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Leon R. Yankwich

LEGAL IMPLICATIONS OF, AND BARRIERS TO, THE RIGHT TO KNOW

LEON R. YANKWICH*

> "Accordingly, if man's ultimate happiness does not consist of external things, which are called goods of fortune; nor in goods of the body; nor in goods of the soul, as regards the intellectual part, in terms of the life of moral virtue; nor in terms of the intellectual virtues which are concerned with action, namely art and prudence; it remains for us to conclude that man's ultimate happiness consists in the contemplation of truth." (St. Thomas Aquinas, ed. Pegis, 1945, Vol. II, pp. 59-60.)

A consideration of the legal implications and barriers of the right to know requires a statement of certain ethical principles in the light of which the discussion must proceed. This discussion is a part of an inquiry into the problem of "communication in a pluralistic world," back of which is the philosophy expressed by Gabriel Marcel,—the relationship between "the I and thou" (le moi et l'autre) in the manner of communicating ideas or information. Marcel has emphasized the concept of personality as implying *responsibility* not only to oneself but to others. As he has put it subjectively,

> "I recognize my responsibility jointly to myself and to the other and that this conjoining is so characteristic of a personal undertaking *(engagement)* that it is the very mark of personality."[1]

I

ETHICS AND DEMOCRACY

In discussing the problem, it is important to bear in mind the dual approach, (a) the point of view of the communicator or transmitter and (b) that of the person to whom the communication goes. At the outset, we are confronted with the problem of definition. If we dealt with mechanical transmitters, we could define information as the transmission of a fact or facts from one person to another. But as the *means* is the individual mind, information takes on a personal tinge. Except when transmitting mathematical facts, the transmitter coordinates and classifies them. So information ceases to be a static, mechanical act. It becomes a personal, dynamic act. In a sense, all information is a bit of life "seen through a temperament."[2]

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*Author of Numerous Books; Judge, U.S. District Court, Southern District of California, 1935; Chief Justice since 1951.

[1] Gabriel Marcel, HOMO VIATOR (1947) p. 26.

[2] Leon Brillouin: "Science et Information," 31 N. NOUVELLE REVUE FRANCAISE, July, 1955, p. 55.

Another student of the problem has stated that

So we are back to the problem of responsibility. For democracy implies responsibility of one to the other and of those who govern to the community. It springs from a belief in the worth of the individual. When asked to expound the meaning of the *new* doctrine, Paul gave as its essence:

> " God that made the world and all things therein, . . . giveth to all life, and breath, and all things;
> "And hath made of one blood all nations of men for to dwell on all the face of the earth, . . .[3]

In his epistle to the Gallatians, he states the universalism of brotherhood in the famous sentence:

> "There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female; for ye are all one in Christ Jesus.
> "And if ye be Christ's, then are ye Abraham's seed, and heirs according to the promise."[4]

These go back to Christ's own words, characterizing the true Christians as "Children of God"[5] made "equal to us."[6] This is the answer to Malachi's, "Have we not all one father? hath not one God created us?"[7] Because it is based on this belief in the worth and trust of the individual, democracy postulates *voluntary assent* as the foundation for government. By contrast, authoritarian government's distrust the individual. They seek to shackle the human mind. And one of the means of achieving this end is the withholding of information.

In English history the movement against secrecy of the proceedings in Parliament was a part of the struggle for greater constitutional

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". . . the selection of a fact is an implicit expression of opinion" and has defined "information" as
". . . a *detached presentation* of materials capable of use by anybody in the formation of an opinion." Rene Maheu, "The Right to Information and the Right to the Expression of Opinion," in HUMAN RIGHTS, A symposium edited by UNESCO, p. 219, 1949 (Emphasis added)
Cf. Émile Zola's definition of a work of art:
"Il est certain qu'une oeuvre ne sera jamais qu'un coin de la nature vu a travers un temperament." (One thing is certain that a work of art will always be a corner of life seen through an individual temperament.) (Émile Zola, "Le Naturalisme au Théatre," in LE ROMAN EXPERIMENTAL, nouvelle edition, p. 111 (1923).

[3] 17 Acts: 24-27.

[4] 3 Galatians: 28-29.

[5] 20 Luke: 36.

[6] 20 Matthew: 12.

[7] 2 Malachi: 10. In a brief sentence, attributed to the great French poet Alphonse de Lamartine, the ethical implications of freedom are epitomized:
"La liberté est plus que l'esprit humain: C'est la conscience humaine."
(Liberty transcends the human spirit: It is the very conscience of man.)
(Quoted in John Lord O'Brian, NATIONAL SECURITY AND INDIVIDUAL FREEDOM, p. 76, Note 17, 1955)
It is attributed to Lamartine in G. E. Fassnacht, ACTON'S POLITICAL PHILOSOPHY, p. 200, 1952.

freedom begun during the reign of William and Mary. Macaulay has commented:

> "It never occurred to any one of these who were zealous for the Triennial Bill that every argument which could be urged in favour of that bill was an argument against the rules which had been framed in old times for the purpose of keeping parliamentary deliberations and divisions strictly secret. It is quite natural that a government which withholds political privileges from the commonalty should withhold also political information. But nothing can be more irrational that to give power, and not to give the knowledge without which there is the greatest risk that power will be abused. What could be more absurd than to call constituent bodies frequently together that they might decide whether their representative had done his duty by them, and yet strictly to interdict them from learning, on trustworthy authority, what he had said or how he had voted?"[8]

The right to publish the debates of Parliament was not established until 1771 and 1772. And, says Buckle,

> ". . . for the first time the people were able to study the proceedings of the national legislature, and thus gain some acquaintance with national affairs."[9]

This came as the result of the long struggle begun early in the eighteenth century between the rising English free press and the two houses of Parliament. George III opposed "this extention of popular rights." In 1771, he wrote to Lord North:

> "It is highly necessary that this strange and lawless method of publishing debates in the papers should be put a stop to."[10]

But neither he, nor the entrenched aristocracy of Parliament could stem the democratic movement. The American colonies reflected the spirit of this revolution. Leaders like Edward Livingston, Patrick Henry and James Madison asserted the right to free flow of information concerning public matters and condemned secrecy in governmental affairs as inimical to free government.[11]

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[8] Thomas Babington MacCaulay, THE HISTORY OF ENGLAND, (Am. Ed. Vol. IV) p. 248, 1856. The Supreme Court of the United States, speaking through Mr. Justice Sutherland, in an unanimous opinion, has stated:

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, *the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.*" (Grosjean v. American Press Co., 297 U.S. 233, 250, 1936) (Emphasis added)

[9] Henry Thomas Buckle, HISTORY OF CIVILIZATION, World Classics pocket edition, Vol. I, p. 351, 1911.

[10] *Ibid., loc. cit.*, p. 401. See, Frederick Seaton Siebert, FREEDOM OF THE PRESS IN ENGLAND, pp. 230, 246-273, 1952.

[11] Edward Livingston was emphatic:

> "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and

Rightly. Because the right of a free community to the free flow of information is paramount. Governmental activities do not allow differentiation between what is private and what is public. All the business which persons in public office, high or low, perform is of a *public nature.* So there is no conflict, as in the case of privacy, between individual rights and the public's demands,—but rather between the right of the public to be informed and the arrogative right of persons in public office to withhold the information.

II

KNOWLEDGE AND FREE GOVERNMENT

The adoption in the Federal and State Constitutions of the guarantee of freedom of speech and press and of the other democratic rights led to the recognition of the right of access and publication of the activities of public men and public bodies. At the present time, the right of the people to have information as the activities of persons chosen in a democratic way is thoroughly established and cannot be challenged. With the development of what we call "mass civilization," there has been a great increase in the number and variety of media of communication, which play an important part in the education of everyone living in a democratic society. And if they are to perform their proper function in our society, there must be a free flow of information towards them which *they, in turn, are,* in *duty bound,* to communicate to the public.

In sum, secrecy breeds irresponsibility and tyranny. The right to know is implicit in the democratic idea of responsibility of those who govern. And the right to circulate information is a part of the guaranty of free speech.[12] Nothwithstanding this, at all levels of government there have been attempts, in recent years, to deny access to the activities of public men and bodies to such an extent that the American Society of Newspaper Editors sponsored the research which resulted in the publication in 1953 of a book showing the extent to which access to activities of public men and to public records and proceedings is being denied.[13] It appears from this publication that

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reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured." (Edward Livingston, WORKS, Vol. I, p. 15)

Patrick Henry stated in the constitutional convention that

". . . to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country." (ELLIOTT'S DEBATES, Vol. III, p. 170)

For Madison's views, see Note 105, *infra.*

[12] People v. Armentrout, 118 C.A. (Supp.) 761, 769-771, (1931); Lovell v. Village of Euclid, 303 U.S. 444, 452, (1938).

[13] Harold L. Cross, THE PEOPLE'S RIGHT TO KNOW, 1953. Since this article was prepared a book dealing with the evils of news suppression and propaganda has been published by the former Chief Executive of the Associated Press.

in thirty-two states legislative sessions *must be* open with certain exceptions. Two states, Idaho and New Mexico, require open sessions *at all times.* In fourteen states there is no statutory access provided but by custom and public opinion, the right is recognized. However, these provisions do not seem to apply to the sessions of legislative committees which determine whether their sessions shall be open or secret. As is well known, the United States Senate and the House of Representatives determine which of their sessions shall be public. And, because there has been, in late years, dissatisfaction with the manner in which access has been denied upon one ground or another, the problem has become very urgent.

III

JUDICIAL PROCEEDINGS

A. The Right to a Public Trial. Before discussing further the problem as it relates to executive, legislative and administrative bodies, it is well to state that, subject to a limited rule of exclusion of certain members of the public, the right of the public to access of judicial proceedings of a criminal nature is absolute. The Sixth Amendment to the Constitution of the United States guarantees to a person accused

". . . the right to a speedy and public trial."[14]

The right to a public trial was established in English common law although scholars are not in agreement as to the date. Recognition of the right of public trial in both civil and criminal cases is found in English law writers in the Sixteenth and Seventeenth centuries.[15] Blackstone referred to it as one of the excellencies of the common law system.[16] Forty-one state constitutions recognize the right in criminal cases.

Whenever the question has arisen in criminal cases, the federal courts have held the denial of a public trial to be a denial of due process.[17] The cases are not in accord as to the nature of the right.

See, Kent Cooper, THE RIGHT TO KNOW, AN EXPOSITION OF THE EVILS OF NEWS SUPPRESSION AND PROPAGANDA, (1956).

[14] U.S. CONST. AMEND. VI.

[15] Max Radin, *The Right to a Public Trial,* 6 TEMPLE LAW REV. 381, (1930).

[16] BLACKSTONE, COMMENTARIES III, c. 23, II p. 375, (Jones' ed.) p. 1983.

[17] Reagan v. United States, 202 F. 488, (9th Cir. 1913); Davis v. United States, 247 F. 294, (8th Cir. 1917); Hodge v. United States, 13 F.2d 596, (6th Cir. 1926); In re Oliver, 333 U.S. 257, 266-278, (1948); Tanksley v. United States, 145 F.2d 58, (9th Cir. 1944); United States v. Kobli, 172 F.2d 922, 3rd Cir. 1949). Generally speaking, the federal constitutional guarantees as to trials have been held not to apply to state prosecutions, Games v. Washington, 277 U.S. 81, 1928; Fay v. New York, 332 U.S. 261, 288, (1947). However, later cases consider the guarantee of a public trial as a part of due process under the Fourteenth Amendment. In re Oliver, 333 U.S. 257, 271-272, 1948. All states provide for public trials either by constitutional or statutory provisions. See, 14 AM. JUR., CRIMINAL LAW, §§139-143.

Some of the earlier cases take the view that the right *is not* absolute.[18] Later cases hold the right to be absolute, especially if the exclusion *is not* limited to immature persons in certain types of cases, but is applied to the *public in general.*

A federal case from the Ninth Circuit, already referred to, has stated the ground against general exclusion:

> "After mature consideration we have reached the conclusion, in accord with the present views of the two United States Courts of Appeals which have passed upon the precise question, that the Sixth Amendment precludes the general indiscriminate exclusion of the public from the trial of a criminal case in a federal court over the objection of the defendant and limits the trial judge to the exclusion of those persons or classes of persons only whose particular exclusion is justified by lack of space or for reasons particularly applicable to them."[19]

A New York State case which, in recent years, attracted nation-wide attention reached a similar conclusion. There, in a criminal prosecution for compulsory prostitution, the court excluded the public generally, *including the press.* On appeal the highest court of New York held this to be denial of a public trial guaranteed by the law of New York.[20] The Court used this language:

> "The public trial concept has, however, never been viewed as imposing a rigid inflexible straightjacket on the courts. . . . Accordingly, it is recognized that the court may limit the number of spectators in the interests of health or for sanitary reasons or in order to prevent overcrowding or disorder. . . . It is also recognized that the court may temporarily exclude spectators, where necessary to enable an immature or emotionally disturbed witness to testify. . . .
> "The authority thus residing in the trial court must be acknowledged as an implicit qualification of the general rule of openness of judicial proceedings, . . . , notwithstanding the wording of the Judiciary Law section. . . . Section 4 undoubtedly has the effect of *extending the guarantee of public trial to all cases, whether civil or criminal, with the exceptions there set forth.* But, beyond that, it presumably does no more than to reaffirm in terms of general application the principle of publicity in judicial proceedings, subject to the qualifications inherent therein."[21] (Emphasis added)

But while the New York court held the order of general exclusion to be a denial of a constitutional right guaranteed to the defendant, in an action instituted by one of the press associations against the

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[18] Davis v. United States, *supra,* note 17; Reagan v. United States, *supra,* note 17.
[19] United States v. Kobli, *supra,* note 17, 922, 923.
[20] N. Y .CODE OF CRIMINAL PROCEDURE, §8; N. Y. CIVIL RIGHTS LAW, §12; N. Y. JUDICIARY LAW, §4.
[21] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769, 772, (1954).

Judge presiding at the trial to compel him to rescind the Order, the court held that the guarantee of a public trial is not one which could be enforced by the public. The decision was by divided court, the majority opinion written by Judge Fuld, being concurred in only by two judges. A third judge concurred in the result in a separate opinion. There was a strong dissent by Judge Froessel, concurred in by Judge Dye, in which it was insisted that the guarantee created a right *in the public* which they could enforce, independently of the defendant:

> "Since the public may attend court sittings, how may their right be enforced in the case of an invalid exclusion? Why may not representatives of the press as members of the public at large do precisely what they did here, and thus test the public right? They are neither meddlers nor outsiders, interfering with or injecting themselves into the conduct of a trial, nor do they seek to control the course of the proceedings. They seek to report what they are entitled to 'see, behold and hear.' If they transgress beyond the pale of the law, they lose the privilege granted them under section 337 of the CIVIL PRACTICE ACT and are answerable for violation of the PENAL LAW (see arts. 106, 126)."[22]

Federal rules and state constitutional or statutory provisions extend the guarantee of public trial to civil cases. Subject to the right of the court to limit attendance in certain types of cases, the trial of a civil law suit is considered *public* business, to be conducted openly "for all to see."[23]

B. Reports of Judicial Proceedings. The right of public access to trials in civil and criminal cases implies the right of persons attending it, including newspaper representatives, to make fair and true reports of the proceedings. Under the view expressed by the Court

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[22] United Press Association v. Valente, 308 N.Y. 71, 123 N.E.2d 777, 789, (1954).

[23] 53 AM. JUR., TRIAL §26; 88 C.J.S., TRIAL, §28-40; CAL. CODE OF CIV. PROCEDURE, §124; Palestroni v. Jacobs, 10 N.J. Super. 266, 77 A.2d 183, 184, (1940); Maduro v. Maduro, 62 C.A.2d 776, 779, 145 P.2d 683, (1944); Wiedenhaupt v. Hoelzel, 254 Wis. 39, 35 N.W.2d 207, 209, (1948); Rea v. Rea, 195 Ore., 252, 245 P.2d 884, (1952). As to exclusion of witnesses in divorce, criminal conversation and similar cases, see, e.g., CAL. CODE OF CIV. PROC. §125. For permissive secrecy as to other judicial and non-judicial proceedings, see statutory references in Notes 64-78, *infra*. As to Federal Courts, the rules provide that "all (civil) trials upon the merits shall be conducted in open court." (Rule 77(b), FED. RULES OF CIV. PROC.)
The *right of the public* is recognized by students of the problem. Radin states:
> "Is it a fact that there is a public right to see how justice is done? I think there should be one, and there is no reason why the court should not create it." (Max Radin, *The Right to a Public Trial,* 1932, 6 TEMPLE LAW Q., 381, 392)

It is implicit in the language of one of the cases cited that
> ". . . the trial of a law suit is public business usually to be conducted *openly for all to see.*" (See Palestroni v. Jacobs, *supra*)

And see cases in Note 39, *infra*.

of Appeals of New York[24] this right would be rendered illusory because an exclusion of newspapers would make it impossible for them to report proceedings except through the relayed reports of others. Most of the states specifically recognize the publication of fair and true reports in a public journal of judicial proceedings. Illustrative is CALIFORNIA CIVIL CODE, Section 47, subdivision 4.

The statutes of Wisconsin specifically provide:

> "The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, . . . proceeding authorized by law."[25]

The question has arisen whether pleadings or complaints filed with a court clerk and which have not yet been read in open court or have been the subject of some judicial act are covered by this privilege. The older cases made the distinction between a complaint and a judicial proceeding,[26] even holding that the qualified privilege of publication applied only to proceedings on the merits, and *hearings in open court.* But this rule has been modified and the privilege now attaches to reports of *ex parte* and preliminary proceedings. Under it a fair report of the charges made in a bill of equity which has been presented to the court, and upon which the court has acted by making an order that the defendants appear and show cause why an injunction should not issue against them is privileged.[27]

Hence, the issuance of an order to show cause *re* alimony makes the publication of the contents of the complaint in an action for divorce qualifiedly privileged. However, the present tendency in some courts is to consider a complaint, which is *the starting point,* a part of judicial proceeding. Both the Appellate Division and the Court of Appeals of New York have so held.[28]

A New York woman brought suit against a newspaper for the publication of a news item which referred to the fact that a summons had been served against her and reciting the alleged facts in the case. Before the complaint was filed, the proposed suit was settled out of court. The woman sued for libel, contending that the publication was

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[24] United Press Association v. Valente, *supra,* note 22.

[25] WIS. STATS. (1953) §331.05.

[26] Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258, (1907).

[27] PROSSER ON TORTS, p. 624, (2nd ed. 1955); 33 AM. JUR., LIBEL AND SLANDER, §157; 53 C.J.S., LIBEL AND SLANDER, §127; Metcalf v. Times Publishing Co., 20 R.I. 674; 78 Am. St. Rep. 900, (1898); Lundin v. Post Publishing Co., 217 Mass. 213, 104 N.E. 480, (1914); Thompson v. Boston Publishing Co., 285 Mass. 344, 189 N.E. 210, (1934); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E.2d 5, (1945); Notes, *Privilege of Pleadings,* 52 A.L.R. 1438, (1927), 104 A.L.R. 1124, (1936).

[28] Campbell v. New York Evening Post, Inc., 219 N.Y. App. Div. 169, 218 N.Y.S. 446, (1926).

untrue, that it was false to say that she had been sued when only summoned and that the publication of news concerning the issuance of a summons was not privileged.

The New York Court of Appeals held that

> ". . . a lawsuit, from beginning to end, is in the nature of a judicial proceeding."[29]

When the question came before the California courts in 1935, they took the same view without any reference to the New York decision. They determined the privileged character of the pleading by analyzing the function of the complaint.[30]

The plaintiff had been the defendant in an action brought by her husband in which it was charged that he was not the father of the son born to his wife. The Los Angeles News published the contents of the complaint. An action for libel resulted in a judgment for the plaintiff. The Court of Appeals reversed on the ground that the publication was qualifiedly privileged for which no action, absent proof of malice, lay:

> "We hold that a lawsuit from beginning to end is in the nature of a judicial proceeding, the filing of a complaint being the first step therein, and that the subsequent pleadings are successive steps therein. (§405, CODE OF CIVIL PROCEDURE)
> "Publication without malice of a truthful report that a charge has been made in the complaint filed in an action is clearly within the protection afforded by subdivision 4 of section 47 of the CIVIL CODE, because the filing of a pleading is a public and official act in the course of judicial proceedings."[31]

Because of the requirement that the publication be not only fair and true but also without malice the question whether a publication is privileged, ordinarily, presents a question of fact. However, at times, the article itself indicates on its face that the report is a fair and true report and if the complaint does not allege the contrary or plead malice, it does not state a cause of action. Such a situation arose in a California case in which a newspaper reported that in a divorce proceeding a woman has been named a co-respondent, the article also stating that the Judge trying the case had found the charge to be untrue. So the ruling which I as a trial judge made that the

[29] Campbell v. New York Evening Post, Inc., 245 N.Y. 320, 157 N.E. 153, (1927). See the interesting comment on this decision by Benjamin N. Cardozo, the then Chief Judge of the court, in his PARADOXES OF LEGAL SCIENCE, pp. 23-24, (1928).

[30] Kurata v. Los Angeles News Pub. Co., 4 C.A.2d 225, 40 P.2d 520, (1935). The courts of other states are adopting the same attitude: Lybrand v. State Co., 179 S.C. 208, 186 S.E. 580, (1936); Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947, (1928); Paducah Newspaper Inc., v. Bratcher, 274 Ky. 220, 118 S.W.2d 178, (1938). But the general rule is still against the existence of the privilege before judicial action on the pleadings. PROSSER, *loc. cit., supra,* note 27.

[31] Kurata v. Los Angeles News Pub. Co., *supra,* note 30, p. 227.

article was both privileged and true on its face was sustained, the higher court saying:

> "The whole case appears to be based not upon the falsity of the imputation, but upon the untruthfulness of the publication of the form in which it was made, which led, we think, to the order of the trial court in sustaining the demurrer without leave to amend. From what we have stated, the conclusion is inescapable that the demurrer was properly sustained."[32]

C. The Problem of Method—"Trial by Newspaper." Granted the public's interest in judicial proceedings and the right of newspapers to report them, the all-important question still remains, How shall it be done? With the rapid development of the press in the English-speaking world and with the greater freedom it enjoyed in England before the Revolution contrasted with the censorship of Continental European countries, judges and others connected with the administration of justice began to feel what they designated even then as "the abuse of the press." In 1770 the great Lord James Mansfield in reversing the outlawry sentence imposed on John Wilkes, a member of Parliament, because of certain publications against the Crown, complained of what he called the *mendax infamia* of the press and gave an answer worthy of his greatness:

> "The constitution does not allow reasons of State to influence our judgments: God forbid it should: we must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say 'fiat justitia, ruat caelum' . . . I will do my duty, unawed. What am I to fear? that mendax infamia from the press, which daily coins false facts and false motives? the lies of calumny carry no terror to me. I trust that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against these arrows. . . . I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press; I will not avoid doing what I think is right; though it should

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[32] Mortensen v. Los Angeles Examiner, 112 C.A. 194, 203, 205, 296 Pac. 927, (1931). Reports of judicial proceedings must be substantially accurate. To be such they need not be a verbatum report of what took place, but may consist of a condensed version. However, they should not omit any important or material fact. 33 AM. JUR., LIBEL AND SLANDER, §154; 53 C.J.S., LIBEL AND SLANDER, §127; RESTATEMENT, TORTS, §611; Sweet v. Post Pub. Co., 215 Mass, 450, 102 N.E. 660, 661, (1913); People v. Gordan, 63 C.A. 627, 635, 219 Pac. 496, (1923); Cresson v. Louisville Courier-Journal, 299 F. 487, (6th Cir. 1924); Times Dispatch Pub. Co. v. Zoll, 148 Va. 850, 139 S.E. 505, 507, (1927); James v. Powell, 154 Va. 96, 152 S.E. 539, 545, (1930); Kurata v. Los Angeles News Pub. Co., 4 C.A.2d 224, 228; 40 P.2d 520, (1935). In reporting judicial and other public proceedings, the press merely reports and transmits what anyone attending would see and hear. The press is thus a *substitute* for the public. Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127, 1130, (1938). See PROSSER ON TORTS, (2nd ed. 1955) p. 623; 6 WIGMORE ON EVIDENCE, (3rd ed. 1940) §1836.

> draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion and under circumstances not unlike, 'Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem'." (I was always of this view that I would consider ill-will bred of virtue as fame, and not as ill-will)[33]

Granted that strong judges can withstand pressure, the fact still remains that we cannot gauge the prejudicial effect of exaggerated, truncated and flamboyant reporting of judicial proceedings both as they relate to what occurs before or after trial. Because of the intense publicity which had been given to the hearings of a congressional committee investigating alleged misconduct of the Internal Revenue Office at Boston, the conviction secured later of the officer in charge was reversed. The Court of Appeals felt that the wide and biased publicity given precluded a fair trial and that a continuance should have been granted until the effect of what the Court called, the "avalanche of unfavorable publicity" had subsided.[34]

The late Mr. Justice Jackson, in an address to the criminal law section of the American Bar Association, in 1953, expressed the fears arising from what has come to be known as "trial by newspaper" or "trial by city desk:"

> "We are troubled about the problem of fair trial—because there is a feeling in some quarters that it's a good thing to bring to the public prematurely every item of information that can be dug up to the discredit of an accused.
> "Confessions that were excluded by the trial court because they were obtained by methods that the law could not sanction have been given out by prosecutors and published and put into the homes of the jurors by way of radio and even television during the pendency of the trial."[35]

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[33] Rex v. John Wilkes, K.B. 1770, 4 Burr. 2527, 2562, 98 Eng. Rep. 327, 347.

[34] Delaney v. United States, 199 F.2d 107, 112, (1st Cir. 1952). Mr. Justice Jackson in his concurring opinion in Shepherd v. Florida, 341 U.S. 50, 51-53, (1950), took occasion to refer to the grave consequences which follow inflammatory press discussions in advance of trial:

> "But prejudicial influences outside the courtroom, becoming all to typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendents were prejudged as guilty and the trial *was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated* . . . Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial."
> (p. 51-53) (Emphasis added)

And see the observation of Mr. Justice Frankfurter in his concurring opinion in Pennekamp v. Florida, 328 U.S. 331 at 359, 365, (1946); Simon H. Rifkind, *When the Press Collides With Justice,* JOURNAL AM. JUD. SOC., Vol. 34, No. 2, p. 46, (1950).

[35] Robert H. Jackson, *Serving The Administration of Criminal Justice,* 15 F.R.D. 65, 69, (1953). In a noted concurring opinion, Justice Jackson has stated that

> "The naive assumption that prejudicial effects can be overcome by in-

Some lawyers and judges have advocated the *restriction* rather than the *enlargement* of the right of newspapers and other communication media, which, at the present time, are free to make reports, subject to the prohibitions of the AMERICAN BAR ASSOCIATION'S CANON 35 and court rules such as Rule 53 of the FEDERAL RULES OF CRIMINAL PROCEDURE against photographs, radio and television broadcasting from court rooms.

In January 1954 there was placed before the New York State Bar a proposed resolution of its Committee on Civil Rights which urged the New York legislature to make it unlawful, while a criminal investigation or a criminal charge is pending, for any prosecuting attorney, counsel for the defense, prosecuting and police officers or others having official connection with the case to disclose any admissions or statements of the accused person, or any evidence in the case, prior conviction or any other matter that might pre-judge the case or prevent a fair trial, unless authorized by an order of the court.

The report which accompanied the resolution stated:

". . . The danger arises primarily from the fact that however scrupulously fairness is maintained in the courtroom, publications outside the courtroom may seriously prejudice the parties and the outcome. . . .

"These practices smack of that gross departure from our conceptions of fair trial, represented by such institutions as the Peoples Courts in Communist totalitarian countries. Trial and conviction by public clamor or on questionable or inadmissable evidence is the very antithesis of our system of justice."[36]

The New York State Society of Newspaper Editors, condemned the resolution in these words:

This proposal would suppress the major news in trials . . . .

"This would interfere with the people's right to know what is going on in their courts. It would automatically weaken law enforcement and increase the opportunities for concealment, collusion and miscarriage of justice. . . . The proposal violates the constitutional right of the people to know, in fullest possible detail, the action of their public servants."[37]

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structions to the jury, cf. Blumenthal v. United States, 322 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." (Krulewitch v. United States, 336 U.S. 440, 453, (1948).

[36] EDITOR & PUBLISHER, Vol. 87, No. 6, February 6, 1954, p. 8. And see, Honorable George H. Boldt, United States District Judge, Western District of Washington, as quoted in EDITOR & PUBLISHER, Vol. 87, No. 35, August 21, 1954, p. 20.

[37] *Ibid.* And see, Alex F. Jones, as quoted in EDITOR & PUBLISHER, Vol. 87, No. 35, August 21, 1954, p. 20. The same editor's address before the New York State Bar Association at a later meeting that year is given in full in NEW YORK STATE BAR BULLETIN, Vol. 26, No. 4, July 1954, pp. 202 *et seq.* The attitude of the committee was expressed at the same meeting by Mr. Louis Waldman whose address is at pp. 219 *et seq.* of the same issue.

Because of strong opposition from both Bar and press the committee later abandoned the idea of dealing with the matter by legislation. Instead, it made two recommendations to the association at its June 1954 meeting:

> "1. That the New York State Bar Association take appropriate action looking towards the amendment by the American Bar Association and by our own Association of Section 20 of the CANONS OF PROFESSIONAL ETHICS, to condemn as unprofessional press releases and public statements by lawyers, the publication of which may interfere with a fair trial in the courts or the due administration of justice.
> "2. That the recommendation contained in your Committee's report submitted to the Association on January 29, 1954 be referred to the Executive Committee and action thereon be held in abeyance pending the adoption of the amendment of Section 20 of the CANONS OF PROFESSIONAL ETHICS or until such time as the Executive Committee may see fit to recommend to the Association further action thereon."

Resolutions in the wording of these recommendations were adopted with practically no dissenting vote.[38]

The attitudes expressed in the New York controversy are typical. Involved is the problem of equating the right to a fair trial with freedom of the press. This is not always easy. The legal profession stresses the primacy of fair justice; the newspapers would subordinate it to the right to disclose what is concededly public business by opposing all compulsory secrecy.

An old California contempt case has taken as broad a view of the right to publish what occurs in a courtroom as is taken generally by the newspapers at the present time. In that case the Supreme Court of California in refusing to hold a California attorney guilty of contempt because, contrary to *express direction* of the Judge, he had told the press what had occurred during a certain hearing, stated:

> "In this country it is a first principle that the people have a right to know what is done in their courts, . . . and the greatest publicity to the acts of those holding positions of public trust, and

[38] NEW YORK STATE BAR BULLETIN, Vol. 26, No. 4, July 1954, p. 225; Letter of Louis Waldman of the New York Bar to writer dated October 24, 1955. The writer expresses his indebtedness to Mr. Waldman who supplied the material from which the outline just given was taken.
CANON 20 OF THE CANONS OF PROFESSIONAL ETHICS which the resolution proposed to amend now reads:
"20. *Newspaper Discussion of Pending Litigation*
"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trail in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement."

the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to the public welfare."[39]

Contentions that the space devoted to crime and criminal activities in the modern newspaper is greater than in the past lack foundation in fact. Indeed, such studies as have been made would warrant a contrary conclusion.[40] However, students, old and new, have condemned the methods which many newspapers use in reporting judicial proceedings.[41] So the main problem still is the *manner* and *content*

[39] In re Shortridge, 99 Cal. 526, 530, (1893). In an earlier case the California court had taken the view that the guarantee of public trial in a criminal case is for the *benefit of the accused only:*

"The word *public* is used in the clause of the Constitution in opposition to secret. As said by Judge Cooley, it is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials. 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triors keenly alive to a sense of their responsibility, and to the importance of their functions, and the requirement is fairly observed, if without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity are excluded altogether.' (CONST. LIM. SIDE p. 312)" (People v. Swafford, 65 Cal. 223, 224, 3 Pac. 809), (1884) (Emphasis added)

In a later case the California court condemned the exclusion of *all* the public in these words:

"The trial should be public in the ordinary common-sense acceptation of the term. The doors of the courtroom are expected to be kept open, *the public are entitled to be admitted,* and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial." (People v. Hartman, 103 Cal. 242, 245, 37 Pac. 153), (1894) (Emphasis added)

This ruling has been approved in later California cases: People v. Byrnes, 84 C.A.2d 72, 190 P.2d 290, (1948); People v. Terry, 99 C.A.2d 579, 584, 222 P.2d 95, (1950). See 6 WIGMORE ON EVIDENCE, (3rd ed. 1940) §§1834-1835.

[40] ANN. AM. ACAD. POL. & SOC. SCI., Vol. CXXV, No. 214 (May, 1936) pp. 1, 18; EDITOR & PUBLISHER, Vol. 61, No. 27, July 7, 1928, p. 18; *Ibid.*, September 15, 1928; Curtis D. MacDougal, 1941, NEWS ROOM PROBLEMS AND POLICIES, p. 179. For the view against publication of crime news, as exemplified by the policy of the Christian Science Monitor, see the article by one of its former editors, Paul S. Deland, "Crime News," 1947, FEDERAL PROBATION, Vol. 11, No. 2, p. 4. And see, Negley K. Teeters, "Fundamentals of Crime Prevention," 1946, FEDERAL PROBATION, Vol. 10, No. 2, pp. 25-30. Except for the increase brought on by the dislocations which followed every war, while crime *detection* and *apprehension* is on the increase crime commission is actually on the decrease. The F.B.I. reported a slight decrease in major crimes of 1% in 1955. Associated Press dispatch, as quoted in Los Angeles Times, December 31, 1955, Part II A, p. 4.

[41] Warren & Brandeis, *The Right of Privacy,* 4 HARV. L. REV., pp. 193, 196, (1890). Raymond Moley, OUR CRIMINAL COURTS, p. 93, (1930). And see, Paul Bellamy, "Why Print Crime News," PROCEEDINGS OF ATTORNEY GENERAL'S CONFERENCE ON CRIME, p. 86, (1934); Stanley Walker, "The Newspaper and Crime," *Ibid,* p. 98; Fulton Oursler, "The Opportunities of the Press in the War Against Crime," *Ibid.,* p. 104; H. V. Kaltenborn, "The Role of Radio in an Anti-Crime Movement," *Ibid.,* p. 111; Carl E. Milliken, "The Screen's Contribution to the Prevention of Crime," *Ibid.,* p. 119. And see, *Note, Control of Press and Radio Influence on Trials,* 63 HARV. LAW REV. 840, 842-843, (1950).

of publication. A good portion of the crime and other court news, instead of being an accurate and objective report of outstanding facts is a highly colored report in which, as stated years ago in the report of a special committee of the American Bar Association, "the play of imagination, exaggeration, effusion, distortion, deduction, conjecture, prediction and all the secondary mental processes (are) often exercised upon the primary physical facts by ingenious reporters."[42]

These mental processes, as the Committee suggested, "do havoc to litigants, courts, the processes of public justice, and inevitably tend to undermine public confidence in our judicial institutions through deliberate misrepresentation."

A more recent critic of "trial by newspaper" writes:

> "The minds of a jury may be likened to twelve test tubes. What scientist would commence an experiment with twelve test tubes, soiled and discolored by the deposits of repeated experiments? Yet this is precisely the condition of the minds of a jury exposed to a barrage of pictures, confessions, purported testimony, theories of the case, and discussions prior to the trial of a capital or colorful felony case, in any American jurisdiction today."[43]

Disastrous results follow this type of reporting. The impression is created that we are, from time to time, in the grip of "crime waves." Danger lurks in "crime-wave psychology" with its unintelligent demand for increased penalties. Many psychologists and criminologists have stressed the important role played in crime by "the law of imitation." Embellished crime news,—glorification of the criminal,—may, by the law of imitation, induce criminal activities in highly suggestible or unstable persons, or in persons of low or subnormal intelligence.[44]

The publication before trial and, sometimes, before capture of the person accused of crime, of all the details of the crime, testimony of witnesses and of the actions, conclusions, surmises, and theories of the *prosecuting* officers, may actually deprive the accused of a fair trial. The contempt power is too dangerous to use.

The provisions for change of venue because the defendant cannot obtain a fair and impartial trial on account of the prejudice against him created by the pretrial publicity may help in a particular case.[45] But it does not solve the general problem.

The function of a newspaper of general circulation is to present

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[42] REPORT OF COMMITTEE ON COOPERATION OF PRESS AND BAR (Reprint) p. 7.
[43] Harold W. Sullivan, CONTEMPTS BY PUBLICATION, Foreward VIII, (1941).
[44] Negley K. Teeters, *Fundamentals of Criminal Probation*, FEDERAL PROBATION, 1946, Vol. X, No. 2, p. 25; Paul W. Tappan, *Juvenile Delinquency*, 1949, pp. 53-165.
[45] Rule 21(a), 22, FEDERAL RULES OF CRIMINAL PROCEDURE. Similar provisions are contained in state codes. See, e.g. CAL. PENAL CODE, §§1033-1038; WIS. STAT. (1953) §56.03 (3); 22 C.J.S. CRIMINAL LAW, §187, 189-190, 196.

facts as they occur. The courts are the people's and whatever occurs in them is a proper subject of report or comment. News, to give a popular definition, is anything new and interesting. As the newspaper *is not the creator, it should not be* the censor of news. It is its right, nay, its duty, to report crime news and to record crime activities. So doing, the newspaper performs a public function and may, *in some instances,* actually aid in assuring a "fair trial." But there remains the question: How should this function be performed generally? The newspapers should be guided by the highest standards of the profession, bearing in mind that an immediate, but ultimately illusory, success in news-gathering *should not* outweigh the interests of the community.

The newspapers can aid in the administration of justice by discouraging sensationalism in crime and court news *before trial,* by encouraging, in the words of the Bar Association Committee, reports which,

> ". . . truthfully, fairly, accurately, objectively write down and and describe in words for publication every emphatic fact which (a reporter) legitimately sees or hears"[46]

at the trial, and by playing up, in the interest of crime prevention, the records of conviction in our courts.

Newspapers should observe the admonition given some years ago by the Associated Press not to

> ". . . glorify crime and heroize criminals by giving a false glamour to a case and thus excite sympathy for a criminal or for a crime."[47]

The American Society of Newspaper Editors, some years ago, evidently convinced of the justness of much of the criticism directed at newspapers, in a Code stressed the responsibility of the newspaper in this manner:

> *"The right of a newspaper to attract and hold readers is restricted by nothing but consideration of public welfare."*[48] (Emphasis added)

Among the requirements listed for responsible reporting were sincerity, truthfulness, accuracy, impartiality, fair play and decency. With special reference to handling of crime news, the Code said:

> "A newspaper cannot escape conviction of insincerity if, while professing high moral purpose, it supplies incentive to base conduct, such as are to be found in details of crime and vice, publication of which is not demonstrably for the general good."[49]

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[46] Report, *supra,* note 42, p. 7.
[47] EDITOR & PUBLISHER, Vol. 61, No. 9, March 3, 1928, pp. 5, 71.
[48] Quoted in Paul S. Deland, *Crime News,* FEDERAL PROBATION, 1947, Vol. 11, No. 2; See, Joseph L. Holmes, *Crime and the Press,* 1929, 20 JOURNAL OF CR. LAW AND CRIMINOLOGY, 6-59.
[49] *Ibid.*

On a balancing of social interests, we should, at all times, bear in mind that despite the annoyance and inconveniences caused, and the bad taste often exhibited, by modern newspaper technique, the freedom of the press is still the greatest safeguard of free institutions.[50] We should, therefore, leave unheeded the appeals of those who would encroach upon this great American fundamental.[51]

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[50] See Lois G. Forer, *A Free Press and A Fair Trial,* 39 A.B.A.J., 800, (1953); Edwin M. Otterbourg, *Fair Trial and Free Press,* 39 A.B.A.J., 978, (1953); Edwin M. Otterbourg, *Fair Trial and Free Press,* 37 AM. JUD. SOC. 75, (1953); Elisha Hanson, *A Free Press and An Independent Judiciary,* 41 AM. JUD. SOC. 217, (1955); George H. Boldt, *Should Canon 35 Be Amended?* 41 A.B.A.J. 55, (1955); Jerry Walker, *A Significant Point in Bar-Press Debate,* December 4, 1954, EDITOR & PUBLISHER, Vol. 87, No. 50, p. 10; Dwight Bentel, *Survey Reports Public Cold to Free Press,* December 25, 1954, EDITOR & PUBLISHER, Vol. 87, No. 53, p. 12. Attempts to control publication by rule of court may infringe the freedom of the press: See, Baltimore Radio Show, Inc v. State, 193 Md. 300, 67 A.2d 497, 510, (1949), cert. denied, 338 U.S. 912. And the exercise of the inherent power to punish for contempt is restricted by the application of the "clear and present danger" concept: Nye v. United States, 313 U.S. 33, (1941); Bridges v. California, 314 U.S. 252, (1941); Pennekamp v. Florida, 328 U.S. 331, (1946); Craig v. Harney, 331 U.S. 367, (1947); Turkington v. Municipal Court, 85 C.A.2d 631, 193 P.2d 795, (1948); Kirkham v. Sweetring, 108 Utah 379, 160 P.2d 435, (1945). In the last analysis, the solution lies in that voluntary restraint which is the most fruitful and permanent cure for abuse of democratic rights. The New York Times summed up the problem in an editorial entitled "Trial by Newspaper" in its issue of May 14, 1954:

> "Officials and lawyers have a right and a duty, in the public interest, to impose self-restraints that will protect civil liberties and fair trial. They are thus censoring themselves. The newspapers have an obligation, likewise in the public interest, to accept the consequences of this act of conscience." (as quoted in NEW YORK STATE BAR JOURNAL, Vol. 26, No. 4, July 1954, p. 220)

[51] A leading newspaper editor has stated the need for adjusting the apparent conflict between the right to a fair trial and freedom of the press in this manner:

> "How best assure that the press will go on playing the part it has played —to its everlasting credit—in helping promote justice, while eliminating abuses which inflame public opinion and create prejudgments of guilt or innocence? Newspapers themselves must establish this balance beyond question if they expect to remain altogether free. "There are not many editors who do not recognize the nature of the conflict; few but can decide where full and objective reporting leaves off and the abuses that hinder a fair trial begin. And surely such professional newspaper groups as the American Society of Newspaper Editors, Sigma Delta Chi, and others ought to take the lead in promoting the kind of code that will reconcile these conflicts. "To assure the public full information about affairs, to prevent the suppression of individual rights which secrecy and censorship make possible, the press is free. It should remain so. If, however, even a few newspapers abuse this freedom the courts and, if need be, the legislatures, will impose restrictions. For it never was intended that freedom of the press should give newspapers license to cripple the right of every man to a fair trial." (John M. Harrison, Associate Editor of the Toledo Blade in the "Press v. The Courts," in Saturday Review, Vol. 38, No. 42, October 15, 1955, p. 9, 35. See Jerome H. Springarn, "Newspapers and the Pursuit of Justice," Saturday Review, Vol. 26, No. 14, April 3, 1954, p. 9; Eustace Cullinan, *The Right of Newspapers: May They Print Whatever They Choose,* A.B.A.J. Vol. 41, No. 11, November 1955, p. 1020)

IV

HEARINGS OTHER THAN JUDICIAL

A. Recent Trends Towards Secrecy. The numerous attempts made at all governmental levels from heads of villages to legislative departments in the states and from low-ranking local heads of federal bureaus to the policy-making executives of the federal government in Washington, to draw arbitrarily, the curtain of secrecy around governmental activities are matters of common knowledge. In recent years the press has referred constantly to incidents of such character. In October of 1951, the members of a Northwestern University Forum, representing newspapers of the Americas, declared that the integrity of the freedom of information goes to the very roots of popular government in the United States and that this right was being,

> ". . . steadily undermined by the growing practice of secrecy in government on national, state and local levels; the growing tendency of public officials to feel that they are not accountable to the public; that they may conduct the business of their offices in secret; that they may seal or impound public records; that they may divulge only such information as they think is good for the people to know; that they may extend 'military security' into areas of news which have no bearing on the nation's security."[52]

Some more recent occurrences may be referred to. The American Civil Liberties Union, in August of 1955, announced that it had begun a study of government news policies to

> ". . . spotlight areas where the press and other mass media have expressed difficulty in obtaining information."[53]

A Government Operations subcommittee of the House of Representatives headed by Representative John E. Moss, Jr. of California last year began investigation of Government information policies and practices. The hearings held disclosed some extra-ordinary practices. The Post Office Department and Civil Service Commission labeled as secret the names of men found to be eligible for post master. The Civil Service Commission also claimed the inherent right to protect itself by withholding information. It insisted that as its actions have not been made public since 1863, the policy of secrecy had become

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[52] EDITOR & PUBLISHER, Vol. 84, No. 41, October 6, 1951, p. 10 cited by the writer in book review, 48 NORTHWESTERN UNIVERSITY LAW REV., p. 527.

[53] United Press Dispatch from Washington August 29, 1955, published in St. Louis Post Dispatch August 29, 1955, p. 3B.

> "Access to government news by the mass media of communication," said Executive Director Malin in announcing the study, "is the heart of democratic government. Our democracy depends on an informed public opinion, by which the public may judge for itself the merits of various social issues and the performance of government leaders. "(CIVIL LIBERTIES, No. 134, September 1955, p. 2)

permanent as it were. The Treasury Department kept secret the applications of organizations for exemption from taxation. The Department of Agriculture claimed the right to delay public information of changes in interest rates in commodity loans. Many agencies enforce secrecy by labeling information "for staff use only" or "administratively confidential."

At the conclusion of these hearings Representative Moss was quoted as stating that the claim of inherent power to keep information from the public was "a fantastical concept of law."[54] Even the easing of some of the restrictions has helped stress *the extent of the secrecy.*

On August 22, 1955, Secretary of Commerce Sinclair Weeks, in a Washington statement carried by all the news agencies, announced that the Government had released *961* secret or restricted reports on atomic energy research. The conservative Los Angeles Times concluded an editorial lead on the event in this manner:

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[54] EDITOR & PUBLISHER, Vol. 88, No. 48, November 19, 1955, p. 13. For other articles relating to the study see EDITOR & PUBLISHER, Vol. 88, No. 45, October 29, 1955, p. 10; *id.* No. 47, November 12, 1955, p. 10-11; *id.* No. 48, November 19, 1955, p. 13; *id.* No. 49, November 26, 1955, p. 9; CONG. REC., 84th Cong. 1st Sess., Aug. 2, 1955, pp. 1-2.

Newsmen and high government officials alike have sensed the danger as the following expressions indicate:

"Many of us in government are concerned about the increasing difficulty of finding out what is going on in government. The marble curtain that has gradually been built between the newsmen and the government in Washington shuts out all the public from what is rightly the public's business." (Hubert H. Humphrey, United States Senator from Minnesota, as quoted in EDITOR & PUBLISHER, Vol. 88, No. 43, October 15, 1955, p.7.)

Another Senator has denounced the practice as "the silent curtain of beaurocratic censorship." (Stuart Symington, United States Senator from Missouri, as quoted in St. Louis Post-Dispatch, October 13, 1955, p. 3A, Col. 1)

"It's high time that the people learned that for the first time in our national history we have saddled onto the civilian branches of government powers of regulating news heretofor held only by the military in times of war. The government calls it power of classification. Classification, nuts! That's merely a pretty word for censorship." (Norman E. Isaacs, managing editor of Louisville (Ky.) Times, in address at Southwest Journalism Forum, as quoted in EDITOR & PUBLISHER, Vol. 88, No. 43, October 15, 1955, p. 7)

The Associated Press Managing Editors Association at its 22nd annual meeting held in October 1955 adopted a resolution which in part stated:

"The Associated Press Managing Editors Assn., here assembled in convention condemns governmental secrecy that is withholding from American citizens facts about their own government that they are entitled to know." . . .

"The association expressly condemns the withholding of information that has not been classified and that is not eligible for classifying on the pretext that it is not 'constructive' or on the excuse that even though it is non-security information it might be of 'possible use' to a potential enemy. It deplores the operations and philosophy of the Office of Strategic Information, the Sept. 15 defense establishment rules for private defense contractors, the secrecy rules of the ODM's Operation Alert, the unannounced invocation of wartime secrecy rules by the Strategic Air Command, and similar abuses of authority." (EDITOR & PUBLISHER, Vol. 88, No. 49, November 26, 1955, p. 9 at p. 72)

"These are the signs: hopeful and pleasant."[55]

The release of this classified material followed the disclosure made at the international scientific conference held in Geneva in August, 1955, that scientists of countries which have advanced in the nuclear field had, *independent of one another,* arrived at identical conclusions, working independently from data known to all the scientific world. A leading English newspaper made this editorial comment:

> "In many ways the most important thing that has happened at Geneva is the practical and public demonstration which has been given of the absurdity of secrecy in matters of what used to be called natural philosophy. In this country, the United States, and Russia the painstaking activities of the scientists have resulted in three identical pictures of the way in which atomic fission works. No *politician will ever again find much support for the argument that the properties of atoms change with the colour on a map, and that information of a scientific kind can be 'classified' by administrative action."*[56]

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[55] Los Angeles Times, September 10, 1955, editorial "It Has Saved More Than It Killed." In the light of later events the tone of the editorial appears rather too optimistic. A United States Senator, Clinton Anderson of New Mexico, who heads the joint Senate-House Atomic Committee complained later in the year that the Atomic Energy Commission kept him and members of his committee from visiting certain areas in the commission's laboratory at Los Alamos, New Mexico. This, despite the fact that this committee was established by the Congress to keep in touch with the development of the atomic project. Speaking before the Nuclear Science and Engineering Congress at Cleveland, Ohio, the Senator was quoted as saying:

> "The atomic energy law says that the commission shall keep the joint committee informed of all devleopments," . . . "but they thought that this was so secret a project, that the joint committee should not be told about it." (Associated Press dispatch in Los Angeles Mirror-News, Friday, December 16, 1955, Part I, page 8)

[56] Manchester Guardian Weekly, August 25, 1955, editorial lead, "Atoms For All." The same newspaper in a story by its Parliamentary correspondent dealing with the debate in the English Parliament on a proposal for an inquiry into the English security services wrote:

> "Nothing was more instructive in the debate than the unanimity with which the House sided with the Prime Minister and Mr. Macmillan in their warning that the search for security against Communist spying must not betray us into encroachments on the freedom of the individual under the law. 'Never,' declared Sir Anthony impressively, 'would I be Prime Minister of a Government that sought powers to detain on suspicion or hold a man until evidence could be gathered against him.' They were his final words in the debate, and they won general applause." (Manchester Guardian Weekly, Vol. 73, No. 20, November 17, 1955, p. 2)

True to their tradition the English press and the English party leaders are unwilling to surrender the safeguards of freedom and to promulgate rules which would substitute suspicion for proof of guilt even in the realm of national security.

A former member of the office of the General Counsel of the Atomic Energy Commission expressed the view in 1953 that the *unquestioned* control over information exercised by that Commission implied a *surrender of democratic rights,* without reserving the all-important right to periodically question and re-examine:

> ". . . While there are genuinely new problems posed by atomic secrecy, and occasions where departures from precedent in coping with them are justified and important, these problems and these occasions are identified by an open-minded examination, not by a blanket assumption or a defini-

B. Protecting the Right to Information. The present Chief Justice of the United States, when he was Governor of California, in a public address, deplored the tendency to restrict information about governmental activities:

> "There is a tendency on all levels of government to withhold information from the public because it might be embarrassing. I have found it necessary to fight the trend in my own state administration. It is the duty of every public executive to do the same thing."[57]

As a result of widespread agitation, California, in 1953, enacted a statute reading:

> "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meetings of the legislative body of a local agency, except as otherwise provided in this chapter."[58]

In enacting this statute the legislature made the following significant statements of policy:

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tion. The proper response to the position that atomic secrets merit unique protection is not a denial but a series of questions and a demand to be shown.

"This analysis suggests that the significance of the atomic secrecy experience can be defined in rather basic and inclusive terms. The atom and its secrets led to the temporary capitulation of a democratic society to the apparent demands of an apparently important subject. In the process, that society failed to reserve to itself the capability of putting any departures from custom, which it imaginatively decided to make, to the irreverent test of justifying themselves in operation. It is by this process, in the past, that the most unknown and frightening subjects have been made familiar and have been effectively assimilated. In the complicated present, we should do well to remember and apply this great resource of a free society." (John G. Palfrey, *The Problem of Secrecy,* ANN. AM. A. POL. & SOC. SCI., Vol. 290, November 1953, p. 99) See, Robert A. Dahl, *Atomic Energy and the Democratic Process, Ibid.,* pp. 1-6.

Preoccupation with security has become so important a part of the world of today that Bertrand de Jouvenel divides modern governments into *libertarian and securitarian.* (Bertrand de Jouvenel, 1945, DU POUVIOR, ch. XVIII, pp. 504 *et seq.*) However, much of what is done in the realm of security is illusory in results and may have a stultifying influence on democratic life.

A noted scientist, Dr. Ralph E. Lappe, stated the lesson of the Atoms for Peace Conference of 1955:

> "We now know beyond all doubt that we have been following a self-deceiving policy in much of our secrecy on the atom. *Our secrets have been betrayed, not by men, but by Dame Nature, that facile dispenser of truth. Secrets, even legitimate ones, cannot be kept for long.*" (Bulletin of Atomic Scientists, October 1955, as quoted in a St. Louis Post-Dispatch editorial, "Progress on Atoms for Peace," October 10, 1955) (Emphasis added)

See, John Lord O'Brian, NATIONAL SECURITY AND INDIVIDUAL FREEDOM, 1955.

[57] From a speech by Governor Earl Warren given to the Press Club in Oregon, as quoted in REPORT OF CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY ON A.B. No. 339 (1953 Reg. Session) p. 13.

[58] CAL. GOV'T. CODE, §54953. In 1955 Ohio extended the scope of its present law governing state agencies by prohibiting closed meetings by boards of education, boards of county commissioners and appointive agencies, commissions and boards of local governments, and specifically forbidding the adoption of

> "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
> "The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."[59]

Many states have inspection statutes. California's is very broad:

> "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."[60]

A related provision makes all public records and other matters in the office of any officer open to inspection at all times during office hours.[61] By another, a public officer having the custody of public writings is bound to give, on demand, to any person a certified copy of it on payment of the legal fees.[62] Wisconsin has a similar statute:

> "18.01 . . . . (2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1)."[63]

A general California statute declares all the written acts and records

> ". . . of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;"

to be public writings. So are also "public records," kept in the state,

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resolutions or the taking of formal action in executive sessions. Because of its significance, the statute is given in its entirety:

> "All meetings of any board or commission of any state agency or authority and all meetings of any board, commission, agency or authority of any county, township, municipal corporation, school district or other political subdivision are declared to be public meetings open to the public at all times. No resolution, rule, regulation or formal action of any kind shall be adopted at any executive session of any such board, commission, agency or authority. "The minutes of a regular or special session or meeting of any such board, commission, agency or authority shall be promptly recorded and such records shall be open to public inspection." (BALDWIN'S OHIO REV. CODE SUPP. (1955) §121.22.)

Proceedings as to parole and pardon are exempt from the provisions of the act.

[59] CAL. GOV'T CODE, §54950.
[60] CAL. CODE CIV. PROC., §1892.
[61] CAL. GOV'T CODE, §1227.
[62] CAL. CODE CIV. PROC., §1893.
[63] WIS. STATS. (1953) §18.01.

"of private writings."[64] A separate provision defines specifically as "public writings," the following: laws, judicial records, other official documents and public records of private writings, kept in the state.[65] Having made so broad a declaration of policy, and given the right to copy any official document, any exemption would, of necessity, have to be governed by special statutory exemptions. The most important of these relate to taxation. The Code declares that all information and records acquired by the state controller and any of his employees, relating to inheritance taxes, are confidential and forbids their disclosure.[66]

However, the controller may allow local, state or federal officials, charged with administration of any tax law, to examine his gift tax records under proper regulations.[67]

Other statutes allow school districts to make rules for the physical examinations of pupils in the public schools and to insure their secrecy in connection with any defect disclosed by any such examination;[68] make the records of the social welfare department, relating to needy children and the aged, confidential, and forbid disclosure of any lists of persons receiving public assistance.[69] A general statute prohibits an officer of the State from divulging any information acquired by him from the private books, documents or papers of any persons, and conducting any investigation on behalf of any state department, to any person other than the head of his department, or when called upon to testify in any court or legal proceeding.[70]

Wisconsin has similar statutes relating to income tax and gift tax returns, which forbid divulging information for compensation, but allow newspapers to publish such information and public speakers to use them in public speeches.[71] Wisconsin also closes certain matters relating to mental health;[72] congenital deformities;[73] physicians' report on tuberculosis;[74] and venereal diseases;[75] permits the impounding of records in divorce cases;[76] closes proceedings before magistrates, so called "John Doe proceedings," investigating the commission of an offense before a warrant is issued.[77] It also forbids the identification,

[64] CAL. CODE CIV. PROC., §1888.
[65] CAL. CODE CIV. PROC., §1894.
[66] CAL. REV. & TAX. CODE, §16563.
[67] CAL. REV. & TAX CODE, §16564.
[68] CAL. ED. CODE, §16482.
[69] CAL. WEL. & INST. CODE, §118.
[70] CAL. GOV'T CODE, §11182.
[71] WIS. STATS., (1953), §71.11 (44).
[72] WIS. STATS., (1953), §51.30.
[73] WIS. STATS., (1953), §69.32.
[74] WIS. STATS., (1953), §143.06.
[75] WIS. STATS., (1953), §143.07.
[76] WIS. STATS., (1953), §247.19.
[77] WIS. STATS., (1953), §354.025.

orally or in the press, of victims in cases involving rape, sodomy and other sex crimes against minors.[78]

What precedes indicates that the difficulty lies not so much with governments, state or federal, but with those *who administer* their agencies. While as to legislative and administrative hearings the guaranty of access is not so broad, as in the case of judicial hearings, nevertheless, it does exist. It is the disregard of the law by the agencies exercising the various activities that is responsible for the agitation seeking, either through additional legislation or through the coercive power of public opinion, *to permit full disclosure.*

C. The Privilege of Reports of Public Meetings. Freedom of assembly is guaranteed both by the federal government and the states.[79] Nevertheless, the courts, while stating that the newspapers may publish accounts of such meetings, have held them responsible for repeating libelous charges made at any such meetings.[80] Only three states, Cali-

[78] WIS. STATS., (1953), §348.412.

[79] U.S. Const. Amend. I; CALIFORNIA CONSTITUTION Art. I, §10; WISCONSIN CONSTITUTION, Art. I, §4.

[80] Jackson v. Record Pub. Co., 175 S.C. 211, 178 S.E. 833, (1935). This case states the principle in this manner:

> "A newspaper is privileged to publish accounts of a public meeting, provided such publication does not contain charges or statements, made by the paper, or a third person, which impute to another the commission of a crime or of acts which will bring him into contempt and ridicule of the public, and cause him to incur its hatred, or which will injure him in his business or calling, or which are false and malicious." (p. 835)

However, in the particular instance, the court held that because the article was *the report* of speeches of candidates for public office, it was privileged, saying:

> "We think the publication falls within the class of quasi privileged communications, inasmuch as it relates to the candidacy of one who is seeking public office." (p. 837)

See, Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N.W. 822, (1892).

[81] CAL. CIV. CODE, §47, subd. 5; VERNON'S TEXAS CIV. STAT., 1948, Art. 5432, subd. 3 and 5; UTAH CODE ANNOTATED, 1953, §45-2-3(5). The Texas statute is broader than California's. It does not contain the qualification "without malice" and reads:

> "3. A fair, true and impartial account of the proceedings of public meetings, dealing with public purposes, including a fair, true and impartial account of statements and discussion in such meetings, and of other matters of public concern, transpiring and uttered at such public meetings."

However, when the matter ceases to be of public concern, republication is not protected:

> "5. The privilege provided under Section 1, 2, 3 and 4 of this article shall extend to any first publication of such privileged matter by any newspaper or periodical, and to subsequent publications thereof by it when published as a matter of public concern for general information; but any republication of such privileged matter, after the same has ceased to be a matter of such public concern, shall not be deemed privileged, and may be made the basis of an action for libel upon proof that such matter has ceased to be of such public concern and that same was published with actual malice."

The language of the Utah provision is almost identical with that of California, and reads:

> "A privileged publication which shall not be considered as libelous per se is one made: . . . (5) by fair and true report without malice of a proceeding of a public meeting if such meeting was lawfully convened

fornia, Texas and Utah, protect newspapers by declaring fair and true reports of the proceedings of a public meeting privileged,[81] although a provision of this character has been a part of the law of England since 1888.[82]

Under the English provision, as interpreted by the courts, it is not sufficient that the meeting be for the public benefit, and that the proceedings and speeches, on the whole, also be for public benefit. It must be shown also that the publication of the particular matter complained of was for the public benefit.[83]

The California provision is broader and the requirement that the publication of the matter complained of be for the public benefit is an alternative one. The privilege would seem to attach to reports of meetings, provided they are public, whether their proceedings or speeches be for the public benefit or not. More, if the publication of the matter be for the public benefit, the privilege would attach even though some of the requirements as to the nature of the public meeting, such as the lawfulness of its purpose be absent.

The criteria by which the fairness of reports of public meetings is judged are, in the main, the same as those by which fairness of reports of judicial, legislative or other offcial proceedings is determined. Fairness is absent when the report contains fragmentary or incomplete parts of the proceedings which do not constitute an accurate summary of the whole. Thus, in a prosecution for criminal libel,— the publication of a false oath attributed to the Knights of Columbus,— to the argument that the oath published was a part of the Congressional Record and that it was, therefore, a fair report of a legislative proceeding under the law of California, the Court's answer was:

> "This section, (PENAL CODE, §254) however, does not afford immunity to one who has willfully and maliciously distorted a statement found in a legislative publication by intentionally publishing fragmentary and incomplete parts thereof which do not indicate a fair summary of the whole proceedings. Here there was a clear intimation that the publication was stamped with the approval of the congressional committee at Washington, no mention being made of the circumstances under which it was printed or that the committee found that the oath was false."[84]

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for a lawful purpose and open to the public or the publication of the matter complained of was for the public benefit."

[82] 51 and 52 Vict., ch. 64 (1888). See Wason v. Walker, L.R. (1868) 4 Q.B. 73. as to newspaper immunity for publication of parliamentary proceedings.

[83] GATLEY ON LIBEL AND SLANDER, (4th ed.) p. 329; Kelly v. O'Malley, 6 TIMES LAW REP. 248, (1889); Sharman v. Merritt, 32 TIMES LAW REP. 360, (1916).

[84] People v. Gordan, 63 C.A. 627, 635, 219 Pac. 486, (1923). However, the courts overlook unimportant inaccuracies. They do not exact perfection of the reporter and will grant him the full benefit of the privilege if his report is substantially correct.

V

THE FEDERAL ASPECTS OF THE PROBLEM

A. Protection of Defense Establishments. Any discussion of the problem of access to government information must, of necessity, deal with the problem of secrecy in government and, consequently, with security. A discussion of the problems of security and loyalty is beyond the scope of this study.[85] Suffice it to say that aside from the large number of security regulations made by the various governmental agencies, the federal statutes other than the ATOMIC ENERGY STATUTE,[86] protect the really vital defense information of the government against loss and against theft of material to aid foreign governments. Thus it is an offense to gather, transmit or lose defense information and to enter a military establishment or docks, canals,

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As said by a California court in another case:

"It is not the mere fact that a difference exists between the published report of what the complaint in the proceeding charged and what was actually alleged in the complaint, but rather is the difference of a substantial character and does it produce a different effect. It seems clear that the published article was a fair and substantial account of the complaint written by a reporter and finally published without any unusual circumstances obtaining." (Kurata v. L.A. News Pub. Co., 4 C.A.2d 224, 228, 40 P.2d 530, 1935) And see note 32, *supra.*

On the whole, California courts take a liberal attitude in determining the privileged character of reports of judicial proceeding. See, Glenn v. Gibson, 75 C.A.2d 649, 657-659, 17 P.2d 118, (1946).

[85] See John Lord O'Brian, NATIONAL SECURITY AND INDIVIDUAL FREEDOM, 1955; Telford Taylor, GRAND INQUEST, 1955; Alan Barth, GOVERNMENT BY INVESTIGATION, 1955. Internal Security and Civil Rights, ANN. AM. A. POL. & SOC. SCI., edited by Thorsten Sellin, July 1955, Vol. 300, pp. 4 *et seq.* Osmond K. Fraenkel, *The Supreme Court as Protector of Civil Rights: Criminal Justice,* in CIVIL RIGHTS IN AMERICA, edited by Robert K. Carr, Vol. 275, ANN. AM. A. POL. & SOC. SCI., Vol. 275, p. 86. Harold D. Lasswell, *Does the Garrison State Threaten Civil Rights?, Ibid.,* p. 111; Eleanor Bontecou, *Does the Loyalty Program Threaten Civil Rights, Ibid.,* 117; Edward C. Kirkland, *Do Antisubversive Efforts Threaten Academic Freedom?, Ibid.,* 132. The Washington Post recently expressed the concern of many earnest citizens over one of the most criticized features of the security investigation, the *Anonymity of the sources of derogation* in an editorial which read, in part:

"It is impossible to refute the charges of unknown accusers. Long ago in ancient Athens, Socrates, on trial for his life, faced this situation and uttered words which ought never to be forgotten:

'. . . These are the accusers whom I dread; for they are the circulators of this rumor and their hearers are too apt to fancy that speculators of this sort do not believe in the gods. And they are many, and their charges against me are of ancient date . . . And, hardest of all, their names I do not know and cannot tell . . . But the main body of these slanderers, who from envy and malice have wrought upon you—and these are some of them who are convinced themselves, and impart their convictions to others, all these, I say, are most difficult to deal with: for I cannot have them up here, and examine them, and therefore *I must simply fight with shadows in my own defense,* and examine when there is no one who answers . . . '"

(Emphasis added) (Washington Post, ed. "Fighting Against Shadows," January 16, 1956, p. 8).

See Yankwich, 1954, *Some Challenges to Our Constitutional Ideals,* 28 So. CAL. L. REV. 1, 10-16.

[86] 42 U.S.C.A. §1801 *et seq.*

factories or other installations for the purpose of obtaining information respecting national defense, with intent or reason to believe that the information is being used to the injury of the United States or to the advantage of any foreign nation.[87] It is also made an offense to gather or deliver defense information with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign government,—an offense which may be punished by twenty years imprisonment in peace-time or by thirty years or death in war-time.[88] Under this section, a former Navy yeoman who stole a gunnery manual from a ship and delivered it to a Japanese officer was found guilty and sentenced to fifteen years imprisonment in my court in 1936. A conviction was had before another judge of transmitting information to Russia. To the argument that the information was of a character *not* connected with national defense, the court's answer is that *this was a question of fact* for the jury, saying:

> "The function of the court is to instruct as to the kind of information which is violative of the statute, and of the jury to decide whether the information secured is of the defined kind. It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts as determined."[89]

Photographing and sketching a defense installation is punished.[90] So is the use of aircraft for photographing defense installations.[91] The publication and sale of photographs of defense installations is also punishable.[92] The statute punishes very severely anyone who harbors or conceals any person whom he knows or has reasonable grounds to believe or suspect has commited an offense under sections 793 or 794 of the title.[93]

These are but a few of the penal statutes which protect the defense installations of the country. Of necessity they have led to security measures by private employers, railroads and others who may be doing work for the government, which affect thousands of establishments, and, perhaps, millions of persons. No one denies the need for these precautions. And while some of the loyalty and security procedures have been attacked, there has been no criticism of these measures which cover serious violations of national security.

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[87] 18 U.S.C.A. §793.
[88] 18 U.S.C.A. §794.
[89] Gorin v. United States, 312 U.S. 19, 32, (1941).
[90] 18 U.S.C.A. §795.
[91] 18 U.S.C.A. §796.
[92] 18 U.S.C.A. §797.
[93] 18 U.S.C.A. §792.

B. The Right to Make Departmental Regulations. However, severe criticism has been directed at the basic law which gives to departmental heads of the federal government the right to make regulations. The policy of the subject dates back to the beginning of our government, a statute having been enacted as early as July 27, 1789.[94] The provision now reads:

> "22. Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."[95]

Under the authority of this provision, the Commissioner of Internal Revenue on April 15, 1898, with the approval of the Secretary of State, promulgated a rule which forbade members of the department to disclose to private persons or to local officers or to produce in state courts, special tax records. When the constitutionality of this was questioned the Supreme Court could see no constitutional infirmity in the statute saying:

> "Can it be said that to invest the Secretary of the Treasury with authority to prescribe regulations not inconsistent with the law for the conduct of the business of his Department, and to provide for the custody, use and preservation of the records, papers and property appertaining to it, was not a means appropriate and plainly adapted to the successful administration of the affairs of that Department? Manifestly not. The bare statement of the proposition suggests this conclusion, and extended argument to support it is unnecessary. . . . Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interest of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded. Besides, great confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates. At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred by Congress."[96]

The ADMINISTRATIVE PROCEDURES ACT recognizes the rule making power of administrative agencies except to the extent that there is

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[94] 1 STAT. 28.
[95] 5 U.S.C.A. §22.
[96] Boske v. Comingore, 177 U.S. 459, 469-470, (1900). This case was approved in Toughy v. Ragen, 340 U.S. 462, 470-471, (1951).

involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, and requires each agency to give public access to matters of official record. The sole reservation in that respect is an exception about

"... information held confidential for good cause."[97]

C. Beaurocratic Discretion? Newspapers insist that notwithstanding the right to judicial review sanctioned by the cases cited and others,[98]

> "The entrance gates to records are shut and guarded except on those occasions when official grace is moved to set them ajar for light and air."[99]

A study of the cases indicates that the existence of judicial control is sufficient guard against abuse of the power. Significant in this respect is the language of the Court of Appeals for the Third Circuit in condemning a government claim of *total immunity* to disclosure:

> "Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity for disclosue which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations

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[97] 5 U.S.C.A., §1003, 1002. Cases decided both before and since the enactment of this statute have sustained the departmental regulations when they do no violence to other constitutional principles. Carter v. Forrestal, U.S.App.D.C., 175 F.2d 364, 366, (1949); Cella v. United States, 208 F.2d 783, 788, (7th Cir. 1953). The view of the Courts is that administrative agencies

> ". . . should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." (Federal Communication Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 1910); McDonald v. Lee, 217 F.2d 619, 624-625, (5th Cir. 1954).

[98] United States ex rel v. Reagan, 340 U.S. 462, (1951); Reynolds v. United States, 192 F.2d 987, (3rd Cir. 1951).

[99] Harold L. Cross, THE PEOPLES RIGHT TO KNOW, 1953, p. 215. Speaking before the Moss sub-committee, the author of this book called the provisions of the ADMINISTRATIVE PROCEDURES ACT an "abject failure," as far as making public records available is concerned. It allows

> ". . . secrecy involving 'any function of the United States requiring secrecy in the public interest (not limited to national security)' and involving 'any matter relating solely to the internal management of any agency'. . .
>
> 'The public interest has always had a way of becoming identified with the *interest of whomever is making the determination.*'" (United Press dispatch, Washington, December 17, in New York Times, December 18, 1955, p. L 69)

today, it embraced the whole range of governmental activities."[100]

Grant that

"Public business is the public's business;"[101]

that the right to the free flow of information about such business is a right of which each public official is a trustee and that the right to refuse disclosure if carried to the extreme may breed tyranny. Nevertheless, on the federal level, it has Congressional sanction not only in the section cited, (5 U.S.C.A., §22) but in others, which justify refusal of information even to other agencies,

". . . when compliance will be injurous to the public interest."[102]

Frankly, I see no reason why the right of access should be made *absolute* in all cases, without restriction. Even the great guarantees of the First Amendment,—including the Freedom of the Press,—are not absolute and uncontrollable. And so long as the refusal to grant access to interested persons, including the public, is reviewable by courts against abuse, I cannot see why the government cannot make access dependent upon the *wise* discretion of the *responsible* heads of the government.

At times, newspapers insist that all preliminary steps in an administrative, executive or legislative matter be thrown open to the public. This would not always work in the public interest. The proceedings of parole or pardon boards might be greatly hampered if *all* the steps before them were opened to the public. Indeed, many are of the view that probation reports, which disclose the ground on which probation is granted or denied, be *not* made public. The California State Bar, in September, 1955, adopted a resolution urging the abolition of the present practice in California which makes probation reports open to the public,[103] and substituting for it access only upon

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[100] Reynolds v. United States, *supra,* note 98, p. 995.

[101] Cross, *op. cit.,* Preface p. XIII.

[102] 28 U.S.C.A., §2507 provides that while the Court of Claims may call upon any department or agency of the United States for information or papers it needs, the head of any department or agency may refuse to comply when "in his opinion, compliance will be injurious to the public interest."

[103] CAL. PENAL CODE, §1023. The editorial reaction of one California newspaper was almost "violent." In a lead editorial entitled "More Light, Not Less" in its issue of September 15, 1955, the Los Angeles Examiner wrote:

"The convention of the California State Bar Association in San Francisco, by its adoption of a proposal to conceal probation reports filed with the court in criminal cases from the public and the press, contribute to the aggravation rather than the solution of the admittedly serious problems of probation and parole.

"It does not solve any part of the crime problem to hide it in dark places. "What is needed in the whole field of criminal study, and particularly in the critical areas of probation and parole, is more light, not less.

"The only source of light is full access to the facts, and concealment of the vital facts draws a curtain of darkness between the public and the problem."

order of the court. In my view, only documents which present *ultimate action* should be open to the public. Those which are only part of the preliminary steps by which the conclusion is reached should become public only in the discretion of the particular agency, subject to judicial review in proper cases.

SUMMARY AND CONCLUSION

In what precedes we have discussed the people's right to know against the background of statutory and official enactments which may or may not affect its exercise. It is apparent that the legal restrictions upon the right are not great.[104] In the last analysis, the problem is, as are many others in a democratic society, one of adjustment between the government and the public.

We began this study by discussing human personality. So we must equate the problem with it. Ours is a government by discussion. Its strength lies in knowledge. As Madison stated:

> "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy, or perhaps both."[105]

Our democratic society, derives its power from the people, and must allow public access to all matters relating to the public's business. Only in this manner can the public participate in government, respond intelligently to its demands, and the right to comment on public men and public matters,—so vital to the proper functioning of self-government by free men,—be exercised. Only as the press serves the public's right to know assiduously

"... is freedom of the press important."[106]

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[104] See statutory and federal provisions in Cross, *op. cit.*, pages 379 to 390.

[105] 6 WRITINGS OF JAMES MADISON, 1906, p. 398. Madison made this statement, as chairman of the commission which drafted the first amendment. A modern student of the problem has insisted that the right to free flow of information should be recognized as *a legal right:*

> "Self-government is possible only to the extent that the leaders of the state are agents responsive to the will of the people. If the public opinion which directs conduct of governmental affairs is to have any validity; if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided. A thorough knowledge of official deportment is essential to protect the electorate from inadvertently condoning the mistakes of those in power. The importance of freedom of information to a nation which professes self-government lies in the fact that without one the other cannot truly exist. "It is not enough merely to recognize the important political justification from freedom of information. Citizens of a self-governing society must possess the *legal right* to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. This right must be elevated to a position of highest sanctity if it is to constitute an effective bulwark against unresponsive leadership." (NOTE, *Access to Official Information. A Neglected Constitutional Right*, 1952, 27 INDIANA LAW J. 209).

[106] EDITOR & PUBLISHER, Vol. 87, No. 53, December 25, 1954, p. 12.

To do so, the information secured should not be deliberately colored in transmittal or suppressed entirely.[107] Granted the public's right to access to all that concern's the public's business, considerations of wise public policy should determine its exercise. Administrators and men who run newspapers are instruments of government.[108] But both are human. And we are back to the responsibility of the "I and thou" *(le moi et l'autre)* of which Gabriel Marcel speaks and which we quoted at the beginning. Secrecy *as such* cannot be tolerated if the democratic process is to survive.

> "All governments," wrote Lord Acton, "in which one principle dominates, degenerate by exaggeration."[109]

A government in which secrecy is dominant would cease to be responsive to the people. To avoid this, the demands of the public for

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[107] A FREE AND RESPONSIBLE PRESS 59-65 (1947). Some newspaper editors insist that "slanting" is legitimate and that

> ". . . complete objectivity in news presentation has never been attained in any newspaper and never will be attained in anything save stock tables and similar tabulations." (Hamilton Ownes, Editor-in-Chief of Baltimore Sun papers, in address before the University of Virginia's Institute of Public Affairs, July 10, 1953, as reprinted in EDITOR & PUBLISHER, Vol. 86, No. 30, July 18, 1953, pp. 12, 48). Very candidly, he added: "No human being is wholly objective and newspaper men from the cub reporter through the copy reader to the editor and publisher are all too human." (*Id.* at 48)

A noted Wisconsin editor has stated that the Washington correspondents of the metropolitan newspapers of the country, in dealing with the problem of governmental secrecy "no longer work hard to develop the *expose* type of story." (William T. Evjue, of the Madison, Wis. Capital Times, in a radio talk as quoted in the St. Louis Post-Dispatch, editorial page, October 18, 1955).

[108] C. P. Scott, the editor of the Manchester Guardian, May 5, 1921, when that English newspaper celebrated its centenary as a newspaper, wrote:

> "A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business; it is an institution; it reflects and it influences the life of a whole community; it may affect even wider destinies. It is, in its way, *an instrument of government.* It plays on the minds and consciences of men. It may educate, stimulate, assist, or it may do the opposite. It has, therefore, a moral as well as a material existence, and its character and influence are in the main determined by the balance of these two forces. It may make profit or power its first object, or *it may conceive itself as fulfilling a higher and more exacting function.*" (As reprinted in Manchester Guardian Weekly, July 7, 1955, p. 7). (Emphasis added)

[109] Lord Acton, "The Civil War in America," in HISTORICAL ESSAYS AND STUDIES, (1907 ed.) by Figgis and Warren, p. 133. In one of his famous letters to the *Rambler* dated January 23, 1861 in stressing the need for what he called ventilation of social questions "interesting to all alike," Lord Acton wrote:

> "But it must be established that all questions of this kind, not exclusively ecclesiastical, but social and interesting to all alike, require ventilation (1) *for the enlightenment of those whose business practically it is to decide about them;* (2) for the satisfaction of others and for inspiring them with confidence, giving security, etc.
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> *"Every thing secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity. The Church especially has been in the habit of appealing to the sense of the masses, to public opinion, as she is founded on conscience."* (Letter LXXIV in Lord Acton and His Circle, ed. by Abbot Gasquet, 1906, p. 166).

information as to its business must be met. Legal restrictions which may impede access should be removed. But, ultimately, the problem is one of responsibility. We should strive for a balance between the needs of authority and liberty.

If those in public office arrogate to themselves the unrestricted power to determine what information shall be made known to the public, it would become too easy for them to conceal their conduct and misconduct,—their deeds and misdeeds. Great harm can be done to the democratic process if governmental activities are covered with a mantle of secrecy. A cabinet officer has asserted the exclusive right to determine whether the release of information concerning his department

". . . is in the interest of the Government."[110]

Another cabinet officer has directed that no news information to his department be released unless

". . . it is constructive."[111]

This makes the officer whose department is subject to scrutiny the sole judge as to the availability of information as to his official conduct or that of his subordinates.

It enables the official to keep from the public *the very acts* which may deserve the censure and criticism of the public, whose servant he is. Such control by public officials over public disclosure of their own activities might well lead the people, the ultimate judges or censors of their performance, to ask *despairingly,* in Juvenal's words:

"Sed quis cutodiet ipsos custodes?"
(Who is to guard the guards themselves?)

In view of the absolute protection which the law attaches to utterances made and acts done in the course of judicial, legislative and executive proceedings[112] and the qualified privilege which attaches to what is done even by the most inferior of public agencies,[113] the un-

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[110] Secretary of Agriculture Ezra T. Benson as quoted in an article entitled "Taking Away Your Right to Know" reproduced from Labor in The Fresno Bee, September 24, 1955, p. 12B.

[111] Defense Secretary Charles E. Wilson as quoted in the same article. Rightly did James S. Polk, Editor of the Louisville Courier & Times, insist that the order would

". . . wipe out the public right to knowledge of public business."

Pertinently, as though bringing Juvenal up to date, he asked:

"When the men whose action, ideas and failures we should know about are deciding what is 'constructive,' where are we?"

Ibid.

[112] 33 AM. JUR., LIBEL AND SLANDER, §§140-143, 146-152; 53 C.J.S., LIBEL AND SLANDER, §§102-105; Yankwich, *Immunity of Congressional Speech—Its Origin, Meaning and Scope,* 99 U. OF PA. L. REV. p. 259, (1951). Yankwich, *It's Libel or Contempt If You Print It,* pp. 291-297, (1950); PROSSER ON TORTS, pp. 611-612, (2nd ed. 1955), RESTATEMENT, TORTS, §§585, 590, 591.

[113] 33 AM. JUR., LIBEL AND SLANDER, §144; 53 C.J.S., LIBEL AND SLANDER, §129;

limited power to withhold information creates an anomaly: The public official enjoys immunity from legal liability to others for his official acts. If he can cover his acts with the cloak of secrecy, he is relieved of the *only* restraint remaining,—responsibility to the public for his acts. Secrecy, therefore, breeds irresponsibility as well as tyranny. By contrast, a generous policy of access, denied only in case of extreme governmental necessity, avoids these evils and is more compatible with democratic ideals.

As accurate reporting of governmental activities is protected by qualified privilege, a liberal rule of access and competition between the news-gathering agencies would tend to encourage the widest dissemination of governmental information.[114]

In brief, if public officials and the organs of information act with full awareness of their moral obligation and responsibility to a democratic society, they will perform truly their essential function as instruments of free government.[115]

PROSSER, *op. cit., supra,* note 112, p. 612; Mills v. Denny, 245 Iowa 485, 62 N.W.2d 222, (1954). Annotation, 40 A.L.R.2d 933, 941.

[114] Kent Cooper, former executive director of the Associated Press, some years ago, summed up the two facets of the problem when he stated that the citizen's right to know was essential to political freedom, and that it implies
". . . *access* to news, *fully* and *accurately presented.*" (as quoted in New York Times, Sunday, September 18, 1955, p. 59).
This means that in order that the right to know be given true scope, *access* by the media of communication must be followed by *full* and *accurate* communication to the public of the information secured.

[115] The convention of Liberty of Information adopted by the Conference of the United Nations in 1950, declared in its preamble that
". . . the free exchange of information is one of man's fundamental rights, essential to the cause of peace and to progress in the political, social and economic fields"
and bound the members who should adhere to it to guarantee
" . . . freedom to transmit and receive information."
(Quoted in Jacques Bourquin, 1950, LA LIBERTÉ DE LA PRESSE, p. 570; for the author's comments on the project, see pp. 137-150).
The Universal Declaration of Human Rights, adopted on December 10, 1948 by the General Assembly of the United Nations in asserting the right to freedom of opinion and expression declares it to include the freedom
". . . to seek, receive and impart information and ideas through any media and regardless of frontiers." (Art. 19)
(See, HUMAN RIGHTS: A UNESCO Symposium, 1949, Appendix III, p. 277. DEPARTMENT OF STATE PUBLICATIONS 3381, INTERNATIONAL ORGANIZATION AND CONFERENCE SERIES . . . 20, January 1949)
A Committee of the National Catholic Welfare Conference on February 1, 1947, sent to the United Nations Committee on Human Rights a "Declaration of Human Rights" which declared among "rights which are inalienable,"
". . . the right to freedom of expression, of information and of communication in accordance with truth and justice." (Part I (6)) (As quoted in New York Times, February 2, 1947, p. 4(L); Catholic Action, February 1947, pp. 4-5, 17)
A French writer has summed up the democratic implications of the recognition of the right to free flow of information in these words:
"Thus in a democracy there is *a recognized judge* of the individual's responsibility in the expression of his views. To be a democrat is *to acknowledge that judge.*
"Admittedly, as no one can be fully a democrat save in a democracy already achieved, and as there are only imperfect potential democracies,

it is at all times the citizen's right—and even his duty—*to judge his judge. It is the fear of that ultimate appeal which holds back the steps of majorities along the path of tyranny.* . . . Doubtless in such an appeal *ad infinitum,* where rules and safeguards successively pass away, there are growing risks of errors. *But is there any liberty without risk? Risk abides in the heart of man, for man exists only by inventing himself.*" (René Maheu, *op. cit., supra,* note 2, pp. 218, 222) (Emphasis added)

In the last analysis the problem like all problems relating to freedom in modern society is one of accommodation. A modern student has stated the problem in this manner:

"Whether pluralism continues in these countries or not will largely depend on how the three problems of accommodation, progress, and liberty, which have been the burden of this paper, continue to be handled; and a pluralistic system offers the best available compromise between the oft-conflicting demands of order on the one hand and liberty on the other. The answer lies in the responsibility of private association and the wisdom of the law. The absolutism of the state can be avoided through strong and responsible associations; the absolutism of the private group through strong individuals properly protected in the exercise of their independence." (Clark Kerr, *Industrial Relations and the Liberal Pluralist,* Reprint #80, INSTITUTE OF INDUSTRIAL RELATIONS, p. 15, 1955).