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# Observation and Study in the Federal District Courts



A Report to the Federal Judicial Center

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# **OBSERVATION AND STUDY IN THE FEDERAL DISTRICT COURTS**

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**1985**

This publication is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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## PREFACE

This report describes the procedures under which a court, prior to sentencing, may refer convicted federal offenders to the Bureau of Prisons for a brief period of observation and study to gain information relevant to the sentencing decision. It also presents the reactions of a number of federal judges to the reports they have received in response to recent referrals.

In detailing the practices of courts and probation offices in making these referrals, and of the Bureau of Prisons in response, the report also comments on the extent to which these procedures are in accord with the recommendations of a 1977 Federal Judicial Center report on the same topic.

In October 1984, after this report was completed, legislation was enacted that will modify the observation and study process (Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473). Under the act's current effective-date provisions, the section authorizing presentence studies (18 U.S.C. § 3552(b)) will become effective November 1, 1986. A number of footnotes have been added to the report to point out pertinent provisions of the new legislation.





# I. INTRODUCTION

## Origin and Purpose of the Research

Since 1958 federal judges have been allowed by statute to commit convicted offenders to the custody of the attorney general for a ninety-day period of observation and study prior to final sentencing.<sup>1</sup> Intended as an aid to the sentencing decision, the presentence study is designed to provide the judge with psychiatric, psychological, medical, educational, and/or vocational evaluations of the defendant—information that goes beyond the scope of the probation officer's presentence investigation report.

The research described in the present report was undertaken by the Federal Judicial Center in response to a request by Federal Bureau of Prisons staff involved in the preparation of presentence study reports, who questioned whether their reports are meeting the needs of the courts. In the course of interviews conducted for the study, however, it became clear that the perceptions of the courts and those of the Bureau of Prisons staff are often at odds, and the study therefore developed into a broader reassessment of the functioning of observation and study. In particular, the present study updates an earlier Center study of the topic by Larry Farmer,<sup>2</sup> both reviewing that report's findings and recommendations and assessing the progress that has been made since.

This report focuses on the referral process in the courts and the preparation of reports in the correctional institutions, presenting the perceptions of judges, probation officers, and correctional staff regarding the observation and study process. Additionally, it raises questions about the purpose of observation and study and offers several recommendations for changes.

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1. Effective November 1, 1986, 18 U.S.C. § 3552(b), as modified by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976, will reduce this time period to sixty days.

2. L. Farmer, *Observation and Study: Critique and Recommendations on Federal Procedures* (Federal Judicial Center 1977).

## Method

To examine the current operation of the observation and study process, informal interviews were conducted with judges, probation officers, and corrections staff involved in study reports, and a sample of cases was examined. Three federal correctional institutions—at Springfield, Missouri; Lexington, Kentucky; and Butner, North Carolina—were visited. They were selected because they produce a substantial number of the study reports prepared through the Bureau of Prisons. At these institutions, interviews were held with a total of five psychiatrists, eight psychologists, four case managers, two unit managers, one case management supervisor, and two assistant wardens.

The judges selected for interviews either had very recently (i.e., during the fall of 1983) referred a case to one of the above institutions or had, according to statistics from the Administrative Office of the United States Courts, referred cases for observation and study during fiscal 1983. To keep travel costs at a minimum, an additional criterion for selection was that the judges be located in one of two general geographical locations. The judges included three from the District of Columbia, four from the Western District of Missouri, two from the District of Nebraska, one from the Eastern District of Virginia, and one from the District of Maryland. From those five districts, four chief probation officers, one deputy chief probation officer, three supervisors, and four probation officers were also interviewed.

In addition, a sample of twenty-eight study reports was collected from the three correctional institutions. They represented all the studies completed by those institutions during a one- or two-month period in the fall of 1983. The previous research by Farmer was also reviewed, as was the joint statement of understanding on observation and study between the Administrative Office (which administers the federal probation system), the Bureau of Prisons, and the U.S. Parole Commission,<sup>3</sup> an agreement that resulted from the recommendations of the Farmer report. Further information came from other relevant policy statements from the Bureau of Prisons<sup>4</sup>

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3. Observation and Study Practices: A Joint Statement of Understanding Between the Probation Division of the Administrative Office of the United States Courts, Federal Bureau of Prisons, and United States Parole Commission (Sept. 1979) (available from the Probation Division) (hereinafter referred to as the "joint statement of understanding").

4. Bureau of Prisons, Study and Observation Cases and Competency Commitments, 18 U.S.C. §§ 4205(c), 4244, 4246, 5010(e), 5037 (program statement no. 5070-3, Jan. 2, 1979).

and the Administrative Office<sup>5</sup> and from a General Accounting Office (GAO) draft report on observation and study.<sup>6</sup>

It should be noted that the institutions studied, judges and other persons interviewed, and reports reviewed were not selected in a random fashion. The findings reported here, therefore, are not necessarily representative of systemwide practices.

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5. Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures, vol. 10: Probation Manual.

6. General Accounting Office, Presentence Evaluations of Offenders Can Be More Responsive to the Needs of the Judiciary (1984 draft report, not yet available for distribution).



## II. OBSERVATION AND STUDY: BACKGROUND

### Studies of Adult Offenders

Under 18 U.S.C. § 4205(c), a judge may commit a convicted offender to the custody of the attorney general, and thus to the custody of the Bureau of Prisons, for a ninety-day period of observation and study prior to final sentencing. This section, originally enacted in 1958, was part of a general statutory reform that provided for the indeterminate sentencing of adult offenders. To facilitate greater individualization of sentencing, the Judicial Conference of the United States suggested the observation and study period as an important adjunct to the probation officer's presentence investigation. Robert Schwaneberg, in reviewing the legislative history of the statute, pointed out that the observation and study period was clearly intended to be used for relatively few cases—namely, those involving “difficult medical, psychiatric, sex, or rehabilitative” problems.<sup>7</sup>

Section 4205(c) stipulates that the study of the offender be like the study carried out under section 4205(d), which is done after sentencing, primarily for the benefit of the Parole Commission. That study “may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent.” Section 4205(c) also calls for the court to be given “any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case.”

Under section 4205(c), the offender is technically given the maximum sentence authorized for the offense; but after receiving the study report, the judge may affirm the maximum sentence, reduce the sentence, or place the offender on probation. The period of observation and study may last for ninety days, and an extension of up to ninety days may be granted by the judge. The benefits of

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7. R. Schwaneberg, *Legislative History of Observation and Study* 29 (Federal Judicial Center 1977).

such an extended period were discussed during legislative hearings on the original statute, in which Deputy Attorney General Walsh testified that "there is very little chance that a person can mislead a group of people like that for ninety days. He can mislead them for a week, perhaps, but over ninety days, or six months if needed, they can tell whether he can be educated or not."<sup>8</sup> In 1976, when the statute was reenacted as section 4205(c), there were attempts to reduce the study and observation period to sixty days with a possible sixty-day extension, but these attempts failed.<sup>9</sup>

### Studies of Youthful Offenders

Section 4205(c) applies to the sentencing of adult offenders. Very similar provisions for the sentencing of youthful offenders exist in 18 U.S.C. § 5010(e). These were enacted several years earlier than the adult provisions, as part of the Youth Corrections Act of 1950, a rehabilitation-oriented statute that provided for the indeterminate sentencing of youthful offenders.<sup>10</sup> Offenders under age 22 at the time of conviction must be sentenced under the act unless the court makes a finding that the defendant would not benefit from the treatment the act allows for. In 1976, the act was extended to offenders up to age 26 for whom a finding of benefit is made. The observation and study provision is intended to assist the judge in making decisions concerning amenability to treatment.

One procedural difference between the adult and youth statutes is in the shorter time period allowed for observation and study of youthful offenders: sixty days with a possible extension of sixty days.

### Local Presentence Studies

Under 18 U.S.C. §§ 4205(c) and 5010(e), offenders are committed to the custody of the attorney general, and the studies are done by the Bureau of Prisons. Presentence psychiatric, psychological, and

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8. *Federal Sentencing—Institutes and Joint Councils: Hearings on H.R.J. Res. 424, H.R.J. Res. 425, and H.R. 8923 Before Subcomm. N.3 of the House Comm. on the Judiciary, 85th Cong., 2d Sess.* 36 (1958).

9. Schwaneberg, *supra* note 7. Note, however, that these reduced time periods have been adopted under the Crime Control Act of 1984 (effective November 1, 1986).

10. The Crime Control Act abolished Youth Corrections Act sentences, effective October 12, 1984. The abolition has been interpreted as applying to offenses committed on or after that date.

medical studies may also be done by experts in an offender's local community, with payment authorized under 5 U.S.C. § 3109.<sup>11</sup> In such cases the local probation office is responsible for making all arrangements, including provision of an evaluation site and transportation.

This alternative method of obtaining information about an offender is generally faster, less expensive, and less intrusive than an institutional study (i.e., one done by an institution under the jurisdiction of the Bureau of Prisons). In theory, local studies also differ in scope from those done by the Bureau of Prisons in that they generally consist of only one type of study (e.g., a psychiatric *or* a psychological workup) rather than a series of investigations by a team of professionals, and do not contain the component of observation. As is discussed later in this report, however, these differences in scope may be more apparent than real under current practices for conducting institutional studies.

## Other Types of Studies

It is important to note that the studies carried out under sections 4205(c) and 5010(e) are done only after conviction of the offender. Thus they are quite different from the pretrial competency studies provided for under 18 U.S.C. §§ 4244 and 4246. Under section 4244, a person charged with a federal crime may be committed to the Bureau of Prisons for an evaluation designed to answer the specific question, Is the patient competent to stand trial at this time? Follow-up studies on those judged incompetent are conducted under section 4246. The section 4205(c) and 5010(e) studies should also be distinguished from the special studies of alleged or adjudicated juvenile delinquents (18 U.S.C. § 5037) and of narcotics addicts (18 U.S.C. § 4252). Very few of these cases are referred to the Bureau of Prisons.

This report focuses on the presentence adult studies conducted under 18 U.S.C. § 4205(c). However, most of the findings apply also to youth studies (18 U.S.C. § 5010(e)), which are handled in an almost identical manner.

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11. Effective November 1, 1986, 18 U.S.C. § 3552(b), as modified by the Crime Control Act, both provides specific statutory authority for local presentence studies and directs that studies ordered under 18 U.S.C. § 3552(b) be done by experts in the community "unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community."





### **III. REFERRAL OF CASES BY THE COURTS**

#### **Selection of Cases**

Farmer observed that the selection of cases for observation and study is “the most crucial decision in the study process” and that “the usefulness of a study report is probably proportionate to the appropriateness of the case for study.”<sup>12</sup> The current interviews revealed, as Farmer found earlier, that in most courts no specific selection criteria are in use. One of the five probation offices visited has written guidelines; in the others, offenders are selected on a case-by-case basis.

#### **Initiation of Referral**

Referrals are typically initiated by the probation officer, who generally receives detailed information about the offender before the judge does, through conducting the presentence investigation. Although judges usually agree with the probation officer’s recommendation, they sometimes decide against a referral if they believe a study will provide no additional useful information. Judges may also initiate referrals when they are bothered by something in the presentence report or by the offender’s in-court behavior. One judge reported that his referrals are usually initiated by defense counsel.

#### **Case Factors**

According to the probation officer in the one office with guidelines, the following factors, although not exhaustive, are deemed suggestive of the need for a study:

1. There is a history (either in the record or known to the family) of serious psychological problems.

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<sup>12</sup> Farmer, *supra* note 2, at 10-11.

2. The offense behavior included violence on the part of the defendant.
3. The background history and current offense do not appear to be related (the latter is out of character for the defendant), or no plausible explanation for involvement in the offense can be suggested by the probation officer, the family, or the defendant.
4. There is some evidence that severe depression or excessive hostility is present or was present either during the commission of the offense or upon interview.
5. A history of prolonged drug or alcohol abuse may have triggered a strong emotional or physical reaction.
6. There are indications of bizarre ideas or activity, including perhaps regressive behavior.
7. There is an indication of significant developmental disability, or the probation officer has questions relating to the defendant's potential for learning.
8. The probation officer is unsure about how the individual could best be assisted if he or she were granted supervision.

The judges and other probation officers interviewed described a number of factors that would lead them to request observation and study for an offender, many of which fall within the above guidelines. Most frequently mentioned were an offender's past history of psychiatric problems or suicide attempts and an offense that seems out of character for the individual. Other factors were strange behavior in court by the offender, unusual aspects to a crime, and drug problems. One judge believes a study is necessary when past treatment programs have failed to help an offender. Physical health problems were also cited as a reason for ordering observation and study, as was concern about possible dangerous behavior. Another judge noted that he sometimes uses the observation and study provision to gather as much information and as many opinions as possible in white-collar crime cases, in which the sentencing decision is made difficult by the necessity of imposing adequate sanctions for an offense without needlessly punishing the offender.

#### **Other Purposes of Referral**

Corrections staff are concerned that some offenders are referred for observation and study for what they consider invalid reasons—reasons other than gaining information pertinent to the sentencing decision. They pointed out that morale suffers when staff feel they

are expending considerable time and energy to gather information that will not be used. Some judges and probation officers said, as Farmer reported earlier, that observation and study is used to give the offender a "taste of jail." One judge, who said he uses the process to give an offender a short period of incarceration, finds it especially useful for people who have gotten into trouble with drugs (usually with no prior record); he believes such an incarceration provides them with an opportunity for self-analysis and treatment. Some judges feel that it is improper to use observation and study for this purpose but that the short period of incarceration is sometimes a useful dividend when the study process is being used appropriately to obtain information. These judges stated that there are other ways to give a taste of jail when there is no reason for a study; these include a split sentence and granting a reduction-of-sentence motion after 120 days.

Another reported use of the study and observation process is to provide a "cooling off" period when there is public pressure to "throw the book" at the offender. The maximum sentence is imposed, satisfying the community, and then, when the report is received after 90 to 180 days, the sentence can be lowered. Moreover, one judge pointed out that because an appeal can be made when a study is ordered, the judge may have a chance to review the defendant's conduct in the community during the appeal process and before final sentencing. Finally, one judge described an instance in which the process was used to "put the heat on" an offender whose testimony was needed on some other matter; he felt such use was clearly not legitimate.

### **Choosing Bureau Versus Local Studies**

A major recommendation of the Farmer report on observation and study was that courts that order more than ten studies a year should have most of their studies done locally rather than by the Bureau of Prisons.<sup>13</sup> Farmer concluded that local studies could be accomplished for much less money, in less time, and with a less restrictive setting for the offender. The joint statement of understanding developed by the Administrative Office, the Bureau of Prisons, and the Parole Commission as a result of the Farmer report states that local studies should be used whenever feasible.

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<sup>13</sup> The essence of this recommendation has been adopted by the Crime Control Act (see note 11).

Two of the jurisdictions visited for the current study make extensive use of local studies, but the others use the section 4205(c) or 5010(e) process to send most cases to the Bureau of Prisons. All those interviewed were asked what determines whether a local or a bureau study is requested.

Public safety was the most commonly mentioned issue. An offender who is considered potentially dangerous is generally referred to the bureau for study. Several respondents said they choose institutional (bureau) studies if the offender is likely to be incarcerated on final sentence. Offenders who are chosen for a "taste of jail" and will probably be released after the ninety-day study period are also referred to the Bureau of Prisons. An institutional study is sometimes used when the court considers it important to get the offender out of his or her present situation, and, conversely, a local study may be chosen when the court believes that involvement of the offender's family or community is important.

Other factors mentioned as determinants of the type of study were the kinds of questions being asked (broader questions resulting in institutional studies, where the study model is based on a team approach), how soon the report is needed (local studies being completed more quickly), and the availability of community resources for local studies.

Although certain jurisdictions have accepted use of local studies, others are clearly very skeptical. Those who are skeptical usually refer to a concern that community psychiatrists or psychologists are not knowledgeable enough about special problems in dealing with criminal offenders, are more likely to be "conned" by the offenders, and tend to be too liberal and opposed to incarceration. Judges and probation officers who use local studies, however, are quite satisfied with the results.

In addition to skepticism, there also seems to be some lack of knowledge about local studies. In one district in which the probation officer reported the availability of excellent resources for local studies, a judge reported using bureau studies because of the lack of community resources. Another judge, who was relatively new to the bench, did not know that a local study was a possible alternative to a bureau study, while others were uncertain about the procedures for local studies.

## Providing Study Objectives and Questions

At the time of Farmer's report in 1977, there had been complaints from judges that they were not getting useful information from the study reports. Farmer concluded that the reports were unsatisfactory primarily because the courts were not communicating to institutional staff what kind of information they needed. He estimated that 95 percent of the cases were referred without any specific questions and concluded that "[t]he failure to send referral questions to the bureau is a root cause of the frustration court personnel experience with the results of these studies. It undermines the rest of the presentence study process."<sup>14</sup> Farmer's most important recommendation for improving the observation and study process was that specific, written study objectives and questions be sent to the Bureau of Prisons for every offender referred. He suggested that probation officers take the major responsibility for presenting the court's questions. These recommendations were incorporated in the joint statement of understanding, which gives the Bureau of Prisons the responsibility to solicit questions if they are not provided by the probation office.

### Generating Questions

Most of the judges and probation officers interviewed for the current study said that they now always transmit specific questions with every observation and study case. The process by which judges and probation officers work together to generate questions varies considerably from district to district and sometimes within a district. In some cases, the probation officer suggests a list of questions at the same time as recommending the observation and study; the judge then approves or disapproves the questions when deciding whether to order the study. In other cases, the judge and probation officer discuss the case and the questions they want answered once the judge has approved the referral; the probation officer next drafts the list of questions, and the judge reviews it and makes any necessary changes. In rare instances, judges play no role in developing questions once they have approved a referral, but instead delegate the entire process to the probation officer.

### Absence of Questions

Although the interviewees reported sending study questions with every referral, there are indications that the problem of lack of

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14. Farmer, *supra* note 2, at 11.

guidance from the courts persists. A recent GAO study examined 157 offender evaluations performed by the Bureau of Prisons in 1981; of those, 90 were done without specific questions from the courts.<sup>15</sup> Corrections staff interviewed for the present study reported that many cases are still referred to them without study questions. The court had not provided questions for three of the twenty-eight sample reports examined in this study.<sup>16</sup>

The absence of questions is of major concern for two reasons. First, of course, is the problem of lack of guidance. All of the staff involved in preparing study reports believe it is difficult to return a useful report if the court does not explain its needs. The second problem is an administrative one voiced by case managers and unit supervisors, who must see that reports are prepared in a timely manner. If no study questions have been received by the time an offender arrives at the institution to begin the study and observation period, the Bureau of Prisons requires the person in charge of the study to contact the probation officer to determine the nature of the court's concerns. This task can consume several days, especially when the available documents do not specify which probation officer has handled the particular case. Sometimes the probation officer, when reached, is unable to articulate the purpose of the study, and the case manager has to suggest questions. Corrections staff suspect that in these instances the offender is being referred for purposes other than evaluation. It was impossible in the present study to determine how often, overall, case managers must contact the courts to obtain questions. The staff of one institution, however, checked their records for two months and found they had called probation officers in four out of sixteen cases.

### Appropriateness of Questions

Although the absence of study questions remains a problem, questions are being forwarded far more frequently than at the time of the Farmer report. An issue that now comes into focus is the appropriateness of the questions being asked. The GAO report mentioned earlier is critical of the Judicial Conference of the United States and the Bureau of Prisons for not having provided judges

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15. General Accounting Office, *supra* note 6.

16. The difference in the percentages of cases without study questions found in these sample cases and those examined by the GAO may be due to the different time periods from which the cases were drawn. It could also be due to the fact that both samples were chosen for illustrative purposes only, not for statistical validity, and that either or both are in some ways not representative of study reports prepared throughout the federal prison system.

with guidance on the kinds of questions that can be answered by the experts. In the present study, corrections staff were asked to discuss what kinds of questions they found appropriate or easiest to answer and what kinds they found inappropriate or hardest to answer. Staff members were not always in agreement, but patterns did emerge with regard to three types of questions: requests for predictions of offenders' dangerousness, requests for sentencing recommendations, and requests for treatment recommendations.

### Dangerousness

In thirteen of the twenty-eight sample cases examined, the court asked for predictions of dangerousness or about the likelihood of the criminal behavior's being repeated. In the corresponding study reports, there were seven predictions of no dangerousness, five predictions that the offender would likely be a danger to the community or specific individuals, and one case in which the psychiatrist and the psychologist disagreed. Most of the psychologists and psychiatrists interviewed for the present study were concerned about the appropriateness of such questions. Task force reports by both the American Psychiatric Association and the American Psychological Association have taken stands regarding the inability of mental health professionals to make specific predictions about someone's future dangerousness.<sup>17</sup> Very few of the institutional staff members, however, said that they do not answer such questions. They usually offer an opinion, though qualifying it with a phrase such as "although it is impossible to predict with any medical certainty, . . ." Some staff thought that they should probably decline to answer more often, whereas others felt that in the absence of anyone more qualified, they should make the predictions. Most reported that when they make predictions of dangerousness, they almost always base them on specific past behavior. One psychologist noted his fairly strict criteria for making a prediction of dangerousness: The individual's history, current behavior, and test data should all point to future dangerousness, and the report should clearly state if any of those measures are in conflict.

Judges and probation officers held varying views on the appropriateness of asking for predictions of dangerousness. A number of the respondents said that they ask when they feel dangerousness is a relevant issue and that they have faith in the ability of mental health professionals to make valid predictions. Others said that

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17. American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, Report No. 8 (1974); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 *Am. Psychologist* 1099 (1978) (reprinted in J. Monahan, Ed., *Who Is the Client?* (1980)).

they ask for predictions mainly because they value additional opinions on the matter, not because they really expect to receive accurate predictions. Still other respondents reported that they avoid asking for predictions of dangerousness because they believe them to be only guesswork, which the judge or probation officer is just as capable of doing.

### **Sentencing Recommendations**

The current Bureau of Prisons policy, in accord with one of Farmer's suggestions, is that sentencing recommendations should be included in study reports only if explicitly requested by the courts. Some judges and probation officers ask for sentencing recommendations and some do not, but most expect to receive them. Only one probation officer expressed familiarity with the bureau's policy. No judges said that recommendations based on bureau studies are inappropriate, but several reported being interested only in whether an offender should be incarcerated, not in a suggested length of incarceration. Sentencing recommendations were explicitly requested in thirteen of the twenty-eight sample cases, and they were only provided when requested. In eleven of the thirteen cases with requests, imprisonment was recommended.

Most of the psychiatrists and psychologists interviewed are uncomfortable about making specific sentence recommendations, believing they have neither the training nor the experience to make such judgments. In general, the case managers and other institutional staff, who are well versed in making good-time and parole calculations according to the guidelines, are much less hesitant to recommend sentences. In one institution the psychologists and psychiatrists do not participate in sentencing decisions at all; the case manager makes the decision after reading their reports. Sentencing recommendations are made at team meetings in the second institution, but the psychologists and psychiatrists do not actively participate in that part of the meeting. In the third institution, the staff never make sentencing recommendations; they discuss any need for structure, supervision, or treatment, but advise the courts that it is their policy not to recommend a specific term of incarceration.

None of the judges or probation officers knew how the institutions arrive at sentencing recommendations. Several said that knowing who was making the recommendations would be of interest to them. One judge was concerned that there may be an effort within the Bureau of Prisons to reach agreement on sentencing recommendations; he felt it would be much more useful to get information on any disagreement that existed. This is in keeping with Farmer's suggestion that a court could only benefit from



knowing the sources of and reasons for disagreement among various sentence recommendations. One probation officer suggested that differences of opinion on sentencing are more likely to be expressed in local studies, in which the people involved are close enough to communicate directly with the judge.

### **Treatment Recommendations**

Most judges and probation officers said that they ask for treatment recommendations in the observation and study reports. Such recommendations were explicitly requested in twelve of the twenty-eight cases examined for this study. Some consider them more important if the offender is likely to be placed on probation, but others feel that treatment options are limited with probation and that treatment recommendations are more useful when the offender is likely to be incarcerated. Corrections staff said that requests for treatment recommendations from the courts are usually appropriate, and psychologists and psychiatrists consider these to be the questions they can respond to most effectively. Two kinds of requests, however, cause problems. A request for design of a specific community treatment plan is difficult for staff to respond to because they are unlikely to be aware of the resources available in communities other than their own. Also problematic is a request for a recommendation on institutional placement. The Bureau of Prisons has classification specialists whose job it is to determine which institution is most suitable for a particular offender, but the staff conducting an institutional study do not have the expertise necessary to advise on placement. They usually respond to such requests with a general statement about the resources of the Bureau of Prisons.

### **Other Questions**

Corrections staff expressed concern about the appropriateness of other kinds of questions, noting that some have little to do with sentencing decisions and represent an invasion of offenders' privacy. One court, for example, asked about a young white woman's proclivity for associating with black males. Another asked whether a woman's having been sexually abused by her father twenty-five years earlier was related to her embezzlement of bank funds. Sometimes referral questions deal with a person's homosexuality or a person's inability to maintain satisfying personal relationships. When the relevance of such questions to sentencing is not clear, the psychiatrists and psychologists are uncomfortable answering them.

Also problematic to prison staff are study questions that involve issues more commonly raised prior to adjudication of guilt, such as an individual's state of mind at the time of the offense or mental competency at the time of legal proceedings. As several psychiatrists and psychologists noted, it is just as difficult for a professional to determine—with any certainty—a person's state of mind at a time in the past as it is to predict a person's future behavior. Moreover, staff are unsure of the purpose of such questions at this stage of the legal process. To avoid possible confusion, the court should clearly specify the relationship between a question on an offender's state of mind and the sentencing decision. For example, though the court may be satisfied that the offender's level of functioning was not impaired to the extent required for preadjudication decisions on insanity or incompetence to stand trial,<sup>18</sup> it may still be interested in taking account of lesser levels of impairment as factors in assessment of current treatment needs.

Most of the staff agree that very general questions, such as a request for a personality profile, do not give enough guidance; however, some also feel questions can be too detailed. A psychologist described one referral that contained fifteen or sixteen detailed questions but left the staff wondering about the purpose of the study. One of Farmer's recommendations was that referral letters include not only specific study questions but also the general objectives of the study. Yet when judges and probation officers were questioned about including study objectives, several said they thought the purpose would be implicit in the presentence report; very few of them explicitly state the purpose of a study when they refer a case. The Administrative Office's Probation Manual stresses the need to make the purpose of a study clear, but indicates this is accomplished through the study questions.

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18. In rare cases, the postconviction examination may reveal functioning impaired to such an extent as to raise anew the question whether the defendant was competent to stand trial. Procedures prescribed at 18 U.S.C. § 4245 enable the Bureau of Prisons to refer such a case back to court to question the appropriateness of the trial.

## **IV. THE STUDY PROCESS IN THE INSTITUTION**

### **Designation of an Institution**

After a judge has ordered a study report, the case is referred to a community programs manager of the Bureau of Prisons, who designates an institution to conduct the study and prepare a report. The designation depends on a number of factors, including special needs of the offender, kind of evaluations requested, and staffing of the various institutions. Some judges request that studies be done in particular institutions, and the bureau honors such requests when possible.

Judges who request a specific institution are usually trying to meet the individual needs of an offender, for example, choosing an institution he or she believes is best equipped to deal with drug problems. In most cases, however, the judges have had experience with only one or two institutions and tend to recommend those with which they are familiar. A probation officer reported that for a time after the trial of John Hinckley (who attempted to assassinate President Reagan in 1981 and was found not guilty by reason of insanity), during which the federal institution at Butner received extensive publicity, judges were more likely to recommend that studies be done at that institution.

### **Offender's Arrival at the Institution**

One procedural problem mentioned numerous times by staff at Bureau of Prisons institutions is the late arrival of offenders referred for study. For those who are in custody when sentenced, the ninety-day period allowed for the study begins on the date of sentencing. Considerable time often lapses between that date and the date the person actually arrives at the institution conducting the study. The U.S. marshal's office is responsible for transporting offenders to an institution, but timing depends on when buses are scheduled to travel, and there may be layovers at one or more in-

stitutions on the way. Lorraine Jensen, chief psychologist at the correctional facility in Lexington, gathered data on twenty-eight cases in 1980 and found that the mean number of days between sentencing and arrival was 25, with a range of 5 to 111. At the very least, the delays necessitate requests for extensions of the ninety-day study period, since a large part of the time available for the study is gone before the person arrives at the institution. Institutional staff suggested that if the study period could start upon the offender's arrival, much paperwork could be avoided. One staff member suggested, however, that an offender would be more likely to get lost in the system if the time pressures did not motivate institutional staff to locate the person. (Bureau policy requires that a staff member contact the U.S. marshal's office if the inmate has not arrived at the institution within ten days of the date of the designation to that institution.)

A second, and related, problem is the late arrival of the probation officer's presentence report and the court's study questions. As mentioned previously, much time can be spent contacting a probation office to determine the court's needs and to obtain the historical material needed by the staff. The process for sending study questions varies from district to district. In some districts, the questions are ready when the presentence report is completed, and the two are forwarded together to the Bureau of Prisons community programs manager. In other districts, questions are not drawn up until after the observation and study is ordered and are sent to the community programs manager several days after the presentence report. One district sends questions to the community programs manager unless he or she has already designated an institution for the observation and study, in which case the questions are forwarded directly to the warden of the institution. It is not clear whether the delays originate in the courts or in the community programs offices.

When asked if study questions could be attached to the judge's judgment and commitment order, some probation officers doubted whether they could be ready in time to be part of the order. One judge expressed concern that the judgment and commitment order passes through too many hands to be able to ensure the offender's privacy with regard to the often very personal study questions.<sup>19</sup>

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19. Effective November 1, 1986, 18 U.S.C. § 3552(b), as modified by the Crime Control Act, will require that the judge's order for study specify the additional information desired from the study.

## **Preparation of Study Reports**

The three institutions visited for this study process the observation and study cases in different ways. A special forensics unit conducts the studies at one institution. Its unit manager and case manager play the major administrative roles, assigning cases to one of the unit's psychologists and, when necessary, to one of the two psychiatrists on the unit. The psychologist and psychiatrist write independent reports, and the case manager then reads those reports, consults with any other unit personnel who might have relevant information, and writes the answers to the study questions or, if no specific questions were asked by the court, a case summary.

At the second institution the mental health unit is responsible for preparing reports. There, one of the psychiatrists assigns cases to a team made up of a psychiatrist, a psychologist, and a case manager. The case manager, whose work is supervised by the unit manager, is responsible for scheduling tests and interviews, for keeping track of deadlines, and for most of the paperwork associated with the study. The psychiatrist and psychologist usually work closely together in preparing their reports, also meeting regularly with the case manager. After their reports are completed and a final team meeting is held, the case manager prepares the answers to the study questions or case summary. The summary is reviewed by the psychiatrist in charge of all studies, who sometimes rewrites it.

At the third institution, in contrast to the other two, no single unit is responsible for the studies. A case management supervisor screens all studies and refers them to one of the six units at the facility, depending on the special needs of the offender. Within each unit a case manager is responsible for administrative handling of the studies. The unit psychologist prepares a report, and if a psychiatric report is also requested, the case is referred to one of the two psychiatrists at the institution, who are treated as consultants rather than as team members. After the reports are completed, the case manager writes the final case summary or answers to study questions. Whether unit staff hold team meetings depends on the particular unit.

Farmer recommended that prison psychologists rather than case managers be responsible for integrating study findings in the report to be sent to the court. He observed that case managers seldom have the training necessary for performing this job and that their "efforts seldom improve the insights of the various eval-

uators.”<sup>20</sup> This recommendation has apparently had little impact. The Bureau of Prisons believes that the case manager plays an important role in pulling together the various subject areas that may be touched on in the study of a particular defendant. The extent of the case manager’s role, however, will depend somewhat on the nature of the study, with a simple mental health evaluation calling for less involvement than, for example, a request for observation or for recommendations on an institutional program. Although some of the case managers interviewed were obviously comfortable with their role in the process, others felt that they add very little to the preparation of reports.

### The Standard Study

Farmer proposed a new model for the conduct of studies by the Bureau of Prisons. He strongly recommended that the bureau and the courts reject the notion of a standard, predefined study. Instead, he suggested, “[t]he presentence study should be designed as a flexible resource to support federal judges in their sentencing responsibility.”<sup>21</sup> Farmer noted that study reports at that time typically included a psychological report, the results of a medical examination, and the results of educational testing; psychiatric reports were sometimes included. Since most courts were seeking psychological evaluations, he proposed that the basic presentence study done in response to nonspecific requests provide just a general psychological evaluation and that a more comprehensive evaluation be included only at the court’s request. The bureau accepted this suggestion; current policy states that if there are no specific study questions, the staff is to provide a psychological evaluation and a case summary.

The psychological evaluation is now the core of the study; medical and psychiatric evaluations are done when requested. In the twenty-eight sample cases examined, eleven medical evaluations and fourteen psychiatric evaluations were performed. The major changes since Farmer’s recommendations are that fewer medical reports are being prepared and, because they are not requested, educational evaluations are rarely, if ever, done. Some of those interviewed believe that psychiatric evaluations are for the most part unnecessary and that a heavy burden is placed on the few institutions that have psychiatrists on their staffs. Ideally, Bureau of

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20. Farmer, *supra* note 2, at 28.

21. *Id.* at 27.

Prisons staff determine whether a psychiatric report is appropriate given the facts of the case and the questions asked. Customarily, however, a psychiatric study is done if the judge's letter contains the term "psychiatric," even though the term may be used synonymously with "mental health," as in "Does this person have psychiatric problems?" Many of the judges and probation officers interviewed were not able to define clearly the distinction between a psychological and a psychiatric report, and it may be quite common for them to request a "psychiatric" evaluation without intending to specify that it be done by a psychiatrist rather than a psychologist.

Instead of fitting Farmer's "flexible resource" model, current studies seem to represent only a different version of a "standard study." The psychologists and psychiatrists conduct routine evaluations of all offenders referred for observation and study. Psychologists typically use a standard battery of tests because a frame of reference must be established before specific questions can be dealt with. The only additional testing normally done in conjunction with the standard psychological or psychiatric study is neurological testing, which is carried out if there are questions about organic damage. The psychologists and psychiatrists also tend to use standard interviews. The studies themselves are thus seldom tailored to specific questions asked by the court; rather, the reports based on the studies are written so as to answer those questions.

### **Observation**

Farmer found that few, if any, institutions were using systematic observation of offenders' day-to-day behavior. He noted that study reports seldom contained comments on the results of the institutional observation, and that when they did, the comments appeared to be based on incidental rather than systematic observation. The model he proposed for bureau studies excluded extended observation as a necessary component, suggesting observation only when needed to respond to specific questions from the court. Farmer predicted that "[s]hifting observation from a mandatory to an optional procedure should result in shorter presentence studies and more systematic observation when it is determined to be useful in achieving the objectives of a particular study."<sup>22</sup>

The current policy of the Bureau of Prisons, in accordance with Farmer's recommendation, states the following role of observation:

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22. Farmer, *supra* note 2, at 28.

Observation should only be used as needed to respond to the court's referral questions. If a general observation report is requested, we should include a discussion of the following items:

- (a) Response to Supervision
- (b) Respect for Authority
- (c) Relationship with other inmates and staff
- (d) Openness with staff
- (e) The kind of associates the inmate chooses
- (f) Use of Leisure time
- (g) Attitude and Work Performance
- (h) Other significant behavior.<sup>23</sup>

Most corrections staff members said that they rely very little on observation of the offender. The major exception was in one institution in which, because of the physical design of the facility, staff members see offenders almost every day in various settings. There, they reported that observation is an important part of the evaluations. In daily meetings of the staff, any unusual behavior noted by nurses, other inmates, correctional officers, or others is logged into the record.

Although formal observation of the offender is the exception rather than the rule, and in spite of the bureau's policy on observation, judges and probation officers unanimously agreed that they expect a study to include systematic observation of the offender. Several judges said they wanted to know how an offender adjusted to the prison situation and how the person dealt with peers and supervisors. None seemed to be aware of the bureau's policy to include such information in a report only if it is specifically requested. Of the twenty-eight cases examined for this research, none included specific requests for observation.

In addition, contrary to Farmer's prediction, a shift from routine to optional observation does not appear to have shortened the time expended on presentence studies. One reason for this may be the report review procedures.

### **Time Pressures in the Study and Review Process**

Each institution, as well as the Bureau of Prisons, has a formal review process for all study reports. The amount of time allocated for review of the reports relative to the amount of time allocated for actual study of the offender was a major issue discussed by institutional staff. Bureau policy states that all reports must be in

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23. Bureau of Prisons, *supra* note 4, at 3.



the regional office thirty days after the inmate is committed, and that extensions should be requested infrequently and only if absolutely necessary. The institutions examined handle this time pressure in different ways.

At one institution the staff rigidly adhere to the schedule. The psychologist has two weeks to study the offender and write the psychological report. One psychiatrist reported being given only five days to prepare a report. As a result of the time pressure, the psychological or psychiatric reports are usually done on the basis of a standard battery of tests and most likely a one-hour interview. There is almost no reliance on any observation by unit staff or others. The case manager then has one week to write the summary or answers to study questions before passing them on to the case management supervisor's office for review. Between that time and the thirtieth day, when it is due in the regional administrator's office, the study report goes to the associate warden for programs and then to the warden.

It is not clear how long the reports typically remain in the regional offices, but according to institutional staff, offenders often spend several weeks in an institution after observation and study has been completed.

At another institution the staff believe in taking as much time as necessary to do what they consider to be a thorough study. They request extensions on most studies, and the psychologist and psychiatrist generally see each offender regularly over a four- to eight-week period. This institution, however, handles many fewer study cases than the other one described.

The tremendous emphasis on reviewing study reports at the institutional level and the regional level seems to stem primarily from a concern with sentencing recommendations. The Bureau of Prisons wants reasonable recommendations to be made; in particular, it does not want the recommendations to appear to be too lenient. Although the regional offices seldom make changes in other parts of the study reports, they do sometimes send reports back for changes in sentencing recommendations. Farmer observed that regional offices usually did not notify the courts if the offices' recommendations differed from those of institutional staff, providing the courts only with the final recommendations. He suggested that regional administrators should give judges complete information regarding any differences in opinion on sentencing, including explanations of any disagreements. The Bureau of Prisons has not adopted this policy. Typically, psychiatrists and psychologists make no sentencing recommendations in their reports. Case managers in one institution, instead of including a specific recommendation on

length of sentence in the study report, place the recommendation in the cover letter to the court from the regional administrator, a letter that is prepared at the institution but can easily be retyped in the regional office. At another institution, case managers include sentencing recommendations in their reports, but only after consulting with the regional administrator's office by telephone to make sure it will be in agreement with them.

At least two judges commented that it is not worthwhile to spend too much time on administrative review of the study reports. One judge said that the cover letter is not very important to him because the only way he can judge the integrity of a study report is through the reasons given for the conclusions reached. Another judge noted that administrative review may constitute unnecessary paperwork; he suggested that a study be done to see how often any changes result from such review. As mentioned earlier, most judges also said they would like to know who made a sentencing recommendation in order to know how to evaluate it.

In general, the judges and probation officers interviewed had no idea how much time psychiatrists or psychologists actually spend with an offender, but many voiced the hope that staff spend at least half of the ninety allocated days studying the person. Several judges noted that they have heard complaints from offenders about their very limited contact (perhaps only one interview) with psychiatrists or psychologists. One judge said that although he could not imagine one interview would be sufficient, if it is, then offenders should be returning to the court much faster than they are now.<sup>24</sup> Another judge expressed his view that the value of the ninety-day commitment is in the opportunity for the offender to be observed on more than one occasion.

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24. Prison staff generally notify the Marshals Service that the offender is ready to be returned for sentencing when the study report, including the administrative review, is complete. Potential sources of additional lag time in the study process, not addressed in this research, are the time between this notification and return of the offender to local custody and between the return and the date of final sentencing.

## V. EVALUATION OF REPORTS BY THE COURTS

Judges and probation officers who were interviewed generally had few complaints about the observation and study reports they receive from the Bureau of Prisons.<sup>25</sup> All said that they read the entire reports, and most stated that the reports are neither too technical nor too simplified. They are not bothered by the use of psychological or psychiatric terms; many are familiar with the terminology, and some reported having copies of the *Diagnostic and Statistical Manual of Mental Disorders* available for consulting when necessary. There was general consensus, however, that the reports should be written for judges and not written as if prepared for other mental health professionals. Those interviewed also agreed that reports should be as comprehensive as possible; as one judge stated, "The more they tell me, the happier I am." In fact, several judges were concerned that by asking specific questions, they risk getting reports that are limited to answering those questions and do not include other valuable information that they did not know to ask for.

In general, the respondents could not say that they find particular parts of the reports to be more or less useful than other parts. One judge said it is crucial for the reports to include reasons for the conclusions presented, and another judge felt there should be more emphasis on the educational and vocational needs of offenders.

Several probation officers complained that the reports often duplicate the presentence reports they prepare. They feel the observation and study reports should build on the presentence reports and not repeat information already available. At the other extreme, they mentioned that it is sometimes obvious that the person who prepared the study did not look at the presentence report at all, for

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25. Because judges were chosen for this study on the basis of having made referrals at least once during fiscal 1983, there may be a selection bias in the sample. It is possible that those who have not been satisfied with the reports simply no longer use the process. Nevertheless, a number of those interviewed said they had been dissatisfied with the study reports in the past, but believe there has been improvement in recent years.

example, when he or she has included information supplied by the offender that has been shown in the presentence report to be false.

Several respondents believe the quality of reports has improved as they have begun to send specific study questions to the Bureau of Prisons. One judge observed that in the past, reports were too general and superficial; but he feels there has been great improvement in the last few years and that the current reports are quite good.

Most judges said the study reports are influential in their sentencing decisions. They approach the reports in different ways, some having a sentence in mind before getting the report, others leaving all options open until the report is received. Those who see a pattern of influence said that the reports tend to lead them toward giving more lenient sentences, but most believe there is no pattern. One judge believes the reports' influence is often primarily superficial. As an example, he described the situation in which a community is demanding a harsh sentence, but the report recommends a lenient sentence closer to what he believes is appropriate; he can then do what he believes is right while also "looking right" because he is following the recommendation of experts.

Judges and probation officers were asked whether they thought it would be useful for the courts to provide regular feedback to the institutions on the quality of the reports and how they were used. Responses were mixed. Those who felt feedback was a bad idea were doubtful that it would really be used and were concerned that it would just create more paperwork that no one would read. Several were also concerned about the time that would be spent in providing regular feedback.

Those who favored the idea felt that there should be as much dialogue as possible between the courts and the Bureau of Prisons. Most agreed that a form or checklist attached to the study report would be the most practical means of providing feedback and that probation officers should be responsible for filling out the forms. Others believed, however, that the most useful feedback would result from personal contact between judges and probation officers and psychiatrists and psychologists.

## VI. CONCLUSIONS AND RECOMMENDATIONS

Although the judges and probation officers interviewed indicated general satisfaction with the reports being prepared by the Bureau of Prisons, there is reason to believe that the observation and study process is not being used as effectively as it might be. A few simple procedural problems should be remedied, and there is a need for improved communication between the courts and the Bureau of Prisons on a number of topics. The GAO's draft report recommended that the Judicial Conference and the attorney general develop guidelines for the courts for selecting cases and generating study questions.<sup>26</sup> The suggestion is a good one; the primary focus of improvement, however, should be on a careful analysis of the underlying purpose of observation and study. Only when that purpose is well-defined will it be possible to establish smooth, efficient procedures and derive the maximum benefit from them.

### Defining the Purposes of Observation and Study

The observation and study process was adopted at a time when rehabilitation was widely accepted as the major goal of sentencing. Extensive information was to be gathered on every offender so that sentences could be individualized. When special questions, such as psychological or psychiatric uncertainties, could not be answered through a probation officer's presentence investigation, the observation and study process was to provide a further source of insights into the needs of the individual offender. But correctional philosophy has shifted in recent years from an emphasis on rehabilitation to an emphasis on incapacitation, deterrence, and retribution. These various goals have different implications for sentencing decisions in general and for the use of observation and study in particular. If rehabilitation is the major goal of sentencing, for example, then the obvious candidate for observation and study is an offender who seems to have special psychological needs or problems.

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26. General Accounting Office, *supra* note 6.

But if incapacitation is the principal consideration, then observation and study is most appropriate for an offender whose potential risk to the community is at issue. If general deterrence is the fundamental goal of sentencing, then neither of those types of offender may be appropriate for referral.

At the time Farmer reported on observation and study, Congress was considering legislation that would establish policies to govern the sentencing process. Farmer noted that in the absence of well-defined sentencing policies, "it [is] difficult to deal with questions regarding the proper contribution of observation and study to the sentencing process," but that professional evaluations presumably play a valid role.<sup>27</sup> Unfortunately the issues have yet to be settled by Congress.<sup>28</sup> With or without congressional guidance, however, it is important for the Judicial Conference and the Bureau of Prisons to engage in open discussion on the purposes of observation and study before trying to establish guidelines for selection of cases and for development of appropriate study questions. It is only in the context of some general agreement on purposes that guidelines can be meaningful and useful.

### Careful Selection of Cases and Study Questions

The recent emphasis on preparation of study questions may have diverted attention from the need for careful selection of cases. A long list of questions may be less useful to staff than a simple explanation of why a study is being ordered. Such an explanation should accompany every case; it should describe why the offender is considered problematic, what sentencing options are being considered, and how the study relates to those sentencing options. Requiring that the study's purpose be made explicit not only would be helpful to corrections staff but would lead probation officers and judges to assess the potential usefulness of a study before ordering it. It is natural when facing a difficult decision to seek additional information. But as one judge suggested, the study is often used as a crutch, and in many cases additional information may be of no real value. Observation and study is expensive and takes staff

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27. Farmer, *supra* note 2, at v.

28. Effective November 1, 1986, 18 U.S.C. § 3553, as modified by the Crime Control Act, will specify in broad terms the factors to be considered by the court when imposing sentence and require that sentencing be pursuant to guidelines promulgated by the Sentencing Commission, created by section 217 of the act. Until the guidelines are promulgated, however, the issue of how observation and study can best be incorporated into the sentencing process remains unsettled.

away from treatment functions; it should be used selectively—only when it can accomplish well-defined goals.

Although the courts are now sending specific questions with referrals more frequently, significant numbers of cases are still being referred without questions, and among the questions being asked are some that may not be appropriate for bureau staff to answer. There must be increased communication among judges, probation officers, and Bureau of Prisons psychologists and psychiatrists concerning what kinds of questions should be asked in study cases and what kinds of answers bureau staff should provide. Again, this communication can only be useful when it is related to the purposes of observation and study.

The question of dangerousness is of major concern to judges, yet it is perhaps the one question the professionals are most reluctant to answer. In light of the positions taken by the American Psychiatric Association and the American Psychological Association, requesting predictions of dangerousness may not be appropriate. Judges should at least have a full understanding of the limitations of professionals' ability to make such predictions and, thus, evaluate their predictions critically. In addition, bureau staff should be required to explain fully their limitations and the bases for any predictions they make.

Questions that solicit sentencing recommendations may also be inappropriate. The original notion of a group of experts coming together to decide on the correct sentence for an offender is closely tied to the rehabilitative model of sentencing. At one time it was popular to think that there was an optimal sentence length, long enough for rehabilitative treatment to have an effect, but not so long as to impede the offender's return to the community. Little faith is currently placed in such a model, and even if it were, the model is not accurately reflected by the procedures now in place. As described earlier, case managers usually play the major role in making sentencing recommendations. Next in importance are the institutional administrators and the regional officials, who have never met the person being considered. The psychologists and psychiatrists generally play a limited role, if any, regarding recommendations on sentence length. Institutional staff consider the experts in this area to be the case managers, who understand parole guidelines and the complex aggregation and good-time formulas that determine how much time a person will actually serve given the sentence imposed by the court. Requests for recommendations on sentence length, therefore, will generally result in answers based on average sentences given for similarly situated offenders—

information already available in the presentence report prepared by the probation office.

It is thus recommended that the court frame its sentence-related study questions to elicit the kind of information mental health professionals can best provide: judgments about whether the person needs active supervision, whether the person is likely to take advantage of various programs, why previous programs have been successful or unsuccessful, whether the person needs psychiatric treatment if incarcerated, and what degree of structure the person needs in his or her environment. Questions framed in terms such as these will result in answers based on study of the particular individual.<sup>29</sup>

### **Improving Communication Between the Courts and the Bureau of Prisons**

It was clear from the interviews that communication between the courts and the Bureau of Prisons is deficient in a number of areas. Judges and probation officers must be well-informed on bureau policies and procedures in order to use the study process effectively and meaningfully evaluate its results. The courts, on the other hand, need to provide certain feedback to the institutional staff who prepare reports. The interviews revealed several specific needs for improved communication.

#### **General Policies and Procedures**

Judges and probation officers were largely unaware of the bureau's policy of providing an observation (as distinct from study) report only when requested by the court; they were similarly unaware of its policy to make sentencing recommendations only upon request. Many assumed that they would receive observation reports and sentencing recommendations for all cases and therefore did not specifically ask for them. None of those interviewed knew how much of the study period is allocated to administrative review as opposed to actual study of the offender. Most also did not know

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29. Effective November 1, 1986, 18 U.S.C. § 3552(b) will require that the study report contain recommendations concerning the guidelines and policy statements promulgated by the Sentencing Commission that the experts believe apply to the defendant's case. As these recommendations are to be included regardless of the type of study requested and as their subject matter is not of a type with which mental health experts, particularly those in the local community, will necessarily be familiar, this statutory mandate is not consistent with the spirit of this recommendation.



how sentencing recommendations are arrived at within the institution, nor that the final recommendation may actually come from the bureau's regional administrative office. All of the bureau's policies and procedures should be clearly stated and readily available to the courts if the process is to be used effectively. Farmer suggested training seminars for judges and probation officers on observation and study issues and a handbook for the courts that would serve as an easy reference. It is evident that educational efforts of this kind should be pursued.

### **Procedures in Individual Cases**

Specific study procedures vary considerably across institutions and sometimes across cases within an institution. Judges should therefore be given complete information about how each study was conducted. Most psychological reports now include the names of tests given, but reports should also state how many times the offender was seen by psychologists and psychiatrists (and for how many hours), how many team meetings were held, who participated in the team meetings, whether any observational data have been incorporated into the report, and, if so, who made the observations. An example of the kind of information that should ideally be given, adapted from one of the sample psychiatric reports, follows:

*Extent of Data Base:* John Doe was received in the institution on August 26, 1983. He was seen initially for one hour and has subsequently been seen individually by the psychiatrist for one half hour every week, for a total of five hours. Mr. Doe was given a complete physical examination, routine blood tests, urinalysis, and a chest X ray shortly after admission. He was given a psychological evaluation and testing; a full report is attached to this report. Mr. Doe was observed daily by mental health and correctional staff as he went about his daily duties and work assignments. Regular team meetings were held at which his progress was discussed.

Mr. Doe was interviewed in front of the group of psychiatrists, psychologists, psychiatric nurses, and correctional staff, and following the interview Mr. Doe's situation and diagnosis were discussed; opinions have been incorporated into this report.

A report of the crime story and background information about Mr. Doe were provided by the U.S. probation officer of the court. This corresponded closely to the information provided by the defendant himself, who was very cooperative and helpful throughout the study. Mr. Doe was invited to write his life history and wrote a twenty-six-page account of his whole life; many of the following details have been taken from that account.

### **Feedback from the Courts**

Many institutional staff are concerned about lack of feedback from the courts. They prepare reports but never find out whether the reports were satisfactory to the courts, how they were used, or what happened to the offenders. Structured evaluations of every report would probably not be functional because the burden of additional paperwork would likely lead to routine answers rather than serious evaluations. More important, the courts might not be able to provide meaningful feedback on individual reports. When questioned about particular cases, judges and probation officers had few specific evaluative comments. Since judges receive most of their study reports from the same institution, they probably see little variation in quality.

Rather than require routine evaluations, it might be more useful to establish a convenient mechanism whereby the courts could make comments about individual reports as needed. The courts should provide routine feedback to institutional staff, however, on the outcome of cases, specifying the final sentence and any treatment provisions. This might be accomplished with a standard form and preaddressed envelope attached to study reports, creating as little extra work as possible for probation officers. Such feedback would be both a simple courtesy to the professionals, who have often invested much time and energy in report preparation, and a help to them in evaluating their own recommendations.

### **Efficient Conduct of Observation and Study**

Three recommended changes could potentially increase the efficiency of the observation and study process, though each involves competing practical concerns that would have to be addressed.

#### **Regional Review of Study Reports**

The Bureau of Prisons should, at a minimum, restructure its policies regarding the time allocated for actual study versus that allocated for administrative review and should also consider eliminating altogether the regional review of study reports prior to their submission to the court. Though the Bureau of Prisons believes that this review is necessary to provide consistency in the quality of reports, its major purpose appears to be the monitoring and possible changing of sentencing recommendations. The rationale is that regional review can provide consistency in sentencing because regional officials receive cases from many jurisdictions and get a

more global view of sentencing patterns. As mentioned earlier, however, the court has already been given an even more global view of sentencing practices from the probation office. The bureau's regional review process is therefore essentially redundant; it considerably reduces the time spent on actual study of offenders and results in persons' remaining incarcerated far beyond the allocated study period. The original intent of the Judicial Conference and the Congress in establishing observation and study was to allow an extended period of time for studying the offender. It is doubtful that they intended for more than two-thirds of the ninety-day period to be reserved for administrative review. The determination of the length of the study period, both generally and in specific cases, should be based on the purposes of observation and study, not on bureaucratic needs.<sup>30</sup> Regional offices could still serve a quality-control function by reviewing copies of the reports that have been submitted to the courts and by providing general feedback to institutional staff.

### **Arrival of Offender and Case Materials at the Institution**

A procedure should be developed to ensure that the probation officer's presentence report and the court's study questions are available at the institution by the time of the offender's arrival. Institutional staff should not have to spend part of the study period locating these materials. The privacy of the offender must be taken into account, however, by considering who will have access to sensitive materials.

Institutional staff noted that they also have a problem when a portion of the ninety-day study period has elapsed before the offender arrives at the institution. It was suggested that perhaps the study period could begin to run upon the offender's arrival at the institution or, alternatively, that it might be possible to implement a procedure for automatic extension of the lost time in order to avoid the paperwork currently required to obtain extensions. Neither of those procedures is recommended here. First, the problem of time will undoubtedly be ameliorated if, as recommended above, the practice of keeping an offender incarcerated during what can be a lengthy regional review process is eliminated. Moreover, it is important to remember that though offenders sent for observation and study have been convicted, they have not yet been sentenced.

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30. Note that the requirement of the new legislation that the study report contain recommendations relative to applicable sentencing guidelines and Sentencing Commission policy statements is likely to provide a stronger impetus for administrative review, because administrators are more likely than psychologists, psychiatrists, and physicians to be expert in this area.

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The court's final judgment may not involve a further period of incarceration from which any additional time spent for study could be subtracted. It should therefore continue to be difficult to extend the time for observation and study. Because it is transportation difficulties that give rise to the problem in the first place, it is suggested that the Bureau of Prisons investigate possible methods of expediting the transportation of offenders referred for observation and study.





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