth, the indeterminate sentence may be chosen which fixes minimum parole eligibility at less than one-third of the sentence, finally, the judge may prescribe a study-and-observation procedure. Under this provision a sentence is imposed subject to the results of a behavioral study of the defendant. In addition to these options, a myriad of alternatives appear when the offense or offenders is of a particular class.

The wide discretion of the judge had prompted the current debate about legislation in the United States Congress which centers on the issue of criminal sentencing. While discretion vested in the sentencing judge has been an accepted concept in the criminal justice system, advocates of reducing the amount of that discretion appear to be gaining support. As one author states that issue: "Does discretion bring on equity into judging the complex nature of human interaction that is not possible by mere behavior description? Or is it simply an open door for the introduction of prejudice and the personal bias of the judges?"[6] Judicial attitudes toward this discretion appear generally to be in support of broad rather than limited discretion at the sentencing stage.[7]

Legislation pending in the United States Congress now in The Criminal Reform Act focuses on the discretionary power of the sentencing judge in great detail. Numerous proposals for reform of the current system are suggested. Included in the proposals are 1) a requirement for standards and guidelines governing the sentencing decision; 2) a requirement that judges state in writing the reasons for the sentence imposed; 3) appellate review of sentences; 4) the establishment of a United States Commission on Sentencing which would issue fixed sentencing ranges for particular crimes and offenders; and 5) a requirement for judges to explain in writing any justification for departing from the range of sentence determined by the Commission.[8]

Judicial Attitude Toward Sentencing

Two additional factors must be noted when considering the sentencing discretion vested in a judge and his attitude toward the sentencing decision. First, in exercising his discretion in the sentencing process the judge, in most cases, has had little or no contact with the defendant until the sentencing stage. This occurs because 80 - 90 percent of all criminal convictions are on the basis of guilty pleas without trial.[9] Second, the information available to the sentencing judge at the time of sentencing is usually provided by the pre-sentence investigation report prepared by a probation officer.

Despite the general attitude of judges that the sentencing decision is a most difficult and important task, Judge Frankel has commented, "Sentencing is today a wasteland in the law...There is an excess of discretion given to officials whose entitlement to such power is established by neither professional credentials nor performance."[10]

Another commentator has stated that, "The sentencing an offender receives seems to depend more on the judge to whom his case is assigned than on any other factor. This is true both as to length of sentence and likelihood of probation."[11]

This view is supported by the existence of such wide disparity in sentencing, and arguably demonstrates that the sentencing system is unfair. The criminal justice system has been functioning on the concept that the "individualization of a justice" is the goal of the system. Because of this concept of individual treatment of every defendant discretion has been a logical development within the system. Since each individual is different, it only follows that the sentence imposed, even if for an identical crime, should vary with the defendant who is being sentenced. Recently, this result has come under increasing attack. However, even the advocates of reduced discretion for the sentencing judge admit that some discretion must remain in sentencing. Computerized justice is something no commentator openly advocates.

With this vast amount of discretion, the sentencing judge must be concerned with responsibility for invoking sentence. Judicial attitudes toward this function vary. Judge Frankel, in his book Criminal Sentences, Law Without Order shared the attitudes he perceived among sentencing judges.

> Some judges, confronting the enormities of what they do and how they do it, are visited with occasional onsets of horror, or, at least, self-doubt. Learned Hand - to some, the greatest of our judges; to all, among a small handful of the greatest - reflected such sentiments. Never accounted soft toward criminals among any who knew his work, he said of his role in sentencing: 'Here I am an old man in a long nightgown making muffled noises at people who may be no worse than I am.' A distinguished committee

> of federal judges, with Hand among its members, acknowledged 'the incompetency of certain types of judges to impose sentence.' It spoke of judges 'not tempermentally equipped' to learn this task acceptably, of judges who compensate for their own inadequacies by 'the practice of imposing severe sentences,' of judges 'who crusade against certain crimes which they feel disposed to stamp out by drastic sentences.' Other judges have expressed similar misgiving about their own and (perhaps more strongly) about their colleagues' handling of powers so huge and so undefined over the lives of their fellow man.

Restricting the discretionary power of the judge has been the focus of reform in the criminal justice system. Various suggested reform methods include mandatory sentencing with fixed ranges, and the establishment of standards and guidelines for sentencing. It may be safely stated that not all judges are entirely happy with the efforts to limit that discretion. It is also true, however, that some judges are extremely pleased with the reform of the sentencing structure.

Other reforms which have been advocated to aid in reducing the disparity in sentences have included appellate review of sentences, statements of written reasons for imposing the sentencing decision, sentencing councils, and sentencing institutes. The impact of these measures for reducing disparity in sentencing is mixed. For example, sentencing institutes, which are designed to reduce disparity in disposition and recommendations have not been evaluated by any of the studies reviewed for their actual impact on judicial sentencing behavior. Sentencing councils appear to neutralize extreme behavior both as to harshness and leniency at sentencing, but usually the sentencing judge still retains the sole responsibility for the sentencing disposition. All of these measures must realistically have some impact on the sentencing decision,

but the significance of any one as the best way to reduce disparity has only been suggested and not adequately tested.

Judicial Attitudes Toward Pre-sentence Reports and Probation Officers

In exercising the judge's discretion various sentencing aids exist. The pre-sentence investigation report is the primary source, of both information about the defendant and a recommendation for sentence.

The report is important because often the information contained in the pre-sentence investigation report constitutes the major contact the sentencing judge may have with the defendant other than at the sentencing hearing. Other contacts which may "impact" the decision are usually vicarious, and include the prosecutor, probation officer, defense counsel and police.

It appears that judicial attitudes about the pre-sentence report vary. Most judges agree that the pre-sentence investigation and report are valuable aids in the decision at sentencing, although there appears to be some difference of opinion as to the value or use of the recommendation section included in most pre-sentence reports.

A study conducted by Lieberman, Schaffer and Martin in 1971 in Bronx, New York was designed to evaluate the effectiveness of an experiment in the use of short form pre-sentence reports for adult misdemeanants. The stated research goal of the study was to evaluate the effectiveness of the project in terms of three criteria: 1) among cases serviced by the project, the actual sentences imposed by the judges correlate closely with the project's recommendations; 2) the presence of the project's pre-sentence report results in a role of prison sentences which is significantly lower than the rate for comparable cases in which no pre-sentence report

is prepared; and 3) the use of the project's pre-sentence reports has not resulted in undue added risk of recidivism.

Although not directly related to the project's objectives one of the findings of the study was that there was a high degree of correspondence between the sentence recommendations contained in the project's reports and the court's actual sentences. The court disposition was a non-prison sentence in 83 percent of the cases in which such sentence was recommended. Prison sentences were the final disposition in 87 percent of the cases in which the project was unable to recommend a non-prison sentence.[13]

Another study conducted in the state of Washington in 1968 and 1969 evaluated four hundred and fifty-five cases on which pre-sentence reports were completed by Washington State Probation Officers. The evaluation included an investigation into judicial attitudes toward recommendations contained in these reports. One of the findings reported by the study was that a high level of agreement between the courts and the probation officers was noted on recommendations for probation but a low level of agreement was noted when imprisonment recommendations were in the reports. The study reported that there were differing degrees of acceptance of pre-sentence reports recommendations by various judges.[14]

In spite of the fact that judges view the pre-sentence report as a valuable sentencing aid, and the discretionary power available to the judge permits the inclusion of factors in addition to those presented by the report, it appears to be the unusual case where a judge details the factors he wants presented in the report.[15] This may result from the broad range of information which is often regularly included in the pre-sentence report which covers all factors important to any judge. The factors which appear to be most significant in the ultimate disposition

include the prior record and current offense.

It must be considered, however, that the actual impact of the report is still contested by some.

One commentator cited Hogarth, a Canadian sociologist, who stated:

> '[N]ot only do many judges fail to assimilate its [pre-sentence report] contents, but they often react negatively to it' and 'in doing so obtain a picture of the offender which is opposite to that communicated to him by the probation officer.' According to Hogarth's findings, judges tend to interpret the data contained in the pre-sentence reports selectively in order to support whatever preconceived attitude they bear toward the offender.

Support for this position is also found in another study which indicated that the pre-sentence investigation report served only to influence the length of sentence and not the decision of whether or not to place the defendant on probation.[17]

Judicial attitudes toward the probation officers who prepare these reports appear to be very positive. When discussing the sentencing process and the new judge, one author has stated:[18]

> Judge Harold R. Tyler, one of the leading experts in the judiciary on sentencing, says:
>
> "The vast majority of district judges have had little or no experience in the field of criminal law and procedure prior to their appointment. ... Suddenly, and without training or advice, the newly created jurist is faced with what to do with a particular offender. Fortunately, the probation officer is always willing to render the necessary assistance and recommendation if the judge is equally willing to realize that the probation officer is a highly competent person in his field with vastly greater opportunities to know the defendant, his background, and what sentence is appropriate. If any word of advice as to sentencing should be given to a new federal judge, it would be to 'lean upon your probation officer.' "

Another view of the sentencing judge's attitude toward assistance in the sentencing decision is as follows:[19]

> "One trial judge is content to make the probation decision without consulting other persons; indeed, he may feel that advice and recommendations are an interference with judicial prerogative. Another trial judge actively seeks advice from others and, although he may not always follow the advice, he reaches a contrary decision only after very careful reconsideration of the sentence which seems to him to be appropriate. Even among the trial judges who rely upon the advice of others, there are differences as to which officials are drawn into the decision-making process: some judges seek the advice of police officers in certain cases; some judges regularly seek the advice of the prosecuting attorney; some judges give great weight to the recommendation of the probation department."

Impact of the Report

Regardless of how the sentencing judge views either the probation officer or the pre-sentence report, numerous studies suggest that in the majority of cases the sentencing judge "follows" the recommendations contained in the pre-sentence investigation report. No study was found that indicated a breakdown between the number of pre-sentence investigations submitted and the number which contain recommendations. However, where recommendations are included, the rate of agreement between the recommendation and the final disposition is uniformly high.

> "When probation or community based treatment is presented to the court, they follow the recommendation 72 percent of the time..."[20]

> "The Court agreed with the Project's recommendations 76 percent of the time."[21]

> "Probation was granted when recommended in 96 percent of the cases."[22]

"There is almost total agreement between a probation officer's recommendation for probation and an actual disposition of probation."[23]

"The overall rate of agreement between recommendation and sentence was 96 percent"[24]

Several studies have pointed out that the rate of agreement between recommendation and final disposition depends in part on whether the recommendation is for incarceration or for probation.

"When probation or community based treatment is presented to the court, they follow the recommendation 72 percent of the time... recommendations for incarceration...were followed by the court in 92 percent of the cases."[25]

"Probation was granted when recommended in 96 percent of the cases. Imprisonment was ordered, when recommended, in 86 percent of the cases."[26]

"The relationship between recommendations for and dispositions of probation are high and the relationship diminishes when viewed from the recommendations against and the subsequent grant of probation."[27]

"There has been a high degree of correspondence between the sentence recommendations contained in the project's reports and the court's actual sentences. The court disposition was a non-prison sentence in 83 percent of the cases in which such sentence was recommended. Prison sentences were the final disposition in 87 percent of the cases in which the project was unable to recommend a non-prison sentence."[28]

"98 percent of the non-imprisonment recommendations were followed by the court...27 percent of the imprisonment recommendations were followed by the courts."[29]

The studies point out that there is no uniform relationship between final disposition and recommendation. They suggest that in some jurisdictions the incarceration recommendation is followed more often than the probation recommendation while in others the reverse is true.

In spite of the lack of a uniform relationship, the level of agreement between recommendation and disposition is still quite high. One explanation for this high rate of agreement is discussed by a study which evaluated pre-sentence information for felony cases in a Massachusetts Superior Court. The 1975 study based its findings on interviews with Massachusetts Superior Court judges, chiefs of probation in superior courts, superior court probation officers and copies of pre-sentence reports in felony cases prepared in every superior court probation office. A major finding of this study was that considerable agreement appears to exist between probation officers and judges as to the significance of particular factors and characteristics in making decisions or recommendations for probation or imprisonment.[30]

Another study found that both judges and probation officers rated the defendant's prior record and the facts of the case as most important to them when considering the disposition for the case. This survey conducted and reported by Carter in 1976 presented the results of a questionnaire to which responses were received from 147 agencies dealing with probation, including national, state and local levels.

Prior record and current offense appear to be the most significant factors at sentencing, but other factors may also have important impact on the final disposition. One study conducted by Carter and Wilkins and reported in 1967, determined that the most influential factors for judges in making a decision for probation included the number of years of education which the defendant had, the defendant's average monthly income, the defendant's occupational level (a higher level receiving a more favorable response), the residence of the defendant, the defendant's marital and employment stability, the amount of participation in church activities,

and the defendant's military record. This same study determined that incarceration was a likely result at the sentencing stage when the defendant was a homosexual, had alcoholic involvement, there was the use of weapons or violence in the commission of the offense, the defendant's background showed family criminality, and the defendant was involved with drug usage. It focused primarily on probation officers and judges at the federal level and evaluated data received from the Administrative Office of the United States Courts and the San Francisco Project, a study of the Federal Probation System in the Northern District of California.

The results of another study conducted in the state of Washington and reported in 1973, found that included in the factors which influence the judge's sentencing decision were the race of the defendant, the number of felony arrests (not convictions) the defendant had experienced, and the attitude of the defendant as perceived by the judge. This study obtained its data from three phase interviews with sixty-nine superior court judges. The first phase was devoted to the resolution of hypothetical grand larceny cases, the second stage employed a checklist of the operational facts in isolation, and the third stage concluded the interviews with a qualitative search for attitudes and ideas concerning the functions of the sentencing system. Each judge was asked to resolve five cases, all different from the cases given any other judge. The hypothetical cases were grouped in sets of five in a non-random fashion. Each set had some variance in age, race, marital status, work history and criminal background of the defendants.[33] It is interesting to note that one study conducted in Santa Clara County, California to evaluate the Offender Rehabilitation Project of the Public Defender office for that county found that some judges have made up their minds on the type of sentence to be imposed

without any background data about the defendant. In those situations the report only served to influence the length of sentence, not the type. The source of information for this study included interviews with persons from the court, Probation Department, District Attorney's office, Public Defender's office and community service agencies with the main research tool a questionnaire designed to provide all the demographic data about defendants, to record the differences between probation department and Public Defender reports, and to record the effects of the Public Defender report on the Court. The questionnaire results were lost prior to analysis.[34]

Although there appears to be agreement on the factors which are important to the sentencing decision, the general judicial attitude about the pre-sentence report appears to be that it should present to the sentencing judge a "total picture" of the defendant, furthermore some judges do not feel there should be "selectivity" in determining what information is included in the pre-sentence investigation report.[35]

Judicial Characteristics

The concern over the wide disparity in sentencing for similar crimes has also prompted investigation into the judicial characteristics which may influence the sentencing decision. One study conducted in Harris County, Texas and reported in 1972, suggested that the age, length of private practice, years of legal practice, time served in a county or district attorney's office, length of tenure on the district court bench, and length of tenure on any court were significant factors which affected the sentencing decision. Empirical data were analyzed from the ten Texas criminal district courts in the county and information was extracted from

the docket sheet records of cases filed in the county district clerk's office. Included in the project design were a set of attitudinal questions to which each of the judges was asked to respond in a structured interview conducted in the privacy of the judge's chambers. From the responses of the judges, comparisons were made with the sentencing record, evaluations compiled and determinations made as to the degree of influence of the attitudes tested upon sentencing behavior. It should be noted, however, the final conclusion of this study was that sentencing disparity could not be explained by the backgrounds and attitudes of the judges.[36] Another study stated that judicial characteristics which influence the final decision are the judge's educational background, the length of time he/she has been a lawyer and has served on the bench, the attitude of the defendant as perceived by the judge, and the judge's personal philosophy on sentencing recommendations received from probation officers and defense attorneys.[37] This study consisted primarily of interviews with sixty-nine superior court judges in the state of Washington and the results were reported in 1973. The design for evaluating judicial characteristics did not appear in the report of the study which was evaluated here. Support for this position is also found in another work which indicated that the pre-sentence investigation report served only to influence the length of sentence and not the judge's decision of whether or not to place the defendant on probation.[38]

Although judicial characteristics result in the idiosyncratic behavior of particular judges which undoubtedly influences the ultimate disposition at sentencing, there does not appear to be sufficient evidence that these are the only characteristics which contribute to the concern over disparity in sentencing practices. Even if judicial characteristics

were solely responsible for the wide disparity in sentencing, it is not known what the "proper characteristics" are, or how to select them given the present system of selection.

Summary

The research included in this chapter is sparse and generally methodically weak, thus it does not provide a firm foundation for advocating any revolutionary findings or conclusions. One can conclude that the sentencing stage of criminal proceedings is shaped by many factors, including the broad discretion vested in the sentencing judge both as to the information considered and the sentence imposed, the personnel involved in the criminal process, and the social climate of the general society. It is difficult, however, to isolate any one of these factors and determine its specific impact upon the judge in the process of sentencing disposition.

It is apparent that judges regard the sentencing phase of the criminal justice process as an important part of the judicial function. Furthermore, judges appear to accept the fact that the ultimate disposition at the sentencing stage is a responsibility that belongs to the judge alone. Inputs from other sources, including the pre-sentence report, are viewed favorably as an aid in the decision-making process. Most judges and probation officers select three types of information as most important in the sentencing decision. These factors are: 1) the current offense, 2) the prior record of the defendant, and 3) stability factors or indicators about the defendant. While these general areas have been recognized, there are a variety of considerations within each, and particularly the third, and they may have a varying impact depending upon the judge.

The surveys of judicial characteristics cited explain very little about the variations in sentences and the affect of the individual characteristics of a particular judge on the sentencing decision. Although such factors as the judge's age, length of practice, and length of tenure may have an impact on the sentencing decision, no study has demonstrated that these factors are entirely responsible for the disparity in sentencing which exists. Because of the wide range of variables available to impact on the sentencing decision, it is difficult to place the responsibility for directing the sentencing decision on any particular set of factors such as judicial characteristics. Other factors, such as the broad discretion vested in the sentencing judge, and the philosophy of "individualizing" justice which virtually requires differential treatment, effectively assure disparity, rather than uniformity, in sentencing.

The research indicates that the impact of the pre-sentence report upon the final sentencing disposition is significant, and that judges view the report as an important factor in the decision-making process. Most of the studies in this area have measured this impact through the high degree of correlation between the recommendations contained in the reports and the final dispositions. The studies have not considered the impact of the pre-sentence report when the judge does not want a recommendation included within it. Other important subjects addressed by commentators, but not by the research reviewed in this survey, include the impact of sentencing councils, appellate review of sentences, and whether statements by judges explaining the basis for a sentence should be required.

Future Research

Several areas concerning the sentencing judge and the sentencing decision merit future research. One of these is the development of guidelines and standards which recognize the large amount of discretion involved in the sentencing decision and the need for that discretion in order to avoid unfair or "rubber stamp sentencing," but which place limitations on the potential abuse of discretion. With the advent of restrictions on sentencing discretion, studies should focus on the results provided by those methods as compared with jurisdictions which still provide virtually unrestricted discretion for the sentencing judge. The obvious difficulty inherent in this analysis will be the definition of what is considered a "fair" result.

Further areas of future study should be the impact of sentencing councils and appellate review of sentences as they relate to the use of the pre-sentence report in the sentencing process.

The study of personal judicial characteristics which influence the sentencing decision probably should not be the subject of future research while methods which are utilized to reduce the disparity which exists between individual judges should be the subject of future research. The use of sentencing councils and the appellate review of sentences are factors which would logically seem to be related to such efforts, but evidence of their effectiveness is not yet available.

Another area where there has been little research, and which should be more closely studied, is the relationship of other court personnel with the sentencing judge. The area is one which is difficult to isolate, as is the subtle influence which it may have. The interrelationships of

the various personnel participating in the sentencing process are recognized but not fully understood. Research should focus on this area.

A final area which deserves further consideration is the actual use of the recommendation section of the pre-sentence investigation report. The impact of the report without the recommendation should be considered.

Footnotes

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CHAPTER V

EVALUATION SUMMARY

Generally, the evaluation studies reviewed for this work were not consistent in research methodology and most of the findings included in this paper are the result of combining the stated findings presented by individual studies into groups consistent with the issue guidelines established by the General Contractor. A summary of the research is presented here:

Chapter II: Differences in techniques and procedures associated with the use and development of pre-sentence investigation reports.

1) Variations exist as to when a pre-sentence investigation report will be required from jurisdiction to jurisdiction.
2) The contents of pre-sentence investigation reports appear to be generally uniform in all jurisdictions in the types of information required.
3) The use of gradations of pre-sentence reports appears to be increasing and the short form report appears to be a useful sentencing aid.
4) Individual probation officers appear to vary in their recommendations even when presented with similar data.
5) Probation officers generally consider the current offense and the prior record of the defendant as the most important factors when making their recommendations.
6) Plea bargaining appears to have an impact on the pre-sentence investigation reporting process.

Chapter III: Differences in expectations associated with pre-sentence Reporting (Diagnostic v. Information Reporting).

1) The diagnostic information received from psychologists or psychiatrists is of interest to sentencing judges and appears to have a significant impact on the sentencing decision.
2) The information reporting by way of the pre-sentence report also appears to have significant impact on the sentencing decision, however judges feel more at ease evaluating these data than diagnostic information.
3) The pre-sentence investigation report is the primary method of information reporting and is used much more frequently than psychiatric or mental examination reporting.
4) The diagnostic reporting process involves the danger of over-prediction and does not provide for effective contradiction.
5) The information reporting process also has the problem of accuracy and verification of information input but appears to be more susceptible to effective contradiction.
6) There are no effective predictors in either the diagnostic or information reporting processes upon which judges or probation officers can rely.

Chapter IV: The role of the pre-sentence reporting process and its impact on judicial decision making.

The following findings appear to be supported by the research evaluated in this issue area:

1) Judges report the sentencing phase of the criminal justice process as an important part of their judicial function.

2) Judges regard the pre-sentence investigation report as an important aid to the sentencing function.

3) Judges generally consider three particular items of information as most important to the sentencing decision: (a) the current offense; (b) the prior record of the defendant; and (c) stability indicators about the defendant.

4) Within the area of "stability" indicates numerous factors appear to be important but the impact of these factors appears to vary with the judge.

5) Judicial characteristics do not appear to explain the wide divergence in sentencing practices which exist among judges.

6) Judges have a high regard for probation officers and their work but judicial attitudes vary on the inclusion of a recommendation in the pre-sentence investigation report.

7) Judges appear to follow the recommendation contained in the pre-sentence report in the majority of cases. The rate of agreement is less when the recommendation is for incarceration than when the recommendation is for probation.

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