LAW ENFORCEMENT THROUGH PUBLICITY*

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ANALYSES of social control in civilized societies have generally proceeded on the assumption that the principal sanctions¹ that government officials can direct against lawbreaking are the ordinary fines and imprisonments provided for in a legal code. The governmental role in the total process of law enforcement has thus been pictured as restricted in the main to the application of formal sanctions.² As a matter of fact, the historical origins of government have been traced to the need for institutionalizing formal sanctions when, at rather obscure breaking-points in social development, social control through informal mechanisms such as custom and public opinion were no longer feasible.³

Heavy reliance upon an informal method of control such as adverse public opinion to prevent and punish violations of community law has, therefore, been regarded up to this point as a distinctive mark of relatively primitive social systems—societies without government or with only embryonic governmental forms. The effectiveness of what may be designated as the publicity sanction in this type of primary group community can be attributed to the frequency of interaction and communication among members of the group,⁴ conditions which quicken and intensify the punitive weight of public disfavor.⁵ Consequently, as the intimacy of association characteristic of tribal communities becomes an early casualty of social evolution, and as individual relationships acquire an anonymous rather than a face-to-face character, the importance of the publicity sanction as a method of insuring conformity correspondingly declines. However,

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¹ "Sanction" is one of those unhappy words in the English language that means both itself and its opposite. Thus, sanction can mean both approval and disapproval, both gain and loss. Its usage in this paper will, however, be restricted to its negative meaning as a penalty, punishment or loss for the person against whom it is applied.

² Consult Bennett and Tumin, *Social Life* 525-28 (1949).

³ This can occur when a society moves from simple to more complex patterns of social organization, or when it seeks to meet the threat of disorganization inherent in rapid social change. Consult, for example, Dickinson, *Social Order and Political Authority*, 23 *Am. Pol. Sci. Rev.*, 293 and 593, esp. 305-8 (1929); Hoebel, *The Law of Primitive Man* 293-94, 330 (1954).

⁴ For rather striking evidence of the existence of such a relationship, consult Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 *Yale L. J.* 471 (1954).

⁵ This disfavor may manifest itself actively by ridicule or passively by the withdrawal of association.

as what is commonly called mass society has moved toward greater interaction among its members, through, for example, developments and improvements in communications technology, it has restored an important environmental prerequisite for an expansion in the scope of influence exerted by public opinion over personal behavior. The testimony of Riesman and others would suggest that, as a result of this and other factors, individual action has come under just such increasing direction and control from public opinion, at least in modern American society.⁶

It is the purpose of this paper to trace what is considered to be a most important aspect of this development—the extension of the use of publicity into a method of coercion in the hands of government officials. The focus of attention here is not upon the spontaneous subjection of the individual to cues and directions from the public of which he is a member,⁷ but rather upon governmental use or threat to use the sanction of adverse publicity as a means of controlling the behavior of individuals under its jurisdiction. Here government does not apply, it only initiates, the application of a punishment. The penalties attached to adverse publicity are actually imposed by the public itself. But because of the increasing ability of government to instigate the application of these penalties, a significant extension in its control capacity has been accomplished. A control technique once thought exclusively suitable for use in small societies without government has in fact become, in complex modern societies, one of the most formidable methods of coercion available to governments themselves. At the same time, however, an important source of disequilibrium has been introduced in the precarious balance between individual autonomy and social control upon which democratic government attempts to find stability.⁸

The power and scope of publicity as an instrument of law enforcement today

⁶ This is of course the principal thesis of Riesman, *The Lonely Crowd* (1950).

⁷ An analysis of the role of this type of control in organized society may be found in Dahl and Lindblom, *Politics, Economics and Welfare* 99–104 (1953).

⁸ It should be noted in passing that the use of the publicity sanction is not the only method by which government officials have today acquired the power to inflict damage upon private individuals without necessary resort to formal prosecution. Similar in its informal coercive effect to the publicity sanction is the ability of government to deny or withdraw access to the expanding list of privileges it has come to control. Consult *The Passport Puzzle*, 23 U. of Chi. L. Rev. 260 (1956); *Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditioned Privilege Doctrine*, 28 Ind. L. J. 520 (1953). But cf. *Rudder v. United States*, 226 F.2d 51 (App. D.C., 1955) (government denied power to withhold access to public housing without due process of law). It was at one time thought possible to curb abuse in the exercise of all such informal power in the hands of executive agencies by making the administrative process more judicial in character. This was a chief purpose of the *Administrative Procedure Act* of 1946. 60 Stat. 237–44 (1946), 5 U.S.C.A. §§1001–11 (Cum. Supp., 1950). But, as one observer has recently pointed out, even the terms of that act leave completely unguarded a “huge portion of administrative discretionary power which lies beyond the reach of both judicial review and procedural safeguards.” Davis, *Administrative Law* 137 (1951) (Chapter 4 contains a comprehensive discussion of aspects of administrative regulatory power that lie beyond the reach of legislative and judicial limitations upon the abuse of executive authority.).

confirms a prophecy made at the beginning of this century in a pioneer study of social control:

Signs are not wanting that in the future an increasing restraint will be exercised through public opinion, and that this kind of control will gain at the expense of other kinds. For one thing, this form of coercion is suited to the type of man created by modern life. Only the criminal or the moral hero cares not how others may think of him. The growing rage for publicity and the craving for notoriety shows that the men of to-day respond warmly to praise and wilt quickly under general disapproval. Then, too, certain social developments favor the ascendancy of the public. The growing economic interdependence and the closer interweaving of private interests mean that the individual gives hostages to the community for his good behavior. . . . The more frequent contacts of men and the better facilities for forming and focussing the opinion of the public tend in the same direction. . . .

With a democratic, forward-looking people like ours, opinion, no longer split up into small currents by class lines or broken in force by masses of family, sect, or caste tradition, the débris of the past, acquires a tidal volume and sweep. In such a stream all oaks become reeds. The day of the sturdy backwoodsman, settler, flat-boatman, or prospector, defiant not only of law but of public opinion as well, is gone never to return.⁹

What Edward A. Ross did not envisage when he wrote these lines was the development of publicity as an instrument of government control, since, like most sociologists, he tended to juxtapose social control through public opinion with government control by law. In point of fact, as these pages will attempt to demonstrate, law and publicity can each be used as an instrument of social control through government.

The discussion that follows represents an appraisal of this new role of publicity as a method of governmental control. It deals first with legislative use of publicity in enforcing the law and proceeds to an examination of the publicity sanction in administrative regulation. Thereafter an attempt is made, on the basis of what is at present limited evidence, to assess the factors determining variations in the coercive power of publicity as a punitive instrument in government hands. In the final sections attention is explicitly focused upon the ethical dimensions of the problem—the compatibility of coercion through publicity with the norms of democratic government. Here particular consideration is given to the attitude taken by the courts toward the legitimacy of governmental use of publicity as a control technique, as well as to evaluation of the extent to which private persons are entitled to protection against possible misuse of this governmental power in a democratic society.

I. CONGRESSIONAL USE OF PUBLICITY

As an Institutional and Political Force. While the use of publicity as a sanction in law enforcement is most visible in connection with legislative investiga-

⁹ Ross, *Social Control* 104-5 (1901).

tions,¹⁰ it is of course true that from the point of view of Congress such investigations have long served a variety of purposes other than that of law enforcement. Not the least important of these is the fact that such hearings provide an avenue whereby the legislature can vie with the executive in the quest for public attention, in much the same way as it competes for the other means and ends of power that are at stake in conflict between the two branches of government.¹¹ No other aspect of congressional activity is as capable of attracting the attention of the public and of the communications facilities that both direct and reflect public interest.¹² The recent upsurge in congressional investigations seems to represent in part an attempt by the legislature to use the powerful entertainment value of investigations¹³ to restore a balance of power in the area of publicity. In this respect the publicity connected with investigations may be said to serve a function for Congress as an institution.

An additional institutional purpose served by such publicity has long been recognized in the literature on investigations. This is the function of attracting public support for pending or proposed legislation, or publicizing the existence of abuses that may need legislative correction.¹⁴ Apparently taking as a point of departure the assumption that investigations should always be directed at the enactment or modification of law, severe criticism has sometimes been directed at investigations that do not culminate in statutory proposals. This criticism tends, whatever its other merits, to ignore somewhat the extent to which publicity in itself may be a corrective, even obviating in some instances the necessity for legislation.

¹⁰ Recent critical discussions of congressional investigations include Barth, *Government by Investigation* (1955), and Taylor, *Grand Inquest: The Story of Congressional Investigations* (1955).

¹¹ The description written by Woodrow Wilson in 1908 of the President's ability to gain supremacy over Congress by focusing public attention upon himself has long been accepted as the classic statement of the case. Wilson, *Constitutional Government in the United States* 67-69 (1908). The executive advantage in this regard has been more than reinforced by recent developments in the technology of mass communications. The presidential ascendancy characteristic of twentieth century American politics has, for example, frequently been traced to the privileged access of the President to the newer media of communications. Consult Hyman, *The American President* 101-4 (1954).

¹² Consult the discussion of "politics as an object of consumption" in Riesman, *op. cit.* supra note 6, at 212-14; Rosenberg, *The Meaning of Politics in Mass Society*, 15 *Pub. Op. Q.* 14, 15 (1951).

¹³ Since investigations have such entertainment values as dramatic conflict—reminiscent even of Aristotle's venerable description of the effects of tragedy in his *Poetics*: "through pity and fear effecting a proper purgation of these emotions"—they can compete with the other forms of entertainment with which politics and political events are in competition for the voter's attention. In their absence Congress might be entirely upstaged before the national audience by the Presidential office and the activities of its incumbent. In short, the preoccupation of Congress with its investigative role may be said to spring in part from the very realistic legislative perception that a President cutting a cake has more news value for the media of communication than almost anything a congressman does in his non-investigative capacities.

¹⁴ McGeary, *The Developments of Congressional Investigative Power* (1940), gives considerable attention to this function of the investigative process.

The value of legislative investigations from an institutional point of view may thus be said to have made at least some contribution to the favorable attitude taken by congressmen toward the publicity with which they are inevitably connected. This assumes, of course, a measure of commitment on the part of congressmen toward their institutional role, which involves, among other things, the maintenance of an effective balance of power with the executive as well as the preparation of legislation. It goes without saying, of course, that the publicity attached to investigations may serve other even more self-interested purposes for individual congressmen or congressional blocs. The fact that prominence in a well-publicized investigation has enormous self-promotional possibilities for the individual legislator needs no documentation here.¹⁵ As the examples of Kefauver and Nixon reveal, the power of publicity can easily short-circuit the traditional dependence of the individual legislator upon length of service for power and prestige.¹⁶

For congressional blocs, whether organized on party or factional lines, the publicity-evoking characteristic of investigations is likewise of practical utility, providing, as it does, the opportunity of inflicting public embarrassment upon executive agencies or, if the legislative inclination so directs, private institutions or individuals. The manipulation of such publicity has become a strategic factor in party or factional warfare in our political system. The most advantageous aspect of this publicity, at least from the point of view of congressional investigators, is that while their own involvement before the public eye is merely one of legitimate legislative curiosity, the group under scrutiny is necessarily put upon the defensive, a posture from which full recovery before the bar of public opinion is very difficult to attain.

Legislative Law Enforcement. However useful publicity has become for legislators in the pursuit of institutional and political objectives, nowhere has its impact been more keenly felt outside the legislature than when it has been used as a sanction against private individuals and institutions subject to legislative

¹⁵ It should, however, be noted that other public officials, including judges, are aware of these possibilities. For example in Sontheimer, *Our Reeking Halls of Justice*, 123 *Collier's*, No. 14, at 19, 77 (April 2, 1949), it is alleged: "Publicity-loving showoffs on the bench have become such a menace that in many courts, such as one I visited in Missouri, smart defense attorneys plead with reporters to leave the room during the hearing of their cases 'so the judge won't throw the book at the prisoner to get his name in the papers.' A Cincinnati judge justified this practice with the explanation: 'It's like any other selling job. If people keep seeing your name in the paper, they recognize it on the ballot.'"

¹⁶ An index of legislative recognition of this fact is provided by the increasing tendency of congressmen to relate their preferences for committee assignments to the publicity surrounding the work of the committees concerned. For example, it was reported in 1951 that no less than one hundred representatives were seeking seats on the House Un-American Activities Committee. Dilliard, *Congressional Investigations: The Role of the Press*, 18 *U. of Chi. L. Rev.* 585, 590 (1951). The publicity factor may be a more important factor in congressional choice among committee seats today than the traditional concern of the legislator with placing himself upon committees related in their jurisdiction to the particular economic and social interests of his constituency.

investigation. The emergence of publicity as a technique of control in this area has occurred in connection with legislative review of executive enforcement activities and, more recently, legislative initiative in securing compliance with statutes in such areas as subversion and espionage. This latter-day preoccupation of legislative committees with the initial enforcement of law has transformed some legislative hearings into legislative courts and led to mounting pressure for reform of investigative procedures. Such pressure is quite similar to that generated more than a decade ago in behalf of reform of administrative law enforcement,¹⁷ which lead to the establishment of the Attorney General's Committee on Administrative Procedure and eventually to the Administrative Procedure Act of 1946.¹⁸

While thus acting as ancillary or *ad hoc* instruments of law enforcement, legislative committees have no power to impose punitive legal sanctions, except indirectly for a refusal to answer questions. Nevertheless, their direct power to punish is considerable. The core of this power is the ability of an investigating committee to inflict the penalty of adverse publicity upon those called before it. Although this sanction has been used with most telling effect in connection with legislative investigations of subversive activities, it is not, as the experience of the Kefauver committee reveals, restricted to use in this area.

In calling witnesses to public hearings for the purpose, for example, of exposing what are considered to be their affiliations with subversive groups, a legislative committee has the visible and usually justified expectation that such exposure will at the very least bring unfavorable public attention to the individuals concerned. Aside from the psychic deprivation or loss of public esteem that this exposure may represent for the person involved, other extra-legal sanctions may follow in the wake of appearance at a public hearing, such as loss of employment.¹⁹ Publicity may thus operate as a sanction in and of itself, or it may initiate the application of other informal penalties. The total impact of the sanction that could be applied bears some resemblance to the ostracism sometimes imposed by primitive societies.²⁰

Legislative use of the publicity sanction as a method of law enforcement is not confined to its employment in the investigative process. Some statutes passed by the legislature also depend for their enforcement upon the effective-

¹⁷ An interesting illustration of the correlation between political attitude and political interest is provided by the fact that the liberal-conservative alignment on the question of reforming the law enforcement procedures of Congress is exactly the opposite from what it was in the struggle over reform of the administrative process. In the case of administration, Senator McCarran, for example, whose political position may roughly be described as conservative, was a sponsor of reform—in the case of Congress he was a target of reformers.

¹⁸ 60 Stat. 237-44 (1946), 5 U.S.C.A. §§1001-11 (Cum. Supp., 1950).

¹⁹ This need not necessarily happen, of course, and in some instances legislative committees have actually intervened to prevent it from occurring.

²⁰ In this regard consult the discussion of "outlawry" in Taylor, *op. cit.* supra note 10, at App. III.

ness of publicity in controlling deviant behavior. This is true of lobbying legislation, for example. The premise upon which the Federal Regulation of Lobbying Act of 1946²¹ rests is that the mere publication of information about the activities of lobbyists will itself, given the disrepute in which such activities are presumed to be held by the public, help to keep lobbying within bounds.²² The same expectation is visible in the Internal Security Act of 1950,²³ which requires Communist front groups to so identify themselves in their published material. There would appear to be little doubt that identification as a Communist organization would dissipate whatever persuasive effectiveness a front group might otherwise have upon the American public. It is, however, also clear that any legislation dependent for its effectiveness upon the publicity sanction may be toothless or may bite very deeply, depending upon the intensity of public disapproval of the activity against which the legislation is directed.

II. ADMINISTRATIVE REGULATION THROUGH PUBLICITY

The visibility of administrative as distinguished from legislative use of publicity as a method of control in law enforcement is comparatively dim. This is so partially because a large part of administrative resort to publicity as a coercive device has been concentrated in areas of social and economic regulation without the attention-claiming characteristic of, for example, congressional investigations into vice or subversion. More importantly, however, it is a product of the fact that administrative use of publicity in law enforcement has concentrated upon the threat of adverse publicity, communicated in an unpublicized pre-trial proceeding, rather than the actual application of the sanction in formal hearings. In such instances, it is even to the advantage of those coerced by the threat of adverse publicity to conceal the fact that any such coercion has occurred.

The Structuring of Public Opinion. Traditionally, the employment of publicity by administrative agencies has been looked upon not as a direct instrument of law enforcement but rather as an avenue through which the public may be acquainted—or more than acquainted—with the objectives and achievements of executive agencies.²⁴ This self-publicizing use of the power of publicity by

²¹ 60 Stat. 839-42 (1946), 2 U.S.C.A. §§261-70 (Supp., 1955).

²² Legislation regulating the financing of political campaigns and the expenditures of political parties also has long rested on the assumption that publicity is by itself an effective instrument of social control in this area. Consult Key, Politics, Parties, and Pressure Groups 550-53 (1952).

²³ 64 Stat. 987-1019 (1950), 22 U.S.C.A. §§611-18 (1952).

²⁴ McCamy, Government Publicity (1939), was the first general study of this particular function of publicity. Administrative publicity or, as it has sometimes been designated, propaganda, may have utility for the attainment of such work-a-day management objectives as informing a clientele of regulations enforced by an agency in its behalf or services made available to it through the agency's facilities. On the political level, to the extent that it succeeds in creating a favorable public image of the agency concerned, this publicity may serve the very practical purpose of strengthening an executive agency's defense against partisan assault upon its program or power.

administration has aroused considerable congressional apprehension. Legislative anxiety in this regard has been reflected by legislation limiting the employment of publicity experts by executive departments,²⁵ restrictions that administrative agencies have been put to devious expedients to evade.²⁶ It is evident also in the sharp scrutiny frequently given by Congress to administrative requests for appropriations to be spent on "publications."²⁷ These congressional fears are rooted in the foreboding that administrative publicity may be used to build support for legislation extending the powers of executive officials, and even indeed, or so the legislative imagination runs, in ways that may have an adverse impact upon the election prospects of individual congressmen.

A Sanction in Law Enforcement. While the employment of publicity by administrative officials as a public relations technique in their own behalf has drawn considerable congressional attention, its use in the same hands as an enforcement sanction against private institutions and individuals has aroused comparatively little concern in Congress. Witness the fact that Congress included no provision regarding the use of publicity as a coercive device in the Administrative Procedure Act of 1946. This congressional indifference ignored the evidence contained in such earlier studies of the regulatory process as that prepared by the Attorney General's Committee on Administrative Procedure. The report of this Committee provided an important link in the chain of events out of which the Administrative Procedure Act emerged; and in its discussion of the enforcement activities of the Federal Alcohol Administration, the Committee's report had stated:

So marked has the fear of disastrous publicity become that many permittees have settled cases by sacrificing bona fide defenses, in order to avoid the issuance of a press release. In some instances, the Committee has reluctantly concluded, the former Federal Alcohol Administration appears to have relied upon threatened adverse publicity as an extra-legal sanction to secure observance of its commands, even when the validity of its dictates was not free from doubt.²⁸

The problem to which the Committee was here calling attention was the authority vested in regulatory agencies to issue a press release at the time judicial action was first initiated against persons suspected of violating the law. This press release, detailing the character of a suspected offense and the culprit in-

²⁵ 38 Stat. 212 (1913), 5 U.S.C.A. §54 (1927). Congress has also conducted investigations designed to curb public relations activities by executive agencies. Consult note 26 *infra*.

²⁶ The first complete analysis of such legislation, and of administrative evasion of the restrictions applied, is contained in the study of the organization of executive agencies prepared by the Brookings Institution for the so-called "Byrd Committee" in 1937. *Investigation of Executive Agencies of the Government*, Senate Select Committee to Investigate the Executive Agencies of the Government, 75th Cong. 1st Sess. 531-53 (1937). More recently the same problem is discussed in Pimlott, *Public Relations and American Democracy* (1951).

²⁷ Hyneman, *Bureaucracy in a Democracy* 127 (1950).

²⁸ United States Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies* 134-35 (1941).

volved, inflicted immediate damage upon the reputation of a defendant even before a formal finding of guilt or innocence had been made. In its final report, the Committee majority side-stepped the problem of controlling this use of publicity with the suggestion that the matter be made subject to further study.²⁹ However, a minority report submitted by three members of the committee gave special attention to what it called the "vexatious subject" of administrative use of publicity in enforcement proceedings and recommended that "[i]n all contested proceedings, agency publicity shall be withheld during preliminary or investigative phases of adjudication."³⁰

It was because of the publicity attendant upon its use that Landis considered the power to prosecute the most dangerous area of discretion open to administrative officials.³¹ This conviction is echoed in a more recent discussion of the prosecuting power, where it is pointed out that "proof of innocence seldom removes the scars of public accusation and public trial."³² At its worst the power to prosecute may afford the opportunity to impose the publicity sanction in the absence of any intention or capacity to bring a defendant to trial. One of the criticisms levelled against OPA enforcement during World War II was that in some instances charges were filed against business concerns where there was no prospect that OPA officials would allow these publicized allegations to be tested in court. Instead, it was alleged, the intention of the price control agency was merely that of calling public attention to its enforcement program. Suspicion that this was the case led some newspapers to initiate a policy of non-publication of OPA hand-outs on impending proceedings.³³

The problem of administrative use of the publicity sanction prior to a formal determination of the culpability of a defendant is complicated by the fact that in some areas such publicity serves a useful if not indispensable control function. In, for example, the enforcement of legislation protecting the consumer against the manufacture and sale of impure food and drugs, the capacity of administrative agencies to inform the public that a product is suspected of containing harmful ingredients may play an invaluable role in preventing consumption of the product under investigation until the accuracy of this administrative suspicion can be determined.³⁴ It was with this consideration in mind that the Food

²⁹ *Ibid.*, at 194.

³⁰ *Ibid.*, at 221.

³¹ Landis, *The Administrative Process* 110 (1938). The publicity value of the prosecutor's office at the local level in government is discussed in Moley, *Politics and Criminal Prosecution* 74-94 (1929), where the author points out: "By virtue of the great advantages which the powers of the office lend to the political machine and the tremendous publicity values in the materials with which it is concerned, it has come to be sought as a means to a political end." *Ibid.*, at 94.

³² Davis, *op. cit. supra* note 8, at 161.

³³ For a discussion of the practice consult Clinard, *The Black Market* 86-87 (1952).

³⁴ Even administrative agencies engaged essentially in providing a service rather than regulation may make incidental use of publicity as an instrument of control. An example of this is the practice of some state welfare agencies of allowing publication of the names of recipients of old age assistance as a means of deterring fraudulent claims.

and Drug Administration was authorized by statute to issue press releases warning the public against the use of products suspected of involving "imminent danger to health or gross deception of the consumer."³⁵ A recent illustration of the use and utility of a similar kind of power was the action of the Public Health Service in giving immediate and national publicity to its withdrawal of approval from the polio vaccine manufactured by the Cutter laboratories in California.³⁶ In this case, as in others, both the value and the punitive effect of the publicity sanction—possibly unwarranted in the Cutter case—are simultaneously clear.³⁷

Whether or not it is applied beforehand, the penalty of adverse publicity has an obvious impact as part of the total punishment received by persons found guilty of violating statutes enforced by regulatory agencies. Indeed this unfavorable publicity may be the most important part of the punishment received on such occasions. This factor needs to be taken into account in any assessment of the total weight of sanction attached to violations of regulatory legislation.³⁸ These laws are frequently criticized on the grounds that the formal penalties they provide for violations are too trivial to deter potential offenders.³⁹ This criticism, however reasonable on its face, tends to overlook entirely the deterrent effect of fear of adverse publicity. Certainly, in contemplating behavior likely to be held in violation of a regulatory statute, a business firm risks, in the possible loss of public esteem, a highly vital economic asset—beside which the possibility of a minor fine may pale in significance.⁴⁰

The utility of the threat of publicity as a deterrent in law enforcement may also be evidenced by its absence. A study of juvenile delinquency in Monmouth County, New Jersey, held that the immunity granted juvenile offenders from the publicity sanction was an important factor in the growth of juvenile delinquency. "Many parents," the report stated, "have greater fear of their neighbors learning of their children's misdeeds than they do of the penalty the law may inflict."⁴¹ This argument may or may not be valid, and it certainly ignores

³⁵ 52 Stat. 1058 (1938), 21 U.S.C.A. §375(b) (Supp., 1955). Consult Lee, *The Enforcement Provisions of the Food, Drug, and Cosmetic Act*, 6 *Law & Contemp. Prob.* 70, 90 (1939).

³⁶ *N.Y. Times* p. 1, col. 2-3 (April 28, 1955).

³⁷ The persistent strain between the public and private interest in the use of the publicity sanction is clearly pointed up in the area of penal administration. The publication of the names of individuals paroled from prison can clearly be justified as a means of alerting the public to the presence of possibly unreformed criminals in the community and of preventing abuse of the parole power. However, it can with equal vigor be condemned as a grave detriment to the rehabilitation of these individuals.

³⁸ Consult the discussion of this problem in Redford, *Administration of National Economic Control* 169-74 (1952).

³⁹ E.g., Purdy, Lindahl and Carter, *Corporate Concentration and Public Policy* 615 (1942).

⁴⁰ One regulatory agency which leaned very heavily on publicity as a method of control was the National Recovery Administration in the enforcement of its industrial codes. The NRA attempted to secure participation in its program by denying firms which refused such cooperation the right to display its blue eagle symbol. Consult Swisher, *American Constitutional Development* 896 (1943).

⁴¹ *N.Y. Times* §1, p. 55, col. 4 (March 27, 1955).

the very positive values served by secrecy in juvenile proceedings. But it is by no means implausible that law enforcement per se is weakened by the absence of publicity in connection with juvenile offenses.

Perhaps the best evidence of the deterrent effect of fear of publicity may be found in the success achieved by regulatory agencies in using the mere threat of adverse public attention to bring about the settlement of complaints by defendants without the necessity of formal hearings. Obviously, fear of adverse publicity is not the sole factor involved in the successful employment by regulatory agencies of this informal adjudication—the so-called “lifeblood of the administrative process.”⁴² The willingness of defendants to admit or compromise their disagreements with complaints lodged against them by regulatory agencies is also the product of such other considerations as the desire to avoid the expense and uncertainty of formal litigation and an ambition to cultivate the good will of a regulatory agency. Nevertheless, the threat of adverse publicity resulting from appearance at a formal hearing before a regulatory agency is a central factor in the total process of extra-legal coercion involved in informal adjudication.

Much has been made, for example, of the value of threatened publicity in effecting the conspicuously successful record of the Securities and Exchange Commission in controlling the investment field without the necessity of formal litigation.⁴³ Only rarely has the SEC found it necessary to hold a public hearing in connection with its regulation of the marketing of securities. Fear of the adverse publicity connected with the public airing of a complaint has been a sufficient pressure to bring about compliance with SEC suggestions for alterations in the language of a prospectus. This is so, of course, largely because successful floatation of an issue of stock demands absolute confidence in the integrity of the product offered for purchase by investors. Any publicity as to the existence of doubt regarding the truth of claims made in a prospectus would almost certainly have a fatal effect upon the sale of the securities concerned.

Other national regulatory agencies have likewise used the threat of unfavorable publicity to effect the informal settlement of complaints. However, one national agency, the Federal Trade Commission, has followed the practice of requiring firms that have waived their right to a public hearing to file stipulations making public acknowledgement of the truth of allegations contained in a complaint.⁴⁴ This policy led to a reduction in the ability of the Commission to

⁴² The phrase is from the Committee on Administrative Procedure, *op. cit. supra* note 28, at 35. It is used as the point of departure for the very thorough discussion of informal adjudication to be found in Gellhorn, *Federal Administrative Proceedings*, c. 2 (1941).

⁴³ Discussions of the SEC's reliance upon the fear of publicity in its enforcement activities may be found in Davis, *op. cit. supra* note 8, at 150-52; Landis, *op. cit. supra* note 31, at 108-10; Chamberlain, Dowling, and Hays, *The Judicial Function in Federal Administrative Agencies* 115-18 (1942) (Chapter 3 contains the best discussion of the use of the publicity sanction in law enforcement to be found in the literature on administrative regulation.).

⁴⁴ Committee on Administrative Procedure, *op. cit. supra* note 28, at 42.

use the threat of unfavorable publicity in forcing the informal settlement of complaints, since the publicity sanction was inflicted upon a defendant even when he agreed not to dispute the charges lodged against him. Consequently, adherence to this procedure could be cited as among the factors that have handicapped the success of the FTC's enforcement program in the past. It is, however, questionable whether there is sufficient public support of the activities of the FTC to make the publicity sanction of compelling importance in the regulation of competitive practices among business firms today.

A graphic illustration of the importance of publicity as a sanction in national administrative adjudication is provided by the so-called *Lamb* case, recently before the Federal Communications Commission.⁴⁵ This case grew out of the refusal of the FCC in 1953 to act favorably on a request for a license renewal by Edward O. Lamb, owner of a television station in Erie, Pennsylvania. As it subsequently developed, the FCC's action in this case was based upon derogatory information it had received linking Lamb with Communist or subversive activities. Throughout this case the battle between Lamb and the FCC was waged as much in the newspapers and trade journals as in the hearing room.⁴⁶ In an effort to combat the unfavorable publicity resulting from FCC press releases on the charges against Lamb, his lawyers took ads in newspapers and filed suits and charges against FCC alleging defamation of character and, among other things, the bribery of witnesses.⁴⁷ If this case represents a trend, the press release will prove almost as important a weapon in adversary proceedings before administrative bodies as the legal brief, and newspaper publicity will come to occupy as much of an attorney's attention as trial strategy.

In state regulation also, the threat of adverse publicity plays an important role in the informal enforcement of administrative law. One of the areas of state administration in which its effectiveness has most recently been proved is in connection with the administration of recently enacted state fair employment practice acts. In this case the effectiveness of the publicity sanction has been vital to the success of the legislation concerned, since the assumption upon which FEP laws were enacted was that the law could be administered with a minimum

⁴⁵ Edward O. Lamb, 10 Pike & Fischer, *Radio Regulation* 373 (1954). For a report on the Lamb case I am indebted to a paper prepared by Nelson W. Polsby for a graduate seminar in public administration at the Johns Hopkins University.

⁴⁶ Noteworthy in this case, of course, is the fact that Lamb, owner of three television stations and otherwise a wealthy man, was able to match government publicity broadside for broadside. It hardly needs mentioning that not many private individuals would be in so advantageous a position.

⁴⁷ E.g., N.Y. Times p. 43, col. 8 (Sept. 16, 1954); N.Y. Times p. 59, col. 4 (May 19, 1955). The FCC examiner eventually ruled in Lamb's favor. Note 45 supra. Also consult N.Y. Times p. 24, cols. 3-4 (Dec. 8, 1955).

of resort to formal litigation.⁴⁸ This conciliation philosophy, which has been at the core of all FEP enforcement programs, is rooted in the consideration that excessive reliance upon legal coercion would conflict with a basic purpose of fair employment legislation—the improvement of group relations. The image of constraint associated with frequent resort to enforcement through court-room proceedings could very well alienate the public from both an FEP agency and the groups whose welfare it seeks to advance. An additional factor impelling avoidance of litigation by FEP agencies is the practical difficulty of proving discrimination or intent to discriminate.

Thus, if it were necessary to rely upon formal legal sanctions for enforcement purposes, it is doubtful if FEP laws would be capable of effective enforcement at all. The degree of success that fair employment agencies have enjoyed is, therefore, impressive testimony to their ability to dispose of complaints without formal process. From its establishment in 1945 through 1951 the New York agency found it necessary to hold a formal hearing in connection with only one of the 507 validated complaints lodged with it.⁴⁹ Of course in many of these cases coercion against the person named in a complaint as guilty of discrimination was unnecessary, since the act to which the complaint referred sprang from ignorance either of the law or of the fact that the particular act was prohibited by it. But where constraint has been needed, one of the most important factors working in behalf of FEP agencies has been the disinclination on the part of those against whom discrimination has been alleged to have the charges against them publicized at a formal hearing.⁵⁰ In the states in which it has been possible to enact FEP laws, the publicity connected with such a hearing may itself be regarded as punishment, whatever the verdict of a hearing tribunal may be. From the point of view of a business firm it may appear a vital necessity to avoid such a hearing, since public relations considerations are paramount over whatever estimate the firm may make of its legal position in a case.

While the strategy of enforcing FEP legislation calls for the avoidance of litigation if possible, and while the threat of adverse publicity has been an effective instrument to this end, the need for formal legal sanctions remains. Some pockets of resistance to the law are relatively impervious to extra-legal pressures.⁵¹ Moreover, an occasional public hearing, so long as the verdict is in

⁴⁸ State and Municipal Fair Employment Legislation, Senate Committee on Labor and Public Welfare, 82d Cong. 2d Sess. 12 (1953).

⁴⁹ Ruchames, *Race, Jobs and Politics* 169 (1953).

⁵⁰ Consult Graves, *Anti-Discrimination Legislation in the American States* 45 (1948), pointing out that "embarrassment not harassment or punishment is the chief sanction."

⁵¹ Note, in this connection, the public hearing called by the New York agency in 1955 regarding trade union discrimination, a difficult knot for FEP officials to unravel. *N.Y. Times* §1, p. 1, cols. 2-3 (March 27, 1955). A similar hearing was held by the Connecticut agency in 1951. *International Brotherhood of Electrical Workers, Local No. 35 v. Comm'n on Civil Rights*, 18 Conn. Supp. 125 (1951).

its favor, may prove a distinct advantage to an FEP agency as a method of calling public attention to itself⁵² and to its vigilant enforcement of the law.⁵³

III. CONTROL THROUGH PUBLICITY: VARIATIONS AND TENDENCIES

Evaluation of the present and future importance of publicity as a method of control in governmental hands depends to some extent upon an assessment of the factors disposing private individuals and institutions to resist or submit to coercion by publicity. To the extent it can be shown, for example, that the developing characteristics of social and economic organization reinforce the tendency of private persons to avoid adverse publicity wherever possible, then it can reasonably be predicted that governmental use of publicity will show increased effectiveness as a control device in the future. As suggested earlier, it is a chief characteristic of publicity as an official control technique that it derives its impact from forces that are largely beyond governmental determination.

As important as any aspect of the publicity sanction is the fact that it is subject to such sizeable variations in its effectiveness against different individuals. In this respect, publicity is of course not singular, since it is in the nature of punishments to vary in their real as distinguished from their nominal effect. Imprisonment, for example, may represent for some, separation from life; for others, separation from anxiety. But the variability of the publicity sanction goes deeper than this. It has indeed no uniform dimensions comparable to a term of years or the sum of dollars usually applied as legal penalties.

This lack of uniformity in its impact is largely traceable to the intangibility of publicity as a punishment. Curiously enough, it is from this very intangibility that publicity derives both its greatest weakness and its greatest strength as a method of governmental coercion. In some cases in which it may be used, this sanction may represent no punishment at all. Indeed some individuals may even aspire to the notoriety connected with violations of what they consider to be obnoxious laws. Sewell Avery's defiance of the War Labor Board during World War II may very well represent a case in point. In situations of this kind, supposedly adverse publicity may actually be a form of psychic income for the person involved. Other persons, however, may not even be able to envisage the upper limits of adverse publicity as a penalty. Some individuals may in fact over-react to the threat of adverse publicity—may have a fear of this publicity

⁵² Malcolm Ross, director of the national Fair Employment Practices Committee during World War II, calls attention to the fact that the national agency's success in disposing of complaints without formal hearings or publicity proved a disadvantage in maintaining public awareness and support of the agency's work. Ross, *All Manner of Men* 39-40 (1948).

⁵³ It is, however, this very desire for publicity concerning enforcement vigilance that may push any regulatory agency, no more FEP than any other, into unwarranted prosecutions. This danger is especially acute where an active and vociferous clientele clamors for action on the part of officials charged with responsibility for enforcing the law. The intense pressure in this direction upon the New York FEP agency is indicated in Ruchames, *op. cit. supra* note 49, at 171-77 and Berger, *Equality by Statute* 153-56 (1952). Such pressure is keenly felt today in connection with the enforcement of anti-subversive statutes.

as inflicting damage that is far out of proportion to its real impact.⁵⁴

Among the factors determining the punitive or coercive effect of publicity as used by government, two may be said to be of central importance. The first of these is the depth of public odium attached to behavior against which the sanction is directed. The second is the priority given public esteem as a value by the person or institution against which adverse publicity is threatened or imposed.

Thus, developments in society that increase the degree of odium attached to a particular kind of behavior may increase the impact of publicity as a sanction against acts in this category. This follows from the fact, previously noted, that the publicity sanction must ultimately be inflicted by the public itself. Similarly, developments that heighten individual sensitivity to the opinions of others, whether the general public or some more specific peer-group, strengthen the susceptibility of the persons concerned to governmental control through adverse publicity. Since publicity does not represent actual physical coercion, the person against whom the sanction is used must, in some sense at least, allow himself to be constrained by it.

The Public Attitude toward Sanctional Acts. As far as the influence of public opinion upon the punitive character of the publicity sanction is concerned, it has of course long been recognized that law in books cannot be enforced in the absence of public support of law in action. It is this fact that has made use of the publicity sanction much more effective in some areas of administrative regulation than in others.⁵⁵ This is not to imply, however, that any agency deals in its enforcement program with a fixed structure of public opinion. It is in fact the malleability of opinion regarding an agency's program that gives a special importance to the opinion-shaping activities of regulatory agencies. Although the public relations activities of administrative agencies performing some government functions may be described as purely informational and educational in character,⁵⁶ this can hardly be said to be the case with regulatory agencies. To the extent that public relations activity widens public understanding and

⁵⁴ This may be the situation with regard to FEP enforcement. Just as employers once entertained exaggerated expectations of adverse public reaction to the employment of members of certain minority groups, so they may now be similarly mistaken in expecting public obloquy if they are even charged with discrimination. But, even as a paper tiger, public opinion can be quite intimidating, and it is of the nature of its power that no one can be quite sure beforehand that the tiger is in fact paper.

⁵⁵ The Federal Trade Commission's enforcement of the norm of competition upon business has been more than handicapped by public apathy and even hostility toward its pursuit of this objective. However, as indicated earlier, the experience of other regulatory agencies has been quite different in character, as for example those agencies involved in the administration of legislation affording immediate protection to the public as consumers of food and drug products.

⁵⁶ For example, note the conception of the role of publicity to be found in McCamy, *op. cit.* supra note 24, at 261: "Publicity . . . creates no policy; it enforces no rules; it reflects only the policies and rules of the bureaucracy to which it is useful as a tool. The possible threats to democracy . . . must be found in the policies and practices of the bureaucracy which is represented through publicity and not in the publicity itself."

appreciation of a regulator agency's goals, it helps structure an unfavorable public attitude toward those found in violation of the statutes administered by the agency. The agency's ability to use the threat of adverse publicity as a coercive device to enforce compliance with the law is strengthened by the creation of such an attitude. It is, of course, also true that a business firm ordinarily commands publicity resources that it can use in an attempt to counteract these government efforts.

In this connection it is especially important to note that one of the handicaps under which economic regulation has traditionally labored has been the tendency of the public to look with less disfavor upon offenses against laws regulating economic behavior than it does upon violations of ordinary criminal statutes.⁵⁷ Consequently, persons subject to such regulation have been threatened with less public stigma for violations than, by comparison, has been visited upon those found in violation of traditional criminal laws. This tendency to attach a lesser degree of disgrace to white collar crime is doubtless a product of the traditional American commitment to freedom from governmental interference in the conduct of private economic activity. In societies based upon collective rather than individual conduct of economic activities, whether primitive or modern socialized economics, deviance from approved norms of economic behavior may be expected to encounter much more severe public disapproval. Consequently, if, as presently appears to be the case, public opinion in this country is moving toward greater acceptance of public control of private economic activity, violations of economic regulatory statutes can expect to encounter increased public disfavor in the future. At the same time, moreover, the publicity sanction will come to acquire increased power as a coercive device in governmental regulation, and the need for providing protection against its abuse will correspondingly increase in importance.

Sensitivity to Adverse Publicity. The sensitivity of individuals and institutions to coercion by the publicity sanction is, like the public attitude toward sanctioned activity, subject to a good deal of variation. Evidence on the factors that lead to differential susceptibility to control in this area is, to use a euphemism, fragmentary, and any discussion of the subject must necessarily be exploratory in character.⁵⁸ Moreover, such exploratory analysis faces many difficulties. Off-hand, for example, it might be assumed that a business firm enjoying something of a monopoly would be less subject to control by publicity in economic regulation than a firm in a competitive industry. A monopoly would have comparatively little to fear from the adverse opinion of a public that has only limited

⁵⁷ For discussions of the relationship between public opinion and law enforcement in this area, consult Sutherland, *White Collar Crime* (1949), and Clinard, *op. cit. supra* note 33, at cc. 4 and 11.

⁵⁸ Although this problem may very well have immeasurable aspects, it would also seem that further empirical research would turn up evidence on the dimensions of the variables determining both susceptibility and resistance to control by the publicity sanction, as well as throw light upon the interrelationships prevailing among these factors.

alternatives to purchase of its product. Not only would a firm in a competitive industry be in no such secure economic position, but it could well anticipate that news of any misdemeanor in which it was involved would be advertised far and wide by its competitors. Contrary considerations that need, however, to be taken into account in any analysis of this economic factor include the fact that some of the firms in a competitive situation are marginal firms, driven perhaps to ignore all such intangibles as public opinion in the pursuit of mere survival. Moreover, a monopoly may have more to fear from government regulation or competition than a firm in a competitive industry and hence may be more interested in cultivating the good will of the public as a defense against restrictive legislation.⁵⁹

It may be the case that, so far as a business firm is concerned, the style rather than the extent of competition in which it is involved is the central factor determining its susceptibility to control by publicity. A firm engaged in product differentiation rather than price competition is selling a reputation, fictional perhaps, but a reputation nonetheless. Under such circumstances the slightest breath of unfavorable publicity may loom as a dire peril.⁶⁰ There may also be said to be a positive correlation between size of firm and sensitivity to governmental control by the publicity sanction, insofar, at least, as the institutionalization of the public relations function occurs only in firms of relatively large size. This assumes that firms which employ a public relations specialist have undertaken to give public relations considerations important standing in their decision-making process. In any event, the quest for favorable publicity signalled by the employment by business firms and other institutions of public relations counselors is in part an attempt to avoid the obvious economic penalties such as reduction in sales that may follow in the wake of adverse public attention. In part also, it is a product of the desire to establish and maintain more subtle assets such as respectability and prestige in the eyes of the community. The manner in which these psychological and economic incentives to avoid adverse publicity are woven together is difficult to determine, but it is at least likely that they reinforce as well as relate to each other.

It is in any event clear that whether it be traceable to an increasing tendency toward monopoly in the American economy, or the increasing resort to product differentiation as a style of competition, or even the increase in the size of firms and the growth in the employment of public relations experts, the fact of the

⁵⁹ Lane, *The Regulation of Businessmen* (1954). Chapter 5 contains an interesting analysis of some other factors that account for differing degrees of respect accorded regulatory statutes by businessmen. Historically it was of course monopolistic enterprise which pioneered in public relations activity. Consult, in this connection, Long, *Public Relations Policies of the Bell System*, 4 *Pub. Op. Q.* 5 (1937).

⁶⁰ The well-known sensitivity to adverse publicity of advertising companies, marketing agents for firms engaged in product differentiation, is perhaps the best indication of the relationship between this style of competition and susceptibility to publicity as a method of control.

matter is that business firms, and other social institutions as well, exhibit far more sensitivity to adverse publicity today than would have been the case a few decades ago. There have been few transformations in American life as sharp as the shift in the attitude of business from one of indifference to that of preoccupation with the character of public sentiment toward itself.⁶¹ This development has very frequently been noted in connection with the growing sense of public responsibility evident in such recent patterns of business behavior as the conduct of employee welfare programs.⁶² That its assiduous cultivation of public good will increases the susceptibility of business to government control by publicity is also clear.

An attempt has been made in this section to indicate some elements in social and economic development and organization that help to account for the power of publicity as a method of control in governmental hands. As important, perhaps, as any of the factors that have been singled out for examination is this growing public relations mindedness on the part of institutions and individuals. To the extent that this desire for public esteem leads to growing pressure for the avoidance of all criticism, however unjust and whatever its source, this emerging public relations orientation may result in a notable increase in the strain toward conformity in the culture. In this event, there may well be future occasion for nostalgia, on the part at least of those partisan to independence of outlook, for the "public-be-damned" attitude of the traditional entrepreneur.

IV. COURTS AND THE PUBLICITY SANCTION

However particular individuals and institutions may vary in their susceptibility to control by the publicity sanction, the evidence already presented regarding both its legislative and administrative usage leaves no doubt as to the general effectiveness of publicity as a law enforcement device. Effectiveness is, however, only one of the requisite characteristics of a control technique in a constitutional society. Of at least equal importance is the requirement that use of the power concerned be subject to limitations that will prevent its arbitrary or unjustified exercise. In this regard governmental control through publicity has opened up novel and perplexing problems for the courts, mainly because the American constitutional system is geared to protecting the rights of individuals against the formal prosecuting power of government, whereas the publicity sanction represents an informal method of constraint of a kind that does not easily lend itself to definition or control within formal legal categories.

As is customary in American politics with problems of this kind, the task of striking a balance between, on the one hand, necessary and proper use of publicity in legislative and administrative law enforcement and, on the other, the pro-

⁶¹ Consult the discussion of the contemporary influence of public opinion upon corporations and corporate executives in Berle, *The Twentieth Century Capitalist Revolution* 54-60 (1954), and Allen, *The Big Change* 240 (1952).

⁶² 43 *Fortune*, No. 2, at 60, 83, 154 (Feb., 1951).

tection of private rights, has in the main been left in the hands of the judiciary. The responsibility delegated to the courts in this area is of course not an exclusive one. The legislature through its jurisdiction over its own rules of procedure, especially as they pertain to the operations of its committees, and its ability to fix and alter the procedures of executive agencies, itself has the capacity, largely untapped, to do much to adjudicate the competing claims of social control and private autonomy in this area. Administrative agencies, acting within their own discretionary powers, can also exert a similar though lesser influence. Some agencies have, in fact, adopted self-imposed restraints upon the use of publicity in law enforcement.⁶³ Nevertheless, it is the courts that have been left to grapple most directly with the task of reconciling use of the publicity sanction with the ways of democracy.

Governmental Immunity from Defamation. It is, therefore, of no little importance that the courts, in their handling of this problem, have exhibited an extreme reluctance to set sharp limits to governmental use of publicity that results in coercion or damage to private persons. This has been true even when a showing could be made that this official publicity was of rather dubious ethical, if not legal, justification. In, for example, the case of libel suits filed by private citizens against government officials, alleging defamation of character as a result of official publicity, the general rule followed by the courts has been that even when these officials are not granted constitutional immunity against such claims, they should, nevertheless, be afforded ample protection against liability even for maliciously inspired damages to private reputation.⁶⁴ Thus, the courts have granted executive officials an absolute immunity from libel similar, under certain conditions, to that enjoyed by congressmen under the Constitution.⁶⁵ As early as 1896 the Supreme Court ruled in *Spalding v. Vilas*⁶⁶ that the Postmaster-General was protected by such immunity notwithstanding the fact that he may have been motivated by malice in including statements damaging to the reputation of a private citizen in an official communication of the department. An administrator, the Court declared, "should not be under an apprehension

⁶³ Consult Chamberlain, Dowling and Hays, *op. cit.* supra note 43, at 120. Among the agencies these authors identify as following a policy of internal restraint on use of the publicity sanction are the Department of Agriculture in its administration of the Grain Standards Act, (39 Stat. 482-85 [1916], 7 U.S.C.A. §§71-87 [1952]), and the Federal Deposit Insurance Corporation. More recently, the hearings on administrative secrecy conducted in 1955 and 1956 by a subcommittee of the House Committee on Government Operations revealed that one of the principal factors accounting for the growth of such administrative secrecy has been a desire on the part of executive agencies to protect private parties from undeserved publicity. Hearings on Availability of Information from Federal Departments and Agencies, 84th Cong. 1st and 2d Sess. (1955-56).

⁶⁴ Prosser, *Torts* §95 (2d ed., 1955).

⁶⁵ For an argument that the immunity from libel presently enjoyed by executive officials is far too extensive, consult *Defamation Immunity for Executive Officers*, 20 U. of Chi. L. Rev. 677 (1953).

⁶⁶ 161 U.S. 483 (1896).

that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."⁶⁷

This precedent has been followed by courts in subsequent decisions. In one of the more recent of these, *Glass v. Ickes*,⁶⁸ the court extended the immunity afforded executive officials against libel suits to include statements made in press releases. In this case Ickes, as Secretary of the Interior, was judged absolutely immune from a libel suit whether or not he had, as alleged, defamed Glass by innuendo in a press release implying that the inability of Glass to practice as an attorney before the Department of the Interior reflected some special misconduct on his part.⁶⁹ In expressing his reluctant concurrence with this decision on the basis of precedents, Chief Justice Groner of the court of appeals nevertheless stated:

I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law.⁷⁰

The *Spalding* decision, and the cases which follow it,⁷¹ give protection to a very wide range of statements by government officials, even including pronouncements having only "more or less connection with the general matters committed by law"⁷² to an executive official's discretion. The justification for the ample latitude thus afforded for the possible misuse of official power has been found in the fact that such immunity frees executive officials from the threat of harassment by civil suits, thus enabling them to discharge their public functions in an uninhibited and competent manner. In no other way, the courts have reasoned, can the public interest in the efficient conduct of governmental affairs be maintained. Moreover, the European experience suggests the possibility that, in the absence of judicial restraint, libel suits might well be used by totalitarian political groups like the Communist party to harass and intimidate public officials from acting against them in a democracy.⁷³

Involved also, so far as the courts are concerned, is the consideration that if

⁶⁷ *Ibid.*, at 498.

⁶⁸ 117 F.2d 273 (App. D.C., 1940). Other decisions include *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Miles v. McGrath*, 4 F.Supp. 603 (D. Md., 1933); *United States v. Birdsall*, 233 U.S. 223 (1914).

⁶⁹ The fact that Glass had, in Ickes words, "been barred from practice before the Department" (*Glass v. Ickes*, 117 F.2d 273, 274 [App. D.C., 1940]), was in reality due to a Department regulation that no former employee of the Department could practice before it for two years after his services were terminated.

⁷⁰ *Ibid.*, at 282.

⁷¹ E.g., authorities cited note 68 *supra*.

⁷² *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

⁷³ Consult Riesman, *Democracy and Defamation: Fair Game and Fair Comment*, 42 Col. L. Rev. 1085, 1282, esp. 1090-91 and 1100-1101 (1942).

the public is properly to direct and supervise public officials, as in a democracy it is intended it do, it must have full information as to the problems confronting these officials.⁷⁴ Judicial imposition of restraints upon government publicity, even if intended merely to protect the reputations of private citizens from unnecessary damage, might very well have a constricting effect upon government by discussion. The dilemma with which the courts have been faced is, as stated in one case, that "[w]hatever is added to the field of libel is taken from the field of free debate."⁷⁵

Publicity in Administrative Adjudication. The punitive effect of publicity initiated by governmental action has also been brought to judicial attention in connection with suits seeking injunctive relief from the adverse publicity threatened by pending administrative proceedings. However, the courts have been just as reluctant to grant relief of this kind as they have been to sustain libel actions against government officials. The basic difficulty faced by private litigants in cases of this kind grows out of the "long settled rule of judicial administration" that the judiciary will not consider a bill for injunctive relief until the prescribed administrative remedies have been exhausted.⁷⁶ In *Myers v. Bethlehem Shipbuilding Corp.*⁷⁷ the Supreme Court held flatly that "the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that . . . the mere holding of the prescribed administrative hearing would result in irreparable damage"⁷⁸—indeed a curious result when it is from the adverse publicity connected with these very administrative "remedies" that the litigant is seeking protection. It is only in cases where the court does not utilize this "exhaustion" rationale that one can observe the basic considerations affecting judicial decision in this area of the law. In one such case, involving the Federal Trade Commission, the business firm put forth the claim that the mere announcement in trade journals of a forthcoming hearing involving the firm had damaged its business, and that an actual public hearing on the matter would "aggravate and increase the injury" for which there was no adequate remedy at common law.⁷⁹ In answer to this contention the court gave as its opinion that the firm would actually have been in a far worse position if the FTC had been allowed to hold hearings in private.

⁷⁴ Consult *Defamation Immunity for Executive Officers*, 20 U. of Chi. L. Rev. 677 (1953).

⁷⁵ *Sweeney v. Patterson*, 128 F.2d 457, 458 (App. D.C., 1942) (involving defamation of, rather than by, a government official).

⁷⁶ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938).

⁷⁷ *Ibid.* It was decided that injunctive relief from adverse governmental publicity could not be granted though an executive agency may have exceeded its authority in taking jurisdiction over the case. Such relief was held similarly unavailable in *Arrow Distilleries v. Alexander*, 24 F.Supp. 880 (D. D.C., 1938), a case in which the claim was made that the statute under which unfavorable publicity was being inflicted was unconstitutional.

⁷⁸ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938).

⁷⁹ *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 63 F.2d 362, 363 (App. D.C., 1933).

The purpose underlying the constitutional guaranty of public trial in prosecutions for crime is to prevent abuses arising out of the avarice of unprincipled officials or the sale of justice or a conviction through illegal evidence. The rule requiring public hearings, whether in courts or bureaus, avoids these possibilities, and is to be approved.⁸⁰

In dismissing this complaint the court emphatically denied injunctive relief for the protection of so intangible an asset as a firm's reputation when "the possibility of loss is founded wholly on the public knowledge that an investigation has been ordered,"⁸¹ although suggesting that where such tangible assets as trade secrets are jeopardized by publicity, injunctive relief might be available.⁸²

The reluctance of the courts to protect private persons from what may perhaps be the undeserved brunt of unfavorable publicity thus springs not only from the consideration, already discussed, that full disclosure of governmental affairs is important to the preservation of public control over policy-making, but also from the knowledge that this publicity may be indispensable to the protection of private rights. Secrecy at the early stage of a proceeding in which he is involved may save an individual from some initial adverse publicity. However, insofar as it serves to mask arbitrary procedures by government officials, such secrecy may ultimately contribute to the imposition of undeserved legal sanctions upon the defendant when the proceeding is concluded.⁸³

In their thinking on this matter, the courts have, therefore, been principally impressed with the danger of injustice to a defendant resulting from secrecy rather than the possible harm from the publicity connected with an enforcement proceeding. For this concern the judiciary can of course find ample support in history. Secrecy has traditionally been a distinctive characteristic of law enforcement in despotic states. However, styles change, in the field of law enforcement as elsewhere, and for many defendants undeserved publicity could in its own way become as much a source of injustice as secrecy ever has been.⁸⁴ To this point at least, judicial supervision of legislative and executive law enforcement activities has been much more effective in providing protection against the

⁸⁰ *Ibid.*, at 363.

⁸¹ *Ibid.*, at 364.

⁸² The dismissal was predicated upon the court's holding that the act of Congress creating the Commission "impose[d] upon it the duty of public hearings," where it is not charged that "the Commission is acting unfairly or arbitrarily or that the result of an open hearing will be to disclose trade secrets or the names of appellant's customers, or any other detail of its business which, without regard to the final determination of the controversy, will result in serious injury to it." *Ibid.*, at 363.

⁸³ For a thorough analysis of the range of factors involved in arriving at a proper balance between publicity and secrecy in a democracy, consult Goldschmidt, *Publicity, Privacy and Secrecy*, 7 W. Pol. Q. 401 (1954).

⁸⁴ Obviously, however, excessive secrecy in government presents at least as many and as complex a set of problems as governmental publicity. Consult Shils, *The Torment of Secrecy* (1956).

dangers of secrecy than it has against unwarranted damage resulting from adverse governmental publicity.⁸⁵

Publicity and the Regulation of Subversive Activities. Reluctant as the judiciary traditionally has been to consider adverse publicity as one of the governmental sanctions against which private individuals are entitled to judicial relief, recent years have seen increasing pressure exerted upon the judiciary to revise its thinking on this score. This pressure has come in the main from individuals claiming immunity or injury from one or another of the extensive efforts undertaken by all the instruments of law enforcement since World War II to control and punish subversive activities. In at least one respect this pressure has had a fate different than previous efforts to convince the courts that a judicial remedy ought to be provided against unjust use of the publicity sanction. Individuals aggrieved by governmental publicity linking them with subversive activities have had a good deal more success in convincing the courts that a real and very punitive sanction has been imposed upon them than litigants claiming damage from governmental publicity in other connections.⁸⁶ Cloistered though they may be, the courts have had little difficulty sensing the depth and intensity of public antipathy toward subversive activities, and the odium and consequent penalties attached to public exposure of an individual as a subversive.⁸⁷

While generally agreeing that, so far as its capacity to identify individuals with subversion is concerned, publicity in governmental hands can be a sanction with great punitive effect, the judiciary has as a rule been reluctant to place restraints upon such official publicity. The courts have, for example, rejected the claim that congressional inquiries into the affiliations of individuals with subversive organizations are unconstitutional because the threatened penalty of adverse publicity interferes with the freedom of speech and association guaranteed by the First Amendment.⁸⁸ The argument here has been that what Con-

⁸⁵ Publicity and secrecy may on occasion be so linked together in the law enforcement process that each makes its own contribution to putting a private defendant at a disadvantage. In this connection consult the discussion of the procedures followed by the Senate Committee on Government Operations in its investigation into alleged subversion at Fort Monmouth. Taylor, *op. cit. supra* note 10, at 113-15.

⁸⁶ The courts have not always shown complete awareness of the conditions under which adverse publicity may impose a penalty in economic regulation. Judicial decisions in such cases have tended to underestimate the extent to which derogatory publicity concerning a business firm may inflict damage even if restricted in its circulation to a small group. This can occur where the firm is economically dependent upon the good will of the group concerned for its livelihood. See the discussion of "defamation and public opinion" in Riesman, *op. cit. supra* note 73, at 1085-1123, 1282-1318, esp. 1300-1308.

⁸⁷ The best measure of this antipathy is to be found in Stouffer, *Communism, Conformity and Civil Liberties* (1955), critically discussed in Blum and Kalven, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science*, 24 U. of Chi. L. Rev. 1 (1956).

⁸⁸ Similarly, in *Ullman v. United States*, 350 U.S. 422 (1956), a case in which the constitutionality of the Immunity Act (68 Stat. 745 [1954], 18 U.S.C.A. §3486 [Cum. Supp., 1955]) was upheld, the Supreme Court rejected the argument that the Fifth Amendment protects a witness against the necessity of making disclosures which will, because of the publicity in-

gress cannot punish by legislation, it cannot punish by exposure. In *United States v. Josephson*⁸⁹ the court dismissed this argument, saying that the Constitution does not protect the "timidity" of individuals fearful of unfavorable publicity, and that, so far as any threat to the individual and his freedom of speech from the publicity sanctioned is concerned,

[u]ntil there is a valid law to the contrary, he may with impunity say what he pleases *so far as legal process is concerned* and, that is the extent of the freedom of speech guaranteed anyone by the Constitution.⁹⁰ (Italics added.)

In *Barsky v. United States*⁹¹ a court rejected a similar contention put forward in an appeal against conviction for contempt of Congress, where it was alleged that "since an answer that the witness is a Communist would subject him to embarrassment and damage, the asking of the question is an unconstitutional burden upon free speech." While this time conceding that "even the most timid and sensitive cannot be unconstitutionally restrained in the freedom of his thought,"⁹² the court nevertheless held that the Communist movement represented a clear and present danger to the national security that would justify inquiry by the House Committee on Un-American Activities into an individual's affiliations with Communist organizations. In an opinion strongly dissenting from this decision, Justice Edgerton of the Court of Appeals for the District of Columbia declared:

The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. . . . The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views. . . . Some people speak freely whatever it costs, but this does not mean that speech is free whatever it costs. . . . What Congress may not restrain, Congress may not restrain by exposure and obloquy.⁹³

involved, subject him to extra-legal penalties. The Court reiterated the established rule that the Fifth Amendment protection is limited to disclosures which will subject the witness to criminal prosecution. Hence, where the Immunity Act frees him from such threat, he is obliged to testify. Ullman's argument would seem to be vitiated by the fact that to invoke the Fifth Amendment subjects one to at least as severe a set of extra-legal penalties as disclosure, except perhaps where the disclosures are of an unusually damaging character. In general, therefore, the Immunity Act does not in itself persuasively add to the weight of the publicity sanction in this area. But for an argument to the contrary, consult Justice Black's dissent in the foregoing case.

⁸⁹ 165 F.2d 82 (C.A. 2d, 1947).

⁹⁰ *Ibid.*, at 92.

⁹¹ 167 F.2d 241 (App. D.C., 1948).

⁹² *Ibid.*, at 249.

⁹³ *Ibid.*, at 254-56. But compare Judge Edgerton's holding in *Methodist Federation for Social Action v. Eastland*, 141 F.Supp. 729 (D. D.C., 1956), where, speaking for the majority of a three-judge district court, he held that the courts have no power to restrain the publication by Congress of an allegedly defamatory document which identified the complainant as a Communist-front organization, since the congressional immunity from libel covers publica-

Perhaps the most formidable problem the courts have had to face in their evaluation of governmental publicity as punishment has arisen out of the operation by the national government of the loyalty-security program covering executive employees. In its administration of this program, set up in 1947 to eliminate and exclude disloyal persons, and at the present time "security risks," from employment in executive agencies, the government has taken the position that it is simply exercising its ordinary and traditional discretion on employment matters when it takes loyalty and security considerations into account in deciding whom to appoint and whom to exclude from government service. It is settled judicial doctrine that a government employee does not have a right to his job.⁹⁴ Since an employee can be summarily denied or removed from a position for a variety of lesser reasons, surely suspicion of disloyalty provides a reasonable grounds for removal, even if the procedure used be arbitrary in character. Furthermore, the government has contended, its moral and legal position in this connection is made impregnable by the fact that it allows employees against whom disloyalty charges have been preferred the privilege of a quasi-judicial hearing, even though it is under no strict constitutional obligation to do so.

However persuasive and reasonable this position may be, it has been sharply challenged before the courts by former government employees seeking judicial relief from a finding of disloyalty and subsequent removal from government employment. This challenge has been rooted in the claim that discharge from government service on charges of disloyalty, unlike the other grounds upon which dismissal may occur, inflicts public disgrace upon an individual⁹⁵ and opens the door to the application of additional extra-legal sanctions including the denial of private employment. This being the case, it is argued, the government is constitutionally prohibited from discharging an employee for disloyalty except when it follows procedures specified by the Constitution as necessary before any legal punishment can be imposed upon a private citizen.⁹⁶

tions by Congress as well as floor statements by congressmen. "We have," the court stated, "no more authority to prevent Congress . . . from publishing a document than to prevent [it] from publishing the *Congressional Record*. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority." *Ibid.*, at 731-32.

⁹⁴ Authorities cited note 98 *infra*.

⁹⁵ "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In view of the community, the stain is a deep one; indeed, it has become a badge of infamy." *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952) (striking down as contrary to due process a state statute which had the effect of excluding individuals from state employment solely on the basis of organizational membership regardless of their knowledge of the activities and purposes of the organization).

⁹⁶ For one thing, the Sixth Amendment of the Constitution prohibits punishment without a fair trial, and the requirements of a fair trial, as set forth in the Amendment, include procedures not necessarily followed in administration of the government's loyalty program—

In *Bailey v. Richardson*⁹⁷ the Court of Appeals for the District of Columbia considered these rival claims and decided in favor of the government, a ruling subsequently affirmed per curiam by an equally divided Supreme Court. The court found itself unable to conceive dismissal from government service as legal punishment, whatever the extra-legal sanctions associated with it might be. Such dismissal was simply denial of a privilege to which no one was legally entitled. So far as the due process clause was concerned, the court reiterated the oft-spoken judicial conviction that no individual has a property right to a government job.⁹⁸ "Miss Bailey," the court pointed out, "may have a perfect right to devote her life to personnel training, but that does not include the right to employment by whatever employer she happens to choose."⁹⁹

The court's decision in this case may have been the correct one; the public interest in a loyal and efficient civil service may demand that any doubt as to procedural propriety be resolved in favor of the government. But right or wrong as the ruling may have been, the notion of punishment maintained in the *Bailey* decision is rather formalistic.¹⁰⁰ Although the statement that no one has a property right to a government job is true beyond peradventure of doubt, it does not dispose of the more difficult question of whether a government employee has a property right to his reputation—upon which his employability in any position, public or private, may depend. However, in order to deal with this problem the court would have had to take into account a fairly complex set of considerations, including the extent to which this country has been moving toward an employee society in which the ability to earn a living through wages or salary has increasingly become the essence of property for most individuals. Also rele-

e.g., the accused need not be confronted with the witnesses against him. The constitutional challenge to the loyalty program rests also upon the fact that, contrary to the Fifth Amendment, it takes away liberty and property "without due process of law."

⁹⁷ 182 F.2d 46 (App. D.C., 1950), aff'd per curiam, 341 U.S. 918 (1951).

⁹⁸ E.g., *Snowden v. Hughes*, 321 U.S. 1 (1944); *Taylor and Marshall v. Beckham* (No. 1), 178 U.S. 548 (1900); 2 *Cooley, Constitutional Limitations* 746 n. 1 (8th ed., Carrington, 1927).

⁹⁹ *Bailey v. Richardson*, 182 F.2d 46, 60 (App. D.C., 1950), aff'd per curiam, 341 U.S. 918 (1951).

¹⁰⁰ A variety of decisions limiting the power to tax evidence earlier judicial recognition of the fact that it is not only through legal prosecution that government punishes or coerces, a recognition given classic expression in Marshall's venerable doctrine that "the power to tax involves the power to destroy." *McCullough v. Maryland*, 4 Wheat. (U.S.) 316, 431 (1819). Moreover, in a decision handed down shortly after its ruling in the *Bailey* case, the Supreme Court was to agree that a private organization had suffered grievous injury through adverse publicity when the Attorney General without a hearing designated it as subversive. The meaning of this decision for judicial doctrine on the publicity sanction is, however, vitiated by the fact that no less than five separate and distinct opinions were written in connection with the majority decision. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), discussed in *Supreme Court No-Clear-Majority Cases: A Study in Stare Decisis*, 24 U. of Chi. L. Rev. 99, 149 n. 250 (1956). For a critical scrutiny of this kind of judicial individualism, consult Swisher, *The Supreme Court—Need for Re-Evaluation*, 40 Va. L. Rev. 837 (1954).

vant in this connection is the fact that complete probity of reputation becomes well-nigh indispensable in a society in which personality rather than skill assets become key factors in determining suitability for work in the varied bureaucracies that have come to make up the employment market.¹⁰¹

In *Peters v. Hobby*¹⁰² the punitive character of dismissal from the government service was once again pointed up for the Court's inspection in a case that had its origin in the removal on loyalty grounds of Dr. John Peters from a position as part-time consultant to the Federal Security Agency. In this appeal the claim was made that during the three years which had elapsed since the *Bailey* decision abundant evidence had accumulated that dismissal with a finding of disloyalty was more than a hardship, it was in the legal sense a punishment, since it "ruins the reputation and career of the accused."¹⁰³ More than that, it was in this case an intended punishment, since the government chose to stigmatize Dr. Peters as a security risk when it could easily have dispensed with his services by ceasing to call upon him as a consultant.¹⁰⁴ The argument concluded:

The most fundamental subject of constitutional concern is the life and liberty of the individual. Imprisonment of course does not follow the findings of loyalty boards but the penalties are hardly less severe:—ostracism and impoverishment and the denial of access to one's profession and the society of one's friends.¹⁰⁵

The catalogue of punishments here described evidences a striking similarity to the penalties visited upon deviant members of primitive societies.

The Supreme Court did not meet the constitutional issues presented by the *Peters* case, disposing of it with the ruling that the Loyalty Review Board had exceeded its authority in taking jurisdiction over the case and that its finding of disloyalty with regard to Dr. Peters was, therefore, invalid and should be "expunged from the record." Since the constitutionality of the earlier *Bailey* decision had been affirmed only by an equally divided court, further tests of the constitutionality of the government's loyalty-security procedures may be expected. It is, however, worth noting in this connection that one of the more

¹⁰¹ In a recent discussion of congressional investigations of Communism in Hollywood, it is reported with regard to William Faulkner that "one of his friends wailed that he had been tapped by the Un-American Activities Committee, and that this could be his ruin. After the victim had departed, Faulkner observed, '——— don't have to worry none, so long as he writes good.' " Kempton, *Part of Our Time: Some Monuments and Ruins of the Thirties* 209 (1955). Faulkner's view is of course a traditional one, but it may very well have been the measure of his friend's predicament that he was not so much a writer as a literary bureaucrat, as replaceable in what is aptly called the entertainment industry as the scenarios he produced. Mills, *White Collar* (1951), is perhaps the most intensive analysis attempted of the relationship between employment and personality factors in modern society.

¹⁰² 349 U.S. 331 (1955).

¹⁰³ Brief for Petitioner at 10.

¹⁰⁴ As the reason for the government's choice of action in this matter, the appellate brief pointed to the publicity value attached in the minds of executive officials to finding and discharging as many security risks as possible.

¹⁰⁵ Brief for Petitioner at 21.

subtle coercive aspects of publicity is its ability to deter challenges to what may be considered to be unconstitutional government action, when reasonable expectations exist that such challenges will bring unfavorable public attention to the private litigant seeking judicial relief.

In retrospect it is clear that the unwillingness of the judiciary to impose restraints upon governmental coercion through publicity has been rooted in some very compelling considerations, including the necessity of keeping the public informed of the conduct of governmental business, the need of executive officials to be free from the harassment of civil suits in the discharge of their duties and the right of the legislature to investigate matters within its jurisdiction. In view of the importance of these interests, it seems more than likely that whatever future protection the judiciary will afford against unjustified use of government publicity to punish or defame private individuals will be at the borders of its use, perhaps through a narrowing of the defamation immunity of executive officials, or a constriction of the permissible scope of congressional inquiry into private beliefs, or even requiring adherence to the traditional elements of due process in administration of the government loyalty-security program in areas of non-sensitive government employment.¹⁰⁶ For the judiciary to embark upon the more ambitious endeavor to bar any use of government publicity in areas in which it may produce unfair coercion would be to risk hamstringing processes vital to governmental efficiency.

It is in any event questionable whether the judiciary ought ever to attempt so much. In a democracy the judiciary necessarily shares responsibility for protecting individual rights with the public and its legislative and executive officers, although it is characteristically American to believe that this is a responsibility that can be borne by the courts alone. A sense of the necessity of using restraint and fairness in applying the publicity sanction ought also to be found in other places besides the judiciary.¹⁰⁷ There is, however, one unfortunate complication here present—the fact that where there is division of responsibility, there may also be evasion of responsibility. In a system of separation of powers, political officials may come to expect judges to keep their consciences for them in areas such as civil rights. This was argued in the *Peters* case where the claim was made that executive officials had no desire to administer the loyalty-security program without regard to due process, but that they were awaiting judicial instruction

¹⁰⁶ This later alternative seems to have been preferred by the Supreme Court in its recent and significant decision, *Cole v. Young*, 351 U.S. 536 (1956), decided after this article was written. Recognizing the "stigma attached to persons dismissed on loyalty grounds," (*ibid.*, at 546), the Court held that the summary dismissal powers granted to the heads of executive departments "when deemed necessary in the interest of national security," (64 Stat. 476 [1950], 5 U.S.C.A. §§22-1 [Cum. Supp., 1950]), applied only to employees in "sensitive positions," whose retention might adversely affect the national security. As the petitioner's agency head had not determined whether his position as a food and drug inspector was "sensitive," his discharge was held invalid.

¹⁰⁷ Consult Jackson, *The Supreme Court in the American System of Government* (1955).

on the matter.¹⁰⁸ It is of course indisputably true that, given the pressures and anxieties presently focused on the loyalty program, the better part of valor so far as political officials are concerned is to leave to the courts the hazardous task of striking a proper balance between public power and private rights.

V. PUBLICITY AND CONSTITUTIONALISM

In the preceding sections of this paper an attempt has been made to point up the infinite variety of roles that the power of publicity plays in the current operations of the American political system. It has introduced a new tactic in the struggle for power between President and Congress, an institutional conflict that is central to the development of American politics and society. It has altered patterns of behavior within Congress and opened up a new avenue for advancement within our political hierarchy. It has greatly reinforced the ability of executive officials to acquaint the public with both the goals of administrative regulation and the services made available by governmental action. Publicity and public relations techniques have also begun to exert increasing influence upon party combat in American politics and may in time have a profound effect upon such party decisions as choice of candidates and selection of issues.¹⁰⁹

But most important, from the perspective of traditional American political values, is the role that publicity has come to play in law enforcement. For here the power of publicity threatens an alteration in our political system that is of normative as well as empirical significance. There is no doubt that the ability of government to control through publicity opens an avenue through which political power may flow beyond the bounds of law. What a government official is not authorized to accomplish through legal sanctions he may now be able to achieve through the threat or use of publicity. It is this fact that provides room for concern about the role of publicity in our political system. Otherwise, governmental use of the publicity sanction might fairly be viewed as simply another of the unceasing adaptations of control techniques to meet emergent social and economic problems.

Moreover, the fact that governmental use of the publicity sanction is an instrument of widespread social utility is quite evident from the variety of interests it has come to serve. These interests are as varied as the regulation and sale of drugs, the control of subversive activities and the establishment of equality

¹⁰⁸ "We believe that an affirmative pronouncement by this Court that government employees should not be compelled to risk their reputations and careers without due process or a fair hearing would be hailed with relief even by those who are now putting men to trial by these procedures. We do not believe that the men who do this enjoy their tasks. We think they would like to give fairer hearings. But it is politically dangerous so long as this procedure is followed for any government official not to use it. To be more fair to persons suspected of Communism than is necessary under the law might well be branded as softness towards Communism." Brief for Petitioner at 13.

¹⁰⁹ Consult, in this connection, Kelley, *Professional Public Relations and Political Power* (1956).

of opportunity for employment. Indeed, use of the publicity sanction can hardly be said to be the inherent advantage of groups clustered around any particular segment of the political spectrum. Contrary, for example, to what might presently seem to be the case, the power of publicity can be used to control the activities of what are alleged to be extreme rightist as well as leftist political groups.¹¹⁰ Thus all sections of the community have an interest in the preservation of due process in the use of the publicity sanction.

It is, moreover, in this area of control of political activities that use of the publicity sanction presents the gravest problems. Indiscriminate executive or legislative use of the publicity sanction for the control of unlawful political activities, insofar as it constricts the opportunity for diversity, and even mistakes in lawful political beliefs and associations, threatens the political free enterprise upon which democracy depends, an interest even more vital to the health of a democratic society than the very real values endangered by arbitrary use of publicity in economic regulation. It is this fact which presents executive agencies, the legislature and the courts with the challenge to develop procedures governing the use of the publicity sanction which will maintain its effectiveness as a legitimate instrument of social control and at the same time protect against unwarranted or unnecessary damage to private persons.

It should not be overlooked that the use of the publicity sanction is to be encountered in totalitarian as well as democratic societies. In Soviet law enforcement, which may fairly be said never to miss a trick so far as sanctions are concerned, the defendant may be confronted not only with the formidable array of penalties provided for in the Soviet legal system, e.g., imprisonment as forced labor, but also with the necessity of making a public confession so as to heap upon his own head the full weight of public obloquy. This practice may be said to be a refinement in cruelty in the use of the publicity sanction—the defendant is forced to call it upon himself. Poignant evidence of its effectiveness in Soviet society is to be found in Bukharin's confession before the Supreme Court of the U.S.S.R., where, accepting with resignation his own impending execution, he states:

¹¹⁰ It was in fact one of the chief recommendations of the President's Committee on Civil Rights that public exposure be used as a weapon against both Fascist and Communist political movements. *To Secure These Rights: Report of the President's Committee on Civil Rights 164* (1947). The investigations of the Buchanan committee in 1951 were, in addition, directed at exposure and control of many political activities that could generally be described as rightist in character. House Select Committee on Lobbying Activities, Conference of American Small Business Organizations, H.R. Rep. No. 3,232, 81st Cong. 2d Sess. (1950). See, however, *United States v. Rumely*, 345 U.S. 41 (1953), where the Supreme Court upheld a witness in his refusal to answer inquiries by this committee that, in his view, threatened adverse publicity for individuals engaged in lawful political activity. The Court's decision was based upon its holding that the congressional resolution authorizing the Buchanan committee's investigation did not give it authority to compel production of the information sought. Compare the concurring opinion of Justice Douglas (*ibid.*, at 48), where the issue of the constitutionality of such inquiries is considered.

[W]hen you ask yourself: "Very well, suppose you do not die; suppose by some miracle you remain alive, again what for? Isolated from everybody, an enemy of the people, in an inhuman position, completely isolated from everything that constitutes the essence of life."¹¹¹

Devout Communist that he was, Bukharin was seeking expiation before the Marxist idol of history as well as before the bar of public opinion in his confession. It is in democratic societies, where public opinion rather than dogma has a primary claim on men's affections, that the impact of public disgrace as a sanction in law enforcement falls with greatest weight. This is because public opinion tends to be the final arbiter of value in democratic societies and to be condemned before public opinion is to be condemned before the highest court of the land. Of the force of public opinion in this regard, three of the principal commentators on American democracy, De Tocqueville, Bryce and David Riesman have given eloquent witness. For De Tocqueville public favor in a democracy "seems as necessary as the air we breathe, and to live at variance with the multitude is, as it were, not to live."¹¹² In Bryce's view the sovereignty of public opinion in American society was no less total: "He whom the multitude condemns . . . has no further court of appeal to look to. Rome has spoken. His cause has been heard and judgment has gone against him."¹¹³ Finally, David Riesman in his analysis of contemporary American society writes:

Approval itself, irrespective of content, becomes almost the only unequivocal good. . . . One makes good when one is approved of. Thus all power not merely some power, is in the hands of the actual or imaginary approving group.¹¹⁴

It is from this power of public opinion in a democratic state, as well as from the fact that democracies, alone among political systems, have concerned themselves with securing justice for the individual as their highest goal, that the case for curbing abuse of the publicity sanction in democratic law enforcement springs.

¹¹¹ Translated in Mendenhall, Henning and Foord, *The Dynamic Force of Liberty in Modern Europe* 124 (1952).

¹¹² 2 De Tocqueville, *Democracy in America* 261 (Bradley ed., 1945).

¹¹³ 2 Bryce, *The American Commonwealth* 350 (1895).

¹¹⁴ Riesman, *The Lonely Crowd* 49 (1950).