The Law of Evidence: Privacy and Disclosure*

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The frequent assertion that the rules of evidence were spawned by trial by jury is an over-simplification. Judicial distrust of the jury, as Professor Morgan has shown,[1] is responsible for only some of the rules. Ancient ideas regarding the reliability of witnesses have contributed. Judicial beliefs that the suppression of truth is essential to the fostering of certain relationships have played a part. The adversary theory of litigation has accounted for many of the rules. But ideals of justice have also been influential. Mr. Justice Frankfurter has described this influence as follows:[2]

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. . . . The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

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1. Morgan, The Jury and the Exclusionary Rules of Evidence, 4 U. Chi. L. Rev. 247 (1937).

2. McNabb v. United States, 318 U.S. 332, 340 (1943).

The profundity of Justice Frankfurter's observations becomes apparent if attention is focused on two themes running through the law of evidence: Privacy and Disclosure.

THE RIGHT OF PRIVACY

Respect for human dignity and individual freedom necessarily demands respect for privacy. "[S]ecurity of one's privacy against arbitrary intrusion by the police . . . is basic to a free society."[3] Not only is privacy protected by the Fourth Amendment against unreasonable searches and seizures by federal police officials but it is "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[4] But only a part of the claim to personal privacy is protected by the Fourth Amendment. Indeed, Mr. Justice Douglas has suggested that "the meaning of 'liberty' as used in the Fifth Amendment . . . must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."[5] However, it is not necessary to accept this far-reaching suggestion to locate at least two enclaves in addition to the search and seizure one where personal privacy has been protected by the Supreme Court. First, there are the illegal detention cases. Arrest whether lawful or unlawful with incommunicado detention for periods up to a week and sometimes more is a persistent and widespread police practice. Prior to 1943, these violations of statutes requiring prompt or immediate arraignment would not alone render inadmissible in evidence a confession obtained during a period of illegal detention. In that year the Supreme Court announced a new rule of evidence in the *McNabb* and *Anderson* cases[6] which was designed to reduce police incentive to violate the arraignment statutes. It provided that any confession obtained during a period of unlawful police detention should be excluded in federal criminal trials however voluntary the confession might otherwise appear.

Another group of cases involving the invasion of privacy are the wiretapping ones. In 1928, the Supreme Court, over the

3. Wolf v. Colorado, 338 U.S. 25, 27 (1949).
4. Ibid.
5. Public Utilities Commission v. Pollack, 343 U.S. 451, 467 (1952) (dissenting opinion).
6. McNabb v. United States, 318 U.S. 332 (1943); Anderson v. United States, 318 U.S. 350 (1943).

vigorous dissents of Justices Holmes, Brandeis, Butler and Stone, held that wiretapping was neither a search nor a seizure and therefore not banned by the Fourth Amendment.[7] This settled the constitutional question but the issue came before the Court again in statutory form nine years later. The Court then held that the Communications Act of 1934 forbids the admission in federal criminal trials of evidence secured by wiretapping.[8]

In all three of these situations—unlawful search and seizure, confessions obtained during illegal detention, and wiretapping—personal privacy is not only recognized but invasions are prohibited and sanctioned by excluding in federal criminal trials evidence so obtained.[9] But the exclusionary rule is not the only sanction. It is reinforced in the search and seizure and in the wiretapping cases by the "fruit of the poisonous tree" doctrine which renders inadmissible not only evidence illegally obtained but also any other evidence resulting from the illegality.[10] Strangely enough, the Supreme Court has refused to extend the doctrine to the illegal detention cases.[11]

That the Supreme Court has recognized the importance of protecting privacy in these three types of cases and has applied the exclusionary rule does not mean that invasions of privacy have been deterred effectively or that the policy expressed has been realized fully. The exclusionary rule has been diluted by various limitations and exceptions. It operates only in situations where the evidence has been illegally seized by federal officials. Consequently, the use of evidence by a federal prosecutor is not barred when illegally seized by a state officer without federal connivance,[12] nor when the evidence is illegally obtained from the defendant by a private party.[13] And until recently the use of evidence by a federal prosecutor was not barred when obtained

7. Olmstead v. United States, 277 U.S. 438 (1928).

8. Nardone v. United States, 302 U.S. 379 (1937).

9. The exclusionary rule was first established in federal search and seizure cases in Weeks v. United States, 232 U.S. 383 (1914).

10. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (search and seizure case); Nardone v. United States, 308 U.S. 338 (1939) (wiretapping).

11. United States v. Bayer, 331 U.S. 532 (1947) (first confession which was not offered, would have been inadmissible under the *McNabb* rule, second confession made after proper arraignment held admissible even though psychologically the fruit of the first). See also Stein v. New York, 346 U.S. 156 (1953).

12. Lustig v. United States, 338 U.S. 74 (1949).

13. Burdeau v. McDowell, 256 U.S. 465 (1921).

by a federal official in violation of the privacy, not of the defendant, but of some third party.[14]

In the illegal detention cases, the Court has refused to extend the *McNabb* rule to a situation where an accused is lawfully arraigned on one charge (perhaps a minor one) and then questioned about other crimes for which he was not arraigned.[15]

The refusal to treat wiretapping as a search and seizure has given the police free reign in using other electronic devices such as the detectaphone[16] and "walky-talky" radio[17] which are not within the proscriptions of the Communications Act. And the burden of proof placed upon the defendant in the wiretapping cases has rendered the exclusionary rule an illusory safeguard. He must prove that his wires were in fact tapped—information that can only be obtained fortuitously and if the government is careless.[18]

The most serious limitation upon the exclusionary rule is its inapplicability to state court proceedings.[19] To those who believe that the Supreme Court's most vital function is protecting and vindicating basic individual freedoms—that in fulfilling this function it is justified in abandoning many of the self-imposed limitations on judicial power recognized in other types of constitutional adjudication—it is difficult to accept the Court's position that obligations of federalism require so high a degree of judicial self-abnegation. This is particularly true in the unreasonable search and seizure cases where the Court has recognized a federal right of privacy as "basic to a free society." To leave to the states freedom in formulating devices for the protection of a federal right is to leave to them the power to give or withhold from it content, meaning and reality.[20]

On the other hand, any meaningful appraisal of the exclusionary rule requires a consideration of present attitudes and

14. United States v. Jeffers, 342 U.S. 48 (1951). For excellent discussions of these exceptions see Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1 (1950); Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144 (1948).

15. United States v. Carignan, 342 U.S. 36 (1951). See Note, 60 Yale L.J. 1228 (1951).

16. Goldman v. United States, 316 U.S. 129 (1942).

17. On Lee v. United States, 343 U.S. 747 (1952).

18. United States v. Weinberg, 108 F. Supp. 567 (D.C. D.C. 1952); Note, 61 Yale L.J. 1221 (1952).

19. Wolf v. Colorado, 338 U.S. 25 (1949) (search and seizure); Gallegos v. Nebraska, 342 U.S. 55 (1951) (confession obtained during illegal detention); Schwartz v. State, 344 U.S. 199 (1952) (wiretapping).

20. See Allen, supra note 14, at 30.

trends regarding the right of privacy itself. This raises the larger question of the peril in which traditional respect for privacy stands in the modern world and whether it should be abandoned or whether, on the contrary, we should attempt to salvage as much as possible from what is perhaps a sinking ship.[21]

Privacy is threatened on two fronts. One is the rapid increase in scientific and technical knowledge about how it can be invaded. The other is the intensity with which certain demands for invasion are generated. Scientific and technological developments become irrevocable traits of the culture—however difficult the problems of assimilation and adjustment they engender. Modern science and invention have developed a host of means by which it is possible to penetrate the traditional zones of privacy. The telephone brought the wiretap. When the microphone was developed, concealed microphones became a reality. With radio has come the "walky-talky" that can be hidden on the person. The modern camera has limitless possibilities. Infra-red photography enables a record to be made without a flash bulb. The "peeping Tom" has acquired a new dimension with the invention of the distance lens. One-way glass makes it feasible to observe the conduct of persons who imagine they are unobserved. Blood tests and intoxication tests have achieved a high degree of reliability. Physiological instruments—the "lie-detectors"—have been adapted to tests for deception. The most startling results have been obtained by hypnosis and the so-called "truth serums" such as sodium amytal. Subjects can be induced to reveal their entire life history even to the most intimate details—revelations they do not recall when consciousness is regained.

These developments clearly indicate that the time is near when all private thoughts and feelings will be vulnerable to enforced disclosure. When this day arrives, privacy, from a scientific and technical point of view, will be a thing of the past.

Accompanying the solution of the technical problems involved another trend is discernible. This is the growth of demands to use these scientific instruments in penetrating hitherto inaccessible areas of human life. Some of these demands spring from persons skilled in the use of the new instruments who are ab-

21. For the following general discussion of privacy I have relied heavily upon the insights of Harold Lasswell. See Lasswell, The Threat to Privacy. In Conflict of Loyalties: A series of addresses and discussions 121-140 (1952).

sorbed in the purely technical task of carrying a method to the highest degree of refinement. Often these technicians are insensitive to the significance of what they are doing to the ideal of privacy. They do not think of themselves as the *avant-garde* of contempt for human dignity. In addition, the media of mass communications have taken a most active interest in dissolving old barriers and anyone who challenges their practices is likely to be assailed as an enemy of freedom of the press.

Policymakers in large business organizations are responsible for some of the most far-reaching invasions of privacy. An ever-present problem is the selection and promotion of personnel. Not only is the lie-detector widely used in examining employees but there is an expanding concern on the part of modern management for the selection of employees on the basis of aptitude tests and temperament tests. Demands for more intimate knowledge of persons eligible to be top executives have led to the encouragement of psychiatric and other appraisals.

The community itself seems to be demanding greater invasions of privacy. The emergence of crime as a national issue has led many to believe that laws for the protection of the individual have too often been exploited and abused. The result has been a softness towards practices on the part of private detectives, police, courts, congressional committees, and crime commissions that contravene some of the traditional methods of protecting privacy. The increasing impatience with the privilege against self-incrimination is an obvious example.

The most striking concentration of incentives undermining privacy occurs in the realm of national security. Even though World War III is avoided, the continuing crisis of insecurity in world affairs is likely to bring serious transformations in the community's way of life and especially in its willingness to protect individual freedom. As the "garrison-police state" is more closely approximated, greater invasions of privacy are to be anticipated.

Under these grim circumstances the burden of surveillance that is put upon the agencies which perform the political police function is exceedingly heavy. There are strong inducements to take shortcuts. Police departments are already accustomed to gather information which is inadmissible in court because of methods used. In addition to wiretapping, the lie-detector has become routine police procedure in some quarters. Similar uses

of "truth drugs" are to be expected. The employment of these techniques is usually justified on the ground of efficiency in clearing the innocent and in exposing the most eligible suspects for further investigation.

Another important factor is that privacy has by no means been felt to be an unmitigated blessing. One of the most characteristic complaints in modern civilization has been against the "impersonality" of modern industry and the destruction of close personal relations. In this connection, modern social science has discovered what Durkheim termed the problem of "anomie." Durkheim undertook to account for the prevalence of suicide in modern society and was led to the conception of anomie, or lack of identification, on the part of the primary ego of the individual with a "self" that includes others.[22] In other words, modern man appeared to be suffering from psychic isolation. This conception of anomie has been greatly enriched by the findings of modern psychology. In a complex and changing world, millions of people are thrown into novel situations in both an ideological and operational sense. Older ways of thinking and performing are no longer appropriate. The resulting uncertainty is a fertile breeder of anxiety. The accompanying tensions of non-identification may be released by invasions of privacy.

It appears, then, that animosity against privacy is one of the major drives of our time; that the trend in America is in the direction of restricting and perhaps abolishing privacy. If this hypothesis is sound then it is imperative that we reconsider the importance that we should attach to respect for privacy. The evaluation, however, should not be swayed by the bare fact of a trend running counter to traditional beliefs.

How have the courts responded to this trend away from privacy and what has been the role of the law of evidence? In addition to the three types of cases previously discussed, what has been the response of the courts to the new scientific techniques? Any rule of evidence or any judicial attitude that excludes the results of scientific techniques may be considered by some to be a desirable protection of privacy. The new knowledge and the new methods of scientists are obstructed, for example, by the unwillingness of courts to accept as reliable conclusions that informed scientific opinion unanimously regards as reliable; by the hypothetical question which Judge Learned Hand des-

22. Durkheim, Suicide: A Study in Sociology 241 et seq. (1951).

cribed as "a wen on the fair face of justice"; by the rule which forbids an expert opinion based even in part upon reports made by third persons; by denying to an expert the right to support his direct examination by quoting from medical treatises; and by the lack of effective measures to prevent the "battle of experts."[23] But the retention of these incongruities is clearly a price too high to pay. The task is to devise rules which will facilitate appropriate uses of what science can contribute and still discourage abuse and misuse.

The development of the drug-induced interview (narcoanalysis) pungently illustrates the ramifications of the problem. If conducted under properly controlled conditions by a qualified psychiatrist with experience in its use, an interview in which the subject is partially under the influence of a drug may be a proper and valuable auxiliary procedure in a thorough diagnostic examination. When correctly used, narcoanalysis may enable the psychiatrist to probe more deeply and quickly into the personality structure of the subject. But the results are not regarded by the psychiatrist as "truth" but simply as clinical data to be integrated with and interpreted in the light of what is otherwise known about the subject's personality.[24] When so used and if the subject has submitted voluntarily after advice of counsel the psychiatrist should be permitted to express an opinion in court about the subject's mental condition and personality. Here is a situation where obstructive rules of evidence should be modified so as to facilitate the use of new scientific techniques. On the other hand, under no circumstances should a suspect be forced to undergo narcoanalysis especially while in police custody. While in police custody the dangers of abuse and violation of individual privacy are so great as to require strong and effective action by the courts in devising controls. One approach would be to hold that the results of an involuntary drug induced interview are inadmissible in evidence as a violation of the right of privacy—the right of privacy to be constitutionally anchored in the Fourth Amendment, the Privilege against Self-Incrimination, or (preferably) the Due Process clause. In this connection, the recent decision of the Supreme Court in *Rochin v. Cali-*

23. For a critical appraisal of the law of evidence in the light of the march of modern science, see McCormick, Science, Experts and the Courts, 29 Texas L. Rev. 611 (1951).

24. For a more extensive discussion of the medico-legal aspects of "truth serum," consult Dession, Freedman, Donnelly and Redlich, Drug-Induced Revelation and Criminal Investigation, 62 Yale L.J. 315 (1953).

fornia[25] is relevant. The admission in evidence of two morphine capsules forcibly disgorged by a stomach pump was held to violate due process. "Illegally breaking into the privacy of the petitioner" does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."[26]

But the exclusionary rule alone is not enough. The "fruit of the poisonous tree" doctrine should be applied where involuntary narcoanalysis and similar procedures are used to obtain leads or clues.

DISCLOSURE

If there is a trend away from the protection of privacy and if the courts admit in evidence the results of these invasions, justice requires that the accused, whose privacy has been invaded, be given extensive disclosure. The Sixth Amendment gives him the right to be informed of the nature and cause of the accusation. This guarantee has been interpreted to require an indictment of sufficient particularity to permit the accused a fair and reasonable opportunity to prepare his defense.[27] The same Amendment also gives him the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The essential purpose of confrontation is to secure for the accused the opportunity for cross-examination and to prevent his conviction upon depositions, ex parte affidavits, or secret evidence.[28] The protections of this Amendment were succinctly summarized by the Supreme Court in *In re Oliver*,[29] as follows:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

25. 342 U.S. 165 (1952). See also Inbau, The Perversion of Science in Criminal and Personnel Investigations, 43 J. Crim. L. & Criminology 128 (1952).

26. Rochin v. California, 342 U.S. 165, 172 (1952).

27. Hagner v. United States, 285 U.S. 427 (1932). And see United States v. Lattimore, 112 F. Supp. 507 (D.C. D.C. 1953).

28. Dowdell v. United States, 221 U.S. 325, 330 (1911).

29. 333 U.S. 257, 273 (1948).

Nor may the government successfully invoke the various privileges in bar of disclosure at the trial. Disclosure of the identity of an informer will be compelled where disclosure would vindicate the innocence of the accused, lessen the risk of false testimony, or where otherwise essential to the defense.[30] And where evidence in the possession of the Government becomes "importantly relevant" to the defendant's case, it must either produce that evidence at the trial for the defendant's use or drop its prosecution against him. This rule applies even though the evidence is otherwise privileged.[31] Although this doctrine has been based upon principles analogous to waiver it reflects the value judgment that no one should be convicted of a crime without having access to material which might exculpate him. And in the *Coplon* case,[32] Judge Learned Hand held that it was a violation of the Sixth Amendment for the trial judge to refuse to disclose all wiretaps to the defendant even though they contained "State Secrets." He announced that:[33]

> "[T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense. . . .
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> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it

30. Wilson v. United States, 59 F. 2d 390 (3d Cir. 1932); Sorrentino v. United States, 163 F. 2d 627 (9th Cir. 1947); United States v. Conforti, 200 F. 2d 365 (7th Cir. 1953). And see Note, 83 L. Ed. 155 (1939).

31. United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1944); United States v. Krulewitch, 145 F. 2d 76 (2d Cir. 1944); United States v. Schneiderman, 106 F. Supp. 731 (S.D. Calif. 1952). See also Gordon v. United States, 344 U.S. 414 (1953) and United States v. Reynolds, 345 U.S. 1 (1953).

32. United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950); Note, 60 Yale L.J. 736 (1951).

33. United States v. Coplon, 185 F. 2d 629, 638 (2d Cir. 1950).

seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism."

Another example of disclosure is evidenced by the cases holding it a denial of due process for a prosecutor to suppress or fail to disclose evidence in his possession which tends to establish the innocence of the accused or even create reasonable doubt of guilt.[34]

Until recent years an accused enjoyed little or no disclosure prior to trial. It was not until 1927 that the New York Court of Appeals canvassed the problem and sketched out certain limited areas where discovery before trial might be ordered.[35] And it was not until 1946 that the Federal Criminal Rules made provision for even limited pre-trial disclosure.[36] American practice falls short of the English and Continental procedure with respect to discovery, a situation that Mr. Justice Jackson, in negotiating the Nürnberg Charter, described as follows:[37]

"It was something of a shock to me to hear the Russian delegation object to our Anglo-American practice as not fair to a defendant. The point of the observation was this: We indict merely by charging the crime in general terms and then we produce the evidence at the trial. Their method requires that the defendant be given, as part of the indictment, all evidence to be used against him—both documents and the statements of witnesses."

The need for broader pre-trial discovery is underlined by the growing intricacy of issues in criminal trials. Such modern crimes as financial fraud, conspiracy, and anti-trust violations necessitate elaborate investigation and research before trial. In fact they

34. Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Baldi, 195 F. 2d 815 (3d Cir. 1952); United States v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946); Griffin v. United States, 183 F. 2d 990 (D.C. Cir. 1950); People v. Riley, 191 Misc. 888, 83 N.Y.S. 2d 281 (1948).

35. People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

36. Fed. R. Crim. P. 16, 17(c). These rules were interpreted in Bowman Dairy Co. v. United States, 341 U.S. 214 (1951). See also Fryer v. United States, 207 F. 2d 134 (D.C. Cir. 1953). For an excellent discussion of discovery in criminal cases, consult Comment, Pre-Trial Disclosure in Criminal Cases, 60 Yale L.J. 626 (1951).

37. Jackson, The Nürnberg Case vi (1947). In England, disclosure is also an accepted part of criminal procedure. Archibold, Pleading, Evidence and Practice in Criminal Cases 412-425 (31st ed. 1943). For discussions of the French practice, see Ploscowe, The Investigating Magistrate (juge d'instruction) in European Criminal Procedure, 33 Mich. L. Rev. 1010 (1935) and Keedy, The Preliminary Investigation of Crime in France, 88 U. of Pa. L. Rev. 385 (1940).

have grown so complicated that there is a real danger that our procedure will break down.[38] And, today, even an old-fashioned murder case may involve complicated scientific evidence which a defendant is without the resources to obtain.

ADMINISTRATIVE PROCEEDINGS

Thus far this article has tried to indicate that in our criminal procedure and law of evidence there is a recognition of the value of individual privacy; that even though there may be a trend toward permitting increased invasions this trend is accompanied by one in favor of increased disclosure. When we turn, however, to certain administrative proceedings and legislative investigations we find not only toleration of serious invasions of privacy but also the very minimum of disclosure. Should not the norms established in traditional criminal trials be embraced as constitutional imperatives in some administrative proceedings and shouldn't they at least be emulated in congressional investigations?

Recent developments in American law have rendered the distinction between criminal and certain "preventive" civil proceedings increasingly technical and artificial. The "accused" in the world of today (meaning one threatened with severe sanctions which in fact are "punitive" in character) increasingly faces the possibility that he may be moved against, not only in a traditional "criminal" proceeding, but in any one of a host of executive, administrative or legislative proceedings aimed at curtailing his privilege of participation in the life of the community.

A catalog of proceedings not technically classed as criminal but resulting in the imposition of severe punitive sanctions would include those for the denaturalization of naturalized citizens, the deportation of aliens, the stigmatizing and exclusion from public employment of persons whose loyalty is administratively found to be suspect, the emergency detention provisions of the McCarran Act, proceedings under the anti-trust laws for such "equitable" relief as dissolution, divorcement and divestiture, and the stigmatizing by members of congressional committees

38. McAllister, The Big Case: Procedural Problems in Anti-Trust Litigation, 64 Harv. L. Rev. 27 (1950); Dession, The Trial of Economic and Technological Issues of Fact, 58 Yale L.J. 1019 (1949); A Report adopted by the Judicial Conference of United States, Procedure in Anti-Trust and Other Protracted Cases (1951).

of individuals who are afforded neither due process in the old-fashioned sense of due notice and fair hearing nor any other form of legal recourse.

On a few occasions the courts have set aside legislative action purporting to be non-penal when they have detected a punitive purpose and a failure to conform to constitutional standards for criminal prosecution. There was the case of *Wong Wing*[39] in 1896 where the Supreme Court considered a provision in the immigration law that deportable Chinese aliens be imprisoned at hard labor as an incident to deportation. The provision was held invalid as an attempt to impose an infamous punishment without benefit of the usual criminal procedures for the ascertainment of guilt. In the *Lovett* case[40] in 1946 the Court struck down as a "bill of attainder" a provision in an appropriation act that "no salary or compensation shall be paid" three named employees in the executive branch whose loyalty was questioned in Congress. The Court has also recognized that a denaturalization case, though a "civil" proceeding, involves issues and sanctions of such gravity as to impose on the government an exceptional burden of proof, namely, "clear, unequivocal, and convincing" evidence which does not "leave the issue in doubt."[41] But these are the exceptional rulings. By and large we still lack any consistently adhered to objective and operationally formulated set of criteria for distinguishing between "criminal" and "civil" sanctions. And in reviewing administrative or legislative action, the courts are more likely to invoke the artificial distinction between "right" and "privilege" than to make realistic appraisals.[42]

At the beginning of the discussion of disclosure four standards of justice in criminal cases were indicated: (1) The right of the accused to a hearing; (2) the right of the accused to be informed of all the evidence against him; (3) The right of the accused to compel the government to produce at the trial evidence in its possession for his use even though that evidence is privileged; and (4) the right to pre-trial disclosure. Alarming departures from the first three of these standards have occurred in the past few years. Indicative of the drift away from traditional notions of fairness and justice are (1) the President's

39. Wong Wing v. United States, 163 U.S. 228 (1896).
40. United States v. Lovett, 328 U.S. 303 (1946).
41. Schneiderman v. United States, 320 U.S. 118 (1943); Knauer v. United States, 328 U.S. 654 (1946).
42. For an excellent analysis, see Davis, Administrative Law 246-254 (1951).

Loyalty Order of 1947[43] and the new Executive Order of April 27, 1953, entitled "Security Requirements for Government Employment";[44] (2) our treatment of aliens; (3) the Internal Security Act of 1950; and (4) the conscientious objector cases.

(1) The Loyalty and Security Orders

These Executive Orders have involved drastic departures from traditional procedures, especially with reference to rules of evidence. Usually, the information disparaging the individual comes from FBI reports based on communications from informers whose identity is not disclosed. The loyalty board thus has no means of testing the probative value or credibility of the information. Furthermore, the accused is denied the historic right to be confronted by and to cross-examine his accusers.[45] The proceedings are secret, a nullification of the long-held belief that the integrity of the judicial process depends upon public scrutiny of its activities. The nature of the proceedings were eloquently summarized and castigated by Judge Edgerton as follows:[46]

> "Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the government of the United States."

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43. Exec. Order No. 9835, 3 Code Fed. Regs. 129 (Supp. 1947).

44. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

45. 50 U.S.C. §§ 781 et seq. For a thorough discussion of this act, see Sutherland, Freedom and Internal Security, 64 Harv. L. Rev. 383 (1951). Also, Notes, 51 Col. L. Rev. 606 (1951), 13 U. of Pitt. L. Rev. 221 (1952).

46. Bailey v. Richardson, 182 F. 2d 46, 66 (D.C. Cir. 1950) (dissenting opinion), affirmed by equally divided Court, 341 U.S. 918 (1951).

Mr. Justice Douglas described the proceedings in the *Bailey* case as follows:

> "The Loyalty Board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is 'a paragon of veracity, a knave, or the village idiot.' His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who her accusers are she has no way of defending. She has nothing to offer except her own word and the character testimony of her friends.
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> "Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1951) (concurring opinion). See also O'Brian, New Encroachments on Individual Freedom, 66 Harv. L. Rev. 1, 18 (1952).

In 1951 came a further undermining of the protection traditionally accorded an accused when the original Executive Order was amended to change the standard for disqualification from "reasonable grounds . . . for belief that the person involved is disloyal" to one of "reasonable doubt" as to his "loyalty."[47] The *John Stewart Service* case[48] illustrates the grave effect of this amendment which for all practical purposes scuttles the presumption of innocence and places upon the accused the burden of proving beyond a reasonable doubt his loyalty and integrity.

The new Executive Order[49] extending the so-called "security risk" program to all departments and agencies of the Government seems to give even less protection to an accused.[50]

(2) Treatment of Aliens

Another great departure from historical standards of justice is our increasingly intolerant treatment of aliens. Two recent decisions of the Supreme Court are illustrative.[51] In the *Knauff* case[52] the German-born bride of an American war veteran was excluded without a hearing under authority of wartime security regulations on the ground that disclosure of the basis for her exclusion would be prejudicial to the public interest. Invoking the right-privilege distinction, Mr. Justice Minton announced the absence of a constitutional right to a hearing in exclusion cases. More recently, the Court upheld the exclusion without a hearing of an alien who had resided twenty-five years in the United States and sought re-entry after a nineteen month sojourn behind the Iron Curtain allegedly undertaken to visit his dying mother.[53] There was no denial of due process, the Court said,

47. Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951).

48. Department of State, Press Release No. 1088 (Dec. 13, 1951).

49. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

50. For description and discussion of the security risk program, see Gellhorn, Security, Loyalty and Science, ch. IV (1950); Barth, The Loyalty of Free Men, ch. VI (1951).

51. Other cases are Carlson v. Landon, 342 U.S. 524 (1952) (denial of bail to aliens held under a warrant of deportation); and Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (deportation of former Communist upheld). The statute upheld in the *Harisiades* case made deportation mandatory for any alien who was at the time of entering the United States "or has been at any time thereafter" a member of a proscribed organization. The statute was applied to Harisiades even though he had terminated his membership in the Communist Party before its enactment. The Internal Security Act of 1950 amended the Immigration Act to make aliens deportable for membership in certain proscribed organizations or any other "totalitarian party" at any time during their lives, whether before or after entry into the United States, 8 U.S.C. § 137(2) (Supp. 1952); 8 U.S.C.A. § 1251 (1953).

52. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

53. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Cf. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

even though the refusal of other countries to accept the alien would likely result in his permanent detention at Ellis Island.

(3) The Internal Security Act of 1950

This act[54] may be "regarded as a fitting climax to . . . [a] decade of fear-inspired legislative and executive action."[55] It makes it clear that not even the ordinary citizen can feel secure in what he has hitherto regarded as basic rights of freedom. In addition to the registration and immigration provisions, the statute authorizes the President, acting through the Attorney General, to apprehend and detain in time of an "internal Security Emergency" any person, citizen or alien, "as to whom there is reasonable ground to believe . . . probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."[56] In the hearing after detention the Attorney General need establish only probable cause.[57] On appeal to the Detention Review Board the issue is "whether there is reasonable ground to believe"[58] and judicial review is limited to whether the findings are supported by "reliable, substantial, and probative evidence."[59]

Even more drastic than those dealing with the quantum of proof is the provision that while the detainee may, at the hearing, introduce evidence and cross-examine witnesses "the Attorney General or his representative shall not be required to furnish information the revelation of which would disclose the identity or evidence of Government agents or officers which he believes it would be dangerous to national safety and security to divulge."[60] Likewise, upon review by either the Detention Review Board or a Court of Appeals the Attorney General is required to present the evidence supporting a finding of reasonable ground for detention only to the extent "consistent with national security . . . but he shall not be required to offer or present evidence of any agents or officers of the Government the revelation of which in his judgment would be dangerous to the security and safety of the United States."[61]

54. 50 U.S.C. § 781 et seq. (Supp. 1952).
55. O'Brian, New Encroachments on Individual Freedom, 66 Harv. L. Rev. 1, 21 (1952).
56. 50 U.S.C. § 813(a) (Supp. 1952).
57. 50 U.S.C. § 814(d) (Supp. 1952).
58. 50 U.S.C. § 819(a) (2) (Supp. 1952).
59. 50 U.S.C. § 821(c) (Supp. 1952).
60. 50 U.S.C. § 814(d) (Supp. 1952).
61. 50 U.S.C. § 814(f). See also 50 U.S.C. § 819(c) (Supp. 1952).

(4) The Conscientious Objector Cases

Under the Selective Service Act[62] any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" may claim exemption from military service. If his claim is rejected by his local draft board he is entitled to an appeal to the "appropriate appeal board." The appeal board refers the claim to the Department of Justice "for inquiry and hearing." The Department of Justice then makes a recommendation to the appeal board which the latter may or may not follow. If the appeal board decides against the registrant and orders him to report for induction, his only remedy is to refuse induction and undergo criminal prosecution. As a matter of practice, the Department of Justice utilizes the FBI to investigate the claims referred to it. The FBI renders a report (a summary of its "raw files") to a "hearing officer" who makes the recommendations to the appeal board.

In a number of cases the question arose as to whether the statute or due process required that the FBI report be made available to the appeal board and to the registrant and also whether the registrant was entitled to be informed of the names of persons interviewed by the investigators. To resolve a conflict the Supreme Court decided the issue in *United States v. Nugent*.[63] Speaking for a majority of five to three, Chief Justice Vinson concluded:[64]

> "We think the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report."

To support this conclusion the Chief Justice reasoned as follows:[65] The word "hearing" in the statute does not comprehend such "formal and litigious procedures" as the "right to confront every informant who may have rendered adverse comment to the FBI." The duty of the Department of Justice is merely "to advise, to render an auxiliary service to the appeal board" and to help it "reach a more informed judgment." It is not "the

62. 50 U.S.C. (App.) § 456(j) (Supp. 1952).
63. 346 U.S. 1 (1953).
64. United States v. Nugent, 346 U.S. 1, 6 (1953).
65. Id. at 8 et seq.

function of this auxiliary procedure to provide a full-scale trial" and the statute does not require the department "to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation." The Selective Service Act "is a valid exercise of the war power . . . calculated to function . . . in times of peril" and procedures under it "must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for 'litigious interruptions.'"

First of all it is difficult to see how an "auxiliary service" can be of much help to an appeal board in reaching a fair and "informed judgment" if the appeal board does not know what the "fair resume of any adverse evidence" is a resume of. Nor does there appear to be any reason why the "fair resume" should be limited to "adverse evidence."[66] An informed judgment would seem to require the consideration of favorable evidence as well, if the FBI investigation disclosed it. And, even if the resume is fair it still does not disclose the identity of informants thus depriving the registrant of the opportunity to interrogate or impeach them.

It is true that if FBI reports (including the identity of informants) are disclosed valuable sources may dry up. "But," as Mr. Justice Douglas put it in his dissenting opinion, "that is not the choice. If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed. Without the identity of the informer the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination."[67]

66. See Judge Jerome Frank's opinion in the court below. United States v. Nugent, 200 F. 2d 46, 50 (2d Cir. 1952):

"Even if the F.B.I. report were favorable to the defendant, it may well be that the statute required that it be disclosed to him at or before the hearing held by the hearing officer. Cf. Griffin v. United States, 87 U.S. App. D.C. 172, 183 F. 2d 990, 993, where the court said that 'the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense.' True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important."

67. Mr. Justice Douglas in United States v. Nugent, 346 U.S. 1, 14 (1953) (dissenting opinion).

It should be noted that the *Nugent* case leaves undecided the question of disclosure at the criminal trial. See notes 30-34 supra, and Judge Frank's opinion in the court below.

The "times of peril" argument of the Chief Justice was met by Mr. Justice Frankfurter as follows:[68]

> "The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies."

CONCLUSION

It has not been the purpose of these strictures to disparage all governmental action directed to protecting national security. Rather they are aimed at the phases of this action which will lead, if unchecked, to the subversion of the American sense of justice. The greatest danger to our institutions lies in our acquiescence in limitations upon those liberties of the individual which were thought to have been permanently guaranteed by the Constitution. We need a resurgence of the principles of justice, such as the right to a fair hearing, upon which our greatness was built. We should not permit our thinking to be beclouded by traditional and technical distinctions between criminal, civil, judicial and administrative proceedings. Nor should we forget two of the most important lessons of judicial experience: (1) The difficulty in arriving at satisfactory decisions without patiently going through a process of due notice and fair hearing wherein the positions of the parties and all the considerations they can advance are thoroughly thrashed out; and (2) the hazard of self-deception involved in settling on any decision which one is not prepared publicly to support with factual findings from an acceptable record and a statement of governing principles.

68. United States v. Nugent, 346 U.S. 1, 13 (1953) (dissenting opinion).