Remarks of
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Secrecy, invoked in the name of privacy, is being imposed on the hitherto open system of criminal justice in the United States, threatening citizens with the hazards of secret arrest.

Records hitherto available to citizens are being "expunged," "purged", "sealed", and otherwise withheld, under Federal laws, Department of Justice Regulations, and statutes in 28 states that subject records of criminal justice to varying degrees of non-disclosure.

Most of the mischief springs from Section 524 (b) of the Crime Control Act of 1973 which provides that criminal justice history information "shall only be used for law enforcement and criminal justice information and other lawful purpose."

Senator Edward Kennedy, one of the authors of this section, stated on the floor of the Senate that "requests from outside the criminal justice community to examine data obtained through the system should be honored only if the receiving agency is authorized access by local law, state statute, or valid administrative directive."

The Law Enforcement Assistance Administration issued its first draft of enforcing regulations on May 20, 1975. It has been at work amending that draft since, and promulgated the most recent regulations on Friday, March 19, 1976.

These regulations, improved somewhat from month to month, nevertheless still will close to public scrutiny a great deal of material hitherto released as a matter of course and made open to the public in many states by right-to-know laws.

More sweeping legislation than the 1973 law was introduced by Senator John Tunney, California Democrat, in 1975 and hearings on that law, S 2008, were held on July 15 and July 16. This law would tighten access laws even more. Raw arrest records could circulate only in law enforcement agencies dealing with the job applications of the persons involved. Arrest records would be available for public inspection if less than a year old, not thereafter. In general, criminal justice records would be available only in "on-going" cases and not as "past history". Old conviction records would be sealed or purged after seven years. Arrest records would be purged after two years. The law seems to be stalled, at the moment, but it has powerful

liberal support and the backing of the American Civil Liberties Union.

Many states have been enacting laws to conform to the regulations of the Law Enforcement Assistance Administration.

Oregon on June 14, 1975 passed such a law drafted by the ACLU. It attracted little attention until September 9, when 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 Sept. 15 law enforcement officials put 175 persons in the Umatilla County Jail at Pendleton, where they were held without bail or access to outside sources, on charges growing out of the Pendleton round-up. The Oregon Legislature met in special session on Sept. 16 and promptly repealed this mischievous statute.

Maine's 1974 Legislature passed two notorious expungement statutes that are the very embodiment of clumsy legislative draftsmanship. Chapter 691 of the Laws of 1974 provided that all records of persons pardoned by the Governor were to be expunged. The Secretary of State was directed to notify all agencies and "persons" having records of offense to "expunge" them. In November of 1974 he directed several newspapers to do just that. No one complied, and no action was taken. This bill had a typical legislative origin. Representative Charlotte White of Guilford, on the last day on which bills could be introduced at the 106th session, received a phone call from a young woman who once had been convicted of shoplifting. She and Ward Murphy of the Corrections Bureau urged Representative White to put in a bill that would expunge this and other pardon records. She did and the bill was unanimously adopted. When the mischievous character of the bill became apparent, Representative White agreed to press for its repeal, but she was defeated before she could accomplish that purpose.

Maine's law requiring expungement of arrest records (Chapter 706 of the 106th Legislature) was passed at the same session in 1974. It provided simply that those acquitted of any charge "shall be entitled to expungement of any records or recordings of any arrest and detention in connection with such charge, complaint, information or indictment."

This law made it the duty of the Clerk of Court to notify all those having such records to "expunge" them.

The Maine Supreme Judicial Court tried to make some sense out of the law by directing clerks to put the "expunge" orders into a special filing cabinet, release them once to the press, and after that withhold them from circulation.

Even with this timely modification by the Court, the statute worked injury on many citizens. (1) It impeded newspapers in their efforts to report acquittal and dismissal of charges. (2) It denied access of accused persons to their own records. (3) It imposed an onerous duty on already over-burdened clerks of court. (4) It threw a veil of secrecy over the operations of criminal justice so that no one could make effective inquiry into the conduct of law enforcement officials after charges were expunged. (5) It deprived persons accused subsequently of other offenses of access to records that would back up defense of double jeopardy. (6) It denied citizens acquitted of a crime of access to criminal records needed to prosecute civil cases. (7) It handicapped job applicants needing written evidence of the dismissal of arrest charges.

Hawaii adopted a similar statute on June 20, 1974. Honolulu police at once construed it to mean that they were required to conceal arrest records. Newspapers, press associations, and broadcasters started suit against these practices on June 20. The Hawaiian Circuit Court held that the act violated rights "to freedom of speech and press under the First and Fourteenth Amendments and under Article 1, Section 3 of the Constitution of the State of Hawaii." "Free and open reporting unaffected by threats of loss of access to government sources and/or potential charges of criminal violations is in the public interest," the Court said.

While the drive to lock up law enforcement records has been blunted in some states, the pressure for such secrecy continues.

The Judiciary Committee of the Maine Legislature reported out a bill repealing both expungement statutes last month, and enacting some milder restrictions on access. Representative Harvey DeVane had previously failed to get consideration of his outright repeal bill.

The repeal bill (L.D. 2326), striking both the pardon expungement act and the arrest expungement act, was passed by both houses of the Maine Legislature this week and now is on Governor Longley's desk, awaiting his signature. The provisions of these laws have been replaced by a rather complicated statute which, to a layman, seems to say that there will be no withholding of criminal justice information contained in posters, announcements or lists of fugitives, police blotters, court records, written decisions and other items of original entry and action where such matter is "reasonably contemporaneous" but that dissemination of "criminal history" information will be limited to criminal justice agencies. How much this statute will obstruct reasonable public access to records to which citizens hitherto have had free access remains to be determined by experience. It would, of course, have been much better if the situation might have been

restored to the same conditions that existed before the expungement statutes were adopted. But it is gratifying that the expungement laws, at any rate, finally have been wiped off the law books of Maine.

The foremost organization supporting expungement and concealment laws is the American Civil Liberties Union. The laws are aimed at a real human problem -- the well being of innocent accused persons; but supporters seem so preoccupied with this genuine problem that they exhibit total indifference toward the extinction of historic safeguards against secrecy in the processes of criminal justice.

Aryeh Neier, Executive Director of the American Civil Liberties Union in testimony before the Senate Judiciary Committee subcommittee said that arrest and conviction records "often create social lepers who must exist as best they can on the fringes of society." The impact of distributed arrest records, he argued, "is almost as severe as that of a conviction record in limiting opportunities for employment." Neier called newspaper publication of arrests "unfortunate." He would have laws forbidding dissemination of arrest records of persons not convicted. He told the committee that even conviction records should not be disseminated "absent the individual's consent."

While Neier expressly opposed legal punishment for newspapers who print criminal records as an affront to the First Amendment, he thought government should not give out information on arrests and convictions. This, of course, is the Blackstonian notion that Freedom of the Press consists of nothing but absence of prior restraint. It has been clear for generations that it also involves: the right to get information, the right to print without punishment, the right of access to the means of publication, and the right to distribute.

Many who support expungement and concealment measures argue that the operation of the criminal justice system is a matter solely the concern of the accused and the convicted, and none of the business of the rest of society. This is a simply untenable argument. In addition to the plaintiff and defendant in each criminal suit, there is a third entity -- the general public, vitally concerned to see that justice is done and that the laws are enforced.

Unless this tampering with arrest records is stopped, we are going to see, in the not-distant future, perils of secret arrest against which we have been fearfully warned by events in Nazi and in Communist countries. Our best protection against secret arrests is the formal arrest book which ought to be made inviolate and inviolable by law and which ought to be open to all citizens. The open arrest book diminishes the likelihood of arrests without cause. It assures falsely arrested citizens of written evidence on which to base actions for

redress. It safeguards the citizen against illegal and secret detention. It protects the community against illegal and improper release of persons with influence. It protects the public against corrupt distortion of information on the state of law enforcement.

Aleksander Solzhenitsyn, in the GULAG ARCHIPELAGO, has described "the sharp night-time ring, or the rude knock on the door," the disappearance of the accused person, the frantic search by relatives, going from jail to jail to be told "Nobody here by that name," or "Never heard of him."

Robert Conquest, in THE GREAT TERROR, has similarly described arrests in the Soviet Union in this paragraph:

"Wives were not told where the arrested had been taken. The method of finding them was to go from prison to prison. In Moscow wives would go to the information center opposite the Lubyanka; then to Sokolnika; then to Taganka; then to the office of the Butyrka; then to the Lefortova military prison, and back again. When the head of the queue of hundreds of women was reached, the official was asked to accept the 50 rubles a month to which as-yet unconvicted prisoners were entitled. Sometimes a prison, perhaps through bureaucratic incompetence, would not admit that they held the man in question until the second or third round."

Oregon citizens had a brief and frightening experience with these methods. Last September citizens were turned away from the Umatilla County jail at Pendleton when they inquired about arrested relatives. There were other cases. Oregon Attorney General Lee Johnson said a resident of a Russian-American community at Woodburn, near Portland, spent three days trying a find a daughter taken into custody by a sheriff's deputy. All requests for information were rebuffed by the Sheriff's office and the state police. The parents sought the aid of John Hudanish, a bilingual state employment counselor whose requests for information were also turned down. The girl was located in a mental hospital after a missing persons report was filed. "What was happening," Hudanish, the son of Russian immigrants, said, "was just like Russia during the purges, when people would disappear from their homes and wind up as a number somewhere." And so it was.

Unless this impulse to secrecy is turned around, there will be more cases of this kind.

Jeremy Bentham, England's great 18th century philosopher warned: "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 question raised by the proponents of privacy bills is simply whether this publicity can be preserved if access to criminal justice information is made secret. Deputy Attorney General Harold R. Tyler described this issue to the Senate subcommittee as a "fundamental conflict between privacy and publicity in the criminal justice process."

In his book DOSSIER, Aryeh Neier cited many samples of persons injured by the disclosure of arrests and convictions. 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 problems.

The question is: can these problems be solved, these hardships eliminated, 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 most of these measures do) may increase the dangers of blackmail or extortion. There are more hopeful approaches to the solution of this kind of injustice. One is better-trained police. Another is restraint on such abuses as the drag-net arrest. Another is the indoctrination and education of society to distinguish between mere arrest and conviction. Another is continuous work to improve public opinion so that society will help in the rehabilitation of those who have served prison terms.

These steps will not eliminate the problem, even though they diminish it. A danger of injury and inconvenience remains. But it is not as great a danger as that which confronts accused and arrested persons in Fascist and Communist countries. No sane man would willingly exchange the predicament of a citizen who gets his name in the newspaper if he is arrested for the predicament of a citizen whose arrest may never be known to any one.

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 right after acquittal. Should the public memory of transgression be extinguished in this manner?

No doubt mankind has been slowly moving away from the deliberate effort to mark indelibly those guilty of crimes. Society no longer clips the ears of felons or brands them on the forehead. A few laws requiring felons to register lingered into the century, but they have largely disappeared. Should we now proceed not only to desist from labeling the felon, but refrain from disclosing his identity and his criminal past?

There are, unfortunately, 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 there murdered a girl. The employer was not informed of his past. The reticence of parole officers, in this case, cost the apartment owner a $600,000 out-of-court settlement, and the parole bureau $200,000 court punishment for "negligence." Should we make that kind of absent-minded 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 Woodrow Wilson has described as "those who submit to authority."

The ex-felon's best defense is not secrecy, but publicity. He has his best protection against discrimination in a frank and open acknowledgement of his past to his employers and to his colleagues.

The sort of double-think, newspeak and reality control practiced in the Soviet Union and made famous in Orwell's book 1984, does not really work, anyway. There is a limit to how much of this can be done even in a dictatorship, and a lower limit in a society where freedom remains so that individuals can refresh their recollection from some unofficial source. Neither Legislatures nor Congress really can undo a single deed, unsay a single word, or unwrite a single line. They can put some obstacles in the path of those seeking the truth. That is all.

To the extent they can impede access to criminal justice information, should they do so? Should citizens be denied access to the criminal justice history of candidates for public office? Should the scrutiny of criminal justice history be denied licensing agencies issuing authority to practice the professions? Should there never be an opportunity to consult a man's background to discover if an environment into which he is to be placed will be safe, for him and for society?

Those who most emphatically criticize dissemination of criminal history information, in my opinion, overestimate their own humanity and underestimate that of the rest of society. Neier himself in his own book relates the story of a man with a criminal past who feared a promotion that might bring about disclosure, but finally went to the head of his company and made a clean breast of it, thereby ending his own anxiety and gaining acceptance. There are many men in private employment who have become similarly successful despite a history of criminal acts. There are men in public life who have been elected and re-elected to office by constituencies aware of, but undeterred by, criminal justice records. Maybe we have left far behind the impulse

of the Middle Ages to brand a man for his errors and hold him forever in reproach, and need no legislation to prod our progress toward humanity by secrecy and concealment.

Proposals to expunge or conceal criminal history information, as distinguished from current or contemporary arrest reports, and conviction accounts, it seems to me, are open to two central objections. These plans generally contemplate confining the circulation of such material to law enforcement agencies. It would be folly for accused or convicted persons to rely upon the absolute security of such a circulatory system. Those who did depend on it might well find themselves the object of rumor, libel, slander, blackmail or extortion, by insiders willing to use the material selectively, as such material has been used. The other major objection rises from doubts about the position of the private citizen in a society where he is kept ignorant of a vast collection of criminal history information to which only an elite bureaucracy of the criminal justice system has access. The citizen arrayed against the state is a David confronting a Goliath, in any case; but his position will be the most desperate, if those who use the power of government against him have access to records that only they, and not he, can examine, such as the criminal history records of others suspected of crimes of which a defendant is accused.

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 but 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 with 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 futilely attempt to induce an eclipse of the sun in order to conceal it. It is better to teach society not to run from shadows than it is to try to persuade them that the shadows are not really there.

Concealment and expungement laws are futile where they do not impose a secrecy so complete as to be dangerous, and dangerous to the degree they are not futile. They are dangerous because they tend, in two ways, to envelop our system of criminal justice in the kind of secrecy that free men always have feared. They give to processes hitherto more open a sanction of secrecy that law enforcement officials are bound to construe with logical extensions, so that the limited secrecy intended by lawmakers is bound to grow in application. In our society, the law often is what the nearest policeman says it is, not what the legislator says it is. And when you plant in that policeman's

mind justifications for secrecy, citizens can escape his construction of legislative intent only by protracted legal controversy beyond the resources or capabilities of the average person.

These laws are dangerous in another way. Secrecy in a society is infectious. Knowledgeable men will no more submit to a little secrecy in our system of criminal justice than they would submit to a little smallpox. To start this contagion is to introduce an epidemic the end of which no man can foresee.

Newspapers, because they often function as the surrogate of the private citizen in their scrutiny of police and courts, are first to fall victim to a plague of secrecy in our system of criminal justice. In the end, however, it will spread its fatal folly throughout our society. None will escape the malignant effects of a policy that we have sought to forestall in western culture in all the long centuries since Magna Charta.

The time has come to summon citizens of every profession and class to a battle against a retrogressive and counter-revolutionary attempt to achieve, in the false name of privacy, the kind of secret administration of justice that this country has feared and resisted for two hundred years.