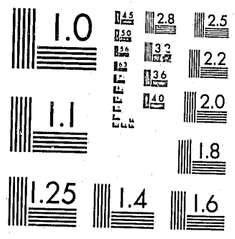






91998

# PROFIT IN THE PRIVATE PRE$ENTENCE REPORT

by

Chester J. Kulis

To Be Presented at the 1983 American Correctional Association's 113th Congress of Correction: Workshop on "Private vs. Public In Corrections: The Continuing Controversy."

August 10,1983

CHESTER J. KULIS
U. S. Probation Officer
Room 1100 U. S. Court House
219 S. Dearborn St. - Tel. 435-5746
Chicago, Illinois 60604

## I. THE FORENSIC CRIMINOLOGIST: THE PHOENIX OF THE CRIMINAL JUSTICE SYSTEM.

Due to government fiscal crises and resulting cutbacks in social service programs, the private sector in corrections has been especially hard hit. Most threatened are halfway house programs. The International Halfway House Association had 30 agencies in 1964, mushroomed to 2,500 members in 1974, and has now dwindled to 1,500 members. (Taft, 1982: 29-30). Yet out of the ashes of the private sector has emerged a new profession for the criminal justice system: the forensic criminologist. Their primary service is the preparation of private presentence reports. G. Thomas Gitchoff, a San Diego State University criminology professor, has observed, "The number of people doing these private probation reports has just grown by leaps and bounds." (Granelli, 1983: 1).

Sentencing is the critical area of the criminal court process most ignored by the legal profession. Two widely used legal texts, Criminal Law and Procedure (Rollin Perkins, 5th ed., 1977) and Basic Criminal Procedure (Yale Kamisar et al., 4th ed., 1974), devote no attention to it whatsoever. Even though defendants find the dispositional phase the most interesting and important part of the criminal proceeding, the art of sentencing advocacy has yet to be discovered or practiced by the majority of criminal defense attorneys. (Craven: 1981: 12).Given the well-documented correlation between probation officers' recommendations and sentences imposed (88% agreement in non-prison recommendations and 98% agreement in prison recommendations), it was inevitable that defense attorneys devote more interest to the presentence report. (Kingsnorth and Rizzo. 1979: 3-14). The interest of the defense bar and the entrepreneurship of former probation officers has spawned the private presentence report and the profession of forensic criminologist.

A case in point is Criminological Diagnostic Consultants, Inc., founded by



brothers William Bosic (a former prison counselor and probation officer) and Robert Bosic (a retired police officer). Their level of aspiration is suggested by their description of their Riverside, California office as their "National Corporate Headquarters."Incorporated in February 1981, C.D.C.'s primary service is the preparation of privately commissioned presentence reports, usually through defense attorneys. However, the firm also prepares change of venue studies and conducts training seminars for criminal justice personnel. Three major reasons have been cited for the recent rise in private presentence report services: 1) budget cuts affecting probation departments' ability to formulate high quality reports; 2) overcrowded prisons which are forcing the criminal justice system to consider alternative sentencing for an ever increasing percentage of offenders; and 3) an alleged institutional bias on the part of public probation officers who are susceptible to public pressure for more jail sentences. (Granelli, 1983: 8).

The Bosic brothers have proposed that California license under its Penal Code the "forensic criminologist,"whose primary qualifications would be a bachelor's degree in criminology or a related science, five years of responsible diagnostic investigative experience, knowledge relating to criminal sentencing/penology/ community services, and no felony record. Under their proposed change of section 1203(b) of the California Penal Code, the court before imposing sentence in a felony case would have to refer the defendant for a presentence report either to the probation officer or a state-licensed, forensic criminologist. Each of California's 58 counties would decide through its Board of Supervisors whether to refer its presentence reports to forensic criminologists or maintain presentence reports done by the probation department. Their scheme also envisions a new bureaucracy comprised of a state criminologist examiner and 58 county criminologist examiners to oversee licensing and regulation of forensic criminologists.

William Bosic maintains: "We don't do anything different than the probation department; we just do it better." (Granelli,1983: 9). In a letter to the California legislature in October 1982, he further claims that "C.D.C. has not experienced any negative reaction to the introduction of privately commissioned P.S.I. reports by the courts." Mr. Bosic's assurances to the contrary, there appear to be at least four major issues suggesting deep reservations about the appropriateness of private presentence reports: 1) whether the private sector has a legitimate role in such a quasi-judicial function as sentencing recommendations; 2) whether a system of private presentence reports emphasizes "individualized justice" while ignoring needed reforms of the probation function within the criminal justice system; 3) whether private reports are truly cost effective; and 4) whether the inevitable politicizing of the presentence process involves ethical questions tending to compromise the integrity of the forensic criminoligist.

I. The Private Sector Should Have No Role In The Quasi-Judicial Sentencing Process.

The criminal justice system has as many objectives as constituencies it serves or affects: specific deterrence, incapacitation and rehabilitation for offenders; restitution for victims; and punishment and general deterrence for the public. Yet the government itself is affected by the criminal justice system's performance, so that a seventh critical purpose of the criminal justice system might be called the symbolic or ritual function by which the government protects its own integrity as the protector of society and enforcer of its criminal laws. This symbolic function assures hopefully both the appearance and fact of the government's credibility.

There is no question that "private participation is probably lowest in the correctional system although correctional services (counseling, education, vocational training) are of the kind that can most readily be provided from other disciplines



and the private sector." (Skoler, 1976: 3). With some justification, Fox has noted that private corrections has always filled the gaps in service delivery. (Fox, 1977: 385). Yet there seems to be a fundamental difference between the private sector providing services such as shelter, counseling or education, versus the private sector actually assuming governmental, quasi judicial authority by having an intimate role in the presentence recommendation process. It is one thing for the private sector to maintain the fleet of police cars; it is another where private practitioners start making arrests.

To maintain the credibility of the presentence function for defendants, the public, and law enforcement agencies, it must clearly remain a governmental function. In response, the private practitioner might argue that "hard management" and the idea that "business must come first" is not inconsistent with the task of preparing credible presentence reports. (Taft, 1983: 38). He/she might emphasize that impartial diagnostic services are provided, thereby making sentencing primarily a scientific enterprise. "Sentencing is basically a scientific prognosis, not a judicial decision, and the intervention of the social scientist in the sentencing process is a healthy change which should be encouraged and expanded." (Imlay and Reid, 1975: 10).
If sentencing were merely a scientific prognosis, clearly the private sector would be in a position to provide a valuable service; but repeated studies concerning judicial and probation officer discretion reveal that sentencing involves much more a social value judgment based on perceived public policy considerations and personal biases. Even where the offense/prior record/social background were a given, as was the probation officer recommendation for probation with restitution, 10 federal judges sentenced the hypothetical bank robber to probation, while 17 others gave periods of imprisonment ranging from 6 months to 15 years. (Block and Geis, 1970: 225).

In his book, Management: Tasks, Responsibilities, Practices, Peter Drucker observes that public services institutions have grown much faster than business, represent the "growth sector of a modern society," and must be run by effective and efficient management techniques. (Drucker, 1973: 130). He gives encouragement to the private sector delivery of services by noting that "wherever a market test is truly possible, it will result in performance and results." (156). He distinguished three types of public service institutions: 1) natural monopolies (eg. phone company); 2) service institutions paid for out a a budget (eg. hospital or school); and 3) "those service institutions in which means are as important as ends, and in which therefore, uniformity is of the essence. Here belongs the administration of justice or defense and most of the areas which, in traditional political philosophy, were considered policy areas." (159-160). The private sector and competition benefit the public in the first two types of institutions but not the third:

> But it is equally clear the market is not capable of organizing all institutions...Service institutions also include the administration of justice and defense which, equally obviously, are not and should not be economic institutions. (156-7).

He concludes: "To make service institutions perform, it should by now be clear, does not require great men. It instead requires a system." (159) (emphasis added).

## II. INDIVIDUALIZED JUSTICE VERSUS REFORM OF THE PROBATION FUNCTION: A SYSTEM APPROACH.

Peter Drucker would very much approve the call for reform of the criminal justice system called for by the American Bar Association Foundation in 1967. The report made four observations about the criminal justice system: 1) chronic system overload; 2) official discretion with few guidelines; 3) lack of coordination of the components



of the system (police/prosecution/courts/corrections); and 4) unwarranted variation in the quality of personnel and facilities from jurisdiction to jurisdiction. It is both ironic and ominous that, like a phoenix, the forensic criminoligist has arisen from a criminal justice system charred by budget cuts and staff layoffs caused by Proposition 13 in California and Proposition 2½ in Massachusetts. For example, the Santa Clara Probation Department reportedly lost 16% of its budget and 26% of its staff during the past two years. (Granelli, 1983: 8).

Whether presentence reports stay public or go private has important ramifications for the criminal justice system. "Individualized recommendations" do nothing to effect needed reform of the system and further threatens the legitimate role of probation services in the criminal justice system. A presentence report does not involve merely a defendant's individual right, nor is it conducted primarily for his benefit. Rather, it is for the benefit of the court. People v. Youngbey, 413 N.E.2d 416 (Illinois Supreme Court, 1980).

The private presentence report often appears to split hairs for the defendant but beheads probation services as an integral function of the criminal justice system. Yet, as Senator Kennedy as pointed out, this medical model of treatment which allows total sentencing discretion has been discredited. (Kennedy, 1979: 357.) The rehabilitation assumption that a sentencing judge, "armed with detailed knowledge and clinical evaluations of the offender's character and background," can formulate a taylor-made sentence, has been rejected. (Dubois, 1981: 3). More and more, criminological theory has refused to define crime merely as an individual pathology and has questioned the appropriateness of unbridled discretion invoked to "cure" it. (Greenberg and Humphies, 1980: 208). Since the sentencing decision is basically a

policy decision, the cry for reform of sentencing procedures has included calls for more legislative input affecting actual sentences imposed (eg. presumptive sentences), appellate review, concern for the victim in what many would re-label a "victim justice system," and decisions based on objective, scientifically validated research. (Forer, 1980:260.) "Professional discretion" by judges and probation officers might mask a concern about professional pride, status and power, although publicly it is legitimatized by the rationale that each defendant is unique. (Robin: 1975, 205). While most of the controversy around sentencing discretion has revolved around judges, there must be consistency and a sentencing philosophy promulgated within probation departments by top administrators, who too frequently are concerned only with typographical errors, submission deadlines, and avoiding flagrant factual errors in reports which might prove embarassing. Setencing recommendations (and for that matter, probation revocation procedures) too often rest on the whim of individual probation officers rather than articulated philosophy and guidelines.

The concern of private presentence reports relates not so much to how much time a defendant gets but to the earlier, more basic "in or out" (incarceration or probation) decision, sometimes alluded to as "conventional" versus "alternative sentencing." Genuine reform from a system perspective must also address discretion concerning this "in/out" decision. (Kennedy: 1979, 362; Silberman, 1978: 292-93). In his influential book, Silberman cites research showing that all but 7% to 10% of sentences imposed can be explained by court norms revolving around the offense and prior record. (291-3). Necessary reform requires that the courts and probation offices make explicit these "norms" and articulate reasons for a particular sentence. Private preparation of presentence reports frustrates the development of such a normative consensus and fragmentizes the probation system by separating the presentence function from the supervision function, thereby reducing its system impact.



There is also a significant question whether private entrepreneurs preparing presentence reports could develop sufficient credibility with other segments of the criminal justice community. Even the cloak of federal probation officer has failed to mask what many in the law enforcement community perceive of as a "do-gooder" image. The problem would be much worse for the private entrepeneur who would be perceived of as a "hired gun" for the defense attorney. Although the Bosic brothers deny any bias, it is interesting to note that while early accounts indicated that they always sent the court and the prosecutor the presentence report at the same time they sent it to the defense attorney, it is now their present practice to release the report only to the party (usually the defense attorney) who commissioned it. In stark contrast, Federal Rules of Criminal Procedure (32 - c) mandates disclosure by the court to both the prosecutor and defense attorney and thereby institutionally assures the credibility of the federal presentence report since there is no veto power concerning disclosure.

Since the position of the private entrepreneur in the criminal justice system is ambivalent (even under the Bosics' licensing procedures), there also is a question of legal liability which seems greater than in the case of the probation officer performing the same function. A state probation officer preparing a presentence report under court order and under authority of the California Penal Code is performing a "quasi-judicial function" which is "an integral part of the judicial process." Friedman v. Younger, 282 F. Supp. 710 (C.D. California 1968). He/she is therefore immune to suit under the federal Civil Rights Act. However, the Court also cited Harmon v. Superior Court, 329 F.2d 154, 155 ((9th Cir. 1964): "a like immunity extends to other officers of the government whose duties are related to the judicial procress." (emphasis added). There is a substantial issue whether private practitioners working for profit should be accorded the same immunity as governmental officers. Increased

vulnerability to lawsuits by defendants or victims might warrant less candor on the part of the private practitioner compared to his public counterpart. Another issue involves whether private presentence reports would be subject to subpoena in other criminal or perhaps civil proceedings. Federal presentence reports are not subject to subpoena by third parties in criminal or civil litigation. U.S. v. Dingle, 546 F.2d 1378 (10th Cir. 1976); Hancock Brothers Inc. v. Jones, 293 F. Supp. 1229 (N.D. California 1968). Since oftentimes private presentence reports are prepared under direction of, or commissioned by, a defense attorney, the issue also arises whether they are covered by the attorney-client privilege or the attorney work-product doctrine.

III. PRIVATE PRESENTENCE REPORTS: THE ISSUE OF COST-EFFECTIVENESS.

In an October 1982 letter to the California legislature, the Bosic brothers claimed that the 70 reports done during an 18-month period "resulted in at least $1,000,000 tax savings." They also claimed that private preparation of presentence reports state-wide would result in "a savings of between $10 million to $50 million annually to the State." The assumption that the private sector is always more cost-effective needs to be closely examined.

In their letter the Bosic brothers claimed that San Diego County spends $672 for every presentence report its probation department prepares; but that figure is denied as ridiculously inflated by that Department. The federal probation system spends probably no more than $225 per presentence report, based on the following calculation:

| | |
|---|---|
| 8 hours probation officer time: | $120 |
| 3 hours secretarial time: | 15 |
| Gas & miscellaneous expenses | 15 |
| Overhead (including supervisory) | 75 |
| Total expense per presentence | $225 |



In the same letter to the California legislature the Bosic brothers claimed that Criminological Diagnostic Consultants could prepare private reports for $372 each. Yet a newspaper article notes that their fee range currently is from $695 to $1,500, with extra fees being charged for psychiatric evaluations or their testimony at the sentencing hearings. (Bowman, 1982: 1). Private presentence reports generally run elsewhere from $500 to $2,000. (Granelli,1983, 8). The claim of cost effectiveness appears to rest on an inflated estimate of what public presentence reports cost plus a somewhat misleading figure of what the private sector will charge. In his letter William Bosic notes that "the only'overhead'which the Forensic Criminologist must incur is that related to the maintenance of his/her personal automobile, gasoline, telephone and cost for the report's typing." Using the brokerage firm analogy, the courts would be getting a bare-bones, discount service, not a service which performs full-time. Yet Mr. Bosic claimed that he typically spends 20 hours per presentence report for only $372, an incredible claim.

The track record of the private sector in the field of mental health and public health has not been spectacular. It has been suggested that the private health care practitioners funnel off the relatively healthy cases for whom minimal treatment can be provided and still make a profit; but the chronically ill cases are still left for the public sector to care for since they are not profitable. In effect, the delivery of social services and health care tends to become a boondoggle for the private sector. Even in the corrections field, the cost-effectiveness of private programs (eg. halfway houses) has generally not been shown. (Taft, 1982: 32).

Not only the cost but the effectiveness of the Bosic estimate must be considered. A public probation officer performs needed court services (eg. surveillance and counseling while preparing the presentence report), is readily available to the public and other criminal justice agencies, and usually is the same person (or at

least the same agency) which will supervise the defendant on probation, thus providing a continuity of contact in the court system. In contrast, the forensic criminologist approach emphasizes labelling and diagnostic workup at intake but ignores service delivery --- a complaint often heard in corrections.

Finally, the cost-effectiveness equation must consider the issue of whether private presentence reports will significantly increase criminal defense fees, since the reports are commissioned usually througb the defendant's attorney. Since the report is not released until the fee for its preparation is paid, rising defense fees will inevitably result in more and longer continuances for "professional courtesy" --- the attorney wants more time before sentencing so that he can get paid! (Despite the public myth that court continuances are sought to frustrate victims and witnesses, the defense bar usually will not employ that tactic once they have been paid in full so that any further continuances are on the attorney's own time.) The prospect of criminal defendants committing additional crimes to pay not only the cost of their attorney but also a private forensic criminologist must be faced. The trend for a dual system of justice (one for the white, middle class and one for everyone else) would be accelerated. The majority of defendants would have public defenders and probation officers doing presentence reports; the elite minority would have private ("real") attorneys and forensic criminoligists in their corner.

IV. POLITICAL AND ETHICAL CONSIDERATIONS.

In today's tight market the key to success of private social service agencies is their becoming political: influencing legislators and officials of correctional bureaucracies. (Taft,1983: 37). The Bosic brothers show an awareness of this reality in their effort to win the support of state legislators and influential criminal justice officials such as police and prosecutorial administrators. Fox has noted



that the political influence of private organizations is perhaps their greatest contribution in corrections, a field usually devoid of political advantage. (Fox, 1977: 403). But the risks of political entanglement must also be recognized, since correctionals realistically will never have the visible constituency that the law enforcement community musters. The Bosics' suggestion in their statutory scheme that each County Board of Supervisors elect whether to go private or stay public in the preparation of presentence reports invites not just competition but a fragmenting of the probation system and a diminution of its present, negligible impact.

More disturbing are the ethical problems associated with "going private." The Defense Department and, more recently, the Environmental Protection Agency have had numerous scandals concerning officials who have used the revolving door to the private sector and profited from their government service, sometimes apparently exploiting the public trust. The credibility of the probation system and the judicial branch will be jeopardized by former-probation-officers-turned-hired-guns and by other officers moonlighting in other jurisdictions. Clearly the appearance of impropriety is as damaging as actual misconduct. The close working relationship of the private sector with criminal defense attorneys raises ethical issues which the defense bar has refused to recognize (eg. fee issues, to name but one). The Bosic brothers maintain an "Attorney's Referral Service," for clients referred to Criminological Diagnostic Consultants without counsel. The Illinois Attorney Registration and Disciplinary Commission has advised that such a practice comes close to violating the Code of Professional Responsibility for lawyers regarding solicitation.

CONCLUSION.

In a rush to "go private," the integrity of the probation system must be the paramont concern. The private sector's role is more appropriate in service-delivery rather than the presentence report process involving a quasi-judicial function.

REFERENCES


1. American Bar Association Foundation, Criminal Justice in the United States. Chicago, Il.: American Bar Foundation, 1967.
2. Block, Herbert A. and Geis, Gilbert. Man, Crime and Society. 2d ed. New York, N.Y.: Random House, 1970.
3. Bowman, Chris. "Brothers Build Business Urging 'Creative Punishment' For Crimes." The Press-Enterprise (Riverside, California), August 29,1982, p. 1.
4. Craven, James B. III. "Random Thoughts on Criminal Sentencing in the United States District Court." Federal Probation, December 1981, Vol. XXXXV, No. 4, pp. 12-16.
5. Drucker, Peter F. Management: Tasks, Responsibilities, Practices. New York, N.Y.: Harper & Row Publishers, 1973.
6. Dubois, Philip A. "Disclosure of Presentence Reports in the United States District Courts." Federal Probation, March 1981, Vol. XXXXV, No. 1, pp. 3-9.
7. Forer, Lois. Criminals and Victims. New York, N.Y.: W.W. Norton & Co., 1980.
8. Fox, Vernon. Introduction to Corrections. 2d ed.Englewood Cliffs, N.Y.: Prentice-Hall, 1977.
9. Friedman v. Younger, 282 F. Supp. 710 (C.D. California 1968).
10. Granelli, James S. "Presentence Reports Go Private." National Law Journal, May 2,1983, p. 1.
11. Greenberg, David F. and Humphies, Drew. "The Cooptation of Fixed Sentencing Reform." Crime and Delinquency, April 1980, Vol. 26, No. 2, pp. 206-225.
12. Hancock Brothers, Inc. v. Jones, 293 F. Supp. 1229 (N.D. California 1968).
13. Harmon v. Superior Court, 329 F. 2d 154 (9th Cir. 1964).
14. Imlay, Carl H. and Reid, Elsie L. "The Probation Officer, Sentencing and the Winds of Change." Federal Probation, December 1975, Vol. XXXIX, No. 4, pp. 9-17.





15. Kennedy, Edward M. "Toward A New System of Criminal Sentencing: Law With Order." American Criminal Law Review, Spring 1979, Vol. 16, No. 4, pp. 353-382.
16. Kingsnorth, R. and Rizzo, L. "Decision Making in the Criminal Courts." Criminology, 1979, Vol. 17, pp. 3-14, cited in Thomas, Charles W. and Hepburn, John R. Crime, Criminal Law and Criminology. Dubuque, Iowa: Wm. C. Brown, Co., 1983.
17. Lindquist, Charles A. "The Private Sector in Corrections: Contracting Probation Services from Community Organizations." Federal Probation, March 1980, Vol XXXXIV, No. 1, pp. 55-64.
18. People v. Youngbey, 413 N.E. 2d 416 (Illinois Supreme Court, 1980).
19. Robin, Gerald D. "Judicial Resistance to Sentencing Accountability." Crime and Delinquency, July 1975, Vol. 21, No. 3, pp. 205-212.
20. Silberman, Charles E. Criminal Violence, Criminal Justice. New York, N.Y.: Random House, 1978.
21. Skoler, Daniel L. "Private Sector Delivery of Criminal Justice Services - The Hidden Input." Criminal Justice Digest, April 1976, Vol. 4, No. 4, pp. 1-3.
22. Taft, Phillip D. "The Fiscal Crisis in Private Corrections." Corrections Magazine, December 1982pp. 27-32; and "Survival of the Fittest." Corrections Magazine. February 1983, pp. 36-43.
23. U.S. v. Dingle, 546 F. 2d 1378 (10th Cir. 1976).

END