

USE OF THE PRESENTENCE INVESTIGATION IN MISSOURI

In any system in which large discretion as to sentence has been vested in the court, it is obviously of the first importance that the court obtain accurate information on the many matters that are relevant to what the sentence ought to be . . . [since] the evidence is likely to give relatively little insight with respect to the history and character of the offender. There is, therefore, a need for systematic methods to provide this necessary information, a need that our society has met increasingly by the development of the pre-sentence inquiry, ordinarily conducted by the probation service of the court.¹

This statement expresses the increasing acceptance of the presentence investigation as a feature of criminal procedure.² The investigation is designed to produce a comprehensive report to be used by the trial judge when deliberating the imposition of sentence. In general, the report compiled after an investigation consists of what has been called "social information;"³ in particular, this is data which when "related"⁴ tends to illuminate the personality, character and conduct of the offender in all his social relationships.⁵

1. MODEL PENAL CODE § 7.07, comment (Tent. Draft No. 2, 1954).

2. Acceptance in the federal system is illustrative of the trend. The federal probation service was established in 1925, consisting of a corps of trained officers whose duties at that time were restricted to supervision of probationers and parolees. However, the district judges began to request that these officers investigate defendants in felony cases and report their findings before sentences were imposed. This practice was formally authorized in 1945 by FED. R. CRIM. P. 32(c). Chandler, *Latter Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts*, 37 VA. L. REV. 825, 835-36 (1951).

However, the constitutionality of the investigation was not decided until 1949 (*Williams v. New York*, 337 U.S. 241). The Court held that a state trial judge, relying upon the information contained in the report to alter a jury-imposed sentence, had discretion even to impose the death penalty without denying the defendant due process of law. Later federal cases, in which questions have been raised as to the legality or propriety of such inquiries, cite the *Williams* case as controlling. *E.g.*, *Hoover v. United States*, 268 F.2d 787 (10th Cir. 1959); *Armstrong v. United States*, 256 F.2d 294 (4th Cir.), *cert. denied*, 356 U.S. 856 (1958); *Pence v. United States*, 219 F.2d 70 (10th Cir. 1955); *Klingstein v. United States*, 217 F.2d 711 (4th Cir. 1954); *Friedman v. United States*, 200 F.2d 690 (8th Cir.), *cert. denied*, 345 U.S. 926 (1953); *Price v. United States*, 200 F.2d 652 (5th Cir. 1953); *Sachs v. Government of the Canal Zone*, 176 F.2d 292 (5th Cir.), *cert. denied*, 338 U.S. 858 (1949); *United States v. Clark*, 11 F.R.D. 269 (W.D. Mo. 1951).

3. Glueck, *Probation and Social Agencies*, 8 UTAH L. REV. 183, 192 (1963).

4. Keve, *The Professional Character of the Presentence Report*, 26 Fed. Prob., June, 1962, p. 51.

5. Glueck, *supra* note 3, at 192.

The report is not a mere recital of facts; it includes an analysis of the information,⁶ and often a recommended disposition of the case.⁷

This note will present and analyze the results of a survey of the opinions and practices of Missouri circuit judges pertaining to the use of the presentence investigation.⁸

I. MISSOURI STATUTORY PROVISIONS

In Missouri there are three principal situations⁹ in which a trial judge has the task of imposing sentence:¹⁰ (1) when the defendant has pleaded guilty

6. This analysis is impliedly required by Mo. SUP. CT. R. 27.07. Compare FED. R. CRIM. P. 32.

7. These conclusions and suggestions could be considered as a normal feature of the report. Sixty-nine percent of the responding judges (see note 8 *infra*) indicated that such recommendations are regularly included, 28% that this practice was only occasional, 3% that recommendations were never offered.

8. A questionnaire was compiled and sent to each of Missouri's 84 circuit court judges. Of the 50 responses, 36 were completed, often with additional helpful comments. There was only one outright refusal to answer the questionnaire, while 13 other judges referred the author to others whom they believed more qualified to complete the form. Interviews were held with the directors of the St. Louis and St. Louis County offices of the state probation and parole division, the St. Louis and St. Louis County prosecuting attorneys, and several circuit judges.

Percentages cited in the body of the note refer to the responses to a particular question, not to the questionnaire responses as a whole.

9. The authority is from both statute and court rule.

Mo. REV. STAT. § 546.440 (1954):

Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render judgment accordingly. Where the jury find a verdict of guilty and assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment and render judgment accordingly.

Mo. SUP. CT. R. 27.03:

Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict the court shall assess and declare the punishment and render a judgment accordingly. Where the jury finds a verdict of guilty and assesses a punishment not authorized by law, and in all cases of judgment by confession, or upon plea of guilty, or in which trial by jury is waived, the court shall assess and declare the punishment, and render judgment accordingly.

It may be noted that only in the court rule is it provided that the court is directed to assess punishment if the defendant has waived trial by jury. Yet, this situation is one in which investigations are frequently ordered.

10. It is sometimes said that a trial judge has two hats, corresponding to (1) his "guilt-finding" function, which might be considered as being objective in nature, and (2) his "sentence-imposing" function, more discretionary in nature. Morris, *Sentencing Convicted Criminals*, 27 *AUSTL. L.J.* 186 (1953); see Note, 9 *U. CHI. L. REV.* 715 (1942). While the "guilt-finding" task is considered as the more time-consuming by 79% of the Missouri judges, 75% find the responsibility of assessing criminal punishment to be the more difficult. See also Hincks, *In Opposition to Rule 34(c)(2), Proposed Federal Rules of Criminal Procedures*, 8 *Fed. Prob.*, Oct. 1944, pp. 3, 8.

at the arraignment or trial;¹¹ (2) when the jury has failed to assess proper punishment or has assessed no punishment;¹² and (3) when trial by jury has been waived and the judge has made a finding of guilt. In these situations, the trial judge may in his discretion order a presentence investigation to aid him in the imposition of sentence.¹³

Use of the presentence report has been authorized in Missouri since 1957 by a statute¹⁴ which provides that an investigation will be made only when ordered by the circuit judge. Therefore, this note will assume that the judge has complete discretion in ordering an investigation. It must be noted, however, that three judges in Jackson County (Metropolitan Kansas City) consider that a 1953 Missouri Supreme Court rule¹⁵ instructing the probation service to conduct an investigation in *all* cases unless otherwise ordered by the court has not been superseded by the statute.

11. The first situation occurs most frequently in Missouri, since the judges estimated that from 31% to 91% of all felony cases are disposed of by guilty pleas. This percentage figure is consistently quite high in the criminal divisions of the circuits sitting in the metropolitan areas of St. Louis (22nd Circuit), St. Louis County (21st), and Jackson County (Kansas City) (16th). In rural Missouri, the figures hover about 60%. Thus, any judge assigned to a criminal docket is often called upon to impose sentence.

12. This failure of the jury is apparently a remarkably infrequent occurrence, since it was mentioned but once in the questionnaire responses and interviews.

13. In view of this fact, it has been argued that it might be to the defendant's advantage to plead guilty or waive a jury trial, since the judge may assess punishment by referring to the investigation report and similar information, while the jury is limited to the evidence which was presented at the trial. George, *Sentencing Methods and Techniques in the United States*, 26 Fed. Prob., June, 1962, pp. 33, 36.

14. MO. REV. STAT. § 549.245 (1959) provides:

At the request of the judge of any circuit or criminal court, the board shall assign one or more officers to act as probation officers for such court, and upon similar request, the board shall make an investigation of any person convicted of crime or offense before sentence is imposed and shall make a report of his findings to such judge.

Since circuit court judges hear few if any misdemeanor cases, the investigation is ordered almost exclusively in cases where the defendant has been convicted of a felony.

The St. Louis office of probation and parole was established in 1897, making Missouri the second state to have such a service. A state-wide Board was created in 1937 (Mo. Laws 1937, p. 400, § 1), and now serves all the circuits except the 22nd (City of St. Louis) since the St. Louis office is still separate, and supported by local, not state funds, even though it serves the state circuit court judges. See 1961 PROB. AND PAROLE OFFICE (ST. LOUIS) CIRCUIT COURT FOR CRIMINAL CAUSES ANN. REP.

15. MO. SUP. CT. R. 27.07(b).

When a probation officer is available to any court having original jurisdiction to try felony cases and to the St. Louis Court of Criminal Corrections, such probation officer shall, unless otherwise directed by the court, make a presentence investigation and report to the court before the imposition of sentence or the granting of probation. . . .

It must be noted that under neither the statute nor the court rule is a presentence investigation mandatory; rather, there is a difference of degree and emphasis. The statute provides that an investigation be conducted *only when* so ordered by the circuit judge, while the court rule requires an investigation in all cases unless the judge orders

II. THE PRESENTENCE INVESTIGATION

Widespread use is made of the presentence investigation by Missouri judges when imposing criminal sentences.¹⁶ Responses from the Kansas City (Jackson County) and St. Louis circuits indicated that investigations are ordered in from 30% of all felony cases heard by one judge to 100% of those heard by another. Likewise, investigations are ordered in 75% and 90% of the felony cases heard in the two Springfield divisions and in 2% to 95% in the rural circuits.

A. *Initiation of an Investigation*

The investigation procedure will normally commence only upon the judge's request to a probation officer that an inquiry be made.¹⁷ However, in many instances the defense counsel asks the judge to require an investigation in the belief that mitigating circumstances which would tend to reduce the sentence will be uncovered by a thorough inquiry. The circuit judges unanimously indicated that such requests *could* be made by the defense; 37% of the judges responded that these requests were submitted frequently, 23% occasionally, 40% rarely or never. Ninety-three percent of the replies mentioned that a request would be honored by the court.

B. *Conducting the Investigation*

The presentence inquiry is conducted by officers of the state Division of Parole and Probation.¹⁸ Although reports are compiled in two days in one

otherwise; under either phrasing, the judge has complete discretion and control over the use of the investigation. However, the Kansas City judges apparently believe that the court rule precludes judicial discretion by requiring an investigation in every case.

16. This use is based on a belief that information upon which to base a rational sentence can best be obtained through such an inquiry. See note 58 *infra*.

17. See note 14 *supra* and accompanying text for a discussion of the statutory authority for this practice.

18. The officers are assigned to one of twelve probation districts throughout the state, not to a county or a circuit. 1963-1964 Mo. OFFICIAL MANUAL 415. While the St. Louis County and Jackson County offices have relatively adequate staffs (13 and 8 officers, respectively), most of the rural courts have but one man available for presentence investigations. In the questionnaire responses, it was indicated that in at least two multi-county circuits probation officers were assigned for only part-time duty, and that in still another, no officer at all was available.

Of the 36 probation and parole officers and supervisors (1963-1964 Mo. OFFICIAL MANUAL 419-20) only the two with Master of Social Work degrees may be considered trained social workers, although a third is to receive his degree shortly. In addition, many of the personnel are not college graduates, but have merely "equivalent experience." This means, of course, that most of the officers do not possess any unique skills; rather, their value to the judge is in the accumulation and analysis of additional data concerning the defendant.

circuit, most judges indicated that three to five weeks are needed for a thorough investigation. The state probation and parole office located in St. Louis County stated that its officers spend approximately twenty man-hours for each investigation. The only available cost estimate was from the City of St. Louis office, which set the average cost of each investigation at 108 dollars.¹⁹

The primary investigative technique of probation officers is interviewing the defendant's relatives, friends, business associates, school contacts and other persons whose statements might give some insight into the defendant's character. In addition to interviews, the investigation involves reference to available records of the defendant's activities during the course of his life; these include documents showing the defendant's conduct and level of achievement in school, prior law violations (including juvenile offenses), military service record and employment history. Court-appointed probation personnel are normally given access to all records containing information about the defendant, including "confidential" ones,²⁰ because the report in which the confidential information is utilized is not made public.²¹

In addition, a physical or mental examination is made part of the investigation when the judge determines that it would be helpful in imposing sentence, or when he grants a request by the defendant's attorney.²² While responses show that some Missouri judges consistently do not order physical examinations, a substantial majority (81%) feels that a psychological examination should be held when the defendant's behavior, the nature of the

19. Expenditures of both time and money by the federal probation service are quite similar, since the cost of an individual investigation was estimated to be between \$75 and \$100 (Keve, *The Message in Mr. Piyo's Dream*, 25 FED. PROB., Dec. 1961, p. 11) and the time, 3 to 4 weeks (FitzGerald, *The Presentence Investigation*, 2 N.P.P.A.J. 320, 329 (1956)).

20. THE MODEL SENTENCING ACT, Art. II, § 3, compiled by the advisory council of judges of the National Council of Crime and Delinquency, lists the procedures to be used in such an investigation. 9 CRIME AND DELINQUENCY 345 (1963).

21. Frequently the label "confidential" is attached to documents arbitrarily or at least on a basis not relevant to a consideration of their availability for pre-sentence purposes. When that is so, it is arguable that a label such as "confidential" should not be allowed to thwart the rehabilitative purpose of the report.

22. The psychological study is designed to (1) "demonstrate any social and personal factors which may have influenced the offender in making his decision to commit a crime" and (2) to determine "suitable measures to lessen the offender's tendency toward crime and, at the same time, to safeguard the community." Smith, *Observation and Study of Defendants Prior to Sentence*, 26 Fed. Prob., June 1962, p. 6. The American Law Institute advocates permitting the judge to order such an observation if, in his discretion, such a step seems advisable. MODEL PENAL CODE § 7.07 (4) (Tent. Draft No. 2, 1954). A similar proposal is to be found in the Model Sentencing Act (note 20 *supra*) and in the Federal criminal statutes, 18 U.S.C. 4208 (1958). Also see Mo. SUP. CR. R. 27.07.

crime or other evidence indicates the necessity. Some judges urged that a mental examination be made of every convicted felon.²³

C. *Sentencing in the Absence of an Investigation*

When no investigation is ordered, 58% of the judges usually hold presentence interviews with the defendant, either in chambers or in open court, in order to supplement the information presented at the trial.²⁴ The prosecuting attorney in every case submits, when he files the indictment or information, his own recommendation for proper punishment or treatment of the defendant. Judges regularly tend to rely upon this recommendation in the absence of a presentence investigation, according to 58% of the responses.

III. THE PRESENTENCE REPORT

The report compiled by the probation officer at the completion of his investigation is organized to present data concerning the defendant's character and background.²⁵ Difficulty arises, however, when the court accepts

23. Of course, the judges stated that this would not be feasible unless present facilities are considerably expanded.

24. One might validly wonder from whence other evidence will be gathered, and if from numerous sources, including the judge's personal knowledge, it might not have been more practical to collect and present this information in an analytical manner, via a presentence report. Within load and time limitations, this professionally drafted summary of the defendant's history is available to all judges in courts to which probation officers are assigned. Federal District Judge Boldt has said, "I cannot imagine how any judge would decline to use the light and aid of a presentence report if it were available to him." Boldt, *Recent Trends in Criminal Sentencing*, 27 Fed. Prob., Mar. 1963, p. 3, 4.

25. For example, the St. Louis County office of the state parole and probation department presents the information in the form of the following outline:

I. Legal history (using a non-legal approach)

A). Present Offense

1. All surrounding circumstances
2. The defendant's version of the commission of the crime

B). Prior Offense(s)

1. All surrounding circumstances
2. The defendant's version of the commission of the crime(s)
3. What sentences, if any, were imposed

II. Social History

A). Family background and economic status

B). Individual history

1. Personal growth and development
2. Religion
3. Education
4. Vocation
5. Health, physical and mental
6. Personal habits
7. Ambitions and motivations

and uses the report in the consideration of punishment because it is a document not drafted for presentation at a trial.

A. *Evidence Rules Applied to the Report*

Information concerning the defendant, derived from interviews, records and examinations, is usually inadmissible in evidence because (1) it has no bearing on the guilt of the crime charged, and (2) it consists largely of hearsay.²⁶ The explanation usually offered for its inclusion in the presentence report is that "after conviction a case ceases to be an action at law and becomes a social problem,"²⁷ and evidentiary rules are inapplicable to a judge's consideration of the presentence report. The Supreme Court, in *Williams v. New York*,²⁸ upheld the relaxation of the rules of evidence in an investigation and report. "[W]e do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court."²⁹ However, another federal court has stated that it would not "condone the use of evidence obtained in breach of law, even for the limited purpose of determining the sentence."³⁰

B. *Presentation of the Report*

If the defendant pleads guilty at his arraignment, the judge will then usually set the date for a hearing to impose sentence. If a presentence investigation is ordered, it will be conducted and the report presented to the judge before the hearing. As long as the judge is not given the report until *after* the defendant's conviction (by guilty plea), the issue of the judge

8. School, service and employment records

9. Personal life—married? any children?

III. Community Acceptance

A). How will community acceptance affect his possible rehabilitation?

B). How is the community apt to react now to the defendant?

IV. Actual details of the suggested plan of probation

26. This is discussed in *Hincks*, *supra* note 10, at 6.

27. *Id.* at 8.

28. 337 U.S. 241 (1949).

29. *Id.* at 251. *Cf.* *People v. Popescue*, 345 Ill. 142, 177 N.E. 739 (1931).

30. *Armpriester v. United States*, 256 F.2d 294 (4th Cir.), *cert. denied*, 356 U.S. 856 (1958). In this case a confession had been given by the defendant-appellant while he was being illegally detained; this could not have been offered as proof of guilt at his trial under the rule established in *Mallory v. United States*, 354 U.S. 449 (1957) and *McNabb v. United States*, 318 U.S. 332 (1943). The Fourth Circuit, in effect, extended the *McNabb-Mallory* rule and sanction to the sentencing hearing and also, presumably, to the presentence report. However, since the defendant had pleaded guilty at the trial, independent of the confession, and was sentenced by the district judge after only an incidental allusion by an officer at the sentencing hearing to the fact that *Armpriester* had confessed his guilt, the relief claimed was denied. Thus the statement by the court of what it would have done if the facts had been different is dictum.

trying the case with access to information of a highly personal and revealing nature does not arise. However, 49% of the answering judges indicated they would refer to the report *before* the defendant had entered his guilty plea; 51% responded to the effect that they were

not entitled to information relating to the social and economic background of the defendant, including his prior criminal record, if any, as disclosed by the report of a presentence investigation, until after a plea of guilty has been received. It is fair to assume that this safeguard [is used] . . . to insure the fact, as well as the appearance, that the judge is an arbiter and not an arm of the prosecution.³¹

In order for the report to be compiled before a guilty plea is entered or a verdict rendered at trial, the investigation must have been ordered *before* the trial—possibly before the arraignment. Responses indicated that 53% of the judges will order an investigation before a plea has been entered, and 38% will do so before a verdict is rendered. But because the Missouri statute³² provides that this investigation be held only upon *conviction* (“the Board shall make an investigation of any person convicted of a crime or offense before sentence is imposed”) the request at an earlier time appears to be an irregular, if not an extra-legal practice.

C. *Evaluation and Use of the Report*

Upon completion of the investigation, the probation officer compiles a report containing and analyzing the collected data.³³ It is from the conclusions included in this report concerning the defendant's background, character and rehabilitative potential that the judge may draw in assessing sentence.

1. *Reliability of the Report*

Methods devised by the judges to test the reliability of the probation officer and the accuracy of the information contained in his report have been few in number and questionable in value; they vary with the judge, case load, and location of the circuit. For example, in metropolitan areas a periodic spot check by one officer on the report of another is the only practical means of testing for accuracy. In rural circuits, the judges' closer personal contact with local residents provides a greater opportunity for verification of the data in the report.³⁴ It has been argued that a mandatory

31. *United States v. Christakos*, 83 F. Supp. 521, 525 (N.D. Ala. 1949), *aff'd sub nom.* *Woolard v. United States*, 178 F.2d 84 (5th Cir. 1950).

32. MO. REV. STAT. § 549.245 (1959). See note 14 *supra* and accompanying text for a discussion of this statutory authority.

33. A suggested outline for the analysis of the evidence is set out at note 25 *supra*.

34. Many of the responding judges from rural circuits replied that their inevitable familiarity with the facts of the case and the defendant's background was a sufficient check

disclosure of the report to the defendant is the only way to insure the validity of its contents.³⁵

2. *Evaluation of the Officer's Recommendations*

The judges differ in the weight they accord the recommendations contained in the probation officer's reports.³⁶ Six percent of the judges considered them controlling, 54% influential, 40% helpful.³⁷ These figures indicate the importance attached by judges to their inherent discretion to fix sentence for convicted criminals.

3. *Effect of Use of the Report*

The effect of the presentence investigation practice on the pattern of sentencing is striking: 76% of the judges said that when an investigation was conducted, probation was more apt to be granted, and 12% indicated that they would tend to impose lighter sentences.³⁸ The correlation between the existence of the report and the amelioration of a defendant's punishment justifies the widespread use of the presentence inquiry if probation is viewed as the preferred means to the desired end of the rehabilitation of felons.

IV. DISCLOSURE

The most controversial issue arising from the use of the presentence investigation is whether the judge should reveal the contents of the report to the defendant.

on the report. This was also expressed in *Williams v. New York*, 337 U.S. 241, 246 (1949).

35. See text accompanying note 39 *infra*. Since, however, the presentence investigation, as a practice, is premised on the competency of the probation officers, as a group, to compile and analyze the information gathered in the course of the inquiry, one might validly ask why there is any pressing need at this stage to check and verify their work-products; the typical answer stresses the possibly untrustworthy character of the hearsay evidence that largely comprises the report.

36. Note 7 *supra* indicates the frequency with which these recommendations are included in the reports.

37. The officer's recommendations would probably not be inserted in the report were it not generally believed that (1) judges should and do appreciate and rely upon them, and (2) that probation officers are competent to make them. Keve, *supra* note 4, at 51. Rather surprisingly, those persons interviewed who were concerned with neither the compilation nor the use of the report (prosecutors) tended to exaggerate and lament the judge's reliance upon the officer's recommendations, estimating that up to 98% of these suggestions were adopted (or considered "controlling"). The other view, which was also presented in these interviews, is that total reliance is justified, since "crime is a social problem," and it is only reasonable to include a sociologist in the handling and disposition of such criminal behavior. See Section IV *infra*, DISCLOSURE.

38. Of course, it must be realized that, as a practical matter, one factor that may encourage 76% of the Missouri circuit judges to grant probations is the knowledge that an offender, if imprisoned, costs the state \$1500 a year to maintain, while if on probation, the expenses of supervision are minimal.

A. *Constitutionality*

It has been argued that non-disclosure results in a denial of due process of law, because (1) the defendant has no opportunity to confront and cross-examine the sources of the information, and (2) traditional evidentiary safeguards are not applied,³⁹ so the information might be untrustworthy. The Supreme Court in *Williams v. New York*,⁴⁰ held that the use of the presentence report was not a violation of due process,⁴¹ but gave no opinion on the constitutionality of its non-disclosure. It has been urged, however, that another Supreme Court decision might be construed so as to require disclosure.⁴² While the constitutional question has not been answered, 97% of the Missouri judges responding were of the opinion that due process did not require disclosure of the report. Yet, while the judges concur on the constitutionality of non-disclosure, conflicting opinions as to the propriety of disclosure remain in Missouri, as shown by the fact that 78% disclose the report in at least some cases and 39% in all cases. Those judges who regularly disclose the report include the few (3%) who believe that non-disclosure is a denial of due process.

B. *Rationale for Disclosure and Non-Disclosure*

A complete disclosure to the defendant in all cases has been urged on two grounds: (1) although the issue of guilt has been previously decided, the information is actually evidence, presented at a hearing which determines the

39. The relaxation of the traditional evidentiary rules is discussed in text accompanying notes 26-30 *supra*.

40. 337 U.S. 241 (1949).

41. *Id.* at 251.

42. *Townsend v. Burke*, 334 U.S. 736 (1947). The Supreme Court overturned a conviction and sentence imposed by a Pennsylvania trial court in circumstances which indicated that the court had either intentionally or carelessly based the sentence upon misinformation, doing so in a facetious manner. The Court held that the disadvantage resulting from the absence of counsel who might have corrected the court's mistaken assumptions regarding the defendant's criminal record amounted to a failure to accord due process. While a presentence report was not involved in the case, the relevance of the holding lies in the very fact that due process limitations were imposed upon the trial court in its sentencing function as well as its guilt determination function. In Note, 101 U. PA. L. REV. 257 (1952), it is argued that the *Townsend* case requires full disclosure of all aspects of the presentence report. The author reasons that if counsel might be required by due process at sentencing, a "fair" hearing is necessary in order that counsel might be effective, and that a "hearing is little more than a sham unless it embraces the right to know and thus be able to challenge adverse information." *Id.* at 270. The author noted that the decision in *Williams v. New York* upheld the admissibility and use of the presentence report, but did not foreclose the question of the constitutionality of non-disclosure. While the Missouri judges believe that due process does not require disclosure (see text following note 42) the Supreme Court has not explicitly ruled, and has at least arguably implied to the contrary.

final disposition of the case; and (2) disclosure will insure the impartiality and veracity of the officer in compiling the report.⁴³ These arguments may have been partially persuasive since, while 61% of the Missouri judges would refuse to disclose in some cases, only 22% deny disclosure in every felony case.

Conversely, when a judge does not permit disclosure of the presentence report, his refusal is based on one of three general reasons. (1) Disclosure may demoralize the defendant, in presenting an intimate and possibly damaging character sketch. (2) The disclosure would make the report of less value to the judge. When the information is gathered from sources or individuals who speak freely only because they have been assured anonymity in the report, they will be more cooperative. Thus a more accurate report is presented to the judge when there is to be no disclosure. For example, if former employers realize that their statements will not be confidential, they will be less likely to cooperate by giving information or to agree to (re)hire the defendant if he is admitted to probation. There is also considerable fear of retaliation by the defendant or his associates against those who provided the probation officer with information.⁴⁴ (3) Great delay in sentencing would also result, since the defendant is likely to challenge all the information contained in the report, often necessitating checking and re-investigating the subject.⁴⁵

C. *Extent of Disclosure*

The varying acceptance of these reasons may explain the lack of agreement between courts, when disclosure is made, as to *what* information should be revealed to the defendant or his attorney (some judges state explicitly

43. Sharp, *The Confidential Nature of Presentence Reports*, 5 CATHOLIC U.L. REV. 127, 135-37 (1955). A third argument could be offered in those jurisdictions in which a defendant is allowed a (limited) pre-trial discovery of the prosecution's confidential documents—that he should likewise be allowed to examine this post-trial document. Rubin, *Probation and Due Process of Law*, Focus, March, 1952, p. 41. However, this is not the Missouri situation. See *State ex rel. Phelps v. McQueen*, 296 S.W.2d 85 (Mo. 1956) (en banc).

44. These points were expanded in an article (Hincks, *supra* note 10, at 5-6) written in the heat of a controversy centering about the wording of proposed FED. R. CRIM. P. 34(c)(2). As proposed, the rule would have made complete disclosure a mandatory practice:

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 objections raised by federal district judges, who were accustomed to exercising their discretion in keeping the report confidential were so strong that the sentence quoted above was omitted from the final version by the Supreme Court. See FED. R. CRIM. P. 32.

45. Sharp, *supra* note 43, at 134-35.

that any disclosure will be made only to defense counsel). Seventy-six percent of the judges will disclose only the basic data contained in the report; 37% the officer's conclusions and recommendations as well; and 33% reveal the names and sources of the information.⁴⁶ It is evident, therefore, that of the reasons set out above, the first (injury to defendant's morale) may not be persuasive, since only 24% of the judges refuse to disclose this portrait of the felon. However, the 67% who will not reveal the officer's sources of information arguably show the influence of the second of these reasons. Again, the recurring evidence of the judge's concern for the preservation of his own discretion in sentencing matters in part accounts for the 63% denial of disclosure of the officer's conclusions and recommendations.⁴⁷

Contrasting with their actual disclosure practices,⁴⁸ are the judges' opinions on what disclosures should be made mandatory. While 41% favor a mandatory revelation of the officer's summary and recommendations, only 31% advocate mandatory divulgence of the basic data composing the report, and only 12% favored required disclosure of the sources of information.

Judges also differ on whether disclosure should be made to persons not involved in the trial. Interested social agencies⁴⁹ are regularly shown the contents in only 14% of the Missouri circuit courts, occasionally in 11%, and rarely or never in 75%. Several judges mentioned that disclosure will not be allowed unless the agency is known by the judge as a responsible organization.⁵⁰ The report is disclosed to the officials of the prison in which

46. The Model Penal Code takes a moderate position in this dispute:

Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed. MODEL PENAL CODE § 7.07(5) (Tent. Draft No. 2, 1954).

This view has been expressed in one recent article (Boldt, *supra* note 24, at 4) but criticized in another (101) U. PA. L. REV. 257, 278 (1952)). The Model Sentencing Act § 4 (note 20 *supra*) has a different approach, varying the disclosure procedure with the type of offense involved. See the comment to Article II.

47. Though the judges may not disclose the nature of the recommendations, the text accompanying note 37 *supra* reveals the extent of their reliance upon these same recommendations.

48. See text accompanying note 46 *supra*.

49. For example, the various social agencies which administer to the needs, economic and social, of the accused's family would be interested in the report.

50. Although sentencing is indeed a judicial function, the fact that social workers do aid the judge in his evaluation of the information contained in the report and consideration of the possible effect of a sentence on the defendant leads one to conclude that such refusal to reveal the contents to another social agency in need of the information is unwarranted if reasonable assurances of confidentiality have been given by that agency. If the social agency is legally entitled to refer to such information as is included in the presentence report, but the collection and analysis of this data would involve considerable

the defendant will be confined⁵¹ in 63% of the circuits, and to the state mental hospital to which he may be committed in 83%. Many of the negative responses were qualified by explanations that the prosecutor regularly sends this report and other relevant documents to the prison or hospital so action by the court is unnecessary.⁵²

In most cases, if the defendant is placed on probation, he is supervised by the officer who conducted the presentence investigation. If, however, another probation officer is assigned to the case, he is allowed the benefit of the report in all but 6% of the circuit courts.⁵³

When disclosure, regardless how limited, is made to the defendant or his attorney, cross-examination is normally not allowed of either the investigating probation officer (in 89% of the courts) or the sources of information (93%). However, 68% of the judges who replied would permit a general rebuttal of the facts or conclusions in the report.⁵⁴

D. *Alternatives to Disclosure*

Those writers who do not advocate a mandatory full disclosure of the report to the defendant sometimes take a moderate position, urging instead that the judge, when imposing sentence, should indicate his reliance upon the report.⁵⁵ However, 34% of the judges do not observe this practice and 63% do not summarize the contents of the report in open court, if no disclosure had been otherwise made. From the disparity in these two figures it is evident that judges consider any concrete revelation of their sentencing criteria and reliance upon the report as a more serious threat to their discretion than is an extended summary of the report's contents.

expense, it is clear that the disclosure is warranted. However, if the report contains information to which the agency is not entitled, revelation is not so necessary or even justified.

51. FitzGerald, *supra* note 19, at 325. Such disclosure is designed to make imprisonment "a constructive instead of a brutalizing experience."

52. The Model Penal Code, *supra* note 1, and the Model Sentencing Act, *supra* note 20, also require these procedures.

53. A denial of access to the report seems almost indefensible, since it is the task of the supervising probation officer to formulate a workable plan of treatment and rehabilitation of the defendant, and thus he should be provided with all relevant data such as a presentence report.

54. One judge mentioned that if the defendant could and did present such contradictory evidence, a re-investigation would be ordered. It is apparently believed that allowing the defendant to present such facts, state his own views of the conclusions to be drawn from the report, or suggest other sources of relevant information more than satisfies the due process requirements, since the adjudication process has ceased and the normal evidentiary rules are not applied to the presentence report (see text accompanying notes 26-30 *supra*). Also see Model Penal Code *supra* note 1, and Model Sentencing Act *supra* note 20.

CONCLUSION

Two distinct forces influence judicial use of the presentence investigation. These are the importance to each judge of his discretion in sentencing practices, and the desire to utilize the services of the available probation officers.⁵⁵

That our society has tremendous confidence in the ability of a judge to settle problems of both legal and sociological nature is reflected in the Missouri statute⁵⁷ which posits total discretion in him to order a presentence investigation and use the resulting report when imposing sentence. It is apparent that the judges are jealously guarding this discretion and are wary of any proposal to limit or eliminate it.⁵⁸

That our society has a similar confidence in the ability of the probation officer to acquire and evaluate information concerning a criminal offender, and his competence to supervise and recommend further rehabilitative treatment for the defendant is reflected in the existence of the state Division of Parole and Probation, and the extensive use of its personnel for presentence investigative work.

It might be argued that there is a real conflict between these two accepted competences. That is, an increase in the mandatory use and disclosure of the presentence report would precipitate a corresponding decrease in the exercise of judicial discretion in sentencing. Conversely, a relative increase in the extent of judicial discretion might tend to limit the effective use of the investigation.

However, a more valid conclusion is that there is not a conflict of interests, but rather a dichotomy of function—the judge and probation officer operating at different levels and different stages in the criminal justice process under the same rationale.

The sociological approach to the criminal justice process in general and sentencing in particular is evidenced in the responses to the questionnaire—the aim of sentencing practices is to provide individualized treatment for the convicted offender. Formulating and imposing such treatment is a two-step process: (1) the accumulation, analysis and presentation, by a probation

55. Boldt, *supra* note 24, at 4; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291 (1952).

56. For a discussion of the extent of the officers' skills and formal training, see note 18 *supra*.

57. MO. REV. STAT. § 549.245 (1959). See note 14 *supra* and accompanying text for a discussion of this statutory authorization.

58. The judges suggested possible advantageous changes in the sentencing procedures. One advocated the adoption by the Missouri legislature of the Model Sentencing Act (note 20 *supra*); numerous others favored removal from the jury of any power to assess sentences, except possibly in cases of capital offenses, otherwise leaving this to the presiding judge, who, it was urged, should not be hampered by numerous fixed minimum sentences. Of course, the call for more qualified probation service personnel was repeated.

officer, of relevant information through a presentence investigation and report, and (2) the assessment, by the trial judge, of a specific punishment, accomplished through the exercise of his sentencing discretion.

That these functions are indeed related, even complementary, rather than conflicting, is revealed in the statements of the judges indicating their high esteem for and confidence in the investigating probation officers, as well as by the percentile figures revealing the widespread use of the presentence investigation in Missouri. Indeed, more judges believed that a sufficient factual basis for assessing a rational sentence could be obtained with a presentence investigation than felt that this could be otherwise obtained.⁵⁹

With such information as is provided by the report, the judge is better equipped to impose a truly individualized sentence, one designed to provide for treatment, confinement or supervision of the defendant, depending upon the perceived needs of each situation. Thus, it seems logical to urge the institutionalization of this practice—that the Missouri statute be revised to require such an investigation be afforded every convicted felon. While it is true that the report is most needed and indeed, most used in the metropolitan areas, the expanded use of the presentence investigation in rural areas is certainly to be encouraged. As long as full disclosure is not required, such a statute as is suggested will maximize the possible implementation of the probation officer's skills without limiting the judge's discretion, since the judge will be availed of an exposition of the factual background of the defendant and yet he need not consider the recommendations binding.

Such an approach would preserve the guiding principle of modern sentencing:

to require the punishment not only to fit the crime but also to fit the particular criminal, treating his crime, his social and personal background, and his dangerousness to the community as elements which must be synthesized into a rational sentence.⁶⁰

As one judge wrote, "Our greatest problem is designing programs for rehabilitation,"⁶¹ and it is suggested that a mandatory use of the presentence investigation would form the cornerstone of any successful solution.

59. Responses indicated that 73% of the judges felt that it is possible to acquire adequate knowledge about a defendant in order to sentence him if a presentence report is used; only 43% considered this possible without the use of a report.

60. Morris, *supra* note 10, at 186.

61. When asked to indicate what, in their opinions, should be the theory upon which sentences should (ideally) be imposed, the judges responded [note that figures total more than 100% because many judges referred to two or more theories]: rehabilitation, 78%, deterrence, 59%, retribution, 11%, expiation, 11%. Other possible theories (such as protection of society, expedience, severance from society) were included in another 11% of the responses.