PRE-ADJUDICATION REVIEW OF THE SOCIAL RECORD IN JUVENILE COURT: A LOW-VISIBILITY OBSTACLE TO A FAIR PROCESS

Martin A. Frey* and Charles P. Bubany**

Substantial numbers of juveniles continue to be deprived of constitutional protections in the juvenile courts, contrary to the letter and spirit of recent United States Supreme Court decisions. This is the result more often than not of informal and low-visibility practices in the juvenile courts which court decisions have left unchanged. Among these practices is the review of the social record by the judge prior to an adjudication of delinquency.

I. The Social Record

The social record consists of a variety of information concerning the juvenile, his background, and his offense. The record may take the form of a formal clinical report prepared by a juvenile court intake officer. It might be called a social investigation report, social study, social background report, case study, or probation report. Some records are less formal. They include, or consist solely of, scattered pieces of information in the form of memoranda of conversations with, or documents obtained from, persons such as police officers, school officials, probation officers, social workers, neighbors and associates. Much of the information concerning the youth may be like the juvenile process itself, largely "invisible" and not recorded within the two flaps of a folder. Nevertheless, the information is part of the youth's "social record" even if it is not recorded but simply known by the officer of the court.

The content of social records will vary with local proce-

* Professor of Law, Texas Tech University.
** Assistant Professor of Law, Texas Tech University.

dure, the frequency with which the juvenile has appeared in court, the stage in the proceeding when the social record is viewed, and the type of case and issue before the court. In general, a social record covers the personal history of the child and his family; the child's social, emotional, mental and physical development; and his environment including his home, school, church and community influences. Emphasis is normally placed on the juvenile's relationship to other members of his family and to others with whom he comes in close contact. Some social records are masses of facts and clinical reports regarding the child and his family. Others contain evaluations and interpretations of these facts in relation to the situation facing the child and his family and recommendations for care or treatment.[1]

II. An Evaluation of the Procedure

The need for a comprehensive social record is obvious. It is an invaluable tool in understanding the child's physical, social and emotional condition and the circumstances of his alleged misconduct. Such an understanding is practically indispensable in fashioning a disposition for the juvenile offender appropriate to the goal of rehabilitation. Notwithstanding its value, use of the social record by the judge prior to adjudication is objectionable on two grounds. First, the social record contains information which is irrelevant to the adjudication decision and which cannot be effectively excluded from the adjudication decision once the trier of fact has studied it. By definition, the information in the social record goes beyond the scope of data relevant to adjudication. This information may be detrimental to the character of the juvenile and his family since it gives the reader the impression that this is a child in need of the services of the juvenile court. In studying the social record the reader tends to forget that the juvenile court must first find that the child is within its jurisdiction by virtue of having committed, be-

[1] For a discussion of the contents of the social record *see* NCCD, Guides for Juvenile Court Judges 49-56 (1957); U.S. Dep't of HEW, Welfare Admin., Standards for Juvenile and Family Courts 65-68 (Children's Bureau Pub. No. 437, 1966).

yond a reasonable doubt, the offense charged in the petition. This finding must be made before the court may set to the task of determining the program of rehabilitation that is best for the child.

Second, information in the social record, even though relevant, may be either false or unreliable. *In re Gault*[2] and *In re Winship*[3] emphasize that the adjudication phase of the juvenile court hearing must be a search for truth. The inherent danger of entering the case through the social record is that this information is not tested for reliability by introduction in open court. This goes to the very heart of the rights provided in *Gault*. Consideration of this information may undermine the juvenile's right to notice of the charge, neutralize the effectiveness of counsel, deny him confrontation and cross-examination and abrogate his privilege against self-incrimination. In addition it may erode the *Winship* requirement that proof of commission of the offense be beyond a reasonable doubt.

These objections have definite application to juvenile court procedure. They impede the effectiveness and distort the function of the screening stages in the pre-hearing period. The impact of the misuse of the social record on the preliminary inquiry illustrates this point. The purpose of the preliminary inquiry is to determine whether the interests of the public or of the juvenile require that a delinquency petition be filed. The nature of the investigation at the preliminary inquiry must relate to this purpose. Implicit is the social character of the juvenile and his relationship to society. No reference is made to whether the juvenile committed the act. Emphasis of the investigation is on the needs of the child and society rather than on his commission of the offense. The proper practice is to have the intake or probation officer, a person separate and apart from the juvenile court judge, review the social record and decide whether further action should be taken. There is no determination of guilt at this

[2] 387 U.S. 1 (1967) (rights to notice of the charge, counsel, confrontation and cross-examination and the privilege against self-incrimination).

[3] 397 U.S. 358 (1970) (proof of commission of the offense must be beyond a reasonable doubt).

stage. If the decision is that a delinquency petition should not be filed, the question of guilt will never be reached. If the decision is to take further action, the probation officer will not be involved in making the ultimate decision of guilt.

A judge who makes the decision at a preliminary inquiry and does not use the social record cannot make an informed determination whether the interests of the public or of the juvenile require that further action be taken. Conversely, if he does employ the social record, it is subject to misuse at this point. To permit the judge to see the social record may give him facts that are unreliable and irrelevant to the question of guilt. These facts may affect his final judgment so strongly that he will determine commission of the offense not on involvement but on the needs of the juvenile. The exigency of this type of decision is not the question since the court's jurisdiction to provide for the needs of the juvenile is limited until there has been proof that the juvenile has committed a proscribed act.

A similar distortion occurs when the "juvenile court" is provided with the opportunity to dismiss the petition without a hearing. At this stage those juveniles who do not need a juvenile court hearing may be removed from the justice process. The juvenile court judge who makes this decision and does not use the social record in his determination changes the function of the opportunity. It no longer serves as a screening device for removing those who do not need a juvenile court hearing at this time. Instead, it may serve only to screen out those who were not involved in the conduct charged in the petition or those who may have been involved but the state does not have sufficient evidence to prove beyond a reasonable doubt that they were involved. The judge who reviews the social record but decides not to dismiss, subjects himself to the charge that he either has decided the issue of delinquency without a hearing or at least now has preconceived notions on the delinquency issues. The presumption of innocence is gone.

The next major screening stage is a juvenile court hearing. At the hearing, when the issue of delinquency is contested, the court should consider only the question of

whether the juvenile comes within the court's jurisdiction. For this purpose any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence.[4] The social record may contain material irrelevant to the jurisdiction of the court. The juvenile's prior record, his present location, results of his and his parents' interview with a probation officer, the child's school report, welfare report, juvenile hall report, psychological, psychiatric and medical reports, personal history and family background, and the probation officer's evaluation of this information and his recommendation to the court, are illustrations.

Justification for the exclusion of the social record prior to the adjudication decision may well be founded on constitutional grounds. *In re Gault, In re Winship*, and *McKeiver v. Pennsylvania*,[5] provide that the child need not phrase his constitutional request as one for a criminal right but may instead claim a fundamental due process right to fair treatment. This applies to civil as well as to criminal proceedings. Using this approach the question becomes "does the use of social records by the trier of fact prior to a delinquency adjudication constitute a denial of fair treatment?" The traditional arguments justify use of such records on the helpful, non-prejudicial nature of the evidence, and convenience. These arguments may be easily answered. For example, the statement is often made that the juvenile court's perusal of the report prior to a decision on the jurisdictional issue would provide helpful background information.[6] While it may be true that the social record provides helpful background infor-

[4] CAL. WELF. & INST'NS CODE §§ 701, 702, 706 (West 1966), *construed in In re* R., 1 Cal. 3d 855, 860, 464 P.2d 127, 130, 83 Cal. Rptr. 671, 674 (1970); N.Y. FAMILY CT. ACT. §§ 742-47 (Supp. 1968-1969); Glen, *Bifurcated Hearings in the Juvenile Court*, 16 CRIME & DELINQUENCY 255 (1970). For a discussion of the admissibility of confessions and hearsay *see* NCCD, MODEL RULES FOR JUVENILE COURTS rule 25 (1969) and accompanying comment.

[5] 91 S. Ct. 1976 (1971) (no jury trial required).

[6] *In re* R., 1 Cal. 3d 855, 861, 464 P.2d 127, 131, 83 Cal. Rptr. 671, 675 (1970); Krasnow, *Social Investigation Reports in Juvenile Court—Their Uses and Abuses*, 12 CRIME & DELINQUENCY 151, 153 (1966) (footnote omited).

mation concerning the juvenile, the judge's premature review of the social record goes directly to the fairness of the adjudication hearing. The proponents of review by the judge prior to adjudication do not seriously dispute (because they cannot) that the social record frequently contains unreliable and irrelevant evidence. However, they argue that the possibility of actual prejudice is minimal because the judge will disregard such information in making the adjudication decision. The assumption that the judge will not consider irrelevant and unreliable information is false. The analogy to a non-jury trial on the criminal docket is not well taken. We cannot assume that in a hearing before a judge in a juvenile court the sifting process takes place. It is clear that despite the Supreme Court's indication that the adjudication decision should be separate from the disposition decision, in practice these decisions are merged. It is most obvious in those situations where the court does not hold a bifurcated hearing. And even in those situations in which the judge gives the appearance, or attempts to give the appearance of separating the two decisions (adjudication and disposition), there is still a feeling on the part of many judges that the decisions are not in fact separate.[7] The judges still say that they need to look at the total picture of the child before they can make the adjudication. This is a carryover from the pre-*Gault* juvenile court. That court was not designed to determine guilt or innocence but to provide for the best interest of the child.[8] Its philosophy minimized the jurisdictional

[7] Because of this failure to separate the two, the juvenile court will subject itself to the criticism that delinquency is sometimes decided on issues that evolve from a social investigation even though the jurisdictional facts have not been clearly substantiated. *In re* R., 1 Cal. 3d 855, 860 n.5, 464 P.2d 127, 130 n.5, 83 Cal. Rptr. 671, 674 n.5 (1970). The *Model Rules for Juvenile Courts* suggests that upon the conclusion of the adjudicatory hearing, the court should set forth the findings of fact upon which it bases its determination of adjudication. "These findings serve two purposes: (1) they explain to the parties why the court has the authority to proceed to the dispositional hearing, and (2) they define the propriety of the juvenile court's actions." NCCD, MODEL RULES FOR JUVENILE COURTS rule 27 (1969) and accompanying comment.

[8] *See In re* Holmes, 379 Pa. 599, 109 A.2d 523, 528 (1954), *cert. denied*, 348 U.S. 973 (1955) (Musmanno, J., dissenting); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). Judges have based their verdicts on social and psychological data in an effort to "help the child" rather than on legal proof of delinquency. JUSTICE FOR THE

facts to a level of non-existence. Under the post-*Gault* philosophy, jurisdictional facts are of prime importance.[9] Furthermore, the juvenile and his family might be reluctant to cooperate fully with the probation officer if they thought the results of the social investigation would become available to the judge prior to the jurisdictional hearing. Not only would the probation officer be unable to submit to the court a social report which contains a complete review of the facts relevant to the juvenile's disposition, but the important and close relationship between the juvenile and the probation officer might be jeopardized.[10]

The arguments based on convenience hold that the proscription of the review of the social record prior to adjudication would in effect require all proceedings to be bifurcated to enable the judge to read and evaluate all of the information in the social record between the adjudication and disposition decisions.[11] In addition, since the vast majority of delinquency cases are uncontested, the adjudication hearing is merely a formality analogous to the judge's entry of a judgment of conviction following a guilty plea in a criminal proceeding. This argument proceeds on the false assumption that premature consideration of the juvenile's social record can have a prejudicial effect only at the adjudication hear-

---

CHILD—THE JUVENILE COURT IN TRANSITION 188 (Rosenheim ed. 1962). There is case law however, to the effect that information in a social report unrelated to the particular offense alleged against the child cannot be the basis of an adjudication of delinquency. For a collection of cases *see* Annot., 43 A.L.R.2d 1128, 1141-43 (1955) and A.L.R.2d LATER CASE SERVICE.

[9] The importance of the adjudication of delinquency prior to disposition cannot be minimized. This is implicit in the Supreme Court's decisions in *In re Gault* and *In re Winship*, in which the necessity of separation of jurisdictional facts from dispositional facts is recognized. This is further bolstered by *In re* R., in which the California Supreme Court not only found that the material in the social record was prejudicial but also found that the juvenile court judge could not be presumed to have excluded this information when deciding delinquency.

[10] *In re* R., 1 Cal. 3d 855, 861 n.7, 464 P.2d 127, 131 n.7, 83 Cal. Rptr. 671, 675 n.7 (1970); N.Y. FAMILY CT. ACT. § 735, Comment (1963).

[11] There are those who advocate delaying the investigation until after the adjudication of delinquency. If the investigation is delayed, then a two-step hearing procedure would be required. For a discussion of the merits for delaying the investigation until after adjudication *see* Note, *Employment of Social Investigation Reports in Criminal and Juvenile Proceedings* 58 COLUM. L. REV. 702, 724-25 (1958).

ing. A subtle but nonetheless substantial prejudice may result in any case that is "settled" before a hearing. The youth or his attorney who knows that the judge has reviewed his record may justifiably conclude that the judge has preformed notions. As a result, in assessing chances for success at the hearing, the youth and his attorney may decide not to contest and to abandon a meritorious defense. If the judge has preconceived notions, he might consider the decision to contest simply a manifestation of obstinance and lack of remorse. The result would be a harsher disposition than if the youth had capitulated and not contested the case. The effect of the practice is not unlike the judge taking an active role in plea bargaining in a criminal proceeding, something which has been condemned as improper judicial conduct and highly prejudicial to an accused. Furthermore, such overreaching tends to undermine any respect the alleged offender may have for the system, something that is considered critical to the rehabilitation of the juvenile offender. One also wonders whether the court is still not subject to the criticism that a contesting juvenile who upsets the routine of the court incurs the wrath of the probation officer and court personnel, thereby subjecting himself to a harsh punishment and unfavorable reports to correction authorities.

Secondly, the argument is advanced that denying the judge access to the social record prior to a non-bifurcated hearing would close the records to him at disposition due to the time relationship between the adjudication and disposition decisions. This would deprive the judge of the social record and would result in dispositions that would not necessarily be in the best interest of the child or society. These arguments suggest their own answer. While the denial of access to the record would require some bifurcation, this would not be necessary in the majority of cases. Only the few cases in which delinquency is contested will the hearing need to be bifurcated or at least recessed in order to permit the judge adequate time to review the social record for disposition. Obviously, perusal of the social record by the judge prior to adjudication provides him information which he can use to justify the adjudication decisions. The point is not whether it is helpful to the judge but whether it is prejudicial

to the youth and improperly considered. Convenience is not a substitute for a just consideration of the juvenile's case.

III. RECOMMENDATIONS

Because the pre-adjudication review of the juvenile's social record by the judge has the effect of undermining the procedural safeguards to which the juvenile is entitled, the practice is indefensible and must be changed. However, any proposal which would deny access to, or limit the review of, the social record by the judge prior to adjudication undoubtedly would encounter considerable resistance. Such a proposal would be contrary to the philosophy of the judge experienced in the system and would require in the majority of instances a substantial change in the present procedure. To permit the judge to make the pre-hearing decisions but to deny him access to the juvenile's social record would tend to frustrate the purposes of the preliminary inquiry and the decision to dismiss the petition without a hearing. The preliminary inquiry would no longer be to determine whether the interests of the public or of the juvenile require that further action be taken. Instead its purpose would be to make a preliminary judgment on whether the child was involved in the act or offense brought to the attention of the court by the applicant. The decision to dismiss the petition without a hearing would no longer be to provide an opportunity to dismiss when it would be appropriate to do so. Instead, it too would center on the commission of the offense.

In order to preserve the purposes of the preliminary inquiry and of the decision to dismiss the petition without a hearing, as well as the integrity of the final decision, if the case comes to hearing, the term "juvenile court" must refer to a qualified person other than the judge. The duties to compile the social record and to make the decisions at the pre-hearing stages must be his. These duties must not be those of the judge, who may ultimately hear the case if the decision is made not to dismiss. In non-metropolitan districts with sparse population and a low incidence of juvenile cases, there may not be the need nor the funds for a full-time or even part-time probation officer. In districts where employment of a qualified probation officer is not feasible due

to cost or need, the answer may be to share a probation officer with several districts. While this decreases the efficiency of the probation officer, it does provide a system whereby the judge will not receive irrelevant and unreliable information prior to the determination of the truth of the petition.

In those cases that go beyond the pre-hearing stages, there must be a limitation on review of the social record by the judge prior to adjudication. The limitation could take three forms: (1) no review in any case; (2) review only in uncontested cases; or (3) review in those cases in which the juvenile has been given or has waived an opportunity to challenge the relevancy and accuracy of the information in the social record. Any limitation on review of the social record prior to adjudication should take into consideration whether the delinquency is to be contested. If the delinquency is not contested, then the only critical issue is disposition. The arguments supporting the necessity for complete denial of access to the social record prior to adjudication no longer are applicable. The adjudication is merely a formality.

To limit effectively the review of the social record in uncontested cases would require: (1) an early determination of whether the petition will be contested; (2) bifurcated hearings in contested cases; and (3) promulgation of the policy that social records will not be used in the adjudication hearing. An early determination of contest could be achieved by an answer to the petition, ascertainment from the parties by a responsible department that no substantive allegations of the petition are denied, or a plea proceeding. A bifurcated hearing is required to prevent the necessity for review of the social record by the judge prior to adjudication.[12] A bifur-

[12] The bifurcated hearing affords a necessary protection against the premature resolution of the jurisdictional issue on the basis of irrelevant and unreliable information in the social record.

> The purpose of the social study is to provide the data for a fair and constructive disposition. The material contained in the social study report is legally irrelevant at the adjudicatory hearing. If the author of the social study report has admissible evidence of the allegations of the petition, it can be elicited at the adjudicatory hearing. Therefore, the social study report, which may contain prejudicial information about the child,

cated hearing, however, does not necessarily prevent the premature review of the social record. A rule should be established, either by the legislature or the court, which insulates the juvenile court judge from exposure to any information concerning the juvenile and his involvement with the court at any time while the case is potentially contestable. This approach is suggested by the *Model Rules for Juvenile Courts*. The *Model Rules*, however, refer only to the formal social investigation, and provide that not only should it not be viewed, but also not prepared in any case which could be contested.

> A social study investigation of the child shall not be commenced before the filing of a petition without the written consent of the parties, and it shall not be commenced after the filing of a petition unless the responsible department ascertains from the parties that no substantive allegations of the petition are denied. If any such allegations are not admitted, no investigation of the child shall take place, and no report shall be made to the court, before the adjudication.
>
> The social study shall not be submitted to or considered by the judge before the adjudication. If no social study has been prepared before the beginning of the dispositional hearing, or if the study has not been completed, or if the judge wishes additional information not reflected in the study, the hearing may be postponed or continued for a reasonable time.[13]

---

should not be submitted to this court before the adjudication, even if it has already been prepared.

NCCD, MODEL RULES FOR JUVENILE COURTS comment accompanying rule 29 (1969); *accord*, STANDARD JUVENILE COURT ACT § 23 (1959); STANDARD FAMILY COURT ACT § 23 (1964).

For a discussion of the use of the social record at disposition *see* NCCD, MODEL RULES FOR JUVENILE COURTS rule 30 and accompanying comment (1969); Krasnow, *Social Investigation Reports in the Juvenile Court*, 12 CRIME & DELINQUENCY 151 (1966); Waterman, *Disclosure of Social and Psychological Reports at Disposition*, 7 OSGOODE HALL L.J. 213 (1969).

[13] NCCD, MODEL RULES FOR JUVENILE COURTS rule 29 (1969). *See also* CAL. WELF. & INST'NS CODE §§ 701, 702, 706 (West 1966); N.Y. FAMILY CT. ACT § 735 (Supp. 1968-1969). The President's Commission on Law Enforcement and Administration of Justice has recommended: "To minimize the danger that adjudication will be affected by inappropriate considerations, social investigation reports should not be made known to the judge in advance of adjudication." *The Administration of Juvenile Justice—The Juvenile Court and Related Methods of Delinquency Control*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 1, 35 (1967);

We suggest this broader approach because much of the information concerning the youth in the social record is not contained in a formal file. For this reason a practice allowing the judge to consider the social record if the juvenile has an opportunity to challenge the information is ineffective. Even if he does not examine the juvenile's file prior to adjudication, the unique position of the juvenile court judge gives him social record information. He may be party to conversations, familiar with the child and his family, or he may receive unsolicited information from other sources.

Even a prohibition comprehensive enough to include any information, whether oral or written, will not completely insulate the judge from exposure to potentially prejudicial information prior to the hearing. At least the rule would alert the judge to the new practice and would minimize the possibility of prejudice to the juvenile. If the question does arise, the issue will be simply whether the child received an impartial hearing or was prejudiced by the judge's exposure to this information.[14]

---

accord, NCCD, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT 57-61 (1962). Krasnow, *Social Investigation Reports in Juvenile Court—Their Uses and Abuses*, 12 CRIME & DELINQUENCY 151, 155 (1966) (footnotes omitted), states a few of the dangers:

> [A]n adjudication of delinquency should not depend on information which is not subjected to the legal checks provided by evidentiary safeguards. Especially because the juvenile court is free from many of the usual legal checks and balances found in other judicial and administrative tribunals, it should not be content with a lower standard for the ascertainment of trust. The consequences of an adjudication of delinquency are just as serious as those flowing from decisions by other courts. Much of the social history of the juvenile is based on data collected from neighbors who may have a hostile or negative attitude toward a child and who may be more inclined to make a biased and incriminating statement to a caseworker than to testify under oath in court. Moreover, the caseworker's heavy caseload and limited time available for thorough investigation may well result in the appearance of inaccuracy, bias, superficial analysis, and rank hearsay in the report.

[14] In *In Re* R., 1 Cal. 3d 855, 862, 464 P.2d 127, 132, 83 Cal. Rptr. 671, 676 (1970), the California court when faced with this question reasoned:

> The court's review of the social report in advance of the jurisdictional hearing would perhaps not require reversal in a case in which the contents of the social study entirely favored the minor and his home environment. But in the present case the social study showed some inquiry into appellant's intent under section 647a [annoying or molesting a child under 18]

IV. Conclusion

Statutory procedure may provide three stages where the use of social records should be questioned: the preliminary inquiry; the dismissal of the petition without a hearing; and the juvenile court hearing. At the preliminary inquiry and at the subsequent decision to dismiss the petition without a hearing, the statute may be read to permit either the probation officer or the juvenile court judge to review the social record in order to make the decision. Information in the social record is appropriate when the court has a probation officer who performs this duty. If the district does not have a probation officer and the judge must make the decision, his use of the social records is inappropriate because he may be the final arbiter in the case. To avoid this dilemma, some provision for appointment of a probation officer must be made. The alternative, to take the social record from the judge at these stages, is undesirable because the respective purposes of the preliminary inquiry and the decision to dismiss the petition without a hearing would change from determining the desirability of further action to a preliminary inquiry of guilt.

The juvenile court hearing may be either bifurcated or non-bifurcated depending on the decision of the judge. The distinction between the bifurcated and the non-bifurcated proceedings is important in isolating where, when and how the use of the social record may affect adjudication. The contrast between the two-stage and the single-stage hearing emphasizes the fact that the taint placed on the proceedings will be more acute in the non-bifurcated proceedings because of its failure to differentiate sharply between legal proof and treatment knowledge.

While the distinction between proceedings is important, it does not resolve the question of the admissibility of social records prior to adjudication. Under either type of proceed-

---

and some negative indications about appellant's home environment. Hence, the court's review of the social study prior to the jurisdictional hearing, at which the jurisdictional facts were far from conclusive, constituted prejudicial error.

ing, there must be statutory or case law that proscribes the use of social records in adjudication when the delinquency is contested. If there is, then a model is established that sets the tenor of the procedure. If no proscription exists, the question rests on a constitutional base of whether use of the specific social record constitutes a denial of fair treatment. The answer to this question will hinge on what is in the social record. If the information is unreliable or irrelevant to whether the juvenile has committed the act charged, and if this information is unfavorable to the child, then in all likelihood the use of these records should constitute a denial of fair treatment and thus a denial of due process of law.