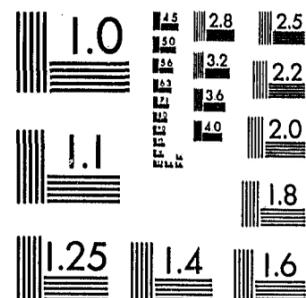


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# Federal Probation

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*Calvin Cunningham*
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MARCH 1981

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All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies—both public and private—are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

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# Federal Probation

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NUMBER 1

## This Issue in Brief

**Disclosure of Presentence Reports in the United States District Courts.**—This article is a summary by Philip L. Dubois of a report prepared by Stephen A. Fennell and William N. Hall under contract with the Federal Judicial Center. The author states that, on the one hand, it does appear that a large proportion of Federal districts have achieved disclosure of presentence report in a large proportion of their criminal cases. On the other hand, he adds, although the high rate of disclosure is a positive step, many districts utilize practices that limit the effectiveness of such disclosure.

**Prosecutive Trends and Their Impact on the Presentence Report.**—With Federal prosecutors launching aggressive prosecutions against white-collar criminals, narcotics traffickers, corrupt public servants, and organized crime racketeers, probation officers find they need significant enhancement of their investigation and reporting skills, assert Harry Joe Jaffe and Calvin Cunningham, U.S. probation officers in Memphis, Tenn. For these offenders, a presentence writer can prepare a useful presentencing document by concentrating chiefly upon three significant areas: the official version section, the financial section, and the evaluative summary.

**The Right To Vote as Applied to Ex-Felons.**—While rights are intimately connected to duties, laws disenfranchising ex-felons show that correlations between the two are often drawn imprecisely, writes Professor John R. Vile. While voting is a fundamental right, the Supreme Court has refused to void felony disenfranchising legislation, he reports. The Court's action is normatively questionable, he maintains, especially when applied to those whose incarceration has ended.

**Action Methods for the Criminal Justice System.**—Dale Richard Buchanan, chief of the Psychodrama Section at Saint Elizabeths Hospital in Washington, D.C., tells us that while role train-

ing, role playing, and psychodrama have been extensively used in the criminal justice system, there has been a lack of coordination among these terms and in the ways in which they were used. Action methods will probably continue to gain greater use within the criminal justice field, he asserts, because of their direct applicability to the jobs that are needed to be performed by criminal justice personnel.

**Administrators' Perception of the Impact of Probation and Parole Employee Unionization.**—This article by Professor Charles L. Johnson and Barry D. Smith presents information from a recent survey on the incidence of parole/probation unionization

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and administrators' perceptions of the impact of unionization on the quality, cost, and difficulty of administering services. Some of the critical issues emanating from the increased parole/probation unionization are delineated and discussed as they are reflected in the literature and as a result of the survey.

**Highlights, Problems, and Accomplishments of Corrections in the Asian and Pacific Region.**—The Australian Institute of Criminology recently organized the First Conference of Correctional Administrators for Asia and the Pacific, which was well attended and prepared the ground for joint action. Already this has resulted in the collection of data on imprisonment, some of which are provided in this article by W. Clifford, director of the Institute. In this very broad survey, some of the problems of corrections in the region—and some of the approaches which are different from those in the West—are highlighted.

**The Demise of Wisconsin's Contract Parole Program.**—This article discusses the elimination of an innovative method of paroling criminal offenders in Wisconsin. The State abolished its creative Mutual Agreement Program because budget analysts deemed the program to be an ineffective method of paroling offenders when compared to the traditional method of parole decision-making. Although this program has been eliminated, Wisconsin Parole Board Member Oscar D. Shade says it is conceivable that contract parole is workable and could prove to be a most effective means of managing an offender's parolability.

**Juvenile Detention Administration: Managing a Political Time Bomb.**—Administering a juvenile detention center is one of the most difficult and frustrating jobs in the juvenile justice field,

asserts Youth Services Consultant Robert C. Kihm. Although it is clearly stipulated in idealistic terms how children ought to be cared for while in state custody, the detention administrator must deal with the reality of providing care with very limited resources and little control over who is admitted and discharged from the facility, he states. This article examines how these contradictions proved the demise of four detention administrators' careers, and what lessons can be gained by current administrators facing similar problems.

**Parent Orientation Program.**—Juveniles paroled from a correctional institution are faced with readjustment problems. Community resources are limited and families poorly equipped to offer assistance. To increase the effectiveness of families as resource people, the author, Serge W. Gremmo, has developed the Parent Orientation Program (POP) which orients families toward potential problems in the parole adjustment of their children, acquaints them with the mechanics of parole, disseminates information to assist juveniles during reintegration, and lends support during a difficult period.

**Crisis Intervention in a Community-Based Correctional Setting.**—Despite their widespread use in other practice settings, crisis-intervention theory and techniques have been woefully underutilized in community-based correctional agencies. This article by New York City Probation Officer Margaret R. Savarese is an attempt to help remedy that situation by presenting an overview of crisis theory and techniques and then illustrating their application at a particular crisis point in the criminal justice system—the point of sentencing—via two actual case situations.

All the articles appearing in this magazine are regarded as appropriate expressions of ideas worthy of thought but their publication is not to be taken as an endorsement by the editors or the federal probation office of the views set forth. The editors may or may not agree with the articles appearing in the magazine, but believe them in any case to be deserving of consideration.

## Prosecutive Trends and Their Impact on the Presentence Report

BY HARRY JOE JAFFE AND CALVIN CUNNINGHAM, JR.  
Probation Officers, U.S. District Court, Memphis, Tennessee

WITH Federal prosecutors launching aggressive prosecutions against white-collar criminals, narcotics traffickers, corrupt public servants, and organized crime racketeers, probation officers find they need significant enhancement of their investigation and reporting skills to prepare presentence reports useful to judges. This shift in prosecutorial direction marks a significant departure from the customary class of offenses and offenders that probation officers have been accustomed to talking with and writing about: The car thief, the check forger, the counterfeiter have now given way to the

neurosurgeon who submits fraudulent Medicare claims, the local city councilman who solicits a bribe, the real estate developer who illegally inflates his net worth to secure loans, and the pharmacist who controls a sophisticated network of illicit drug selling.

Since this shift in prosecutive focus, however, our search for a suitable model of a presentence report bearing upon these priorities of national concern—public official corruption, white-collar crime, sophisticated drug-dealing, and organized crime—has been unproductive. The example of a presentence report depicted in Paul Keve's classic text of good presentence investigation and reporting skills is out of date in the Federal system—a presentence report focusing on a defendant convicted of third-degree burglary.<sup>1</sup> Even a recently published monograph distributed to officers of the United States Probation System covering all

<sup>1</sup>Attorney General Griffin B. Bell in a speech delivered Oct. 8, 1978, at New York City before The International Association of Chiefs of Police designated these offenses to be prosecutive priorities of the Executive Branch.

<sup>2</sup>Paul W. Keve, *The Probation Officer Investigator* (Minneapolis: University of Minnesota Press, 1960). This text, as well as Keve's other seminal work, *Prison, Probation or Parole: A Probation Office Reports* (Minneapolis: University of Minnesota Press, 1954), is out of print; however, both texts reprinted in full-size in paperback binding may be ordered from the University of Microfilms of Ann Arbor, Mich.

phases of the presentence report is deficient regarding the preparation of presentence reports focusing on these target areas of Federal prosecution.<sup>3</sup>

Though this monograph includes two illustrations of serviceable presentence reports, neither pertains to those offenses currently labeled as major areas of Federal concern. One has to do with a small-time heroin pusher, the other with a petty mail thief whose offense severity should compel any creditable Federal prosecutor to decline prosecution. Such models may offer guidance to the probation officer writing about a thief who drove a stolen Datsun from Maine to New York, or a postal employee who embezzled a Social Security check, or a desperado who held up the local First National Bank; but, they offer no perspective on the investigation, collation, and composition of a useful presentence document that will translucently relate to a sentencing judge information about offenders convicted of, for example, transnational trade violations; multidistrict illicit manufacture, shipment, and sale of controlled substances; cross-regional corruption affecting several governmental agencies; or unlawful influence peddling in the area of labor management relations.<sup>4</sup>

Yet, these types of crimes have been designated by the Attorney General as the focus of the Executive Branch's law enforcement strategy for the 1980's. FBI Director Webster explains his agency's investigative priorities:

Our three principal priorities are foreign counter-intelligence, white-collar crime, and organized crime. Antitrust and civil rights matters, along with personal and general property crimes, make up our second tier of priorities. And at a lowest priority we have placed the fugitive . . . and general government crimes programs.

With respect to the white-collar and organized crime programs, we have attempted to determine the scope of a par-

ticular criminal enterprise or activity. We then target our efforts toward top level criminals rather than those who are involved in street level crime . . .

Taking white-collar crime as an example, we are not as interested in investigating a \$1,500 bank embezzlement as we are in a bank embezzlement of over \$250,000.<sup>5</sup>

Director Webster then comments on this shift in priorities and what it implies for the judiciary:

On a recent visit to San Francisco I was invited to lunch by my former colleagues in the federal judicial system and this was one of their questions. They wanted to know what types of cases they could expect to see in their courtrooms as a result of the Bureau's realigned priorities.

I told them that I think there will be fewer of the more traditional cases such as Dyer Act cases. [And I also stated that they will see fewer bank robbery cases . . .

What I believe they will see with increasing frequency are criminal enterprise or multiple party cases. These matters can involve white-collar and/or organized crime. We are more effective in our investigation efforts against criminal enterprise crimes, thus these are the types of cases which will be coming to the forefront.<sup>6</sup>

From this overview, what then can be said about the offenders of the 1980's? Many will be first offenders who have committed ingenious, elusively complex crimes impacting substantially on the community. Because they will have come generally from solid middle- or upper-middle class backgrounds, they will have no particular needs for social services from the probation officer. Few will, for example, need to participate in a urine surveillance program to detect narcotics abuse. Likewise, though some may lose their jobs because of the immediate offense, they may enjoy a panoply of influential friends who will quickly find them new employment. Furthermore, they will seldom return to the criminal justice system taking, so-to-speak, one bite of the apple. And, finally, they may have derived substantial pecuniary gain from the commission of their unlawful activities.

These observations fall together to impact on the form and function of the presentence report: The shift in Federal prosecution policy signals the end of the diagnostic style of presentence report writing. A sentencing judge of the new decade will need little social or developmental history when fashioning a disposition to fit defendants convicted of such offenses as multiregional corruption, certification manipulation of crude oil, maladministration in the operation of employee benefit plans, or consumer victimization. The notion that rehabilitation increases in proportion to the volume of data collected about an offender will fail to pass muster in the 1980's.<sup>7</sup> In fact, the only portions of the presentence report needing significant expansion will be the following three: the official version section, the financial section, and the evaluation section.

<sup>3</sup>The Presentence Investigation Report (Washington, D.C.: Administrative Office of the United States Courts, 1978). This monograph was published before the change in Executive enforcement strategy.

<sup>4</sup>Though prosecutive trends change, the authors speculate that a return to Federal prosecution of general crimes remains a distant possibility. Philip B. Heyman, Assistant Attorney General, Criminal Division, appearing March 16, 1980, before the House of Representatives Judiciary Committee, noted that "[o]f all our enforcement activities, our greatest resource needs remain in the area of white collar crime. The [Criminal] Division's only personnel increase is requested for this area, and if appropriated, will be used to augment the recently created Office of Economic Crime Enforcement." This program focuses on five areas of white-collar crime: prevention, detection, investigation, prosecution, and sentencing.

<sup>5</sup>"A Former Federal Judge Talks About His New Position: An Interview With FBI Director William H. Webster," *The Third Branch*, 11, No. 4 (April 1979).

<sup>6</sup>Id. Deputy Assistant Attorney General Robert L. Kouch, appearing August 18, 1978, before the Senate Judiciary Committee, set forth the following items for United States Attorneys to consider before undertaking a Federal bank robbery prosecution: (1) Degree of Federal investigative involvement; (2) Use of firearms or other dangerous weapons during the offense; (3) Involvement by the offender in multistate activities; (4) Prior similar offenses committed by the subject; (5) Whether there is a backlog of Federal cases awaiting trial; (6) Ability and determination of state and local authorities to prosecute effectively; (7) The relative sentences imposed in Federal as opposed to state courts; (8) Commission of other crimes during the bank robbery.

<sup>7</sup>The flexible approach called for by *The Presentence Investigation Report* discourages the probation officer from becoming a mindless cataloger of data. Rather, this new approach encourages the probation officer to select wisely the relevant pieces of information for inclusion in a report. The probation officer is directed to gloss over an individual's developmental or social history in those instances when that information has no bearing on the dispositional process.

### Official Version Section

The proposed Federal criminal code itself mandates extensive coverage of the official account of the offense. Pursuant to the proposed new rules affecting the drafting of presentence reports, probation officers will be required to include in their reports the following information: (1) the classification of the offense and of the defendant set forth under the sentencing guidelines, (2) the kinds of sentences as well as the sentencing range under the guidelines suggested for the particular type of crime committed by a certain category of defendant, and (3) an explanation of any aggravating or mitigating circumstances suggesting an enhancement or diminishment of sentence from that specified in the guidelines.<sup>8</sup> Unlike the present scheme by which the trial judge uses the presentence report to help him exercise discretionary authority in imposing sentence, a sentencing judge of the 1980's is likely to use the contents of the report—especially the narrative of the immediate offense—to locate a sentence falling within some specific Congressionally mandated guidelines. Thus, a substantial part of the presentence report will look chiefly toward the blameworthiness of the offender's criminal conduct, not to his personal characteristics.

By accentuating the nature and circumstances of the offense, the defendant's role in the offense, and the nature and degree of harm caused by the offense, the presentence report becomes no longer a vehicle of social inquiry but rather a finely honed legal document drafted to insure that the factual basis of sentence is accurate. By subordinating, moreover, such markers of social class identity as a defendant's education, community ties, and employment history to the gravity of the offense,

the presentence report of the 1980's goes a long way toward eliminating disparity and inequality in sentencing. The new realism currently planned by the Congress for the 1980's says, quite simply, let the punishment fit the crime—no more, no less.

### Financial Section

A common denominator emerging from the shift toward the four designated areas of national prosecutive concern is that each of the offenses makes a pile of money for the criminals involved. For that reason, probation officers will need to dig deeply into a defendant's financial affairs to uncover relevant pieces of information helpful to the trial judge's reaching an informed disposition. The information uncovered may relate to general financial status as well as to the ability of the defendant to pay a fine, to make restitution, or to pay the costs of prosecution. But as any investigating probation officer has learned, the task of collecting, collating, and verifying financial data can become a singularly oppressive burden. Letters must be drafted and mailed. Releases must be attached. Some institutions require an original release, necessitating further paperwork. And our readers could certainly add other frustrations. But we have found a seldom used but nevertheless expeditious route out of this financial quagmire.

Some of the most insightful material about a defendant's financial history can be extracted from a single source: the credit bureau report. An investigative consumer report is like a financial arteriograph—it reveals all. Unlike defendant-supplied net-worth statements which may be inflated or deflated or tax returns which may be incomplete or downright false, the investigative credit report reflects financial reality.<sup>9</sup> Here are the kinds of information reflected from credit reports:

- (1) number and kinds of purchases (boat, furniture, automobile, etc).
- (2) amount of purchase
- (3) regularity of payment
- (4) outstanding balance on credit and bank cards
- (5) closed and pending civil matters such as garnishments, bankruptcies, foreclosures
- (6) balance of mortgage and amount of monthly payment
- (7) savings and checking account balances
- (8) tax liens
- (9) conviction records (arrest, parole)

<sup>8</sup>Proposed *Fed. R. Crim. P.* 32 (c) (S. 1722, 96th Cong., 1st Session (1979)). At this writing, the Congress still has not acted on this legislation; therefore, the authors cannot speculate when these reforms will become law.

<sup>9</sup>Certain confidentiality provisions of the Tax Reform Act of 1976 have denied Federal probation officers access to tax returns and return information. Although prior law described tax returns as "public records" open to inspection under regulation approved by the President or under Presidential order, Congress, in passing the Tax Reform Act of 1976, felt that returns and return information should generally be treated as confidential and not subject to disclosure except in the limited situations set forth by statute. This disclosure statute permits the IRS to disclose returns or return information in a Federal or state judicial proceeding pertaining to criminal tax cases. In the opinion of the IRS the preparation of a presentence report to guide the court in imposing sentence may be considered a part of the total judicial proceeding, and the disclosure of returns and return information may be made to probation officers in those limited instances.

The IRS has, however, taken a contrary position regarding the disclosure of tax data in criminal non-tax cases. The pertinent disclosure statute authorizes disclosure only to officers and employees of a Federal agency who are personally and directly engaged in and solely for their use in the preparation for any administrative or judicial proceeding or investigation which may result in such a proceeding. Since Federal probation officers are appointed by and serve under the direction of the U.S. District Court, they do not qualify as officers or employees of Federal agencies. Thus, absent the defendant's written consent, they may not receive returns or return information in criminal non-tax cases for purposes of preparing a presentence report. See letter of September 6, 1978, in authors' possession from Stuart E. Selgel, chief counsel, IRS, as well as statute relating to disclosure of tax data; 26 U.S.C. § 6103 (l).

- (10) accounts placed for collection
- (11) past and present employment<sup>10</sup>

With this information, the probation officer can present the sentencing court with an intelligently drawn picture of a defendant's financial status. The information also allows the probation officer to reinterview the defendant for elaboration or clarification or to follow additional leads suggested by the data.

#### *Evaluation Section*

The concluding section of a presentence report prepared on one of the four areas of national pro-

<sup>10</sup>According to 15 U.S.C. § 1681 (b), a consumer credit reporting agency may disclose information to a third party pursuant to a consent signed by the consumer. Though most credit reporting agencies require the requesting party to pay a membership fee, the U.S. Probation Office, W/D Penn., has entered into a contract with the local credit bureau for the gratis receipt of investigative consumer reports. For further details, contact the authors. Interestingly, the presentence report has been described as an effort to determine "the social credit rating of the individual." Wallace, *Aids in Sentencing*, 40 F.R.D. 433, at 433 (1966).

<sup>11</sup>The authors note that the U.S. Probation Office, District of Maryland, includes in the writing of certain presentence reports the following: Verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been perpetrated. (cited in *Concern*, January 1980, a publication of the National Victim/Witness Resource Center). The authors assume that the word "individual" can be broadly interpreted to include the government.

<sup>12</sup>To be relevant, information conveyed in the presentence report must be specific to the defendant. See, *United States v. Cavazos*, 530 F.2d 4, 5-8 (5th Cir. 1976) (improper for court to use nonrecord irrelevant hearsay statistics unrelated to defendant as basis for imposition of sentence).

secutive concern should serve to tie together offense, defendant, and community. The probation officer should, in his concluding comments, provide the court with a comprehensive assessment of the gravity of the offense, its relationship to the general conduct of the defendant, and the degree of harm incurred by the victim.<sup>11</sup> This information will aid the sentencing judge to validly assess the personal, social, and financial cost arising from the immediate offense for which the offender is about to be sentenced.<sup>12</sup>

#### *Conclusion*

Prosecutive trends change. For the coming decade, they have already been established: public official corruption, organized crime, white-collar crime, and international narcotics conspiracies. This shift in Executive enforcement strategy calls for a change in the drafting of the presentence investigation report. Although it may require more time and effort, a different approach to the report may provoke fresher and more direct observation of people and events—just what a sentencing judge needs.

**END**