

Notes

The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows

Sharon M. Bunzel

The federal probation officer sits uneasily in today's federal criminal justice system. A product of the rehabilitative penal philosophy that evolved as a tool for indeterminate and individualized sentencing, the probation officer is now an important player in a criminal justice system dominated by the Federal Sentencing Guidelines (the Guidelines).¹ Philosophically opposed to the rehabilitation model, the Guidelines are a product of a movement that focused on a retributive or "just deserts" penal philosophy. The Guidelines were a direct reaction against everything that the probation officer originally represented: They established a determinate sentencing system to end the "disparity" resulting from individualized treatment of offenders.

Despite this philosophical clash, the probation officer, once the "social worker" of the criminal justice system,² has been vested with a new title: the

1. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1994) [hereinafter GUIDELINES]. The Guidelines were created pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)), which established the United States Sentencing Commission as an "independent commission in the judicial branch," 98 Stat. at 2017, and directed the Commission to promulgate sentencing guidelines by April 1, 1987, 98 Stat. at 2031-32. The Commission created a complex set of instructions to cabin judges' sentencing discretion: The Guidelines direct sentencing judges to consider an offender's criminal history and the characteristics of his offense, and then to impose a sentence according to a two-dimensional grid. The Guidelines went into effect on November 1, 1987. For a description of the Guidelines and their application, see *infra* part III.

2. See *infra* part II.

“guardian” of the Guidelines.³ Early probation officers had limited contact with the legal intricacies of sentencing. Their focus was on the offender, and their expertise was in the investigation of an offender’s life history, the assessment of his character, and the analysis of his potential for rehabilitation. The probation officer’s purpose in the pre-Guidelines criminal justice system was to facilitate sentences that fit individual *offenders*. In contrast, under the Guidelines regime, the probation officer ensures that sentences fit *offenses*. Probation officers are considered to have the most expertise and familiarity with the Guidelines.⁴ Officers have primary responsibility for collecting and presenting the facts relevant to Guidelines calculations,⁵ and sentencing judges often adopt probation officers’ Guidelines recommendations.⁶ The Guidelines’ guardian also acts as a conduit to the United States Sentencing Commission (the Commission) of information that is used to assess and amend the Guidelines.⁷

This Note questions the propriety of these new responsibilities. It argues that the probation movement developed from a philosophical posture antithetical to that of the Guidelines, and that, in light of this conflict, the probation officer is not the proper “guardian” of the Guidelines. Like the proverbial fox guarding the chicken coop, the probation system is fundamentally unsuited to the task of implementing a sentencing structure to which it is philosophically opposed. More important, playing the role of guardian forces the probation officer to betray daily her philosophical origins and to portray a false vision of the probation system.

3. Judy Clarke, *Ruminations on Restrepo*, 2 FED. SENTENCING REP. 135, 135 (1989); see also Marcia Chambers, *Probation Officers Sit in Judgment*, NAT’L L.J., Apr. 16, 1990, at 13, 13 (calling the probation officer “the keeper of the[] sentencing laws”).

4. Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENTENCING REP. 94, 96 (1989); *Editors’ Notes*, 4 FED. SENTENCING REP. 62, 62 (1991); Michael Piotrowski, *The Enhanced Role of the Probation Officer in the Sentencing Process*, 4 FED. SENTENCING REP. 96, 98 (1991).

5. John S. Dierna, *Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues*, FED. PROBATION, Sept. 1989, at 3, 3 (“An integral component of [the Guidelines] sentencing process is the probation officer, who is required to investigate the facts of the offense and determine the guideline applicability of these facts for the purpose of offense level computation . . .”).

6. Sentencing authority remains with the sentencing judge, who has the sole statutory responsibility for Guidelines calculations. 18 U.S.C. § 3553(a)(4), (b) (1988). The judge cannot delegate that authority to anyone. See *United States v. Johnson*, 935 F.2d 47, 51 (4th Cir.) (“[T]he determination of an appropriate sentence in all respects[] remains the exclusive province of the trial judge . . .”), *cert. denied*, 112 S. Ct. 609 (1991). Nevertheless, judges are extremely reliant on the probation officer’s findings and Guidelines calculations. As Judge Jack Weinstein notes, judges have become somewhat “passive” in the sentencing process: “We find ourselves giving probation reports cursory attention because we are usually just checking the probation officer’s addition. Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats.” Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV 357, 364 (1992); see also *United States v. O’Meara*, 895 F.2d 1216, 1223 (8th Cir.) (Bright, J., concurring in part and dissenting in part) (“[D]istrict courts have come increasingly to rely on the recommendations of the probation officer Consequently, it is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers . . .”), *cert. denied*, 498 U.S. 943 (1990).

7. See *infra* notes 184–85 and accompanying text.

Part I of this Note examines the rehabilitative model of criminal justice and how it gave rise to the probation movement. Part II illustrates how this philosophical foundation influenced the institutional structure of the probation system and the responsibilities given to the probation officer. The Part focuses on one of the officer's most important responsibilities, the preparation of the presentence report. An examination of the original purpose and contents of the report demonstrates that the probation officer acted as an integral component of a system of individualized, indeterminate sentencing. The Note then analyzes the philosophical opposition between the probation and Guidelines movements, and critiques the probation officer's current "uncomfortable fit" in the Guidelines regime. Part III provides a brief outline of the Guidelines' historical background, focusing primarily on the philosophical foundations of the determinate sentencing movement out of which the Guidelines arose. The Part suggests that the probation officer and the presentence report—the former tools of individualized justice—were gradually transformed by a shift in the philosophical focus of the criminal justice system away from rehabilitation and toward just deserts. Part IV presents the radical transformation of the probation officer co-opted by a system antithetical to the probation movement's philosophical origins. The Part situates the probation officer in the Guidelines-dominated criminal justice system, analyzing how the probation officer has fared now that rehabilitation is no longer the dominant goal of the criminal justice system. For purposes of comparison, Part IV documents the transformation of the early presentence report from a diagnostic tool for rehabilitation into a component of determinate sentencing. This Note concludes by discussing the strained position in which this transformation has left the probation officer, and by questioning the propriety of the current role of the probation officer in the Guidelines regime.

I. THE PROBATION MOVEMENT

The history of probation—both its antecedents in English common law and its origins in the United States—reveals an institution concerned almost exclusively with the individualization of justice and the rehabilitation of offenders. At common law, the development of mechanisms to mitigate the severity of the criminal law provided a model focus—the individual offender—for the pioneers of the probation movement. The development of the rehabilitative penal philosophy provided a philosophical starting point for the early probation movement, which sought to treat criminals as individuals with unique problems that the criminal justice system could address with correspondingly unique treatments. This Part will address briefly each of these historical roots of the probation officer.

A. *Common Law Antecedents: Individualization of Punishment*

Probation finds antecedents in practices in early English common law that were "attempts to avoid the mechanical application of the harsh and cruel precepts of a rigorous, repressive criminal law."⁸ Judge-made mechanisms, including the benefit of clergy,⁹ judicial reprieve,¹⁰ and recognizance,¹¹ allowed judges to exercise discretion in dealing with individual defendants rather than being bound by rigid statutory schemes. These equitable principles were the forerunners of probation: Dependence on judicial discretion and a focus on individual offenders rather than on a mechanistic application of law would become central components of the movement that created and sustained the probation officer.

B. *The Dominance of the Rehabilitative Model*

The probation movement is an expression of the penal philosophy of rehabilitation. "[T]he rehabilitative ideal is the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare . . . of offenders."¹² In stark opposition to a retributory penal philosophy, the rehabilitation model fashions appropriate punishment by focusing on the offender rather than on the offense: The rehabilitation philosophy "is part of a humanistic tradition which, in pressing for ever more individualization of justice, has demanded that we treat the criminal, not the crime. . . . As a kind of social malfunctioner, the criminal

8. United Nations, Dep't of Social Affairs, *The Legal Origins of Probation, excerpted in PROBATION, PAROLE AND COMMUNITY CORRECTIONS* 81, 82 (Robert M. Carter & Leslie T. Wilkins eds., 2d ed. 1976). At common law, criminal punishments were extremely severe and conviction for any serious crime could lead to death by hanging, stoning, or burning; minor crimes were punished by amputation, branding, and flogging. CHARLES LIONEL CHUTE & MARJORIE BELL, *CRIME, COURTS, AND PROBATION* 4 (1956).

9. Dating back to thirteenth-century England, the benefit of clergy exempted ecclesiastics from the King's criminal courts on the theory that only church courts had jurisdiction over them. *See generally* LEONA C. GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* (Smith College Studies in History, Vol. 14, Nos. 1-4, Oct. 1928-July 1929). The benefit was eventually extended to all those who could read. Frank W. Grinnell, *The Common Law History of Probation*, 32 J. CRIM. L. & CRIMINOLOGY 15, 17 (1941).

10. Through judicial reprieve, a judge temporarily suspended either the imposition or the execution of a criminal sentence. This practice allowed judges to modify the severity of the law in individual cases at their discretion. Judicial reprieve was a precursor to the practice of suspension of sentence, which was brought to the colonies from England and remained in effect until the enactment of probation laws. CHUTE & BELL, *supra* note 8, at 16.

11. Developed in England in the fourteenth century, recognizance allowed a defendant convicted of a minor offense to "make an assurance to the public" of his future good behavior. A direct ancestor of supervised probation, "the device was one of [the] measures employed to reduce the hardships involved in the mechanical application of a rigorous criminal law." United Nations, *supra* note 8, at 85.

12. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 2 (1981).

needs to be 'treated' or to be . . . rehabilitated. Rehabilitation is . . . the opposite of punishment."¹³

The rehabilitative theory was the impetus behind various reform movements—all philosophical brethren of the probation movement. One of the most important and widespread manifestations of the rehabilitation model was indeterminate sentencing, under which the length of imprisonment was determined not by the sentence imposed upon conviction, but by the offender's progress toward rehabilitation during incarceration.¹⁴ Judges and parole boards were empowered to adjust an initial sentence accordingly.

The indeterminate sentence concept emerged in 1870¹⁵ as a central component of the program advocated by the National Congress of the American Prison Association at Cincinnati.¹⁶ Rehabilitative reformers, who saw determinate sentencing as antithetical to the rehabilitative ideal,¹⁷ triumphed by the early twentieth century. The rehabilitative model was firmly entrenched in state and federal criminal justice systems. Indeterminate sentencing structures became the norm;¹⁸ "good time" laws were enacted;¹⁹ and parole was established in most states and in the federal system.²⁰

13. Willard Gaylin & David J. Rothman, *Introduction* to ANDREW VON HIRSCH, *DOING JUSTICE. THE CHOICE OF PUNISHMENTS* at xxix (1976).

14. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 (1972) ("[Indeterminate sentencing attempts] to avoid the Procrustean mold of uniform sentences to fit crimes in the abstract and to focus upon the progress over time of the unique individual in order to determine when it may be safe for society and good for him to set him free . . .").

15. Marvin Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 WAYNE L. REV. 45, 48 (1977).

16. TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 541-42 (E.C. Wines ed., Albany, N.Y., Weed, Parsons & Co. 1871) ("Preemptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.").

17. See, e.g., FREDERICK HOWARD WINES, *PUNISHMENT AND REFORMATION* 214 (London, Swan Sonnenschein & Co. 1895) ("Definite sentences are never reformatory, since they are in fact retributory, and are founded on the character of the act, which is . . . irrevocable. Reformatory sentences can be based only upon the character of the actor, which it is desired to correct . . .").

18. See, e.g., CAL. PENAL CODE §§ 1168, 3020 (West 1970) (providing that after service of sentence has begun, "Adult Authority may determine and redetermine . . . what length of time, if any, such person shall be imprisoned") (amended 1977, replacing indeterminate system with determinate sentencing) (amended 1984); MODEL PENAL CODE §§ 6.06, 402.2(1)(a) (1962) (providing indeterminate sentences for all felonies, with Board of Parole determining actual length of imprisonment within range).

19. "Good time" laws give prisoners "credit" for good behavior, amounting to nearly one-third of their nominal sentence. Good time has existed in the federal system since the late nineteenth century. Act of Mar. 3, 1875, ch. 145, 18 Stat. 479-80 (codified at 18 U.S.C. § 4161 (1988) (repealed 1984, effective 1987)). At the state level, New York enacted a good time law as early as 1817; by 1869, 23 states had good time laws in place. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 159 (1993).

20. See SANDRA SHANE-DUBOW ET AL., U.S. DEP'T OF JUSTICE, *SENTENCING REFORM IN THE UNITED STATES* 4-5 (1985). A paroled convict is conditionally released from jail and is allowed to serve the remainder of his sentence outside the confines of an institution so long as he complies with the conditions set by the parole board. Federal parole was established in 1910. Act of June 25, 1910, ch. 387, 36 Stat. 819. Prior to the enactment of the Guidelines, the U.S. Board of Parole had discretion to grant parole at any point between completion of one-third and two-thirds of a sentence. 18 U.S.C. §§ 4163, 4164, 4205 (1988) (repealed 1984, effective 1987). At the state level, more than half of the states had parole laws in place by the end of the nineteenth century. FRIEDMAN, *supra* note 19, at 161-62. By 1925, 46 of the 48

Discretion was central to indeterminate sentencing. Criminal statutes typically set only maximum penalties and/or fines for crimes, permitting the sentencing judge to impose any sentence as long as it did not exceed that maximum.²¹ Indeed, a judge could choose to impose no prison time at all.²² The parole board also wielded significant discretion in releasing offenders from prison after a statutorily required fraction of their sentences had been served. The probation officer played an important role in the wielding of this discretion, providing the judge and the parole board with information necessary to meet rehabilitative goals. This role in indeterminate sentencing would prove to be a key factor in organizing the probation system.²³

C. *History of Probation in America*

The probation movement was a manifestation of the rehabilitative ideal. A quest for rehabilitation of offenders and a focus on individualized sentences formed the core of the probation movement in America. An examination of the movement's history reveals these institutional aims, which the determinate sentencing movement would later explicitly reject.

A recounting of the history of probation in this country invariably begins with the story of John Augustus, the "Father of Probation." In 1841, John Augustus became the first probation officer when, encountering a man about to be sentenced in the Boston courts and finding him "not yet past all hope of reformation," Augustus bailed him and succeeded in getting his sentence reduced.²⁴ From that day forward, Augustus sought out suitable candidates for what he termed "probation." He would petition the court to suspend a defendant's sentence and to grant the defendant conditional liberty under Augustus' supervision.²⁵ Augustus first worked with drunkards, then with women and children, and later with offenders of all types, finding them shelter, food, clothing, and employment.²⁶ Between 1841 and 1859, judges released almost 2000 offenders into Augustus' custody instead of incarcerating them.²⁷

In 1878, based on the success of Augustus' efforts, Massachusetts legislated an official localized trial of Augustus' practice, pursuant to which

states had enacted parole provisions, with the last two to follow by 1942. *Id.* at 304.

21. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

22. KATE STITH-CABRANES, FEAR OF DISCRETION: THE NEW REGIME OF CRIMINAL SENTENCING IN THE FEDERAL COURTS (forthcoming) (manuscript at 11, on file with author).

23. See discussion *infra* part II.

24. JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE 5 (Boston, Wright & Hasty 1852), reprinted as JOHN AUGUSTUS, FIRST PROBATION OFFICER (Nat'l Probation Ass'n 1939).

25. REID MONTGOMERY, JR. & STEVE N. DILLINGHAM, PROBATION & PAROLE IN PRACTICE 22 (1983).

26. *Id.*

27. DEAN J. CHAMPION, FELONY PROBATION 2 (1988).

Boston hired its first probation officer.²⁸ In 1880, the Massachusetts legislature approved the nation's first statewide hiring of probation officers.²⁹ The law required that the officers "carefully inquire into the character and offence of every person arrested for crime . . . with a view to ascertaining whether the accused may reasonably be expected to reform without punishment."³⁰ Other states followed Massachusetts' lead in the ensuing years. By 1925, every state had some type of probation for juveniles, and by 1939, at least thirty-nine states had laws governing adult probation.³¹ Every state had adult probation laws by 1967.³² Although federal courts, like their state counterparts, had been suspending sentences to meet rehabilitative goals,³³ federal legislative efforts lagged behind those in the state arenas.³⁴ It was not until 1925 that the Federal Probation Act³⁵ was passed.³⁶

Federal probation, like indeterminate sentencing, was a "legislative expression" of the rehabilitative ideal,³⁷ and the criminal justice system that embraced probation in the early twentieth century was firmly committed to the rehabilitation model and to individualized justice: "After persisting for centuries in an eye-for-an-eye, tooth-for-a-tooth concept of criminal justice, our society's philosophy of crime and its control is now making a massive turn [to] individualized handling of offenders that . . . considers the offender himself, and not just his offense. . . . [This] coincided with the development

28. See Act of Apr. 26, 1878, ch. 198, 1878 Mass. Acts 146

29. See Act of Mar. 22, 1880, ch. 129, 1880 Mass. Acts 87

30. *Id.* § 3.

31. CHUTE & BELL, *supra* note 8, at 90; MONTGOMERY & DILLINGHAM, *supra* note 25, at 24

32. MONTGOMERY & DILLINGHAM, *supra* note 25, at 24

33. From as early as 1808, when Chief Justice John Marshall approved of a suspended sentence while riding circuit, probation existed "extralegally," practiced on an informal level by judges who assumed the authority to suspend sentences. J.M. Master, *Legislative Background of the Federal Probation Act*, FED. PROBATION, June 1950, at 9, 10.

34. NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 8 (1983)

35. Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259. The Act provided for one salaried probation officer for each district, drawn from the civil service list. A 1930 amendment removed the civil service requirement. In 1940, the probation system was moved from the executive branch, where it had been run by the Bureau of Prisons, to the judicial branch. Henry P. Chandler, *Probation in the Federal System of Criminal Justice*, FED. PROBATION, Jan.-Mar. 1945, at 3, 5.

36. Although the first federal probation bill was introduced as early as 1909, it was met with indifference and opposition. CHUTE & BELL, *supra* note 8, at 91. Opponents of a federal probation law saw probation and the philosophical ideals upon which it was based as a threat to the criminal justice system. Many thought that the rehabilitative focus would weaken the criminal law, where there must be "certainty of punishment." Charles L. Chute, *The Campaign for Federal Probation*, FED. PROBATION, June 1950, at 3, 3 (quoting unidentified federal judge's response to 1916 bill providing for federal probation program). In addition, successive attorneys general vehemently opposed the regular practice of suspending sentences. Master, *supra* note 33, at 14-15 (noting that one assistant attorney general expressed the "hope that no such mushy policy will be indulged in as Congress turning federal courts into maudlin reform associations"). In 1916, the Supreme Court decided *Ex Parte United States (Killits)*, 242 U.S. 27 (1916), holding that, without enabling legislation, federal courts had no authority to suspend sentences indefinitely. Congress considered some sort of bill providing for probation in almost every one of the 10 years between the *Killits* decision and the passage of the Federal Probation Act. Richard A. Chappell, *Federal Probation Service. Its Growth and Progress*, FED. PROBATION, Oct.-Dec. 1947, at 29, 29.

37. ALLEN, *supra* note 12, at 6.

of probation"³⁸ Probation officers saw their role in the criminal justice system as implementers of the rehabilitative ideal. One probation officer remarked upon the birth of federal probation: "[T]here is one belief upon which a common agreement can be arrived at, and that belief is the necessity for . . . the individualization of punishment. . . . Crime, like disease, cannot be treated *en masse*"³⁹ Thus, for over a century after probation's introduction in America, "the concept of rehabilitation [was] at the heart of any official statement of mission regarding probation."⁴⁰

II. THE EARLY PROBATION OFFICER AND THE PRESENTENCE REPORT: SHAPED BY THE MOVEMENT'S PHILOSOPHICAL ORIGINS

This philosophical foundation provided the early probation office with its main institutional focus: the offender and his rehabilitative prospects. The probation system and the probation officer's niche in the federal criminal justice system were designed to realize the institutional goal of rehabilitation. This Part discusses one of the main responsibilities of the probation officer—the preparation of the presentence report (PSR)—and how the rehabilitative philosophy influenced the report's contents and purpose. This Part shows that the probation movement's dedication to the rehabilitative penal philosophy dictated the probation officer's function and continued existence in the federal system, as reflected by the PSR.

A. *The Presentence Report*

For the rehabilitative model to function, the sentencing judge required detailed information about each offender to fashion an individualized sentence. Under this model, "the sentencing judge seeks to define the offender's exact personality and social situation, and then prescribes an 'individualized' sentence and treatment program. . . . [A] sentencing judge must have complete information about every aspect of the offender's life in order to make an accurate diagnosis and choose an effective sentence."⁴¹ As the Supreme Court noted in *Williams v. New York*,⁴² "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . . [M]odern

38. PAUL W. KEVE, *THE PROBATION OFFICER INVESTIGATES* 3–4 (1960).

39. EDWIN J. COOLEY, *PROBATION AND DELINQUENCY* 275 (1927).

40. Eugene H. Czajkoski, *Issues in Probation and Parole*, in *THE ADMINISTRATION OF JUSTICE SYSTEM* 351, 354 (Donald T. Shanahan ed., 1977). In a 1977 survey of probation administrators, an overwhelming majority considered rehabilitation the "fundamental mission" of their agency. *Id.*

41. Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1622 (1980) (citations omitted).

42. 337 U.S. 241 (1949).

concepts individualizing punishment have made it all the more necessary that a sentencing judge . . . obtain pertinent information"⁴³

Although the federal probation officer was originally, like John Augustus, responsible for supervising offenders placed on probation, the officer's close relationship with offenders after release made the probation officer the ideal vehicle for the collection and presentation of the information necessary for individualized sentencing. At first, judges turned informally to the probation officer for information about the defendant. Gradually, probation officers came to prepare formal PSRs containing the requisite information. The individualized information became increasingly important in the criminal justice system, as PSRs went from being only sporadically used⁴⁴ to being mandated in all cases.⁴⁵ Judges became dependent on the probation officer's PSR to provide them with a thorough understanding of the person to be sentenced. As one judge noted in 1946: "To exercise proper discretion it is necessary in many cases for the court to rely heavily upon the presentence report [The probation officer's PSR-writing] duty . . . cannot be properly discharged on a mechanical basis of . . . the presentation to the court of the equivalent of a stereotyped set of facts."⁴⁶

The original purpose and contents of the PSR reveal the extent to which the rehabilitation model shaped the probation officer as an institutional player. The original concept of preparing a thorough report on an offender's personality and motivation is credited to William Healy, director of the Juvenile Psychopathic Institute at Chicago, who asserted that all offenders "require careful, individual diagnosis before the rational treatment can be instituted which is really adapted to its needs."⁴⁷ Healy's early effort was the precursor to the federal PSR, which became an integral component of the process of individualized justice. One probation officer called the preparation of the PSR the "first specific step in the process of individualizing the offender. It is the key document that . . . symbolizes the vast change that our civilization is . . . making: leaving our long cherished practice of 'make-the-

43. *Id.* at 247.

44. See Victor H. Evjen, *The Federal Probation System: The Struggle To Achieve It and Its First 25 Years*, FED. PROBATION, June 1975, at 3, 12; Magdeline E. Jensen, *Has the Role of the U.S. Probation Officer Really Changed?*, 4 FED. SENTENCING REP. 94, 94 (1991).

45. In 1944, in order to "encourage and broaden the use of presentence investigations, which are now being utilized to good advantage in many cases," Rule 32(c) of the Federal Rules of Criminal Procedure was enacted, instructing probation officers to prepare PSRs whenever the court requested. FED. R. CRIM. P. 32(c) advisory committee's note (1944 adoption). By 1970, federal district courts ordered presentence investigations for almost 90% of all defendants sentenced. Note, *The Presentence Report. An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L.J. 451, 455 (1970). In 1974, the rule was amended to require preparation of a PSR except when the defendant waived it or when the court directed otherwise for reasons stated on the record. See Jensen, *supra* note 44, at 94.

46. Robert L. Russell, *What the Court Expects of the Probation Officer*, FED. PROBATION, July-Sept. 1946, at 6, 8.

47. William Healy, *The Individual Study of the Young Criminal*, 1 J. CRIM. L. & CRIMINOLOGY 50, 50 (1910).

punishment-fit-the-crime' and embracing . . . the revolutionary new practice of 'provide-treatment-to-fit-the-offender.'"⁴⁸

Early publications of the Probation Division of the Administrative Office of the United States Courts, which established national standards for the appropriate format and contents of the PSR, best illustrate the PSR's role in a rehabilitative criminal justice system. In 1943, less than two decades after the passage of the first federal probation law, the Probation Division published its first monograph concerning the PSR, referred to at that point as "the social investigation" or "social diagnosis."⁴⁹ These labels reveal the report's purpose of providing the court with a diagnostic tool to fashion individualized treatment for the offender. The 1943 monograph instructed the officer to "make the defendant live,"⁵⁰ and stated that the "primary object [of the PSR] is to focus light on the character and personality of the defendant, to offer insight into his personality needs, to discover those factors underlying the specific offense and his conduct in general."⁵¹ The monograph directed that the main body of the PSR contain the defendant's "family history," which should relate "the defendant's own story of his life,"⁵² followed by separate sections on the defendant's "home and neighborhood," "education," "religion," "interests and activities," "health," "employment," and "resources."⁵³ The probation officer was to consider and present these factors as "symptoms" of the defendant's "maladjustment."⁵⁴ From its inception, then, the PSR was concerned not with the facts of the offense, but rather with the underlying social causes of the offender's actions. The PSR thus typified the rehabilitative philosophy.

The 1965 monograph⁵⁵ exhibits a similar focus. Concerned primarily with the individual offender's personality and motivation, the directive began:

The primary objective of the presentence report is to focus light on the character and personality of the defendant, to offer insight into his problems and needs, to help understand the world in which he lives, to learn about his relationships with people, and to discover those salient factors that underlie his specific offense and his conduct in general.⁵⁶

The monograph instructed that the PSR should "give an account of a living person—his character and personality in action. People in the report must come

48. KEVE, *supra* note 38, at 48.

49. PROBATION DIV., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 101, THE PRESENTENCE INVESTIGATION REPORT I (1943) [hereinafter 1943 MONOGRAPH].

50. *Id.* at 15.

51. *Id.*

52. *Id.* at 8.

53. *Id.* at 9–12.

54. *Id.* at 12–13.

55. DIVISION OF PROBATION, ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 103, THE PRESENTENCE INVESTIGATION REPORT I (1965) [hereinafter 1965 MONOGRAPH].

56. *Id.*

to life. Instead of giving an accumulation of cold facts the report should rather present a true, vivid, living picture of the defendant."⁵⁷

Like the 1943 publication, the 1965 monograph focused the probation officer's attention on the offender rather than on the offense. Indeed, although the monograph recommended an "offense" section, it cautioned the probation officer to be "interested in the crime and its details to the extent to which they tell something about the defendant. . . . [T]he offense represents only one facet of the defendant's behavior [T]here is no need in telling any more about the offense than what light it sheds on the defendant."⁵⁸ As in the earlier monograph, the probation officer was instructed to include sections on the defendant's family history, marital history, home and neighborhood, education, religion, interests and leisure-time activities, health, employment, military services, and financial condition.⁵⁹ The "Evaluative Summary" of the PSR was to provide the court with an overall "evaluation of [the defendant's] personality."⁶⁰ Recommendations concerning probation and commitment were to be included only upon the judge's specific request.⁶¹

As these monographs illustrate, the early PSR was a tool with which a judge could fashion an individualized sentence geared toward rehabilitating the offender. One proponent of the utility of the early PSR asserted that "[the PSR's] only reason for being is to depict the intimate dynamics of one particular individual offender and to enable the court to dispose of his case with a tailor-made plan that is corrective in intent, whereas without such knowledge the disposition can only be punitive."⁶² As one judge noted, this individualization inherently resulted in dissimilar sentences for similar conduct:

The nature of the crime is but one element in determining what penalty should be imposed in any individual case. The sentence in large part must be adjusted to the circumstances surrounding the offense and the character and previous history of the offender. It is at this point that the work of the probation officer becomes vital. . . . As soon as we individualize punishment, there will of necessity be wide divergence in sentences imposed on different defendants for similar offenses. The use of presentence investigations, which makes it possible to [further] the process of individualization . . . of necessity increases the disparity of sentences.⁶³

57. *Id.* at 3.

58. *Id.* at 10.

59. *Id.* at 13–20.

60. *Id.* at 20.

61. *Id.* at 21.

62. Paul W. Keve, *The Professional Character of the Presentence Report*, FED PROBATION, June 1962, at 51, 51.

63. Alexander Holtzoff, *The Criminal Law and the Probation Officer*, FED PROBATION, Dec 1959, at 3, 4–5.

Disparity was embraced as a necessary corollary of rehabilitative justice, of which the PSR, originating as a catalog of personality traits that enabled the sentencing judge to dispense individualized justice, was an integral component.

B. *The Probation Officer's Niche in the Criminal Justice System*

Because the preparation of the PSR was one of the main responsibilities around which the federal probation system developed, the purpose and contents of the PSR shaped the probation officer's niche in the criminal justice system. Not surprisingly, the author of the offender's social history was considered to be something of a specialized social worker, and, as the eyes and ears of the sentencing judge, the probation officer developed specialized relationships with other players in the system.

From early on, the probation officer's role as a social worker was explicitly recognized. At a 1928 meeting of the National Probation Association, federal probation officers were told: "If there is any probation officer here . . . who does not consider himself or herself to be a social worker, . . . you are either going to change your mind and develop a social work consciousness, or you are a member of a passing race."⁶⁴ In 1964, one officer noted that "[the probation officer's] function in the court is indeed that of a social worker."⁶⁵

Educational requirements for probation officers generally reflected this social work focus. In 1928, the recommended training for federal probation officers included courses on social problems and pathology, clinical courses in abnormal psychology or psychiatry, news writing, and either family casework or fieldwork.⁶⁶ There were no formal qualifications for entry-level officers until 1938, when the Attorney General established minimum standards that included two years of full-time experience in social casework, and a college degree or the "equivalent practical training in probation work or in an allied field."⁶⁷ Although by 1967 the President's Commission on Law Enforcement and Administration of Justice identified a master's degree in social work as the preferred educational level, in 1973 the Joint Commission on Correctional Manpower and Training modified the standard to include only an undergraduate degree in the social sciences.⁶⁸

64. Philip A. Parsons, *The Selection and Training of Probation Officers*, 1928 PROC. NAT'L PROBATION ASS'N 37, 38.

65. NATIONAL PROBATION ASS'N, *THE PROBATION SERVICE* 181 (Joan F.S. King ed., 2d ed. 1964).

66. Parsons, *supra* note 64, at 50-51.

67. *Minimum Standards for United States Probation Service, Circular No. 3072*, FED. PROBATION, Apr. 1938, at 2, 5; *see also Report of the Committee on Standards of Qualifications of Probation Officers*, FED. PROBATION, Oct.-Dec. 1942, at 3, 5 (report adopted by Judicial Conference of Senior Circuit Judges (now Judicial Conference of United States) recommending that probation officers have two years' "experience in personnel work for the welfare of others" and B.A., B.S., or "successful experience in probation work").

68. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *PROBATION: NATIONAL STANDARDS AND GOALS* (1973), *excerpted in* PROBATION, PAROLE AND COMMUNITY

The probation officer's function as a specialized social worker shaped the officer's relationships with other institutional figures. The sentencing judge saw the probation officer as the court's "eyes and ears,"⁶⁹ a neutral information gatherer with loyalties to no one but the court. The defense attorney might have considered the probation officer to be an ally: The officer's goal of offender rehabilitation could translate into leniency for the defense attorney's client. At the same time, because of the unclear effect of the PSR on the ultimate sentence, the defense attorney did not worry about potentially incriminating evidence coming out in the presentence interview; indeed, many defense attorneys did not even attend the interviews.⁷⁰ Defendants, in turn, could trust the probation officer, because she provided information that might lead to "mercy" from the sentencing judge. The prosecutor, meanwhile, worked closely with the probation officer in her review of the case file, as did law enforcement personnel who provided the officer with the offender's "'law enforcement reputation' and involvement in other unrecorded, suspected criminal activity."⁷¹ In all, the probation officer was a trustworthy player in the system. With allegiances to no one but the court, the officer's only "agenda" was to provide as much information about the defendant to the sentencing judge as possible. The officer's association with rehabilitation kept her from being perceived as a threat to the case of either the prosecution or the defense.

This Note has demonstrated thus far that the probation officer was entirely a product of the rehabilitative penal philosophy. Shaped by its historical antecedents that sought to individualize what had previously been a mechanistic application of criminal law, the probation movement sought to focus the system's attention on the unique characteristics of the offender. As an indispensable component of the rehabilitative philosophy, the probation officer provided the information essential to individualized sentencing. In turn, the federal probation system was molded by the institutional purpose of rehabilitation.

CORRECTIONS, *supra* note 8, at 115, 145. See generally Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, FED. PROBATION, Dec. 1991, at 49, 49 (noting that early probation officers were "typically educated in the behavioral sciences . . . [and] came to employment with a variety of skills, not the least of which were assessing factors contributing to behavior maladjustment, investigating, writing, and counseling. The officer's required knowledge base was primarily concerned with the social/human behavior").

69. Denzlinger & Miller, *supra* note 68, at 50.

70. *Id.*

71. Fennell & Hall, *supra* note 41, at 1624 n.44.

III. THE DETERMINATE SENTENCING MOVEMENT AND THE FEDERAL SENTENCING GUIDELINES

The rehabilitative philosophy gradually lost its stranglehold on the criminal justice system. The push for determinate sentencing that gave rise to the Guidelines was in many ways a direct reaction against probation and its philosophical underpinnings. This Part analyzes this philosophical opposition between the probation and Guidelines movements. It outlines how the rehabilitative model lost its dominance in the criminal justice system as societal focus shifted from criminal treatment to crime control, and illustrates the corresponding shift in the focus of the PSR. It then discusses the prominence of the just deserts philosophy in the Guidelines' origins and traces the manifestations of this penal model in the Guidelines themselves.

A. *Philosophical Foundations*

1. *"The Decline of the Rehabilitative Ideal"*⁷²

The 1970's and early 1980's witnessed attacks against the rehabilitation model on which the probation movement was based. The idea that the penal system could rehabilitate offenders came into disrepute: Empirical and psychological studies published in the 1970's seemed to show that incarceration did nothing to reform criminals.⁷³ The indeterminate sentencing system also came under attack because of the "anxiety [bred] among prisoners [due to] uncertainty in their release dates" and the "unwarranted disparity" that "was said to be fundamentally at odds with ideals of equality and the rule of law."⁷⁴ Thus, the bedrock principle of rehabilitation, that offenders and society benefit from individualized sentencing, came into question.

Societal pressures also contributed to the decline of the rehabilitative model. Increasing crime rates made an uneasy public suspicious of the treatment-focused system. Professor Friedman describes the resulting "Age of Backlash" against the perceived leniency of the rehabilitative ideal: "The crime rate had increased catastrophically. Politically speaking, crime and punishment

72. ALLEN, *supra* note 12.

73. See, e.g., DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 627 (1975) ("While some treatment programs have had modest successes, it still must be concluded that the field of corrections has not as yet found satisfactory ways to reduce recidivism by significant amounts."); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22, 25 ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."). It should be noted that Martinson later retreated from his widely cited position, asserting that his criticism of rehabilitation had been misunderstood and overstated. See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979).

74. Stith & Koh, *supra* note 21, at 227; see also LYNNE GOODSTEIN & JOHN HEPBURN, DETERMINATE SENTENCING AND IMPRISONMENT: A FAILURE OF REFORM 13–22 (1985).

were suddenly like an exposed nerve. The public put enormous pressure on politicians to do something about the problem. In the light of this pressure, the system did a kind of about-face."⁷⁵ As Friedman explains: "In periods of high crime . . . the American system tends to shift its emphasis from the *offender* to the *offense*. . . . [I]n an age of paralyzing fear, [the] middle class gives off . . . a great shout: 'We don't care *who* these people are. . . . We want them caught, convicted, and put away!'"⁷⁶ The growing skepticism about the value of rehabilitation was accompanied by increased support for a crime control model of punishment based primarily on retribution and incapacitation.⁷⁷

Changes in the officially endorsed contents of the PSR reflected this growing discontent with the rehabilitative model. Gradually shifting from the "social history" it once was, the PSR of the 1970's and 1980's mirrors the flux in penal philosophy at that time.

In a 1978 monograph,⁷⁸ the Division of Probation of the Administrative Office of the United States Courts introduced what it labeled the "Core Concept" approach to investigating and preparing PSRs: The probation officer was instructed to focus on a "core of essential information," including an official version and a defendant version of the offense, introductory data concerning the defendant, and an evaluation and recommendation for disposition.⁷⁹ Individual offender characteristics and social history were to be treated as "additional" information, to be included in the PSR only to the extent that it was "pertinent" to the sentence decision.⁸⁰ Information previously included in the PSR to humanize the individual lost its significance: Details concerning the defendant's family life, psychological state, and social adjustment could be condensed in a "single narrative statement."⁸¹ Only in the unusual situation was such information to be considered remarkable enough to warrant its own extensive discussion. The goal of the probation officer was no longer to allow the defendant to "live" on paper, but to produce "reports that are factual, germane, precise, and succinct."⁸² Although the 1978

75. FRIEDMAN, *supra* note 19, at 305; see also Sanford H. Kadish, *Introduction to NATIONAL INST OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, DETERMINATE SENTENCING. REFORM OR REGRESSION?* at ix (1978) (collected essays published as *Proceedings of Special Conference on Determinate Sentencing* held at University of California at Berkeley School of Law (Boalt Hall)) ("With a precipitousness remarkable in social change, there has been a dramatic turning. Individuation, rehabilitation, sentence indeterminacy all seem on their way down, if not on their way out.")

76. FRIEDMAN, *supra* note 19, at 305-06.

77. See DALE G. PARENT, *STRUCTURING CRIMINAL SENTENCES* 10 (1988) ("In the sentencing debates of the late 1970s, most wished to suppress rehabilitation as a goal, particularly prison sentences that were imposed to pursue rehabilitative objectives. Some wanted retribution to be the dominant goal. Others sought to emphasize deterrence or incapacitation.")

78. DIVISION OF PROBATION, ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 105, *THE PRESENTENCE INVESTIGATION REPORT* (1978) [hereinafter 1978 MONOGRAPH].

79. *Id.* at 5-6.

80. *Id.*

81. *Id.* at 6.

82. *Id.* at 5; cf. *supra* notes 50 and 57 and accompanying text.

monograph did not explicitly exclude social history, the shift in the PSR's focus from offender to offense is clearly discernable.

The 1984 monograph⁸³ slightly revised its precursor and moved the PSR subtly closer to the retributive model. All language that had been present in earlier monographs (including the 1978 version) about focusing on or even presenting the defendant's "needs" was deleted from the 1984 monograph: What once instructed the probation officer to provide "an assessment of the needs of the defendant and the community" that "evaluates [the defendant's] problems and needs"⁸⁴ became, in the 1984 monograph, "an assessment of the problems of the defendant and a consideration for the safety of the community" that "evaluates [the defendant's] problems."⁸⁵ The crime control model can be seen slowly overtaking the PSR—once an integral component of rehabilitative justice.

These changes in the PSR reveal the precarious position in the criminal justice system held by the probation officer. So much a product of her philosophical origins, the officer was left without guiding principles as the rehabilitative model lost prominence. The relatively modest changes in the probation officer's focus, as revealed by the changing PSR, were only a precursor to the much more radical transformation that the Guidelines would bring about. Under the Guidelines regime, the probation officer and the PSR would be co-opted by a system that explicitly rejected everything that the probation system was designed to achieve.

2. *Determinate Sentencing and Just Deserts*

Critics of the rehabilitative model, and of the judicial discretion and individualized consideration of offenders upon which it relied, called for a determinate sentencing mechanism. The Guidelines would become the final manifestation of the changing philosophy. Most notable among these critics were the American Friends Service Committee, a former proponent of the rehabilitative ideal, and Marvin Frankel and Andrew von Hirsch, each of whose work was instrumental in the development of the Guidelines.

Until the 1970's, the American Friends Service Committee had, through its involvement in prison reform, promoted the rehabilitative model that formed the philosophical basis for the probation movement. In a complete reversal, however, the Committee published a scathing criticism of the rehabilitation model in 1971, thus paving the way for reformers who sought to replace individualized treatment of offenders with determinate sentencing. The Committee asserted that there was "compelling evidence that the individualized

83. PROBATION DIV., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 105, THE PRESENTENCE INVESTIGATION REPORT (1984) [hereinafter 1984 MONOGRAPH].

84. 1978 MONOGRAPH, *supra* note 78, at 1.

85. 1984 MONOGRAPH, *supra* note 83, at 1.

treatment model, the ideal toward which reformers have been urging us for at least a century, is theoretically faulty, systematically discriminatory in administration, and inconsistent with some of our most basic concepts of justice."⁸⁶ The Committee proposed that "all offenders in a broad class—such as type of crime, but not according to the unique characteristics of the individual—are to be treated alike. . . . The whole person is not the concern of the law."⁸⁷ The Committee called for a sentencing structure that would eliminate disparity by reducing judicial discretion.

Marvin Frankel, former District Judge for the Southern District of New York, developed a concrete proposal embodying the Committee's general assertions. His ideas would form the basis of the Guidelines.⁸⁸ Frankel leveled stinging criticism against judicial discretion, indeterminate and rehabilitative sentencing, and individualized justice. Calling the idea that all prisoners can be rehabilitated "airy nonsense,"⁸⁹ Frankel asserted:

The [rehabilitative] theory is flawed in the vagueness and overbreadth of its first premise, the idea of "sickness" calling for medical or quasi-medical "treatment." . . . We sentence large numbers of people . . . who have coldly and deliberately appraised the risks and rewards, taken their stand against received morality, but then had the misfortune to be caught. Whatever else such defendants may need or otherwise deserve, they are not promising candidates for any sort of useful "treatment" available in either our prisons or our hospitals.⁹⁰

Frankel went on to attack the individualized justice that the probation movement sought to promote: "Like all good ideas allowed to bloom without pruning . . . , the notion of individualized sentencing has gotten quite out of hand. . . . [W]e ought to recall that individualized sentencing is *prima facie* at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law."⁹¹ Frankel suggested that offenders' unique characteristics—the probation officer's focus and the former centerpiece of the PSR—should not be considered in sentencing.⁹² Frankel proposed a permanent national commission to study sentencing and to promulgate laws and rules for objective, effective, and uniform sentencing.⁹³

86. AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 12 (1971).

87. *Id.* at 144, 147.

88. Indeed, during early Senate hearings on proposed sentencing guidelines, Senator Edward Kennedy (D-Mass.) acknowledged Frankel's contribution, calling him "the father of sentencing reform." 128 CONG. REC. S26,503 (1982).

89. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 99 (1972).

90. Frankel, *supra* note 14, at 31 (citation omitted); *see also* FRANKEL, *supra* note 89, at 86–102.

91. FRANKEL, *supra* note 89, at 10.

92. *Id.* at 11 ("[V]ariations [in sentencing should] turn upon objective, and objectively ascertainable, criteria—impersonal in the sense of the maxim that the law 'is no respecter of persons' . . .").

93. *Id.* at 118–23.

While Frankel never actually chose among the objects of sentencing, his rejection of the rehabilitative ideal and individualized justice is inherent in the determinate sentencing model he proposed. This is made clear in the work of Andrew von Hirsch, whose suggestions for sentencing reform provided a model for the actual structure of the Guidelines. Von Hirsch condemned the rehabilitative ideal and in its place proposed "greater mechanization of justice"⁹⁴ based on the "commensurate deserts" principle. Specifically, he argued that "the sentence . . . is a deserved penalty based on the seriousness of [the offender's] past criminal conduct. In order for the principle of commensurate deserts to govern, there *must* be standards specifying how much offenders receive for different crimes."⁹⁵ Von Hirsch called for a sentencing structure with offense categories ranked by graded levels of seriousness and presumptive sentences prescribed for each level. Increases in the sentence would be based on past criminal history, and departures from the prescribed sentences would be allowed only in "special circumstances."⁹⁶

Von Hirsch's work makes it clear that determinate sentencing necessarily abandons the rehabilitative ideal, of which indeterminate sentencing was a legislative manifestation. As determinate sentencing gained popularity, there was a commensurate shift in penal philosophy to retribution and just deserts:

The dominant perspective associated with determinate sentencing was that of "just deserts." As the individualized sentence was replaced by determinacy, and as rehabilitation and its uncertain duration [were] abandoned as . . . primary consideration[s] in the determination of an offender's release, it became reasonable to fix the prison term at sentencing, and to do so in terms of some appropriate or "just" level of punishment. . . . Legislatures and sentencing commissions, charged with establishing values for sentences, naturally found just deserts with its fundamental demand for "proportionality" to be an appropriate philosophy.⁹⁷

The penal philosophy associated with determinate sentencing inescapably conflicts with the rehabilitative model: "There is room for punishment [i.e., retribution] . . . in the treatment [i.e., rehabilitation] approach, but little room for treatment . . . in the punitive approach."⁹⁸ Because the rehabilitative model allowed judges to distinguish among offenders based on their individual circumstances, resulting in dissimilar sentences for similar criminal acts, proponents of the just deserts philosophy deemed rehabilitative sentences "inherently unfair" and thus "violently oppose[d]" the rehabilitative

94. Gaylin & Rothman, *supra* note 13, at xl-xli.

95. ANDREW VON HIRSCH, *DOING JUSTICE* 98 (1976).

96. *Id.* at 99-100.

97. Alfred Blumstein, *Sentencing Reforms: Impacts and Implications*, 68 *JUDICATURE* 129, 131 (1984).

98. HARRY E. ALLEN & CLIFFORD E. SIMONSEN, *CORRECTIONS IN AMERICA* 84 (2d ed. 1978).

philosophy.⁹⁹ The philosophical foundation of the Guidelines is therefore based on a rejection of that of the probation movement.

B. *The Guidelines*

The legislative history¹⁰⁰ of the Sentencing Reform Act of 1984 (the Act) reveals the abandonment of the rehabilitative model in favor of the just deserts philosophy. The Guidelines mandate that sentences previously determined by the offender's unique characteristics be replaced by sentences that are uniform and proportional according to the offense committed.

1. *The Rejection of the Rehabilitative Model*

Congress directed the Commission to "assure that, to the maximum extent possible, the Federal sentencing practices and policies carry out the four purposes of sentencing"—retribution, deterrence, incapacitation, and rehabilitation.¹⁰¹ Congress also instructed the sentencing judge to "consider" all four purposes of sentencing before imposing a particular sentence.¹⁰² However, this inclusive direction is misleading. The four purposes of sentencing diverge in their aims and conflict in their applications. Rehabilitation, with the goal of treating and reforming the individual offender, is fundamentally inconsistent with retribution, which seeks to punish the offender for his wrongful acts regardless of his individual treatment needs. "Ultimately a choice must be made to follow one purpose at the expense of another."¹⁰³ Despite Congress' assertion to the contrary, the Guidelines do not weigh equally the four sentencing goals. A distinct preference for the just deserts philosophy, accompanied by a rejection of the rehabilitative model, are evident in the Sentencing Reform Act, in its legislative history, and in the Guidelines themselves.

The Senate report accompanying the Act states that the purpose of "'just deserts' . . . should be reflected clearly in all sentences."¹⁰⁴ Throughout the public hearings held by the Commission after passage of the Act, many who testified noted that the Guidelines "elevated retribution . . . above all other principles as the primary objective in sentencing, while plainly disregarding

99. CHAMPION, *supra* note 27, at 16.

100. For a comprehensive analysis of the Guidelines' legislative history, see Stuth & Koh, *supra* note 21.

101. S. REP. NO. 225, 98th Cong., 1st Sess. 161 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3344. Senate Report 225 is the "central document in the legislative history of the Sentencing Reform Act." Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 425 (1992).

102. 18 U.S.C. § 3553(a)(2) (1988); S. REP. NO. 225, *supra* note 101, at 75.

103. Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U. L. REV. 19, 20 (1987).

104. S. REP. NO. 225, *supra* note 101, at 75.

rehabilitation."¹⁰⁵ One member of the Commission noted at the hearings that he expected rehabilitation to play a lesser role in sentencing since Congress had placed it "at the bottom" of the list of sentencing purposes.¹⁰⁶ One commentator has noted that the Commission's annual amendments to the Guidelines also have displayed a predisposition toward deterrence, incapacitation, and just deserts as the principal penal philosophies of the Guidelines system.¹⁰⁷

This embracing of the retributive philosophy was accompanied by a rejection of the rehabilitation model. Although Senate Report 225 claims that the Act "retain[s] rehabilitation and corrections as an appropriate purpose of a sentence," it notes that, "in light of current knowledge . . . 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'"¹⁰⁸ The Report criticizes an alternative legislative proposal by the Judicial Conference because it "retains vestiges of the rehabilitation theory upon which current law is exclusively based."¹⁰⁹ The Report introduces the Act by noting that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."¹¹⁰ The Report implies that the Act "revise[s] the sentencing laws] to take this into account."¹¹¹ Thus, the Act includes a presumption against rehabilitation-focused sentencing: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."¹¹² The Act similarly instructs judges that "imprisonment is not an appropriate means of promoting correction and rehabilitation."¹¹³

The Commission incorporated Congress' rejection of the rehabilitation model. Discussing the "philosophical problem" it confronted in attempting to "reconcile differing perceptions of the purposes of criminal punishment," the Commission describes its choice as that between "just deserts" (retribution)

105. Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1117 (1992) (citation omitted).

106. *Regional Public Hearing Before the United States Sentencing Commission, Washington, D.C.* 236 (1986) (remarks of George MacKinnon, Member, U.S. Sentencing Commission), quoted in Koh, *supra* note 105, at 1117 n.58.

107. Miller, *supra* note 101, at 443-48.

108. S. REP. NO. 225, *supra* note 101, at 76 (quoting proposed 18 U.S.C. § 3582(a)).

109. *Id.* at 58.

110. *Id.* at 38.

111. *Id.*

112. 28 U.S.C. § 994(k) (1988). As Stith and Koh note, while the bill that became the Sentencing Reform Act allowed one exception to this prohibition, the exception was not in the provision as modified and finally enacted. Stith & Koh, *supra* note 21, at 241 (comparing S. 1437, 95th Cong., 1st Sess. § 124 (1977) with 28 U.S.C. § 994(k)).

113. 18 U.S.C. § 3582(a) (1988).

and “crime control” (deterrence and incapacitation); rehabilitation is not considered.¹¹⁴

2. Structure

The structure of the Guidelines that were promulgated pursuant to the Sentencing Reform Act also reveals the abandonment of the rehabilitative model that gave life to the probation system. The Guidelines are concerned primarily with the offense committed rather than with the offender who committed the offense. The sentencing judge’s consideration of individual offender characteristics is limited: The offense and the defendant’s criminal history dictate the sentencing decision. As Professor Alschuler has noted, “The focus [of the Guidelines is] on harms, not people.”¹¹⁵

The Guidelines Manual sets forth Congress’ three objectives in promulgating the Act, each of which runs directly counter to the ideals that lay at the heart of the probation movement. The Manual states:

[First, Congress sought to achieve] honesty in sentencing. [Congress] sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. . . .

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.¹¹⁶

The first and third principles—determinate sentencing and proportionality—focus on the offense rather than on the offender. Under determinate sentencing, the defendant’s rehabilitative progress cannot be measured and his prison time adjusted accordingly; rather, the sentence initially given is the one served. Proportionality requires the sentence to focus on the offense, as the offender is punished based on the severity of his crime—he is given his just deserts. By abolishing parole and indeterminate sentencing, the Guidelines abandon the tools for rehabilitative justice and the institutions for which the probation officer’s duties were developed.

114. GUIDELINES, *supra* note 1, § 1A, at 4. In the end, the Commission reports, it was unnecessary to choose between the two theories because the goals of each could be achieved by the same sentence. *Id.*

115. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 909 (1991).

116. GUIDELINES, *supra* note 1, § 1A, at 2.

Uniformity in sentencing—the second congressional goal noted above—is likewise contrary to the philosophical foundations of the probation movement. Although the Guidelines Manual suggests that the Guidelines will treat only “similar” offenders similarly, the Guidelines in fact do not allow sufficient consideration of individual offender characteristics to determine whether criminals are in fact “similar” enough to warrant similar sentences. Instead, by focusing on the offense, the Guidelines achieve uniformity of sentences without regard to the unique offender characteristics that may warrant dissimilar treatment. As Judge Edward Becker of the Third Circuit has noted, “the guidelines have created a new form of disparity: instead of treating like defendants differently as the previous sentencing regime did, the guidelines treat offenders with dissimilar . . . backgrounds similarly.”¹¹⁷

This “new form of disparity” is not an untemplated by-product of Guidelines sentencing; rather, the structure of the Guidelines themselves suggests that it was an intended consequence of the Guidelines system. The centerpiece of the Guidelines is a 258-box grid.¹¹⁸ Along the vertical axis are criminal offenses grouped into forty-three “offense levels,” ascending in severity from the first to the forty-third. The offense level comprises a base score (established by the Guidelines for each statutory offense) for the defendant’s offense of conviction¹¹⁹ and adjustments for specific offense characteristics.¹²⁰ The horizontal axis—consisting of six “criminal history categories”—calculates severity on the basis of the defendant’s past conviction record.¹²¹ The box at which the axes intersect dictates a defendant’s “sentencing range.”

The presumptive Guidelines sentence is thus determined without reference to an offender’s unique character or situation: The Guidelines grid is two-dimensional, allowing only offense characteristics and criminal history to be considered. This inherent limitation in the binary scheme reflects the limited importance of individual offender characteristics suggested by the congressional direction to the Commission to consider whether certain offender characteristics “have *any relevance* to the nature, extent, place of service, or other incident[ce] of an appropriate sentence” and to “take [the characteristics] into account [in developing the Guidelines] *only to the extent* that they do have relevance.”¹²² The Commission was required to “assure that the guidelines

117. Conference Summary, *Conference on the Federal Sentencing Guidelines*, 101 YALE L.J. 2053, 2054 (1992) (comments of Judge Becker).

118. GUIDELINES, *supra* note 1, § 5A (Sentencing Table).

119. *Id.* §§ 2A1–2X5.

120. Adjustments are related to the victim, *id.* §§ 3A1.1–3, the defendant’s role in the offense, *id.* §§ 3B1.1–4, the degree of the defendant’s obstruction of justice, *id.* §§ 3C1.1–2, whether the defendant was convicted of multiple counts, *id.* §§ 3D1.1–5, and whether the defendant has accepted responsibility for the offense, *id.* § 3E1.1.

121. *See id.* §§ 4A1, 4B1 (explaining how to determine criminal history category).

122. 28 U.S.C. § 994(d) (1988) (emphasis added).

and policy statements . . . *reflect the general inappropriateness* of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."¹²³ As Professor Freed has noted, "[t]o interpret this language consistently with the legislative history, one might say that Congress was enumerating characteristics [for non-consideration] that connoted a rehabilitative sentencing purpose."¹²⁴ At the very least, "these mandates to the Commission took a decided step toward discouraging individualization of sentences."¹²⁵

To depart from the presumptive sentence, the court must either rely on one of the acceptable reasons for departure listed in the Guidelines,¹²⁶ or find "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."¹²⁷ A judge who departs must provide an explanation for the departure on the record.¹²⁸ Judges are severely constrained, however, in their consideration of offender characteristics. Section 5H1 of the Guidelines methodically lists the individual characteristics of offenders that are "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range,"¹²⁹ many of which were formerly central considerations for the probation officer in making a sentence recommendation. The only characteristics considered relevant in determining whether a departure is warranted are the defendant's role in the offense,¹³⁰ the defendant's criminal history,¹³¹ and the degree to which the defendant depends upon criminal activity for livelihood.¹³² Indeed, when courts permit departures based on offender characteristics "not adequately taken into consideration" in the Guidelines, the Commission often responds by amending the Guidelines "to clarify the irrelevance of the offender's background."¹³³ For example, a 1991 amendment to the Guidelines adding past military service and physique to the list of factors "not ordinarily relevant in determining whether a sentence should

123. *Id.* § 994(e) (emphasis added).

124. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1716 n.178 (1992).

125. Stith & Koh, *supra* note 21, at 251.

126. Guidelines authorize departures relate primarily to the defendant's level of assistance to the authorities and to the type of injury resulting from the crime. See GUIDELINES, *supra* note 1, § 5K.

127. 18 U.S.C. § 3553(b) (1988).

128. *Id.* § 3553(c).

129. GUIDELINES, *supra* note 1, §§ 5H1.1-6, 5H1.10-12 (presumptive irrelevancy of age; educational and vocational skills; mental and emotional conditions; physical condition or appearance, including physique; drug or alcohol dependence or abuse; employment record; family ties and responsibilities, community ties; race, sex, national origin, creed, religion, and socioeconomic status, military, civic, charitable, or public service; employment-related contributions; record of prior good works; and lack of guidance as youth and similar circumstances indicating disadvantaged upbringing).

130. *Id.* § 5H1.7.

131. *Id.* § 5H1.8.

132. *Id.* § 5H1.9.

133. Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION, Dec 1991, at 45, 45

be outside the guidelines" reversed two judicial decisions holding that those offender characteristics warranted downward departures.¹³⁴

Far from considering offenders individually, the Guidelines categorize them in relation to their offense. As Professor Stith has noted, "In order to achieve greater uniformity in sentencing of like offenders for like crimes, the Commission found it necessary to pigeon-hole crimes and offenders along complex gradients of severity and to greatly confine judicial discretion in all but 'special' or 'extraordinary' cases."¹³⁵ Indeed, the strict cabining of judicial discretion led several district courts to hold that the Guidelines unconstitutionally deprive defendants of an individualized sentence.¹³⁶ The Guidelines' interest in uniformity has resulted in what Professor Alschuler has labeled "excessive aggregation"—that is, "treating unlike cases alike"¹³⁷—a phenomenon completely antithetical to the quest for individualization that was at the heart of the probation movement.

Reconsidering the comments of early probation officers who celebrated the probation system because it recognized that crime could not be treated "*en masse*" and it "consider[ed] the offender himself, and not just his offense,"¹³⁸ it is clear that the probation officer as previously conceived has no place in the Guidelines regime. Having abandoned indeterminate sentencing and the rehabilitative model, the Guidelines rejected the institution that gave rise to the probation officer and shaped her role in the federal criminal justice system.

134. *Id.* (citing *United States v. Lara*, 905 F.2d 599, 601 (2d Cir. 1990) (upholding downward departure based on potential for victimization of "delicate looking young man" in prison); *United States v. Pipich*, 688 F. Supp. 191, 193 (D. Md. 1988) (finding military service basis for downward departure)).

135. STITH-CABRANES, *supra* note 22 (manuscript at 10).

136. *See, e.g.*, *United States v. Martinez-Ortega*, 684 F. Supp. 634, 636 (D. Idaho 1988) ("The Guidelines exemplify the arrogance of quantification. If a sentencing judge, under the [pre-Guidelines] system, lumped all defendants into categories based on broad generalizations, he would rightly be accused of abusing his discretion. But that is precisely how the Guidelines operate."), *remanded sub nom.* *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989); *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1513 (C.D. Cal. 1988) (en banc) ("[T]he mechanical formulas and resulting narrow ranges of sentences prescribed by the Guidelines violate defendants' right to due process of law . . . by divesting the Court of its traditional and fundamental function of exercising its discretion in imposing individualized sentences according to the particular facts of each case."); *United States v. Frank*, 682 F. Supp. 815, 818-19 (W.D. Pa.) ("Under the sentencing guidelines . . . a defendant has no opportunity to affect the court's assessment of the appropriate sentence based upon the facts and circumstances. . . . [D]ue process protects a defendant's opportunity to affect a court's assessment of a proper sentence."), *rev'd*, 864 F.2d 992, 1010 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989). The circuit courts that have considered the issue have held that the Guidelines do not violate defendants' substantive due process rights. In addition to those cited above reversing lower courts' holdings, see *United States v. Bryant*, No. 93-5022, 1994 U.S. App. LEXIS 27511 (4th Cir. Sept. 30, 1994); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Seluk*, 873 F.2d 15 (1st Cir. 1989); *United States v. Britman*, 872 F.2d 827 (8th Cir.), *cert. denied*, 493 U.S. 865 (1989); *United States v. White*, 869 F.2d 822 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989); *United States v. Vizcaino*, 870 F.2d 52 (2d Cir. 1989). One circuit has noted that "it is clear that the due process issue cannot survive the Supreme Court's determination [in *Mistretta v. United States*, 488 U.S. 361 (1989),] that the Guidelines were promulgated in a constitutionally proper manner." *United States v. Bolding*, 876 F.2d 21, 22 (4th Cir. 1989).

137. Alschuler, *supra* note 115, at 916.

138. *See supra* notes 38-39 and accompanying text.

IV. THE MODERN PROBATION OFFICER AND THE PRESENTENCE REPORT: CO-OPTED BY THE GUIDELINES

The clash between the underlying philosophies of the probation movement and the determinate sentencing movement left little room for the probation officer in the Guidelines system. The shift from rehabilitation to just deserts robbed probation officers of their philosophical footing. Probation offices remained open but operated in a kind of limbo: "Much of the energy and force for . . . maintaining a professional [probation] personnel corps was spent with the loss of rehabilitation. . . . [D]espite this ambiguity of purpose, . . . most probation agencies went on as they always did. . . . [But probation officers] had no relevance to the growing demands for crime suppression"¹³⁹ Rather than fading out of the criminal justice picture, however, the probation officer has been forced to adapt to the new landscape. This new role has left the probation officer in the uncomfortable predicament of being an integral component of a system that explicitly rejects everything that the probation system represents. The probation officer has been co-opted by Guidelines justice: Indeed, even the PSR has become a tool for uniform determinate sentencing that focuses on the offense rather than on the offender. This Part analyzes the extent of the probation officer's transformation and the problems that have resulted.

A. *The Presentence Report Perverted*

The Sentencing Reform Act makes surprisingly little reference to the role of the probation officer in the implementation of the Guidelines system. Although the Commission repeatedly consulted probation officers during the formulation of the Guidelines¹⁴⁰ and the Act empowers the Commission to monitor and instruct probation officers,¹⁴¹ the only statutory instruction to the officer requires the submission of a PSR to the court pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure.¹⁴² Considering the PSR's philosophical origins and early format, the incorporation of the PSR into the Guidelines scheme seems inexplicable: As this Note has shown, the PSR and the Guidelines are tools of incompatible penal philosophies. Nevertheless, the Guidelines have co-opted the PSR, ironically transforming what was once a

139. Vincent O'Leary, *Probation: A System in Change*, 51 FED. PROBATION, Dec. 1987, at 8, 8-9.

140. Letter from Tomasso D. Rendino, Chief U.S. Probation Officer, Southern District of Georgia, to Judge Wilkins, Chairman, U.S. Sentencing Commission, in 2 FED. SENTENCING REP. 247, 248 (1990) ("The Federal Probation Officers Association has been working with the Commission since before the first set of Guidelines was promulgated We applaud the Commission for always having had an open door policy for us.") (recounting testimony on behalf of the Federal Probation Officers Association delivered before the Commission on March 15, 1990).

141. 28 U.S.C. § 995(a)(9)-(10) (1988).

142. 18 U.S.C. § 3552(a) (1988).

tool of rehabilitative sentencing into an integral component of determinate sentencing.

The 1987 monograph published by the Division of Probation of the Administrative Office of the United States Courts¹⁴³ evidences a radical shift in the PSR's role. Published the year that the Guidelines went into effect, these instructions to the probation officer demonstrate that the original purpose of the PSR and its role in the criminal justice system have been corrupted.

The 1987 monograph opens ominously: "There have been few events in the history of the Federal Probation System that have had as revolutionary an effect as the Sentencing Reform Act."¹⁴⁴ The extent of this revolution is made explicit:

Traditionally, probation officers have been guided in their presentence investigations by a philosophy that put a premium on understanding the causes of an offender's antisocial behavior and evaluating the possibilities of change. Under guideline sentencing, the emphasis will be very different. Although the judge will have some discretion to take into account the defendant's potential for change, the dominant task in guideline sentencing is to apply a set of legal rules—the Guidelines—to the facts of the case. The presentence investigation will be guided largely by the need to resolve those factual questions that the Guidelines treat as relevant.¹⁴⁵

Rather than including in the PSR all of the information acquired in the course of the presentence investigation, the probation officer is instructed to provide the sentencing judge with only those "data that may be relevant to sentencing in a guideline system."¹⁴⁶ As the previous discussion of relevant offender characteristics showed, the data concerning the individual offender that traditionally constituted the bulk of the PSR—and justified its existence—are considered "irrelevant." Information that was once central in the preparation of the report—family ties, personal data, psychological history—is thus excluded from the modern PSR. For example, the 1987 monograph states that the information once provided by the family ties section serves only "limited purposes . . . in the context of guideline sentencing."¹⁴⁷

The result of this new approach to PSRs is made abundantly clear by the sample PSR included in the 1987 monograph.¹⁴⁸ Infamously known among

143. DIVISION OF PROBATION, ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 107, PRESENTENCE INVESTIGATION REPORTS UNDER THE SENTENCING REFORM ACT OF 1984 (1987) [hereinafter 1987 MONOGRAPH].

144. *Id.* at i.

145. *Id.* at 6.

146. *Id.* at 38.

147. *Id.*

148. *Id.* app. E.

probation officers as the "Mali Pre,"¹⁴⁹ the sample is a PSR for an offender named David Mali. The "Offender Characteristics" section, which includes the bulk of the information outlined in the 1965 monograph, covers just over one page of the twelve-page document. The section is dwarfed by the Guidelines calculations, which occupy much of the remainder of the report.

After incorporating the 1987 PSR changes, many probation officers found that, although the report provided sufficient information for the imposition of a Guidelines sentence, there was no longer enough information concerning the defendant *as an individual* for the PSR adequately to serve its other functions, which include aiding in supervision during probation and assisting the Bureau of Prisons in classifying prisoners, implementing institutional programs, and planning prisoner release. Prison officials found the Guidelines PSR ineffectual because it failed to serve any function other than facilitating determinate sentencing.¹⁵⁰ Judges also balked at the new PSR; some demanded that reports retain the social history of the pre-Guidelines era.¹⁵¹

Perhaps because of the widespread dissatisfaction with the 1987 monograph's approach to offender characteristics, the 1992 monograph¹⁵² retreats from its predecessor's approach. The 1992 monograph states:

The informed exercise of the court's discretionary authority demands that the presentence report include all information relevant to sentencing decision making, whether or not the information is directly relevant to guideline application. Information regarding the defendant's personal background is of assistance to the court in selecting appropriate sentencing options In extraordinary cases, [this information] may even be considered when determining if a departure is warranted.¹⁵³

Despite this seeming moderation, the sample PSRs provided in the 1992 monograph do not devote significantly greater space to offender characteristics than did the Mali Pre. The bow toward a more extensive personal history is

149. Interview with Virginia Swisher, Senior Probation Officer, District of Connecticut, in New Haven, Conn. (Apr. 2, 1994).

150. The PSR had been reduced so dramatically in its scope that prison officials denied visitation rights to close family members of new inmates because the PSR did not discuss the offender's family history. Interview with Maria R. McBride, Chief U.S. Probation Officer, District of Connecticut, in New Haven, Conn. (Mar. 27, 1994).

151. Weinstein, *supra* note 6, at 364 ("[Guidelines PSRs are] no longer designed to uncover good as well as bad facts about defendants. They mechanically describe what the guidelines consider relevant. In recent . . . cases for which I sought full reports, our chief probation officer had to assign an 'old style' officer with an advanced social work degree and preguidelines experience." (citation omitted)); Interview with Virginia Swisher, *supra* note 149 ("I was told when I came on—the judges want more information than [the national PSR format called for].").

152. PROBATION AND PRETRIAL SERVS. DIV., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO 107, THE PRESENTENCE INVESTIGATION REPORT FOR DEFENDANTS SENTENCED UNDER THE SENTENCING REFORM ACT OF 1984 (1992) [hereinafter 1992 MONOGRAPH].

153. *Id.* at II-59.

more smoke than substance. With judges still demanding more information, and probation officers feeling as if compliance with the national standards may be unjust to defendants,¹⁵⁴ some districts have taken it upon themselves to develop their own local "guidelines" for the format and contents of the PSR to restore some of the important social history data of the pre-Guidelines PSR.¹⁵⁵ Nevertheless, as one chief probation officer notes in frustration:

We may value the social history information, but when it comes down to what is supposed to be scrutinized, it's going to be the Guidelines, it's going to be the offense conduct and prior record—that's what's going to get the most attention. . . . If no one is going to pay much attention to the rest of the report, you're going to put your attention into the Guidelines.¹⁵⁶

Just as the early PSR both reflected and affected the probation officer's function in the criminal justice system, the Guidelines PSR has perverted the probation officer's once well-established philosophical purpose. As one probation officer notes, the Guidelines have "cast[] the probation officer into a different and, some would argue, an uncomfortable role [as] punisher."¹⁵⁷ It is interesting to note that, in conjunction with the effective date of the Guidelines, Rule 32(c) of the Federal Rules of Criminal Procedure was amended so that defendants can no longer waive preparation of a PSR.¹⁵⁸ The PSR is currently required in all cases unless the sentencing judge determines that there is sufficient information on the record to allow meaningful exercise of her sentencing authority.¹⁵⁹ The PSR is thus no longer a benefit that the defendant can waive; rather, it is a vehicle for his punishment. No longer able to focus on the individual to facilitate rehabilitation, the probation officer has been transformed into a component of determinate sentencing and of a just deserts penal philosophy.

154. As one probation officer notes:

The [PSR] is designed to inform, and if you don't add anything more [than the Guidelines call for] . . . you don't tell the judge anything. As the court's investigator, it is our job to convey information, and . . . if the report does not give you any idea about what this person went through as a child or as an adult, you have no idea what the person's state of mind was when he committed the offense

Interview with Virginia Swisher, *supra* note 149.

155. *See, e.g.*, Probation Office, District of Connecticut, The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 (1994) (draft, on file with author).

156. Interview with Maria R. McBride, *supra* note 150.

157. Harry Joe Jaffe, *The Presentence Report, Probation Officer Accountability, and Recruitment Practices: Some Influences of Guideline Sentencing*, FED. PROBATION, Sept. 1989, at 12, 12.

158. As the Guidelines note: "In order to ensure that a sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report." GUIDELINES, *supra* note 1, § 6A1.1 commentary; *cf. supra* note 45 (describing previous rule under which report was waivable).

159. FED. R. CRIM. P. 32(c)(1).

B. *The Niche Undone*

This radical transformation has left the probation officer's world disjointed. The institution of probation had been built on a solid foundation of the rehabilitative model, and the needs of the indeterminate sentencing system had shaped the probation officer's duties. Now, with that foundation eroded, the established position of the probation officer in the criminal justice system has been left in disarray; the social worker has responsibilities beyond a social worker's training, and the former neutral agent has become a powerful player with a statutorily imposed agenda that runs contrary to the officer's design.

The probation officer, whose place in the criminal justice system developed as that of a specialized social worker, can no longer function in the Guidelines-dominated system with the skills of a social worker. The Guidelines PSR is no longer a social history; rather, it requires "legal" reasoning and other skills heretofore alien to probation officers.¹⁶⁰ Despite these new demands on the probation officer, formal requirements for entry-level probation work have remained essentially the same as in the pre-Guidelines era.¹⁶¹ "[T]he burden of the massive training effort (both formal and informal) to implement guideline sentencing fell largely on the probation officer."¹⁶² The Federal Courts Study Committee has expressed concern with this state of affairs: "Although district judges have great confidence in the federal probation service, there is a growing concern among judges, prosecutors and defense lawyers that the new sentencing regime imposes on these officers responsibilities as independent investigators and fact-finders . . . for which they may not be particularly well trained or well suited."¹⁶³ This divergence of formal training requirements and the training necessary for probation officers to fill their role in the Guidelines system reveals the uneasy fit between what

160. See Dierna, *supra* note 5, at 6 (noting that new role at sentencing hearing requires officer "to exhibit oratorical skills, professional savvy, and an ability to present rational and persuasive arguments"). Jaffe, *supra* note 157, at 12 ("[Modern PSR's] numerical quantification of such abstractions as relevant conduct, obstructionism, and degrees of culpability, demands . . . sophisticated reasoning powers. Analyses must be made, inferences must be drawn, and options must be selected—all within the confines of a somewhat complex instructional manual whose text ranges from the translucent to the opaque"). Piotrowski, *supra* note 4, at 97 ("Probation officers are [now] required to evaluate the reliability of certain information and the credibility of statements, draw inferences, and consider issues such as standards of proof.").

161. Still not required to have any legal training or background, federal probation officer candidates must have an undergraduate degree from an accredited institution in any of the social sciences. Jaffe, *supra* note 157, at 13; cf. *supra* notes 66–68 and accompanying text.

162. Denzlinger & Miller, *supra* note 68, at 50. The Sentencing Commission does provide one-day training sessions in each district for judges, U.S. attorneys, defense lawyers, and probation officers. Each district has such training approximately every 15 months. Districts also run their own in-house training sessions. For example, in the District of Connecticut, in-house Guidelines "specialists" conduct at least two sessions per year for the entire staff on specific Guidelines issues. The "specialist" gets some training from the Commission at "train-the-trainer" sessions. Interview with Virginia Swisher, *supra* note 149.

163. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138 (1990).

the probation officer is and what the Guidelines need and expect the probation officer to be. While the solution to this problem may be relatively simple—change the educational training and work experience requirements—the mere existence of the disjunction is symptomatic of the larger conflict presented in this Note. The Guidelines regime chose the probation officer to be its guardian without considering that the development of the probation system has made the probation officer particularly ill suited for the task.

The probation officer's new role in the Guidelines-dominated system has also affected the probation officer's relationships with other players in the criminal justice system. Once a neutral party whose social history was relied upon in varying degrees by judges, the probation officer's role is now more strictly defined, and the role of the PSR in the sentencing process is clearer. As one probation officer notes: "The immediate impact of the[] judgments [now included in the Guidelines PSR], if adopted by the court, is much more visible than were the officer's general conclusions and recommendations prior to the guidelines."¹⁶⁴ This means that the defense attorney, the prosecutor, and the judge view the probation officer differently. Because the probation officer now stakes out a legal position through the PSR's factual findings and Guidelines calculations, the officer is no longer just a conduit of information; rather, the officer now has a position to defend.¹⁶⁵ Thus, whereas the pre-Guidelines probation officer was a passive observer at the sentencing hearing, the new PSR format forces the probation officer to "become the focus of . . . a very adversarial sentencing system"¹⁶⁶ in which the probation officer is in "the business of lawyering."¹⁶⁷ Having been given "increased . . . decision-making responsibilities that affect . . . guideline calculations,"¹⁶⁸ the probation officer has an increased investment in the sentencing decision: The probation officer must defend the factual scenarios and the Guidelines calculations presented in the PSR.¹⁶⁹

This process has led some to dub the probation officer the "'third adversary' in the courtroom."¹⁷⁰ Relationships founded on the assumption that the probation officer was a neutral agent of the court have been dismantled, or, at least, radically altered. As defender of Guidelines protocol,

164. Charlie E. Varnon, *The Role of the Probation Officer in the Guideline System*, 4 FED. SENTENCING REP. 63, 63 (1991).

165. Whereas in pre-Guidelines PSRs the probation officer presented both the prosecution and defense versions of the facts, in the modern PSR the probation officer makes independent judgments and factual findings. The probation officer may be called upon to argue the merits of the conclusions presented in the PSR and to present testimony at the sentencing hearing to justify the PSR's factual findings. Susan Krup Grunin & Jud Watkins, *The Investigative Role of the United States Probation Officer Under Sentencing Guidelines*, FED. PROBATION, Dec. 1987, at 43, 46.

166. Denzlinger & Miller, *supra* note 68, at 51.

167. Clarke, *supra* note 3, at 135.

168. Dierna, *supra* note 5, at 4.

169. *Id.* at 6 ("[I]t is the probation officer's responsibility . . . to defend (orally and in writing) guideline decisions if objections are raised by the prosecutor and/or defense attorney.").

170. Denzlinger & Miller, *supra* note 68, at 51.

the probation officer presents an obstacle to the prosecutor's discretion in arriving at plea agreements.¹⁷¹ This conflict has "begun to deteriorate the once strong and symbiotic relationship between the U.S. Attorney's office and the U.S. Probation office."¹⁷² The probation officer's relationship with defense counsel has changed as well. Before the Guidelines, defense attorneys developed strong, trusting relationships with probation officers based on the assumption that the officers' focus on rehabilitation would translate into leniency for the defendant. Since the enactment of the Guidelines, defense attorneys have tended to view probation officers suspiciously "as a second prosecutor, whose purpose is to review and then raise the guideline calculations of the government"¹⁷³ or to interfere with beneficial plea agreements.¹⁷⁴ Rather than seeing the probation officer as an ally, the defense attorney now views her with distrust: Whereas pre-Guidelines defense attorneys "placed a premium on cooperation with the officer, directing their clients to truthfully answer all questions posed by [her]," defense attorneys now demand to be present at the presentence interview, sometimes directing their clients not to answer the probation officer's questions.¹⁷⁵ Taking cues from their attorneys, defendants view probation officers as agents of the harsh Guidelines, and sometimes decline to be interviewed at all. As one probation officer notes, "Since defendants can make statements which increase their guideline range, such concerns are justified."¹⁷⁶

Thus, rather than being a team player in the quest for rehabilitation, the probation officer as punisher now "stands alone" in an environment that is sometimes "overtly hostile."¹⁷⁷ Once the probation officer's relationships with these other institutional actors are undermined, the officer's utility in the criminal justice system is compromised:

Probation officers report difficulty in gaining access to the U.S. Attorney's file and even greater difficulty in getting information from defendants. Defense attorneys are reportedly advising their clients against full cooperation and often will not allow them to discuss the offense with the probation officer due to a concern that the client

171. Chambers, *supra* note 3, at 13-14. The Guidelines instruct judges to "make certain that prosecutors have not used plea bargaining to undermine guideline sentencing." GUIDELINES, *supra* note 1, § 6B introductory commentary (quoting S. REP. NO. 225, *supra* note 101, at 63). The probation officer's independent fact finding serves this purpose. See Denzlinger & Miller, *supra* note 68, at 51 ("[The probation] officer may determine [that plea agreements or stipulations] are contrary to the operation or intent of the guidelines."); Dierna, *supra* note 5, at 7 ("[The probation officer's factual] determinations may be in direct contrast to the plea agreement and the discussions between prosecutor, defendant, and defense counsel. Further, [the officer's] guideline decisions may result in the rejection of the plea agreement.").

172. Dierna, *supra* note 5, at 7.

173. Piotrowski, *supra* note 4, at 97.

174. Denzlinger & Miller, *supra* note 68, at 51.

175. *Id.* at 50, 51; Piotrowski, *supra* note 4, at 98.

176. Piotrowski, *supra* note 4, at 98; see also Julian Abele Cook, Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENTENCING REP. 112, 113 (1991).

177. Denzlinger & Miller, *supra* note 68, at 51.

might provide information that could result in a higher guideline range. Consequently, the probation officer is left with a version of the offense that is less complete than in pre-guidelines cases and a social history that is severely lacking.¹⁷⁸

The Guidelines-induced disintegration of relationships developed under the rehabilitative model evidences the philosophical conflict between the Guidelines and the institutional forces that gave rise to the probation system.

With the Guidelines causing bickering among the prosecution, the defense, and the probation officer, the sentencing judge is left to play umpire, thus endangering yet another close institutional relationship.

The probation officer, in developing recommendations for the judge about proposed findings, is thrust into the middle of a highly contentious situation—and sometimes must testify at the hearing itself. In these circumstances, the district judge may be forced to pass formal judgment on the credibility and judgment of professionals who . . . should enjoy a close and confidential working relationship with the district judges.¹⁷⁹

Indeed, some judges have advised their own probation officers to secure counsel.¹⁸⁰ Furthermore, because the probation officer is the “guardian” of the Guidelines, those judges opposed to Guidelines sentencing—of which there are many¹⁸¹—could develop strained relationships with their former trusted agents. The Guidelines-era probation officer faces the challenge of a “resistant judiciary”: “[T]he probation officer [is] a messenger, bearing a message which frequently no one want[s] to hear.”¹⁸²

The demise of the close working relationship between the sentencing judge and the probation officer has been countered under the Guidelines regime with the creation of a new relationship—that between the probation officer and the Sentencing Commission. The Commission provides training for probation officers and staffs a hotline that probation officers can call for help with Guidelines application problems.¹⁸³ In addition, the Commission has requested that, for every defendant sentenced under the Guidelines, probation officers submit to the Commission: PSRs, Guidelines worksheets, indictments,

178. Conference Summary, *supra* note 117, at 2069 (comments of Maria Rodriguez McBride, Chief U.S. Probation Officer, District of Connecticut).

179. FEDERAL COURTS STUDY COMM., *supra* note 163, at 138–39.

180. *Id.* at 139.

181. *See, e.g.*, sources cited in Freed, *supra* note 124, at 1685 n.10, 1686 n.14, 1719–20; Stith & Koh, *supra* note 21, at 282 n.370 & *passim*.

182. Denzlinger & Miller, *supra* note 68, at 52.

183. One probation officer reports that she is on the phone with the Commission at least once a week. Interview with Virginia Swisher, *supra* note 149. In 1993, the hotline received an average of 149 questions each month from probation officers and judges, and, as of the end of 1993, the hotline had received a total of 13,000 questions since its inception. U.S. SENTENCING COMM’N, 1993 ANNUAL REPORT 32 (1993).

written plea agreements, a Report on the Sentencing Hearing (including a statement of reasons for imposing sentence as required by 18 U.S.C. § 3553(c)), and a Judgment of Conviction.¹⁸⁴ The Commission also relies on probation officers to provide their input in the Guidelines amendment process, often making probation officers the first to see new Guidelines policies.¹⁸⁵ “In a practical sense, federal probation officers have become guardians, a role which results from the probation officer being closely connected with the Commission’s training efforts and becoming well versed in the Commission’s view of the guidelines.”¹⁸⁶ One probation officer’s comments reveal the extent of this relationship’s potential for intrusiveness:

[P]robation officers should understand that *they owe a dual loyalty*: to the district court and to the Sentencing Commission. The Sentencing Commission has, no doubt, painted a different and difficult world for the probation officer. The Sentencing Commission has called on probation officers to perform formal analyses, to draw inferences from evidence, and to grapple with . . . elusive conceptual terms While the sentencing judge may well quarrel with our conclusions, implications, deductions, and interpretations, the Sentencing Commission has mandated that we make them.¹⁸⁷

Another probation officer notes, “The Commission is here to stay, and if you have a good relationship with the Commission, it’s going to make your job a lot easier—you’re going to attract a lot more flies with honey than you are with vinegar.”¹⁸⁸ Legislative embodiments of antithetical philosophical movements, the probation officer and the Sentencing Commission ironically now work hand in hand in the federal criminal justice system.

V. CONCLUSION

The probation officer and the Guidelines make, to put it mildly, strange philosophical bedfellows. The philosophical conflict between the probation movement and the determinate sentencing movement makes the probation officer fundamentally unsuited for the task of being the “guardian” of the Guidelines. Placing this responsibility on probation officers does a disservice

184. The Commission collects this information for its review and for research purposes. U.S. SENTENCING COMM’N, *supra* note 183, at 45–46 (1993); Interview with Maria R. McBride, *supra* note 150.

185. Interview with Maria R. McBride, *supra* note 150; *see also* Denzlinger & Miller, *supra* note 68, at 52 (“The United States Sentencing Commission, appreciating the value of the probation officer’s experience and role, continues to solicit and rely upon the probation service for input regarding the guidelines and procedure, as well as for assistance in fulfilling the Commission’s education mission.”).

186. Clarke, *supra* note 3, at 135.

187. Jaffe, *supra* note 157, at 13 (emphasis added).

188. Interview with Virginia Swisher, *supra* note 149.

to the Guidelines, the centerpiece of the federal criminal justice system, and to the probation officers themselves.

As a product of the rehabilitative model, the probation system developed according to the needs of a criminal justice system with an institutional focus of rehabilitating offenders: Probation officers were chosen and trained with an eye toward their social work function; their responsibilities were meted out based on the probation officer's strengths and philosophical origins; and their relationships with other institutional players developed on the foundation of the probation officer's role in indeterminate sentencing. While probation officers have done an admirable job in adapting to their new tasks under the Guidelines system, increased training only masks the essential opposition between the probation officer and her new charge.

While the probation system has proven its ability to undergo the transformation necessary to adequately "guard" the Guidelines, it has been forced to undermine its fundamental purpose in the criminal justice system. Every action taken by a probation officer to implement the Guidelines is a betrayal of her origins. In 1962, one probation officer poetically noted that the presentence report "provides a window to our profession that can help to gain understanding and respect. Through it [outsiders] not only will learn about the defendant, but may learn about the profession of correctional social work. . . . [T]hrough it they gain their impression of us and our profession."¹⁸⁹ Sadly, this statement is no longer true today: The Guidelines PSR is not a window, but a distorting circus mirror. No longer reflecting the probation system's institutional focus of rehabilitation, the PSR—like the probation system itself—has been corrupted. Now a spokesperson for Guidelines "justice," the probation officer is forced to defend a system to which she is philosophically opposed.

If the Federal Sentencing Guidelines are "here to stay,"¹⁹⁰ their importance in our criminal justice system demands that we consciously and carefully decide who will be their guardians. Currently, the title has been bestowed upon the probation officer not with foresight, but as a matter of convenience—the probation officer's previous role in the criminal justice system has become obsolete in an era in which rehabilitative efforts and individualized justice are shunned. Today's probation officer has been forced to don new robes over the vestiges of old ones, and has been left in the awkward position of playing an integral role in a criminal justice system that rejects everything that the probation officer represents.

189. Keve, *supra* note 62, at 52.

190. Conference Summary, *supra* note 117, at 2058 (comments of Judge A. David Mazzone, District of Massachusetts; Member, U.S. Sentencing Commission).