NOTES AND COMMENTS

THE CONSTITUTIONAL RIGHT TO ANONYMITY: FREE SPEECH, DISCLOSURE AND THE DEVIL

Today there is a recognized right to speak and write anonymously and to participate anonymously in group activities. The Supreme Court has developed this right as a derivative of the protection given speech, assembly, the press, religion, and petition by the first and fourteenth amendments. Several members of the Court have, however, denied that the Constitution guarantees a "freedom of anonymity." These Justices, joined by some distinguished and civil liberty minded commentators, have doubted the wisdom of granting constitutional protection against compulsory disclosure of expression and association, since, they assert, disclosure implements rather than defeats the goals of the first amendment. This school argues as follows: the attainment of truth is the goal of the first amendment; the disclosure of a source of argument is necessary to an honest evaluation of its truth in the market place of ideas; disclosure, therefore, best effectuates the policy of the first amendment. But other scholars, who also assume the so-called truth or market place theory, argue that disclosure often deters free expression and therefore defeats the goals of the first amendment. This Comment, after examining the history and present case law of anonymity, will evaluate these conflicting claims and in so doing it will directly challenge the market place theory of the first amendment.

Anonymous writings have long played an important role in the expression of ideas. Anonymous pamphlets have been used in England since the beginning of printing. The English licensing laws brought forth a series of anonymous religious tracts. John Udall, an Anglican clergyman with Puritan views, was convicted in 1590 for writing unlicensed pamphlets attacking the bishops under the pen name "Martin Marprelate." In 1637 the licensing laws were amended to require that all books bear the name of the author as well as the printer,

2. E.g., id. at 67; REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 52 (1957); Fly, Full Disclosure: Public Safeguard, 168 Nation 299 (1949); Institute of Living Law, Combating Totalitarian Propaganda—The Method of Exposure, 10 U. Ch. L. Rev. 107, 108 (1943); Smith, Democratic Control of Propaganda through Registration and Disclosure, 6 Pub. Op. Q. 27, 31 (1942).
6. Id. at 192-97.
and to regulate the importing of books. John Lilburn and John Wharton, working men of Puritan views, were convicted of contempt in 1638 for refusing to say whether they had smuggled books from Holland into England. The licensing laws expired in 1694, and the device of anonymous authorship continued to be utilized in English political life; Defoe, Swift and Johnson, as well as many lesser known authors, published anonymous political pamphlets critical of affairs in England. During the early history of the United States prominent persons used anonymous pamphlets and the unsigned letter to the editor to express their views on public issues. William Bradford was brought to trial because he had, in order to inform the people of their rights, anonymously printed and distributed the charter of Pennsylvania. At the time the first amendment was adopted, the device of anonymous political authorship was well known, and utilized by many of the founding fathers. The Federalist papers of Hamilton, Madison, and Jay were published originally as letters to the editor under the name of "Publius." The Letters of Pacificus by Alexander Hamilton defending Washington's proclamation of neutrality and Madison's answering Letters of Helvidius were published anonymously. Even Chief Justice Marshall, writing anonymously as "a friend to the Republic," vigorously defended certain Supreme Court decisions against attacks by Spencer Roane, also writing anonymously. Between 1789 and 1809 no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names.

But throughout history governments have sought to limit or abolish the right of an individual to express himself anonymously, by requiring those engaged in the expression of ideas to register or in some other way to disclose their identity. In 1850 France enacted a requirement that newspaper articles discussing political, philosophical, or religious questions be signed. England

7. Holdsworth, Press Control and Copyright in the 16th and 17th Centuries, 29 Yale L.J. 841, 848 (1920).
9. Holdsworth, note 7 supra at 849, 855.
15. Id. at 9.

This provision was soon after amended to apply to all articles of whatever length, published in political or nonpolitical papers, in which articles the acts or opinions of persons and individuals or collective interests shall be discussed.

Id. at 3.

Analogous disclosure provisions appear in the current code.

Art. 1. Regardless of its form of organization, any periodical publication must:
in 1881 adopted a requirement that the printers and publishers of unincorporated newspapers file annually the title of the paper and the names of its proprietors. Similarly, in the United States, both the state and federal gov-

1. Inform the public of the names and qualifications of the persons assuming its direction de jure or de facto.
2. Include a technical committee in accordance with article 16 of this ordinance.
3. For the purpose of this ordinance, the term "publication" will mean any newspaper, magazine, information brochure or sheet, not strictly scientific, artistic, technical or professional, appearing at regular intervals at least once a month.

4. Any person convicted of having lent his name to the proprietor, co-proprietor or financial backer of a publication in any way, and especially by means of signing up for stock or any interest in a publishing enterprise, will be punished by 3 months to 2 years in prison and by a fine, the minimum of which will be 300,000 francs and the maximum a sum equal to fifty times the amount of his investment, of his purchase or of his hidden loan.

The same penalties will be incurred by the person in whose profit the operation of name lending will have been performed.

If this name lending operation is made by a company or society, the penal responsibility envisaged by the present article extends to the president of the administrative council or the managing director depending on the type of society or company.

5. Each issue of the publication must, at the top and under the title bear the names of the publisher and of the co-owners if there are any. If the enterprise is a company, the names of the members of the board, of the partners or their responsible deputies will be mentioned in like fashion.

In each case, the name will be followed by the indication of the person's profession and nationality.

In the case of a company, once every three months, one issue of the publication will give a complete list of the owners, with their addresses and qualification. If the publication is owned by more than 100 partners, this list will be limited to the names of the 100 partners who have the largest holdings in the business; and the list of other partners will be supplied each quarter to the Bureau of Information, where it will be available to the public on request.

At the same interval, an issue of the publication will give a complete list of editors, regular and occasional ones.

In case of violation of one of the above provisions the publisher will be sentenced for 6 days to 6 months imprisonment and to a fine of 30,000 to 300,000 francs, or to either of them.

6. In the case of a company of stockholders, stocks will necessarily be nominative. Their transfer will be subject to the approval of the board of directors. No founder's share will be created.

10. Authors using a pseudonym must indicate in writing, before publication of their articles, their real names to the publisher.

In the case of an action against the author of an article, unsigned or signed with a pseudonym, the publisher's professional secrecy is waivered at the request of the prosecuting attorney in charge of the complaint to whom he will disclose the author's true identity. . . .


17. Newspaper Libel and Registration Act, 1881, 44 & 45 Vict., c. 60, §§ 1, 8, 9, 13; see PHILLIPS, THE CONSTITUTIONAL LAW OF GREAT BRITAIN AND THE COMMONWEALTH 566 (1952). See generally id. at 561-68. Similarly a penalty is imposed on any printer or
governments have enacted disclosure provisions. For example, the Post Office Appropriations Act of 1912 required users of second class mailing privileges periodically to file and publish the names of their officers and proprietors. The federal government compels lobbyists and agents of foreign governments to register. Any group which is found by the Security Activities Control Board to be a "communist action group" must submit a membership list. Some organizations have been required by state statutes to disclose to the state the names of their members; persons and groups wishing to use parks and streets for meetings and public speeches have been required to publish who does not print his name and residence on every paper or book. The Newspapers, Printers, and Reading Rooms Repeal Act, 1869, 32 & 33 Vict., c. 24, § 1, reenacting 2 & 3 Vict., c. 12 (1839), § 2. This section attempts to assist the identification of libelers. See 48 L.J. 41 (1913). The same statute further requires that each printer keep a copy of every paper he prints for six months and that he write on this copy the name and address of the person or persons who employed him to print it. Newspapers, Printers, and Reading Rooms Repeal Act, 1869, 32 & 33 Vict., c. 24, § 1, reenacting the Unlawful Societies Act, 1799, 39 Geo. 3, c. 79, § 29.


(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended, to be disseminated among two or more persons, unless such publication and any envelope, wrapping, or other container in which it is mailed or otherwise circulated or transmitted, bears the following . . . with the name of the organization appearing in lieu of the blank: "Disseminated by , a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by , a Communist organization."


register; and, in some instances, state laws have required authors to sign their works.

In a number of cases such provisions have been challenged in the Supreme Court as violating freedom of expression. While early cases reaching the Court upheld such requirements, in recent years the Court has found some forms of compulsory disclosure invalid under the first and fourteenth amendments.

THE CASE LAW OF ANONYMITY

The Early Cases—Disclosure Requirements Upheld

The first governmental disclosure case to reach the Supreme Court was *Lewis Publishing Co. v. Morgan,* which challenged the registration and publication provisions of the Post Office Appropriation Act of 1912. The act required "every newspaper, magazine, periodical, or other publication" to file with the Postmaster General a list of its editorial and business officers and its proprietors, and to publish this information twice annually. Under the terms of the act any delinquent publication was to be "denied the privileges of the mail." Lewis argued that since the denial served no post office function it was a regulation of the press, not the mail, and was therefore outside congressional powers over postal matters. Moreover, Lewis asserted that the first amendment expressly forbids the exercise of such power, for "[b]y compelling a public disclosure of the editors and owners of newspapers, the right to disseminate ideas impersonally is destroyed." The Court, by construing the phrase "privileges of the mail" to mean only the privilege of being classified as second class matter, avoided the broad question of congressional power to require disclosure as a condition to using the mails. It then held that since

24. E.g., KAN. GEN. STAT. ANN. § 25-1714 (1949); N.Y. Penal Law § 781(b); OHIO Rev. CODE Ann. § 3599.09 (Page 1960); LOS ANGELES, CAL., MUNICIPAL CODE § 28.06 (1936).
32. *Id.* at 301-12 (looking to language, administrative background and legislative history of the act). See also 29 Ops. ATT'y Gen. 550 (1912).
33. *Id.* at 316.
second class matter was carried at a considerable loss, and thus reflected a
government subsidy designed to promote the dissemination of knowledge. The Congress could place functionally related conditions on the granting of such subsidies. The Court accepted the congressional theory that disclosure advanced knowledge by preventing deceptive propaganda and therefore held that since the requirements were reasonably related to the purpose of the second class privilege, they were within congressional power. Reflecting a now outdated view of the first amendment, the court seemed to feel that since Article One gave Congress the power to make these restrictions, the provisions was valid regardless of what effects it might have upon freedom of the press.

The next disclosure case to reach the Court—New York ex rel. Bryant v. Zimmerman—raised the question of whether the fourteenth amendment gave members of the Ku Klux Klan a right of anonymity. In 1923, New York passed a statute forbidding all corporations and associations of more than twenty members, which required an oath as a condition of membership, from delivering any anonymous writings to non-members. Each such group was also

34. [L]etter mail . . . is subjected to a rate eighty times higher than that given newspapers under the second class. . . . [A] very great discrimination also exists against the other classes and in favor of the second class.

Id. at 304.
35. Id. at 312-13.
36. Id. at 314.
37. Id. at 315-16.
38. Morgan was decided seven years before the first of the World War I espionage act cases.
39. The Court asked:
Was the provision intended simply to supplement the existing legislation relative to second class mail matter or was it enacted as an exertion of legislative power to regulate the press . . . ?

229 U.S. at 308.

The Court found that Congress had the power to grant a subsidy and that the disclosure requirement was limited to publications subsidized. Id. at 309-14. The Court then asked whether "the conditions . . . exacted [were] incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second class classification . . . [T]he illuminating rule announced in McCulloch v. Maryland and Gibbons v. Ogden governs here . . . ." Id. at 314. The court stated that only if the condition was not incidental did it infringe freedom of the press. Ibid. The Court thus seemed to adopt Alexander Hamilton's view of the amendment; to Hamilton, no first amendment was needed since no power to regulate the press was delegated. The Federalist No. 84, at 631-32 (Hamilton ed. 1871) (Hamilton); see Hart, Power of Government Over Speech and Press, 29 Yale L.J. 410-12 (1920).

The narrow construction given the statute by Lewis suggests that the Court sensed a difference between a ban on all the mail—which might be characterized as a denial of a "right"—and a disqualification from the second class subsidy—the revocation of a "privilege." Lewis might thus be read as holding that the first amendment does not affect the granting or denial of governmental "privileges," whatever its impact may be on "rights." In view of the Court's conception of the function of the first amendment, however, this reading of Lewis does not seem tenable.

40. 278 U.S. 63 (1928).
required to file with the Secretary of State copies of its constitution, by-laws, a list of members and officers and any resolutions which dealt with the group's political and lobbying activities. Delinquent associations were subject to fine, and any member who knowingly remained in an organization which failed to comply was guilty of a misdemeanor.\textsuperscript{41}

The Ku Klux Klan failed to register or disclose any of the required information.\textsuperscript{42} Bryant, a Klan official, was indicted for retaining membership in the Klan with the knowledge that it had failed to comply with the statute.\textsuperscript{43} Bryant filed a petition of habeas corpus, claiming that the statute was invalid under the fourteenth amendment.\textsuperscript{44} New York denied the petition,\textsuperscript{45} and, on appeal, the Supreme Court affirmed.\textsuperscript{46} The court rejected the argument that a citizen has a “privilege and immunity” of anonymous membership in an oath bound organization by virtue of his United States citizenship.\textsuperscript{47} Nor did the Court think that by subjecting Bryant's right of membership in the Klan to “rightful” regulation, the state denied him due process of law.\textsuperscript{48} The Court concluded that disclosure in this case was a “rightful” state regulation on the two-fold theory that

the State within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted\textsuperscript{49}

and that

requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required.\textsuperscript{50}

The Court may have found support for the second assertion in the nature of the Klan, which it assumed to be the object of the legislation.\textsuperscript{51}

\begin{thebibliography}{50}
\bibitem{41} N.Y. CIVIL RIGHTS LAW §§ 53-56. Benevolent orders listed in the N.Y. BENEVOLENT ORDERS LAW § 2 and labor unions were explicitly exempted from the requirements of the act. N.Y. CIVIL RIGHTS LAW § 53. In 1947 the attorney-general was given, in addition, injunctive remedies. N.Y. CIVIL RIGHTS LAW § 57.
\bibitem{42} New York \textit{ex rel.} Bryant v. Zimmerman, 278 U.S. 63, 71 (1928).
\bibitem{43} See Record, pp. 9-10, 20, New York \textit{ex rel.} Bryant v. Zimmerman, \textit{supra} note 42.
\bibitem{44} 278 U.S. at 65.
\bibitem{45} People \textit{ex rel.} Bryant v. Zimmerman, 241 N.Y. 405, 150 N.E. 497 (1926).
\bibitem{46} Mr. Justice McReynolds dissented; he would have dismissed the writ of error on jurisdictional grounds. 278 U.S. at 77.
\bibitem{47} \textit{Id.} at 71-72. (“If to be and remain a member of a secret, oath-bound association within a State be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship. . . .”).
\bibitem{48} \textit{Id.} at 72.
\bibitem{49} \textit{Ibid.}
\bibitem{50} \textit{Ibid.}
\bibitem{51} Addressing itself to the question whether the statute's regulation of only oath-bound organizations was a reasonable classification the Court emphasized the “manifest tendency” of the Klan to use the secrecy surrounding its purposes and membership as a “cloak for acts and conduct inimical to personal rights and public welfare.” 278 U.S. at
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In two cases involving state regulation of streets and parks the Court, in effect, broadened the area in which at least some disclosure may be required. In the cases of *Cox v. New Hampshire* 52 and *Poulos v. New Hampshire* 53 the Court upheld licensing requirements which apparently required at least some disclosure as a condition to holding a parade on the public streets or holding a meeting in a public park, although neither case discussed the extent of the disclosure required.54 The right anonymously to use such facilities for public expression was therefore denied by the Court.

Following *Cox* but prior to *Poulos*, the Court decided an anonymity case involving the compulsory registration of foreign agents. In the period just before World War II agents of the fascist nations were disseminating vast amounts of propaganda in the United States.55 Apparently believing that

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75. For this finding it relied heavily on testimony given at Congressional hearings that the Klan believed in "white supremacy" and "punished what some of its members thought to be crimes." *Id.* at 76-77.

The statute appears to have been an attempt indirectly to outlaw the Klan. See Robinson, *Protection of Associations From Compulsory Disclosure of Membership*, 58 Colum. L. Rev. 614, 643 nn.151 & 152 (1958). Although argued in the briefs, see Brief for Plaintiff-in-Error, pp. 35-36, Brief for Attorney General of the State of New York, pp. 14-15, Brief for Defendants in Error, pp. 15, 23-24, the deterrence problem was not discussed in the Court's opinion.

52. 312 U.S. 569 (1941).
53. 345 U.S. 395 (1953).
54. Both cases arose under a New Hampshire statute providing that

No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for.

N.H. Rev. Stat. Ann. § 286:2 (1955). In *Cox* a unanimous Court sustained the conviction of five Jehovah's Witnesses for holding a parade on a public street without securing the required license. The Court found that licensing was necessary to prevent traffic disorders and conflicting parades. 312 U.S. at 576. See generally 2 Emerson & Haber, *Political and Civil Rights in the United States* 797-98 (1958). Because the statute was narrowly drawn to achieve this end—it did not restrict use of placards, distribution of handbills, or discussion, 312 U.S. at 575—and because it left the licensing board no discretion to discriminate between applicants on the basis of what was to be advocated, *Id.* at 576, the Court concluded that the requirement for prior licensing was a reasonable regulation of use of the streets, and did not unconstitutionally curtail freedom of expression. In *Poulos*, the court upheld the provision of the New Hampshire statute requiring registration prior to use of public parks. Poulos was convicted for making a religious address in the face of a denial of a license. State v. Poulos, 97 N.H. 352, 88 A.2d 860 (1952), aff'd, 345 U.S. 395 (1953). The court rejected Poulos' argument that the statute on its face infringed free speech. Finding, as it had in *Cox*, that the act properly construed left licensing officials no discretion, it upheld the provision on the ground that some system for the allocation of public facilities was essential to maintenance of effective speech. 345 U.S. 395, 403 (1953). Justices Black and Douglas, while agreeing that a purely ministerial statute would be valid, dissented, in part because they did not believe the statute to in fact be ministerial. 345 U.S. at 424-26.

identification of these individuals as foreign agents would permit the public to
discount their propaganda.\(^5\) Congress enacted a series of disclosure statutes,\(^5\)
one of which \(^5\) required any person acting as an agent of a foreign principal
to register with the Secretary of State and to disclose, among other things, the
terms of his contract, his compensation under it, and the names of those who
have contributed to his compensation.\(^5\) The act further required the filing of
supplemental registration statements.\(^6\) Viereck, a registrant, was tried for
failure to give information in supplemental registration statements about cer-
tain propaganda activities, including speech-writing and the publication of
translations of books authored by the \textit{Deutsche Informationsstelle} of Berlin.\(^6\)
Viereck was convicted upon an instruction that conviction could result whether
the activities were engaged in "on behalf of his foreign principal or principals
or on his own behalf."\(^6\) On appeal, the Supreme Court reversed, finding that
under the statute the Secretary could require disclosure only of activities
engaged in on behalf of a foreign principal.\(^6\) \textit{Viereck v. United States} \(^6\) is
principally interesting for the dissent of Justices Black and Douglas.\(^6\) They
urged that the statute should be construed in light of the congressional pur-
purpose of turning "the spotlight of pitiless publicity" upon the propaganda
activities of foreign agents. Mr. Justice Black specifically stated his approval

56. See Institute of Living Law, Combating Totalitarian Propaganda—The Method
of Exposure, 10 U. Chi. L. Rev. 107, 111-12 & n.20 (1943); Smith, Democratic Control
57. For a description of the statutes enacted and their effectiveness in achieving the
goals Congress sought see Institute of Living Law, Combating Totalitarian Propaganda
—The Method of Exposure, 10 U. Chi. L. Rev. 107 (1943).
60. The supplemental registration statements were to bring the original filing up to
date and in addition to disclose
   \(b\) The amount and form of compensation received by such person for acting as agent
   for a foreign principal which has been received during such six months' period
   either directly or indirectly from any foreign principal; and
   \(c\) A statement containing such details required under this Act as the Secretary shall
   fix, of the activities of such persons as agent of a foreign principal during such
   six months' period.
Foreign Agents Registration Act of 1938, § 3, ch. 327, 52 Stat. 632, as amended, ch. 521,
62. \textit{Id.} at 240.
63. Viereck v. United States, 318 U.S. 236 (1943). The majority based its interpretation
on the specific language of section 3(\(c\)) which directed that supplemental registration
statements contain "such details required as the Secretary shall fix, of the activities of such
person as agent of a foreign principal," see note 60 supra (emphasis added), and upon the
absence of congressional history indicating intent to require broader disclosure. See 318
U.S. at 244-47.
64. 318 U.S. 236 (1943).
65. \textit{Id.} at 249.
of the principle of required disclosure as "resting on the fundamental constitutional principle that our people adequately informed, may be trusted to distinguish between the true and the false. . . ."\textsuperscript{66} He argued that the statute was "intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the first amendment."\textsuperscript{67}

Towards a Right to Anonymity

The Court that decided \textit{Viereck} had few doubts as to the constitutionality of disclosure legislation; the dissent in fact urged the positive virtues of disclosure as grounds for a broad reading of the statute. This dissent, the high-water mark of judicial approval of compulsory disclosure, highlights the shift that was to take place in the post World War II period. Two years after \textit{Viereck} came the first case invalidating a disclosure law.\textsuperscript{68} And in the following fifteen years the Court has dealt with a broad range of disclosure requirements, which on first and fourteenth amendment grounds, it has either invalidated\textsuperscript{69} or construed narrowly.\textsuperscript{70} The Court has never specifically articulated this action as recognition of a "right" of anonymity. But analysis of the Court's treatment of disclosure laws impinging on expressional freedoms indicates a growing awareness that disclosure may destroy these freedoms as effectively as an outright ban.

The shift came with \textit{Thomas v. Collins}.\textsuperscript{71} Thomas, president of the United Auto Workers, traveled to Houston to deliver an organizational address to non-union employees. Prior to his speech, he was served with an ex parte order restraining him from soliciting members until he had registered as a labor organizer and secured an organizer's card from the Secretary of State. The Texas statute required such registration as a condition to any solicitation of members; the statute provided for the automatic issuance of cards to anyone giving his name, union affiliation, and credentials.\textsuperscript{72} Despite the restraining order Thomas addressed the meeting, closing his speech with a general invitation to persons present to join a named local, and specifically invited one member of the audience by name. For these actions he was tried for contempt

\textsuperscript{66.} Id. at 251.  
\textsuperscript{67.} Ibid.  
\textsuperscript{68.} Thomas v. Collins, 323 U.S. 516 (1945).  
\textsuperscript{71.} 323 U.S. 516 (1945).  
\textsuperscript{72.} Tex. Rev. Civ. Stat. Ann. art. 5154a § 5 (1947). But see 323 U.S. at 541 n.24. The Court—finding registration itself to be invalid—did not consider it necessary to determine whether the restraint imposed went beyond requiring previous identification. Id. at 541.
and sentenced to a fine and imprisonment. Finding that the speech in question—despite its economic nature and exhortative quality—was protected by the Constitution, the Court reversed the conviction holding that the requirement of prior registration was “incompatible with an exercise of the rights of free speech and assembly,” where failure to register resulted in a penalty. As long as the conduct is not something beyond speech, such as collection of funds, registration cannot be required.

Although ambiguities in the Thomas opinion leave its scope in doubt, it may be read as a recognition of a right of anonymity. No reason is given to explain the Court’s implicit holding that registration restrains speech. Arguably, the possibility of delay inherent in even the most automatic procedure might be a restraint. But, as the statute is aimed solely at professional organizers who could foresee the requirement, it is doubtful that such delay would result in postponement of speech. Moreover, the Court stated that the restraint involved was only the requirement of “previous identification or registration,” and did not mention delay. An alternative reading of the opinion may, however, be offered. Thomas argued that a disclosure requirement in labor relations would sometimes deter speech, since disclosure may subject organizers to employer reprisals; the Court was thus aware of the practical impact of the statute. This reading is supported by the fact that the Court invalidated the statute not only as personally applied to Thomas, but generally as applied to speakers advocating union membership.

73. Id. at 539.
74. Rutledge distinguished dicta in several earlier cases which had suggested that a state might “protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent,” Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (dictum) (invalidating imposition of licensing requirement on solicitors of funds for religious causes), as involving free speech plus conduct. Thomas v. Collins, 323 U.S. 516, 540 (1945).

Justices Black, Douglas, and Murphy concurring emphasized that once a man uses “the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the first amendment.” Id. at 543-44. Justice Jackson also concurred, categorizing Thomas’s activity as “making a public labor speech” rather than practicing a vocation as solicitor. Id. at 548.
75. Id. at 541.
76. Brief of Appellant, pp. 46-47. See also Hearings on Labor Management Relations in the Southern Textile Industry, 82d Cong., 1st Sess. (1951) (account of pressures used to combat unionization).
77. The Court refused to pass on “any other application [of the statute] than that made upon the facts of this case.” This might be read as invalidating only the application of the statute to Thomas. But the Court in Thomas v. Collins also stated

We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the first amendment.

323 U.S. at 540. In Poulos the Court distinguished Thomas as a case in which the statute was construed to prohibit the making of “labor speeches anywhere on private or public property without registration” was held unconstitutional. 345 U.S. at 414. And Thomas
The next test of disclosure laws involved federal regulation of lobbying. In two cases decided shortly after *Thomas*, the Court indicated that the first amendment does not prevent Congress from requiring of lobbyists who have direct contact with legislators, registration, disclosure of their principals, and an accounting of receipts and expenditures. At the same time, the Court suggested that broader regulation of lobbying would raise serious constitutional questions. In the first case, *United States v. Rumely*, Rumely, secretary of the Committee for Constitutional Government, was cited for contempt of Congress because he refused to disclose to the House Select Committee on Lobbying Activities the names of certain individuals who had purchased books from him. The Court of Appeals reversed the citation; and the Supreme Court speaking through Justice Frankfurter affirmed the reversal, without reaching the constitutional issue by construing the congressional authorizing resolution to permit only an investigation of “buttonhole” lobbying, not the grass roots type of lobbying involved in the *Rumely* case. The Court felt that in view of the guarantees of the first amendment a serious constitutional issue would be raised if the resolution were construed to sanction the investigation of “all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process.” Justices Douglas and Black thought that the resolution could not be so narrowly construed but concurred with the majority on first amendment grounds. They argued that to require a publisher or author such as Rumely to disclose purchasers and readers of his works would discourage free inquiry, for anticipating public censure and future governmental action, individuals may “fear to read what is unpopular, what the powers-that-be dislike.” The concurrence argued that since Cong-

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78. 345 U.S. 41 (1953).
79. Specifically the names of those who had made bulk purchases of books for further distribution in amounts of more than $500. See 345 U.S. at 49-54 (concurring opinion); Record, pp. 3-4. For an account of the background of the case see H.R. REP. No. 3024, 81st Cong., 2d Sess. (1950); TAYLOR, GRAND INQUEST 140-47 (1955).
80. The resolution empowered the committee to investigate “all lobbying activities intended to influence, encourage, promote, or retard legislation...” 345 U.S. at 44.
81. Id. at 46. See also Rumely v. United States, 197 F.2d 166, 175 (D.C. Cir. 1952), aff’d, 345 U.S. 41 (1953).
82. 345 U.S. at 48.
83. Id. at 57.
ress could not by statute penalize speech, it could not through a statute re-
quiring disclosures “hold a club” over speech and the press. Feeling that the
investigative powers were equally limited they concluded that Congress could
not initiate an inquiry into these matters backed by the contempt power.

In United States v. Harris,84 decided a year later, the Court sustained the
Federal Regulation of Lobbying Act85 which provided in broad terms for
disclosure and regulation of lobbying activity. All individuals, organizations
and corporations collecting or spending money to aid “the passage or defeat
of any legislation by... Congress” or to “influence, directly or indirectly”
passage or defeat of such legislation were required to disclose names of con-
tributors and recipients of funds.86 In addition the statute provided that all
persons paid to influence the passage or defeat of any congressional legislation
must register, give the name of their employer, and financial data.87 The dis-
trict court, holding that the statute was unconstitutional, dismissed an informa-
tion brought under it.88 On direct appeal by the government the defendants
claimed that statutory language defining the act’s coverage was too vague to

85. 60 Stat. 839 (1946), 2 U.S.C. §§ 261-70 (1958); see Comment, 56 Yale L.J. 304,
316-25 (1947).
86. Section 305 of the Federal Regulation of Lobbying Act required
Every person [defined in § 302(c) to include individuals, partnerships, committees,
associations, corporations, and organizations] receiving any contributions or expend-
ing any money for the purposes designated in subparagraph (a) or (b) of section
307 shall file... a statement containing...
(1) the name and address of each [contributor]... of $500 or more...
(3) the total sum of all contributions made...
(4) the name and address of each person to whom an expenditure... of $10
or more has been made... and the amount, date, and purpose of such expenditure;
(5) the total sum of all expenditures made...
60 Stat. 840-41 (1946), 2 U.S.C. § 266 (1958). The disclosures required include an accounting of receipts and expenditures, as
well as the purposes and recipients of any disbursement. Ibid.
88. Two individual defendants, Moore and Linder allegedly having arranged to have
members of Congress contacted either by their own emissaries or through an artificially
stimulated letter writing campaign were charged with failure to register under § 308. De-
fendants Moore and Harriss were charged under § 305 with failure to report expenditures
both of compensation to others to communicate face-to-face with members of Congress
and of the costs of a letter-writing campaign. Finally the information charged the National
Farm Committee with failure to report the solicitation and receipt of contributions to in-
fluence the passage of legislation. See 347 U.S. 612, 613-17 (1954); Record, pp. 1-23.
meet the demands of due process, and that the substantive provisions violated the first amendment.

The Court avoided the vagueness attack by construing the statute to extend only "to direct communication with members of Congress on pending or proposed federal legislation." It also rejected the contention that the disclosure provisions contravened the first amendment, since the statute as construed did not directly deter the exercise of first amendment rights and the information was necessary to evaluate pressures placed on Congress.

Justices Black, Douglas, and Jackson dissented. Justices Black and Douglas agreed that Congress had the power to require disclosure of the real principals behind lobbyists who come to Congress "and speak as though they represent the public interest." But, they argued, the statute was so vague that persons would be deterred in the legitimate exercise of first amendment rights because of uncertainty over what the statute prohibits. Moreover, they thought Congress had intended to require the registration of persons paid to influence Congress by influencing public opinion as well as "button-holing" and that as written by Congress a considerable question under the first amendment was posed.

Anonymity and Legislative Inquiries: "Void For Vagueness" Under the First Amendment

Between 1957 and 1960 the Court in a series of cases dealing with legislative inquiries into speech and association sketched the contours of the right of anonymous organizational membership. The decisions explicitly recognized that compulsory disclosure of thought and association could and often did invade the liberties protected by the first and fourteenth amendments. In some

89. 347 U.S. at 620. For a discussion of the scope of "lobbying" so defined see text accompanying notes 231-33 infra. The majority also read the substantive provisions of §§ 305 and 308 as applying only to those "persons" defined in § 307. Thus, the Court limited § 305, which unlike § 303 contained no such express limitation, to persons who "directly or indirectly" solicit, collect, or receive money either to influence "directly or indirectly" or to aid the passage or defeat of legislation. In so construing the statute the Court relied upon statements in both the House and Senate reports that § 307 defined the application of the act. See 347 U.S. at 620 n.9.

90. The majority reasoned that if Congress were properly to evaluate pressures placed on it, it needed to know "who is being hired, who is putting up the money, and how much." 347 U.S. at 625.

91. Id. at 632.

92. Id. at 632-33. Jackson alone expressed the view that as construed there was doubt whether the statute "does not permit applications which would abridge the right of petition ...." Id. at 636. He rested his agreement that Congress could regulate lobbying for hire and require lobbyists to disclose their principals, their activities, and their receipts on his characterization of lobbying for hire "as a business or profession." Ibid. Compare Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). Thus, while demonstrating a diversity of opinion on the approach to these two cases, all the justices agreed that paid lobbyists who have direct contact with legislators may be required to register and disclose their principals, receipts, and expenditures.
cases—where the investigation involved Communism—a majority of the Court found these inroads justified by an overriding governmental interest. In other cases, however, the Court found that the infringements of political freedom caused by compulsory disclosure were sufficiently grave to require careful scrutiny, under the due process clause, of the legislative authorization for the investigation.

The companion cases of *Sweezy v. New Hampshire*, and *Watkins v. United States* reflect this interplay of first amendment liberties and the due process clause. In *Sweezy*, which involved a contempt conviction for refusal to identify members of the Progressive Party and to disclose the contents of a lecture given at the state university, Chief Justice Warren, speaking for four members of the Court, questioned whether there was any state interest sufficiently strong to warrant such interference with first amendment freedoms. Since the legislature might lack the constitutional authority to require Sweezy to answer, due process required the resolution directing the investigation to be sufficiently definite so that a court could determine whether the legislature really wanted this information. Because the authorizing resolution was "sweeping and uncertain" the court was forced to assume that the legislature really had no interest in the information sought and it therefore declared that the use of the contempt power violated due process. Justices Frankfurter and Harlan concurred in voiding the conviction, arguing that Sweezy's freedom of speech and association guaranteed by the fourteenth amendment had been unjustifiably infringed. To these Justices the "inviolability of privacy belonging to a citizen's political loyalties" far outweighed the meager interest the state derived from the danger the Progressive Party posed to its security.

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97. At the hearings Sweezy denied that he had ever been part of any program to overthrow the government by force or violence, or had ever known members of the Communist Party in New Hampshire. Record, p. 21.
98. 354 U.S. at 254. The grounds of decision are dictated by an unwillingness to hold that the state lacked power where the decision could be placed on other grounds. Compare, e.g., Peters v. Hobby, 349 U.S. 331, 338 (1955) ("From a very early date, this Court has declined to anticipate a question of constitutional law in advance of the necessity of deciding it. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 553."); United States v. Rumely, 345 U.S. 41, 45 (1953) (construing a resolution to avoid constitutional question).
100. *Id.* at 265. Similarly, they felt that "the grave harm resulting from governmental intrusion into the intellectual life of a university" clearly outweighed the contention of the state that the curtailment of expression was limited to situations in which the legislative committee had reason to believe that the violent overthrow of the government was being advocated or planned—particularly since Sweezy had denied ever advocating the forceful overthrow of the government. *Id.* at 260-61.
They emphasized further that the massive proof which justified regarding the Communist Party as something different from a conventional political party did not exist in the case of the Progressive Party.¹⁰¹

In Watkins a witness had been sentenced for contempt because of his refusal to disclose to a subcommittee of the House Committee on Un-American Activities whether certain persons had been members of the Communist Party. The Court found that first amendment freedoms were threatened by the committee's investigation in two ways: community scorn and pressure may be brought to bear on those forced to reveal membership in unpopular organizations or sympathy with minority views, and at the time it may deter other persons from joining such groups or expressing such views.¹⁰² It therefore reasoned that the due process clause of the fifth amendment required a clear congressional delegation of authority to ask these questions, so that witnesses could judge their pertinence.¹⁰³ The Court concluded that this criterion had not been met in Watkins, and therefore the conviction was invalid.

In Barenblatt v. United States the Court reiterated the proposition that the first amendment protects an individual from compulsory disclosure of associational relationships, but limited the principle by holding that the individual's interest in associational privacy was outweighed by the governmental interest when the subject of inquiry was the Communist Party.¹⁰⁴ Sustaining the conviction of Barenblatt for refusing to tell the House Committee on Un-American Activities whether he was or had ever been a Communist, the Court held that such information was essential for the preservation of the government. The Court distinguished Sweezy on the ground that the questions asked of

101. Id. at 266.
102. 354 U.S. at 197-98.
103. Id. at 198, 205. Where first amendment freedoms are involved the Court applies a stricter standard of vagueness. See, e.g., Winters v. New York, 333 U.S. 507, 509-10 (1948); Note, 109 U. Pa. L. Rev. 67, 75 nn.39 & 40 (1960) (collecting authorities); cf. United States v. Harris, 347 U.S. 612 (1954) (construing statute narrowly to eliminate vagueness and restraints on expression). A vague statute having a potential inhibiting effect on expression has the vice that “persons at the fringes of amenability to regulation will rather obey than run the risk of erroneous constitutional judgment.” See Note, supra at 80 (1960). Watkins should not be made to guess at whether the Committee's inquiries are pertinent lest he be deterred from refusing to answer where he has a right to refuse to answer. In this respect Watkins differs from cases like Sweezy. The Court's objection in Sweezy was not that Sweezy would have to guess whether the questions were pertinent but rather that the Court was itself unable to tell whether the legislature wanted the information demanded.

104. 360 U.S. 109, 134 (1959). Barenblatt has been followed in two cases involving the conviction of critics of the committee for contempt for failure to disclose whether they were members of the Communist Party. Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). The first amendment issues involved in these cases were agreed by both the majority and the dissent to be the same as the issue in Barenblatt and consequently no extended analysis of the first amendment issues was given. Wilkinson v. United States, 365 U.S. 399, 413-14, 416-17 (1961); Braden v. United States, 365 U.S. 431, 440-41 (1961) (dissent).
Sweezy related to the Progressive Party, which the Court had found not to be subversive. Justices Black and Douglas, and Chief Justice Warren dissented, arguing that the committee could not use indirect means such as "exposure, obloquy, and public scorn" to achieve results clearly prohibited by the first amendment.

L"envoi: The Mind of the Court

A comparison of the reason given by Justices Frankfurter and Harlan for concurring in Sweezy with the position taken by them in Barenblatt seems to indicate that to them the critical factor in determining whether an investigative committee may compel disclosure of the names of members of an association is the extent to which the group in question has been linked with the Communist Party. Where a nexus, however, is not established they apparently consider the right of the state to disclosure subordinate to the "right of a citizen to political privacy." Mr. Chief Justice Warren, and Justices Black, Douglas, and Brennan indicated by their dissent in Barenblatt that even in the case of the Communist Party the compulsory disclosure of the names of party members infringes first amendment rights. Thus, by concurrence and dissent six members of the Court have expressed some recognition of a right of associational anonymity, at least under certain circumstances. Despite the broad language of these six justices in concurrence and dissent, the form

105. 360 U.S. at 129. In a companion case, Uphaus v. Wyman, 360 U.S. 72 (1959), the same majority sustained the contempt conviction of Uphaus for his failure to produce the guest list of the World Fellowship Association's summer camp. The majority found that the record revealed a sufficient "nexus between World Fellowship and subversive activities" to show that the investigation was undertaken in the interest of self-preservation. 360 U.S. at 79. The majority concluded that the governmental interest in self-preservation outweighed the individual's rights in associational privacy. Id. at 79-80.

106. 360 U.S. at 140-41. See generally id. at 163-66. Brennan took a similar position dissenting in Uphaus:

For in an era of mass communications and mass opinion, and of international tensions and domestic anxiety, exposure and group identification by the state of those holding unpopular and dissident views are fraught with such serious consequences for the individual as inevitably to inhibit seriously the expression of views which the Constitution intended to make free.

Black also criticized the Court's apparent holding "that the ordinary rules and requirements of the Constitution do not apply because the committee is merely after Communists." 360 U.S. at 146.

107. That subversives are treated by the Court as forming a special category is further indicated by those cases in which the Court has sustained requirements that public employees as a condition of employment disclose whether or not they are Communists. See Garner v. Board of Pub. Works, 341 U.S. 716, 719 (1951) (sustaining ordinance requiring every employee to execute an affidavit "stating whether or not he is or ever was a member of the Communist Party...."); cf. Beilan v. Board, 357 U.S. 399 (1958) (sustaining the dismissal of a teacher for lack of frankness in refusing to answer whether he had been a member of the Communist Political Association).
which the holdings in *Sweezy*, *Watkins*, and *Barenblatt* took left open the question whether the Court would invalidate a disclosure requirement phrased in unmistakably clear language.

**Recognition of a Right to Anonymity**

An answer to this question was provided by two cases testing the power of southern states to compel the NAACP to produce membership lists for governmental scrutiny. *NAACP v. Alabama ex rel. Patterson*\(^{108}\) arose out of a state investigation of the organization's alleged failure to comply with a statute requiring registration of foreign corporations doing business in the state. Pursuant to a motion by the state, the NAACP produced records of its activities, but refused to turn over its membership lists. For this refusal, the NAACP was convicted of contempt. On appeal to the Supreme Court, however, the conviction was reversed. The Court found that to compel an individual to disclose his membership in this group would restrain his freedom of association; the history of this organization demonstrated that disclosure is likely to induce members to withdraw and to dissuade others from joining. The attitude toward the group in certain areas creates a fear of exposure of their beliefs and the consequences which might flow from such exposure.\(^{109}\) The Court then looked to see whether the state's interest in securing this data might justify the restraint. The NAACP had produced much of the desired information, including the names of paid employees and officials. In view of this, the court found that disclosure of the names of rank and file members had no "substantial bearing" on the issue raised in the hearing,\(^{110}\) and therefore the state's interest was insufficient to justify the infringement on freedom of assembly.

In *Bates v. City of Little Rock*\(^{111}\) the court extended these protections to NAACP contributors. It voided a conviction for failure to comply with a statutory requirement—passed in 1957 as an amendment to Little Rock's licensing tax provisions—that organizations operating in the city file lists of their contributors, members, and other data.\(^{112}\) Noting that the information did not seem to be related to the taxing provisions, the court found that the


\(^{109}\) The Court buttressed its conclusion by reference to evidence "that on past occasions revelation of the identity of . . . rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. The Court rejected Alabama's contention that the NAACP lacked standing to assert the constitutional rights of its members. The Court pointed out that it was inconsistent to say that a member had a right to withhold his connection with an association and at the same time to require that he personally assert the right, since in asserting the right he would be disclosing his connection with the organization. *Id.* at 458-60. Compare *Barrows v. Jackson*, 346 U.S. 249, 255-59 (1953).

\(^{110}\) 357 U.S. at 464.

\(^{111}\) 361 U.S. 516 (1960).

state's interest was insufficient to warrant the clear imposition on associational freedom. Thus the Court made it clear that disclosure was a vice in itself, which could not be cured by resort to clear statutory language, and that the right of anonymity applied to statutory requirements and court orders as well as to committee inquiries. While NAACP v. Alabama attempted to distinguish the Bryant case, which had upheld New York's requirement that the Klan file membership lists, the rationale of this opinion, as well as the Bates opinion, severely undercuts the earlier validation of disclosure.\(^1\)

Following the two NAACP cases, the Court in Talley v. California \(^2\) struck down a Los Angeles city ordinance which prohibited public distribution of handbills unless they bore on their face the name and address of the author, publisher, and distributor.\(^3\) Talley was convicted under the statute. The Court stated that under past decisions a complete prohibition of the distribution of handbills would be invalid;\(^4\) thus the Los Angeles ordinance—since it was not narrowly drawn to reach only handbills which are obscene, offensive or which advocate unlawful conduct—could be justified only if saved by the qualification that suitably labeled pamphlets could be circulated. But the Court compared compulsory disclosure with outright prohibition and concluded that since identification and fear of reprisal might deter peaceful discussions of public matters of importance the Los Angeles ordinance was void on its face for infringing the freedom of expression. Mr. Justice Harlan concurred\(^5\) arguing that in the absence of a showing as to the city's experience with the distribution of obnoxious handbills, the city could not suppress the circulation of all anonymous handbills in order to identify the distributors of obnoxious handbills. Justices Clark, Frankfurter and Whittaker dissented.\(^6\) The dissenters distinguished the NAACP cases on the ground that "the record is barren of any claim, much less proof, that he [Talley] will suffer any injury whatever by identifying the handbill with

\(^{113}\) At the trial evidence was offered to show that many former members had declined to renew their membership because of the existence of the ordinance and that persons identified as members had been subjected to harassment and to threats of bodily harm. 361 U.S. at 521-22.

\(^{114}\) The Court clearly rejected the implication of Zimmerman that the effect of disclosure would be to restrain unlawful acts, to an organization which like the Klan or the Communist Party engaged in unlawful conduct. 357 U.S. at 465. Finally the Court suggested that the decision in Zimmerman may rest upon the failure of the Klan to supply any of the data sought by the state, although the Zimmerman Court placed no emphasis on this factor. Id. at 465-66. In summary, the NAACP cases appear to have limited Zimmerman to its particular facts: an organization which engaged in unlawful conduct and which had failed to supply any of the information required by the statute.

\(^{115}\) 362 U.S. 60 (1960).


\(^{118}\) 362 U.S. 60, 64 (1960).

\(^{119}\) Id. at 66.

\(^{120}\) Id. at 67.
his name."\textsuperscript{121} The dissenters asserted that the Constitution accorded no "freedom of anonymous speech," noting past instances in the areas of lobbying and second class mailing where the Court had approved of such disclosure requirements. They argued that the ordinance did no more than create in writing that responsibility which is present in public utterance.

In the most recent case developing the right of anonymous association, \textit{Shelton v. Tucker,}\textsuperscript{122} the Court invalidated an Arkansas statute\textsuperscript{123} which required every teacher to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years. The statute was tested by teachers who asserted that they belonged to no subversive organizations. Writing for the Court, Mr. Justice Stewart stated two broad principles governing the case. First, that the state had a right to investigate the competence and fitness of those who teach in its schools and that these inquiries were relevant to the fitness and competence of the teachers of Arkansas. Secondly, that to compel a teacher to disclose his every associational tie would impair that teacher's right of free association. The Court pointed out that the statute did not provide that the information be kept in confidence. But even if there were no disclosure to the general public, "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."\textsuperscript{124} This is especially true in Arkansas, where teachers have no tenure and can be dropped from employment at the end of the school year without notice or hearing. The Court then stated the question for decision narrowly: whether Arkansas could compel all of its teachers to disclose all of the organizations with which they had been associated during the preceding five years. The majority argued that even though the governmental purpose be legitimate and substantial, the means chosen for implementing that purpose must be narrowly drawn so as not to stifle fundamental liberties more than necessary. Since in the view of the majority the affidavit requirement, although relevant, was "unlimited and indiscriminate" in sweep and went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers," the statute was held to infringe the freedom of association protected by the fourteenth amendment.\textsuperscript{125} Justices Frankfurter, Harlan, Clark, and Whittaker dissented.

\textit{Summary}

Despite broad language stressing the conflict between compulsory disclosure and first amendment rights, the scope of that right of anonymity established by the actual holdings is limited. \textit{Talley} bars a state from requiring

\textsuperscript{121} \textit{Id.} at 69.
\textsuperscript{122} 364 U.S. 479 (1960).
\textsuperscript{123} \textit{ARK. STAT. ANN.} § 80-1229 (1960).
\textsuperscript{124} 364 U.S. at 486.
\textsuperscript{125} \textit{Id.} at 490.
the names of the distributors or authors to be printed on the face of all handbills. The *NAACP* cases by analogy suggest that a state cannot require such information to be filed with a state official. Under *Morgan*, however, newspapers may be required to disclose the names of their officers and owners in order to receive the benefits of the second class mailing privileges. *Thomas v. Collins* establishes that as a general proposition individuals may not be required to register with public officials before speaking in a private hall. But a lobbyist who directly contacts members of Congress for pay may be required under the *Harris* case to register and give the name of his principal. And similar information may be required from an agent of a foreign government. Numerous dicta suggest that a solicitor may be required to identify himself before soliciting funds.\textsuperscript{126} The scope of the right of anonymous membership in or contribution to an association is particularly indeterminate. *Shelton v. Tucker* established that a state might not require all teachers to disclose all of the groups to which they belong. The *NAACP* cases established as a minimum that the state could not require all organizations to disclose their membership lists. In narrowly limiting *Bryant* in terms of the unlawful activities of Klan members the Court indicated a somewhat broader scope of the right. And any organization which employs lobbyists who by direct contact with Congressmen attempt to influence the passage or defeat of legislation may be required to register and to disclose the names of contributors of more than $500. An organization may also be required to register before holding a meeting in a public park or holding a parade on a public street. Furthermore, the early cases validating disclosure requirements, though seeming to conflict in philosophy with more recent decisions, have not been overruled or, with the exception of *Bryant*, expressly limited.

Many questions are left unanswered by the cases establishing the right to anonymity. The *Talley* court specifically refused to consider whether a more narrowly drawn statute—for example, one limited to handbills issued by a business—would be valid. *Harris*, by narrowly construing the lobbying act, avoided deciding whether Congress could extend the statute to indirect lobbying if the language were clear. For an understanding of how far the Court should extend the right of anonymity, it is necessary to consider the justification for asserting such a right.

### Disclosure Or Anonymity? The Market Place of Ideas Reappraised

At the heart of the Court's recognition of a right of anonymity lies the belief that compulsory disclosure may deter the expression of ideas and the

\textsuperscript{126} “Without a doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.” *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (dictum); *accord, Martin v. Struthers*, 319 U.S. 141, 148 (1943) (dictum); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (dictum).
participation in associations both of which are protected by the first and fourteenth amendments.\(^\text{127}\) This position has evoked sharp criticism. It is sometimes said that disclosure does not necessarily have this deterrent effect.\(^\text{128}\) More frequently, however, some deterrence is admitted but it is argued that such deterrence is consistent with the theory underlying freedom of expression.\(^\text{129}\)

**Deterrence Through Disclosure**

The Court's recognition that the deterrent effect of disclosure may result in an infringement of freedom of speech seems to reflect an extension of the rationale behind the cases voiding subsequent punishment for speech and prior restraint as violative of the first and fourteenth amendments. In the 1920's, when the first significant free speech cases were being litigated, it was widely believed that the first amendment forbade only prior restraint on speech.\(^\text{130}\) This view stems from Blackstone, who defined the liberty of the press as consisting "in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."\(^\text{131}\) In a series


\(^{129}\) See text at notes 30-31 supra.


of cases delineating the boundaries of the first amendment, the Court indicated that it would not follow the Blackstonian view. This position was articulated in Chief Justice Hughes famous dictum in Near v. Minnesota ex rel. Olson. Quoting Cooley on Constitutional Limitations, Hughes said “The liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.” The opinion implies that because subsequent punishment could, through its deterrent effect, achieve the same results as prior censorship, it too was forbidden by the first amendment. This view was confirmed in a series of later cases which struck subsequent punishment laws as being repugnant to the first and fourteenth amendments. In Grosjean v. American Press Co., where the Court held invalid a tax on certain newspaper corporations, Mr. Justice Sutherland also quoting Cooley declared “The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent . . . free and general discussion of public matters. . . .” Similarly, in other cases focusing on the deterrent effects of disclosure, the Court seems to be saying that the prohibition against subsequent punishment and against prior restraint might be put to naught if an identical repression of free speech could be achieved by putting “the pitiless


I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.

133. 283 U.S. 697 (1931).
134. 2 Cooley, Constitutional Limitations 885 (8th ed. 1927).
135. 283 U.S. 697, 715 (1931).
137. 297 U.S. 233 (1936).
138. Id. at 249-50. (Emphasis added.) This language appears in the paragraph immediately subsequent to the one quoted in Near. 2 Cooley, Constitutional Limitations 886 (8th ed. 1927). Language identical both to that quoted in Near and in Grosjean appeared in the seventh edition of Cooley's work which antedated the 1919 decisions. Cooley, Constitutional Limitations 603-04 (7th ed. 1903). That Chafee in his influential 1920 volume on free speech urged a similar view is additional evidence of the thinking that underlay the decision that subsequent punishment was prohibited. Chafee argued that “A death penalty for writing about socialism would be as effective suppression as a censorship.” Chafee, Freedom of Speech 10 (1920). To the framers of the Constitution, he argued, freedom of speech meant not only security against prior executive restraint but also security against legislative restraint by means of subsequent punishment, Id. at 21. A similar view was expressed by Madison, 4 Elliott, Debates on the Federal Constitution 569 (1836); and most recently by Mr. Justice Douglas, Douglas, Censorship and Prior Restraint, in The First Freedom 41, 43 (Downs ed. 1960).
spotlight of publicity" on individuals exercising their rights of expression and association.

Of course, such an extension—from restraint and punishment to disclosure—would have been unwarranted unless disclosure did in fact deter expression and association. Not even the critics of anonymity, however, have been able to deny that disclosure may in some instances have such an effect. And actual instances of the deterrent impact of disclosure laws are legion. Such laws may affect the exercise of first amendment rights in several ways. First, there is the fear that hostile members of the community or even governmental officials will take reprisals. These reprisals may take many forms—the most obvious being physical violence. Evidence that persons who had been publicly identified as members of the NAACP had been threatened with bodily harm was offered in both NAACP cases. Similarly, social ostracism and economic pressure may make the price of association too high where membership in unpopular groups must be made public.

And, quite apart from direct social pressures, the desire to keep out of the limelight might silence some, who, if they could remain anonymous, would express themselves.

Privacy is highly regarded in American society; in a number of jurisdictions, privacy has been accorded the status of a common-law right.

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143. See Shelton v. Tucker, 364 U.S. 479, 486-87 (1960); Bates v. City of Little Rock, 361 U.S. 516, 521-22 (1960); CHAFFEE, THE BLESSINGS OF LIBERTY 149-52 (1956); COURTNEY, THE SECRETS OF OUR NATIONAL LITERATURE 33-34 (1908) ("... the fear of compromising relations or friends, or bringing discredit on oneself, has often led to the use of a pseudonym."); HAYS, "Full Disclosure": Dangerous Precedent, 168 NATION 121 (1949); Comment, 66 YALE L.J. 545, 560 (1957); Note, 48 COLUM. L. REV. 589, 604 (1948). Compare Franklin, Infamy and Constitutional Civil Liberties, 14 LAW. GUILD REV. 1 (1954). The House UnAmerican Activities Committee has indicated repeatedly in its reports that it conceives its purpose as one of "turning the light of pitiless publicity" on organizations and individuals who engage in activities which the committee deems "inimical to our American concepts." The Committee boasts of the organizations it has crippled and the individuals—both in government and in private employment—it has caused to be fired. See Barenblatt v. United States, 360 U.S. 109, 134, 163-66 (1959) (appendix to opinion of Black, J., dissenting, collecting statements by House Un-American Activities Committee).

144. The right to be let alone was characterized by Mr. Justice Brandeis as the right "most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 471, 478 (1928) (Brandeis, J., dissenting). See also Dykstra, "The Right Most Valued By Civilized Man," 6 UTAH L. REV. 305 (1959).

over, the Supreme Court has repeatedly recognized that privacy is one of the values protected by the fourth amendment. The high regard the American people have for their privacy, suggests the possibility that its denial may deter expression and association.

A particularly pernicious aspect of disclosure legislation is its selective deterrence. On its face a disclosure law may be impartial, aimed at all groups and viewpoints. This apparent impartiality may, however, mask actual discrimination against unpopular ideas. The major sources of deterrence are social and economic pressure; these are most effective when they reflect, and are reinforced by, the majority sentiment of the community. Those who advocate popular views, who express the ideas of the majority or dominant groups, have little to fear from disclosure laws. Any reprisals against such popular views may bring down the wrath of the whole community. The rebels and heretics, on the other hand, typically get no such support. They must bear the full brunt of disclosure and the concomitant community sanctions. For the advocate of popular views the "light of pitiless publicity" is the spotlight thrown on a favored performer; for the dissenter it is the harsh glare

(listing jurisdictions). This right is founded upon the direct harm to the feelings of the individual; Spiegel, Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy, 30 So. Cal. L. Rev. 280, 291 (1957); Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196-98 (1890); Yankwich, The Right of Privacy, 27 Notre Dame Law 499, 506 (1952); and is based upon the recognition that the mental pain and distress flowing from an invasion of privacy may be far greater than could be inflicted by bodily injury. See Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193, 196 (1890).

The right of privacy was founded on the view that every person had a common law right of determining which of his thoughts, sentiments, and emotions should be communicated to others. Id. at 198.

146. The fourth amendment "marks the right of privacy as one of the unique values of our civilization. . . ." McDonald v. United States, 335 U.S. 451, 453 (1948); see Trupiano v. United States, 334 U.S. 699, 709 (1948); Frank v. Maryland, 359 U.S. 360 (1959) (dictum); Wolf v. Colorado, 338 U.S. 25 (1949) (dictum). Similarly, Dean Griswold has advanced the thesis that the right to be let alone is at the heart of the fifth amendment; that the fifth amendment is a means of protecting individuals holding unorthodox beliefs from governmental prying. Griswold, The Right to be Let Alone, 55 Nw. U.L. Rev. 216 (1960).

147. See Hays, "Full Disclosure": Dangerous Precedent, 168 Nation 121 (1949). One aspect of the invasion of privacy deserves special mention. There is a common feeling that some matters are so personal that no other person has a right to know them. The Court in Sweezy recognized this when it suggested that "merely to summon a witness and to compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (dictum). In response to protests the Census Bureau dropped from the 1960 census an inquiry into religious beliefs. N.Y. Times, April 8, 1960, p. 33, col. 1. Yet the information taken on the census is by law confidential. 13 U.S.C. § 214 (1958).

148. "An exposure law applying to all organizations automatically seeks out the unpopular group as its target." Robison, Protection of Associations From Compulsory Disclosure of Membership, 58 Colum. L. Rev. 614, 635 (1958); see Hays, "Full Disclosure": Dangerous Precedent, 168 Nation 121 (1949); Comment, 66 Yale L.J. 545, 560 (1957).
of the third degree. Yet it is the rebel and heretic for whom, to a large degree, the first amendment protections were forged.149

The existence of this deterrent effect, therefore, suggests a strong analogy between subsequent punishment and disclosure legislation. If disclosure, like subsequent punishment, deters free speech and association it should fall within the proscription of the first amendment. The analogy, however, is incomplete. The cases invalidating subsequent punishment held that any expression, unless it fit into one of several exceptions,150 came within the area protected by the amendment and could therefore not be repressed by any means. These cases seemed to say that it does not matter how the state repressed speech—whatever the means—the result is forbidden. This equation cannot necessarily be drawn in the area of disclosure. The most cogent argument for disclosure asserts that publicity in itself advances the goals of the first amendment.151 Since no such claim can seriously be made for subsequent punishment, there may be reasons, growing out of the rationale underlying the protection of free expression, which would justify the deterrence ancillary to disclosure yet not justify restraints by censorship or subsequent punishment.152

Several arguments have been advanced against a right of anonymity. The most serious is the assertion that disclosure advances the search for truth.153 Secondly, it has been argued that that disclosure only represses irresponsible ideas.154 Anonymity, it is asserted, will serve as a cloak for the progenitor of irresponsible ideas; it may encourage the making of unfounded charges which the author would fear to raise if he knew he would be subject to public censure were they proven false.155 And finally it has been argued that disclosure cannot

149. See CHAFEE, FREE SPEECH IN THE UNITED STATES 4 (1941); Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865, 880 (1960); Robison, Protection of Associations From Compulsory Disclosure of Membership, 58 Colum. L. Rev. 614, 635 (1958).

150. Speech may be punished upon a sufficient showing under one of several tests of a causal relation to illegal conduct, see note 237 infra, or on a showing that the punishment was narrowly drawn to control an evil arising from a non-speech aspect of communication, see notes 235-36 infra, or upon a showing that what is punished is not speech, see text at note 234 infra.

151. See text at notes 162-66 infra.

152. On this statement of the problem, a consideration of those arguments in favor of disclosure becomes completely distinct from whether in a particular instance disclosure may be justified because of the state's interest in activity other than speech. Thus the problems that gave rise to the clear and present danger, balancing, and speech-plus tests are not pertinent.

153. See text at notes 162-66 infra.

154. See People v. Arnold, 127 Cal. App. 2d 844, 273 P.2d 711 (Super. Ct. 1954); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1945); Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1944); ANONYMOUS JOURNALISM 9, 21 (1855). The President's Committee on Civil Rights in advocating a disclosure requirement argued that those who try to stir up racial and religious hatred are reluctant to say who they are because they know their doctrines have been "morally outlawed" for more than a century and a half. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 51 (1947).

155. See ANONYMOUS JOURNALISM 18-21 (1855).
be considered a governmental restraint on freedom of expression since any sanctions attached to speech are imposed solely by private individuals acting on their own volition. The two final objections, however, have slight merit. The argument that only irresponsible ideas will be hindered rests on a false premise. Disclosure deters advocates of all unpopular faiths and theories; yet many of the ideas now widely accepted were once thought to be radical and dangerous. At one time abolition, woman suffrage, unionization were advocated by only a few, and scoffed at by the majority. Yet these ideas were not any the less worthy for being unpopular. Thus, it is often the advocate of change, not the purveyor of unfounded claims or pernicious beliefs, who fears disclosure. Similarly, the argument that disclosure is not governmental repression has slight substance. The theory of the first amendment offers little justification for a distinction based on whether the injury was governmentally imposed or privately imposed. Of course, the first amendment restrains only governmental action. But a disclosure requirement is the action of the government. It is the sine qua non of the repression of expression, and

156. See Brief for Respondent, 2 L. Ed. 2d. 1151, NAACP v. Alabama ex rel. Patterson, 357 U.S. 448 (1958). This objection was somewhat misleadingly formulated in the Harris case as an objection that the only restraint imposed by disclosure on the interaction of ideas is self-censorship. United States v. Harris, 347 U.S. 612, 626 (1954). Of course, in so far as fear of reprisals is the operative factor the censorship is self-censorship exactly to the same extent that any other subsequent punishment is an instance of self-censorship. What's important is that the punishment is imposed by extra legal authority.

157. See CHAFEE, THE BLESSINGS OF LIBERTY 151 (1956). Indeed, any advocate of substantial change in the existing order will at the outset encounter the strong opposition of the great majority of men who believe that things are quite all right as they are. See ibid.


160. Of course, if the private reprisals were based on information secured by means other than the disclosure law, this analysis would not apply. But, if the information which the law demands were sufficiently well known for such a result to occur, it would seem that a claim of a right of anonymity could not be made at all. In Brown v. Board of Education, 347 U.S. 483 (1954), the connection between the governmental action and the asserted illegal result was even more tenuous, at least in so far as the fear of reprisals is the basis of the right of anonymity. In Brown the state action declared illegal was the separation of the races in the public schools. Separation does not logically imply inequality. The Court found, however, that separation on the basis of race did deny Negroes an equal education because separation "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. In other words it was the psychological effect of the state action on Negro students that made the state action illegal.
therefore, there is little functional difference between restraint through disclosure and restraint through direct governmental sanction.\footnote{161}

The first argument for disclosure, however, retains vitality. Proponents of this position assert that the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation.\footnote{162} Anonymous propaganda makes it more difficult to identify the self interest or bias underlying an argument or the qualifications of its exponent.\footnote{163} The use of the “third party technique”—publication of interest group propaganda under the name of a supposedly impartial “institute” or “foundation”—may add prestige to an argument, which would lack such prestige were it labeled as emanating from a vested interest.\footnote{164} It is therefore argued that exposure of the source of propaganda will advance the search for truth by permitting a more critical evaluation of facts, figures, and arguments presented.\footnote{165} Since according to the conventional market place theory the function of the first amendment is to promote the discovery and dissemination of truth, disclosure will in this fashion advance the policy underlying the amendment.\footnote{166} But for the market place to produce truth, it would seem that there must be “free
trade" in ideas. Such at least is the premise of the market place theory. Disclosure requirements may, however, check the free flow of ideas. Thought that is not offered cannot get itself accepted in the competition of the market. Furthermore, disclosure chiefly deters the espousal of unorthodox and unpopular ideas; thus, disclosure provisions may distort the working of the market. Moreover, disclosure may cause persons with a strong bias against the source of an argument to reject it regardless of its intrinsic validity.

Both arguments—that disclosure tends to promote truth and that anonymity tends to promote truth—have merit. Each rests on a belief which lies at the heart of the market place theory: that man, if given the opportunity to choose freely between competing ideas, will choose wisely, and that this choice is meaningful only if based on complete information. But there is conflict latent in the application of this belief. If truth can be discovered only by the free trade of ideas, then, clearly, no idea should ever be excluded; any provision which has the effect of excluding an idea from the market place should thus be abolished. And if truth can be discovered only by full information, any provision which promotes such full information should be retained. But if disclosure—which promotes full information—does have the effect of deterring and thereby excluding ideas, it is obvious that free trade of ideas and full information are conflicting values which cannot be achieved simultaneously.

Choice between them would seem to depend on an empirical evaluation of which most effectively promotes the discovery of truth, which, according to the market place theory is the goal of the first amendment. No such empirical evaluation, however, is possible. To determine whether anonymity or compulsory disclosure is more injurious to the discovery of truth it is necessary to compare the progress towards truth achieved by two societies—or two eras of the same society—one operating on the disclosure principle, the other permitting anonymous expression. Thus, to know which is more injurious to the discovery of truth it is necessary to know what is true. Yet the market place theory is grounded on the premise that any certain knowledge of truth is impossible. This paradox, inherent in the market place theory, seems to

168. See notes 139-47 supra and accompanying text.
169. See notes 148-49 supra and accompanying text.
172. Meiklejohn, Political Freedom 27 (1960); Ernst & Katz, Speech: Public and Private, 53 Colum. L. Rev. 620, 622-23 (1953); Fly, Full Disclosure: Public Safeguard, 168 Nation 299, 301 (1949). ("[E]ven the optimistic Milton did not suggest that truth could win every fight except in open encounter.").
lead to an impasse, and to make impossible any resolution of the question whether disclosure or anonymity is most consistent with the aims of the first amendment. To resolve this question and to determine the desirable scope of the right of anonymity it is therefore necessary to reevaluate the market place theory.

The Theory of the First Amendment: Epistomological Scepticism and Free Competition of Ideas

At the time the first amendment was adopted the freedom to speak was widely considered a natural right of man. To Jefferson the right publicly to express an opinion was not merely a legal right derived from the English municipal or common law; it was a natural right which no just government could invade. Jefferson was equally emphatic concerning the value of free expression as the surest means yet uncovered for discovering the truth, echoing Milton who had asserted that in a free and open encounter truth was always the victor over falsehood.

With the decline of the natural law theory greater emphasis came to be placed on this second aspect of the early arguments for freedom of expression:

174. For an illustration of the futility of applying the market place approach to the problem of disclosure vs. anonymity see Note, 70 YALE L.J. 135, 148-49 (1960), where a deus ex machina in the form of a model electorate consulting alternative sources is imported to resolve the balance.


176. See Franklin, supra note 175; Letter from Jefferson to Monroe, 1797, in 7 THE WRITINGS OF THOMAS JEFFERSON 172 (Ford ed. 1896). Legislatures were authorized only to enforce man's natural duties; Jefferson expressly rejected Hobbe's notion that man in entering society gave up his natural rights. Letter from Jefferson to Francis W. Gilmer, June 7, 1816, in 10 THE WRITINGS OF THOMAS JEFFERSON 31, 32 (Ford ed. 1899). The Virginia Religious Toleration Act, which Jefferson authored, declared that any future act tending to narrow its operation would be an infringement of a natural right. An Act for Establishing Religious Freedom Passed in the Assembly of Virginia, 1786, in THOMAS JEFFERSON ON DEMOCRACY 112-14 (Padover ed. 1939).

177. See Jefferson, Notes on Virginia 293-95 (1782), reprinted in 3 WRITINGS OF THOMAS JEFFERSON 263-64 (Ford ed. 1894); A Bill for Establishing Religious Freedom, 2 WRITINGS OF THOMAS JEFFERSON 237-39 (Ford ed. 1893); Letter from Thomas Jefferson to George Washington, 1792, in THOMAS JEFFERSON ON DEMOCRACY 93 (Padover ed. 1939); Letter from Thomas Jefferson to Picket, 1803, id. at 94.

178. And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing. Milton, Areopagitica, in THE TRADITION OF FREEDOM 1, 28 (Mayer ed. 1957). In Milton's view good and evil are so mingled that knowledge of virtue cannot be gained without knowledge of vice. The "scanning of error" Milton perceived to be necessary to "the confirmation of truth." Id. at 10-11.
the social value of free and open discussion as the best means of discovering and disseminating truth.\textsuperscript{179} This theory was developed and given its classic statement by Justices Holmes and Brandeis. In his dissenting opinion in \textit{Abrams v. United States},\textsuperscript{180} Holmes presented the argument. It is based upon the observation that "time has upset many fighting faiths."\textsuperscript{181} As a consequence, men come to feel that "the best test of truth is the power of thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out."\textsuperscript{182} That, stated Holmes in a tone both ironic and hopeful, "at least" is the theory of the first amendment; "it is an experiment, as all life is an experiment."\textsuperscript{183} Developing the "clear and present danger" exception to the absolute language of the first amendment, Justice Brandeis, cast additional light on the market place theory. Brandeis felt that underlying the first amendment was the belief that political truth is essential to government, and that "freedom to think as you will and to speak as you think are means indispensable to the discovery of political truth. . . ."\textsuperscript{184} Are there limits to this process; may speech be suppressed? Yes, said Brandeis but only in an emergency, when it is too late to correct error through discussion; only then does a "clear and present danger" exist justifying suppression. The Founding Fathers, Brandeis asserted, had confidence that reason, freely applied, would reach the truth; thus the remedy for the correction of error is more speech, not enforced silence.\textsuperscript{185}

These famous opinions—a dissent and a concurrence—have now become the language of the majority of the Court. Sustaining an injunction against picketing in \textit{Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.}\textsuperscript{190} Justice Frankfurter argued that back of free speech lay a faith in the power of an appeal to reason. In a context of violence an utterance loses its significance as an appeal to reason.\textsuperscript{187} Similarly, he argued for sustaining group libel laws because libelous and insulting words like the lewd and the obscene have so little value as a step to truth as to be clearly outweighed by the social interest in order and morality.\textsuperscript{188} Mr. Justice Black has also on occasion espoused the market place theory; in \textit{Adler v. Board of Education},\textsuperscript{189} he said "Such a

\textsuperscript{180} 250 U.S. 616 (1919).
\textsuperscript{181} \textit{Id.} at 630 (Holmes, J., dissenting).
\textsuperscript{182} \textit{Ibid}.
\textsuperscript{183} \textit{Ibid}.
\textsuperscript{184} Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
\textsuperscript{185} \textit{Id.} at 377.
\textsuperscript{186} 312 U.S. 287 (1941).
\textsuperscript{187} \textit{Id.} at 293.
\textsuperscript{188} Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952).
\textsuperscript{189} 342 U.S. 485, 496-97 (1952) (dissenting opinion).
governmental policy [freedom of the mind and spirit of man] encourages varied intellectual outlooks in the belief that the best views will prevail. 190

This theory draws heavily on eighteenth century thought; it is consciously modeled on Jefferson's stirring assertion that "if there be any among us would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." 191 Indeed, both Holmes and Brandeis present the market place theory not necessarily as their own view, but as the view of the Founders, the "theory of our Constitution." 192 In recent times, however, it has been subjected to skeptical attacks. Among these are: the assertion that all too frequently the desire of one side in a debate to "win the game" overrides the desire to reach the truth; the observation that concentration of the mass media in a few hands distorts the functioning of the market; and the fear that the multiplicity of arguments presented today is greater than man's ability to assimilate them. 193 These attacks, however, question the operation of the market only at the mechanical level where correction is quite possible. They implicitly assume that if the market operated at peak efficiency truth would be discovered, but they suggest that there presently exists a partial disequilibrium which renders the market temporarily incapable of correctly tabulating the results of free debate. Answers to these attacks have been offered, 194 but the answers, like the questions, do not go to the core of the problem. For a more fundamental skepticism questions the

190. Id. at 497 (Black J., dissenting).
193. Chafee, The Blessings of Liberty 103-04, 107-10 (1956); see Meiklejohn, Political Freedom 87-88 (1960):
   The radio, as we now have it, is not cultivating those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends. On the contrary, it is a mighty force for breaking them down. It corrupts both our morals and our intelligence. . . .


194. Chafee suggests, as a partial answer to the first objection, that the skeptic attack misconceives the process of discussion. It is not like a debate in which we choose up sides. Rather the process of public discussion through which viewpoints are changed is unsystematic and consists in large part of "a flying word from here and there." Chafee feels that though reason may not be perfect it is better than any other tool of uncovering truth that man has. He concludes that the reasoning process cannot work properly if government prescribes which view is correct. Chafee, The Blessings of Liberty 110-12 (1956). Emerson has suggested that "new forms of social control" may be used to solve the problem of monopolization of the media. Emerson, An Essay on Freedom of Political Expression Today, 11 Law. Guild Rev. 1, 3 (1951).
assumption made by both sides of the argument: that discussion—if it can be free—will lead to truth.

The assertion that free discussion will lead to truth is unverifiable. In order to judge whether progress toward truth has been made it is necessary to know what is true. To prove that a society operating on the principle of free discussion has progressed toward truth in the period of time $T_1$ to $T_2$, it would seem necessary first to compare the total range of propositions thought true by a consensus of the population at $T_1$ with the facts, then make the same evaluation of beliefs at $T_2$, and assess the relative degree of error between the two times. If error had declined and truth increased, and factors unrelated to legal treatment of free expression were found not to have contributed to that change, it would be reasonable to assert that free discussion leads to truth.

There is a two-fold difficulty with such a process of measurement. First, what weight is to be ascribed to varying degrees of error? It seems impossible to rank errors for the purpose of determining whether rejection of one fallacy for another reflected progress toward truth. Even assuming that such comparative levels of truth could be evaluated, however, a more fundamental obstacle remains. The process of measurement requires a knowledge of what the facts actually are. To prove that under the first amendment we as a nation have progressed toward truth, we would have to show that our current beliefs are more correct than those of 1789. This can be done in only two ways: either the observer must assume that present beliefs are more true than those of 1789, or he must look to the “facts” and compare both views with this absolute standard. The former assumes that very question which is to be proven; the latter flies in the face of the underlying premise of the market theory itself—that experience has taught man that no matter how firmly he believes any proposition to be true, there is a substantial possibility that it is untrue. Indeed, the empirical evidence at man’s disposal seems to indicate that the intellectual history of mankind has been a procession of mutually inconsistent beliefs and progression from one apparent error to another. The market place theory is therefore unverifiable; it is thus little more than an elaborate metaphor. Its inability to resolve the question, anonymity or disclosure, stems from the fact that stripped of an empirical basis it is no more certain a guide to action or evaluation than any other model or image.

A Pact with the Devil—An Alternative Theory of Free Speech

The observation that the market place theory is unverifiable, and that history reflects only the diabolical process of one error replacing another, does not

195. Or, to say the same thing differently, to compare what is believed to be the case by a consensus of the population at $T$, with what is the case.

196. *i.e.*, that free discussion results in the replacement of erroneous judgments by ones more correct.

197. Consider, for example, the procession of gods. See *Haydon*, Biography of the Gods 314-15, 317 (1941); authorities cited note 202 *infra*. See generally *Haydon infra*.
compel the conclusion that freedom of discussion is without a rational basis. For a theory can be advanced which reaches conclusions substantially similar to those of the classic case for free expression—the market place of ideas—but, it is submitted, one which lacks the flaws of that thesis. The theory to be proposed stems from the basic premise of the market place doctrine, the fallibility of human judgment; however, it is an alternative and significantly different formulation of the case for free expression. This reformulation, moreover, may permit resolution of the question, disclosure or anonymity, which, under the market place approach, leads only to an impasse.

The starting point of the proposed theory is the observation which for Holmes was the starting point of the market place doctrine; “that time has upset many fighting faiths.” Stated more precisely, if less colorfully, it is the empirical observation that all normative judgments are highly uncertain. Modern philosophers have recognized that no judgment is so certain, as to exclude all possibility of error. Even analytic a priori judgments—historically recognized as the most certain of all—may be erroneous. The irreducible human element in all judgment may make any single analytic a priori judgment erroneous even in operations such as totalling a column of figures or the making of a geometric proof. Empirical judgments too are suspect. Human inability to evaluate all data relevant to matters such as the economic superiority of capitalism or communism makes any final resolution of the issue impossible. Modern physics has recognized this limit on human knowledge and offers all its conclusions on future occurrences as statements of probability. Doubts on questions of this nature, however, are directed at the adequacy of the data, and therefore they may be resolvable by additional observation. More perplexing are questions as to the existence of God, or the nature of knowledge—questions which new evidence can never settle.

198. See note 181 supra and accompanying text.
199. This in the sense that no matter how certain judgments may seem there remains the logical possibility that they may be erroneous. See AYER, THE PROBLEM OF KNOWLEDGE 35-44 (1956). See generally WISDOM, OTHER MINDS 131-91 (1952).
200. See AYER, op. cit. supra note 199, at 41-44. The certainty spoken of in these areas is not the certainty of a particular person at a particular time but rather the fact that if an a priori proposition is true then it must be true. See ibid. But this is a point which only recently came to the attention of philosophers.
202. Some of the most serious persecutions of ideas have been persecutions for belief in false gods. See, e.g., BAINTON, TRAVAL OF RELIGIOUS LIBERTY 33-94 (1958); Canfield, THE EARLY PERSECUTIONS OF THE CHRISTIANS, in 55 COLUMBIA UNIVERSITY, STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 451 (1913); HOLMES, CHRISTIAN PERSECUTION OF NON-CHRISTIAN RELIGIONS IN THE FOURTH CENTURY (1946). Few beliefs are followed with greater fanaticism and few believed with greater conviction. Yet throughout history men have adhered to different gods and continue to do so today.
204. Rather these are questions of how data already possessed by man can be assessed most fittingly. See id. at 1-5; WISDOM, PHILOSOPHY AND PSYCHO-ANALYSIS 156-59 (1957). And on these questions the debate goes on endlessly. See id. at 181.
normative judgments—moral and ethical beliefs and counsels based on them—are particularly open to doubt. The moral beliefs of one era are overturned by those of another: in time the new faith yields to a third. Slavery, imperialism, aryan supremacy, social darwinism each have had their day. And many quite different creeds, each of which is believed by its adherents to be the only right one, exist in the world today. Nor is this process surprising. Many normative judgments involve decisions on cause and effect which are more apt to be erroneous than decisions based on direct observation. Indeed some ethical theories make the evaluation of an action depend on its total consequences through history. While the physical sciences deal with particular aspects of the world, there is no aspect which is generally regarded as irrelevant to normative judgment. Motivation, consequences, and the entire personal character have seemed relevant to different moralists. Finally, no general agreement has ever been reached on a method for arriving at particular ethical judgments.

All normative judgments are thus highly uncertain. Yet action seems to require at least some modicum of certainty; for to take a given course of conduct is necessarily to assert, at least, that that course is no worse than any other.

205. For a fuller and more precise description of the range of normative discourse see Nowell-Smith, Ethics (1954).

206. Some believe that a country’s economic development should be left in the hands of private individuals, while others believe that all major industries should be state run. Some in this country believe it highly desirable that the world unite under one government. Another segment believes with equal fervor that nothing worse could be imagined. The desirability of an unrestricted press is still a live issue. U.S. News & World Report, Oct. 17, 1960, p. 73. The questions which divide us could be multiplied many times.

207. See Feigl, Notes on Causality, in Readings in the Philosophy of Science 408, 417 (Feigl & Brodbeck ed. 1953). See also Hume, An Enquiry Concerning Human Understanding (Selby-Biggs ed. 1894).

208. See Bentham, Principles of Morals and Legislation 70 (New ed. 1823); Mill, Utilitarianism, in The English Philosophers from Bacon to Mill 895, 904 (Burt ed. 1939); Moore, Ethics 140 (1912).


211. See Plato, Gorgias, in 1 The Dialogues of Plato 505, 568-69 (Jowett ed. 1892); Wisdom, Philosophy and Psycho-Analysis 225-26 (1957).

212. Is, as Butler suggested, the conscience the guide? See Butler, Sermons, in British Moralists 221 (Selby-Biggs ed. 1897). Or writings of a Mohammed or a Christ? Or the pronouncements of some institution such as the Communist Party or the Roman Catholic Church? Or should human conduct be guided by a hedonistic calculus, as suggested by Bentham and Mill? See Bentham, Principles of Morals and Legislation 29-32 (New ed. 1833); Mill, Utilitarianism, in The English Philosophers from Bacon to Mill 895, 904 (Burt ed. 1939). Or by weighing the considerations pro and con in the light of some unquestionable first principle?
available course. Thus to engage in endless and purposeless debate—to refuse to act—is entirely consistent with the recognition of uncertainty. But non-neurotic man, realizing that uncertainty can never be eliminated, does in fact act. This does not indicate that non-neurotic man always acts inconsistently with the recognition of uncertainty. For a certain class of acts may be as consistent with the recognition of uncertainty as endless neurotic debate is. The only class of acts, however, which may be consistent with the recognition of uncertainty, are those which implicitly recognize that they are based on uncertain normative judgments. Any act which cuts off the continuing discussion of normative questions, however, implicitly asserts that the normative judgments upon which it is based are certain and such an act is therefore inconsistent with the recognition of uncertainty. Since any act which has the effect of cutting off the discussion is inconsistent with the recognition of uncertainty, the only class of acts which is justified—consistent with the recognition of uncertainty—is that class which does not foreclose the possibility of modification of beliefs; for only through modification of beliefs can error ever be corrected. This is not to assert that man may not choose to act irrationally; it is merely to assert that if man does choose to act rationally he must not act so as to preclude the modification of beliefs. And since only acts which do not preclude the modification of beliefs are rational, to reject the proposition that one ought not act so as to preclude the modification of beliefs is to choose irrationality.

213. On the relativistic view of ethics while it would not be true of any course of conduct that it was better than any other, it would be true that a given course of conduct was no worse than any other.

214. Some existentialists would agree that human judgment was highly uncertain and that to take a given path is to assert that that path is no worse than any other. They depart from the analysis presented in drawing from these premises the relativistic thesis that all action is unjustified, which serves as the basis for their further assertion that all action is an irrational leap of faith. Cf. CAMUS, THE MYTH OF SISYPHUS 49-55 (Alfred A. Knopf, Inc. ed. 1955). But, as has been suggested, man is not unjustified in acting. Men often have reasons for acting in their normative beliefs and these normative beliefs though uncertain are the best reasons men can have. To analogize uncertain reasons to an absence of reasons is mistaken. And to insist on the standard of certainty is to insist on a standard that could not possibly be met. “[I]t is perverse to see tragedy in what could not conceivably be otherwise. . . .” AYER, THE PROBLEM OF KNOWLEDGE 41 (1956). Thus what the skeptical attack shows is the futility of demanding and waiting for certainty—not the absence of any rational base for action. Compare the treatment given by Ayer and Wisdom to the problem of knowing the mind of another. While A cannot know the mind of B in the way B does, it does not follow A has no basis for saying he knows the mind of B. A may base his claim to know on B’s demeanor, the physiological resemblances between A and B, and even upon telepathy. AYER, THE PROBLEM OF KNOWLEDGE 243-54 (1956); WISDOM, OTHER MINDS 207-11, 216-17 (1952). Of course, any action which could be justified only if a criterion of certainty were met must remain unjustified.

215. The proposition “it is not the case that it is wrong to take an act which cuts off the possibility of correcting mistaken beliefs” has been shown to be unjustifiable on every possible ethical viewpoint. From this it does not follow logically that “it is wrong; etc.”
It is as if the realization of the fallibility of ethical judgment forces all who desire to act rationally to make a pact with the Devil. In return for the justification of acting on judgments that well may be erroneous, he must bind himself to leave open the possibility of modification of belief. Any act foreclosing modification of beliefs violates the terms of the contract; it is a breach of faith with the guiding principle of uncertainty.

The obligation to take no action foreclosing the modification of beliefs is, at least, an obligation not to suppress the free communication of ideas. For the process of modifying beliefs proceeds, at least in part, by communication. The market place theory assumes that rational debate is the major source of such change. It may be argued, however, that verbal communication is not the chief factor in the change of normative beliefs. Irrational factors undoubtedly affect the process; however, it seems clear that speech plays a necessary if not a sufficient role. Since the free communication of ideas is necessary to modify beliefs, its suppression is a violation of the unholy compact.

Thus this alternative theory of free expression ends, as it began, in substantial accord with the market place theory, for both conclude that the suppression of the free communication of ideas is not justified. While these theories begin from the same premise and reach similar conclusions, there are substantial differences in the reasons underlying the conclusions. The market place theory builds from the empirical proposition that the best test of the truth of any proposition is its ability to withstand the competition of the market. Like the assertion that discussion leads to truth, however, this proposition is unverifiable; moreover, it is of dubious empirical value.

Secondly, the market place theory asserts that truth ought to be sought as
the safest guide to conduct.²²² From these propositions is derived the normative proposition that a free competitive market of ideas ought to be maintained. The alternative theory, however, rejects these notions as unverifiable. It attempts to establish an argument, against the suppression of free expression the empirical basis of which—the uncertainty of normative judgments—is verifiable.²²³ Moreover, this view differs from the market place analysis in rejecting the proposition that reason will produce truth if discussion is left free. Rather the suppression of any conduct essential to the correction of error is unjustified under this analysis regardless of whether that conduct is directed to reason or to man's irrational aspects.²²⁴

The philosophical argument against the suppression of any form of free expression is extremely broad; it includes any conduct which may be necessary to modify beliefs. The first amendment, however, is far narrower; it protects only speech, press, religion and assembly.

Conclusion: Disclosure or Anonymity?

Armed with this analysis of free expression it is possible to return to the problem posed at the outset; is disclosure or anonymity more compatible with the goals of the first amendment? Under the market place theory, this problem admits of no solution; under the case for free expression proposed in this Comment, it is submitted, a choice may be made. Before considering the legal question disclosure or anonymity?, however, it is necessary to relate the preceding philosophical analysis to the legal norm of the Constitution as viewed by the Supreme Court.

²²² See text accompanying note 182 supra.

²²³ The argument is rooted in no one ethical system. The statements it makes are statements about all ethical systems; the assertion that suppression of conduct essential to the correction of error is never justified is a metaethical proposition—a statement about normative discourse as opposed to a normative statement. Rejecting the notion that free speech ought to be maintained because it leads to truth as unverifiable, the alternative theory reasons from the empirical proposition that normative judgment is highly uncertain to the metaethical proposition that conduct essential to the correction of error is never justified. On the basis of this metaethical proposition the theory asserts that conduct essential to the correction of error ought not to be suppressed. On the basis of the further empirical proposition that communication is necessary to the modification of beliefs and hence to the correction of errors a subsidiary normative proposition is derived: that the expression of ideas ought not to be suppressed.

²²⁴ If it could be shown that there were contexts in which violence was necessary to the modification of beliefs, then society would be unjustified in suppressing violence in those contexts, since any normative belief condemning violence would be too uncertain to provide a basis for taking action which would cut off the possibility of modifying belief. This does not mean that the first amendment ever protects violence. While the conclusion that the suppression of violence is unjustified where violence is essential to the modification of belief is drawn from the same basis as the conclusion that the suppression of beliefs is unjustified, violence is not speech. While the basis of the protection of speech may be helpful in determining the scope of the language, of the amendment, the Court can only protect conduct which might reasonably be said to fall within the language of the amendment.
The Court has never adopted any single rationale for the protection of free speech; it has however favored one of several formulations of the market place theory, each of which lays stress on a different aspect of free speech. One such statement bears some similarity to the theory presented in this Comment. This statement, which at one time or other was articulated by Jefferson, Brandeis, and Murphy, stresses the necessary role of reason in the correction of error, rather than in the attainment of truth. Of course, there are significant differences between this aspect of the market place theory and that developed in this Comment; the chief of these being that it seems to lack the scepticism implicit in the "compact with the Devil" thesis. However, it suggests that adoption of the latter theory would not represent a significant departure from the traditional concept of the value of speech, but a reformulation of that concept in light of the teachings of certain schools of contemporary philosophy.

It is thus possible to return to the question originally posed: should anonymity receive constitutional protection? On the basis of the preceding analysis two answers to this question may be offered. The first of these stems from the relationship between the anonymity cases such as Talley and the earlier cases. Both the natural rights theory and the market place theory have been given parallel recognition. Compare Grosjean v. American Press Co., 297 U.S. 233, 243 (1936) ("the natural right ... to impart and acquire information..."), with Milkwagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941) (market place theory). And in many cases the court has not articulated any theoretical basis for decision. E.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943); Largent v. Texas, 318 U.S. 418 (1943); Schneider v. New Jersey, 308 U.S. 147 (1939).

226. Underlying the view of Brandeis that speech should only be suppressed when the danger was immediate lay the view that given time for discussion good ideas would correct bad. See Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In contrast Vinson in Dennis v. United States, 341 U.S. 494 (1951), while adhering to the view that "free debate of ideas will result in the wisest governmental policies," id. at 503, adopted a view of the clear and present danger test that substituted for the requirement that the danger be immediate, a test which excluded immediacy from consideration. Id. at 510.

227. "Reason and free inquiry," said Jefferson, "are the only effectual agents against error." Jefferson, Notes on the State of Virginia 293 (1782), reprinted in 3 Writings of Thomas Jefferson 263 (Ford ed. 1894) (emphasis added). Similarly, Mr. Justice Brandeis in Whitney v. California stressed that one function of speech is to "free men from the bondage of irrational fears," and to expose falsehood and fallacy by discussion. 274 U.S. 357, 376 (1927). This statement of the role of free speech in correcting erroneous doctrines which may gain currency was clearly articulated by Justice Murphy in Thornhill v. Alabama, when he said that "abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." 310 U.S. 88, 95 (1940).

228. John Stuart Mill, whose writings have deeply affected the development of the American understanding of free speech, see Chafee, Free Speech in the United States 30 (1941), advanced arguments similar to those presented here. Mill based his case for free expression on the dual proposition that: "We can never be sure that the opinion we are endeavoring to stifle is a false opinion" and that silencing the expression of opinion eliminates the opportunity "of exchanging error for truth." Mill, On Liberty 36 (1863).
RIGHT TO ANONYMITY

The cases invalidating subsequent punishment of speech on the ground that it, like prior restraint, deterred the expression of ideas. It was suggested that since disclosure may in like manner deter speech, no distinction should be made between disclosure and subsequent punishment. The following counter-argument was raised against this assertion: disclosure may promote the discovery of truth, by permitting the choice between competing ideas to be made on complete information; it therefore advances the goal of the first amendment. But an analysis of the market place theory led to the conclusion that, due to the unverifiable character of that thesis, no resolution of the dilemma could be offered. Under the theory of this Comment, however, the argument that disclosure is consistent with the promotion of truth is irrelevant since the promotion of truth is not the justification of free expression. There is, therefore, no valid justification for disclosure, and since it admittedly has some deterrent effect on free expression, it is constitutionally indistinguishable from subsequent punishment.

The theory of free expression presented by this Comment supports a constitutional right of anonymity on grounds independent of the subsequent punishment cases. Disclosure laws frequently deter expression; they especially curb criticism of established belief and ideas. Thus, unless it can be positively demonstrated that such laws themselves are sometimes essential to the modification of beliefs, they conflict with the pact with the devil—that one ought to take no act which cuts off the possibility of modifying beliefs. The laws themselves—compulsory disclosure against the will of the proponent of modification—and not the fact of disclosure must be demonstrably essential to modification. It should be recalled that under the proposed theory, constant modification of beliefs, regardless of whether such modification is in the direction of truth or error, is essential. Although a legislature may be able best to judge whether disclosure or anonymity will most effectually promote truth, presumably the proponent of modification can best judge whether disclosure or anonymity will most effectively cause a desired modification to occur. If this is so, then it follows that the proponent should have the absolute right to make the decision whether or not to disclose. It may be argued, however, that the legislature, even when modification not truth is the goal, can best judge whether disclosure or anonymity will bring about a general climate in which modification is most likely to be encouraged. Thus if the legislature made an accurate determination that a certain disclosure law would not deter essential expression but would help the modification of beliefs, it certainly would be justified in enacting such a law. (The law, however, would have little, if any, effect in terms of compulsion, since any reasonable proponent under such circumstances would disclose anyhow.) If the legislature made an accurate

229. See text accompanying note 150 supra.
230. See text accompanying notes 162-66 supra.
231. See text accompanying notes 171-73 supra.
232. See text accompanying notes 139-49 supra.
233. See text accompanying notes 148-49 supra.
finding that a certain law would deter essential expression and would not, in any other way, help modification, it would, of course, be unjustified in enacting such a law, regardless of its judgment concerning the promotion of truth. If, however, the legislature made an accurate finding that a certain disclosure law would deter certain essential expression but at the same time would itself be essential to the modification of beliefs, arguably, the legislature would be justified in compelling such disclosure. But it is unlikely that any compulsory disclosure requirement which deterred speech essential to the modification of beliefs, would itself be essential to the modification of beliefs. Additionally, long experience has indicated that the proponents of modification and not the legislature—almost by definition opponents of at least some types of modification—will be more genuinely interested in securing modification of beliefs; it would thus be foolish to permit the legislature to compel the proponents to perform an act which it felt was essential to the modification of beliefs.

Limitations upon the Constitutional Right of Anonymity

The right of anonymity is not absolute. Inherent in the theory of the right are two varieties of limitations. First, the scope of the right is limited by its rationale—deterrence. Unless a disclosure provision is likely to deter the expression of ideas either because a potential advocate fears reprisals or desires to avoid publicity, it does not infringe the constitutional right. Secondly, since the constitutional right to anonymity derives solely from the first amendment, those limitations which inhere in the first amendment obviously limit the right of anonymity. Thus, in those circumstances in which a speaker could constitutionally be silenced by direct governmental action, he could also be silenced by a disclosure provision.

Since the right of anonymity is a derivative of first and fourteenth amendment rights of freedom of expression and association it extends only as far as those protections extend. Even if deterrence is found, therefore, a court must also ask whether the speech or association deterred is protected by the first amendment. The court has developed several tests to separate unconstitutional from constitutional curtailments of utterances. First, a court has to determine whether the content communicated is “speech” in the first amendment sense.234

234. The demand “Buy” is the promotion of a product—not the expression of an idea or belief. Compare Valentine v. Christenson, 316 U.S. 52 (1942) (upholding ordinance prohibiting “purely commercial advertising”) (applied to ad to see submarine), with Jameson v. Texas, 318 U.S. 413 (1943) (reversing conviction of Jehovah’s Witness for distributing handbill advertising sale of religious literature). Several distinctions may be drawn between a commercial advertisement and the expression of an idea. In Valentine the purpose was commercial, the function of the handbill profit making; in Jameson the purpose was clearly religious and the money-raising aspect ancillary. The communications are also distinguished by a difference in the breadth of the subject matter, the extent of the result sought. The paradigm of the commercial advertisement is limited in that it urges some specific act by recipients of the communication—e.g., to attend an exhibition—and no more; the paradigm of the expression of an idea is the expression of a social, religious
If the communication is protected, the court must then decide whether the curtailment of expression is only incidental to the regulation of a regulable nonspeech aspect of communication and whether the curtailment is no broader than is necessary. If those conditions are met the statute is constitutional. But even if the governmental action is a direct regulation of speech, the action may still be validated by showing, under one of several tests, a likelihood that the speech will result in illegal conduct.

The factors determining whether or not the communication or association in question is protected by the first amendment are many and complex; they are no more relevant to the right of anonymity than to any other first amendment right; detailed analysis of these factors will therefore not be attempted here. But the relationship between disclosure and deterrence, a relationship which is of particular relevance to the right of anonymity, will be considered in detail.

**Deterrence**

Since a finding of deterrence is an essential precondition to the invocation of the right, the question of how deterrence is determined is crucial. Several problems face a court attempting to decide whether a given disclosure law will, in fact, deter free expression. First, does it matter whether the disclosures must be made to the public or need they only be made to a governmental official? Laws requiring disclosure of information to governmental officials, where the information is placed on open file, have been considered no less violative of the first amendment than requirements of public disclosure. Identity of or economic philosophy. The nature of the arguments presented in a commercial advertisement—where there are arguments in the customary sense of that word—tend to differentiate it from any typical "expression of an idea." Advertisements typically take the form of a demand that an individual buy a product and the arguments used are typically directed to the advantages that come to the individual from buying it. Finally, the social importance of the communication—the scope and nature of the beliefs affected—distinguishes arguments in the election of a President from arguments urging the purchase of a brand of automobile quite irrespective of the nature of the arguments presented. While particular instances of the communications of ideas may not differ from commercial advertising in all of these ways, they resemble one another in each possessing some of those distinguishing characteristics even though not in all cases the same ones. Compare Wittgenstein, Philosophical Investigations 31e-32e (2d ed. 1958). Similarly the Court has held obscenity not to be speech in the first amendment sense. Roth v. United States, 354 U.S. 476, 484-85 (1957).


238. Compare Shelton v. Tucker, 364 U.S. 479 (1960) (affidavit to be filed with board of trustees), Bates v. City of Little Rock, 361 U.S. 516 (1960) (list of members and contributors to be filed with city clerk), and Thomas v. Collins, 323 U.S. 516 (1945) (regis-
treatment seems sensible, for information on open file would be available to all those wishing to take reprisals; those sufficiently in opposition to views to take reprisals against the exponents of those views are likely also to be sufficiently interested to look up the names of their advocates. A very different problem—a problem on which the Court has yet to pass—would be presented if the required information were kept from the public. In such a case any likelihood of deterrence would depend in part on the opportunity for government officials to use the disclosures as a basis for governmental discrimination, in part on the likelihood that the information would be leaked to those wishing to take reprisals, and in part on the probability of a change in government from one friendly to the proposed view to one antagonistic to the proposed view. The second problem posed by the deterrence requirement concerns the standards a court should apply to determine the existence of deterrence. The Court might first apply an "objective" test: when faced with an attack on the constitutionality of a given disclosure law it would ask whether it was likely that this law would keep any individuals or groups from expressing ideas. If so, the law would be found unconstitutional; if not, the court could then apply one or more "subjective tests." It could focus solely on the individual or organization contesting the statute or requirement and determine whether the law had a deterrent effect upon them. To answer this question, a court might use several tests. Because of the paramount importance of the right of free expression, it might presume deterrence and require the state to rebut this presumption. Or, the protestant might be required

239. See Shelton v. Tucker, 364 U.S. 479, 486 (1960) ("[T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."); United States v. Rumely, 345 U.S. 41, 57 (1953) ("Some will fear to read... what the powers-that-be dislike.") (Douglas, J., concurring).

to prove that he was deterred. At this point, the court would have to decide whether all deterrence, even if proved, should receive constitutional protection. Individuals might be deterred by unreasonable fears flowing from imagined dangers. A court might find this response beyond the threshold of constitutional protection; yet the impact of the disclosure requirement on free expression in such a case is as great as if actual sanctions were applied.

The "objective" test, looking to the import of the disclosure requirement on the generality of persons affected by it, seems the most desirable starting point for judicial evaluation of deterrence. This test makes the effect of the statute on the party before the court initially irrelevant. If the court finds that there is a likelihood that someone will be deterred by this requirement it will declare it void regardless of the law's impact on the protestants. This approach might be criticized because it permits a party to raise as a defense the constitutional rights of another. In most constitutional areas, this criticism would defeat the proposed test, for its application would violate the well established rule that no one has standing to raise another's constitutional rights.

In the area of the first amendment, however, the Court does not adhere strictly to this rule; rather, it frequently tests the constitutionality of a law "on its face," not necessarily as applied to the case at bar. Thus in Thornhill v. Alabama the Court invalidated a blanket prohibition of picketing without determining whether on the evidence a conviction could be supported on a more narrowly drawn prohibition. And in Talley, the court followed this approach by striking a disclosure law without any inquiry into the law's effect on Talley himself and despite the fact that no proof of deterrence was offered.

241. Evidence of deterrence was offered in both of the NAACP cases.


243. Bode v. Barrett, 344 U.S. 583, 585 (1953); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915); New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907); see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 298 (1951). This rule should be but has not always been carefully distinguished from the constitutional requirement of a case or controversy. See Barrows v. Jackson, 346 U.S. 249 (1953) (discussing cases and drawing distinction).


246. Talley v. California, 362 U.S. 60 (1960); accord, Shelton v. Tucker, 364 U.S. 479 (1960). A final problem posed by the need to prove deterrence is whether the judge or the jury should determine the likelihood of deterrence. Resolution of this question is unlike the usual finding of fact, for it will determine not whether the activity in question was violative of the statute, but whether the statute itself was constitutional. In this respect the determination of the existence of deterrence is like the determination of the existence
Under the proposed system, therefore, a court would first have to determine if the communication in question was protected by the first amendment. If it was so protected it would next have to determine whether the disclosure law in question would have the effect of deterring the generality of persons who might be affected by it. If the law would probably have this effect, it would be struck down on its face. If it would not have this effect, the court would then have to determine whether the law did in fact have a deterrent effect upon the particular defendant. If it did have this effect, it would be struck down, not on its face, but only as applied to the particular defendant.\textsuperscript{247} The courts would thereby be acting consistently with the recognition of normative uncertainty; it would be voiding legislative action which might have the effect of foreclosing the modification of at least some beliefs.

\textsuperscript{247} See Bates v. City of Little Rock, 361 U.S. 516 (1960) (ordinance tested only in application to NAACP). In \textit{Poulos} the licensing scheme held valid on its face was said to have been invalidly applied when Poulos was denied a license. Poulos v. New Hampshire, 345 U.S. 395 (1953) (dictum).