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THE CONFIDENTIAL NATURE OF PRESENTENCE REPORTS

by

LOUIS J. SHARP*

Attention to the confidential nature of presentence investigation reports of probation officers has been sharpened in recent years by the increasing use of this device in criminal law and more specifically by a Supreme Court decision in 1949 in *Williams v. People of the State of New York*¹ which bears on this point.

In the *Williams* case the Supreme Court was presented with an appeal from a decision of the Court of Appeals of New York upholding a conviction of murder in the first degree. The jury found the defendant guilty but recommended life imprisonment. The trial judge, after considering the presentence investigation report prepared by an officer in the court's probation department, imposed the death penalty. In explaining the more severe sentence, the judge indicated he was influenced by the heinous nature of the crime as brought to light at the trial, and just as cogently by the persistent criminality and degeneracy of the defendant as shown in the presentence investigation report. The report had not been shown to the defendant or his counsel, a procedure unnecessary under the law of the State of New York.²

Here seemed to be a case in which the right of a defendant to be confronted with derogatory information against him was clearly at issue. The Supreme Court affirmed the decision of the Court of Appeals of New York,³ in an opinion of considerable importance to the legal and correctional fields.

Value of the Presentence Investigation Report

Advocates of greater individualization of treatment of convicted offenders stress the importance of sentences based on sound and complete knowledge of the offender—his character, background, physical and mental makeup, and many other factors aside from the offense itself.

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¹ 337 U.S. 241 (1949).

² N.Y. CODE CRIM. P. § 931.

³ The death sentence was later commuted to life imprisonment.

Sound knowledge of the background of an offender facilitates the court's task of determining a sentence which provides requisite protection for society and aids the court in reaching a decision whether to grant probation to those defendants who may be expected to profit from it. A court does this much more accurately if provided with a careful estimate of the defendant's character, situation, and tendencies for good and evil, than if it depends on such understanding as can be gained during a trial or from the briefest kind of an interview with the defendant before the bench at the time of sentence. A number of jurisdictions provide for this important information through presentence investigations of defendants by the probation department.⁴ As one federal judge has said, "Of all the administrative aids available to the judge an adequate, comprehensive, and complete presentence investigation is the best guide to intelligent sentencing."⁵

Such an investigation includes four main essentials. A study is made of the complete social history of the individual, including his personal and family background, school and work record, economic status, physical and emotional health, moral and recreational habits, and a description of his ambitions, hopes, and fears. A community-wide investigation amasses personal information from neighbors, coworkers, friends, and others among whom the defendant has lived and worked. Delinquency and criminal records are checked through court, police, and identification agency records. Then finally, there is the analysis of the material collected, the reasons for the offense if they can be isolated with any clarity, and the recommendation by the probation officer to the court whether probation is indicated.

Three Major Areas of Discussion

The question of the confidential nature of presentence reports is a fundamental one not only for the legal profession but for those responsible for the treatment of offenders in institutions, and on probation and parole. In a discussion of this subject there are three major questions to be considered:

1. Whether the presentence investigation report should be made available to persons and agencies having a specific professional interest in it;
2. Whether the presentence investigation report should be made a

⁴ E.g. FED. R. CRIM. P. 32(c); ILL. ANN. Stat. § 37.773; N.Y. CODE CRIM. P. § 931; N.C. CRIM. P. § 15-206.

⁵ Campbell, William J., "Developing Systematic Sentencing Procedures," FEDERAL PROBATION, September 1954, p. 3.

matter of court record after sentence and thus be open to public inspection;

3. Whether the presentence investigation report should be made available to counsel for the defense and the defendant.

The differences of existing opinion vary when considered in relation to each of these questions. Let us look at each in turn.

Disclosure of the presentence report to persons and agencies with a specific professional interest in its contents.—It is generally agreed, perhaps without exception, that persons and agencies with a legitimate professional interest in the probationer or his family should not arbitrarily be denied access to the report. These include social agencies, physicians and psychiatrists, law-enforcement officers, correctional institutions, probation and parole departments, and other agencies which cooperate with the court and probation office and are available for personal services to the defendant and his family. Prosecuting attorneys would also fall within this group.

There is unusual unanimity of agreement on the need for disclosure under these circumstances. A definite provision for disclosure is made in the statutes in some jurisdictions.⁶ There is often the requirement in the law that the presentence report itself, or essentially the information in it, be provided the institution in which the defendant is to be confined or be given to the correctional authority in the state responsible for the institutional treatment of offenders.⁷ In the federal courts it is left to the discretion of the court.⁸ The writer knows of no state in which there is a specific prohibition against disclosure under these conditions.

The presentence investigation report as a part of the court record after sentence and thus open to public inspection.—This arrangement is provided for by statute in California where the law reads:

Immediately after judgment has been pronounced, the judge and the district attorney, respectively, shall cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with such reports as the probation officer may have made relative to the prisoner. . . .⁹

Disclosure in this way is not widespread in other jurisdictions. Such provision makes the presentence investigation report open to public inspection.

Disclosure of contents of presentence report to defendant and his counsel.—In regard to the disclosure of the presentence investigation report to counsel for the defense and to the defendant himself, there are

⁶ E.g. N.C. CRIM. P. § 15-206.

⁷ E.g. N.Y. CODE CRIM. P. § 931; CAL. PEN. CODE § 1203.01.

⁸ FED. R. CRIM. P. 32; 18 U.S.C. 3652; 18 U.S.C. 3655.

⁹ CAL. PEN. CODE § 1203.01. ALA. CODE tit. 42, § 23 (1940) provides that the presentence report is privileged and "shall not be available for public inspection except upon order of the court to which the same was referred."

sharply divergent views which have remained far from settled even by the Supreme Court decision in the *Williams* case. It is to a discussion of the controversy in this area that the remainder of this paper will be devoted.

Broadly, the position taken by the proponents of disclosure to defense counsel is that since the sentence affects the defendant almost as importantly as the judgment of guilty, the defendant has the same right of cross examination and rebuttal of anything the judge takes into consideration in shaping sentence that he has in conducting his defense, and further has the right to insist that the judge state publicly the factors taken into account at the sentencing.¹⁰

Those opposed to disclosure of the contents of the presentence report to defense counsel argue that due process is not violated by denial of the report to defense counsel and that disclosure will destroy the value of the presentence report.

Constitutional Rights of the Defendant

In the literature of both the legal and the correctional fields there have been discussions of due process in relation to the preparation and submission of presentence investigation reports to the court. Strong arguments have been advanced on both sides. One federal judge, for example, has made this observation:¹¹

Despite the latitude permitted by the Due Process Clause, it seems to me that a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it. *Audi alteram partem*, if it is not a universal principle of democratic justice, is at any rate sufficiently well-founded not to be departed from by a trial judge when he is performing his most important function. In those situations where a wife, a minister, a doctor or other person is willing to give confidential information to the judge provided that the defendant does not hear it, this information ought to be revealed to the defendant's counsel for scrutiny and reply. This in no sense implies "a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial" (*Williams v. New York*, 337 U.S. 241, 247) or "open court testimony with cross-examination." (*Id.* at 250.) Other methods will avoid those grave errors which sometimes follow from acting on undisclosed rumor and prejudice.

In some states, disclosure to defense counsel is made mandatory by

¹⁰ There is no question that under the Constitution (AMENDMENTS V, VI, XIV) a person may not be convicted in either a federal or a state court without having had the opportunity to hear and refute evidence against him. See also Note, 49 Col. L. Rev. 567-572 (1949).

¹¹ Wyzanski, Charles E., Jr., "A Trial Judge's Freedom and Responsibility," 65 Harv. L. Rev. 1281, 1291 (1952).

law. This is the case, for example, in Alabama¹² and in Ohio.¹³ The same rule is well established in England and Canada.¹⁴ In many other states, the court is granted specific authority to permit inspection of the presentence report by authorized individuals, presumably including the defendant and his counsel.¹⁵

The development of the Federal Rules of Criminal Procedure may best exemplify the controversy in this area. The issue of the confidential nature of presentence reports arose early in the formulation of the Rules.¹⁶ The Advisory Committee appointed by the Supreme Court in February, 1941 included in the draft recommended to the Court the following language:

. . . After determination of the question of guilt, the report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate.¹⁷

This language was a clear directive that the contents of the presentence report be disclosed to counsel for the defendant. Although the court was given the power to impose conditions under which disclosure was to be made, there would have appeared no logical way in which the court could have ordered withholding of the information from the defendant himself.¹⁸

There followed considerable discussion of the possible effects of such a practice. Judges accustomed to treating the reports as confidential expressed great apprehension that disclosure would seriously impair the

¹² ALA. CODE tit. 42, § 23 (1940) reads in part: ". . . in no case shall the right to inspect said report be denied the defendant or his counsel after said report has been completed or filed."

¹³ LAWS OF 1951, S.B. 306, GEN. CODE § 11521-1 says: ". . . (the report) . . . shall not be considered by such judge . . . at any stage of the proceedings . . . unless and until the full contents of such report shall have been made readily available and accessible to all parties to the case or controversy or their respective counsel."

¹⁴ For a thorough review of the English and Canadian rule, based on the statutes and cases, see *Rex v. Stevenson*, Court of Appeal of British Columbia, June 22, 1951. (From footnote 13 in "*Probation and Due Process of Law*," FOCUS, March 1952, p. 46.)

¹⁵ E.g. N.C. CRIM. P. § 15-207 says: "All information and data obtained in the discharge of official duty by any probation officer shall be privileged information . . . and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this article to receive reports, unless and until otherwise ordered by a judge of the court or the director of probation." See also KY. REV. STAT. § 439.210 and 439.220 (1942); MD. LAWS 1931, c. 132, § 1-351F; FED. R. CRIM. P. 32; 18 U.S.C. 3652.

¹⁶ Which ultimately went into effect on March 21, 1946.

¹⁷ Rule 34(c)(2) as recommended in *Federal Rules of Criminal Procedure, Report of the Advisory Committee* 34 (June 1944).

¹⁸ As one federal judge said: ". . . the relationship between attorney and client is and should be one of great intimacy and it would certainly be a novel, and I think unfortunate, innovation in judicial procedure to sanction judicial disturbance of that relationship. . . . An attempt by the court to circumscribe the right of counsel to communicate with his client by imposing a condition that the contents of the report should be withheld from the client would tend to undermine the confidence between client and attorney." FEDERAL PROBATION, October-December 1944, p. 3.

value of the investigation. Those in favor of disclosure were just as vehement that the defendant should see the information on the simple constitutional grounds that he was entitled to be confronted with the evidence against him.

Judge Carroll C. Hincks of the United States District Court for the District of Connecticut,¹⁹ writing in opposition to the proposed rule²⁰ contended that the requirement that the presentence investigation report be made available to counsel for the defense "will destroy the confidential status of the presentence report."²¹

Judge Hincks was of the opinion that the proposal for disclosure:

. . . stems not from actual experience which demonstrates that the existing practice is unsatisfactory or defective, but from a vague, quixotic notion that "fairness" requires 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.²²

Judge Hincks thinks that:

. . . the advocates of the rule have unconsciously confused the situations existing before and after conviction. Before conviction the defendant is presumed to be innocent. He is entitled to be confronted with the witnesses against him. He may insist that all hearsay and much opinion evidence be excluded. Even prior convictions are not admissible on the issue of his guilt. All those constitutional guarantees terminate with conviction. That fact, though not disputed, seems forgotten.²³

The Supreme Court of Illinois once declared, in effect, that a difference does result from conviction.²⁴ The court said this:

. . . 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 a presumption of innocence they are naked criminals, hoping for mercy but entitled only to justice. . . .²⁵

Another writer, however, contended that

. . . the argument that a man is entitled to the protection of the Constitution while it is being determined whether he shall be liable to sanction by the state, but not in the determination of what that sanction will be, is based on a distinction of dubious validity. For it would seem that even after conviction a man is not shorn of all constitutional protections.²⁶

The Supreme Court of the United States decided the matter in the federal courts by omitting the stipulation which required that presentence

¹⁹ Later named to the United States Court of Appeals for the Second Circuit.

²⁰ FED. R. CRIM. P. 34(c) (2). See footnote 17, *supra*.

²¹ FEDERAL PROBATION, October-December 1944, p. 3.

²² *Id.* at 7.

²³ *Ibid.*

²⁴ *People v. Riley*, 376 Ill. 364, 33 N.E. 2d 872 (1941).

²⁵ *Id.* at 368, 875.

²⁶ *Op. cit. supra*, note 10, at 568-569.

reports be made available to the interested parties, and the pertinent rule²⁷ now reads as follows:

The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

Thus by implication the decision whether to make the presentence report available to the interested parties after conviction is left to the discretion of the court.

The Supreme Court of the United States expressed the opinion in the *Williams* case²⁸ that there are sound reasons for distinguishing between trial procedure and sentencing.²⁹ The Court said this:

Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.³⁰

The Court did not consider that imposition of the death penalty altered the principle. It said:

We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.³¹

In discussing due process of law as it relates to probation, Sol Rubin pointed out in a recent article in which he referred to the *Williams* case:

. . . It was inevitable that the U. S. Supreme Court would uphold a statute which provided for a presentence report to the court based on information given by persons outside the courtroom not confronted by the defendant or subjected to cross-examination by him. The court said, "Most of the information now relied on 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. . . . Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."³²

Rubin admits that termination of the trial ends the defendant's protection by the rules of evidence. He finds it interesting, however, that

. . . the Supreme Court relied on common law sentencing practice rather than on the probation statute, despite its tribute to the modernity of probation laws. In its opinion the court said—and it appears the precedent

²⁷ FED. R. CRIM. P. 32(c)(1), 18 U.S.C. 3652.

²⁸ 337 U.S. 241 (1949).

²⁹ See further, Henry P. Chandler, "Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts," 37 VA. L. REV. 831-835 (1951).

³⁰ 337 U.S. 241, 247 (1949).

³¹ *Id.* at 252.

³² Rubin, Sol, "Probation and Due Process of Law," FOCUS, March 1952, p. 40.

cited is sufficient to justify the holding—"Before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders." The decision, like most due process decisions, is a negative one, ruling that a particular practice, restrictive of the defendant's rights, does not violate constitutional and statutory due process requirements.³³

Judges who follow the practice of treating presentence reports as confidential and use their discretion in imparting information to others find their philosophy well stated, according to Henry P. Chandler,³⁴ in these words of Mr. Justice Black in the *Williams* case:

The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.³⁵

Disclosure Results in Sentencing Delays

Delay in sentencing has been proposed as another major argument against disclosure.

Traditionally, a defendant in a criminal proceeding is entitled to a trial without delay. The Constitution of the United States provides for this.³⁶ The stipulation for sentence without undue delay is added to the probation acts of many states, if not explicitly, at least by implication. To speed up the sentencing process, it is generally emphasized that the probation officer shall make the necessary presentence investigation "promptly,"³⁷ or "without unreasonable delay."³⁸

The objective of speed is salutary. For sentence to be long delayed while the offender is on bond is to breed disrespect for the law.³⁹ For it to be delayed while the defendant is in custody is to provide incarceration without purpose. Some delay in sentence for the purpose of providing sufficient time for the preparation of a presentence investigation report, although laudable, has been troublesome to courts and probation officers alike. And as Judge Hincks said:

If the rule requiring a disclosure of the report be adopted, defense counsel can properly urge that the only reason for the rule was to afford opportunity

³³ *Ibid.*

³⁴ *Op. cit. supra* note 29, at 834.

³⁵ 337 U.S. 241, 251 (1949).

³⁶ U.S. CONST. AMEND. VI.

³⁷ E.g. N.Y. CODE CRIM. P. § 931; ILL. ANN. STAT. § 37.773.

³⁸ FED. R. CRIM. P. 32(a) and (c).

³⁹ Hincks, *op. cit. supra* note 21, at 7.

for an independent investigation of material therein and can then protest in all sincerity that their pressing trial engagements elsewhere will prevent them from promptly undertaking their investigation of the subject matter. Such tactics might easily result in delays of several weeks.⁴⁰

Judge Hincks goes on to add that the trial judge will face an added dilemma:

He will be accused of frustrating the rule unless he affords defense counsel reasonable opportunity to verify the report in the field without interference with his court assignments elsewhere, and yet he must so contrive that sentence shall not be unduly delayed. The practical result will be that the offender whose lawyer is most in demand for trial work will have the most success in stalling off the dreaded day of sentence. And it is common knowledge that the most notorious offenders often are served by the busiest lawyers.⁴¹

On the other hand, it may be said that the argument of delay is not a strong one. One of the weaknesses in many jurisdictions is hasty and offhand sentencing. A delay may have value if due to the preparation of a presentence investigation report. Thus a contribution to a sounder sentencing policy is made. As Rubin says, "If still further delay is introduced by the defendant in controverting material in a presentence report, it is a privilege for which he, not the court, pays in time."⁴²

It may even be said that argument about statements in the presentence report would not often be time-consuming. Large portions of a report would likely not be challenged. Other points under challenge could be proved or disproved quickly. One writer mentions a time-saving compromise:

If any statement denied is difficult to prove, and the sentencing court does not consider the issue sufficiently important to warrant the trouble of having evidence produced, the court may simply disregard the statement. It is only where the truth or falsity . . . will be highly determinative . . . that . . . proof will become necessary.⁴³

It has been pointed out too that if a hearing controverting material in the report is permitted, the manner of conducting it is at the discretion of the judge. No formal evidentiary rules are required, unless the judge desires them.

Disclosure Assures Impartiality of Report

Another question raised is that since appellate courts may have access to presentence reports, it follows that the defendant needs to have access to the report if he is to make a sensible decision whether to appeal on

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Op. cit. supra* note 32, at 44.

⁴³ *Op. cit. supra* note 10 at 572.

⁴⁴ E.g. N.Y. CODE CRIM. P. § 931.

the basis of material in the report. In effect, giving the defendant access to the report may promote the requirement in many laws that the report be "accurate" and "full."⁴⁴ Under such a statute, it would follow that due process requires an accurate report. And if this is so, must not some authority outside the trial judge for whom the report is made have an opportunity to scrutinize the report and judge its accuracy and completeness.

In Illinois, it has been held that such scrutiny may be made by a court higher than the sentencing court. In *People v. Adams*,⁴⁵ affidavits in contradiction of the presentence report had been presented to the trial court and weighed against the probation officer's report. Both statements were considered by the Supreme Court of Illinois which said that the presentence report is not a document inviolate in the bosom of the court, but is also subject to review by an appellate court. If the report is found not to be complete, the defendant's rights are held to have been infringed; that due process demands a proper probation report. In reversing the lower court and ordering a new trial in the *Adams* case, the court said,⁴⁶ "It cannot be said in this condition of the record that the report of the probation officer was either of that accurate or prompt character which the statute requires."⁴⁷

But would disclosure of the presentence report to defendant and his counsel assure its accuracy? Judge Hincks thinks it would take a great deal more than that. He believes this may be the result of a dispute on accuracy:

Normally counsel will ask his client whether the detail of the report is true, but all familiar with the task know how commonly a convicted defendant will deny every unfavorable feature of such a report. Obviously such a denial is of far from conclusive effect. Defense counsel will then feel obligated to make an extended verification in the field. If this is conscientiously done, every essential element of the report, at least in the vast majority of cases, will be confirmed and all the additional labor on the part of counsel and possibly a substantial addition to his fee will have been for naught.⁴⁸

What if, even then, the presentence report is still impugned? What can be done? Judge Hincks believes that safeguards of fallibility can be developed in another way. In a workmanlike report ". . . the probation officer will check with the defendant much of the factual data which he has obtained from other sources."⁴⁹ If conflicts still remain, the officer will be on notice that his report is being challenged and ". . . may be

⁴⁵ 379 ILL. 323, 40 N.E. 2d 730 (1942).

⁴⁶ *Id.* at 3.

⁴⁷ The statute referred to says: "Before granting any request for admission to probation, the court shall require the probation officer to investigate accurately and promptly the case of the defendant making such request. . . ." ILL. ANN. STAT. § 37.773.

⁴⁸ FEDERAL PROBATION, October-December 1944, p. 4.

⁴⁹ *Id.* at 5.

trusted . . . just as much as the defendant's lawyer, to undertake any further investigation that seems desirable." In this way, an unresolved conflict ". . . can be as well brought to the attention of a judge in the report itself as by counsel in open court."⁵⁰ The judge can then either disregard the item in dispute or, if it is of controlling interest, call for more information or evidence. Judge Hincks concludes:

Thus in the great mass of cases a cautious judge, without disclosing the contents of the report and in practical effect inviting an attack on its accuracy, can in a few minutes prior to the imposition of sentence accomplish all the verification that can possibly be useful. Thus viewed, the disclosure of the report for verification by partisan counsel seems wholly unnecessary as a safeguard of accuracy.⁵¹

Effects on the Correctional Process

What is the effect of disclosure or nonaccess of the presentence report to defendant and his counsel, considering the matter as part of the correctional process for offenders? There are really two problems involved here.

The first is that disclosure of the report to defense counsel may destroy the confidential nature of the investigation and make it difficult, if not impossible, for probation departments to compile meaningful and searching reports. Secondly, disclosure may affect the attitude of the offender and his relationship with the court, the probation officer, and correctional authorities in general.

Destruction of the confidential nature of the report.—What of the destruction of the confidential nature of the report and consequent drying up of sources of information? This is the argument often used by the opponents of disclosure. Rubin feels that "Probably there would be no opposition to giving the defendant . . . access to the report if it were felt . . . (this) . . . would not damage the presentence investigation."⁵² Furthermore, he believes that the "usual report" could be shown quite safely to the defendant; that since a great deal of the information comes from public records and from sources indifferent to the defendant, disclosure does no harm. Even then, in his judgment, there would be adequate means of safeguarding the identity of confidential informants.⁵³ He supports this position further by referring to some professionals in the social work field who within recent years have come to believe that a sharing of so-called confidential information with the person being helped

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Op. cit. supra* note 32, at 9.

⁵³ *Id.* at 10.

"will insure maximum value in the use of collateral information."⁵⁴

At least one supporter of disclosure admits the possibility of a partial drying up of sources of information. But this, he contends:

. . . is an unavoidable consequence of any system of criminal administration which requires that the defendant be informed of the evidence against him, and would seem to be no more than one of the many burdens imposed on the state in any such system because of the overriding importance of avoiding falsity and oppression of the individual.⁵⁵

These are not compelling arguments to opponents of disclosure, particularly to probation officers who are responsible for the investigations. In their judgment, disclosure would dry up sources of information and make it difficult, if not impossible, to amass meaningful data. Judge Hincks thinks as much.⁵⁶

It is not necessary here to spell out the obvious handicaps probation officers would encounter in dealing with the medical profession (particularly psychiatrists), government agencies (such as the military services, Veterans Administration), social agencies, families, employers, and neighbors if, under a system of disclosure, these sources were told that any information they would give would be disclosed to the defendant and that the chances were good they would become involved in time-consuming and unpleasant controversies in open court. The rules of many such agencies state that the information in their files is confidential and is to be divulged only to official persons and agencies, and then only under rigid requirements covering use of the information. Even individuals without limitation on disclosure would prefer not to give information under any arrangement for unlimited disclosure.

The probation officer would thus be reduced to including in the report only the most elementary factual information from public records and statements about the defendant which either were inconsequential or were in the defendant's favor. The result 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.

Effect on the attitude of the defendant.—What is the effect of non-disclosure on the defendant himself? To turn again to Rubin. If the report is not shown to the defendant,

. . . what is the effect on his attitude of the realization that he was not trusted, that an account and evaluation of his own history was concealed from him? What of his feeling of unfairness that the crucial matter of

⁵⁴ *Ibid.* Quoted by Rubin from Helen H. Perlman, "The Case Worker's Use of Collateral Information," SOCIAL CASEWORK, October 1951.

⁵⁵ *Op. cit. supra* note 10, at 571.

⁵⁶ *Op. cit. supra* note 21, at 3.

sentence has been done without his knowing the basis for it, without an opportunity to contribute to it with knowledge of what it contains?⁵⁷

The defendant speculates on what is known and reported. Later, on probation, "he may be on guard because the court and probation officer have not trusted him with information he feels should be his."⁵⁸

Practically, this is not the way it works out. Probation treatment (and treatment begins with the initial presentence contact!) is based on close person-to-person relationship between officer and probationer. Mutual understanding, confidence, and a sense of fair play and justice characterize the effective handling of probationers.⁵⁹ This interplay of confidence anticipates a mutual sharing of knowledge throughout. In this way, the probationer comes to learn of derogatory information against him; but from the probation officer, not from a presentence report! Such mutual confidence comes through the personal relationship of officer and client. Reading a presentence report will not do it; more likely it will destroy any possibility of later understanding.

Conclusion

The two factors of greatest importance in a discussion of the confidential nature of presentence investigation reports are these:

1. Whether denial of the presentence reports to counsel for the defendants violates or does not violate rights of defendants required by due process of law; and
2. Whether disclosure of the report to counsel for the defense destroys or does not destroy the value of the presentence investigation.

Perhaps the clearest answer to both these points of debate has come from the Supreme Court in the *Williams* case, described earlier.

On *due process*, the Court said that there are sound reasons for distinguishing between trial procedure and sentencing procedure, and that a sentencing judge should not be denied pertinent information by a requirement "of rigid adherence to restrictive rules of evidence properly applicable to the trial."⁶⁰

On the possibility of *destruction of the value of the presentence investigation*, the Court had this to say:

Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.

⁵⁷ *Op. cit. supra* note 32, at 9.

⁵⁸ *Ibid.*

⁵⁹ See e.g. *Probation and Related Measures*, UNITED NATIONS, p. 247 (1951) *passim*; THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, Vol. II, Probation, Chapt. VIII.

⁶⁰ 337 U.S. 241, 247 (1949).

Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied 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. . . .⁶¹

These are compelling words.

⁶¹ *Id.* at 249.