Probation: A Comparative Study of Louisiana Law and the ABA Standards

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Conclusion

Due to the “slippery” nature of the right to a speedy trial and the ad hoc balancing test used to determine whether the right has been denied, it is doubtful that a statutory scheme could master its nuances. The ABA Standards offer guidelines in protecting both the defendant’s and society’s interests, but even a strict adherence to the standards would not likely solve all potential problems in this area. Although the Louisiana supreme court has recognized that the constitutional right cannot be infringed by legislative enactments, such enactments “do serve to establish legislative recognition of the time that body has in all probability found to be reasonable delays for prosecutions.” It is therefore unlikely that Louisiana courts will find a denial of the constitutional right where the time limitations have not expired. Gladden and Montgomery emphasize the wording of code provisions at the expense of the right which the time limitations attempt to protect. Although no statutory formula, however precise, could fully and fairly implement the right to a speedy trial in all cases, the writer submits that judicial reflection on the underlying considerations could serve to minimize anomalous results in the application of procedural rules.

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PROBATION: A COMPARATIVE STUDY OF LOUISIANA LAW AND THE ABA STANDARDS

Probation, the most frequently employed form of correctional treatment, was first used as an ameliorative device to soften the edges of a rigid, punitive system. While the punishment of crime was once considered to serve a prophylactic purpose in itself, the focus today centers on the treatment and rehabilitation of offenders and the correction and prevention of factors which bring about criminal behavior. Probation

64. State v. Gladden, 260 La. 735, 744, 257 So.2d 388, 391 (1972).
2. Id.
stands as both an example and an instrument of this new emphasis.\textsuperscript{5}

Reliance on probation is linked to the popularity of the broader concept of community-based treatment;\textsuperscript{6} it assumes that rehabilitation in the community is possible.\textsuperscript{7} This community-based treatment permits the defendant to remold his life within the framework of normal living conditions. It preserves his family life and other social relationships and offers a more individualized approach than a penal institution can provide.\textsuperscript{8} As an affirmative correctional tool, probation is used not only because of its maximum benefit to the defendant, but also because of its maximum benefit to the society.\textsuperscript{9} Even though evidence indicates the superiority of community treatment over confinement, only 14.4% of correctional costs are for probation services nationally, with approximately 80% expended on institutions.\textsuperscript{10} A cost comparison shows that probation supervision costs approximately $100 per person per year in Louisiana compared with $1,000 for incarceration.\textsuperscript{11} Thus, the increased reliance on probation is also linked to economic matters.

In consideration of the growing importance of the role probation plays in the correctional process, the American Bar Association has established certain Standards to guide each state in developing an effective probation program.\textsuperscript{12} The Standards Relating to Probation complement the Standards Relating to Sentencing Alternatives and Procedures, and together they are designed to promote a greater flexibility in sentencing as a means to accomplish the purposes of rehabilitation and

\textsuperscript{5} Id.
\textsuperscript{7} Dawkins, \textit{Probation or Prison: Youth or Adult?}, 30 F.R.D. 185, 277 (1961).
\textsuperscript{8} Id.
\textsuperscript{9} ABA \textit{PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION} 1 (approved draft 1970) [hereinafter cited as ABA STANDARDS, PROBATION].
\textsuperscript{10} President's Crime Commission on Corrections app. A (1961). In Louisiana, only 11% of the corrections budget is for probation and parole. \textit{LOUISIANA COMM. ON LAW ENFORCEMENT & ADMIN. OF CRIM. JUSTICE, LOUISIANA ADULT CORRECTIONS--NEW DIRECTIONS} 45 (1969) [hereinafter cited as NEW DIRECTIONS].
\textsuperscript{11} NEW DIRECTIONS 48. In Louisiana, the cost of probation and parole is $146 per person per year compared with $985.69 per year for maintenance in the Louisiana State Penitentiary. Id.
\textsuperscript{12} ABA STANDARDS, PROBATION §§ 1.1-6.6.
to decrease the costs of correction. In most areas of probation Louisiana complies with the ABA Standards. The purpose of this Comment is to determine the areas in which Louisiana probation law does not comply substantially with the Standards and to examine the underlying reasons for the Standards in order to determine the feasibility of future changes in those areas in Louisiana.

Probation Without Supervision

In stating the general principles of probation the Standards recommend: "Upon a sentence to probation, the court should not be required to attach a condition of supervision by the probation department if in its judgment supervision is not appropriate for the particular case." Louisiana, however, requires supervision in all felony cases. In Louisiana the terms "pro-

14. ABA STANDARDS, PROBATION § 1.1 (C).
15. La. CODE CRIM. P. art. 893 provides: "When it appears that the best interest of the public and of the defendant will be served, the court, after conviction of a felony for which the punishment is with or without hard labor or a felony which is a violation of the Controlled Dangerous Substances Law of Louisiana, or a non-capital felony, may suspend for the first conviction only the imposition or execution of any sentence, where suspension is allowed under the law and in either case place the defendant on probation under the supervision of the division of probation and parole supervision. The period of probation shall be specified and shall not be less than one year nor more than five years. The suspended sentence shall be regarded as a sentence for the purpose of granting or denying a new trial or appeal.

The court under the same conditions and by the same procedure as provided for above may suspend the execution or imposition of the sentence of a multiple offender and place the defendant on probation if he intends to participate in the program authorized by the Federal Narcotic Rehabilitation Act or other federal or state rehabilitation programs, however, if for any reason the defendant is rejected by said program he shall be returned to the custody of the court which imposed the sentence and the sentencing judge shall order the sentence be executed. Rejection by said program shall be a violation of the defendant's suspended sentence.

"If the sentence consists of both a fine and imprisonment, the court may impose the fine, and suspend the sentence or place the defendant on probation as to the imprisonment.

"The court shall not suspend a felony sentence after the defendant has begun to serve the sentence.

"When the imposition of sentence has been suspended by the court, as authorized by this article, and the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution and the dismissal of the prosecution shall have the same effect as acquittal, except that said conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and further shall be considered as a first offense for the purposes of any other law or laws relating to cumulation of offenses."
bation" and "supervision" are treated as being synonymous while the term "suspended sentence" is used as the basis of probation which does not require supervision.\textsuperscript{16} The ABA Advisory Committee feels that the requirement of supervision is unwise and that the courts should be free to attach supervision only as the facts of each case indicate.\textsuperscript{17}

Intensive supervision is generally believed to be more effective than occasional contacts between the probation officer and the probationer.\textsuperscript{18} However, studies in this area indicate the opposite is true. Although the following summary of a research study concerns parole, it is equally applicable to probation:

"In order to evaluate the effects of a special selection and training program of parole officers on recidivism reduction of male delinquents, two control groups of 157 . . . and 152 . . . parolees, all of whom were supervised by regular parole officers, were compared with 95 Experimental Group parolees, who were supervised by 12 specially trained counselors. The three groups were initially matched for background and offense variables. However, when comparison was made for delinquent acts committed during the six-month post parole period, of this study, no significant differences were found in the percentage or type of recidivism among the groups."\textsuperscript{19}

In another study conducted by the San Diego Municipal Court, it was found that probation of chronic alcoholics with supervision by Alcoholics Anonymous, or probation with clinic supervision, produced no better results than no treatment at all.\textsuperscript{20}

These studies do not indicate that probation is a failure, but rather that probation (with supervision) is not being used

\textsuperscript{16} In Louisiana, probation is generally defined as "the supervision of the offender in the community subject to the authority of the courts." New Directions 40. The ABA defines probation as "a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if he violates the conditions." ABA Standards, Probation § 1.1(b).
\textsuperscript{17} ABA Standards, Probation 25, 26.
\textsuperscript{18} Schwitzgebel & Baer, Intensive Supervision by Parole Officers as a Factor in Recidivism Reduction of Male Delinquents, 67 Am. J. Psychology 75 (1967).
\textsuperscript{19} Id. at 90.
\textsuperscript{20} Ditman, Crawford, Forgy, Moskowitz & Maclendon, A Controlled Experiment on the Use of Probation for Drunk Arrests, 124 Am. J. Psychiatry 2 (1967).
properly.\textsuperscript{21} In some cases a fine or suspended sentence would be more effective;\textsuperscript{22} therefore, research is still necessary to determine in which cases supervised probation would be of value.

On the question of suspended sentence without probation, one author has stated:

"More frequent use of suspension of sentence without probation, like the fine, is part of the answer to the prison problem. The national average use of probation is probably about one-third of felony convictions. Many of our informed students of crime tell us it can safely be two-thirds, and that public security would not be damaged with that percentage of usage.

"We achieve success even now with many probationers who receive little or no actual help or guidance from their overworked probation officers. Can we not assume that these offenders would have been equally successful if they had received suspended sentences, without probation? When we speak of trying to achieve greatly increased use of probation, we are really referring to both probation and suspended sentence."

As these studies indicate, even probation should be used selectively since outright discharge, fines, and suspended sentences are often more appropriate.\textsuperscript{24} There is a need for Louisiana to broaden the choice of sentencing alternatives and in that way individualize the correctional process to insure that the goal of rehabilitation is accomplished.

\textit{Criteria for Granting Probation}

Recognizing the growing use and importance of probation,

\begin{itemize}
\item 22. Id.
\item 23. Laws, \textit{Criminal Courts and Adult Probation}, 3 N.P.P.A.J. 354, 358 (1957). Louisiana's work load of probation and parole is so large that very little supervision, counseling or treatment is possible. In 1969, there were 4,611 probation cases supervised by 53 probation and parole officers. "These officers also supervised 2,129 parolees, a total of 6,740 'cases' or an average of 162 per officer." \textit{New Directions} 41.
\item 24. Rubin, 92.
\end{itemize}
the Standards set out a declaration of policy and certain criteria to apply for granting probation. No comparable declaration exists in Louisiana. The criterion for granting probation in Louisiana for felony cases provided by the Louisiana Code of Criminal Procedure is “where it appears that the best interest of the public and of the defendant will be served . . . .” In misdemeanor cases the court may, in its discretion, suspend the execution of the whole or part of the sentence imposed.

Although Louisiana has long recognized the soundness of the rehabilitation approach by enacting statutes creating probation, there is a further need to establish more specific criteria instead of leaving trial courts with such broad discretionary power. The basic premise should be (as the Standards reflect) that the automatic response in a sentencing situation should be probation, unless specific aggravating factors emerge in the particular case.

The lack of specific guidelines in the probation area is mainly

25. ABA Standards, Probation § 1.2 provides: “Probation is a desirable disposition in appropriate cases because: (1) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law; (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts; (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community; (iv) it greatly reduces the financial costs to the public treasury of an effective correctional system; (v) it minimizes the impact of the conviction upon innocent dependents of the offender.”

26. ABA Standards, Probation § 1.3: “Criteria for granting probation. (a) the probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that: (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed. (b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.”

28. Id. art. 894.
29. Suspension of sentence has been provided for in Louisiana since 1914 (La. Acts 1914, No. 74 §§ 1, 5) and was incorporated into the article 893 of the 1928 Code of Criminal Procedure. The first comprehensive system of suspended sentence and probation was enacted in 1942 (La. Acts 1942, No. 49 § 1).
30. ABA Standards, Probation § 1.3.
the result of probation's lack of constitutionally protected status. The theory was that probation was a legislative grace or privilege and not a constitutionally protected right. This right-privilege distinction in probation cases was first established by the United States Supreme Court in Escoe v. Zerbst.31 Other theories are that by accepting probation the probationer enters into a contract with the state and thereby waives his due process rights,32 and that probation is not different from imprisonment because the probationer remains within the protective custody of the court.33 However, the Supreme Court has rejected the concept that due process rights turn upon whether a right or privilege is involved34 and in Morrissey v. Brewer indicated that whether “any procedural protections are due depends on the extent to which an individual will be ‘condemned to suffer grievous loss.’”35

In other jurisdictions, some courts have indicated that probation may not be denied arbitrarily or in contradiction of the pre-sentence report.36 For example, in a California case37 the defendant had waited in the car while her companion killed a man in a robbery. She pleaded guilty and received a sentence of life imprisonment. The judge had indicated in advance of the the sentence hearing that he would not consider probation. The case was reversed by the state supreme court on the grounds that the California statute requires that consideration be given to the pre-sentence report and the desirability of probation. The court held that a judge may not confine a defendant, even on a murder charge, without considering probation as a possible disposition.

The attitude of the law seems to have changed greatly since

the right-privilege distinction made in *Escoe v. Zerbst.*

Perhaps under the "grevious loss" test, courts should be compelled to consider probation in every case.

**Pre-sentence Report**

In order to properly implement the criteria for granting probation, it is necessary prior to sentencing for the court to have adequate information about the offender, the crime, and the resources in correctional facilities and elsewhere in the community. With rehabilitation as the dominant concern, the court is expected to select the sentence which best fits the individual defendant within the sentencing alternatives available. Yet, the contact between the sentencing judge and the defendant in federal courts has been limited to matters brought out in the trial if, in fact, there was a trial. The pre-sentence report is the vehicle generally used to relay needed information to the court before an appropriate sentence can be imposed. It ranges well beyond matters that normally arise at the trial and is concerned with defendant's character, his history and environment, and his adjustment to them. The pre-sentence report and its influence on the sentencing process epitomize the fact that the humanitarian's plea—let the punishment fit the criminal and not merely the crime—has come to be an accepted postulate of correctional policy.

The Standards recommend that the pre-sentence report be made available in all criminal cases to assist the judge in making an intelligent decision. Under Louisiana law the sen-

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38. *295 U.S. 490 (1935).*
40. See note 26 supra.
41. ABA STANDARDS, *PROBATION* § 2.
43. Id. at 162.
44. Id.
45. *La. Code Crim. P.* art. 875 provides in part: "In making the investigation, the probation officer shall inquire into the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, his family situation and background, economic and employment status, education, personal habits, and other matters deemed relevant by the officer, or ordered investigated by the court."
47. ABA STANDARDS, *PROBATION* § 2.1: "Availability and use: (a) All courts trying criminal cases should be supplied with the resources and supporting
tencing judge is authorized to order a pre-sentence report in all cases other than "capital offenses." If the pre-sentence report is not ordered, a post-sentence report is mandatory where a sentence of one year or more is imposed. Louisiana has adopted the philosophy that "the pre-sentence investigation is the most reliable and scientific device available for sound sentencing," but, the requirement of making only the post-sentence report mandatory hinders the sentencing process. Indeed, the value of the pre-sentence report continues beyond imposition of the sentence. Although the pre-sentence report was originally advanced as an indispensable element in enlightened sentencing, its application has demonstrated a potential for other use within the criminal justice system. For example, if the defendant is placed on probation, the probation officer is supplied with the report; if the defendant is committed to some institution, that institution may use the report in order to plan the defendant's rehabilitation. The post-sentence report achieves this purpose but fails to provide an intelligent basis for the most crucial aspect of the judicial process, sentencing. Most authorities agree that the pre-sentence report is the heart of sentencing and probation.

staff to permit a presentence investigation and a written report of its results in every case. (b) The court should explicitly be authorized by statute to call for such an investigation and report in every case. The statute should also provide that such an investigation and report should be made in every case where incarceration for one year or more is a possible disposition, where the defendant is less than (21) years old, or where the defendant is a first offender, unless the court specifically orders to the contrary in a particular case." See also, CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURE § 4.1 (approved draft 1968) [hereinafter cited as ABA STANDARDS, SENTENCING].

48. La. Code Crim. P. art. 875, states in part: "If a defendant is convicted of an offense other than a capital offense, the court may order the division of probation and parole supervision to make a pre-sentence investigation and report within sixty days from the date of the conviction. The court may postpone imposition of sentence until the report is received. "Local and state law enforcement agencies and mental and correctional institutions shall furnish to the probation officer criminal records and such other information and data as the probation officer requests. The court may order a physical and mental examination of the defendant. "If the defendant is sentenced to imprisonment, a copy of the report shall be transmitted by the division of probation and parole supervision to the institution to which he is committed."

49. Id. art. 876.

50. La. DEPT OF CORRECTIONS, REPORT OF PAROLEE REHABILITATION COMMITTEE 153 (Jan. 1960).


It would seem that the goals of criminal justice may best be served in Louisiana by making greater use of the pre-sentence report, rather than the post-sentence report.

Although the Standards suggest employment of the pre-sentence report in every case, it is not suggested that it be mandatory in every case. The legislature must face the question of whether it is sound policy to require the use of the report in any particular class of cases. The Model Penal Code has suggested that the pre-sentence report be authorized in every case and mandatory in all felony cases, in all cases when the defendant is less that twenty-two years old, and in all cases where an extended term can be imposed. The Standards are in accord with the Penal Code and also add the instance where the defendant is a first offender. However, as subsection b of Sentencing Standard 4.1 indicates, the court should have discretion not to obtain a report if there are affirmative reasons which would make it unadvisable.

The importance of a full and accurate pre-sentence report cannot be overstated. In the majority of criminal cases the accused is convicted but ordinarily his conviction follows from his own guilty plea rather than a trial. Hence, in most cases the major question is not guilt or innocence but the appropriate sentence. Intelligent, informed sentencing is frustrated when the judge’s determination is based on an erroneous report. There is a need to balance the requirements of availability of sources of information to the court and fairness to the defendant. A sentencing process based on confidential sources of information serves no useful purpose if the information is wrong. The policy against delay and disclosure prevents counsel from showing that

55. ABA Standards, Probation § 2.1.
56. At present, the pre-sentence report is not required in any case, but the post-sentence report is required in felony cases where a pre-sentence report has not been made. LA. CODE CRIM. P. arts. 875, 876.
58. Id.
59. ABA Standards, Probation § 2.1; ABA Standards, Sentencing § 4.1.
60. Id.
62. Id.
a mistake has been made. To avoid such an injustice the Standards recommend requiring the court to disclose to the defendant the information adversely affecting him which is contained in the pre-sentence report.

Under the Louisiana Code of Criminal Procedure, disclosure of information contained in the pre-sentence report to the defendant is discretionary. There is no requirement that the judge state in the record the basis of his determination, nor is appellate review of sentencing available. Thus, this crucial stage of the criminal process is without effective procedural safeguards.

The question of disclosure of the pre-sentence report to the parties has produced a heated controversy for over twenty years.

Principal arguments raised against disclosure focus on

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64. ABA STANDARDS, PROBATION § 2.5. See ABA STANDARDS, SENTENCING § 4.4. “Presentence report: disclosure; parties.
   “(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.
   “(b) This principle should be implemented by requiring that the sentencing court permit the defendant’s attorney or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality. In all cases, where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action.”
65. LA. CODE CRIM. P. art. 877 states: “The pre-sentence or post-sentence investigation report shall be privileged and shall not be disclosed directly or indirectly to anyone other than the sentencing court, members of the division of probation and parole supervision, the officer in charge of the institution to which the defendant is committed, the parole board, the probation or the parole officer if the defendant is placed on probation or released on parole, medical authorities if the defendant is committed to a hospital, the pardon board, and the governor or his representative.
   “Before imposing sentence the court may advise the defendant or his counsel of the factual contents and conclusions or any pre-sentence investigation report. The sources of confidential information shall not, however, be disclosed.”
67. Lorensen, The Disclosure to Defense of Presentence Reports in West Virginia, 69 W. VA. L. REV. 159 (1967); Roche, The Position for Confidentiality of the Presentence Investigation Report, 29 ALBANY L. REV. 206 (1965);
loss of information and harm to the defendant. First, there is the fear that disclosure would dry up sources of information. It is pointed out that social agencies, families, employees and other informants would be extremely reluctant to provide the necessary information which would materially affect the efficacy of the report. Another objection is that disclosure would cause a tremendous delay in the sentencing process by allowing the defendant opportunity to take exception to data contained in the report. The fear is that the defendant, already having been found guilty, will have nothing to lose by denying every unfavorable aspect of the report. Finally, there is the argument that there are certain kinds of information that would be affirmatively harmful to the rehabilitation efforts of the defendant. A cold objective evaluation by a wife, probation officer, or psychiatrist, might cause great resentment and a harmful reaction within the defendant. The difficulty with these contentions is that each is aimed at a specific evil which may be legitimate cause for concern, but does not support a general denial of disclosure in all cases.

The basic argument in favor of disclosure is simply that it is fundamentally unfair to sentence a man on the basis of information he has had no opportunity to correct or comment


72. P. KEVE, THE PROBATION OFFICER INVESTIGATES (1960). This authority, in putting forth the principal argument against disclosure writes: "But if he reads a report that suddenly strips his personality naked, he will deny the picture he is shown and reject the help that is accordingly offered. This can be particularly true in those frequent cases where the client's personality has some paranoid characteristics. When this sort of client is confronted with analytical material about himself, he is likely to receive it as reinforcement for his paranoid views, and so the process contributes to his sickness, instead of his cure." Id. at 10.

73. ABA STANDARDS, SENTENCING 217-18.
upon. The ABA recommendation takes into consideration the major causes of concern espoused by the opponents of disclosure. The Standards recommend mandatory disclosure of all information contained in the pre-sentence reports with specified exceptions designed to protect sources of information and to prevent an adverse effect on rehabilitation. Thus, the defendant is provided with an adequate basis upon which to challenge the authenticity of the report while the procedure is protected from the possible evils of mandatory disclosure in all cases, under all circumstances.

As for the argument that disclosure would unduly delay the sentencing process, quite the opposite effect is indicated. Several judges who follow the practice of disclosure have noted that disclosure permits the scope of argument regarding sentencing to be limited, thus permitting the discussion to be directed to pertinent considerations. This "disadvantage" of disclosure may be turned into an "advantage" since disclosure seems to provoke responses, attitudes, opinions and suggestions which are valuable to the court in arriving at a more sensitive determination.

There is a strong argument that a sentence based on erroneous information is violative of due process. Although the Supreme Court has never squarely faced the issue of whether disclosure is required, writers and courts consistently cite Williams v. New York as support that due process does not require disclosure of the pre-sentence report. The court in Williams held due process does not require that a defendant have the right to confront and cross-examine witnesses who sup-

75. ABA Standards, Sentencing § 4.4.
76. See note 74 supra.
77. See note 74 supra. See also Lorensen, The Disclosure to Defense of Presentence Reports in West Virginia, 69 W. Va. L. Rev. 159 (1967).
78. Rubin, supra note 21, at 79.
79. 327 U.S. 441 (1949).
plied information which the probation officer included in his report. The issue of disclosure was not even mentioned in the majority opinion.

A more pertinent United States Supreme Court decision is *Townsend v. Burke.*81 This case strongly supports the position that the purpose of counsel at the sentencing procedure is to assure the accuracy of information to be used in framing the sentence. Obviously this function of counsel cannot be accomplished without disclosure of the pre-sentence report and a hearing in which erroneous information may be challenged.

Most authorities agree that there should be disclosure unless there are compelling reasons against it.82 As previously shown, even the strongest arguments against mandatory disclosure have been taken into consideration in drawing up the Standards. Thus, there appear to be no such compelling reasons to deny disclosure. Although the Louisiana law indicates an encouragement of such disclosure, it is submitted that stronger provisions are needed.

**Revocation of Probation**

The question of due process again arises in the area of revocation of probation. A probationer's status can be revoked only upon a breach of conditions of probation;83 it cannot be revoked arbitrarily.84 This restriction against arbitrary action has its basis in the due process clause.85

The Standards provide grounds for, and alternatives to, probation revocation, and guidelines for determining when revocation should be followed by imprisonment.86 In Louisiana, pro-

81. 334 U.S. 736 (1948).
83. See, e.g., Manning v. United States, 161 F.2d 827 (5th Cir.), cert. denied, 332 U.S. 782 (1947); Ex parte Maguth, 103 Cal. App. 2, 284 P. 940 (1930).
85. See note 84 supra.
86. ABA STANDARDS, PROBATION § 5.1: "Grounds for an alternative to probation revocation.

"(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:
bation may be revoked if the court finds that the defendant has violated or is about to violate a condition of his probation.\textsuperscript{87} Under the Louisiana Code of Criminal Procedure, the probationer is given a hearing concerning the alleged violation, and, if the court finds that the conditions have been or are about to be violated, it may: (1) reprimand and warn the probationer; (2) order that supervision be intensified; (3) add conditions to the probation, or (4) order revocation of probation.\textsuperscript{88} Revocation is also appropriate when a probationer is convicted of another felony, when he is on probation for a felony or any crime when the sentence has been suspended, or when the defendant is on probation for a misdemeanor.

The Standards recommend that the court should not revoke probation without an open court proceeding where defendant will be represented by counsel.\textsuperscript{89} They also provide that an order revoking probation should be appealable after the offender has been resentenced.\textsuperscript{90} In Louisiana, only an informal or summary hearing is required by the court.\textsuperscript{91} If the imposition of the

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"(i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

"(b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:

"(i) a review of the conditions, followed by changes where necessary or desirable; (ii) a formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions; (iii) a formal or informal warning that further violations could result in revocation."
\end{quote}

\textsuperscript{87} LA. CODE CrIM. P. art. 900.
\textsuperscript{88} Id.
\textsuperscript{89} Id. art. 901.
\textsuperscript{90} ABA STANDARDS, PROBATION § 5.4: "Nature of revocation proceedings.

\textsuperscript{87} (a) The court should not revoke probation without an open court proceeding attended by the following incidents:

"(i) a prior written notice of the alleged violation;

"(ii) representation by retained or appointed counsel; and

"(iii) where the violation is contested, establishment of the violation by the government by a preponderance of the evidence.

Sentence should be imposed following a revocation according to the same procedures as are applicable to original sentencing proceedings.

"(b) The government is entitled to be represented by counsel in a contested revocation proceeding.

"(c) As in the case of all other proceedings in open court, a record of the revocation proceeding should be made and preserved in such a manner that it can be transcribed as needed.

"(d) An order revoking probation should be appealable after the offender has been resentenced."

\textsuperscript{91} LA. CODE CrIM. P. art. 900.
sentence was suspended, the court will impose sentence at the revocation hearing. The defendant has a right to counsel only at revocation hearings where sentence is imposed. The only available remedies for the defendant in appealing a revocation of probation or suspended sentence are through habeas corpus proceedings or supervisory jurisdiction of the Louisiana supreme court.

The United States Supreme Court, in \textit{Mempa v. Rhay}, held that a defendant's sixth amendment rights had been violated at "deferred sentencing hearings" where he was not afforded the right to counsel. Louisiana has recognized this right but should go one step further by affording the right to counsel at revocation proceedings where no new sentence is imposed.

The majority of state courts have used the right-privilege distinction not only to justify lack of counsel and other procedural safeguards at revocation hearings but also to deny the hearing itself. In the face of recent United States Supreme Court cases, this distinction is no longer dispositive as to whether due process is applicable. In \textit{Morrissey v. Brewer}, the Supreme Court held that certain due process protections must be afforded at a parole revocation. In reaching this decision the court reiterated that whether due process rights apply depends upon whether the individual will be "condemned to suffer grievous loss." The court found that such a loss would be sustained when parole is revoked because the parolee's rights were of such a nature as to include "many of the core values of unqualified liberty . . . ". Thus the Court found that some orderly process is required, "however informal." The process outlined by the court included the following minimum protec-

\begin{itemize}
\item 94. 389 U.S. 128 (1967).
\item 98. 92 S. Ct. 2593 (1972).
\item 99. \textit{Id.} at 2601.
\item 100. \textit{Id.}
\end{itemize}
tions: (1) written notice of the claimed parole violations; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Although the *Morrissey* case deals with revocation of parole, the same loss occurs when probation is revoked, and due process protections would therefore seem equally applicable. Two court of appeals cases decided before *Morrissey* expressly held that due process rights were applicable at a revocation proceeding. In *Hahn v. Burke*, the court applied a balancing test, concluding that the probationer's loss of freedom outweighed the burden on the state to provide a limited hearing before revocation of probation and holding that due process required the limited hearing. The holding of this case seems to be strengthened and expanded by *Morrissey*.

The Supreme Court in *Morrissey* expressly pretermitted the question of whether a parolee is entitled to assistance of counsel at a parole revocation proceeding. The Seventh Circuit in *Scarpelli v. Gagnon* has held that such a right does exist at a probation revocation proceeding. In reaching this decision the court stated that "[w]hether assistance of counsel at the revocation proceeding is essential to fundamental fairness turns on the function counsel may be expected to perform . . .". The court found that counsel at the revocation proceeding would serve the purpose of "direct[ing], amplif[y]ing, and promot[ing] the flow of information . . ." which would be "of real significance." Such a pragmatic approach is in keeping with the balancing test enunciated in *Goldberg v. Kelly*.

It can also be argued that the holding in *Mempa v. Rhay*,

101. 430 F.2d 100 (7th Cir. 1970).
102. 454 F.2d 416 (7th Cir. 1971), cert. granted, 408 U.S. 921 (1972).
103. 454 F.2d at 422.
104 Id.
logically extended, calls for the availability of counsel at the revocation proceeding. It is submitted that if, as recognized in *Mempa*, there is a right to counsel at the initial sentencing stage, there should be a corresponding right at the probation revocation because a revocation, like initial sentencing, determines the length of imprisonment and is part of the prosecution process.

It should be noted that the Supreme Court has granted certiorari in the Scarpelli case thus paving the way for a definitive ruling on this question. The Advisory Committee favors the approach indicated in *Scarpelli* by recommending that the probationer be entitled to counsel at probation revocation proceedings regardless of constitutional requirements.\(^\text{107}\)

**Conclusion**

This comparison of Louisiana probation laws and the American Bar Association recommendations suggests several areas which are in need of legislative consideration. It is submitted that not only do certain procedural changes need to be made, but new policies and guidelines should be implemented to aid in the effective application of probation in the correctional process. By adopting the Standards, these necessary changes may be accomplished.

*Pamela A. Prestridge*

**LOUISIANA AND CRIMINAL DISCOVERY**

In recent years, the subject of discovery in criminal cases has inspired great interest and much discussion. This is undoubtedly due in no small measure to the success of discovery in civil proceedings. The question is often asked, why should there be a difference between civil and criminal proceedings with respect to discovery? The varied responses to this question will be discussed in some detail. Perhaps the best answer is that given by Justice Traynor of the California supreme court who characterized the resistance to criminal discovery as founded in "the force of adrenal reaction against seemingly plausible menaces."\(^\text{1}\)

\(^{107}\) ABA Standards, Probation 69.