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Sentencing: The Use of Psychiatric Information and Presentence Reports

By RUTHEFORD B. CAMPBELL, JR.*

I. INTRODUCTION

In the 16th Century legal literature an author observed that "many books have appeared in which sorcery is considered not a crime but a superstition and a melancholy, and these [writers] insist violently that it should not be punished by death. The [reasonings of Dr. Weyer, however,] are not very important, for he is a physician and not a jurist."¹

It has become apparent that the two disciplines of law and psychiatry have a common "interface" in the field of criminal justice.² Commentators generally agree that the administration of criminal justice is greatly aided by psychiatrists and psychiatric data.³ That is not to say, however, that the meeting of the disciplines has been without incident or misunderstanding.⁴ Problems have arisen because of divergent attitudes and goals of the professions. Some commentators say that the concerns of the two disciplines are not the same,⁵ others claim that much of the

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¹ W. Burger, *Psychiatrists, Lawyers, and the Courts*, 28 Fed. Prob. 3 (1964) (quoting from G. Zilboorg, *A History of Medical Psychiatry* 233 (1941) [hereinafter cited as Burger]).

² Comment, *The Psychiatrist's Role in Determining Accountability For Crimes: The Public Anxiety and an Increasing Expertise*, 52 MARQ. L. REV. 380 (1969).

³ But see, M. Nord, *The Mental Element in Crime*, 37 U. DET. L. J. 671, 679 (1960).

Under this theory, criminal law is irrelevant. Psychiatrists are relevant. Criminals are sick, and are captive patients of psychiatrists who are well. No one is convicted of being a criminal; he is merely a grown-up juvenile delinquent. Why worry about such formalities as "burden of proof," "due process of law," and "jury trial"? A little treatment by "scientific-type" psychiatrists will cure everything. . . . This will all be very well if the psychiatrists are as gifted as they think they are, but what if they should turn out to be as confused as they seem to be?

⁴ See generally, L. Roberts, *Some Observations on the Problems of the Forensic Psychiatrist*, 1965 WIS. L. REV. 240.

⁵ *Id.* at 242-43, wherein the author states:

Part of the inter-professional barrier relates to this relative concern for the alleged offender by each profession. Psychiatry is concerned with

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problem lies in the over-estimation of the certainty and reliability of psychiatric information;⁶ while still others believe that the use of the psychiatrist to assess criminal responsibility involves the psychiatrist in "legal, philosophical and moral considerations, clearly outside his scope."⁷

While many of the problems⁸ raised by commentators are present at all stages of the criminal proceeding, at least some writers feel that the psychiatrist can make his most important contribution at the dispositional (*i.e.*, sentencing) stage⁹ of the action, after the guilt of the defendant has been determined.¹⁰ It is felt by these commentators that the psychiatrist is better able to function with respect to predictions of dangerousness at the dispositional stage of a proceeding.¹¹ It would seem that at least the psychiatrist would be less involved in the kinds of value

(Footnote continued from preceding page)

the individual, his evaluation and treatment. Law is more basically concerned with the protection of society and the rehabilitation of the adjudged offender.

But the author goes on to point out that in the long run, these goals may be closer than they seem. He further adds, however, that the approaches are "radically different."

⁶ M. Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 *Nw. U.L. Rev.* 19, 20 (1962).

In the last twenty years, we have been subjected to such a barrage of indiscriminate and often irresponsible glorification of psychiatry, largely by popular press, that some of the fundamental issues have been obscured.

The intelligent public has the right to know that, today, psychiatry is in ferment—many concepts, held for decades to be firmly established, are being increasingly challenged, and fundamental divergencies are developing amongst its leading exponents on almost every issue of psychiatric diagnosis, therapy and prophylactic recommendation. This holds true to an even greater degree for legal psychiatry. *Id.* at 21.

⁷ J. Suarez, *A Critique of the Psychiatrist's Role as an Expert Witness*, 12 *J. For. Sci.* 172, 174 (1967) [hereinafter cited as Suarez].

⁸ It should be noted that the above issues are merely illustrative of the problems raised by commentators. It is by no means intended to be exhaustive.

⁹ Throughout this paper I shall use the terms "dispositional stage of a trial" and "sentencing stage of a trial" interchangeably. These terms are used to mean that part of the trial which takes place after the determination of the defendant's guilt and in which the sentencing judge determines whether the defendant should be probated or sentenced, and if sentenced, how long a term he should serve.

¹⁰ *E.g.*, L. Friedman, *No Psychiatry in Criminal Court*, 56 *A.B.A.J.* 242 (1970) [hereinafter cited as Friedman]. Other writers have indirectly agreed with the proposition that the psychiatrist can make his most valuable contribution at the dispositional stage by recommending a bifurcated trial, at the first stage of which the court would determine the physical commission of the act. At the second stage the court would determine disposition, and at this stage the court would consider psychiatric data. Burger, *supra* note 1.

¹¹ Friedman, *supra* note 10; R. Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 *U. Pa. L. Rev.* 378, 389 (1952) [hereinafter cited as Waelder].

judgments implicit in a determination of criminal responsibility so troublesome to Dr. Suarez.¹²

But even at the dispositional stage of the proceedings, the use of psychiatric information presents many problems. It is the purpose of this paper to explore the problems encountered by the use of psychiatric information at the dispositional stage of a criminal trial and to demonstrate that a procedure adequate to protect the constitutional rights of the defendant when the ordinary-type presentence report (containing only factual background information, past crimes, opinions of friends, relatives, and employers as to attitudes and character of defendant, etc.)¹³ is used by the court is not necessarily adequate when psychiatric information is included in the report.¹⁴ In this context it is assumed that the psychiatric information is obtained by a court appointed psychiatrist. Further, although there will be a brief discussion of mechanics of gathering pertinent information about the defendant, this article will generally be divorced of any discussion of the legal problems encountered in the gathering of such information.¹⁵ Instead the attention shall be directed to a consideration of the defendant's right to due process and the equitable balancing of the rights of the defendant and society when psychiatric information is used to determine the disposition of a convicted offender.

II. THE EVOLUTION OF MODERN SENTENCING THEORY

In *Williams v. New York*,¹⁶ Justice Black indicated that indi-

¹² Suarez, *supra* note 7. See also Waelder, *supra* note 11, at 385.

¹³ For a discussion of the contents and use of a presentence report see p. 299 *infra*.

¹⁴ I wish to make clear at the outset that the line which I draw between psychiatric data and the rest of the information contained in the presentence report is not intended to be a line separating two, all-inclusive categories. It is possible that there are other types of information having characteristics that would make it more analogous to psychiatric data. I merely use the two categories to demonstrate that there are separate considerations which must be analyzed in the two types of information.

¹⁵ There are a number of other problems involved in the gathering of psychiatric information from a defendant, such as whether the defendant can be forced to submit to a psychiatric examination against his will, whether the defendant has the right to counsel during such an examination, etc. For a good discussion of whether a defendant has a right to refuse a psychiatric examination see F. Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination*, 19 *RUTGERS L. REV.* 489 (1965); Note, *Requiring A Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 *HARV. L. REV.* 648 (1970).

¹⁶ 337 U.S. 241 (1948).

vidualization of punishment for the same crime was not the acceptable norm in earlier periods:

. . . [M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information. . . .

. . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial.¹⁷

At early common law penalties for felonies were fixed.¹⁸ Blackstone described it as one of the glories of the law.¹⁹ Not only were the penalties fixed for the various crimes, but it also appears that from the reigns of Henry III and Edward I that death was the punishment for all felonies except petty larceny and mayhem.²⁰ That is not to say, however, that each person convicted of a felony was put to death. Judges sometimes engaged in various practices—such as the benefit of clergy and transportation²¹—which would save the defendant from death. Thus, even in this early period, the judge had some minimal amount of discretion.

The nineteenth century saw a dramatic switch from the position that the trial judge had no discretion in imposing sen-

¹⁷ *Id.* at 247-48.

¹⁸ For a good discussion of the development of sentencing theory see Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821-25 (1968).

Judges did have discretion with regard to sentencing in misdemeanor cases. S. RUBIN, *THE LAW OF CRIMINAL CORRECTIONS* 23 (1963) [hereinafter cited as RUBIN].

¹⁹ W. BLACKSTONE, *COMMENTARIES* ch. 29, 378 (Lewis ed. 1897). Blackstone defended his stand as follows:

For, if judgements were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation with which an offender might flatter himself, if his punishment depended on the humor or discretion of the court.

²⁰ I. J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 458 (1883); F. Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1, 17-18 (1968) [hereinafter cited as Cohen].

²¹ For a good general discussion of these discretionary devices see Cohen, *supra* note 20, at 18-19. See also RUBIN, *supra* note 18, at 17-18, 20-21 for a discussion of the practice of benefit of clergy (by which clergy, and later others, could avoid the criminal penalties) and the practice of transportation (by which convicted persons were pardoned on the condition that they be transported abroad, usually to the colonies); see also J. HALL, *THEFT, LAW AND SOCIETY* 68-72 (1935) for a discussion of benefit of clergy and transportation.

tence,²² as reforms gave judges wide discretion in the imposition of sentences.²³ The shift, although not immediate, was substantial.

In the United States, not only do judges often have wide discretion as to the quantum of the sentence (including usually the right to probate the defendant),²⁴ but there are also virtually no procedural requirements,²⁵ "no statutory guidance for judges, and, except for a few jurisdictions, no appellate review of sentences."²⁶ This shift, investing discretion in the sentencing judge, was at least an opportunity, if not a directive, for the individualization of sentencing. If individualization of sentencing means that persons who commit the same crime should not necessarily receive the same punishment, there must be some criteria, other than the specific crime committed, upon which to base the sentence. Otherwise, the imposition of a sentence may very well be as arbitrary—or perhaps even more so—as when conviction for a felony meant a mandatory death penalty. This leads to the following question: What are the objectives to be attained by a sentence?

Most commentators agree that the objectives of an enlightened sentencing philosophy are three: (1) deterrence; (2) neutralization; (3) rehabilitation.²⁷ It is relevant to note that this at best can be called a majority view of sentencing philosophy, since various commentators disagree with the above categories.²⁸

²² It is interesting to note that even before any formal shift in the law, there arose a discrepancy between the policy of the legislature, which had increased the number of capital crimes, and those who administered these laws. This manifested itself in a sharp decrease in the number and percentage of convicted felons who were executed. L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, 158 (1948).

²³ G. Pugh & H. Carver, *Due Process and Sentencing: From Mapp to Mempa to McCautha*, 49 *TEX. L. REV.* 25, 27 (1970).

²⁴ *E.g.*, in Kentucky involuntary manslaughter is punishable by imprisonment of from one to fifteen years, *KY. REV. STAT.* [hereinafter cited as *KRS*] § 435.022 (1962); maiming is punishable by imprisonment of from one to five years, *KRS* § 435.160 (1962).

²⁵ See *Williams v. New York*, 337 U.S. 241, 246-47 (1948), where Justice Black discusses the inapplicability of the rules of evidence at the sentencing stage of a trial.

²⁶ Cohen, *supra* note 20, at 19. See generally, G. Mueller, *Penology on Appeal: Review of Legal but Excessive Sentences*, 15 *VAND. L. REV.* 671 (1962) for a discussion of appellate review of sentences and the states which allow it.

²⁷ Note, *Sentencing: The Good, The Bad and The Enlightened*, 57 *KY. L.J.* 456, 457-59 (1969). The author of this paper was the co-author of that note in the *Kentucky Law Journal*. I have, therefore, felt at liberty to substantially retrace what was said in that note concerning sentencing philosophy [hereinafter cited as Note].

²⁸ For a discussion of the various philosophies of sentencing see Mueller, *Punishment, Correction, and the Law*, 45 *NEB. L. REV.* 56, 65-83 (1966).

Deterrence "simply refers to the prospect . . . of pain as a psychological stimulus posited by society in anticipation of the response of abstention from gaining illicit pleasure. . . ." ²⁹ Within the category of deterrence, there are two sub-categories:

(1) special deterrence, aimed at the specific offender and based upon the assumption that the inflicted punishment will deter the particular offender who has received the punishment from repeating the proscribed act; (2) general deterrence, aimed at the populace and based upon the assumption that the threat of punishment will provide a stimulus for the general public to abstain from the commission of the act. ³⁰

Another aim of any sentence should be neutralization. This is based on an "incapacitating effect:" that the removal of one from society prevents repetition of his deviant act during the period of his absence. "Naturally, the principle of utility would dictate that solely as far as neutralization is concerned, no more force should be employed than is necessary for preventive purpose. That means also that restraint should last no longer than the danger emanating from the restrained person persists." ³¹

Finally, there should be a rehabilitative effect on the convicted individual. This argument "suggests that the criminal is sick . . . and therefore needs treatment. . . ." ³²

The above discussion makes clear two problems. First, arriving at a rational sentence requires a weighing of the above factors which means that in choosing an appropriate penalty, one should balance the need for general deterrence (which would seem to favor harsher sentence) ³³ against the other objectives such as rehabilitation and special deterrence (which may favor probation of the defendant). Second, the proper consideration of these objectives requires information about the convicted ³⁴ in

²⁹ *Id.* at 74.

³⁰ Note, *supra* note 27, at 458. The concept of general deterrence has come under much fire from writers as to the morality of inflicting punishment based on an attempt to deter others. See, e.g. Bittner & Platt, *The Meaning of Punishment*, 2 *ISSUES IN CRIMINOLOGY* 89, 93 (1966). But see Andennaes, *The Morality of Deterrence*, 37 *U. CHI. L. REV.* 649 (1970) [hereinafter cited as Andennaes].

³¹ Mueller, *supra* note 28, at 74.

³² Gerber & McAnany, *Punishment: Current Survey of Philosophy and the Law*, 11 *ST. LOUIS U.L.J.* 491, 498 (1967).

³³ Some modern writers have questioned whether there is any general deterrence as a result of the threat of criminal sanctions. See the discussion in Waelder, *supra* note 11; see also the discussion in Andennaes, *supra* note 30.

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order to determine the length of sentence necessary to effect neutralization, rehabilitation and special deterrence. In essence more information than that which is revealed at trial is required.³⁵

III. DEVICES FOR GATHERING INFORMATION TO BE USED AT DISPOSITION

To fill the above informational requirement, many jurisdictions have developed the presentence report as a vehicle to bring before the sentencing judge relevant data concerning the defendant.³⁶ This presentence report is typically a report prepared by the probation service³⁷ before the sentence is imposed and contains background information about the defendant. It usually includes information such as the defendant's prior criminal record, his religion, education, employment and finances, interests and activities, physical and mental health, and his attitudes and personality.³⁸ This report would seem of undisputed value to any judge attempting to assess a penalty in conformity with the objectives of sentencing.³⁹

An obvious flaw in any report prepared by a probation officer is that it would normally lack psychiatric data concerning the defendant.⁴⁰ To fill this void, some jurisdictions have instituted a system of psychiatric court clinics, which make available to the court psychiatric facilities. Because of the potential importance of the court clinics as a source of psychiatric information a brief

(Footnote continued from preceding page)

³⁴ See Levine, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966) wherein he states:

A just sentence will reflect the divergent backgrounds and present circumstances of each individual offender, his present attitudes, and the nature of the offending act itself.

³⁵ See *Williams v. New York*, 337 U.S. 241 (1949). It is important to note that most defendants (about 80% to 90%) plead guilty and therefore do not have a trial. Pugh & Carver, *supra* note 23, at 26. Thus there may be no information on which to base a sentence.

³⁶ E.g., Fed. R. Crim. P. 32(c)(1) & (2). In the state courts the requirement for a presentence report varies from jurisdiction to jurisdiction. E.g., CAL. PENAL CODE § 1203 (1966 Supp.) requires a presentence report for each felony conviction where defendant is eligible for parole; MINN. STAT. ANN. § 609.115(1) makes the use of the presentence report discretionary.

³⁷ E.g., FED. R. CRIM. P. 32(c)(1); OHIO REV. CODE ANN. § 2951.03 (1965 Supp.).

³⁸ Lehigh, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225, 228 (1969) (citing Keve, *The Probation Officer Investigates* (1960)).

³⁹ See the discussion *supra* pp. 8-10.

⁴⁰ The presentence report may contain psychiatric data if the defendant has

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description of the functioning of one such clinic—the Massachusetts Court Clinic—will be presented.⁴¹

Briefly, the psychiatric court clinics are located in the courthouse and are staffed by social workers and psychiatrists. The breadth of the Clinic System in Massachusetts is reflected by the fact that in 1969 the twenty separate clinics saw over 4,200 individual cases,⁴² or about 5% of all defendants.⁴³ One aspect of the Massachusetts clinics which seems a bit curious is that only one of the twenty clinics functions at the Superior Court level, which generally handles the more serious felonies.⁴⁴ It would seem that there would be a greater need for psychiatric information in disposing of these more serious offenses.

The basic purpose of the court clinics is “to provide diagnostic and treatment services within courts, with the clinical services located in the court house and in a close working relationship with

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been given an examination to determine his competence to stand trial or his criminal responsibility. But the use of such data may raise constitutional issues. In *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968) the court held it was unfair to allow a psychiatrist who had examined the defendant to determine his competency to stand trial to testify as to defendant's criminal responsibility, where defendant had not been warned that the information may be used at the trial. Although the issue in that case was somewhat different, the reasoning of the court may be applicable to the issue at hand.

For a good discussion of the *Driscoll* case see Comment, *Psychiatrist Who Conducted Pre-Trial Competency Examination May Not Testify on Issues of Mental Responsibility Unless Defendant is Notified of this Possibility Prior to Examination*, 43 N.Y.U.L. REV. 1243 (1968).

⁴¹ Psychiatric court clinics are not unique to Massachusetts. See, e.g., Hartman, *Social Issues and the Court Psychiatric Clinic*, 33 Fed. Prob. 37 (1969) where the author discusses the clinics in Chicago.

⁴² Department of Mental Health Division of Legal Medicine Court Clinic Program, Annual Report (1969).

⁴³ Russell, *Massachusetts Court Clinics: A Study of its Administration and Community Aspects*, 1970 INTERNATIONAL JOURNAL OF OFFENDER THERAPY 140 (from a reprint) [hereinafter cited as Russell].

Dr. Russell goes on to state that “. . . [B]oth Court and clinic personnel affirm the usefulness, in the remaining 95 percent of the cases, of the concepts learned by the court from clinic cases.” *Id.* at 142.

⁴⁴ In Massachusetts the Superior Courts have exclusive jurisdiction over all felonies with penalties of over 5 years, and concurrent jurisdiction with the District Court over all felonies punishable by imprisonment for not more than 5 years. MASS. CODE ANN., ch. 218 § 26 (1966); MASS. CODE ANN., ch. 212 § 6 (1966). The District Court has general jurisdiction over lesser offenses. MASS. CODE ANN., ch. 218 § 26 (1966).

One possible explanation is that the District Court also has jurisdiction over juveniles. MASS. CODE ANN. ch. 218 § 26 (1966). One author has justified this on the grounds that the offenders dealt with by the Superior Court are “frequently either ineligible or too dangerous for probation.” Wolf, *Legal Psychiatry and Criminal Justice: The Court Clinic in Massachusetts*, 12 J. FOR. SCI. 147, 161 (1967).

court personnel."⁴⁵ In a Court Clinic bulletin the Director of the Program stated what he considered to be the functions of the clinic as follows:

1. To assist the Court, upon referral, in presentence investigation by providing a psychiatric study of the case.
2. To provide psychiatric treatment within the court setting for certain cases.
3. To be of assistance to probation officers in their work with probationers.
4. To provide psychiatric examinations in cases where commitment to mental hospital is under consideration by the court.⁴⁶

Of the above, it is the first function (to assist the Court in the presentence investigation) that is of primary interest here.

It has been estimated that about 30% of all cases referred to the Superior Court Clinic are referred for the purpose of providing psychiatric data for dispositional purposes.⁴⁷ The determination of which cases should go to the clinic for a pre-disposition psychiatric examination is a decision made by the judge.⁴⁸ It is impossible to articulate and set criteria for determining which defendant is afforded an examination under the Massachusetts program. The most that can be said is that after seeing the probation report, and based on it and other factors about the defendant, the judge may, at his discretion, order the defendant to be examined by the court clinic.⁴⁹ Dr. Russell, the Director of the Court Clinics has stated that referral may be appropriate where "questions arise which require a more definitive inquiry into the offender's personality—his motives, his inner conflicts, his capacity for self control, or his latent character assets, and also the question of his need for psychiatric treatment. . . ."⁵⁰

There are a number of advantages in the court clinic as an apparatus for the gathering of psychiatric information to be used

⁴⁵ Russell, *supra* note 43, at 3.

⁴⁶ D. Russell, *The Role of the Court Clinic*, 1 COURT CLINIC BULLETIN (1956).

⁴⁷ Interview with Dr. Eugene Balcanoff, M.D., Director of the Court Clinic for the Superior Court of Suffolk County, Massachusetts, December 22, 1970.

⁴⁸ Russell, *supra* note 43, at 3; Interview with Judge Reuben L. Lurie, Criminal Division of the Superior Court of Suffolk County, Massachusetts, February 25, 1971.

⁴⁹ Interview with Judge Lurie, *supra* note 48.

⁵⁰ Russell, *On Writing Reports to the Court*, 1970 INTERNATIONAL JOURNAL OF OFFENDER THERAPY 2 (from a reprint).

in the disposition of a defendant.⁵¹ First, there is the ease of access to psychiatric facilities, because they are located in the courthouse. Initially the judge would seem to be more willing to submit the defendant to an examination under such conditions. But just as important, if any questions arose as to the results or the procedures of the examination, the ready accessibility of the doctor would simplify the clarification of any points. Second, the general educating influence on judges and other clinic personnel of the exposure to the psychiatric discipline is also advantageous. "Both Court and clinic personnel affirm the usefulness in the remaining 95 per cent of cases [which are not referred to the clinic], of the concepts learned by the court from clinic cases."⁵² Finally, the close relationship between the clinic and the court helps the psychiatrist develop his forensic ability. The development of the forensic ability can only come by exposure of the psychiatrist to legal proceedings.⁵³ The Massachusetts judges are of the opinion that the increased exposure has worked to the advantage of the court: "All judges [who have had clinics in their courts] agreed that having their own psychiatric services within their courts was much more satisfactory to them, since communications, written reports and recommendations made by the court clinics were better adopted to the legal framework."⁵⁴

IV. THE RIGHT TO A HEARING AT THE SENTENCING STAGE OF A TRIAL WHEN PSYCHIATRIC INFORMATION IS USED

An appropriate starting point for a discussion of the use of

⁵¹ This discussion assumes that there is available an alternative source of psychiatric data which can be used in the dispositional phase of a trial. In fact, however, psychiatric data is at a premium at all stages of sentencing and corrections. See e.g., Note, *supra* note 27, at 485:

It is appalling that there is no resident psychologist or psychiatrist at any Kentucky correctional institution. As previously stated, the only data available is obtained by independent contracts with psychologists. Psychological data is available only when relating to those who are guilty of crimes of violence. There is hardly any psychiatric data available for inmates in general, no matter what their needs or how heinous the crime they have committed. [Based on an October, 1968 interview with the Chairman of the Kentucky Parole Board.]

⁵² Russell, *supra* note 43, at 4.

⁵³ See, Burger, *supra* note 1, at 6, where he states:

Psychiatric witnesses skilled in forensic arts . . . are in short supply. . . . Skill as an expert witness can be acquired only after long years of experience in both the clinic and courtroom, and a relatively few psychiatrists have great forensic skill, no matter what their other professional attainments may be.

⁵⁴ Russell, *supra* note 43, at 3.

psychiatric information at the dispositional stage is a consideration of whether the use of that information requires that the defendant be afforded a hearing.

In *Specht v. Patterson*⁵⁵ Justice Douglas, speaking for the majority, stated:

We held in *Williams* . . . that the Due Process Clause of the Fourteenth Amendment did not require a judge to hold hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed.⁵⁶

It is submitted that this opinion is no longer in accordance with the present state of the law of sentencing. Today, in order to comply with constitutional mandates of due process, a sentencing hearing must be afforded the defendant when psychiatric information is used at sentencing.⁵⁷ The right to a hearing is a necessary implication from the right to counsel at sentencing, as guaranteed by *Mempa v. Rhay*⁵⁸ where the judge imposed sentences at a hearing at which the defendants were not represented by counsel. The Supreme Court held that this denial of counsel at the sentencing stage violated defendant's right to due process.⁵⁹ The Court also emphasized the critical nature of the sentencing process and the role of the attorney.

It seems quite obvious that the Court does not conceive of the lawyer's function at sentencing as that of a eunuch. ". . . [T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting defendant to present his case as to a sentence is apparent."⁶⁰ The Court has subsequently affirmed that the attorney

⁵⁵ 386 U.S. 605 (1967).

⁵⁶ *Specht v. Patterson*, 386 U.S. at 606.

⁵⁷ I do not mean to imply by this that *only* where psychiatric information is used is the defendant entitled to a sentencing hearing. On the contrary, it would seem that anytime the defendant is sentenced on the basis of information supplied by anyone other than the defendant himself, a sentencing hearing would be required.

⁵⁸ 389 U.S. 128 (1967).

⁵⁹ Some lower courts had previously held that a lack of counsel at sentencing may be prejudicial to the defendant. See, e.g., *Martin v. United States*, 182 F.2d 225 (5 Cir.), cert. denied 340 U.S. 892 (1950). States also usually reversed sentences imposed without the presence of defendant's counsel. See, e.g., *Remeriz v. Maroney*, 415 Pa. 534, 204 A.2d 450 (1964). See also, Note, *supra* note 18, at 834.

⁶⁰ *Mempa v. Rhay*, 389 U.S. at 135.

has an important and multiple function at sentencing in *McConnell v. Rhay*⁶¹ where the Court stated that "The right to counsel at sentencing must . . . be treated like the right to counsel at other stages of adjudication."⁶²

The necessary implication of the above is that counsel at the sentencing stage of a trial *must be afforded the opportunity to properly function*.⁶³ To sterilize the function of counsel at the sentencing stage would be in direct contradiction to the Court's conception of an attorney's function—as expressed in *Mempa*—as aiding in "marshalling the facts, introducing evidence of mitigating circumstances, and in general aiding and assisting defendant to present his case. . . ."⁶⁴

Further comments concerning the right to counsel have been enunciated in *Kent v. United States*:⁶⁵

[T]hese rights [to counsel] are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function.

The right to representation of counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice. *Appointment of counsel without affording an opportunity for hearing on a "critically important" decision is tantamount to denial of counsel.*⁶⁶ [Emphasis added]

The Court also took the opportunity to comment on its conception of the importance of a hearing in this type of proceeding:

*[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. . . . We do not mean by this to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.*⁶⁷

⁶¹ 393 U.S. 1 (1968).

⁶² *McConnell v. Rhay*, 393 U.S. at 4.

⁶³ For a good discussion of the proper role of counsel at the sentencing stage of a trial, see Portman, *The Defense Lawyer's New Role in the Sentencing Process*, 34 Fed. Prob. 3 (1970); Steele, *Counsel Can Count in Federal Sentencing*, 56 A.B.A.J. 37 (1970).

⁶⁴ 389 U.S. at 135.

⁶⁵ 383 U.S. 541 (1968).

⁶⁶ *Kent v. United States*, 383 U.S. at 561.

⁶⁷ *Kent v. United States*, 383 U.S. at 562.

Conceding that *Kent* is dealing with a waiver of jurisdiction in a juvenile proceeding, and realizing that the decision was based on a statute, as opposed to the due process clause,⁶⁸ it is nonetheless, hard to escape the conclusion that, if the Court is expressing concern for adequate procedural safeguards where there is a "critically important" decision made, the directives of *Kent* are applicable to a disposition proceeding. It is hard to imagine a decision more "critically important" to a defendant than that which determines whether he is to be executed⁶⁹ or whether he is to be incarcerated one year or fifteen.⁷⁰

If the right to counsel as guaranteed by *Mempa* and the requirement from *Kent* that the counsel be given "an opportunity to function" are to be observed, there must be afforded to the counsel a forum in which he can perform his function. Professor Cohen states with reference to the implication of that:

It is inconceivable, however, that the Court intended to create so significant a right as representation by counsel and then to allow the various jurisdictions either to nullify it by the adoption or continuation of a "no right to a hearing" policy or to dilute it by placing severe restraints on the nature of the hearing and, therefore, on the role and function of counsel.⁷¹

The right to a hearing at the sentencing stage of a trial can be supported on another ground other than the right to counsel. Generally, wherever one has a sufficient interest in governmental action, he has the right to participate in some hearing to determine the course of action to be taken.⁷² In such cases the Court has held that "a fundamental requisite of due process is the 'oppor-

⁶⁸ It is relevant to note that the next year after the *Kent* decision, the Court, in the case of *In re Gault*, 387 U.S. 1 (1967), cleared up much confusion about *Kent* by placing a juvenile's right to counsel on the same plane as the right to due process of law. In that case a juvenile was committed to a State Industrial School for a period of up to six years. This was accomplished at a hearing at which the complainant was not afforded, *inter alia*, the right to counsel. The Court held that this violated the juvenile's right to due process of law.

⁶⁹ *Williams v. New York*, 337 U.S. 241 (1949).

⁷⁰ See note 24, *supra*.

⁷¹ Cohen, *supra* note 20, at 12.

⁷² See K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.01-.04 (1958) where the author reviews the cases in Administrative Law in which the Court has held a hearing was required. The author concludes:

The conclusion seems rather fully supported that a party who has a sufficient interest or right at stake in determination of governmental action should have an opportunity for a trial type hearing on issues of adjudicative facts.

tunity to be heard,'⁷³ and that "it is an opportunity which must be granted at a meaningful time and in a meaningful manner."⁷⁴ This was strongly pointed out in *Mullane v. Central Hanover Bank & Trust Co.*,⁷⁵

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that a deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.⁷⁶

If the criteria for the determination of the right to a hearing is the possible deprivation of "life, liberty or property by adjudication," it seems clear that the sentencing hearing is within this mandate.⁷⁷ This is made even clearer in light of cases such as *Kent*,⁷⁸ *In re Gault*,⁷⁹ and *Specht v. Patterson*,⁸⁰ which show that the Court is no longer willing to neglect the necessity for fair procedures in hearings which were heretofore deemed as discretionary, non-retributive, or for the benefit of the defendant.⁸¹

V. THE RIGHT TO CONTROVERT INFORMATION USED BY A COURT IN ASSESSING A SENTENCE

If the use of psychiatric data at disposition requires some type of dispositional hearing, one must come to grips with the issue of whether the defendant has the right to controvert such data, and if he does, what procedure is required in order that his

⁷³ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Goldberg v. Kelly*, 397 U.S. at 267 (1970).

⁷⁴ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁷⁵ 339 U.S. 306 (1950).

⁷⁶ *Id.* at 313.

⁷⁷ See Pugh & Carver, *supra* note 23, at 31, where the authors conclude that the sentencing process would clearly fall within the above rule.

⁷⁸ 383 U.S. 541 (1966).

⁷⁹ 387 U.S. 1 (1967).

⁸⁰ 386 U.S. 605, 608 (1967). In that case the defendant, who had been convicted for indecent liberties under a statute which carried a ten year sentence, was, instead of being sentenced under that statute, sentenced without a hearing under a sexual offender's act for an indeterminate period. Although the Court emphasized that this situation was distinguishable from the normal post-conviction sentence and that the full panoply of due process was necessary because the sentence was based on a "new finding of fact . . . that was not an ingredient of the offense charged," I would agree with the commentators who are of the opinion that the decision demonstrates that the court is "increasingly concerned about the rights of defendants who . . . [have] already been convicted of crime." Pugh & Carver, *supra* note 23, at 29.

⁸¹ See Pugh & Carver, *supra* note 23, at 31.

objection may be effective. This issue has often been discussed with respect to the use of presentence reports generally, but with little specific consideration of the psychiatric data which may be contained therein.⁸² Since the problems encountered in the use of an ordinary presentence report are somewhat related to those encountered in the use of psychiatric information, a discussion of the current thoughts as to what procedures are necessitated by the use of a ordinary presentence report will be useful at this point.

A. *The Right To Controvert The Presentence Report*

The primary issue regarding the use of the presentence report is the question of whether the report should be revealed to the defendant and his counsel at the sentencing hearing as a matter of right.⁸³ The lines seem to be drawn not only along philosophical lines, but also along occupational lines, with judges⁸⁴ and probation officers⁸⁵ against a mandatory revelation of the report, and defense attorneys⁸⁶ and professional organizations⁸⁷

⁸² See, e.g., Bach, *The Defendant's Right of Access to Presentence Reports*, 4 CRIM. L. BULL. 160 (1968). But see Higgins, *Confidentiality of Presentence Reports*, 28 ALBANY L. REV. 12, 34 (1964) where he states that there may sometimes be reasons not to reveal psychiatric data contained in the presentence report, as it may tend to interfere with the treatment of the offender. But he is of the opinion that the other parts of the report should be made available to the defendant.

⁸³ For a list of the literature both in favor of and opposed to the disclosure of the presentence report, see Wright, FEDERAL PRACTICE AND PROCEDURE: Criminal § 524, at 396 n. 49 and n. 50 (1969).

⁸⁴ See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1967 at App. A); Hoffman, *What Next in Federal Rules*, 21 WASH. & LEE L. REV. 1, 19 (1964), himself a Federal District Court Judge, states that "[i]trial judges are, almost without exception, opposed to any requirement of disclosure." See also Wright, *supra* note 83, § 524 at 398 wherein he reports the results of a survey revealing that 290 federal judges opposed compulsory disclosure, 25 favored compulsory disclosure, and 6 had no opinion.

⁸⁵ See Higgins, *supra* note 82 at 29, wherein the author notes that "[i]t has been stated, perhaps with a bit of exaggeration, that the probation service, to a man, is against providing the defendant with a copy or even allowing him to inspect the report" citing Sharp, *The Confidential Nature of Presentence Reports*, 6 CATH. U.L. REV. 127 (1955).

⁸⁶ The results of a survey taken in 1963 of defense attorneys practicing in the District of Columbia showed that 94% (16 of 17) felt hampered by the non-disclosure of the presentence report. Junior Bar Section of the Bar Association of the District of Columbia, *Discovery in Federal Criminal Cases*, 33 F.R.D. 101, 124 (1963).

⁸⁷ See, e.g., American Law Institute, Model Penal Code § 7.07(5) (Preliminary Official Draft 1962) (requiring disclosure of the presentence report and a fair opportunity to controvert, but the sources of confidential information need not be disclosed); ABA Standards for Sentencing Alternatives, *supra* note 84 § 4.4, at 213-25 (recommends disclosure except where such action would disrupt rehabilitation or the information was obtained on a promise of confidentiality).

generally favoring mandatory disclosure of the contents of the report.

The arguments for and against the mandatory disclosure of the presentence report have been stated and restated by many commentators.⁸⁸ Those opposing compulsory disclosure of a presentence report usually start with the contention that after a determination of guilt has been made at a trial, with all the included protections, the trial judge is under no obligation to reveal the contents of the report on which he bases his sentence.⁸⁹ This is essentially an argument that due process does not require the judge to reveal the report. Although this argument is at best questionable,⁹⁰ it seems quite clear that a majority of judges agree⁹¹ that due process does not require the disclosure of the contents of the presentence report.⁹²

After "getting by" the due process problem, those opponents of disclosure assert that if the presentence reports are revealed to the defendant, the sources of information available to the probation service will be destroyed.⁹³ It has been emphasized that the social agencies, wives, employers, physicians, etc. that provide information would be extremely reluctant to do so⁹⁴ because of possible harassment, physical threats, embarrassment, family

⁸⁸ For a summary of the arguments both for and against the disclosure of the contents of the presentence report, see Schaffer, *The Defendant's Right to Access to Presentence Reports*, 3 CRIM. L. BULL. 674 (1967); Lehigh, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225, 238-46 (1969).

⁸⁹ Schaffer, *supra* note 88, at 677.

⁹⁰ See the discussion at p. 302 *infra*.

⁹¹ E.g., Judge Hoffman has stated: "The Supreme Court has affirmatively held that it is not a denial of due process of law for a court imposing sentence, to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it." Hoffman, *supra* note 84, at 19. See also the cases cited in Lehigh, *supra* note 88, at 228, n. 19, for a list of federal cases holding the trial judge was not required to reveal the contents of the presentence report. A survey of the judges in Missouri showed that 97% of the responding judges felt that disclosure of the presentence report was not required by due process. Note, *The Use of Pre-Investigations in Missouri*, 1964 WASH. U.L.Q. 396, 405.

⁹² Judge Hincks states: "In my view after conviction a case ceases to be an action at law and becomes a social problem." Hincks, *In Opposition of Rule 34 (c)(2), Proposed Federal Rules of Criminal Procedure*, 3 Fed. Prob. 3, 7 (Oct.-Dec. 1944).

⁹³ See, e.g., *Id.* Judge Hoffman has perhaps been a bit too pessimistic in his appraisal of the effect of mandatory disclosure when he opined that "any mandatory disclosure may tend to destroy the probation system." Hoffman, *supra* note 84, at 19.

⁹⁴ See generally Parsons, *The Presentence Investigation Report Must be Preserved as a Confidential Document*, 28 Fed. Prob. 3 (Mar. 1964).

breakups, hard feelings, etc.⁹⁵ The fear of the probation officers is that if these parties decide not to give the information about the defendant the presentence report will become practically worthless. As one writer has said, the result of disclosure would be "a weak, ineffective report, with little or none of the more meaningful data, on attitudes, feelings and personal standards and relationships so essential to adequate presentence investigation reports and probation supervision."⁹⁶

Another attack on the disclosure school of thought is the belief that the disclosure will result in a delay of the proceedings. As one writer put it, to allow the disclosure ". . . will conjure up an entire new set of procedures which may precipitate sentencing delay."⁹⁷ It is obvious that this contention has had its effect on the Supreme Court, as the Court in *Williams v. New York* pointed out that the type and extent of sentencing information "make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."⁹⁸

Another of the arguments against disclosure is that it will be harmful to the defendant. This view proceeds on the assumption that if the information reveals a picture of the defendant that he had heretofore not accepted, the result can be disastrous on any attempt to rehabilitate the defendant.⁹⁹ Keve, himself a probation officer, states:

Every person makes use of certain defense devices that help him to rationalize and live more comfortably with his shortcomings. . . .

. . . .

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.¹⁰⁰

⁹⁵ Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALBANY L. REV. 206, 217-24 (1965); Barnett & Gronewold, *Confidentiality of the Presentence Report*, 26 Fed. Prob. 28 (Mar. 1962).

⁹⁶ Sharp, *The Confidential Nature of Presentence Reports*, 5 CATH. U.L. REV. 127, 138 (1965).

⁹⁷ Parsons, *supra* note 94, at 7.

⁹⁸ *Williams v. New York*, 337 U.S. at 250.

⁹⁹ Roche, *supra* note 95, at 219, explains his thoughts on the danger of this "disclosure overdose."

¹⁰⁰ KEVE, *THE PROBATION OFFICER INVESTIGATES* 10 (1960). He goes on to emphasize that the damage may be particularly probable when the defendant has "some paranoid characteristics."

Both Hincks, *supra* note 92 and Parsons, *supra* note 94 agree with this position.

Although there are other arguments against disclosure¹⁰¹ the foregoing are the most persuasive.

The advocates of disclosure believe that the presentence report, or at least a summary of it, should be disclosed to the defendant and his counsel.¹⁰² It seems at present that there may be some trend toward this position.¹⁰³ In favor of disclosure, it is asserted that due process and fairness require that the defendant be advised of information which is used in determining his disposition. The crux of this argument is that sentencing is a vital part of the criminal proceedings, and that to sentence the defendant on information which he has not been allowed to see is so unfair as to deprive the defendant of his right to due process.¹⁰⁴ These advocates reject the notion that: anything less than a maximum sentence is a privilege, and that, since due process protects the *rights* of a defendant and not privileges granted to him, the judge, in determining whether to grant this privilege, can rely on any material he wishes. One author points out that most persons convicted of felonies do not receive the maximum sentence. Thus, "[w]hen a judge metes out a maximum sentence, he treats a defendant more harshly than most persons convicted of the crime are treated. To call a defendant's interest in receiving a lesser sentence a privilege seems, therefore, misleading."¹⁰⁵ The proponents of disclosure contend that the defendant is left virtually at the mercy of any bias or mistake included in the presentence report, and that this is so grossly unfair as to deny the defendant due process of law. But the opposition argues that protection for the defendant can be achieved in other ways. One probation official stated that the necessary protection is afforded by the probation officer's constantly reviewing and checking

¹⁰¹ Other arguments advanced by writers opposed to the disclosure of the presentence report are that "[a]n already over worked probation department, if they are to maintain any degree of integrity, will be forced to prepare a separate report for the defendant." Parsons, *supra* note 94 at 7. That the lack of a presentence report caused by the drying up of information sources would cause the judge to deny probation more often than he does when he has such presentence information. *Id.* at 5-6.

¹⁰² *E.g.*, Pugh & Carver, *supra* note 23, at 37.

¹⁰³ *E.g.*, Bach, *supra* note 82. The trend is especially noticeable among the legal professional organizations. See generally, Wright, *supra* note 83, § 524 at 396 for a listing of these professional groups. See also note 87, *supra*.

¹⁰⁴ Higgins, *supra* note 82, at 27, where the author states that the secret report is "self-insulative" and "the extent of error that creeps into the reports is virtually incapable of ascertainment."

¹⁰⁵ Pugh & Carver, *supra* note 23, at 32.

information from the various informants, thereby discovering discrepancies. Also, that writer finds much protection in the possibility that the judge may ask the defendant questions about the contents of the report.¹⁰⁶ Another author finds the necessary protection should be achieved by a "uniformly high quality of federal probation officers."¹⁰⁷

A somewhat related view (that fairness demands the defendant be advised of the contents of the report) is that to allow the defendant access will enable him to clarify and refute the data contained within the report.¹⁰⁸ Disclosure permits "the discussion to be directed to pertinent considerations"¹⁰⁹ and it will aid the judge in his consideration of the proper weight to be given each factor. In relation to this view Higgins polled judges across the country as to their experiences with disclosure to the defendant and concluded that: "The observation was often made that one of the most salutary experiences of the practice of disclosure is that it provokes responses, attitudes, opinions, and suggestions which are valuable to the court in arriving at more sensitive determinations."¹¹⁰

In opposition to the argument above that a disclosure could militate against rehabilitation of the defendant is the view that disclosure of the basis of a sentence will help the defendant to better understand and accept the sentence as just; thus the defendant will not feel that he is being punished unjustly or too severely. Judge Thomsen has explained it as follows: "If he [the defendant] knows that nothing is being withheld from his attorney, he cannot justly feel that he is being left out of the decision, that his fate was sealed in advance, that the courtroom procedure was only window-dressing, or that he is a pawn of the whims of the judge or the probation officer or both."¹¹¹

¹⁰⁶ Roche, *supra* note 95.

¹⁰⁷ Parsons, *supra* note 94, at 7. Although I do not express an opinion as to the quality of the Federal Probation Officers, it is this author's opinion that there are severe limitations on the time which such Probation Officers can spend on each case. See, Note *supra* note 18, at 837, n. 82, where that author cites the 1966 figures for the average case load of the Federal Probation Officers, and compares them to the recommended loads. It appears that such officers have about twice the number of the recommended maximums. Also, the footnote indicates that the overload is aggravated by the high turnover in probation officers.

¹⁰⁸ Schaffer, *supra* note 88, at 677.

¹⁰⁹ Higgins, *supra* note 82, at 32.

¹¹⁰ *Id.*

¹¹¹ *Id.*, (quoting Judge Roszel C. Thomsen, United States District Court for the District of Maryland).

Most of the other arguments advanced by the "disclosure school" are primarily aimed at refuting the arguments of the "non-disclosure school." The disclosure school also points out that empirical data indicates that "the reasons of most concern to those who oppose disclosure are 'paper dragons' for the reason that they have either not troubled the jurisdictions which disclose, or any trouble experienced has been far short of predicted magnitude."¹¹²

With regard to the belief that a disclosure will delay the proceedings, Higgins, based on a poll of Federal and State judges,¹¹³ found that, of all the judges who practiced disclosure, none complained "that the sentencing process had become unduly protracted by defendant's opportunity to take exception to and controvert data contained in the reports." In fact, Higgins reported that several judges stated "that disclosure permits the scope of argument regarding sentencing to be limited and permits the discussion to be directed to pertinent considerations."¹¹⁴ Other commentators contend that even if disclosure will delay the proceedings, when this is weighed against the requirement of fairness to the defendant, the former must be compromised to the degree of allowing the defendant access to the report.¹¹⁵ Still others have defended the possibility of a delay as a positive benefit, in that it allows more time for the attorney to gather information to aid his client at the sentencing process.¹¹⁶

Those commentators in favor of disclosure also assert that there is little, if any, evidence of a drying up of information in jurisdictions in which disclosure is regularly practiced. Again, the empirical evidence of Higgins indicates that judges do not feel that disclosure results in a decrease in the supply of information concerning the defendant.¹¹⁷ Another commentator notes that at the guilt determination stage of the trial "[t]here is no guarantee of confidentiality for testimony, but the system

¹¹² Higgins, *supra* note 82, at 30. Higgins himself took a poll by sending 345 questionnaires to district judges throughout the United States. He received 197 replies, 167 of which he considered responsive. He also sent 164 questionnaires to New York judges, receiving 57 replies, 48 of which he considered responsive.

¹¹³ See note 112 *supra*, for details of the poll.

¹¹⁴ Higgins, *supra* note 82, at 32. The work by Higgins has often been cited by other commentators in support of their positions. See, e.g., Parsons, *supra* note 101.

¹¹⁵ See, e.g., Lehigh, *supra* note 88, at 240.

¹¹⁶ ABA Project on Minimum Standards for Criminal Justice, *supra* note 84, commentary § 4.4 at 222-24.

¹¹⁷ Higgins, *supra* note 82, at 22.

works."¹¹⁸ Others have joined in the conclusion of Higgins and concluded that "experience . . . belies the fear that, as . . . sources of confidential information dry up, probation officers are deprived of trustworthy and logical informants and the object of the report is defeated, if the contents of reports are disclosed."¹¹⁹ Still another commentator reports that in California, where disclosure is required¹²⁰ there have been no signs of a loss of information.¹²¹

With regard to the presentence report (assuming the report contains no psychiatric information), it appears that the latter arguments are more persuasive—that the information contained in the presentence report must be made available to the defendant.

It would seem that non-disclosure of a presentence report violates the defendant's right to due process. In *Townsend v. Burke*,¹²² the Supreme Court overturned a sentence which was based on false information about the defendant's background. In holding that this violated the defendant's right to due process the Court stated:

Consequently, on this record, we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.¹²³

From the above language it is obvious that there were two elements of impropriety mentioned by the Court: (1) lack of counsel; (2) a sentence based on untrue assumptions. So far as the first condition is concerned, the lack of counsel at the dispositional stage, it is hard to base the decision on this, because at the time there was no right to counsel at the dispositional stage

¹¹⁸ Parsons, *supra* note 101, at 30.

¹¹⁹ Baker v. United States, 388 F.2d 931, 935 (4th Cir. 1968) (Winter, concurring). See also Higgins, *supra* note 82, at 31-32, quoting an address by Chief Judge Roszel C. Thomsen, United States District Court for the District of Maryland, at the Federal Probation System Inservice Training Institute, Annapolis, Md., October 10, 1962 (p. 10 of unpublished copy), in which Judge Thomsen arrives at the same conclusion.

¹²⁰ CAL. PENAL CODE § 1203 (West 1966 Supp.).

¹²¹ Bach, *supra* note 82, at 160-61.

¹²² 334 U.S. 736 (1948).

¹²³ *Id.* at 740-41. See also Keenan v. Burke, 342 U.S. 881 (1951) (per curiam, citing *Townsend*).

of a trial.¹²⁴ The heart of the matter seems to be contained in the second part of the quotation—that the sentence was based on untrue information.¹²⁵ Thus the proposition emerging from *Townsend* appears to be that one has the right to a sentence based on accurate information. Still the question remains as to what procedural safeguards, if any, is the defendant entitled in order to insure that he is not sentenced on the basis of false information?

Several commentators¹²⁶ believe, correctly, that the spirit of *Townsend*, as well as the necessary implication of the holding, leads to the conclusion that the defendant must be afforded the necessary machinery to insure the accuracy of the information used in determining sentence.¹²⁷ Otherwise the *Townsend* decision would stand for the proposition that one has the right to be sentenced on accurate information, but no right to find out if the information is accurate.

To sentence a defendant on the basis of information which is not disclosed to him would seem to violate the above principle of due process. It would leave him virtually unprotected against any mistake and/or bias which may slip in to the report. Mistakes are bound to occur and, in fact, do occur.¹²⁸ In this respect Roche's position that protection is afforded by the constant checking and comparing by the probation service of the information received from other informants is totally unacceptable.¹²⁹ Likewise the proposition that adequate protection of the defendant can be left to depend on a highly skilled, professional staff of probation officers is not very convincing.¹³⁰ In the first place, it appears

¹²⁴ *Bute v. Illinois*, 333 U.S. 640 (1948); *Betts v. Brady*, 316 U.S. 455 (1942). "Mere lack of counsel in this non-capital case at the time that it came down would not have produced this result." Higgins, *supra* note 82, at 20. *But see* W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 184-85 (1965) where he concludes that the case was based on the lack of counsel.

¹²⁵ This seems to be the view taken by the majority of commentators. *See, e.g., Note, Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 COLUM. L. REV. 567, 570 (1949).

¹²⁶ Higgins, *supra* note 82, at 20; Bach, *supra* note 82, at 168.

¹²⁷ For a discussion of cases involving inaccurate and inadequate presentence reports, *see* *New Jersey v. Kunz*, 259 A.2d 895 (N.J. 1962); *New Jersey v. Pohlbel*, 160 A.2d 647 (N.J. 1960); *United States ex rel Jackson v. Myers*, 374 F.2d 707 (3d Cir. 1967).

¹²⁸ There have been a number of cases come to light in which the presentence report contained mistakes. *See e.g., United States ex rel. Jackson v. Myers*, 374 F.2d 707 (3d Cir. 1967); *New Jersey v. Pohlbel*, 160 A.2d 647 (N.J. 1960). *See* *New Jersey v. Kunz*, 359 A.2d 895 (N.J. 1969) for a discussion of cases involving inaccurate and inadequate presentence reports.

¹²⁹ *See* Roche, *supra* note 95.

¹³⁰ *See* note 107, *supra*.

that most probation officers are handling more cases than they have time to properly handle.¹³¹ But even if all probation officers were absolutely competent and had time to properly administer each case, proper safeguards for the defendant must depend on the advocacy of his rights by someone whose interests are the same as his. The probation officer, who owes primary duties to others than the defendant, cannot provide this protection of the rights of the convicted. This must be accomplished by an attorney. Thus it would appear that to deny the defendant the right to examine the presentence report would deny him the adequate procedure to prevent a sentence based on false information.

Beyond the necessity for a procedure to insure that false information does not go undetected, to allow the defendant to be sentenced without disclosure of the contents of the presentence report is to effectively deny him the right to counsel as prohibited by *Mempa* and *Kent*. To say that *Mempa* insures that one has the right to counsel, but that this counsel need not be advised of the contents of the presentence report is to make the right to counsel what was referred to in *Kent* as "meaningless—an illusion, a mockery. . . ."¹³² The Court in *Kent* said that "[t]hese rights [to counsel] are meaningless . . . unless counsel is given an opportunity to function. The right to representation of counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."¹³³ To do otherwise would constitute a denial of the requirement that counsel be given "an opportunity to function."¹³⁴

Even if due process considerations did not require the disclosure of the presentence report the defendant should be shown the contents of the report. The contention that sources of information may dry up and that the disclosure of the report may be harmful to the defendant are at best questionable, and possibly "paper dragons." As shown earlier, opinions of judges and empirical data tend to dispel this loss of information argument.¹³⁵

In regard to the possible harm to the defendant, it is conceivable that derogatory opinions of friends, family, or employer

¹³¹ *Id.*

¹³² *Kent v. United States*, 383 U.S. 541, 561.

¹³³ *Kent v. United States*, 383 U.S. 541, 561.

¹³⁴ *Kent v. United States*, 383 U.S. 541, 561.

¹³⁵ See text at p. 47, *supra*.

of the defendant could endanger a relationship which is important to the defendant's mental well-being. But, because of the number of variables involved in the underlying assumptions of the proposition, it is far from clear how often such circumstances exist. For example, if the information is an opinion about the defendant, the defendant would have to be benefiting from a relationship with the individual who had a derogatory opinion about him. Further, this hostile opinion would have to be unknown to the defendant or at least denied by him. If the information were factual, the defendant may feel betrayed; however, the occurrence and extent of this harm remain speculative.

As to the belief that the disclosure of the report will endlessly delay the proceedings, available data suggests that this is not true in courts which practice disclosure.¹³⁶

The above views cannot be dismissed without recognition of the fact that, in some cases, there may be a direct possibility that disclosure of the report will cause delay, loss of sources of information and harm to the defendant. In such a case, fairness to the defendant would still seem to require disclosure of the report. The defendant's interest in being sentenced only on accurate information must be recognized.

Although the above analysis suggests that due process and fairness require that the defendant be provided the information contained in the presentence report, neither consideration requires that the defendant be afforded the right to confront and cross-examine every informant who provides information used in the presentence report.¹³⁷ The elaborateness of the procedure necessary to insure the defendant's right to due process is a functional decision. It is determined by weighing the defendant's interest in the threatened loss against the "government's interest in summary adjudication."¹³⁸ The minimum procedural apparatus entails a consideration of "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."¹³⁹ The interest of the defendant

¹³⁶ See text at p. 46, *supra*.

¹³⁷ This appears to be the holding of *Williams v. New York*, 337 U.S. 241 (1949).

¹³⁸ *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

¹³⁹ *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

is obvious: since most defendants plead guilty¹⁴⁰ the decision as to the penalty is the only decision which will affect his future. He is vitally interested in whether he will get a life sentence or whether he will be sentenced to death.¹⁴¹ It is also quite obvious that the government has an interest in an abbreviated proceeding at the sentencing stage of the trial. In light of the present burden of the court system and the long delay before cases are brought to trial, the interest of the government in preventing endless "delay" in "criminal administration . . . [by having] a retrial of collateral issues"¹⁴² must also be recognized. Unlike the alleged delay resulting from mere disclosure of the report, the delay resulting from each informant testifying at a disposition hearing is virtually certain. It is also important to remember that the number of facts relevant to sentencing would be infinite, thereby contributing to the delay.

A proper balance of the above considerations could be achieved by supplying the defendant with the presentence report, and allowing him to refute any of the information which he thinks is untrue or biased.¹⁴³ It should be remembered that the type of information which we are concerned with is the factual-type and opinions of non-experts, such as the defendant's employer, wife, etc. Generally, such information as the number of his convictions, his reputation in the community, etc., could be controverted by facts and opinions which the defendant could obtain without cross-examining the informants. This could be presented by the defendant to the judge in the form of affidavits, statements, etc., without the need of an undue consumption of the court's time.

B. *Right to Controvert The Psychiatric Report*

As previously suggested, allowing the defendant access to the presentence report would satisfy the demands of due process

¹⁴⁰ See note 35, *supra*.

¹⁴¹ E.g., *Williams v. New York*, 337 U.S. 241 (1949).

¹⁴² *Id.* at 250.

¹⁴³ Here I have made explicit a previously implicit assumption. That is, the right to controvert this report must include the right to introduce evidence which tends to disprove the presentence report. This is a necessary corollary to the right of disclosure. Otherwise the defendant would be in the curious situation of having a right to disclosure but no right to disprove inaccuracies found in the report. For a discussion of the right to present mitigating evidence at a sentencing hearing, see *Note, supra* note 18, at 841-43.

because with regard to the non-psychiatric information, it is possible to insure the accuracy of such information and allow the defendant's counsel sufficient latitude to perform his duty merely by disclosing the report. The use of psychiatric information in sentencing, however, raises problems of a somewhat distinct nature. Because of these problems, it is wrong to blithely include psychiatric information in the general discussion of a presentence report and thereby assume that the same procedure would likewise protect the interests of defendant and society. To determine the proper safeguards when using psychiatric information, it is necessary to analyze the unique characteristics of the information and the method by which it is obtained and presented to the court.

One must begin by recognizing that there has been a legislative investment to determine disposition in one other than the psychiatric profession. Usually the judge has the duty to determine sentence¹⁴⁴ and the psychiatrist should not be allowed to determine the length of an offender's incarceration. "If it is claimed that he [the psychiatrist] can do this better than either jury or judge, then this position must lead to the revision of our basic legal structure."¹⁴⁵ Until such a revision, the power to determine disposition is a power of the court.¹⁴⁶ The court also has the duty to use all appropriate scientific data in order to bring the disposition into line with current philosophy of sentencing.¹⁴⁷ As Professor Kaplan has stated, "the judge . . . [has] the responsibility of assimilation and wisely using the total knowledge of man so as to reduce any cultural lag between the law and existing knowledge."¹⁴⁸

Concerning the psychiatrist's role at the sentencing stage, one must remember that he occupies a position distinct from other "informants" who supply information about the convicted defendant. This is because the information given by the psychiatrist is of a type that cannot be effectively controverted by anyone but another psychiatrist. A brief example should demonstrate this principle. If the defendant's boss says that the de-

¹⁴⁴ *E.g.*, FED. R. CRIM. PRO. 32.

¹⁴⁵ Suarez, note 7 *supra*, at 177.

¹⁴⁶ Schmideberg, note 7 *supra*, at 27.

¹⁴⁷ See text at p. 8, *supra*.

¹⁴⁸ Kaplan, *An Academic Lawyer Plays Armchair Analyst: Some Speculations of the Relevance of Psycho-Analysis to the Law*, 46 NEB. L. REV. 759, 766 (1967).

defendant is always drunk on the job, or if the defendant's wife says he beats her, it would seem probable that the mere disclosure of these statements in the presentence report would allow the defendant to refute the allegation by introducing statements of other persons who deny the truth of the former allegations.¹⁴⁹ However, it would be much more difficult for the defendant to convince the judge by lay testimony that, contrary to the psychiatrist's testimony, he (the defendant) is not a sociopath and a danger to society. To be sure, it is possible that some judges would give more weight to lay testimony tending to show that the psychiatrist was wrong in his analysis. But it appears that judges do give strong consideration to the findings of psychiatrists,¹⁵⁰ and it would seem that as a general proposition, a judge would be reluctant to disregard an unfavorable psychiatrist's report and grant probation or a light sentence on the basis of a layman's opinion which is contrary to that of a psychiatrist.

Further, any such lay testimony cannot go directly to the issue of whether defendant is a sociopath. Rather, the lay testimony could only go to the manifestations of this disorder. All the witness could say is that the defendant has not committed any anti-social acts so long as he has known him. But this does not successfully refute the psychiatric testimony. It only shows that the manifestations of the disorder are unknown to the witness. The doctor could have based his medical conclusion on the interview and tests he performed, as well as information unknown to the witness. Thus, even assuming that the witness is believed, that testimony is less effective against a psychiatrist's opinion than the testimony of one layman disagreeing with another.

¹⁴⁹ I recognize that there may be some allegations about the defendant contained in the presentence report which, because the alleged fact is known only to the informant, could not be refuted by the statement of a third party. But even in that case, the defendant himself could deny the allegation.

¹⁵⁰ Professor Vamm has reported that, with regard to determination of competency to stand trial, "judges have followed the major findings of the psychiatrist in all but one of the cases [he] studied." Vamm, *Pretrial Determination and Judicial Decision Making: An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justice*, 43 DET. L.J. 13, 24 (1965).

Dr. Szasz believes that psychiatric data is important in a judge's determination of the severity of sentence. It is his opinion that because of the judge's strong feelings of guilt, he needs the authority to overcome these feelings and mete out a severe sentence. Szasz, *Some Observations on the Relationship Between Psychiatry and the Law*, 75 AMA ARCHIVES OF NEUROLOGY AND PSYCHIATRY 297 (1956).

The uniqueness of the psychiatrist's position is also due to the fact that normally there will be only one psychiatrist (if indeed there are any) involved at the determination of sentence. It is obvious that with regard to the 30% to 60% of felons who are indigents, it would be impossible for them to afford the services of a competent psychiatrist.¹⁵¹ Even with regard to persons above the indigent level, the availability of a second psychiatrist may be practically foreclosed. It must be remembered that the scarcity of psychiatric resources in some areas of the nation may necessitate substantial travel expenses in order to obtain the necessary psychiatric examination. Also, when a psychiatrist is asked to give an opinion after an unfavorable opinion by another psychiatrist, he would normally be reluctant to give a favorable opinion without an extensive examination¹⁵² which would obviously increase the costs of his service.¹⁵³ Thus, as a practical matter, a substantial percentage of dispositional determinations are made in circumstances in which it would be impossible for the defendant to controvert the court appointed psychiatrist by introducing his own psychiatric data.

The above should demonstrate that, in a substantial percentage of the dispositional determinations, any controversion of the report of the psychiatrist must come from an *attack on the report itself*. This is because of the inability of a layman to controvert the psychiatrist's report and the unavailability of other psychiatric data.

In light of these considerations and in light of the defendant's right to procedure which will prevent his being sentenced on inaccurate information, it would seem that if psychiatric information is to be used at sentencing, the report must be in such a form so that *the report itself* is attackable. That is, the report

¹⁵¹ It is generally estimated that 30% to 60% of all persons charged with felonies cannot even afford the cost of counsel. Hall, Kamisar, La Fave & Israel, *MODERN CRIMINAL PROCEDURE* 80 (3rd ed. 1969).

The authors go on to cite the figures compiled by the Junior Bar Section of the Bar Association of the District of Columbia, *Report of the Committee on Standards of Indigency* 31 (1963) which suggests that the percentage of accused felons unable to afford psychiatric help would be substantially above the aforementioned figure. The Association found that 40% were unemployed when arrested; another 28% lost their jobs before arraignment; and a majority of the remaining defendants earned less than \$40 per week.

¹⁵² Interview with Dr. Alan A. Stone, Lecturer on Law and Assistant Professor of Psychiatry at Harvard Medical School, April 1, 1971.

¹⁵³ Dr. Stone roughly estimated the cost of such examination at \$300. *Id.*

must be in such detail, or the psychiatrist must be available to add such detail, that an attorney¹⁵⁴ can point to inadequacies in the procedure or the report of the psychiatrist. Unless the report is in such a form the defendant's counsel is unable to protect the defendant from being sentenced on inadequate information, and the defendant's counsel is not afforded adequate procedure to perform his assigned function.

The problem of the impregnable psychiatric report is compounded by the fact that it is at least possible for two honest and competent psychiatrists examining the same clinical data to reach different conclusions.¹⁵⁵ This is a result of many factors, not the least of which is the nature of the science itself: "[t]he science of psychiatry cannot provide absolutely certain answers to many questions."¹⁵⁶ The varying schools of thought,¹⁵⁷ the type of methodology used by the psychiatrist,¹⁵⁸ and the "biases that the psychiatrist . . . has as a member of his profession, as a whole, and as a citizen in . . . society . . ."¹⁵⁹ are all factors which could contribute to a professional disagreement among the psychiatrists examining the same patient. Dr. Roberts, an Associate Professor of Psychiatry at the University of Wisconsin, summed up the problem as follows:

[A] number of schools of thought have developed in the field of psychiatry. Each school has its own theoretical underpinning for evaluating the mental status of a given person, as well as its own treatment approaches. Psychiatrists from different schools of thought may view a clinical problem in a different manner even though they base their conclusions on

¹⁵⁴ I do not indulge the fiction that all attorneys are of sufficient competence and energy to analyze the report of psychiatrists. But the fact that some attorneys lack these attributes does not mean that one's right to be sentenced on accurate information is nullified. Instead, it is necessary to arrive at a procedure by which an energetic attorney can protect the rights of his client at sentencing.

¹⁵⁵ Meyers, *The Psychiatric Examination*, 54 J. CRIM. L.C. & P.S. 431, 433 (1963).

¹⁵⁶ Roberts, *Some Observations on the Problems of the Forensic Psychiatrist*, 1965 Wis. L. Rev. 240, 244. See also Comment, *supra* note 2, at 385 wherein the author states:

He [*i.e.*, the psychiatrist] places the system before us, not in the hope that it is exact or that it will ever quantify, but rather that it offers more information and better comprehension of the human behavior than any other system presently can. Psychiatry does not claim to be mathematical.

¹⁵⁷ Roberts, *supra* note 156, at 244.

¹⁵⁸ Kaplan, *supra* note 148, at 781.

¹⁵⁹ *Id.*

the same information. Thus it is clear that the manner in which a psychiatrist examines a patient or responds to questions may be dependent, to a large extent upon the school of thought to which he adheres. . . . [P]sychiatrists disagree among themselves because of adherence to one or another school of thought.¹⁶⁰

Any effective controverting of the psychiatrist's report must include procedure by which the attorney could discover the acceptability of the school of thought of the psychiatrist, his methodology, and whether it is possible that other psychiatrists may disagree with his conclusions. It would seem that the only source of such information is the psychiatrist who performed the examination. Further, it would seem that the written report may not be able to convey sufficient information without being unusually long, detailed, and confusing. Therefore it may be that in this instance the mere disclosure of the psychiatric report would not be sufficient to meet the requirements of due process.

Another set of problems with regard to a psychiatric examination could occur if the conclusions are based on an inadequate examination or inadequate techniques. For example, some doctors have warned of "minimal psychiatric evaluation . . . presented as a full examination. . . ."¹⁶¹ A psychiatrist may not have devoted adequate time to the interviewing of the defendant, and there is always the possibility that the cause of deviant behavior is organic. Thus it may be that a physical examination is required.¹⁶² Or it may be that the actual interview techniques of the psychiatrist are subject to doubt as to their efficacy.¹⁶³ There is the

¹⁶⁰ Roberts, *supra* note 156. See also Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1341 (1965) wherein the authors state:

Further, his [*i.e.*, the psychiatrist's] inferences as well as his observations, are strongly colored by the qualities of his instrument: that is, his own personality, experience, and theoretical training.

¹⁶¹ Roberts, *supra* note 156, at 243. See also Meyers, *supra* note 155, at 431 where he states: "Too often conclusions given are the result of impressions, intuitions, and even hunches."

¹⁶² *Id.* at 435 where the author states that although a physical examination frequently does not contribute notable information, "very often the physical may confirm suspicions entertained by the examiner about his case. . . . Then, of course, at times a central nervous system, or systemic, disease process may be uncovered, to explain aberrant action."

¹⁶³ *Id.* at 435 where the author comments on the techniques of indirect questioning as the most acceptable form of interview. But see Freedman & Cutler, *Structured Interview Method for Psychiatric Research*, 135 J. NER. MENTAL DIS. 346 (1962) for an opposing view.

further problem often faced by the psychiatrist of incomplete medical and psychiatric history available to the doctor when he examines the defendant. One psychiatrist has stated that "it is at times next to impossible, and always extremely difficult, to obtain a proper psychiatric history."¹⁶⁴ This void of information makes an adequate examination more difficult for the psychiatrist: "With a poor medical history, such as one which may be distorted, confused, or . . . replete with misrepresentations, it is often taxing for the psychiatrist to present a valid conclusion or opinion."¹⁶⁵ It is possible that all or any of one of the above inadequacies could be presented at a psychiatric examination. It is also possible that a vaguely written psychiatric report could hide these inadequacies of technique or information. In such a case the mere disclosure of the psychiatric report would not permit the defendant to determine if the information in the report was based on acceptable techniques.

Another reason that the defendant needs procedural safeguards when psychiatric information is used is that the psychiatrists' record of predicting the dangerousness of defendant is somewhat questionable. The studies which are available tend to show that the psychiatrist is a poor predictor of dangerousness. The errors in prediction seem to be biased in the direction of over-prediction: "They tend to predict anti-social conduct in many instances where it would not, in fact, occur."¹⁶⁶ It is obvious that such an over-prediction could be to the disadvantage of a defendant at sentencing.

The foregoing discussion indicates that the psychiatric report can be the source of problems with regard to the defendant's right to test the accuracy of the report. The discussion further suggests that, unlike the situation in which the ordinary presentence report not containing psychiatric data is used, the mere disclosure of the report may not protect the rights of the defendant. But there are arguments on the other hand, that the report of the psychiatrist should remain secretive from the convicted defendant.

The most cogent of the views against disclosure of the psychi-

¹⁶⁴ De La Vega, *A View of the Psychiatrist and His Opinion in the Law*, 13 N.Y.L. F. 659, 666-67 (1967).

¹⁶⁵ *Id.* at 667.

¹⁶⁶ Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29, 32 (Feb.-Mar. 1968).

atric data is that to reveal the report to the defendant may be harmful to him in that the shock of an evaluation of his psychological make-up may constrain attempts to rehabilitate the defendant (patient).¹⁶⁷ Thus, it is argued, in the interests of protecting the defendant from a "disclosure overdose" which may decimate an already weak ego, and in the interests of rehabilitating a defendant, the results of the psychiatric examination should not be disclosed to the defendant. This view, however, is based on some dubious assumptions. First, this belief is based on the assumption that a psychiatrist could not write a report of a psychiatric examination in such a way as to be harmless to the defendant and yet be as potent for dispositional purposes as is the normal type of report which is prepared for the judge. This, at best, is a tenuous assumption. One psychiatrist was of the opinion that such a report was entirely possible. He stated that, although such a report would not be the same as a report which a patient would not be allowed to see, it could contain information qualitatively as good for dispositional purposes as any other report.¹⁶⁸

The possibility of harm to the defendant would seem to be greater, however, if the psychiatrist were required to be subjected to cross-examination in open court. In such a situation it may be impossible for him to avoid the answers which may in fact harm the defendant. It would require a doctor versed in the forensic art to assure that the ineptness of an over-zealous attorney did not result in harm to the defendant.¹⁶⁹

Another contention, that the defendant should not be allowed to examine the psychiatric report or cross-examine the psychiatrist is that, as with the presentence report, such a procedure

¹⁶⁷ Keve, *supra* note 100, at 10, where he states that if defendant 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. See also Roche, *supra* note 95, at 219; Hincks, *supra* note 92, at 5.

¹⁶⁸ Interview with Dr. Alan A. Stone, *supra* note 152 on March 19, 1971.

¹⁶⁹ Chief Justice Burger has stated:

[P]sychiatric witnesses skilled in forensic arts . . . are in short supply. Skill as an expert witness can be acquired only after long years of experience in both clinic and courtroom and relatively few psychiatrists have great forensic skill no matter what their other professional attainments may be.

Burger, *supra* note 1, at 6.

It may be noted that a benefit of the court clinic system is relevant to this consideration. The constant forensic exposure of the court clinic psychiatrist would be helpful in developing those skills necessary to deal with this problem.

would appreciably delay the proceedings. But this argument is subject to the same counter-arguments as explicated in the section of this paper on the presentence report. First, at least the ABA Advisory Committee on Sentencing is of the opinion that a somewhat protracted proceeding is necessary in order for the attorney to discover information helpful to his client.¹⁷⁰ Also, judges who practice disclosure have not complained of protracted proceedings.¹⁷¹ But the assertion of delay is even less persuasive when one is considering psychiatric data. This is because the information involved in the psychiatric report has as its source only one informant—the psychiatrist. The presentence report, however, contains information from various sources and on many different facets of the defendant. Thus the right to cross-examine each informant about every statement he made to the probation officer would entail substantially more delay than extending the right to cross-examine one psychiatrist.

Another argument against the necessity of disclosing the psychiatric data to the defendant is that the psychiatrist is an unbiased participant in the proceedings and thus should not be subjected to the rigors of an adversary proceeding.¹⁷² But this view is unpersuasive for a number of reasons. First, even if the psychiatrist is without bias, this does not negate the possibility of a mistake in the report, nor does it remedy any of the problems with regard to possible inadequacies in the report. But beyond this, a number of commentators have sharply questioned whether court appointed psychiatrists are in fact unbiased. One writer suggests that to give the psychiatrist such a privileged status is to make him a “junior judge,” but without the corresponding incentive to be impartial that is found in the judge’s duty to uphold the law.¹⁷³ Another writer points to the possibility that close relationships with the attorneys or the defendant may hamper the psychiatrist in making an unbiased evaluation.¹⁷⁴

A final contention which may be advanced, at least against

¹⁷⁰ ABA Project on Minimum Standards for Criminal Justice, *supra* note 84, commentary § 4.4 at 222-24.

¹⁷¹ Higgins, *supra* note 82.

¹⁷² One judge advanced this argument with regard to the reason why he did not require the psychiatrist to give his report in open court and subject to cross-examination. Interview with Judge Lurie, *supra* note 47.

¹⁷³ T. Szasz, LAW, LIBERTY, AND PSYCHIATRY 115 (1963).

¹⁷⁴ Diamond & Louisell, *supra* note 160, at 1344-45.

requiring the psychiatrist to appear in court, present his report and be subjected to cross-examination, is the effect which this procedure may have on the source of psychiatric information. The allocation of forensic psychiatric resources is a very real problem. For example, the Massachusetts Court Clinic can see only about 5% of all defendants who are tried for crimes,¹⁷⁵ and it is estimated that the psychiatrists spend 82% of their time with the offenders.¹⁷⁶ It would seem that both these percentages would be decreased if the clinic psychiatrists were required to testify in open court concerning each dispositional examination which they conducted.

VI. AN ALTERNATIVE PROCEDURE

After consideration of the above arguments with regard to the use of psychiatric information at the dispositional stage of a proceeding, it would appear the requirements of due process *can* be satisfied and the interests of the defendant and society properly balanced without requiring the psychiatrist to testify in open court and be subjected to cross-examination.

It is questionable whether a psychiatrist could draft a single psychiatric report which contained enough information about methodology, techniques, amount of interview time, the degree of certainty of the diagnosis, etc. that the defense attorney can properly evaluate the report and point out to the judge its weaknesses, if any. Further, there are a number of problems in using this method. For example, it may unnecessarily protract the psychiatric report by becoming needlessly bogged down with what procedure and techniques were employed by the psychiatrist. As noted earlier, it is a bit unrealistic to imagine that every defense attorney is going to have the expertise or energy to explore what constitutes acceptable psychiatric procedures.¹⁷⁷ Thus, in many instances, such labor of the psychiatrist would be lost. Also, it seems a bit unrealistic to instruct the psychiatrist to first examine the patient and write up a report, and then, in the same report, criticize his own report by stating that "x" school of thought may have reached a different result.

¹⁷⁵ Russell, *supra* note 43.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ See note 154, *supra*.

A better procedure for the use of written psychiatric reports at disposition would be as follows. The psychiatrist would be required to write an initial report of his examination. The report should be designed to illuminate the defendant's personality by describing "his motives, his inner conflicts, his capacity for self control, or his latent character assets, and also the question of his need for psychiatric treatment. . . ."¹⁷⁸ The report also should contain some basic information as to the interview procedure, such as what unusual techniques, if any, were used, how many times the doctor saw the defendant, and what factors were considered most important in arriving at the psychiatrist's recommendation. This report, which it is hoped would be in a form not harmful to the defendant, would be disclosed to the defendant and his attorney. Then, after examining the report, the attorney should be allowed to submit any questions which he has about the report, the degree of certainty of the diagnosis, the acceptability of any techniques used, and even the doctor's credentials. The psychiatrist would be allowed to submit written answers to the court. Thus, unless special conditions necessitated, the psychiatrist would not be forced to testify in open court. It is submitted that this procedure will protect the defendant's right to due process and also properly balance the rights of the defendant and society.

As stated earlier, the defendant has the right to a procedure which will insure that he is not sentenced on the basis of inaccurate information. This is guaranteed by due process. Because of the unique nature of psychiatric data, the only procedure which can insure this right is one which allows the defendant an opportunity to test the accuracy of the psychiatric data by attacking the report itself. The foregoing procedure will insure that the defendant has the right to so attack the psychiatric report.

To be sure, this is not the only procedure which would satisfy the requirements of due process. If the court is willing to provide the defendant with an alternative source of psychiatric data which the defendant may choose, then psychiatric data begins to look more like the non-psychiatric data contained in the pre-

¹⁷⁸ Russell, *supra* note 50.

sentence report, and thus probably a mere disclosure of the data would satisfy due process requirements. Although providing the defendant with his own psychiatrist is of obvious merit, it would seem that few courts would be willing to supply the defendant with the funds for this alternative psychiatric examination.¹⁷⁹ It is further submitted that such a procedure is not necessary, if a procedure, such as the one discussed above, is adopted whereby a defendant can protect himself from inaccurate and unsupported conclusions.¹⁸⁰

This alternative procedure has merit above and beyond its satisfaction of due process. It would provide the defendant with protection from the impregnable psychiatric report while at the same time allowing the psychiatrist to write his report and answers in the more relaxed atmosphere of his office. This would better permit the psychiatrist to present a report which would be harmless to the defendant. If a psychiatrist is subjected to open courtroom examination, an inept defense attorney and the doctor's lack of forensic skills may combine to give the defendant the shock of "disclosure overdose," which may impair opportunities for rehabilitation. Further, this procedure would somewhat remove the psychiatrist from the harshness of the adversary proceeding, which Mr. Chief Justice Burger has referred to as "not ideally suited to developing an accurate portrait or profile of the human personality. . . ."¹⁸¹ But it would not do this at the sacrifice of the rights of the defendant.

Also, this procedure would effect an efficient allocation of the time of the court and the psychiatrist. Since the reports of the psychiatrist would be written, the actual courtroom time could be lessened and thus result in a more efficient allocation of the court's resources. Further, as regards the psychiatrist, this procedure would help in the efficient allocation of forensic psychiatric resources. The psychiatrist who is willing to devote time in the administra-

¹⁷⁹ Even at the guilt determination stage of a trial, the courts have been exceedingly reluctant to allow the defendant the right to have a second court appointed psychiatrist. *See, e.g.,* Wynder v. United States, 352 F.2d 662 (D.C. Cir. 1965), *cert. denied* 382 U.S. 999 (1966); Rudd v. United States, 347 F.2d 321 (9th Cir. 1965).

¹⁸⁰ As stated earlier, the right to due process must consider the interests of both the government and the individual. *See* the discussion at p. 32, *supra*. To require the use of two psychiatrists in each sentencing hearing would obviously be detrimental to the already thin supply of forensic psychiatrists available.

¹⁸¹ Burger, *supra* note 1, at 6.

tion of criminal justice should be encouraged to spend as much time with defendants or patients as possible. To require the psychiatrist to appear at a proceeding obviously cuts back on the amount of time he can devote to the diagnosis of other defendants. Although time would be required to answer the written inquiries of the defendant's attorney, it would seem that not all attorneys would submit clarification questions to the psychiatrist. Also, even if they did, one must remember that travel time and the time spent waiting to testify would be avoided by the submission of written reports.

It is submitted that through this procedure the defendant's right to due process and the interests of society and defendant can be properly balanced.

VII. CONCLUSION

Psychiatric information seems especially well suited for use at the dispositional stage of a trial. It can help the sentencing judge better understand the convicted defendant by describing his personality, conflicts and psychological problems. But the use of such information must be subject to a procedure to check its bias and mistakes. Anything less runs afoul of the requirement of due process and fairness.

To be sure there are other procedures which could be adopted, but after deliberate consideration, this one appears as the most workable.