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DISCLOSURE OF SOCIAL AND PSYCHOLOGICAL REPORTS AT DISPOSITION

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Introduction

The new treatment orientation of some criminal courts and particularly of the Juvenile Court has given rise to several procedural and evidentiary questions with regard to dispositional hearings. The underlying conflict seems to be between the social scientist, who claims he needs flexibility and scope if his treatment is to be successful and the lawyer interested in civil liberties, who argues that the only way to protect the individual from abuse at the hands of these uncertain sciences is by stringent procedural regulations. Ought the social scientist to be able to present to the judge his professional assessment without reserve, or must he be equivocal because the subject of that evaluation will see the report and may take offence, rendering him hostile toward those who are trying to help him? On the other hand, ought the subject to be a helpless bystander while his character is being discussed by someone who has possibly known him for an hour or so?

The conflict is nicely raised in a recent case, *Re C. (an infant)*. The case was appealed from a Juvenile Court to the Supreme Court of Ontario, and the unreported decision by that Court has caused great concern to the professional people connected with the juvenile court movement.

THE CASE

The Facts

A 15½-year-old girl was arrested and brought into Juvenile Court for shop-lifting (theft under $50). The girl was already on probation for two previous appearances for truancy. In total there were four hearings over the next two months after which it was decided that she should be sent to training school where she would receive a more stable, disciplined, constructive environment and at least learn enough skills to help support herself. In the course of these four hearings long discussions took place between the girl, the mother, the girl's supervising probation officer, a Catholic Children's Aid worker, the school attendance officer, the girl's aunt, duty council and the judge. A report on the girl and her home-life was prepared and submitted by the C.A.S. worker and a psychiatric clinic (psychiatric interview with a

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report from the psychiatrist and then a report from a conference of all the professional people in the case) report was submitted to the judge.

At the first hearing, the girl accompanied by her aunt decided to proceed without a lawyer, at which point the judge instructed duty counsel to pay close attention. After a conference with duty counsel the girl pleaded guilty. The probation officer, the school attendance officer and the social worker all testified in court about the girl's past and present problems. At every hearing duty counsel was present and both mother and girl entered into the discussion with the judge and witnesses. Many of the items challenged by the defendant were verified by further investigation or testimony.

The behavioural scientists were unanimous: the girl's major problems were her mother (who had her own psychological problems, and who offered the girl no discipline or sense of responsibility) and the girl's own poor self-image (arising from a series of lengthy illnesses, obesity, below average intelligence, rejection by her peers, and a weak father). The consensus was that probation had proven unworkable, and the probation officer requested that it be terminated. The school found the family unco-operative and irresponsible; and the psychiatrist concluded that this was the case of an immature personality in a girl of borderline intelligence, hindered by physical, social, and family problems. The social worker's report concluded that all the community's resources had been tried and proven inadequate, and that if the girl were allowed to return home the situation would deteriorate; therefore, it went on,

> ... the only way to help the girl is through training school which would offer a stable, consistent environment providing regular classes, home economics and a properly supervised diet. The structure of routine would help to reduce her feelings of 'mere existenc' through participation thus increasing her self-image and confidence.

The reports of the social worker of the Catholic Children's Aid Society, the psychiatrist's report, and a report of a psychiatric conference were never offered to the offender or her mother, nor were their contents disclosed to them. They were, however, aware of the existence of these reports, but did not request to see them.

Finally at the fourth hearing the Judge, over the protests from mother and child, ordered the girl committed to training school, concluding:

> I feel that I can only follow the advice that is given to me when I ask it. I asked for a full-scale clinical report have asked for observations by the Catholic Children's Aid Society. I depend heavily on the probation officer who deals with the case and for me to turn around and flatly repudiate that is not to do this girl any favours; whereas, what she really requires is indentification. This is an opportunity that this girl needs and its been indicated that she must have it and I must see that she gets that opportunity.

Later in response to the girl's comment that she wished to stay at home he added:

> What you want to do is like a horse running back into a burning barn. You want to get back to a place where you can't get the education and training and opportunity to be a young woman.[1]

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[1] Trainscript of Evidence of proceedings in Juvenile Court.

The Appeal

One month later an appeal from this order was heard by a Judge of the Supreme Court of Ontario, in chambers. Leave to appeal was granted under s. 37 of the *Juvenile Delinquents Act,* R.S.C. 1952 c. 160 on the grounds put forward by the girl's counsel that the trial judge:

> ... was presented with reports by a social worker of the Catholic Children's Aid Society, a psychiatrist's report and a report of a psychiatric conference. These reports, made numerous damning comments about the girl and her mother and her home. They all recommended training school. None of these reports were shown to the girl or her mother and at no time did the judge indicate that the defendant or her mother had a right to cross-examine or call witnesses. The mother also complained that the social worker advised her shortly before the last hearing that he would not recommend training school which he subsequently did.

The notice granting leave pointed out that it is in the public interest to know in what manner a juvenile and her guardian should be given the evidence affecting sentence. At the appeal the appellant argued that the learned trial judge appeared to have relied primarily on the three reports (phychiatrist, psychiatric conference and social worker's) in ordering that the girl be committeed to training school[2]; that the appellants were unaware of the contents of these three reports and disagree with many of the assertions made therein; and that neither the appellant nor her mother was given a full and complete opportunity to cross-examine nor advised of their right to call witnesses. Affidavits of the appellant, her mother, and of two neighbours were filed, stating that the home and home life of this family was good. It was submitted for the appellant that the failure to show the reports to the appellant or her mother was fatal and that it amounted to a secret inquiry; and they were ignorant of the case they had to meet, their right to cross-examine and to call witnesses.

The respondent replied that if it was an error in law for the learned trial judge to consider evidence not explicitly shown to the appellant relative to the question of *sentencing* that no substantial wrong or miscarriage of justice had been occasioned; and that this was a case for the discretion of the trial judge.[3] The appeal was allowed and the Juvenile Court Judge's order was varied so that the girl was released to the custody and control of her mother—order effective one month hence.[4]

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[2] See text relating to footnote 1 for the most pertinent quotation. The other quotation states that "the professional people here are indicating that what this girl needs is an opportunity to get away from ... apron strings" ..."I am saying what the professional people are saying not me"—Transcript of Evidence, p. 42-43, line 42, p. 42 and line 10 p. 43.

[3] Citing R. v. Bezeau [1958] O.R. 617 and the Juvenile Delinquents Act .s. 17 (1), (2); s. 20 (1), (5).

[4] The first obvious concern is that this order may be beyond the jurisdiction of the judge to make in that it in effect confirms the committal but varies it from an indefinite period to two months. We spoke to the appellate judge, and there seems little doubt that this is what he meant. There is not, and never was intended to be, any provision for a definite term committal to training school. A juvenile is never "sentenced"; punishment, which the use of this term implies, is reserved for adults.

The Significance

This seemingly unimportant, unreported decision given without reasons has the possibility of producing profound repercussions in the Juvenile Courts' use of background social and psychiatric reports. Such a decision quickly became known to the juvenile and family court judges across the province, to the probation services, to the Toronto C.A.S. workers and the court psychiatrists. Many of the judges and others assume that the case establishes a rule which would force them to disclose completely the contents of every such report considered by them in sentencing.

By comparing the trial transcript, the arguments on appeal, and the appellate judge's comments the case seems to demand:

(1) that the court take the initiative in disclosing the complete contents of all psychiatrist's and social worker's background reports which it considers at disposition to the juvenile offender or his parents

(2) that the offender or his representative must be informed that he may challenge the contents of this report by cross-examination and by calling witnesses.

Failure to follow this procedure may result in the lower court's order being set aside or varied.

We will argue that the case, rather than establishing a precedent in the area of disclosure, must more importantly be regarded as an example of the breakdown in communications between the various parties and courts involved. We take this case as an opportunity to examine what ought to be the rules and procedures in the future.

UNDERLYING PRINCIPLES

Sentencing

The twentieth century has been marked by the great development of the behavioural sciences and the welfare state. These intellectual and humanitarian trends have been reflected by the rise of individualization of criminal justice with its new rehabilitative-treatment orientation in sentencing. During this century there has been increased recognition of the part played in crime by social and environmenal factors. Efforts were made to mitigate the inhumanity and injustice of laws which sought to treat all alike and the sentencing in theory came to take into account both the individual criminal and the offence. Social control and protection of the community became the justifications of any disposition and it was realized that this was best accomplished by the permanent reclamation of the offender to be a productive citizen. The judge was compared to a doctor, "first observing and studying a person's symptoms to establish the nature and extent of his ailment, before a course of treatment can be suggested."[5]

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[5] Advisory Council of Judges, GUIDES FOR SENTENCING, (New York, 1957) 26.

Effective, therapeutic sentencing was seen as being in the long term interests of both the offender and society. It is a task which demands the full use of man's increased knowledge of human behaviour so that the decision might be made systematically, deliberately and rationally rather than haphazardly or intuitively. Sentencing in ignorance of pertinent information is inefficient and inhumane. From this therapeutic approach arose the need for the social scientist, the expert witness and the social investigation of the causes of the anti-social behaviour. Thereby the social investigation and the psychiatric report have become uniformly accepted as helpful tools which allow the application of a *scientific* approach and anlysis by a professional behavioural scientist to be introduced into the sentencing process.

> If the criminal law and its administration is to develop efficiently to fulfill the purposes for which it exists in an everchanging society, lawyers, magistrates and judges... must develop a new consciousness of the contribution that the social scientist, the psychiatrist and the psychologist can make to the courtroom.[6]

The approach has gained widespread acceptance, because it is based on values and concepts which are consistent with current ideals in our society—respect for the individual, the capacity of the individual for change, the belief that behaviour has a multiplicity of causes which may be varied, the belief that sentencing is a semi-rational process which can be made more efficient by the input of scientific, empirical and factual knowledge and the belief that a degree of precision in predicting the future behaviour is now possible. In recent years many lawyers have expressed reservations about the appropriateness of such an inexact science in the law, which derives much of its value in channelling behaviour merely by being clear, predictable and appearing fair. These reservations have been supported to some extent by the inital attempts to empirically test the success of this new approach to sentencing. Studies of recidivism rates cast a number of doubts on the effectiveness of present social science theory as it is being applied to the criminal process.

Although information and expertise may aid the sentencing process, wrong or misleading theories or erroneous facts will make the process inefficient and inhumane. It may deprive a man of years of freedom, society of a productive member or as in this case a child of her family and home. There are many dangers inherent in the use of social investigations and psychiatric reports at disposition such as inefficient or inadequate investigation, an incompetent investigator, deceitful sources, inefficient techniques, judges unschooled in the proper use of such reports etc. Such dangers may be discovered by internal supervision, a careful judge or more qualified staff; however, all these protections are beyond the control of the individual offender. What safeguards has the subject either personally or through his representative? Is there a right to see this report, to challenge its contents, to cross-examine its author or his informants, or to exclude certain material because it breaches accepted evidentiary rules? Such legal safeguards are unclear and unsettled. The basic need in this area, as demonstrated by this present case, is for clearer rules and increased understanding in relation to the use of these reports in order

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[6] McRuer, *Sentencing*, (1961), 3 CANADIAN JOURNAL OF CORRECTIONS 207.

to promote an efficient compilation of material while preserving the meaningful traditional common law rights of the subject whose liberty is at stake.

THE DISPOSITIONAL HEARING IN JUVENILE COURT

It must be remembered throughout that this case was tried under the *Juvenile Delinquents Act* which expressly demands in s. 38 that:

> Where a child is adjudged to have committed a delinquency he shall be dealt with not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.

S. 17 states expressly:

> No adjudication or other action of a Juvenile Court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

Evidentiary Rules and Juvenile Court—Generally

The question of what procedural and evidentiary rules apply to Juvenile Court has largely been left unanswered by Canadian appellate courts and commentators. The *Juvenile Delinquents Act,* s. 5 (1) provides that:

> ...prosecutions and trials under this Act shall be summary and shall 'mutatis mutandis' be governed by the provisions of the *Criminal Code* relating to summary convictions in so far as such provisions are applicable....

This would seem to imply that all the procedural rights provided for by sections 708 and 709 of the *Criminal Code* of Canada applied, unless expressly varied by other sections of the *Juvenile Delinquents Act.* Of interest to our discussion in this paper is the right "to examine and cross-examine witnesses personally or by counsel or agent"[7] and the fact that "every witness at a trial in proceedings to which this Part applies shall be examined under oath".[8] It also seems that the provisions of the *Canada Evidence Act*[9] would apply. except where inconsistent with the express provisions of the *Juvenile Delinquents Act.* Section 2(e) of the *Canadian Bill of Rights* applies to prevent the juvenile from being deprived of "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."[10] Therefore, it would seem that except as provided expressly by the *Juvenile Deliquents Act,* the juvenile should have a right to all the procedural protections of the adult.

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[7] Criminal Code of Canada, S.C. 1953-4, c. 51, s. 709 (2). See R. v. Langenack (1962), 132 C.C.C. 277, and R. v. Ignat (1965), 53 W.W.R. 248. (a review of the right to cross-examine).

[8] Code, s. 109(3).

[9] R.S.C. 1952, c. 59.

[10] S.C., 1960, c. 44, s. 2 (e).

However, in practice, and even in academic writings, some of these rights have been abridged in the name of the socialized, informal procedure authorized by s. 38 and s. 17 (1) and (2) of the *Juvenile Delinquents Act*. In *Regina v. Arbuckle*,[11] Mr. Justice Aikins of the Supreme Court of British Columbia held that:

> ... nothwithstanding the informality of the conduct of proceedings permitted by s. 17 of the Act it must be conducted on ordinary laws of evidence ... That a proceeding may be informal does not mean that it may be conducted without regard to the law of evidence, nor do I think that a failure to proceed in accordance with the rules of evidence is a mere informality or irregularity with s. 17 (2).[12]

This decision was reversed upon appeal in that a hearing under s. 9 (the waiver provision) of the *Juvenile Delinquents Act* was held to be admistrative rather than judicial and that:

> ... while the judge must act judicially in the sense of proceeding fairly ... it would be incompatible with the essential purpose of the Act, namely, to see that a juvenile delinquent is treated not as a criminal but rather as a misguided child ... and is provided with that care and discipline that should be given by its parents, to restrict the Judge to the rules of evidence admissable in a Court of law. Accordingly, on such an application the Judge falls into no error if he admits and considers hearsay evidence.[13]

In general, Canadian precedent regarding evidence under s. 9 applications does not require:

> ... the Juvenile Court Judge to base his opinion solely on sworn testimony and an order transferring a juvenile to an ordinary Court which is based in part on the unsworn testimony of a probation officer will not on that ground be interfered with.[14]

It also appears that unsworn evidence by a probation officer regarding the child's previous conduct and response to previous corrective treatment or a written psychiatrist's report is admissable and sound evidence.[15]

These cases are relevant to our present discussion in several ways. If we accept that such a relaxation of the rules of evidence applies to the adjudication of issues in juvenile court then our arguments regarding the need for and efficacy (i.e. capability of meaningful challenge) of disclosure of dispositional reports may be affected. Even if, as the Supreme Court of British

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[11] [1967] 2 C.C.C. 32.

[12] *Id.* 32, 40.

[13] Re Regina v. Arbuckle [1967] 3 C.C.C. 380, headnote. The issue in this case was testimony by a probation officer as to his opinions that it was in the child's best interests to be tried in the ordinary courts which was based on hearsay evidence of satements of the child's teachers.
1 C.C.C.. 173, 174-5.

[14] Shingoose v. The Queen [1967] 3 C.C.C. 291 (S.C. of C.); R. v. Pagee [1964].

[15] See R. v. Todd [1966] 3 C.C.C. 367; R. v. Pagee [1964] 1 C.C.C. 173.

Columbia suggests, s. 9 (1) applications are administrative rather than adjudicative they still seem analagous to the Juvenile Court judge's administrative task of sentencing and similar consideration should be applied to this stage of the hearing. If evidentiary[16] and procedural safeguards are relaxed in juvenile court when performing an administrative function, then there is less compulsion from precedent to support mandatory disclosure. Also if the ordinary evidentiary rules regarding hearsay, opinion, etc. do not apply then social reports will be more difficult to attack suggesting a different method of challenging the report than simple reliance on cross-examination and the production of witnesses.

Evidentiary Rules and Adult Dispositional Hearing

What are the evidentiary and procedural restrictions which govern the *dispositional* portion of an *adult* hearing? In *Regina v. Arbuckle* the Court, in answering Crown Counsel's contention that proceedings under s. 9 were analagous to speaking to sentence which is nothing more or less than hearsay, concluded that such hearsay evidence was permitted because no issue is raised as to the accuracy of the statements, and if they were challenged the judge would not act upon them unless they were properly proven.[17] It is generally accepted that the strict rules which govern the admissability of evidence at the adjudication of guilt do not and should not apply to the dispositional hearing.

> What happens after verdict is very different from what happens before verdict. After the verdict, there is no longer an issue between the crown and the prisoner. The issue has been determined by the jury and there is no more room for evidence except to inform the mind of the court as to what the previous history of the prisoner has been, if the court desires to hear it, for the purpose of enabling the court to assess the proper sentence... There is no obligation on the Court to hear such evidence. One small point which shows the distinction between evidence after the verdict and evidence before the verdict is the different oath

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[16] The general rules governing admissability of evidence in Juvenile Court are unsettled and many cases suggest an adoption of some of the general rules, at least at the adjudicatory stage. Compare Regina v. McMillan [1967] 2 C.C.C. 12 where the Alberta Supreme Court held that "conviction on a sexual offence is unsafe without corroboration" applies to prosecutions under the Juvenile Delinquents Act not withstanding the absence of specific statutory provision to that effect, with R. v. Horsburgh [1966] 3 C.C.C. 240 at 244 per Porter C.J.O.: "The Juvenile Delinquents Act, R.S.C. 1952, c. 160 is I think intended to be a complete code relating to the trial of juvenile delinquents... The Act provides that there must be corroboration of the evidence of children of tender years, but make no provision for corroboration otherwise. Corroboration is a statutory safeguard and since the Act omits to make further provision for corroboration it must not be taken to have been intended that corroboration is not necessary." See also the judgments of Evans, J. and Laskin, J. (at 262) who disagree and also R. v. McBean (1953), 107 C.C.C. 228 that the same restrictions and considerations should apply as under the Criminal Code.

[17] [1967] 2 C.C.C. 40, 40-41.

> which used to be administered to the witness... not an oath as to a matter in issue between the Crown and the prisoner; it was an oath which was to inform the court truthfully in answer to its questions.[18]

The position in the United States is much clearer and offers even less protection than the Canadian in regards to the quality of evidence to be received and the procedural protections to be provided after conviction. The United States Supreme Court stressed the need to draw a clear line of demarcation between "strict evidentiary procedural limitations" imposed on on courts in adjudication of guilt by the Constitution and the relaxation of these strictures when sentence is being considered.[19] Mr. Justice Black notes that traditionally the judge had wide discretion as to the sources and types of evidence upon which he could base his sentence and such discretion was even more necessary now.

> Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in evidential procedure in the trial and the sentencing process. For indeterminate sentences and probation have resulted in an increase in the discretionary powers expressed in fixing punishments... (dispositional) reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognise that most of the information now ruled upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.[20]

Therefore, in the United States and probably in Canada precedent suggests that dispositional reports are ungoverned by evidentiary rules and, therefore, although loaded with hearsay and opinion, are admissable.

Absent statutory provisions, what rights should the defendant have, based on the demands of due process and the elemental sense of fair play and justice which underlies the British system of justice? It has been argued that perhaps all constitutional guarantees may cease at conviction.[21] Such a

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[18] R. v. Butterwasser [1948] 1 K.B. 4, 8-9. See also Regina v. Arbuckle, 284-5 and also the comments of Lord Goddard C.J. in Marquis (1915), 35 Cr. App. Rep. 33 at 35 that "The learned Recorder seems to have some conviction as to whether he could accept what he called "hearsay evidence" of character after conviction. Of course he could... although the matter is not proved with the strictness which would be necessary to prove an issue at trial... After conviction, any information which can be put before the court can be put before it in any manner which the court will accept." Hearsay and opinion evidence is admissible but care should be taken in labelling it as such and disclosing the sources, c.f. R. v. Ellery (1921) 15 Cr. App. Rep. 143.

[19] G. Parker, *Use of the Pre-Sentence Report,* (1964), 42 CAN. B. REV. 629.

[20] Williams v. New York (1959), 337 U.S. at 246, 248-9. Many commentators wonder whether, in light of the trend evidenced by In Re Gault, this question were raised again to-day if the devision might not be reversed. Note also how this case was interpreted and limited by the British Columbia Court of Appeal in Rex. v. Benson and Stevenson (1951), 100 C.C.C., 247. For another American decision stating that trial rules of evidence need not be followed at disposition see Farrell v. State (1957), 131 A. 2d. 863, 867; and see H. P. Chandler *Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts* (1951), 37 VA. L. REV. 831.

[21] See discussion under the advantages and disadvantages of disclosure regarding due process and especially the quotation from People v. Riley (1941), 33 N.E. 2d, 872 at 875.

relaxation of rights is justified on a moral rationale—i.e. through his anti-social behaviour the offender has given up some of his rights and is put at the mercy of society, which must now prevent him from harming the community in the future. Rules of evidence governing adjudication may be in-applicable because the inquiry is broader and more complex than the simple question: "Did the accused do the act?" The inquiry must consider medical and psychological information to understand the actual cause of this behaviour. Evidentiary rules of exclusion derived from extraneous policy considerations unique to adjudication would simply block information which might be essential to the rehabilitation of the offender.[22] Therefore, we must be careful that we do not frustrate the social purpoess of disposition by the blind adoption of the rigid procedural requirements of the adjudicatory hearing Likewise we should not ignore the legal safeguards, such as adversary conflict, which have proven valuable in protecting the individual over the years. The appearance of fairness and justice must be retained.

Disclosure of Reports in Adult Court

Historically, the receiving of additional information from a police officer at the time of sentencing was made in the presence of the accused. This practice was followed in Canada in *Rex v. Benson and Stevenson*[23] which is the most quoted Canadian case on this issue and generally lays down the practice followed by most Courts in Ontario:

> A pre-sentence report from a Probation Officer in so far as it contains factual allegations prejudicial to the convicted person stands on the same plane as a pre-sentence statement by a police officer. The principles applicable in either case require that the convicted man be *informed of the substance* of the report or statement *in so far as detrimental* to him so that he may have an opportunity to agree with or explain it or deny it. If the report or statement contains prejudicial observations *considered by the Court* to be relevant and likely to influence sentence and the prisoner denies them, then proof thereof should be given in open Court when their accuracy can be tested by cross-examination. If the Court does *not consider the matters to be important* enough to justify formal proof, they *should be ignored* as factors influencing sentence.[23] (emphasis added).

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[22] M. G. Paulsen, *Kent* v. *United States: The Constitutional Context of Juvenile Cases* [1966] SUP. CT. REV. 167 at 170.

[23] (1951), 100 C.C.C., 247, headnote (note enabling legislation, The Probation Act. R.S.B. C. 1948, c. 268 is essentially similar to its counterpart in Ontario). See also Rex. v. Abbott (1940) 74 C.C.C., 318 at 323 (if judge knew something beyond what was given in evidence it ought to have been disclosed and the defendant given the opportunity to meet everything which calls for consideration); R. v. Markoff, 67 C.C.C. 311 (statements by policeman after a plea of guilty should be made in the presence of the accused and if challenged proper proof should be required or the information so obtained should be ignored by the Court in passing sentence); R. v. Piluk (1933), 60 C.C.C., 92 at 94 (follows R. v. Campbell infra); and R. v. Tolmie and Rambo (quoted in Rex. v. Benson and Stevenson, supra.) (proper practice for magistrate to explain to the appellants that these statements were made to him in a report and that they are permitted to concur in or explain or deny them. If denied, Magistrate may require proper proof or he may ignore the statement in passing sentence); R. v. Dolbec [1963] 2 C.C.C. 87 (non-disclosure of the sources of information and the lack of any opportunity afforded the appellants to rebut the contents of the pre-sentence report constitued a miscarriage of justice. It was improper not to inform the accused of the substance of the report and in so far as it contained prejudicial observation not to afford him the opportunity of disputing the report and of testing its accuracy by cross-examination in open court—once again only material detrimental to him must be disclosed).

Therefore, the right is limited by these qualifications and complete disclosure of such social investigations is not required.[24] Therefore, except for the provision in the *Canada Evidence Act,* s. 12, regarding full disclosure and strict proof of the offender's prior criminal record, there does not seem to be an inherent right in the offender to complete disclosure of a dispositional report. The manner and amount of discloseure appears to remain in the discretion of the trial judge; although, he is warned that if upon review it appears he was influenced by undisclosed detrimental factors in the pre-sentence report, his sentence is likely to be quashed. Thus, if we can trust the discretion of our judges this solution seems to have the advantages of allowing the judge some flexibility and discretion in the use of the report while at the same time protecting the offender by encouraging the general practice of disclosure except in those special cases where the judge is willing to risk appeal because of factors within a certain case which suggest to him that disclosure would be harmful.

These cases seem to have had their desired effect in Ontario for the general policy of the Provincial Probation Services demands that the officer submit copies to the Bench, the crown attorney, defence counsel and the offender twenty-four hours before his hearing, subject to the guidance of the presiding judge. If the probation officer is particularly worried about disclosure in an individual case, he is advised to approach the judge with his reasons, and then it is up to the judge to decide if and how the offender will be able to learn the detrimental substance of the report.[25]

Disclosure of Reports in Juvenile Court

With juveniles different practices are applied. "[T]he report is not necessarily—in some courts is never—shown to the child or his parents".[26] It was and still is the general practice of Juvenile Court Judges in Ontario not to disclose the complete contents of the report; at a conference last September only one Judge stated that he allowed the child to see the report.

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[24] Commentators have suggested that this rule is unworkable and that it is foolish to try to distinguish what factors in a report influence the judge's decision and which do not. This criticism seems quite valid as it was our experience that usually the overall tone and structure of the report may be the most influential factor. This is one weakness then of any rule of selective disclosure. If we decide that everything in every report should not be disclosed every time then someone must make the choice and this is a function which we expect our judges to be able to fulfill in relation to other evidentiary questions.

[25] See Provincial Probation Services, MEMORANDA, Chap. C., p. 6 and Outerbrige, HANDBOOK, III (15) Appendices A & B. See also Memorandum dated Dec. 1958 which points out that the question whether complete disclosure has been made is often of interest to the Court of Appeal and that this should be made a matter of record.

[26] Outerbridge, HANDBOOK, V (21), Appendix C.

To the best of our knowledge this practice continues despite the concern raised by *In Re C.* which has been interpreted as requiring disclosure.[27]

The second report in *In Re C* was that of a psychiatrist, and it seems that different principles have been applied to such. Even *Rex v. Benson and Stevenson* would extend special privileges to such reports:

> Pre-sentence matters relating to the prisoner's mental condition should not ordinarily be communicated to him because they are not a factor warranting a heavier sentence than would otherwise be imposed and any allegation of mental instability should be based on a psychiatric examination when it could be determined whether the result thereof should be disclosed to the convict.[28]

Psychiatrists involved with *In Re C.*, when interviewed argued that since the reports could be very harmful if disclosed in toto or misunderstood, or if parts were disclosed out of context, they should be able to request that the report in whole or in part be kept confidential and that if it did have to be disclosed they would like to be able to interpret it personally to the offender in a clinical setting rather than have the court hand out copies. This view is supported by the comments in *R. v. Dickson:*

> It is not clear to me or any of His Majesty's Judges why it is necessary to serve that report on the prisoner. In some cases I think it very undersirable because it may sometimes give him ideas about his mental condition which he perhaps should not know.[27]

However, it appears that this rational middle position may not be the law in Ontario. In *R. v. Bezeau*[28] it was held that for the judge and crown counsel to meet privately with a psychiatrist (defendant not notified nor present) to get ideas about sentence was bad practice. The common law prohibited the judge from making private investigations of his own without the knowledge of the accused, and as a general rule the judge cannot interview *ex parte* a witness.

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[27] An interesting qualification (if we do accept the proposition of mandatory disclosure) may be found in Pinder v. Pinder (unreported B.C. decision) which holds that failure to disclose the contents of a welfare report did not result in a miscarriage of justice when the defendant's counsel had consented to this use of the report. Therefore, under the present case law, a viable solution may be to have the judge disclose to the offender's counsel and if he is unrepresented to duty counsel or appointing counsel and getting his consent not to completely disclose the report to the child.

[28] (1951), 100 C.C.C. 247, headnote. This reasoning does not seem to apply to a treatment setting, if, understanding that treatment can be tyranous, we accept that certain forms of treament may be considered heavier sentences than others (e.g. here training school was considered a heavier sentence or punishment by all the participants except perhaps the professional treatment personnel, than a suspended sentence or a probationary order. Although such reasoning is inconsistent with the treatment philosophy it was not surprising to learn that even the Supreme Court Judge fell into the error of considering training school punishment too harsh for the magnitude of the offence.) Therefore until the treatment philosophy is completely accepted many people will consider the pre-sentence report as increasing sentence. For an example of this thought see R. v. Holden (supra) which states that heavier sentences must not be imposed for collateral purposes which may be found in the pre-dispisition reports.

[27] (1949), 34 Cr. App. R. 9 at 13.

[28] (1958), 128 C.C.C. 35 (Ont. C.A.).

Once again this right to disclosure has the same implied limitation as with social histories—only that which influences sentence must be disclosed.[29]

The English law is similar to the Canadian case law and many of the Canadian cases follow earlier English cases in giving the offender a right to know and meet any detrimental facts in such a report which influences sentence. Under the English *Criminal Justice Act*[30] a copy of such a report "shall be given the court to the offender or his counsel or solicitor". The general practice in adult courts in England is for the police to supply a report and the offender is then given a chance to deny portions of it. If denied the judge must either disregard the controversial statements or hear evidence on both sides.[31] In *Rex v. Pelz,* it was carefully pointed out that the court was not attempting to lay down a rule in such wide and at the same time such exact terms as would cover every case as this would be impossible but that it was hoped that such comments regarding disclosure would be a guide to the right practice. Once again, the case seems to have worked out a viable compromise which both protects the offender by encouraging disclosure in most cases and in also allowing enough flexibility that if such disclosure would not be in his interests the judge may refuse. There seems, at present, to be no requirement of full disclosure or strict proof.

The most interesting case regarding access to hearsay evidence of a "confidential" nature is the House of Lords decision *In re K*[32] which denied the mother the right to see the final reports of the Official Solicitor and a psychiatrist regarding her suitability to have care and custody of children. It seems that the issue was the exact one facing the court in *In Re C.* The decision seems to turn on the fact that the wardship jurisdiction of the Court of Chancery was a very special one in which the principles of natural justice must bow to (or be qualified by) the principle of *parens patriae.* This reasoning seems directly applicable to *In Re C.* However, the case was not cited in argument, it may still be applicable in Ontario as *In Re C* is unrecorded with no written reasons for judgment.

The situation in the United States is even more confused, and in general, offers less protection than either in Canada or England. In a few states the defendant has a statutory right to examine the report prior to imposition of

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[29] Such a restriction is of particular interest in In Re C. where the Trial Judge did not even read the Social worker's report but rather relied on his oral testimony which means that his decision could not have been influenced by any detrimental material in the report and therefore within the case law, the appeal which was argued largely on the non-disclosure of the social worker's report, should have been dismissed on this ground.

[30] 1948, c. 58, s. 21 (5). For an earlier provision allowing character testimony by both the Crown and the defence after conviction, see the Prevention of Crime Act, 1908, 8 Ed. 7, c. 59, s. 10 (5).

[31] See Rex. v. Von Pelz [1944], 1 All E.R. 36 (duty of crown to keep policeman to allegations of capable proof); R. v. Butterwasser [1948] 1 K.B. at 8, 9 (evidence received after verdict should be given in open court), R. v. Weaver (1908 1 Cr. App. Rep 12 (damaging facts to be noted); R. v. Campbell (1911) 6 Crim. App. Rep. 131 at 132 (procedure of reports questioned).

[32] [1963] 3 W.L.R. 408.

sentence:[33] in one state a right of access is specifically denied;[34] and in the remainder the statute is silent. When there is no express statutory provision requiring disclosure, it has been held that disclosure is at the discretion of the sentencing judge and is not a right.[35] In several cases, disclosure of at least enough of the adverse material in the report to enable the defendant to refute it has been provided for[36] while in others non-disclosure was approved.[37]

Challenging the Report

Assuming a right of access to the report does the offender have a right to cross-examine the writer or the informants? How is he to challenge errors he finds in the report. As we saw earlier most of the Canadian and English cases which give a right of access also give a right to cross-examine the report writer, but the one right does not necessarily follow the other.[38] Historically, at Common Law, a convicted defendant did not have the right to confront and cross-examine adverse witnesses, at the disposition hearing.[39] Therefore it would seem doubtful that the defendant has a right to confront and cross-examine the report writer and *a fortiori* it would seem that he has no such right with regard to the investigator's informants, absent any statutory or case law provisions.[40] Of interest when trying to formulate a new rule in Canada regarding the right to challenge and cross-examination in this area is the McRuer Report's analysis of which participants in an administration hearing should be entitled to procedural rights. It concludes that any person

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33 Alabama, California, New Mexico, Ohio and Virginia.

34 Kentucky.

35 U.S. v. Schwenke (1955), 221 F. 2d. 356; State v. Moore (1954) 108 A. 2d. 675; State v. Benes (1954) 108 2d 846; Smith v. U.S. (1955) 223 F. 2d 750.

36 See Zeff v. Sanford (1940) 31 F. Supp. 736 at 738; Driver v. State (1952), 92 A. 2d 570; State v. Harmon (1960), 157 A. 2d 394; State v. Fowler, 49 Mich. 234; Kuhl v. District Ct. 366 P. 2d 347; Townsend v. Burke (1948), 334, U.S. 736. For a further list see J. P. Higgens, *Confidentiality of Pre-Sentence Reports,* (1964), 28 ALBANY L. REV. 14.

37 The two most quoted American cases, both of which deny access, seem to be Williams v. New York (1949), 337 U.S. 241 and U.S. v. Durham (1960), 364 U.S. 854. The strong statements in obiter by Mr. Justice Black gives the impression that the American practice does not protect the accused from a sentencing judge considering factors which are never known to him. This is the interpretation which has been followed by the report writers in the United States. In Canada, Rex. v. Benson and Stevenson in explaining and distinguishing Williams limits it to the constitutional question (also points out that the substance was disclosed orally and that the accuracy of the report was never challenged and concluded that it does not affect the person's common law rights to know detrimental facts being used against him.

38 The cases definitely hold that the offender has a right to cross-examine any person presenting evidence which is detrimental and may influence the sentence. See R. v. Benson and Stevenson and R. v. Campbll supra at 132. In addition the appeal court may seek further evidence and make a more comprehensive investigation—see R. v. Elley (1921), 15 C. App. Rep. 143; R v. Markoff supra at 311-312; R v. Carey (1951), 13 C.R. 370 at 376; R v. Dolbec [1963] 2 C.C.C. 87.

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

40 See State v. Benes (1954), 108 A. 2d 846 (denies there is a right to cross-examination) but see Canadian cases cited above in footnote 38.

substantially and directly interested or whose reputation could be prejudicially affected by the inquiry should have such rights but considerable discretion must be left with the person conducting the inquiry. The witness should have:

(a) an opportunity to be heard on any relevant matter.

(b) a right to cross-examine witnesses in respect to relevant matters unless it would frustrate the purposes of the statute.[41]

The current practice in the courts of Ontario is to have the probation officer present in court, be it juvenile or adult, to hear the evidence at the dispositional hearing; but seldom does he give his report orally, and even less often is he cross-examined on it. There is only one magistrate's court in Ontario which makes a practice of having the probation officer take the stand. In Juvenile Courts more use is made of the probation officer in court, and he frequently speaks. However, he is seldom subjected to formal cross-examination, which is considered by most juvenile court judges as being inconsistent with informal procedure.

The legal position at present in Canada seems best summed up in *Rex v. Benson and Stevenson* and in *R. v. Bezeau*. The offender has a right to know the substance of the detrimental material in his report which influences the judge's decision. There does not seem to be a right to see the full report. Much discretion seems to be left in the judge as to if and how he will use the report and how he will disclose it to the offender.

In Re C. and the Case Law

Returning to the realities of *In Re C.*, it seems that there was oral disclosure of the substance of the psychiatric reports. The probation officer testified in open court and did not submit a report. The social worker disclosed the substance of his report by testimony. In fact, it seems that though he also submitted a handwritten report, it was never read by he judge and therefore could not have influenced the disposition. Parent, child and duty counsel, all knew of the existence and use of the reports and did not request to see them.[42]

The social worker involved generally tried to explain the contents of his report to the parents and child before the hearing, which he states was done in this case. He also states that he was willing, and expected, to give his report

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[41] McRuer, Royal Commission, INQUIRY INTO CIVIL RIGHTS, (Toronto: Queens Printer, 1968), 447-52.

[42] Mr. Peter Scandiffio, a duty counsel, was present at the hearing at which these reports were introduced but did not speak during the proceedings. At the commencement of the hearing he was instructed by Judge that his comments would be appreciated at any time during the hearing (As for the other dispositional hearings, Mr. D. Gastmeier and Mr. J. D. Webster were present as duty counsel.) This is of interest in that his name was not recorded in the transcript and one argument at appeal was that the defendant had not had the aid of any legal advice. Obviously if the child or her mother had wished help at this time they could have requested it. They were aware that duty counsel was there to help them as they had been so told at the first hearing and Mr. Gastmeier had actively participated in the girl's behalf.

orally in court and to be subjected to questions by mother and child. In fact, he prefers this procedure and would like to see it continued as long as the informality of the proceedings is retained. He submited a written report only because there was a chance he might not be able to be present at the hearing. The chief argument on appeal revolved around the non-disclosure of one phrase in the social history—that the mother "had difficulty saying no to men", which was interpreted on appeal to suggest prostitution or at least low moral standards. This fact was not expressly disclosed at the hearing and the offender's mother was not given a chance to deny it; however, it is of interest that none of the additional affidavit evidence which was submited to the Court of Appeal dealt with this point but rather simply tried to show that this was a good home where the child was happy. In our opinion, from reading the transcript, the reports and the arguments at appeal, the substance of the reports was disclosed to the mother and child who were given an opportunity to question the probation officer, the school attendance officer and the social worker.

The offender and her mother were warned at all three dispositional hearings that the likely result would be committal to training school, as all the other welfare resources of the community felt they could no longer help this girl. It might be argued that since the mother disputed the views of the probation officer and social worker, the judge should have required more certain proof of these allegations. However, this point was not pursued by the legal arguments or the appellate judge's comments. If the case stands for the proposition that there should be complete mandatory disclosure of the contents of dispositional reports, we would suggest that it is inconsistent with the present law in Canada, England and the United States and is misconceived in its rigidity and inflexibility.

TOWARDS A RULE

Considerations

A consideration which should help guide any new practice is that often quoted from *Rex. v. Sussex Ex. P. McCarthy*:

> [J]ustice should not only be done but appear to be done... The course of justice includes a fair conduct of a criminal trial through all its stages from arraignment to and including sentence.[44]

It is unjust and dictatorial for a judge to make grave decisions to commit a child to an institution without allowing any opportunity to correct misinformation.[45]

If the court is to protect itself from error it must be its duty to verify the truth of the matter contained in the pre-dispositional reports and to discount any source wherein prejudice or unfairness could exist. On the other hand there is the point of view which argues that,

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[44] See also Townsend v. Burke (1954), 334 U.S. 736 (discusses injustice of using a report which is detrimental and possibly inaccurate).

[45] N. Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New York Family Court"*, (1963), 48 CORNELL L. REV. 517.

> ... any person indicted stands before the bar of justice clothed with a presumption of innocence and as such is tenderly regarded by the law. Every safeguard is thrown about him ... After a plea of guilty admitted murderers are in a much different position. As such they are felons. Instead of being clothed with presumption of innocence they are naked criminals, hoping for mercy but entitled to justice.[46]

One proponent of this view holds that any proposal for more full disclosure,

> ... stems not from actual experience which demonstrates that the existing practice is unsatisfactory or defective but from a vague, quixotic notion that 'fairness' required that even after conviction a defendant is entitled to have access to all the official information on his life and character that comes to the judge.[47]

An appearance of fairness would be promoted by disclosure in most cases. In many cases the dispositional hearing may be as important as the adjudication of guilt—certainly with regard to juveniles. The dispositional hearing is also closely associated with the trial procedure temporally, by nomenclature and by participants. In general laymen expect that similar practices will be carried over and are embittered if they are not. McRuer suggests:

> The court should avoid leaving any impression in the mind of the juvenile that he has been unfairly treated. To leave such an impression might result in the juvenile concluding that if the State has no respect for procedural rules of a fair hearing then the laws of the State are not deserving of his respect. One of the main purposes of the juvenile court proceedings is to create a respect for the law. As the formality of a hearing, however, may be relative to the age of the juvenile, less formality may be required where the court is dealing with less mature children.[48]

The probation officer or other investigating official is a representative of the court—a public relations man; and if we are to encourage respect for and understanding of the system, he should be forced to deal with all people, both subject and informants, in a straightforward manner. To make it the general practice for the officer to explain to the informants and the offenders that the information being gathered will be used responsibly but cannot be kept completely confidential (as the offender must be protected from secret erroneous information) would raise the respect of all involved for the system.

Many of the criticisms of disclosure are based on the idea that an effective complete investigation and later treatment must be based on a relationship of trust and confidence which the proponents of non-disclosure argue is promoted by the retention of confidentiality. This argument seems self-defeating. In essence they are saying that since it would breach our relationship of trust and confidence to allow the offender to read what we are communicating to the judge we wish to do it secretly, behind his back. It seems that the investigators' integrity and this relationship of trust and confidence, in many cases would be better promoted by a forthright honest disclosure to the offender of the investigator's function and position in writing the report, of how the material was to be used, and then by allowing him to see it to assure him that it has not been misused. Such disclosure-confrontation could be a useful part of the treatment process if done by the professional behavioural scientists in a setting where implications could be explained and interpreted. Such a sharing with the client may insure the maximum value in the use

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[46] People v. Riley (1941) 33 N.E. 2d, 872 at 875.

[47] Judge Carroll Hinks, *In Opposition to Rule* 34 (*c*) (2), *Proposed Rules of Criminal Procedure,* [1944] FEDERAL PROBATION.

[48] McRuer, 604, see footnote 35.

of collateral information. When the subject realizes that the purpose of the investigation is to promote his own welfare he will be more willing to co-operate.

However, some information, which though necessary for the court if it is to understand the offender, may be psychologically harmful if suddenly disclosed to the subject. The report will contain an intimate character sketch of the defendant which may with certain types of individuals be harmful to his morale and his regenerative effort. This argument is even more pressing when dealing with an immature, inexperienced juvenile. It is believed that unsought revelations of their inadequacies as others see them may affect the inidivduals' self confidence and block therapy not only immediately but indefinitely.[49]

Thus, discretion must be left in the judge whether or not to disclose the contents of the report completely, in part, or not at all. It should be remembered that there will seldom be reason to suppress the whole of the report. It has been pointed out by a knowledgeable, experienced probation officer that perhaps 90 per cent or more of the material in most reports could be revealed with no unfortunate results.[50]

The most compelling incentive to disclosure is that it will help safeguard both the court and the defendant from error.[51] Effective sentencing requires adequate information; but erroneous information can do positive harm, depriving a man of his liberty, society of a useful citizen, and the law of respect.

No matter how competent the probation officer and how adequate his report, we must remember that the collection and anlysis of this type of data is an inexact science.[52] The problem of a practice of non-disclosure is that

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[49] Dembitz, 516-7, see footnote 45. Only last summer there was a case brought to the attention of the Probation Services where a pre-sentence report given to defense counsel was "indiscreetly" given *"in toto"* to his client, who at the time was under observation in the Clark Institute because he had attempted suicide. The report upset him and it was necessary to put him "on special observation": a one to one, full-time attention of a member of staff. See also Lord Goddard's comments in R. v. Dickson (1949), 34 Cr. App. Rep 9, 13.

[50] P. W. Keve, THE PROBATION OFFICER IVESTIGATES—A GUIDE TO THE PRESENTENCE REPORT (Minneapolis, 1960) 9.

[51] The probation office relates a case from Parry Sound where a serious injustice was prevented because a pre-sentence report was disclosd to counsel who later in conference with the offender's father discovered that the Toronto police had mistakenly forwarded a lengthy criminal record which was not the subject's. When this was brought to the attention of the probation officer, further investigation was undertaken and an addendum attached to the report correcting the error.

[52] Part of the social scientists' reaction against disclosure may be defensive, in that he feels that his honesty, integrity, responsibility, competence or professionalism are being questioned. In most cases, this is not so and the advocates of disclosure are concerned that, no matter how competent, human beings make mistakes and that it is wise if possible to provide safeguards to minimize the harmful result of such mistakes. Remembering also our original warning that we must be cognizant of the realities of the situation it must be realized that the chances that errors, biases and irrelevancies will appear in the report are not insubstantial in view of the superficiality of many of the investigations caused in large part by the heavy caseload of the officers, the pressures to meet court deadlines and the immaturity of the behavioural sciences. (See Canadian Corrections Association, Recommendation 1 (3), where it is admitted that there is not sufficient knowledge at present to determine the relevancy of different factors in determining disposition.)

it is self-insulative and therefore, the extent of errors that may creep in and the efficiency and value of the system cannot be properly evaluated.[53]

The social worker may reply by saying that if challengeable, the report would be too limited in scope; and data necessary for treatment may have to be excluded because there was not sufficient time or means to verify it sufficiently to stand up under attack. These arguments seem weak rationalizations. If the material is so speculative or unsupported that it cannot be defended to the satisfaction of the judge, then it should not be acted on, especially if it means arbitrarily dealing with the offender. It is also argued that disclosure would increase the already over-burdened investigator's workload. Even though this is valid, the answer lies in being more selective about the number of reports assigned, more selective about the material to be included (i.e. the length of the investigation) and in an increase in personnel, not in sacrificing the quality of the reports.

The behavioural scientist also argues that for all practical purposes, the disclosure of a pre-dispositional report to the defendant or his counsel, by seriously impairing the confidential nature of the report, destroys its value to the court. In collecting this material friends, associates and relatives of the offender, agencies with which he had dealt and the offender himself are contacted. The information is collected not through mere questioning but by the establishment of a relationship of trust and confidence. Any procedure which silences these sources or makes it more difficult to get adequate information to write a complete report is, in the long run, to the disadvantage of the offender. Also any procedure which forces a breach of trust between the investigating officer and the people in the offender's personal environment decreases the effectivenss of any later in-community treatment.

It also seems arguable that disclosure in many cases is meaningless, because the offender is incapable of challenging the report effectively.[54] To a certain extent this is true and in such a case disclosure may be used as a subterfuge behind which the offender's rights are abridged unchallenged, because of the apparent fairness of the procedure. This argument is diminshing in weight as the general population becomes increasingly educated and knowledgeable. This increase in capability is especially evident when discussing juveniles and perhaps now for the first time the teen-ager in certain cases may be even more capable of reading critically and challenging his report than some adults. This problem is avoided also if the offender is represented.

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[53] Higgens, *Confidentiality of Pre-Sentence Reports,* (1964), 38 ALBANY L. REV. 27.

[54] In general, it was our experience that disclosure had no effect on the report at all. For various emotional and phychological reasons (overawed, authority figure, "playball" attitude, time of stress and uncertainty, insecurity, lack of education and experience, defeatist, lack of comprehension, etc.) the reports were seldom challenged except for trivial factual details. Much of the report is filled with professional opinion which the subject may not even understand never mind have enough knowledge meaningfully to challenge. Since much of the content is hearsay, it is impossible to challenge and any comments which the offender has about the sources' bias usually goes unrecorded as the reports are already completed.

It is then the lawyers' duty to verify questionable facts and allegations and to be able to discredit erroneous expert opinion.[55] If the subject is unrepresented, this difficulty may be abated by having disclosure preceded by an interpretative session with the social worker, at which time the report could be adequately explained.[56] The writers of such reports, being aware of the problem of comprehension should be encouraged to keep the report simple enough to be understood by the layman. If this restricts the writer too much, then he must be forced to interpret any difficult professional jargon to the subject.

Another argument raised against disclosure is that it results in sentencing delay. Although a short delay may be a minor imposition on the offender, it must be balanced against the resulting sounder sentencing policy. If delay is caused by the offender, in controverting material in the report, it is a privilege for which he must pay with his own time.

All of the above considerations apply to the case of a juvenile as equally as to the case of an adult. However, the report itself may be more influential and therefore more misleading than in adult court, because of the scope open to the judge in sentencing. Therefore, protection is more necessary. But any suggested procedure should not be inconsistent with current informal procedures. For example, although disclosure should be encouraged, formal cross-examination should give way to discussion; and acrimonious adversary proceedings should be avoided. Because of the child's more limited comprehension, oral explanation should be encouraged; and if he is represented by counsel, the counsel should play a more active, protective role than is necessary in adult court.

After weighing the preceding considerations, we make the following recommendations. The judge must have discretion to decide how, when and to whom the report will be disclosed. With the juvenile, because of the great variation in needs and the juvenile court because of the informality of procedure, the judge's discretion becomes even more important and necessary. As we trust the judge's discretion with regard to other procedures, there seems to be no reason why we should not here.

The practice regarding disclosure presently used by the Probation Services in Ontario should be extended, in a modified form to the Juvenile court. The underlying rationale of any decision by the juvenile court judge must be the best interests of the child. This standard seems appropriate in considering whether there should be disclosure or not, and if so, how. One must realize that while, in general, some form of discloseure may be in the

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[55] The lawyer, if need be, could check and challenge the report without ever disclosing the complete contents to the subject. This solution, then puts the discretion in the lawyer, as to what should be disclosed and if he is in doubt he should consult with the social worker or psychiatrist first. In discussing this with the social worker and psychiatrist and probation officer connected with In Re C. they were all amenable to such a solution and said that they would be available to any defence counsel who wished to challenge them on their reports.

[56] This was the suggestion of the psychiatrist connected with in Re C., and she pointed out that this is now the standard practice; alhough, it was not at the time of our case.

best interests of the child, in some situations the child's best interests will be served by concealment. We propose that the court should disclose that which it considers influential. But we also feel that it should be able to disregard certain material if it feels that disclosure would be harmful. In the interests of expediency the court should be able to disregard contested material which it does not consider significant. It should be able to authorize further investigation into challenged influential material. The court should discourage any undue formalization of procedure and should encourage discussion-type disclosure, hopefully making such disclosure and confrontation a part of the treatment process.

However, a failure to follow such procedural guidelines should not result in the over-turning of the disposition.[57] The court should be encouraged to take the initiative in pointing out the existence of the report and in summing up the substance on which the judge intends to rely. If any question arises as to the accuracy of the report during the hearing the court should be forced either to order a further investigation or to disclose the disputed portion to the defendant. If a question regarding the contents of the report arises, and the child is unrepresented by counsel, rather than a disclosure to the parents or the child, the court should take the initiative to have counsel appointed for the defendant or to elicit the services of duty counsel.

The suggesions that if the child is not represented by counsel then disclosure should be made to the parents is ill-conceived. Often the most decisive segments of the juvenile report are those evaluating the home and the juvenile's comments regarding the home. This material if disclosed to the parents, could have a very detrimental effect on any subsequent in-home treatment and perhaps even pose a threat to the child's physical safety. The provision for disclosure to the parents seems premised in the idea that the parent is interested in representing the best interests of the child. The almost unanimous reaction of the people working in juvenile court is that often the parents are indifferent, hostile or in a hurry to get away from the court. Often they are incompetent, that being the main reason that the child is before the court. Often, in fact, the court must actively protect the child from his parents. These observations have several important consequences. First disclosure to the parents should not be encouraged by statute. Secondly, rather than ever disclosing to his parents the youth would be better served if a lawyer was appointed for him by the court. Lastly, care must be taken when the child is represented by the parents' lawyer as there may be conflict of interests and the lawyer's loyalty will usually be to the parents, who retained him. Therefore, in some hearings even though the parents have brought a lawyer, it may be necessary for the court to appoint an independent lawyer for the child.

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[57] See New Zealand, Criminal Justice Act (1959) s. 5 (3): "Failure to show or give a copy of any report in accordance with this section shall not affect the validity of the proceedings in any court or of any order made or sentence passed by the court." and Juvenile Delinquents Act R.S.C. 1952 s. 17 (2). Although these sections may be necessary to prevent harm to the child by the overturning of a sentence on a technicality, they are difficult to justify if the failure to disclose has prejudiced the offender. In Re C. neither the factual content of the reports nor the girl's guilt was disputed and yet the disposition was still varied.