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Privacy Laws: A Threat to Criminal Justice

Americans are risking their priceless heritage of a relatively open system of criminal justice that protects them against secret arrest, secret trial and secret punishment, by submitting to the enactment of federal and state laws enforcing privacy upon the arrest records of persons acquitted, and the files of those who have completed prison sentences, and records of those who have been pardoned.

Twenty-eight states have passed varying laws enforcing some degree of concealment, expungement, or sealing of such records. The Tunney subcommittee of the Judiciary Committee held hearings on a sweeping federal statute (S. 2008) last July. The Law Enforcement Assistance Administration has been promulgating regulations requiring the states to conform to concealment guidelines in the circulation of criminal justice information.

In the forefront of this assault upon historic protections against secrecy in the criminal justice system, odd to relate, are the American Civil Liberties Union, and liberal legislators such as Sen. John Tunney and Sen. Edward Kennedy.

The wave of privacy laws being enacted in the states already has brought to two states the reality of secret arrest which Americans have hitherto associated only with fascist and Communist countries.

In Hawaii, in August, 1974, Honolulu police, acting under a privacy statute, refused to release any information about incarcerations or arrests, and the public could not find out the names of those arrested or the offenses with which they were charged. A prosecutor refused to release the names of persons indicted by a grand jury.

Acting under their interpretation of an act lobbied through the Oregon legislature by the American Civil Liberties Union, law officers at the Umatilla county jail at Pendleton, Ore., held 175 persons in jail on Sept. 15, 1975, refusing to acknowledge their presence to relatives and friends or bail bondsmen. On Sept. 17, the Oregon legislature summoned into special session by Gov. Robert W. Straub, hastily repealed the law entirely. In Maine, acting under his interpretation of the Maine expungement statute, the then secretary of state, Joseph Edgar, in November, 1974, directed newspapers in the state to excise from their files records of the arrest and conviction and prison service of persons pardoned by the governor. (The Maine legislature now is considering legislation to repeal an expungement statute.)

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Areyeh Neier, executive director, American Civil Liberties Union, in his testimony before the Tunney subcommittee on July 15 and 16 made a strong appeal for privacy of both arrest and conviction records. He said that only if the victim of an arrest consents should the fact be made public, and he argued that it violates due process to disseminate to the press conviction records "absent the individual's consent." If the press discovers the records, it should be free to publish them, in Neier's view—an empty privilege if laws punish all disclosure of the records. In its current solicitation of funds the ACLU states: "ACLU court cases and legislative action seek to open government actions to public view." S. 2008 and the Oregon, Hawaiian and Maine laws seem singular ways to "open government actions to public view." Neier revives a Blackstonian opinion that freedom of the press consists only of immunity to prior restraint in an age when society, by two centuries of experience, has found that it comprehends (1) the right to get information about government; (2) the right to print without prior restraint; (3) the right to print without fear of punitive punishment; (4) the right to distribute. A press that is deaf and blind, by law, is not able to make effective use of the power of speech.

The state laws already passed, and the agitation launched by ACLU and others, is already, in many practical ways, diminishing the power of the press to fulfill its function as the public's surrogate in the constant scrutiny of the law enforcement process. The extreme interpretation of the Hawaii statute, the Oregon statute, and the Maine statute flow logically from the spirit of the expungement and concealment laws. They give a sanction to secrecy by police and courts. Over time, they will draw about the transactions of the police and the courts a cloak of secrecy that will be so difficult to penetrate that citizens will come to know very little about criminal justice processes.

The very citizens these statutes are intended to protect will have their basic rights imperiled, exposing them to the risk that none will learn of their arrest, scrutinize the conduct of the police and judges who deal with them, or keep alive the just public concern with the conditions of their incarceration. These are all public matters that involve all of society which is interested in seeing that justice is done and injustice is not countenanced.