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Pre-Sentence Reports: Utility or Futility? A Report of the New York City Board of Correction

Cover Page Footnote

This article is based upon a report prepared under the direction of Mary D. Pickman, A.B. Radcliffe College (1965), LL.B. Columbia Univ. (1968), by the staff of the Legal Advocate Program of the New York City Board of Correction. The Board of Correction is an agency of the New York City government existing pursuant to section 626 of the City Charter, having as its powers and duties, inter alia, the preparation for submission of studies and reports in regard to methods of promoting closer cooperation of custodial, probation, and parole agencies of government. The chairman of the Board of Correction is Robert B. McKay. The Legal Advocate Program analyzes court-related problems as they affect the institutions within the Board's jurisdiction. The Board of Correction wishes to give particular thanks to Carol Gerstl, a third-year student at New York University Law School for her work in the preparation and writing of this article.

PRE-SENTENCE REPORTS: UTILITY OR FUTILITY?

A REPORT OF *THE NEW YORK CITY BOARD OF CORRECTION**

Introduction

Attention has recently focused on the long delays which have developed between a finding or plea of guilty and the sentencing of the defendant in the criminal courts of New York City.¹ Delays in sentencing of from two to five months or more exist in most New York City courts. On August 17, 1973, 879 defendants who had pleaded or been found guilty of crimes remained in New York City jails awaiting sentencing.² These defendants comprised 15 percent of all inmates awaiting disposition in the criminal and supreme courts and 24 percent of all inmates awaiting disposition in felony cases.³ Inevitably, these convicted but unsentenced inmates have added substantially to the severe overcrowding in the city's deten-

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1. R. WITZTUM, *THE UTILIZATION OF PRE-SENTENCE REPORTS IN KINGS COUNTY: AN ANALYSIS OF THE VALUE OF MANDATORY PRE-SENTENCE REPORTS FOR PLEA BARGAINED DISPOSITIONS* (1972) (a report submitted to the Presiding Justice of the Appellate Division, Second Judicial Department, the Counsel of the Mayor's Office, and the Criminal Justice Coordinating Council) [hereinafter cited as *WITZTUM REPORT*].

2. N.Y.C. DEP'T OF CORRECTION, *NUMBER OF CASES AWAITING DISPOSITION IN CRIMINAL AND SUPREME COURT* (August 17, 1973).

3. *Id.*

tion institutions.⁴ Timely sentencing, if available, would have led either to their release on probation or their transfer to less populated state or city prisons. Instead, unsentenced inmates are required to sit idly for months in crowded city jails, contributing to a marked lessening of all inmates' respect for the criminal justice system and impairing the ability of that system to serve the purposes for which it was created.

The deleterious results of such delays are numerous, regardless of final sentencing outcome, and involve areas of concern that extend beyond the actual physical confines of the prisons themselves. With respect to inmates not ultimately destined for jail, the time spent awaiting sentence is doubly costly. When a defendant receives a suspended sentence or is released on probation, the waiting period constitutes needless imprisonment and imposes a large financial burden upon the city, which must spend a substantial amount to incarcerate each inmate.⁵ The city and state also incur the additional expense of supporting the prisoner's dependents who, deprived of his income, are often forced on the welfare rolls. For inmates ultimately sentenced to terms of imprisonment, the time served in detention counts toward the maximum sentence imposed by the court.⁶ However, since most do not serve out the maximum sentence, but are released on parole, the time served is often irrelevant. Further, detained inmates are not offered the type of work or the recreational and educational programs found in institutions for sentenced inmates. Thus, the delay results in further alienation of

4. On August 21, 1973, there were 6,387 inmates detained in New York City institutions awaiting disposition of their cases. N.Y.C. Dep't of Correction, Daily Inmate Census, Aug. 21, 1973. The New York City detention population is expected to rise as a result of enforcement of the state's stringent new drug law which went into effect September 1, 1973. The new law requires mandatory life sentences for persons convicted of certain drug offenses and substantially limits plea bargaining in such cases. See N.Y. CRIM. PRO. LAW § 220.10 (McKinney Supp. 1973). The New York City Department of Correction estimates that the detention population will increase by 2,500-3,000 individuals by September 1, 1974.

5. The average daily cost per inmate as estimated by the New York City Bureau of the Budget was \$17 in 1972. Interview with Paul Dickstein, Lead Planner for Justice, New York City Bureau of the Budget, in New York City, July 12, 1973.

6. N.Y. PENAL LAW § 70.30(3) (McKinney 1967).

those convicted of crimes, making rehabilitation correspondingly more difficult, and adds to the inhuman overcrowding in the city's detention facilities.

Although the "wrong"—the long delays between time of conviction and time of sentencing and the effects thereof—is thus readily apparent, little progress has been made in righting it. These delays in sentencing are directly attributable to the requirement of a pre-sentence reports on almost all defendants prior to sentencing. The volume of reports required together with present practices of compiling such reports combine to make such delays inevitable. Thus the utility of the pre-sentence report must be examined with the goal of proposing both short and long-term solutions to the difficulties this requirement poses.

Under New York law, a person found guilty of a felony cannot be sentenced until a pre-sentence report is submitted to the sentencing judge.⁷ While not mandatory in all misdemeanor convictions, the report is required before certain enumerated sentences may be imposed, and may be requested by the judge in all other cases at his discretion.⁸ Although sentencing must await receipt of the required report, the statute provides that sentence must be pronounced without unreasonable delay.⁹ However, no court has as yet defined the line between reasonable and unreasonable delay.¹⁰

7. N.Y. CRIM. PRO. LAW § 390.20(1) (McKinney 1971) reads: "Requirement for felonies. In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation."

8. N.Y. CRIM. PRO. LAW § 391.20(2) (McKinney 1971) reads: "Requirement for misdemeanors. Where a person is convicted of a misdemeanor a pre-sentence report is not required, but the court may not pronounce any of the following sentences unless it has ordered a pre-sentence investigation of the defendant and has received a written report thereof: (a) A sentence of probation; (b) A reformatory or alternative local reformatory sentence of imprisonment; (c) A sentence of imprisonment for a term in excess of ninety days; (d) Consecutive sentences of imprisonment for terms aggregating more than ninety days."

9. N.Y. CRIM. PRO. LAW § 380.30(1) (McKinney 1971) reads: "In general. Sentence must be pronounced without unreasonable delay."

10. See, e.g., *People ex rel. Accurso v. McMann*, 23 App. Div. 2d 936, 259 N.Y.S.2d 198 (2d Dep't 1965) (a delay of three and a half months in pronouncing sentence did not divest the court of jurisdiction); *People v.*

Delays in the completion of pre-sentence reports are directly attributable to increases in the workload of the probation officers who prepare the reports.¹¹ The increased workload itself results from two principal causes: 1) a substantial rise in the number of felony arrests and convictions in the past three years¹² and 2) recent changes in the state's substantive and procedural law. These changes have placed added burdens on probation officers by increasing the categories of cases in which pre-sentence reports are required¹³ and by extending the mandatory periods of probation.¹⁴ These extensions,

Gibson, 39 App. Div. 2d 947, 333 N.Y.S.2d 104 (2d Dep't 1972) (delay of one year neither extremely long nor unreasonable where probation department demonstrated that it was overburdened with cases and understaffed). Compare *People ex rel. Weingard v. Casscles*, 40 App. Div. 2d 530, 333 N.Y.S.2d 973 (2d Dep't 1972) (19 month delay neither unreasonable nor a violation of defendant's right to a speedy trial) with *People ex rel. Harty v. Fay*, 10 N.Y.2d 374, 179 N.E.2d 483, 223 N.Y.S.2d 468 (1961) (court loses jurisdiction to sentence where sentence is deferred without justifiable cause for five and a half years after conviction).

11. Probation officers perform two separate functions: investigation and supervision. Pre-sentence investigations of supreme court (felony) cases are conducted by three separate probation departments, one in each of the New York City supreme court judicial districts. The first district includes Manhattan and the Bronx, the second district consists of Kings and Richmond, and the eleventh district covers Queens. Investigations of criminal court (misdemeanor) cases are conducted by the New York City Office of Probation. Effective Feb. 1, 1974, these four separate departments will be consolidated into one New York City Office of Probation.

12. Felony arrests rose from approximately 75,000 in 1969 to over 102,000 in 1971. In 1972, felony arrests dropped to 98,000; in the first six months of 1973, there were approximately 45,000 such arrests in New York City. There were 7,249 felony convictions in fiscal year 1969, and 12,841 felony convictions in fiscal year 1971. 1973 ADMIN. BD. OF THE JUDICIAL CONF. OF THE STATE OF N.Y. ANN. REP. [hereinafter cited as THE JUDICIAL CONFERENCE]. "In New York City . . . felony defendants get indicted at a rate of 25,000 a year, while the disposition of such cases runs only to 20,000. As of . . . January [1972] there was a backlog of 10,000 cases, and one quarter of those kept in jail wait more than six months before their cases are disposed of." *Time*, May 8, 1972, at 61. The increase in felony convictions alone has occasioned a concomitant twenty percent rise in pre-sentence investigations and reports.

13. N.Y. CRIM. PRO. LAW § 390.20 (McKinney 1971).

14. N.Y. PENAL LAW §§ 65.00(3)(a)-(d) (McKinney Supp. 1973). Under the revised law, there is a mandatory five-year period of probation for all

while not directly affecting the number of pre-sentence investigations required, did substantially increase the probation departments' overall workload, and correspondingly diminished the total manpower available for pre-sentence investigations.

Working within restrictive budgetary limitations, the probation departments have implemented various measures designed to counteract the effect of these statutory changes: staff has been increased,¹⁵ the size of the caseload has been frozen,¹⁶ and volunteers have been recruited to help process cases.¹⁷

sentences of probation after conviction of a felony, a three-year period for any misdemeanor carrying a possible prison term exceeding three months, and a one year period for any misdemeanor carrying a possible term of less than three months.

15. Staffing remains well below the level required to meet the maximum caseload standard promulgated by the State Department of Probation which is, at present, 132 pre-sentence investigations per year per probation officer in the Supreme Court Probation Departments and 385 cases per year per officer in the Office of Probation. 1972 N.Y.C. OFFICE OF PROBATION AND SUP. CT. PROBATION DEP'T ANN. REP. 3. It is suggested that staffing requirements should not be projected, as they are now, on the disproven assumption that the rise or fall in the level of one year's workload will continue unchanged into the following year. Instead the number of indictments filed should be the determining standard since this would have direct correlation to the pre-sentence caseloads several months later. For a study dealing with related administrative problems in the courts see Miller, *New York Group Produces 'Instant' Court Reforms*, 61 NAT'L CIVIC REV. 120 (1972).

16. See note 15 *supra*. The probation department has limited the growth of this caseload by petitioning the court frequently to exercise its discretionary power to discharge individuals from probation who have performed satisfactorily on probation for periods of more than one year. See N.Y. CRIM. PRO. LAW § 410.90 (McKinney 1971).

17. In August 1972, the Legal Advocate Program of the New York City Board of Correction instituted such a volunteer program by recruiting lawyers and law students to assist probation officers in the investigation and preparation of reports. A first group of fifteen volunteers worked on approximately fifty cases, gathering information on the defendants for ultimate inclusion in pre-sentence reports. On the same day that the volunteers began working, the Probation and Parole Officers' Association of Greater New York, Local 599, filed suit against the Board of Correction to restrain the volunteer effort as an unfair labor practice. This petition was subsequently dismissed. The volunteer program was suspended in September 1972 because the Department of Probation could not afford the super-

The most significant response occasioned by the Criminal Procedure Law's expansive pre-sentence report requirements, however, has been an alteration in the form of the pre-sentence report itself. The applicable statute defines the scope of the pre-sentence investigation and report in very broad terms.¹⁸ Although it lists specific areas of investigation, including the defendant's criminal history, education, employment, family, and economic status, the statute provides that the investigation may encompass any matter that the probation department or the court deems relevant to the issue of sentence.¹⁹ Traditionally the information generated by the investigation had been presented in the form of a long narrative case history. The preparation of this case history was found to be unduly time consuming. Faced with an increasing caseload, and in an effort to increase its output, the New York City Office of Probation adopted a greatly simplified short-form report for misdemeanor cases.²⁰ (Fig. 1)

visory time necessary to monitor the volunteers. *See* Morton v. New York City Bd. of Correction, No. 18933-1972 (Sup. Ct., dismissed Sept. 13, 1972).

18. N.Y. CRIM. PRO. LAW §§ 390.30(1), (2) (McKinney 1971) reads: "(1) The investigation. The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included. (2) Physical and mental examination. Whenever information is available with respect to the defendant's physical and mental condition, the pre-sentence investigation must include the gathering of such information. In the case of a felony or a Class A misdemeanor or in any case where a person under the age of twenty-one is convicted of a crime, the court may order that the defendant undergo a thorough physical or mental examination in a designated facility and may further order that the defendant remain in such facility for such purpose for a period not exceeding thirty days."

19. *Id.*

20. N.Y. CRIM. PRO. LAW § 390.30(4) (McKinney 1971) provides that the short-form report may be used where the conviction is of a misdemeanor. The Kings County Probation Department has also adopted a short-form report for cases in which a guilty plea to a misdemeanor is accepted by the court. Such cases account for 37 percent of all guilty pleas

It is not overly optimistic to suggest that the present aggravated delays can be alleviated in the short-run through such measures as have been taken.²¹ Yet, as long as the number of convictions continues to grow, these steps will not be adequate in dealing with the problem of post-conviction delays. Moreover, neither the steps already taken nor those which might be envisioned, confront the fundamental problem—whether the report itself is necessary. It is essential to determine what benefits, if any, accrue to the defendant and society from the pre-sentence investigation and report, and to decide whether such benefits warrant continuation of the present pre-sentence procedure in spite of its attendant problems.

Benefits of the Pre-Sentence Report

The goals of criminal law enforcement are generally ill-defined and contradictory. They include retribution, deterrence, isolation of offenders from society, and rehabilitation.²² It is for the sentencing

and verdicts in the supreme court of that county. However, the President's Commission on Law Enforcement and Administration of Justice has urged that short-form pre-sentence reports only be used as a temporary step when dictated by manpower and financial shortages. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE ON ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 19 (1967) [hereinafter cited as THE COURTS].

21. Implementation of the short-term measures described has significantly reduced the number of jailed defendants awaiting sentence. On September 15, 1972, 1,460 defendants waited in New York City jails for sentencing; as of August 17, 1973, that number had been reduced to 879. Jailed defendants awaiting sentence on September 15, 1972, numbered 1,379; the corresponding figure for August 17, 1973, was 736.

22. See THE COURTS, *supra* note 20, at 14; Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). In the early period of this country's history, prisons were used to house prisoners awaiting execution or some form of public punishment. Though the methods of punishment were varied—whipping, the stocks, the ducking stool—the dominant theory was that of retribution, with a certain element of deterrence inherent in the public aspect of the punishment. The concept of imprisonment as a form of punishment first took hold in the 18th century. Imprisonment was considered a humane development at that time, but was still based on a retributive rather than rehabilitative concept. It was not until the 19th century that the idea of reforming prisoners developed, and two separate reformatory patterns were established. The "Pennsylvania" approach, epitomized in the word "penitentiary," was rooted in the Quaker belief

judge, within statutory limits, to determine which goal should take precedence in a particular case.²³ In theory the pre-sentencing report, by individualizing the defendant and his case, assists the judge in assessing what the deterrent, retributive or rehabilitative effect on the defendant would be and thus helps him to select the appropriate sentence. Thus, pre-sentence investigations and reports should result in sentences that are advantageous to both the individual offender and society.²⁴ This justification for the pre-sentence report requirement of course assumes a smoothly functioning criminal adjudicative system where sentence is not determined until after the pre-sentence report has been received by the judge, and the sentence is tailored to the individual needs of the defendant within the limits set by law.

Assuming that it is to society's benefit to have as many offenders as possible released under supervision rather than imprisoned, the pre-sentence report is valuable in encouraging sentencing judges to assume the risks involved in granting probation rather than imprisonment.²⁵ Initially, a number of states required that a judge have

that criminals were corrupted by an evil society and could only be reformed by a complete removal from that society. Accordingly, inmates were placed alone in cells and denied any contact with the outside world or even with other prisoners. In such isolation the inmate could contemplate his misdeeds, repent of his corruption, and so be reformed. On the other hand, New York authorities believed that total isolation would ultimately lead to insanity rather than rehabilitation. To mitigate the isolating effect of individual cells they provided dining areas for the prisoners, although the rule of silence remained in force until well into this century. In addition, late in the 19th century, New York attempted to implement certain of the reform proposals first advanced in 1870 by the National Prison Association. This reform group stressed the need for instilling self-respect in prisoners and tried to shift the emphasis of punishment from retribution to rehabilitation. Facilities were built in Elmira and Great Meadow to house young first offenders. However, after the rash of prisons riots which took place during the 1920's, the emphasis in criminal law enforcement was again laid upon secure detention as an end in itself, while the theorists continued to pledge support to the goal of rehabilitation. *See generally* ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972); R. CLARK, CRIME IN AMERICA (1970); G. LEINWAND, PRISONS (1972).

23. *See* THE COURTS, *supra* note 20, at 14.

24. S. RUBIN, THE LAW OF CRIMINAL CORRECTION 88 (1963).

25. A probationary sentence maintains the person in the society where

access to a pre-sentence investigation and report before a sentence of probation could be imposed.²⁶ Since the 1930's, the use of the report has expanded to include various other sentences. The President's Commission on Law Enforcement and Administration of Justice found that the general absence of pre-sentence reports for misdemeanants contributed to the unwillingness of judges in many cases to consider alternatives to imprisonment and was a major cause of irrational sentencing.²⁷

The New York Experience

Section 65.00 of the New York Penal Law requires that certain conditions must be present before a sentence of probation may be granted.²⁸ Since only a minimum amount of information relevant to

he must live and function. By so doing, the possibility for normal social development is not interrupted by the traumatic break which institutionalization causes. "If we have learned anything about the correctional process, it is that many of the people sent to prisons would have had better prospects of being restored to useful life if they were placed on probation under close professional supervision, rather than confined. . . . [A] probationer can be given close supervision for less than one-tenth of what it costs to keep the same person in prison." Burger, *The Judiciary*, 38 VITAL SPEECHES OF THE DAY 740, 742 (1972). "[T]he fact that four out of five prison inmates are recidivists demonstrates the utter failure of the present structure to achieve any correctional or rehabilitative potential [T]he startling increase in youthful criminality (while serious crime was increasing dramatically during the 1960's, arrests of persons under 18 years of age increased 90 percent, 15-17 year-olds being subject to more arrests than any other age group) . . . [coupled with] the present rate of recidivism mandates a more vigorous attempt to prevent the initial involvement of individuals in what is now a never-ending maze of criminality and governmental retaliation." Clark, *The Courts, the Police, and the Community*, 46 S. CAL. L. REV. 1, 6, 9 (1972).

26. See RUBIN, *supra* note 24, at 76-77.

27. See THE COURTS, *supra* note 20, at 78-79. In the federal system, for example, the average length of prison sentences for narcotics violations in 1965 was 83 months in the tenth circuit, but only 44 months in the third circuit. *Id.* at 23-24. For a discussion of disparity in sentencing, see Frankel, *supra* note 22.

28. N.Y. PENAL LAW § 65.00(1) (McKinney 1967) reads: "1. Criteria. The court may sentence a person to a period of probation upon conviction of any crime other than a class A felony, if the court, having regard to the nature and circumstances of the crime and to the history, character and

the issue of whether these conditions are met will be forthcoming in a trial and even less will be disclosed if the defendant pleads guilty, the information developed in the pre-sentence report is essential.²⁹ In addition, the report provides judges with independent verification of whatever background information has been provided by the defense.

In May 1971, a committee appointed by the Presiding Justices of the Appellate Divisions, First and Second Judicial Departments, surveyed New York judges' attitudes toward pre-sentencing reports.³⁰ The Committee asked 131 judges to rank each of 17 elements of the pre-sentence report as either "essential," "desirable but not essential," or "of little or no value."³¹ Each response commented on the 17 categories of pre-sentence information, and, as Table I indicates, almost every item of information was considered essential by an overwhelming majority of judges. On the basis of the survey, the Committee concluded that: "the justices . . . having failed to conclusively identify any items as being of "little or no value," all should be retained. However, it was also agreed that "a greater portion of the time expended . . . should be spent on [those] items considered . . . to be 'Essential'."³² Assuming the survey accurately reflects judicial attitudes,³³ the results demonstrate that judges

condition of the defendant is of the opinion that: (a) Institutional confinement of the defendant is not necessary for the protection of the public; (b) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and (c) Such disposition is not inconsistent with the ends of justice."

29. MODEL PENAL CODE § 7.07, Comment 1 (Tent. Draft No. 2, 1954) wherein it is indicated that only information as to nature of crime will be brought out at trial; information regarding the defendant's background will not.

30. INTERDEPARTMENTAL COMM. ON PROBATION REPORTS, OF THE APP. DIV., 1ST & 2D DEP'TS 4 (1971).

31. Of the 65 supreme court justices and the 66 criminal court judges polled, all responded.

32. INTERDEPARTMENTAL COMM. REPORTS, *supra* note 30, at 4.

33. The question might be asked how many judges, in responding to a questionnaire prepared under the auspices of the Appellate Division, would state that they did not consider the information provided in the pre-sentence report to be essential since to do so might be taken as an indication that they were not giving full and careful consideration to the imposition of sentences.

place considerable value on pre-sentence reports. This conclusion presumably would include the more specific presumption that judges considering sentences of probation rely substantially upon pre-sentence reports. Sentences of probation have been imposed more frequently when the judge awaits receipt of the pre-sentence report than when the judge promises such a disposition during plea bargaining. Such was found to be the case by a subsequent study showing that probation is granted in 22.2 percent more cases when sentencing follows receipt of the report rather than when sentence is imposed without the report.³⁴

The assertion that pre-sentence reports are responsible for keeping defendants out of prison by making probation a more appropriate alternative to judges is, however, extremely difficult to prove. As yet, no in-depth study has been made of sentencing patterns in the criminal courts before and after the expanded use of these reports mandated by the new Criminal Procedure Law.³⁵ However, the percentage of sentenced defendants placed on probation by the criminal court has increased significantly since the law took effect on September 1, 1971.³⁶ While this change in sentencing patterns might well be explained by other factors, it would seem to confirm some of the conclusions about the usefulness of the reports drawn by the Vera Institute of Justice during its Bronx Sentencing Project.³⁷ That study, which predated the adoption of the Criminal Procedure Law, was a response to the recommendations of the President's Commission on Law Enforcement and Administration of Justice.³⁸ It was designed to study the usefulness of pre-sentence reports in the sentencing of misdemeanants.³⁹ A special short-form report was designed for misdemeanor offenders. It included a sentencing

34. See WITZTUM REPORT, *supra* note 1.

35. See notes 7-8 *supra* and accompanying text.

36. In August 1971, 571 individuals were placed on probation, comprising 6.8 percent of all those sentenced by the criminal court in that month. N.Y.C. OFFICE OF PROBATION MON. REP. (Aug. 1971). In January 1972, these figures increased to 700 and 9.3 percent, respectively. *Id.* (Jan. 1972).

37. J. LIEBERMAN, A. SCHAFER & J. MARTIN, THE BRONX SENTENCING PROJECT OF THE VERA INSTITUTE OF JUSTICE: AN EXPERIMENT IN THE USE OF SHORT-FORM PRE-SENTENCE REPORTS FOR ADULT MISDEMEANANTS (1971) [hereinafter cited as SENTENCING REPORT].

38. See THE COURTS, *supra* note 20, at 18-19.

39. See SENTENCING REPORT, *supra* note 37, at 3.

recommendation which was made available to the court prior to sentencing in those cases where no report had previously been requested by the court.⁴⁰ Some observations on the effect of the report can be made, especially with regard to the imposition of probationary sentencing for legal aid clients. (Table II) In cases where no report was ordered, legal aid clients were sentenced to prison at a rate 57 percent greater than that of clients of private attorneys. In "Vera Report" cases, 12 percent fewer legal aid clients received prison sentences, and as a result, the gap between legal aid clients and clients of private attorneys sentenced to prison was narrowed to 34 percent.⁴¹

The results of the Vera pre-sentencing project strongly imply that the pre-sentence investigation may help to correct inequities built into the criminal justice system. However, generalizations drawn from the results of the project are suspect since the sentencing project undertook an active referral role⁴² and was, in this respect, totally different from the official pre-sentence investigations. In many cases, this role led the project to request a six-month sentencing delay so that the convicted defendant could be placed in a supervised release program. It is thus difficult to conclude whether the project's impact on sentencing patterns is a result of the pre-sentence report or the nature of the supervised release aspect of the project which differs from that of the probation department.⁴³

Pre-Sentence Reports and Guilty Pleas

While results in the foregoing studies reasonably support the theory that pre-sentence investigations and reports may result in more effective sentences, the pre-sentence report must be evaluated within the context of the day-to-day operations of the city's criminal

40. *Id.* at 3a. No direct comparison was made between the sentence imposed in cases where a "Vera Report" was prepared and those in which there was no report at all.

41. *Id.* at 62.

42. This active referral role consisted of the project's developing ties with community social service agencies and private employers who could provide jobs. Therefore, when Vera completed its sentencing investigation, it was able to refer the defendant to a job and to social service help and could thus inform the court that, if not sentenced to jail, the defendant had specific opportunities available to him.

43. SENTENCING REPORT, *supra* note 37, at 25-31.

courts, where more than 95 percent of all findings of guilt are the result of pleas by the defendant.⁴⁴

Most discussions of the need for pre-sentence reports note that even with a trial very little of the information needed for proper sentencing will be presented in court.⁴⁵ Where there is a guilty plea, it is inevitable that little verified information relevant to sentencing will be produced.⁴⁶ Thus, the argument has been made that in cases resulting in pleas of guilty, the pre-sentence report assumes even greater importance in the sentencing process. However, this ignores the fact that guilty pleas are usually obtained by a promise of a reduced charge, with a correspondingly lower maximum sentence.⁴⁷ It must therefore be asked whether the pre-sentence report can influence the sentence imposed if that sentence has already been agreed upon before the investigation is begun. If the pre-sentence report has in fact little or no effect on the actual sentence imposed, the rationale for the whole system of pre-sentence investigations is obviated.

For example, although a 79 percent correlation between sentence recommendations and final dispositions (actual sentences) exists in the Kings County (Brooklyn) Probation Department, a cause and effect relationship is difficult to identify.⁴⁸ Almost all of these reports are prepared in cases where the defendant pleaded guilty to a charge other than that averred in the indictment. In many cases the probation department is aware of the promised sentence before beginning its investigation. The correlation between the sentence recommendation of the probation department and final disposition may represent no more than the probation department's acceptance of the bargained-for sentence.

In order to gain a more definite idea of the relationship between the sentence bargained for and the sentence recommended, the

44. N.Y. Times, Dec. 4, 1972, at 41, col. 6. For a comparison with the federal courts see Clark, *supra* note 25, at 5 wherein it is stated that: "[A]pproximately 60 percent of all criminal prosecutions result in a guilty plea, of the remainder only one third are convicted and less than 15 percent of those are reversed." (footnotes omitted).

45. See note 29 *supra* and accompanying text.

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

47. Zimroth, *Speedy Trials: What They Can and Cannot Accomplish*, N.Y. Times, Feb. 6, 1972, § 6 (Magazine), at 4.

48. See WITZTUM REPORT, *supra* note 1, at 24.

Witztum study⁴⁹ tested the following hypotheses: 1) when a sentence promise had been made in return for a guilty plea, the pre-sentence report would have little or no effect on the actual sentence imposed; and 2) when the sentence promise was known to the probation officer before the report was completed, that knowledge would have a direct, although perhaps subtle, effect on the officer's recommendation, making his agreement with the sentence promised more likely.⁵⁰

The study confirmed both hypotheses. In 209 cases where the sentence promise was made prior to the report's writing, the probation recommendation clearly influenced the final sentence in only 7.7 percent of the cases.⁵¹ In those cases, either the sentence imposed followed the recommendation of the pre-sentence report, rather than the sentence promised, or the guilty plea was withdrawn after the pre-sentence report recommended a harsher sentence than had originally been promised. In addition, where the sentence promise was known, the probation department's recommendation and the actual sentence imposed agreed in 14.8 percent more cases than where a promise had not been made.⁵²

The report concludes that in the Kings County Supreme Court, the pre-sentence report is not being used for the purposes originally intended.⁵³ Instead it suggests:

1. Where there is an understanding as to sentence as a part of the plea bargaining process, the judge will honor that understanding. . . .
2. As a general rule the judge does not make significant use of the pre-sentence report when the plea bargain includes a sentence agreement. . . .
3. Where an agreement as to sentence exists, the Probation officers will tend to make an identical recommendation in the pre-sentence report, to support the judicial pre-disposition to honor the agreement. . . .
4. Where a judge is considering release he will seek to avoid making a commitment as to sentence. . . .
5. The Judges, in plea bargained cases, will primarily use the pre-sentence reports to guard against mistaken decisions of release.⁵⁴

The report concluded:

The major findings suggest that, at least in Kings County, the value of the

49. *Id.*

50. *Id.* at 15-17.

51. *Id.* at 18.

52. *Id.* at 18-19.

53. *Id.* at 2-3.

54. *Id.* at 27-29.

pre-sentence report as a tool for effective sentencing is limited. In all but a few cases, the pre-sentence report seems to be largely superfluous, at best verifying the judge's perceptions formed at the time the guilty plea is taken. The City is bearing a major expense for little benefit.⁵⁵

The New York State Joint Legislative Committee on Crime, its Causes, Control, and Effect on Society in its 1971 report⁵⁶ asserts very much the same conclusions:

Another reason for condemnation of the practice of sentence commitments by a judge in advance of the entry of a plea is its nullification of a very important component in the sentencing process, the probation report The Committee's inquiry has disclosed that once the sentence commitment has been made by a judge the probation report is subtly tailored to justify the sentence. The original purpose of the probation report is thus distorted to fit the exigency of having to keep the dispositions flowing.⁵⁷

The Committee also found that the distortion introduced by the subtle tailoring of the pre-sentence report continues into the correction process itself, affecting the treatment accorded an inmate during the course of his prison term.⁵⁸

The report is used by a correctional facility as an initial source of information as to the inmate's background and personality and as a basis upon which decisions regarding job placement and program assignment are made. It is entirely possible that it could be the difference between assignment to a minimum, medium, or maximum security institution. The report is also reviewed by the parole board in connection with its decision when to release the inmate. Therefore as an important first step in the prison rehabilitative process and in the determination of parole eligibility, it is vital that the pre-sentence report be fairly and accurately prepared.

The foregoing discussion raises serious questions as to the overall benefit of mandatory pre-sentence investigation and reports in the majority of criminal cases in which such reports are presently required. While in theory the pre-sentence reports have obvious bene-

55. *Id.* at 29.

56. NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON CRIME, ITS CAUSES, CONTROL AND EFFECT ON SOCIETY (1971) [hereinafter cited as HUGHES COMMITTEE REPORT].

57. *Id.* at 32. A case which recognized the danger of misinformation created by tailored pre-sentence reports is *Townsend v. Burke*, 334 U.S. 736 (1948).

58. HUGHES COMMITTEE REPORT, *supra* note 56, at 32.

fits for both the defendant and society in general, the reality of the criminal court system may outweigh such theoretical benefits. If 95 percent of all convictions are gained through guilty pleas, and if in over half of these cases the sentence is determined prior to any investigation so that the report acts merely to confirm the already negotiated sentence, the city is expending a great deal of money for rubber stamps. If reports, prepared with an intention of conforming to negotiated sentences, can determine the rehabilitative program chosen for a prison inmate, has either the defendant or society gained from the existence of the report? In light of these questions, it is difficult to find clear justification for the legislature's action increasing the categories of cases in which reports are required, especially in light of the resultant delays in adjudication and the overcrowding of detention facilities. In practice, therefore, the utility of the pre-sentence report sharply contrasts with its theoretical benefits envisioned by the legislature and ascribed to by the judiciary.⁵⁹

Long-Range Solutions

The short-term solutions discussed earlier⁶⁰ can reduce the delays that now exist, but they do not address the problem of continued growth in caseloads. More importantly, the short-term solutions only allow for better administration of existing law and court procedures—and do nothing to answer the serious questions raised concerning the usefulness of the reports themselves. The present pre-sentence process can only be evaluated in the context of the entire criminal justice system, of which it is an integral part.⁶¹ Specifically, the effect of plea bargaining on the utility of pre-sentence reports must be considered.

The state's criminal statutes postulate an adjudicative system where the determination of guilt or innocence is based solely on proof that the particular defendant did or did not commit a specific crime. The defendant is presumed innocent until proven guilty and the determination of guilt or innocence is made at trial by jury. All of the procedural and substantive rules developed by courts and legislatures are premised on the theory of a fully functioning adjudicative system.

59. See notes 23-24 and 28-34 *supra* and accompanying text.

60. See notes 15-17 *supra* and accompanying text.

61. N.Y. Times, Oct. 2, 1972, at 40, col. 1.

cative system and, therefore, present pre-sentence procedures reflect this theory. In fact, what exists is a dual system—the theory of the laws and the reality of criminal case processing. The law does not reflect the reality of a system, where less than 10 percent of all felony defendants have the benefit of trials; where for many of the 95 percent who plead guilty⁶² the charge to which they plead is meaningless and their only concern is in bargaining for a reduced sentence;⁶³ where the judge takes part in the bargaining and then insists that the defendant swear that he is actually guilty of the charge, which by this time is any crime carrying the agreed-upon sentence; where the defendant knows that if he insists on a trial and is convicted, the sentence will be much heavier than that offered in return for a guilty plea;⁶⁴ where, in fact, guilt, innocence, the defendant, and the crime itself are of little importance—where “dispositions” are the goal.⁶⁵

To date, attempts to rationalize or reform the pre-sentence process have accepted the dichotomy between the criminal law as printed and practiced. Chief Justice Burger’s sound advice that every piece of legislation creating new cases be accompanied by a court impact statement to determine how many more judges and supporting personnel will be needed to handle the new cases⁶⁶ has

62. 95 percent of all those who are ultimately convicted plead guilty.

63. Johnson, *Sentencing in the Criminal District Courts*, 9 HOUSTON L. REV. 944 (1972). “You don’t get a plea without a bargain and part of the bargain is the sentence.” N.Y. Times, Sept. 26, 1972, at 1, col. 2.

64. Comment, *The Influence of the Defendant’s Plea on the Judicial Determination of Sentence*, 66 YALE L.J. 204 (1965).

65. Another basic flaw in the plea bargaining system is that “each individual trial prosecutor is free to apply plea bargaining policies he considers appropriate and to change these policies from case to case.” White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 449 (1971). To limit the use of discretion, district attorneys could provide prosecutors with fairly detailed guidelines of the criteria to be applied.

66. See Burger, *supra* note 25, at 741. The Court in *Brady v. United States*, 397 U.S. at 753 (1970) recognized that plea bargaining is essential to the effective utilization of “scarce judicial and prosecutorial resources.” However, Chief Judge Fuld, dissenting in *People v. Ganci*, 27 N.Y.2d 418, 431, 267 N.E.2d 484, 494, 318 N.Y.S.2d 484, 494, *cert. denied*, 402 U.S. 927 (1971) stated “[I]t is the responsibility of the State, or of its subdivisions, to do what is necessary—by furnishing funds, facilities and personnel—to

been ignored by state legislatures which enact laws without any thought of their effect on the system as a whole. The New York Criminal Procedure Law which merely increases the categories of cases requiring pre-sentence reports is an example of such legislation.⁶⁷ It fails to deal with the fact that over the past twenty years increasing caseloads have already imposed a tremendous burden on the entire criminal justice system and that plea-bargaining, the system's major response to the caseload increase, is the primary tool for disposing of criminal cases. Under such circumstances, the efficacy of conducting any such pre-sentence investigations after the sentence has been promised is questionable at best.⁶⁸

Several suggestions for dealing with these problems have been advanced. One would do away with the requirement for a pre-sentence report in all cases where there has been a plea of guilty. This proposal leaves the sentencing judge without the report and, since its availability to him has been found to be of significance only with regard to his possible imposition of a sentence of probation,⁶⁹ we might expect the frequency of such sentences to decrease. A result of a reduction in the number of probation sentences imposed is an increase in the prison population together with the individual and societal ills attendant upon incarceration that would have been eliminated by a sentence of probation.

Another suggestion has been legislation repealing the requirement for a pre-sentence investigation when there has been a sentence promised prior to a guilty plea. Such a step could result in immediate sentencing in the cases where the pre-sentence report is now

assure the effective operation of the judicial system, and that burden may not be shifted to the defendant."

67. N.Y. CRIM. PRO. LAW § 390.20, Practice Commentary (McKinney 1971) cites the need for the "fullest possible information" before imposing sentence as the rationale for the mandatory pre-sentence report. No mention is made of the effect of plea bargaining.

68. Another detrimental effect of piecemeal legislation is that its passage acts to postpone further consideration of the problem addressed. The legislature, having considered the problem once, moves on to other issues, and is reluctant to reconsider legislation too quickly after its adoption.

69. See notes 27-34 *supra* and accompanying text. It should also be noted that the efficacy of the pre-sentence report is in question only when there has been agreement on a sentence before the report is written. See WITZTUM REPORT, *supra* note 1, at 2-3.

nothing but a formality.⁷⁰ Such legislation would constitute both an admission that judges do involve themselves in plea bargaining,⁷¹ and an acceptance of present plea-bargaining practices. It therefore should not be adopted without an exhaustive study to determine what role a judge should properly play in the plea-bargaining process.⁷² Several of these difficult issues were discussed in the Hughes Committee Report:

Most legal commentators declare [sentence commitment in advance of plea] to be an undesirable practice which raises constitutional questions involving due process. . . . There are a number of reasons for keeping the trial or conference judge aloof from the plea-bargaining process. As enumerated by the ABA, they are: 1) judicial participation in the discussion can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; 2) judicial participation in the discussion makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; 3) judicial participation to the extent of promising a certain sentence is *inconsistent with the theory behind the use of the pre-sentence investigations report*; and 4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent. . . .⁷³

It seems clear that any reform legislation must confront the serious question of whether conviction by negotiation should be substituted for trial by jury. Problems created by the rising crime rate, soaring caseloads, increasing backlogs, and the need for faster dispositions cannot be solved in the long run by piecemeal legislation directed at the pre-sentence report requirement or any other isolated trouble spot. For too long the legislatures, courts, and other criminal justice agencies have used just such sporadic administrative, management, and legislative reforms as holding actions to avoid confronting the breakdown of the system. Additional fragmented legislation can only serve to take the actual system further away from the theory of criminal justice by adjudication which the common law has developed and further alienate large segments of the population from the belief that justice exists in the society. What is needed is a decision for a working system, implementing the

70. WITZTUM REPORT, *supra* note 1, at 30.

71. N.Y. CRIM. PRO. LAW § 380.20 (McKinney 1971) reads: "Sentence required. The court must pronounce sentence in every case where a conviction is entered. . . ."

72. See HUGHES COMMITTEE REPORT, *supra* note 56, at 29.

73. *Id.* (emphasis added).

lawbook theory of criminal justice or effecting a basic change in this theory based on a determination that the present reality of the courts is the best system that can be developed.

Interim Solutions

It would hardly be desirable, however, for the pre-sentence process to be left as is until the desired legislative reevaluation takes place. Relatively minor steps might be taken in the interim to alleviate the problem of pre-sentence delays.

One possible means of eliminating the delays and the circularity involved in plea bargaining is to permit defendants who have already been promised a specific sentence to waive the report and be sentenced immediately. In considering the issue of waiver, however, two distinct questions must be dealt with: 1) is waiver permissible under existing law? and 2) if it is, from which interested parties must consent be obtained in order to effectuate a valid waiver?

Presently New York case law would seem to indicate that attainment of an effective waiver without some statutory changes is unlikely.⁷⁴ However, should the legislature decree that a waiver of the

74. N.Y. CRIM. PRO. LAW § 390.20 (McKinney 1971) requires the preparation of pre-sentence reports in all felony cases, but is silent on the matter of waiver. It is phrased in mandatory rather than discretionary terms. Of course, the fact that a "court must order a pre-sentence investigation" does not, in and of itself, preclude the possibility of a waiver. Rather, it must be ascertained whether the pre-sentence report is a "right" designed so exclusively for the benefit of a given group of people that they can waive the right if they desire or it is, instead, a right imbued, by way either of constitution or of statute, with a degree of overall public interest that precludes waiver. When there has been a constitutional basis for the existence of the right sought to be waived, New York has not hesitated in disregarding the wishes of the individual intended to benefit from the procedural safeguard and has rejected the purported waivers claiming such rejection to be required by the public interest. Thus in *People ex rel. Battista v. Christian*, 249 N.Y. 314, 164 N.E. 111 (1928), it was held: 1) that a New York statute under which a defendant was given the opportunity to waive the state constitutional requirement for indictment by grand jury was a nullity and 2) that the defendant could not waive the right to indictment by grand jury. A public right, the exercise of which is basic to the establishment of jurisdiction cannot be waived. Criminal trials involve public wrongs and rights in which the state has an interest. The court reasoned that consent cannot grant jurisdiction or change the mode of the

pre-sentence report is permissible (assuming *arguendo*, that no constitutionally protected public interest in pre-sentence reports nullifies such a legislative determination),⁷⁵ then the second concern becomes important—if waiver is to be by consent, whose consent is required?

As a minimum, a clear and unequivocal waiver by the defendant would seem a necessity, for if there were any interest intended to be protected, it would presumably be his. In cases where no promise of a sentence has been made or where the defendant feels probation more likely if the information a pre-sentence report might include were known to the judge, the defendant would naturally not consent to waiver.

trial. *Id.* at 318, 164 N.E. at 112. This view was reaffirmed in *Simonson v. Cahn*, 27 N.Y.2d 1, 261 N.E.2d 246, 313 N.Y.S.2d 97 (1970) where, in sustaining an Article 78 (mandamus) proceeding, the court repeated the message of *Battista* that “[W]e are not dealing with policy expediency or convenience . . . but with fundamental rights fixed by the Constitution.” *Id.* at 3, 261 N.E.2d at 247, 313 N.Y.S.2d at 99. The requirement for a pre-sentence report, however, unlike that for a grand jury indictment, finds its source in state statute rather than the state constitution. Thus, a pre-sentence report is arguably not a “fundamental” right fixed by the constitution. However, in two recent cases, New York courts have held that the public interest which precludes the defendant’s right to waiver extends beyond constitutionally prescribed procedures to those established by statute. Thus, in *People v. Lopez*, 28 N.Y.2d 148, 269 N.E.2d 28, 320 N.Y.S.2d 235 (1971), the Court of Appeals found that the record did not support the contention that defendant pursuant to plea bargain had waived application of N.Y. PENAL LAW § 70.25(3) (McKinney 1967) which provides that, where consecutive definite sentences of imprisonment are imposed for offenses which are committed as parts of a single transaction, the aggregate of the terms of such sentences shall not exceed one year. The court held that, in any event, the defendant could not waive application of the statute even if he had so wished. 28 N.Y.2d at 151-52, 269 N.E.2d at 29-30, 320 N.Y.S.2d at 237-38. Similarly, in *People v. Rosser*, 36 App. Div. 2d 35, 318 N.Y.S.2d 533 (3d Dep’t 1971) the appellate division rather summarily held that a defendant could not, by consent to sentencing, waive the application of N.Y. MENTAL HYGIENE LAW § 207 (McKinney 1971), which requires a mental and physical examination for all who appear to be addicted to drugs. 36 App. Div. 2d at 36, 318 N.Y.S.2d at 535. Together, these cases undercut any attempt to distinguish the waiver of pre-sentence reports on the grounds either that it is statutorily, rather than constitutionally, based or that it does not effect jurisdiction or the mode of trial.

75. See the discussion of *Battista*, *supra* note 74.

The consent of the sentencing judge would also be relevant and most probably required, for he would stand as the guardian charged with insuring the imposition of an appropriate and most likely to be rehabilitative sentence. As the Criminal Procedure Law currently requires the probation department to make available a copy of the pre-sentence report to any New York court or correctional facility into whose jurisdiction or care the defendant may come,⁷⁶ it is likely that consent from these specified individuals might also be necessary.⁷⁷ Parole officials represent yet another category of potential "consenters," since in some situations, the current law requires that they too have the benefit of the report.⁷⁸

Obtaining the consent of all these parties could be quite difficult and would assumedly be time consuming. The consent of some—the corrections officials, judges (other than the one imposing sentence), and parole officials might, with appropriate statutory changes, be deemed unnecessary⁷⁹ or procedures might be worked out to minimize administrative delays in obtaining those consents still deemed to be necessary.⁸⁰ However, in view of the past and present case law,⁸¹ the prospects for evading by way of waiver the current pre-

76. N.Y. CRIM. PRO. LAW §§ 390.50(2), 390.60(1) (McKinney 1971).

77. The difficulty of identifying such individuals in the relevant categories prior to sentencing is readily apparent. Any legislative revision might include a requirement that a report is to be made available when either the defendant or the sentencing judge feels one to be required and thus does not consent to waiver. The sentencing judge would, for the most part, assume the burden of determining when the information that a pre-sentence report could provide would be relevant, not only to his own sentencing considerations but to future judicial or correctional concerns as well. Since the defendant, by refusing consent to waiver, would also, via the report, be afforded a chance to present to correctional officials information he considered relevant, his rights in this respect should be adequately safeguarded.

78. N.Y. CRIM. PRO. LAW § 390.50(2) (McKinney 1971).

79. See note 77 *supra*. Any interest of the parole officer (or any public interest he represented) could, as in the case of the correction official, presumably be protected by the sentencing judge.

80. Thus, a sentencing judge could as part of his preliminary consideration of a defendant, evaluate his sentencing options with respect to where the defendant might eventually be incarcerated, according to the crime charged, or existing inmate population criteria, or whatever, and thus identify a particular correction official as one empowered to give consent.

81. See note 74 *supra*.

sentence report requirements do not appear especially sanguine, unless and until there is a legislative resolution.

A more promising alternative for eliminating post-conviction delays is to begin the pre-sentence investigation at an earlier stage of the proceedings. If the pre-sentence investigation is begun well before disposition of a case is recorded, the report can be submitted promptly after a finding of guilt. The President's Commission on Law Enforcement and Administration of Justice urged that this procedure be adopted,⁸² although the Commission favored the change primarily as a means of rationalizing the criminal justice process rather than as a method for alleviating delays. The Commission's recommendation attempted to deal with the problems of plea bargaining. Accepting the necessity of plea bargaining, the Commission regarded the early preparation of reports as a means of insuring that an informed decision in line with the needs of the defendant can be made by the prosecutor and the judge.⁸³ The Commission reasoned as follows:

[Plea] bargaining takes place at a stage when the parties' knowledge of their own and each other's cases is likely to be fragmentary. . . . Thus, the prosecutor's decision is usually made without the benefit of information regarding the circumstances of the offense, the background and the character of the defendant, and other factors necessary for sound dispositional decisions.⁸⁴

. . . .
The prosecutor needs to know enough about the offender to determine whether he should be diverted from the criminal track. Greater involvement of court probation departments and the availability of probation officers for consultation with the prosecutor and defense counsel at this stage of the proceedings are clearly advisable. . . .⁸⁵

The Commission argued that as much background information as possible about the defendant should be used in determining the charge to which the defendant will be allowed to plead guilty:

[A] plea bargain should be founded on the kind of information available to

82. See *THE COURTS*, *supra* note 20, at 7.

83. *Id.* at 7-8.

84. *Id.* at 7.

85. *Id.* at 11. Prosecutors and defenders should assume more responsibility for the state of the criminal justice system. Few come to trial prepared and appellate briefs and arguments are often pathetic. The result is that defense for indigents who depend on the state is second rate and in most cases ineffective. See Clark, *supra* note 25, at 5-6. See also, N.Y.C. Bd. of Correction: *LEGAL REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS IN NEW YORK CITY* (1973).

both parties that is gathered by probation departments for pre-sentence reports [P]rocedures should be adopted which would enable the parties to call upon the probation office . . . to obtain what is in effect a pre-sentence investigation for use in the negotiation discussion.⁸⁶

The Commission's assumption was that the information contained in the pre-sentence report should be influential in determining the crime with which the defendant is charged, as well as the sentence to be offered. The Commission thus advocated a basic change in the adjudicative system, going far beyond present plea-bargaining practices. Without endorsing the Commission's view of what the plea-bargaining system should be, its recommendation is tendered as one means of achieving the limited goal of reducing needless pre-sentence delay.

The efficacy of adopting this approach is questionable. On the one hand, the idea of starting the investigation earlier allows sentencing immediately after a finding of guilt. On the other hand, the pre-sentence report should not be used as the basis for determining the crime with which a defendant will be charged. Such a use is contra to a system of criminal justice based on the theory that an individual is punished only when found to have committed a particular act defined by law as criminal. Indeed, under present evidentiary concepts, a defendant's prior social history is irrelevant to such a finding. Therefore, as long as there exists the desire to pay lip-service to the present fanciful concept of the operational aspects of our system of criminal justice, then pre-sentence reports, coming by definition after a finding of guilty, cannot *a priori* be used to delineate the crime itself.

The proposal to begin the pre-sentence investigation earlier in the proceedings was considered by the American Bar Association in its *Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures*.⁸⁷ That report recommends that pre-sentence investigations not be undertaken until after a finding of guilt, unless the defendant had consented and adequate safeguards were instituted against the possibility of prejudicing the court.⁸⁸ The ABA objected to conducting an early

86. See THE COURTS, *supra* note 20, at 12.

87. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 4.2 (Approved Draft 1968).

88. *Id.* at § 4.2(b), Commentary.

investigation on the grounds that it might constitute an invasion of the defendant's right to privacy⁸⁹ as well as his right against self incrimination.⁹⁰ The ABA was also of the opinion that the report might prejudice the court before guilt was determined⁹¹ and that it would be economically disadvantageous to compile a report that might never be used.⁹²

The problem of invasion of privacy, however, could be avoided by requiring that no investigation be instituted until the defendant had given his informed consent. As to the possibility of prejudicing the court, a rule could be adopted whereby the report would remain in the hands of the probation department until it was needed by the court for sentencing. Regarding the possible increase in the number of investigations required, it should be noted that in the past three years approximately 87 percent of defendants indicted on felony charges were ultimately convicted.⁹³ Thus, if this pattern continues in the future, no more than 13 percent of the investigations initiated would not be used.⁹⁴

Vermont⁹⁵ presently allows pre-sentence investigations to begin prior to a determination of guilt. In addition, many of the federal probation offices begin pre-sentence investigations before guilt is established,⁹⁶ although not until the defense has indicated an intention to plead guilty and the defendant is fully informed of his rights. The federal judge does not see the report until after a verdict or plea of guilty has been entered.⁹⁷

The earlier involvement of the probation department in sentencing would complement the city's commitment to the establishment of a pre-trial services agency, one charged with the responsibility of easing the chronic overcrowding in the city's detention facilities by

89. *Id.* at § 4.2(a), Commentary.

90. *Id.*

91. *Id.*

92. *Id.*

93. See THE JUDICIAL CONFERENCE, *supra* note 12, at Table 12.

94. A short statistical study of those cases dismissed in supreme court should disclose a stage in the proceedings after which very few dismissals would occur. Investigations could then be instituted only after this step had been reached; such a step would further reduce extra workload.

95. VT. STAT. ANN. tit. 28, § 204 (1973).

96. See RUBIN, *supra* note 24, at 80.

97. *Id.*

developing and sponsoring alternatives to money bail.⁹⁸ By insuring supervision and liaison with community service agencies, the pre-trial services agency will attempt to secure release for those defendants not presently released because of the court's determination of the inappropriateness of an unsupervised release on recognizance (pre-trial parole). In addition to serving supervisory, referral, and notification functions, the agency would have to develop and verify a comprehensive background profile on each defendant.⁹⁹ This profile could be made the basis of the pre-sentence report. Further, with the pre-trial services agency in operation, most of the investigative work would be done in the preliminary stages of each case. An earlier pre-sentence investigation should substantially eliminate the delays which now occur between conviction and sentencing.

Beginning the pre-sentence investigation before conviction is advocated here solely as a device for reducing the pre-sentence delays which have so damaged the city's jail system. No legislation would be required for the implementation of this recommendation. The rights of the unconvicted defendant can be protected by rules requiring that the pre-sentence report not be released to the judge until after conviction, as is done in the federal system. Any additional costs incurred by the increase in the number of investigations initiated could be minimized by cooperation between probation departments and the pre-trial services agency, and be offset by reduced pre-sentence delays that would result in an easing of jail population levels with their attendant costs.

This proposal is not advanced as a means of reforming the present pre-sentence process. The questions of whether present plea bargaining practices should be continued and what role the pre-sentence report should play in plea bargaining are reserved. This study has raised serious issues as to the utility of the pre-sentence report in a criminal justice system based upon plea bargaining. What is urgently needed is a thorough review of the present system, since the decision whether to preserve the pre-sentence investigation and report cannot be made until it is decided whether criminal liability should be determined by adjudication or by bargain.

98. The Brooklyn Pre-Trial Services Agency began its operation in June, 1973. N.Y.C. Office of the Mayor, Release No. 354-73 (June 7, 1973).

99. N.Y.C. Dir. of the Mayor's Crim. Justice Coordinating Council, Possible New Manhattan Detention Facility (Memo., June 30, 1973).

Conclusion

The recent enactment of the Criminal Procedure Law, increasing the number of cases requiring pre-sentence investigations and reports exemplifies the piecemeal, fragmented approach which the legislature has too long employed in dealing with the problems in the courts. The new law was adopted with little consideration of the resulting delays or the impact of plea bargaining—the present reality of the system. The problems of the criminal justice system will not be solved as long as the widespread practice of plea bargaining is ignored. Rather than merely taking further legislative action to correct the problems of the present pre-sentence process, the legislative and executive branches of the New York State government should undertake a comprehensive review of the realities of the criminal justice system. Such a review must determine whether plea bargaining is both the most effective way of insuring that only those who are in fact guilty of a specific crime are convicted and also the most efficient means of disposing of the huge volume of cases that flows through the criminal courts every year.

Such a study, if undertaken, would necessarily require lengthy investigation and reflection. In the meantime, short-term measures must be taken to alleviate the delays produced by pre-sentence investigations. Specifically, with the informed consent of the defendant, the pre-sentence investigation should begin prior to the actual plea of guilty. This would make it possible to have a pre-sentence report ready almost immediately after a verdict or plea of guilty is entered so that sentencing could follow quickly. In addition, the legal possibility of a defendant's waiver of the report should be expanded since waiver would eliminate many superfluous pre-sentence reports prepared after a sentence has already been promised.

Most informed observers agree that New York City's criminal justice system is near collapse. It is very important, therefore, that consideration of short-term solutions not delay the more important priority—a detailed review of the functioning of the entire criminal justice system and a decision as to the best way of adjudicating criminal charges against individuals.

TABLE I. INTERDEPARTMENTAL COMMITTEE ON PROBATION REPORTS

Judges' Evaluation of Probation Report Data

	SUPREME COURT			CRIMINAL COURT		
	Desirable but not Essential		Of little or no Value	Desirable but not Essential		Deemed of little or no Value
	Essential	Essential		Essential	Essential	
1. Prior Criminal History	65	0	0	66	0	0
2. Circumstances of Present Offense	48	14	3	49	14	3
3. Mitigating and Aggravating Circumstances	40	21	4	32	30	3
4. Status of Co-defendants	29	24	10	9	30	27
5. Defendant's Version of Offense	30	21	13	23	23	20
6. Attitude of Complainant	25	32	8	13	33	20
7. Personal History of Defendant	47	12	3	47	18	1
8. School Board	13	37	12	13	40	13
9. Juvenile Record	41	18	6	35	23	7
10. Family Setting	26	29	9	36	26	4
11. Those Dependant for Support on Defendant	26	32	6	23	32	11
12. Employment	40	21	4	52	14	0
13. Military or Draft Record	19	36	9	5	44	16
14. Physical and Mental Condition	52	13	0	47	16	3
15. Drug Use or Involvement	58	7	0	63	3	0
16. Past Response to Social Agency/Court Contacts	38	22	3	35	25	4
17. Character, Habits and Associates	36	24	2	26	30	8
	633	363	92	574	401	140

Source: Report of the Interdepartmental Committee on Probation Reports

TABLE II: EFFECT OF USE OF VERA REPORT ON DISPOSITION PATTERNS
BY TYPE OF LEGAL COUNSEL*

PRE-SENTENCE REPORT

Actual Sentence	Legal Aid		Private Attorney	
	No.	Percentage	No.	Percentage
Prison	118	77	12	20
Non-Prison	36	23	48	80
Total	154	100	60	100

VERA REPORT				
	No.	Percentage	No.	Percentage
Prison	127	65	18	31
Non-Prison	67	35	41	69
Total	194	100	59	100

*SOURCE: J. LIEBERMAN, A. SCHAFER & J. MARTIN, THE BRONX SENTENCING PROJECT OF THE VERA INSTITUTE OF JUSTICE: AN EXPERIMENT IN THE USE OF SHORT-FORM PRE-SENTENCE REPORTS FOR ADULT MISDEMEANANTS (1971).

SHORT FORM PRESENTENCE REPORT

Defendant _____ Last _____ First _____ Mi _____ Age _____ Date of Birth _____ Mo. _____ Day _____ Yr. _____

Convicted of _____ P.L. § _____

Custody Status: Bail (_____) R.O.R. ☐ Jail ☐

Jail Time Credit _____ As of _____

Counsel _____

Original Charge _____ Date of Arrest _____

Other Charges Pending (including probation and parole violations):

Charge	Court/Agency	Status
_____	_____	_____

Prior Record: Adult ☐ Juvenile ☐ None ☐

Arrests _____ No. _____ Convictions _____ No. _____ JD/PINS ADJUDICATIONS _____ No. _____

Most Recent Other Offenses _____ Disposition _____ Date of Disp. _____

(Attach Fingerprint Sheet for Additional Items)

Address _____ Street _____ Apt. No. _____ City/Village/Borough _____

Time at Present Address _____ Addresses Past 2 Yrs. _____ No. _____

Resides With _____ Marital Status _____

Number of Children _____ Age Range _____

Provides Support (or care) for _____

Occupation _____ Wage \$ _____ Per Wk. _____

Present Employer _____ How Long _____

Last Two Years: Employers _____ Amount of Time Unemployed _____ Yr.-Mo. _____

Other Source of Support _____

Education: Highest Grade _____ Special Training/Skill _____

Current Education/Vocation/Other Program _____

Military: Draft Status _____ Branch _____ Type of Dis. _____ Date _____

Youthful Offender: Eligible ☐ Required ☐

Certificate of Relief from Disabilities: Eligible ☐ Ineligible ☐

INFORMATION VERIFIED: Age _____ Other Charges Pending _____ Prior Record _____

Address _____ Present Employment _____ Education _____ Vocation/other Program _____

Military _____ Comments on Verification: _____

NAME: _____ (Docket) (Indictment) # _____

DESCRIPTION OF PRESENT OFFENSE

CODEFENDANTS	(Name)	(Status)
_____	_____	_____

EVALUATION

RECOMMENDATIONS (OPTIONAL): Youthful Offender: Yes _____ No _____

Certificate of Relief From Disability: Grant _____ Refuse _____ Defer _____

SENTENCE: Unconditional Discharge ☐ Conditional Discharge ☐ Fine ☐ Probation ☐ Commitment ☐

Special Conditions: _____

Date Prepared: _____ Signed: _____ Probation Officer

Approved: _____

Probation Case #: _____ Director/Supervisor

Sentence and Date: _____