The Infection of Secrecy

Lecture by James Russell Wiggins

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Thirty Years have passed since Basil (Stuffy) Walters, as chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, opened a struggle to preserve the right of citizens to know about the conduct of their own government.

Walters passed the job on to James S. Pope, who quickly saw that the main lack of the ASNE was knowledge of the law and the facts. He induced Harold Cross to become counsel for the committee, and the first fruit of that fortunate move was the publication in 1953 of the Cross report: *The People's Right to Know*. Cross discovered that access to many of the departments and agencies of the federal government was closed and barred, and he commenced a door opening operation that he continued until his death in 1959.

The effort to improve access to the proceedings and records of government has accomplished a great deal. The old federal "housekeeping statute" (5 USC 22), upon which federal officials had based their obstruction, was repealed—an initial accomplishment made possible by the work of Representative John Moss and his committee. Other gains have included the amendment of the Administrative Procedure Act signed into law by President Lyndon Baines Johnson. State after state has adopted access laws clearing up statutes that had been invoked to bar public knowledge of proceedings and records of state and local governments. Not the least of the accomplishments in the years since the start of the struggle has been the establishment here in Columbia, Missouri, of the Freedom of Information Center.

Much has been accomplished, but much remains to be done if citizens of this country are to possess the right to be informed about the transactions of their own government.

There are five broad rights that society must preserve if its press is to be effective in informing it. They are, in the order of their exercise: the right to get information, the right to print without prior restraint, the right to publish without confiscatory punishment for publication alleged to be wrongful, the right of access to the means of printing, and the freedom to distribute material once printed.

Of these five rights, we can say with confidence and assurance that only one of them is absolutely secure in this country today: the right to print without prior restraint. That right was all that "freedom of the press" meant in the age of Blackstone, and it is all that some authorities today think that it means. An eloquent opinion by Charles Evans Hughes in *Near vs. Minnesota* in 1931 so firmly established the right to print without prior restraint that it has not been seriously challenged since. The U.S. Supreme Court upheld it again in the opinion denying the right to restrain publication of the Pentagon Papers.

The battle for the other rights goes on. The fight for them, like the fight for all freedom, no doubt is an endless one.

The right to know is so inextricably bound up with the theories of self-government that its existence in a free society is taken for granted by most people. It is one of those things that goes without saying; but as the late Carl Becker once warned us, we need to take a look at things that go without saying to see if they are still going. One of the best expressions of this right I have ever found was in the *London Magazine* in 1747, which stated: “Every subject not only has the right, but is duty bound to inquire into the public measures pursued; because by such an inquiry he may discover that some of the public measures tend toward overturning the liberties of his country; and by making such discovery in time and acting strenuously, according to his station, against them, he may disappoint their effect."

This country's Founding Fathers understood the principle well. Thomas Jefferson said: “My own opinion is that government should by all means in their power deal out the materials of information to the public in order that it may be reflected back on themselves in the various forms into which public ingenuity may throw it." He described the secrecy of the constitutional convention as “an abominable precedent."

James Madison warned: "A people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

Woodrow Wilson put it bluntly but eloquently in his criticism of the secrecy of congressional committees when he said: "It has got to be put into the heads of legislators that public business is public business."

In spite of the fact that our whole system of popular government is premised on the theory that citizens have a right to know, officials at every level of government, from time to time, attempt the interposition of authority between the people and the proceedings and records of government.

The late Max Webber was one of the first to explain why this happens when government grows beyond a certain size. He explained that in a pure democracy, government is run by amateurs of similar status. But democracy becomes alienated from its purity when a group grows beyond a certain size and the administrative function becomes too difficult to be satisfactorily taken care of by anyone whom rotation, the lot, or election may happen to designate. As he put it: “The growing complexity of the administrative tasks and the sheer expansion of their scope increasingly result in the technical superiority of those who have had training and experience and will inevitably favor the continuity of at least some of the functionaries."

A pure democracy is a government of amateurs - the government of a bureaucracy is a government of professionals. Webber shrewdly warns that “wherever increasing stress is placed on official secrecy, we take it as a symptom of either an intention of the (bureaucratic) rulers to tighten the reins or of a feeling on their part that their rule is being threatened."

The flowering of our modern bureaucracy explains in part the rising impulse to secrecy in state and federal government. The bureaucracy is inherently endowed with a defensive resistance to inquiry by citizens. It is naturally afflicted with an itch to secrecy, which it scratches with mountains of regulations and rules.

Another danger to the right to know has arisen out of a fascination with the rights of privacy. Secrecy, in the name of privacy, is being imposed upon the hitherto open system of criminal justice in the United States to a degree that threatens us with the hazards of secret arrest. Records hitherto available without question are being "expunged," “purged," “sealed," and otherwise withheld, under new federal laws, Department of Justice regulations, and statutes in 28 states.

Much of the mischief springs from Section 524(b) of the Crime Control Act of 1973, which attempts to govern the release of “criminal history information." The Law Enforcement Assistance Administration issued its rules under this law in May 1975 and revised them in March 1976. Many states have passed laws to bring state acts into conformity with federal desires to ban access to, many criminal records.

Maine's 1974 Legislature passed expungement statutes requiring that pardon records be expunged and that arrest records of persons subsequently acquitted be expunged—including records of arrest, detention, complaint, information and indictment.

The statute kept newspapers from reporting acquittal of charges; it denied accused persons their records; it cluttered up the courts with impossible tasks of concealment; it threw a veil of secrecy over criminal justice operations; it deprived accused persons of records needed in their own defense; it denied citizens material needed to prosecute civil cases; and it handicapped job applicants needing written evidence of dismissal of arrest charges.

The Maine statute was repealed last April, but it left behind a legacy of secrecy in criminal history records that subsequently caused difficulty. This Criminal History Information Act has been variously construed to restrict the records of individuals involved in law enforcement when the records are maintained alphabetically, although the state's right-to-know law requires the release of information filed chronologically.

In July of this year, members of the Maine Press Association undertook a survey to find out what police records were being denied citizens. They discovered that law enforcement officials, in most cases, denied citizen access to even arrest records. At its annual meeting on September 8, the Maine Press Association unanimously decided on a formal inquiry into accessibility of police arrest records. The newspapers visited law enforcement agencies to request arrest records on October 16. Only nine officials, out of more than 90 examined, obstructed access.

On October 11, 1978, Attorney General Joseph Brennan issued an opinion on what records are available under Maine's contradictory right-to-know law and criminal history law. He concluded that records generally available to the public include: records of arrests which are filed chronologically, police blotters and other chronologically organized logs, wanted posters, fugitive lists circulated by law enforcement agencies, written decisions of courts, records of civil violations, petitions for pardons, and statistical data. He found not available under the Criminal History Information Act: intelligence files relating to investigations, names of informers, juvenile records, records relating to dismissal or acquittal of criminal charges where a full and free pardon has been granted, records relating to convictions, and guilty pleas or pleas of *nolo contendere*.

The criminal history act, emerging from the opinions of the Law Enforcement Assistance Administration of the Department of Justice, is not satisfactory. It introduces into our system elements of secret administration of justice hitherto unknown in this country, and it ought to be amended. That its inherently offensive effects were spread far beyond even the intent of the framers of the law was to be expected. Secrecy is contagious and infectious.

Other states have had similar troubles. Hawaii adopted a privacy statute on June 20, 1974. Honolulu police construed it to mean that they were required to conceal all arrest records. The media filed a suit against enforcement of the law. The Hawaiian Circuit Court held that the act violated rights “to freedom of speech and press under the First and Fourteenth Amendments and under Articles of the Hawaiian Constitution."

Oregon, on June 14, 1975, passed an expungement statute like that of Maine. On September 9, the Legislative Counsel's office issued an opinion that the law made it illegal for officials to tell anyone, including reporters, whether an individual had been arrested, indicted, tried, convicted or imprisoned. On September 15, law enforcement officials put 175 persons in the Umatilla County Jail at Pendleton, during the annual round-up, and held them without bail or access to outside sources. This abuse of secrecy caused the governor to summon the Oregon Legislature into a special session, at which it promptly repealed the mischievous law it had adopted at the behest of the Law Enforcement Assistance Administration and the American Civil Liberties Union.

The American Civil Liberties Union is the strongest supporter of these laws. They are aimed at a real human problem—the well-being of innocent accused persons; but they risk an even greater menace to all citizens—the danger of secret arrest.

Aryeh Neier, executive director of the American Civil Liberties Union, in his testimony before the Senate Judiciary Committee in support of the Tunney bill (S. 2008), July 15 and 16, 1975, said that arrest records and conviction records "often create social lepers who must exist as best they can on the fringes of society." He believed that even records of conviction should not be disseminated "absent the individual's consent."

It is astonishing and dismaying to find an organization that has so often defended press freedom agitating for laws that would bring to this country, for the first time in its history, the dangers of secret arrest, secret trial and secret punishment.

Jeremy Bentham, England's great 18th century utilitarian philosopher, has warned that "In darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice."

The legislation being sought by the ACLU, and supporters like Senator Kennedy and former Senator Tunney, raises the most serious questions about the preservation of open justice in this country. Deputy Attorney General Harold R. Tyler warned in 1975 that the bills then before the Senate raised the issue of a "fundamental conflict between privacy and publicity in the criminal justice process."

In his book *Dossier*, Aryeh Neier cited many examples of persons injured by the disclosure of arrests and convictions. He said that many suffer difficulty in getting employment. Many find it difficult to regain a place in society. Many continue to have difficulty getting jobs even after pardon. These are real human problems.

The question is: Can they be solved by expungement or concealment of records? Is it possible to extinguish wholly the memory of society? Measures that merely limit the number of sources of disclosure (as these measures do) may even increase the dangers of blackmail and extortion by the few who know. There are better ways to diminish such hardships. One is better-trained police. Another is elimination of dragnet arrests. Another is the education of society. Another is continuous effort to enlighten public opinion so that society will help in rehabilitation. Even with such efforts, a problem will remain. But it is not as great a problem as that arising from secret arrest.

What about non-disclosure, expungement, purging or concealment of the records of persons convicted of crimes who have discharged their debt to society by prison terms? Aryeh Neier thinks such records ought to be sealed or destroyed after a person's release from imprisonment. Should the public memory of transgression be extinguished in this manner to further the possibility of rehabilitation?

Slowly, society has been moving away from medieval notions of branding the convicted. Laws requiring felons to register in a new community lingered into this century, but such laws have largely vanished. Should we now proceed not only to desist from labeling the felon, but to refrain from ever after disclosing his identity and his criminal past?

Unfortunately, there are cases in which a criminal record is relevant as a means of protecting society. The District of Columbia had the Whalen case, in which a convicted rapist and burglar was given a job in a secure apartment for women and while employed there murdered a girl. The employer got no facts of previous crimes from the probation office. The reticence of parole officers cost the apartment owner a $600,000 out-of-court settlement and the parole bureau a punishment of $200,000 for negligence. Should we make this sort of absentminded negligence compulsory?

Criminal history information may be abused, but it sometimes is of great importance to the safety of society. We owe it to those who have defied authority in one way or another not to cast them out of human society forever; but we owe something also to persons who, in the words of Woodrow Wilson, "submit to authority."

In any case, the ex-felon's best protection against discrimination is not secrecy, but publicity. He has his best defense in a frank and open acknowledgement of his past. The sort of double-think, newspeak and reality control practiced in the Soviet Union and made famous in Orwell's *1984* does not really work anyway. There is a limit to how much of this can be done even in a dictatorship; and the limit is lower in a society where enough freedom remains so that individuals can refresh their recollection from some unofficial source the government has not been able to expunge. Neither legislatures nor Congress really can undo a deed, unsay a word, or unwrite a line. They can put some obstacles in the way of those seeking truth. That, fortunately, is the limit of their power.

As a practical matter, we will have to alter more than the laws on the statute books if we are to relieve utterly those unjustly accused, those convicted and pardoned, and those who have paid the penalty of the law from all consequences of their encounters with the system of criminal justice. We must deal with the laws of life, as well as the laws of legislatures. A man's past, in this unhappy world, follows him like a shadow. It is better to learn to live with the shadow than to attempt to induce an eclipse of the sun to conceal it. It is better to teach society not to run from shadows than to try to persuade it that shadows are not really there.

Concealment and expungement laws are futile when they do not impose secrecy so complete as to be dangerous, and dangerous to the degree they are not futile. They are dangerous because they tend to envelop our system of criminal justice in the kind of secrecy free men always have feared. They give to processes hitherto open a sanction of secrecy that law enforcement officials are bound to construe with logical extensions (as they did in Maine). Secrecy in a society is like an infection. Knowledgeable men will no more submit to a little secrecy in our system of justice than they would submit to a little smallpox. To start this contagion is to risk introducing an epidemic the end of which no man can see.

In a free society, the people need to know not only the official proceedings and the official records of government; they must have access, as well, to the evidences of wrongdoing or abuse of power that are observed by private persons privy to the vast bureaucracy of the government.

The U.S. Supreme Court, which so often has been the chief defense of the right to know, has in the past few years struck serious blows at the ability of the press to tap those unofficial sources that often are the only possible avenue by which the people can be fully informed.

The U.S. Supreme Court opinion in *Branzburg vs. Hayes*, in 1972, decreed that the First Amendment does not provide a newsman with immunity from having to reveal confidential sources to a grand jury. The more recent opinion of the Supreme Court, in *Stanford Daily vs. Zurcher et al*, gave its approval to the use of a search warrant to obtain evidence for use in a riot prosecution, again threatening the ability of a newspaper to protect its sources of information. If that capacity is kept in question by the demonstrated inability or unwillingness of newspapers to protect their files from rummaging law enforcement officials, the resultant disclosure will dry up a fountain of information upon which the press historically has been dependent for facts in one case of bureaucratic fraud after another. Officials of government, guilty of wrongdoing or malpractice, will have thrown about their misdeeds the shelter of judicial authority. The danger of reprisal will restrain individuals bold enough to divulge to inquiring citizens corruption in high places.

Associate Justice Byron White expressed confidence that search warrants, properly limited, would not give occasion or opportunity for officers to rummage at large in newspaper files. It is a confidence no one has been willing to depend upon since the British government caused the home of John Wilkes to be searched on the 23rd of April, 1762. The searchers were looking for written evidence on which to base a punishment for the attacks on the king in Number 45 of North Briton. Wilkes was freed on that count. But in the papers found at his home was a copy of an essay on women that Wilkes had not yet

printed. He was sentenced to serve 12 months in jail for a discovery that had nothing to do with the reason for the issuance of the search warrant.

The punishment of the *New York Times* and its reporter M. A. Farber, for refusing to divulge names of sources in the trial of Dr. Mario Jascalevich, casts a further shadow over the ability of the press to protect sources. If these cases diminish the faith of citizens in the willingness or ability of the press to maintain their confidentiality, the courts will have closed another door by which society is able to learn about the conduct of government. Citizens will be afraid to rely upon the assurance the press hitherto has been able to give them.

Those who still believe in the right to know must continue to press for legal power to enforce that right wherever it is put in jeopardy by legislatures, courts or executive department officials. Some notable victories have been won by the press in the last 25 years, but the experience with laws and opinions of the court instructs us that more is needed. Alexander Hamilton made the point that "whatever fine declarations may be inserted in any constitution respecting it (freedom of the press), it must altogether depend upon public opinion, and on the general spirit of the people and of the government."

Even when the laws are sound, and the rulings of the courts beyond reproach, if newspapers, at every step of gathering information about transactions and proceedings of government, encounter the reluctance or refusal of government officials to disclose the ordinary transactions of the day, the flow of information to the public will be delayed and obstructed.

In every government office in the land, there ought to be a presumption that citizens have a right to know what government is doing. The government apparatus ought to be committed to the principle that it has a duty to divulge and disclose in every situation where there is not a plain legal dictate to the contrary.

Government offices are not the private property of men and women who occupy them by the lottery of election or the accident of political appointment. They have no authority to decide what is to be divulged and what is to be concealed when the law plainly and unequivocally provides for disclosure. We are in peril indeed if we are at the mercy of any perverse, obstructive or uninformed illiterate who wears the hat of authority. Citizens should not have to beg, wheedle, conspire and petition authority for the facts about government.

The struggle to see that the laws of the nation, the states, and the communities are right must be carried on vigorously. In addition, we must work harder to achieve among officials and citizens alike an understanding of the importance of freedom of information so universal that the acts of government can be examined without recourse to prosecution. The right to know must be so uniformly conceded that citizens will seek information without fear and officials will supply it without cavil, reluctance, avoidance or evasion.

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