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Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues

Daniel Katkin

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I. INTRODUCTION

Individualization in punishment has emerged as a guiding consideration of modern criminal science.[1] The sentencing decision is no longer legislative in nature; the statute books no longer dictate the precise limits of the punishment on the basis of the nature of the crime. The judiciary has been vested with broad discretion and sentencing has become the most difficult and usually the only function of the criminal bench.[2] Presentence reports are essential to the proper use of this discretion.

The concept of individualization revolves around a notion that justice will best be served when the rehabilitation of the convicted offender into a noncriminal member of society is among the objectives of the sentencing decision. Other objectives include isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender after release (primary deterrence), deterrence of others who have tendencies toward similar criminal conduct (secondary deterrence), reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves and retribution, that is satisfaction of the community's emotional desire to punish the offender.[3]

II. NATURE AND USE OF THE PRESENTENCE REPORT

A. Statutory Basis

The sentencing authority is unable to determine the priority

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1. F. Frankfurter & J. Landis, The Business of the Supreme Court 249 (1927).

2. Note, *Due Process and Legislative Standards in Sentencing*, 101 U. Pa. L. Rev. 257 (1952). In 1950, out of a total of 33,502 convictions in federal courts, 31,739 pleaded guilty or nolo contendere. In 1962, out of a total of 34,638 cases disposed of by federal courts, 85.8 percent resulted in convictions and 85.7 percent of those convicted pleaded guilty. 1962 Dir. Ad. Off. U.S. Cts. Ann. Rep. 110. From July 1, 1961, to June 30, 1962, 70.8 percent of all persons convicted or handled as youthful offenders in the New York courts were sentenced after a guilty plea. 1963 N.Y. Jud. Conf. Ann. Rep. 152-54.

3. Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1453, 1455 (1960).

and relationship of these objectives in each particular case without factual information about the offender and his environment. The presentence investigation is designed to uncover the necessary facts. Judges often seem to feel that their broad experience has equipped them to size up their fellow men by merely looking and talking to them; but the knowledge of the life of a man, his background and family, is the only proper basis for determination of his treatment. There is no substitute for information. The sentencing judge has the tools with which to acquire that information (presentence reports). "Failure to make full use of those tools cannot be justified."[4] Such failure, however, is not the rule.[5] Statutes in most jurisdictions authorize courts to request presentence reports from probation officers, and even without such authorization, courts apparently have felt free to make use of such reports.[6] The relevant statutes are varied. Many require the preparation of reports in the case of certain classes of offenders, such as felons.[7] Others prohibit a grant of probation or a suspension of sentence absent consideration of such a report.[8] A third type gives the trial court complete

4. Schwellenbach, *Information Versus Intuition in the Imposition of Sentence*, 7 FED. PROBATION 3 (Jan.-Mar. 1943).

5. Louis J. Sharp, Chief of the Probation Division, Administrative Office of the Federal Courts, has pointed out that nationally 87 percent of all convicted defendants were investigated by a probation officer in 1960. Sharp, *The Presentence Report*, 30 F.R.D. 242, 243 (1962).

6. Note, *Employment of Social Investigation Reports in Criminal and Juvenile Proceedings*, 58 COLUM. L. REV. 702, 703 (1958).

7. *E.g.*, COLO. REV. STAT. ANN. § 39-16-2 (1963) (felonies where court has discretion as to penalty); CONN. GEN. STAT. ANN. § 54-109 (1960) (all first offender felons except those convicted of first degree murder or in any case in which the court desires a report with the exception of cases of first degree murder); MICH. COMP. LAWS ANN. § 771.14 (1968) (all felons and cases involving a misdemeanant in which the court desires a report); N.C. GEN. STAT. § 15-198 (1965) (where services of a probation officer are available). The Model Penal Code contemplates broad use of presentence reports:

> (1) The Court shall not impose sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation where:
> (a) the defendant has been convicted of a felony; or
> (b) the defendant is less than twenty-two years of age and has been convicted of a crime; or
> (c) the defendant will be (placed on probation or) sentenced to imprisonment for an extended term.
> (2) The Court may order a presentence investigation in any other case.

MODEL PENAL CODE § 7.07 (Proposed Official Draft, 1962).

8. Note, *supra* note 6, at 703.

discretion as to the use of these reports.[9]

Probation officers are generally responsible for the investigation that yields the report.[10] Generally the report is submitted to the judge after a plea or verdict of guilty. It is reasoned that earlier submission might prove inconsistent with the judge's role as fair and impartial arbiter of the issue of guilt,[11] particularly since reports do not have to comply with the trial rules of evidence.[12]

B. Contents of the Report

There is some disagreement over the nature of the contents of an adequate report. It is seen on the one hand as a very technical and precise study and on the other as a humane investigation into a unique individual. The technical and precise study approach is most clearly delineated in the proposal of the Judicial Conference of the United States,[13] which suggests that a decision to give probation (which must be based on the information contained in a presentence report) should be made on very narrow considerations. For example, in the case of an automobile theft the relevant facts are the extent of the defendant's participation and whether he is an habitual offender. Some commentators have reduced the gravamen of an adequate report to a check list. The Model Penal Code suggests:

> The presentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits and any other matters that the probation officer deems relevant or the Court directs to be included.[14]

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9. *E.g.*, Fed. R. Crim. P. 32(a) (probation officer shall report unless judge directs otherwise).

10. Each of the statutes cited at note 7 *supra* makes the preparation of such reports the duty of the probation officer. In most jurisdictions these officers must be college graduates with a year's experience with a recognized social work agency. Note, *supra* note 6, at 702.

11. United States v. Christakos, 83 F. Supp. 521, 525 (N.D. Ala. 1949). The purpose of not disclosing a report to the judge until after a finding of guilt is "to insure the fact, as well as the appearance, that the judge is an arbiter and not an arm of the prosecution."

12. Smith v. United States, 238 F.2d 925, 931 (5th Cir. 1956), discussed in Note, *supra* note 6, at 705. *See also* United States v. Durham, 181 F. Supp. 503 (D.D.C. 1960), in which Judge Holtzoff stated, "Rules of evidence are not applicable to the imposition of sentence." *See also* Coleman v. United States, 334 F.2d 558 (D.D.C. 1964).

13. *Pilot Institute on Sentencing*, 26 F.R.D. 380-81 (1959).

14. Model Penal Code § 7.07(3) (Proposed Official Draft, 1962).

Other attempts to create a checklist are substantially similar. Judge Duffy has suggested a list of criteria which does not include family situation and background and economic status but which does include a military history and a statement by the defendant.[15] Such a statement may prove very helpful. It is very possible that the defendant, speaking informally to a competent probation officer outside the imposing and confining courtroom situation may be able to project an element of his personality that would not otherwise be apparent to the judge.[16]

The more humanist approach moves away from the concept of a list of criteria and views the report as a case study. The report should still include factual data on the defendant's family background, his activities and experiences in youth, his education, employment, associations and interests. It should also discuss more subjective matters including:

> causal factors underlying his downfall, opportunities for growth, and probabilities of his responding to sympathetic and understanding treatment, together with a multitude of isolated but significant episodes of his past life which portray a vivid picture of his very character and personality. Such a revealing sketch of an individual, coupled at times with letters of responsible citizens who have knowledge of a defendant's former conduct, would certainly seem to lay a foundation upon which one may exercise a reasonable judgment, fallible though it may be.[17]

A somewhat less zealous statement of the same approach has been made by Louis Sharp, Chief of the Probation Division of the Administrative Office of the United States Courts:

> The report should clearly reflect the attitudes and feelings of the defendant regarding his offense, his family, his employment, and the community. It should be a living story. As one judge has so aptly put it, "It should be a story told briefly about a fellow human being who is in trouble. It should be told in simple language but in so doing the probation officer should never lose sight of the fact that he is describing a living personality."[18]

This approach may be visionary but it does seem to represent a wholesome attitude toward the judicial job of individualization. While the checklist is more likely to be within the reach of an understaffed and overburdened probation officer and the "psy-

15. Duffy, *The Value of Presentence Investigation Reports to the Court*, 5 FED. PROBATION 3, 4 (July-Sept. 1941).

16. *Id.*

17. Kennedy, *The Pre-sentence Investigation Report is Indispensable to the Court*, 5 FED. PROBATION 3 (Apr.-June, 1941).

18. Sharp, *Presentence Resources*, 30 F.R.D. 483, 484 (1961).

chiatric report" is not likely to be within his professional competence, whatever help the officer can furnish to a sympathetic judge is likely to facilitate and ameliorate the sentencing function.

In short, the content of the report should be such as will allow the sentencing authority to make a decision based on a knowledge of the defendant's personality, environment and needs. Even with an excellent report before him, however, a judge without a flair for people may not make the right choice; but even a judge with such a flair can make mistakes.

> It has just been assumed that, given an investigation report on the particular offender before him for sentence, the judge will, by his learning and experience, or by some sort of superjurisprudential magic, be able to decide the exact penal or correctional measure suited to the particular person undergoing sentence and the length of time the offender needs to be subjected to such treatment in order to reform or be rendered nondangerous. . . .
>
> To speak glibly about "individualization" is one thing and to be able to accomplish it is quite another.[19]

The problem of achieving creative individualization is not as simple as the problem of achieving adequate presentence reports. And while criteria for the presentence report may be established it is no assurance of the ultimate goal.

C. Presentence Investigations and Uniformity of Sentencing

Uniformity is also an objective of the criminal law; it need not be in opposition to the objective of individualization. The presentence investigation and report has potential to help in the realization of this objective also.

It has been suggested that disparity of sentencing which has no apparent rational basis is both offensive to principles of justice and harmful to rehabilitation of the criminal. Successful rehabilitation depends in large part on prisoner morale, which may be adversely affected if a prisoner believes his sentence to be the result of the sentencing judge's personal prejudices.[20] There is some justification for such a belief. The sentence an offender receives seems to depend more on the judge to whom his case is assigned than on any other factor. This is true both as to length of sentence and likelihood of probation.[21] As the system moves from statutory to judicial definition of sen-

19. Glueck, *The Sentencing Problem*, 20 Fed. Probation 15, 16 (Dec. 1956).
20. Comment, 69 Yale L.J. 1453, 1459 (1960).
21. Glueck, *supra* note 19, at 17.

tences such disparity becomes increasingly possible. "Discretion there should certainly be; but the problem is to provide a technique whereby discretion shall be allowed ample creative scope and yet be subjected to rational external discipline or self-discipline."[22] Adequate presentence reports are essential to such discipline so long as the objective of the system is to treat similar individuals similarly.[23] Offenders can be treated in a consistent and uniform manner in a system which emphasizes individualization only when the sentencing authority has adequate information to know what variables of personality are being dealt with. Without such reports the decision as to sentence can rest only on hunches and impressions, an unsteady base at best.

It may be useful at this point to examine briefly three possible modes of reducing sentencing disparity with particular emphasis on the role of the presentence investigation.

1. *Judicial Review*

Judicial review of sentences would tend to eliminate disparity in two ways. First, it would reduce the number of tribunals actually making the sentencing decision, for the number of appellate courts is considerably smaller than the number of courts of original jurisdiction. Second, as in any area of the law, appellate review would over time tend to lead to clear enunciation of standards which lower courts would follow.[24]

There are three major objections to such a system. It flies in the face of eighty years of precedent which has led almost every jurisdiction to deny itself such a system.[25] It would add

22. *Id.* at 19.

23. There is a temptation to assume that uniformity requires that all people who commit the same act be treated in the same manner; but, of course, similar treatment of all individuals who have similar characteristics without regard to the specific criminal act they commit is also a form of uniform handling.

24. *See* Note on sentencing disparities in M. PAULSEN & S. KADISH, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 162 (1962).

25. *See, e.g.*, United States v. Rosenberg, 195 F.2d 583, 604-07 (2d Cir. 1952), in which the court disclaimed power to modify the death sentences imposed by the trial judge on Ethel and Julius Rosenberg:

> Unless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." Gurera v. U.S., 40 F.2d 338, 340 (8th Cir. 1930). *Id.* at 604. . . . In England, Canada and in several of our states, upper courts have held that they may revise sentences while affirming convictions. But these rulings were based on statutory authority. Commonwealth v. Garramone, 307 Pa. 507, 161 A. 733 (1932). *Id.* at 605.

to the work schedule of appellate courts which are already overburdened, and would make speedy justice a more distant reality. Finally, such a system would produce only surface uniformity rather than the creative use of discretion because the deciding court would be twice removed from the offender and would not have an opportunity to observe him directly and thus come to understand him.[26] To the extent that this criticism denies that an adequate job could be done, it denies the efficacy of presentence reports. It is apparent that the further the deciding tribunal is removed from the defendant, the greater will be its reliance on such reports. It is equally apparent, however, that there would be virtually no possibility of obtaining meaningful uniformity under a system of judicial review without competent presentence investigation.

2. *Prediction Studies*

Prediction studies often are advanced as a desirable way of obtaining uniformity.[27] Prediction tables are the product of empirical studies of the subsequent careers of representative samples of offenders which relate personal and social characteristics of classes of offenders with their subsequent post-correctional conduct. Using these tables a judge can "score" a defendant in terms of the existence of success- or failure-predictive factors and thus indicate the likelihood of his leading a law-abiding life.

It is not uncommon in our society to make judgments about a man's potential on the basis of probabilities—consider the Scholastic Aptitude Test or the Law School Aptitude Test. Such a course is followed with more hesitency, however, when the probabilities will determine whether an individual is to be compelled to remain in prison or may be permitted to walk the streets free.

Another objection to this approach is that, given the present nature of our society, prediction tables may serve to institutionalize racism. Even if race factors were not considered in creating tables of this nature, other factors relating to environment, such as relative poverty might correlate highly not only with recidivism but also with race. Thus members of a group which has a high rate of recidivism would be likely candidates for comparatively harsh treatment at the hands of the courts. A

26. *See* Glueck, *supra* note 19, at 19.
27. *See* M. PAULSEN & S. KADISH, *supra* note 24, at 162.

self-fulfilling prophecy would thus begin; such harsh treatment could become a factor in the continued high recidivism rate within that group. A constant revision of the data would be necessary and even that might not be enough; the treatment accorded on the basis of present variables might inhibit change and thus serve permanently to stigmatize one section of the population.

At any rate, if a jurisdiction were to make use of these tables it would require reliance on presentence investigation and reports. The usual variables that are considered in the creation of such tables are the seriousness and frequency of the offender's criminality, prior penal experience, economic responsibility and mental abnormality.[28] If a given offender is to be "scored" against norm groups on these factors, the judge will have to have reliable information about him that cannot be otherwise obtained. Mere hunches and impressions do not appear on the table. The presentence report is an essential part of the prediction table method of obtaining uniformity.

3. *Indeterminate Sentencing*

The Model Penal Code and others have suggested an indeterminate sentence plan.[29] The Code would consolidate all felonies into three punishment categories[30] and would require that the sentencing judge impose both the statutory maximum and the statutory minimum for each category of felony in every case.[31] Parole is available after the minimum time has elapsed.

The major shortcoming of such a plan is that it provides no assurance of uniformity in the decision to give parole. The problems created by the requirement of uniformity are post-

28. *Id.* at 166.
29. *Id.* at 167.
30. MODEL PENAL CODE § 6.01 (Proposed Official Draft, 1962).
31. *Id.* § 6.06:

A person who has been convicted of a felony may be sentenced to imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum of which shall be life imprisonment;
(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years;
(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum of which shall be five years.

poned, not resolved, by the plan. Under such a plan, however, a single board or group of boards working together in close cooperation might be used to determine the length of incarceration to which every prisoner would be subjected. Uniformity would be assured by the fact that all cases would proceed through the same channel.[32]

In a system where the judge must impose a statutory minimum and maximum the need for a presentence report is negligible. However, this does not mean that there is no need for investigation and report. The plan merely shifts the time and place of discretion from the court before sentencing to the parole board some time later. Professor Wechsler has argued that this delay is one of the most valuable attributes of such a system. "Even when aided by a competent presentence study and report, the court is poorly equipped at the time of sentence to make solid and decisive judgments on the period required for the process of correction to realize its optimum potentiality or for the risk of further criminality to reach a level where release of the offender appears reasonably safe."[33] Arguably this can best be done after time has elapsed allowing for more detailed examination of the individual offender. The indeterminate sentence plan allows more time for a report to be prepared and gives prison social workers and psychiatrists an opportunity to observe each offender. The system strives to maintain individualization; and, to the extent that it does, it must rely on such techniques.

In short, it has been demonstrated that the objectives of individualization and of uniformity need not be at odds with one another. Judicial review, prediction studies and indeterminate sentence plans represent three possible approaches which allow for the uniform treatment of similar individuals. Further, it has been shown that presentence reports or something essentially similar in nature will have an important role in a system which successfully administers criminal rehabilitation.

> When once we realize that punishment qua punishment does not bring about the desired result of protection of society, and that constructive individualized treatment of offenders against the law is more likely to achieve it, we are met with the basic problems in administrative law—the need and the methods of safeguarding individual rights against the possible arbitrary action of a technically skilled, yet "all too human," administrative board.[34]

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32. Holtzoff, *The Indeterminate Sentence Plan: Its Social and Legal Implications*, 5 FED. PROBATION 3, 5 (June-Mar. 1941).

33. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 476 (1961).

34. Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 478 (1928).

III. DISCLOSURE OF PRESENTENCE REPORTS

The results of a presentence investigation may be damaging to a defendant; yet a right to see and contest such reports is not yet established. Most statutes are silent on the issue of disclosure and the silence has been construed as affording trial courts discretion as to whether the contents of a report should be disclosed.[35] There is evidence that trial judges, in exercising this discretion, generally deny disclosure.[36] Some courts have followed a middle road, endorsed by the Model Penal Code, disclosing the contents of a report but not its sources.[37]

Even where disclosure is allowed, it does not necessarily follow that an opportunity will be provided for the defendant to refute adverse material contained in a report. Statutes are silent on this issue in most jurisdictions and the courts have generally restricted a defendant's opportunity to refute.[38] These matters are apparently within the discretion of the trial court. There is usually no right to cross-examine a probation officer[39] and, of course, there can be no such right as to the investigator's informants.[40] Generally cross-examination is denied on the theory that it would excessively burden an already overworked staff of probation departments.[41] Professor Gellhorn

35. United States v. Schwenke, 221 F.2d 356 (2d Cir. 1955); State v. Moore, 49 Del. 29, 108 A.2d 675 (1954).

36. Sharp, *supra* note 5, at 246 (citing a 1958 study which revealed that in 65 of 96 probation units the report was available only to the sentencing judge and that in only 11 units was the report generally available to defense counsel). *See also* Higgens, *Confidentiality of Presentence Reports*, 28 ALBANY L. REV. 12 (1964); Lorenson, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W. VA. L. REV. 159 (1967); Note, *supra* note 6, at 706.

37. MODEL PENAL CODE § 7.07(5) (Proposed Official Draft, 1962); Zeff v. Sanford, 31 F. Supp. 736, 738 (N.D. Ga. 1940).

38. Note, *supra* note 6, at 709. *But see* the language of the amendment to FED. R. CRIM. P. 32(c)(2) which became effective July 1, 1966.

> The court before imposing sentence *may* disclose to the defendant or his counsel *all or part* of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be available to the attorney for the government (emphasis added).

The language seems to state that the court *may* disclose the contents of the report to the defendant and *may* allow defendant an opportunity to refute.

39. People v. Giles, 70 Cal. App.2d 872, 161 P.2d 623 (1945). However, in Virginia cross-examination of the officer is allowed by statute. VA. CODE ANN. § 53-278.1 (1967).

40. Note, *supra* note 6, at 710.

41. *Id.*

has suggested that the possibility of cross-examination would tend to make an investigator unduly cautious, causing the removal of important data from the report in an effort to avoid the presentation of controversial issues that might lead to an unpleasant cross-examination.[42]

At present, then, neither disclosure nor an opportunity to refute damaging information in a report is generally considered a right of a defendant. It is arguable, however, that the United States Constitution requires the establishment of such a right; and that even if it does not, that the establishment of such a right would be in the public interest.

The issue of whether due process compels disclosure and an opportunity to refute has never been squarely faced. The issue was not presented in *Williams v. New York*.[43] That case upheld the constitutionality of section 482 of the New York Criminal Code which permitted the use of presentence reports which include information that would not have been admissible at trial. The opinion itself[44] stresses that the report was not challenged by the defendant; thus it is not clear whether the defendant has a right to challenge under *Williams*. The case stands only for the admissibility of such reports and for the principle that they need not adhere to the constraints of the usual rules of evidence. Yet some maintain that *Williams* held more. Thus, for example, Judge Keating has said:

> Strictly speaking, the Supreme Court held only that the use of hearsay probation reports for purposes of aiding the discretion of the sentencing court did not constitute a denial of due process. Implicit in the Court's ruling, however, is the unmistakable recognition of a practice which denies a defendant the right to confront and cross-examine those who supply the critical information upon which the report is based.[45]

Two state courts have held that disclosure is not a constitutional requirement under due process.[46] Contra, however, is

42. W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK 332 (1954).

43. 337 U.S. 241 (1949). The narrow holding of the case is that the 14th Amendment does not restrict the trial judge when determining sentence to the same type of evidence used to determine guilt. *Id.* at 250.

44. *Id.* at 244.

45. People v. Peace, 18 N.Y.2d 230, 233, 219 N.E.2d 419, 420, 273 N.Y.S.2d 64, 66 (1966), *cert. denied*, 385 U.S. 1032 (1967).

46. State v. Moore, 49 Del. 29, 108 A.2d 675 (1954); State v. Benes, 16 N.J. 389, 108 A.2d 846 (1954). In addition, People v. Peace, 18 N.Y.2d 230, 219 N.E.2d 419, 273 N.Y.S.2d 64 (1966), *cert. denied*, 385 U.S. 1032 (1967) argues for the same position and accepts it as operative without actually referring to constitutional language.

Townsend v. Burke,[47] which seems to stand for the principle that disclosure is a federal constitutional requirement. The judge in the lower court relied heavily on material allegations of defendant's past which were untrue. The Supreme Court indicated that the unrepresented defendant had been denied due process because without counsel he was unable to go about trying to correct the misconceptions of the report. The due process violation was in the denial of counsel; however, disclosure is implicit in the Court's reasoning, since the assumption that counsel could operate effectively was rooted in the assumption that he would have had access to the material. This case seems to establish a right to have access to the presentence reports and to refute the material contained therein. However, the passage of twenty years has not seen the actual creation of such a system of constitutional rights. Whatever *Townsend v. Burke* seems to stand for, its history indicates that it is not a landmark case in American jurisprudence.[48] A Third Circuit case decided in 1953[49] holds that an enhanced sentence cannot be made unless the defendant is protected by a due process right to contest the basic factual allegations on which the increased sentence is predicated. This case, however, stands with *Townsend v. Burke* as something other than a significant landmark in American law.

A 1966 case, *Kent v. United States*,[50] is arguably the decision in which a constitutional requirement of disclosure can be found. Petitioner was arrested at age 16 in connection with charges of housebreaking, robbery and rape. He was subject to the exclusive jurisdiction of the District of Columbia juvenile court, unless that court after "full investigation" decided to waive jurisdiction and remit him for trial to the U.S. District Court.[51] After the investigation a waiver of jurisdiction was made. The defendant was never given a hearing of any sort. The Supreme Court held the waiver invalid. Terming the waiver decision

47. 334 U.S. 736 (1948).

48. *See, e.g.*, Hoover v. United States, 268 F.2d 787 (10th Cir. 1959), in which the statement is made that not affording a defendant an opportunity to rebut statements contained in a presentence report does not violate due process.

49. United States *ex rel.* Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953).

50. 383 U.S. 541 (1966).

51. Of course, issues relating to jurisdiction are statutory; thus the requirement of "full investigation" is a statutory requirement. This is important because some commentators maintain that *Kent* involves statutory interpretation rather than constitutional law in which case its implications are severely limited.

critically important, the Court held that a hearing was required and that petitioner's counsel was entitled to the probation records and similar reports. The discretion of the lower court was abused by virtue of a failure to act with "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness."[52] The Court stated that the investigation and decision without a hearing constituted a denial of effective assistance of counsel on a matter of tremendous consequence and that "it is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner."[53] In the circumstances of this case, where the decision made could affect whether the sentence was five years' imprisonment or death, the Court concluded that, "as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports. . . . [T]his result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel."[54]

A look beyond the particulars of the immediate case suggests that the due process and right to counsel provisions of the Constitution require that reports which will be used in reaching a decision of great consequence to an offender must be subject to attack by counsel. The sentencing decision is of immense consequence to his future. Consequently, presentence reports must be subject to attack. *Kent v. United States* would seem to be the constitutional authority needed to introduce this much needed safeguard into the law.

However, it is not clear that *Kent* represents constitutional authority at all. In a subsequent case, making reference to the *Kent* decision, Mr. Justice Harlan maintained that the case did not purport to rest on constitutional grounds but depended solely on the interpretation of the statute vesting jurisdiction in the juvenile court.[55] That same position was taken by Judge Keating of the New York Court of Appeals.[56] In essence the argument is that disclosure of the records is necessitated by the language of the District of Columbia statute which requires that "[t]he records or parts thereof . . . shall be made available by

52. 383 U.S. at 553.
53. *Id.* at 554.
54. *Id.* at 557.
55. *In re* Gault, 387 U.S. 1, 66 (1966) (Harlan, J., concurring & dissenting).
56. People v. Peace, 18 N.Y.2d 230, 219 N.E.2d 419, 273 N.Y.S.2d 64 (1966), *cert. denied*, 385 U.S. 1032 (1967).

rule or special order of court to such persons . . . as have a legitimate interest in the protection . . . of the child."[57]

But such a position seems to deny a great deal else that is in the language of *Kent*. In the very paragraph in which the statute is cited the court stated, "With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel."[58] This would seem to be the case without regard to the statute, as a consequence of the right to effective assistance of counsel. The statutory language is then introduced by the Court, but it would seem to be not decisive but merely supportive. In fact earlier in the opinion the Court concludes that:

> as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. *We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.*[59]

It must be pointed out that the Supreme Court denied certiorari in the case of *People v. Peace*,[60] the case in which Judge Keating took the position that *Kent* involved statutory interpretation rather than constitutional principles. Although a denial of certiorari cannot be taken to indicate acceptance of all the dicta in an opinion of a lower court, it is an indication that the Court was not prepared at that time boldly to state a seemingly logical extension of *Kent*.

There is an additional and perhaps more persuasive argument that the *Kent* holding does not necessarily constitute constitutional authority for the disclosure of presentence reports. That argument is rooted in the language and history of the Federal Rules of Criminal Procedure. Despite a recommendation to the contrary by the Advisory Committee it had appointed, the Supreme Court in 1944 adopted rules which did not require that presentence reports be disclosed to the defense.[61] In subse-

57. D.C. CODE ENCYCL. ANN. § 11-1586(b) (1966).
58. 383 U.S. at 562.
59. *Id.* at 557 (emphasis added).
60. 18 N.Y.2d 230, 219 N.E.2d 419, 273 N.Y.S.2d 64 (1966), *cert. denied*, 385 U.S. 1032 (1967).
61. For a discussion of this history see State v. Moore, 49 Del. 29, 103 A.2d 67 (1954). *See also* L. ORFIELD, 5 CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 166 (1967).

quent years the issue of disclosure continued to be hotly debated. Other advisory committees were commissioned to make recommendations to the Court, and on July 1, 1966, an amendment to Rule 32 (c) (2) became effective. The Rule now provides: "The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon."[62] The amendment is in no way innovative; it is a restatement of existing procedure.

If *Kent* represents constitutional authority on the issue of disclosure, Rule 32(c)(2) is in violation of constitutional principles.[63] But the Rule, promulgated by the very same Supreme Court that decided *Kent*, became effective more than three months after that decision.[64] One is hard put to explain how it came to be that the Court promulgated a rule violative of constitutional principles it had just recently established. It is plausible to maintain that the adoption of the Rule makes clear that *Kent* stands for less than the proponents of disclosure maintain. There is, however, one other possible explanation—that the process of promulgation of the Rule began and, in fact, was completed prior to the March 21 decision.[65] In the short period of time remaining before the Rule became effective, the Court may not have had time to make changes in the Rule. Indeed, in so short a period of time the Court may not have had time to consider all the implications of *Kent*. It is not reasonable to expect that all the problems raised by the creation of a new constitutional right will be so immediately obvious to the Court, especially when it is operating in a legislative (rule-making) capacity without the benefit of counsel and adversarial procedure. In short, though the Rule became effective after *Kent* was decided, it is possible that the implications of *Kent* were not thoughtfully considered and incorporated into the Rule. Thus, it is not at all implausible to maintain that, as between the case law and the rule of procedure, the rule must fail in the case of discrepancy despite the fact that it carries the more recent date. The author

62. L. ORFIELD, *supra* note 61, at 226.

63. People v. Peace, 18 N.Y.2d 230, 219 N.E.2d 419, 273 N.Y.S.2d 64 (1966), *cert. denied*, 385 U.S. 1032 (1967).

64. *Kent* was decided on March 21, 1966.

65. The statement of the Advisory Committee to the Supreme Court on the amendment to Rule 32(c)(2) made no mention of *Kent*; indeed no material cited in the statement is dated later than 1964. L. ORFIELD, *supra* note 61, at 167 *et seq.* The amendment was adopted by the Court on Feb. 28, 1966—before *Kent*. 383 U.S. 1087 (1966).

believes that, considered in the light of the *Kent* case, the rule of procedure requires a new amendment.

In any event it seems that this is the direction in which the law ought to move. Proponents of a different view maintain that disclosure will tend to dry up the sources available to probation officers. In addition to information obtained from the defendant himself through interviews, the officer makes use of more traditional ways of obtaining information. He investigates documents such as police records and health reports and he interviews relatives, acquaintances and employers of the defendant and members of the social work community with whom he may have had contact.[66] It is feared that such persons will be reluctant to talk openly and honestly if they cannot be assured confidentiality. However, we require that people who come to court to testify on the issue of guilt be available for confrontation. There is no guarantee of confidentiality for testimony, but the system works. It is not altogether clear that the same procedure used to determine the crucial issue of guilt will prove dysfunctional in the determination of appropriate sentence. In fact, judges whose usual practice includes the disclosure of such reports indicate that the accessibility of such reports to the defense does not seem to have the inhibiting effect on informants that is feared by those who resist disclosure.[67]

It is also argued that disclosure will cause delay by protracting the sentencing process while the defendant controverts data which appears in the report. In practice, however, this seems not to be the case. Several judges, in fact, have reported the opposite experience—that disclosure permits the scope of argument regarding sentence to be limited and permits the discussion to be directed to pertinent considerations.[68] Beyond that, it seems plausible, if not probable, that interested cross-examination (as by a defendant rather than a disinterested probation officer, who is probably inadequately trained in any event) is necessary to assure the truth of the allegations in the report on which a judge may rely very heavily;[69] this alone would justify any delay.

Furthermore, disclosure may well be the best possible case-

66. Barnett & Gronewald, *Confidentiality of the Presentence Report*, 26 FED. PROBATION 26 (Mar. 1962).

67. Higgens, *supra* note 36, at 32.

68. *Id.*

69. Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 276-77 (1952).

work practice in a system which aims towards rehabilitation. Such disclosure is "an opportunity to interpret the report, so that the disposition will be better understood and a mutually open relationship begun."[70] Disclosure is an act of fairness and honesty and as such it is a positive, constructive element in the success of the entire probation process.[71]

Regardless of any possible constitutional stricture, an enlightened judiciary would do well to follow such a policy. Judge Wyzanski has written that "[d]espite the latitude [so far] permitted by the Due Process Clause, it seems to me that a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it."[72]

IV. CONCLUSION

As the system of criminal administration strives to treat similar offenders in a consistent and uniform manner, the use of presentence investigations and reports is likely to constantly increase. Such a procedure represents a threat to the protection of individual rights. However, disclosure of the contents of such reports and provision for an opportunity to rebut the material therein are likely to constitute effective safeguards. The constitutional groundwork for finding such a procedure indispensable may already exist. It is at least plausible to expect that disclosure increasingly will become the rule of procedure in American courts.

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70. Rubin, *What Privacy for Presentence Reports*, 16 FED. PROBATION 8, 9 (Dec. 1952).

71. *Id.*

72. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291 (1952).