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The Effect of Public Opprobrium On Investigative Due Process

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THE EFFECT OF PUBLIC OPPROBRIUM ON INVESTIGATIVE DUE PROCESS

> Nothing in the law, perhaps, better illustrates the enormously increased reach of government in the last fifty years than does the broadening of the power of administrative investigations.[1]

This expansion of administrative power is paralleled by another phenomena, not necessarily related, of the critical law in many areas of government having become "due process law." For instance, the prevailing concerns of criminal procedure, mental health and loyalty-security hearings, and traffic, juvenile, and family courts are due process oriented.[2] Proceedings of federal and state regulatory agencies, as well as those incidental to the average citizen such as Workmen's Compensation, welfare, insurance, public housing, school discipline, and labor relations also demonstrate the extent of the subject's importance.

"Due Process" simply means "the reign of law" or the "law of the land",[3] as opposed to rules based on expediency or the discretion of a particular individual. It is the recognition of some type of restraint implicit in the fourteenth amendment's "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." That is, due process is a recognition that "[a]ll the officers of the Government . . . are creations of the law and are bound to obey it . . . and to observe the limitations which it imposes upon the exercise of the authority which it gives."[4] It is a concept aimed at the "arbitrary assertions of executive power",[5] through the use

1. L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW, CASES AND MATERIALS 722 (3d ed. 1968) (hereinafter cited as JAFFE). Since 1940 there has occurred a reversal in the constitutional principles which govern the administrative powers of investigation. The new principle is that administrative power must be made fully effective whenever possible. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.01 at 159 (1958) (hereinafter cited as DAVIS). The operation of this principle in the broad delegation of investigative authority has resulted, in the case of Congressional grants to investigative bodies, for example, in a gradual relaxation of the showing necessary to obtain a valid court subpoena, so that only a cursory examination by the courts of the underlying grounds is the rule. Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look At CAB v. Hermann*, 69 YALE L.J. 131 (1959).

2. Newman, *The Process of Prescribing Due Process*, 49 CALIF. L. REV. 215, 238 (1961) (hereinafter cited as Newman, 49 CALIF. L. REV.).

3. H. TAYLOR, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW *viii* (1917) (hereinafter cited as TAYLOR).

4. *Id.*

5. P. KAUPER, CONSTITUTIONAL LAW, CASES AND MATERIALS 605 (3d ed. 1966).

of such devices as the opportunity for judicial review. More broadly, due process has been interpreted to include limitations on the exercise of legislative power against such power's encroachment on certain substantive rights as well.[6]

The clearest tension is likely to occur where the concept of due process of law confronts the area of governmental administrative activity. Due process of law, it has been said, "stands as the antipole of what the French jurists call *droit administratif*, which rests upon the assumption that in France the government and each of its servants possesses a body of special rights and privileges as against private citizens to be fixed on principles different from those defining the legal rights and duties of one citizen toward another."[7] Although in England and this country, there has been an absence in governmental institutions of anything like the preemptory authority of *droit administratif*;[8] its nearest kin may well be found in the activity of many administrative bodies. Some evidence of the tension in this area may be reflected by the fruitlessness of pursuing any degree of homogeneity in the development of due process of law in administrative fields. Only recently, for example, due process of law was characterized as

> an elusive concept [whose] exact boundaries are undefinable, and [whose] content varies according to specific factual contexts . . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[9]

It is in this context that the implications of the 1969 case of

6. *Id.*
7. TAYLOR at *v.*
8. *Id.* at *vi.*
9. Hannah v. Larche, 363 U.S. 420, 442 (1960). It has been suggested that the due process clause of the 5th and 14th amendments be reexamined for the possibility of giving its words a broader meaning, by discarding certain encrusted doctrines presently used to include the protection of certain rights while excluding certain "privileges," although both are contained within an individual's bundle of "legal interests" and are not differentiated by the clauses' wording. Life, liberty or property should be read to include all of a person's more important legal interests, particularly his reputational and emotional interests which are already recognized by tort law. Another doctrine said to deserve discard is the "too pervasive criminal trial analogy" used as a guide in almost all instances as the optimum extent of due process. Newman, 49 CALIF. L. REV. 215 (1961).

Jenkins v. McKeithen[10] will be studied, and particularly its recognition of the harmful results of unfavorable publicity—public disfavor and opprobrium—on persons connected with administrative investigations.

I. JENKINS v. MCKEITHEN

Jenkins is the Supreme Court's most recent decision on the question of procedural due process and public opprobrium during the conduct of an administrative investigation. In *Jenkins*, an action was brought by a union member seeking declaratory and injunctive relief and a ruling on the constitutionality of a Louisiana statute creating a state Labor-Management Commission of Inquiry. The stated purpose of the commission was to publicly investigate potential criminal law violations and to recommend follow-up action to appropriate enforcement agencies. The complainant was not called to testify before the commission. He complained, however, of violations of the due process and equal protection clauses of the fourteenth amendment, because the body in effect was an "executive trial agency" with the function of publicly condemning certain persons, including generally the plaintiff and other members of his union local. A three-judge district court panel dismissed the complaint[11] and the plaintiff appealed directly to the Supreme Court. The Supreme Court reversed and remanded on grounds that a cause of action had been adequately stated.

Jenkins follows a definitive case on administrative due process, *Hannah v. Larche*.[12] In *Hannah*, the plaintiffs were Louisiana voter registrars and certain private citizens. They brought suit to enjoin the U. S. Civil Rights Commission from holding hearings on Negro voting deprivations on grounds that the hearing procedures and the act itself were unconstitutional under the due process requirements of the fifth amendment. The objectionable procedures were the non-disclosure of the identity of persons submitting complaints to the commission, and the failure to permit persons summoned before the inquiry to cross examine witnesses. A third matter raised was the risk of public opprobrium against those called to testify. The Supreme Court reversed the lower court and held that such procedures were not unconstitutional under the circumstances. The basis of its

10. 395 U.S. 411 (1969) *rehearing denied*, 90 S. Ct. 35 (Oct. 1969).
11. 286 F. Supp. 537 (E.D. La. 1968).
12. 363 U.S. 420 (1960).

holding was that the function of the Civil Rights Commission was purely investigative and fact finding, and that it did not adjudicate any person's legal rights by determining either civil or criminal liability. The commission, the Court found, sought out information for later use by some other executive or legislative body.

Virtually identical investigative bodies were before the Court in both cases. In each proceeding the plaintiffs complained of the effects of injurious publicity resulting from the conduct of the proceedings. An important difference between the administrative commissions, insofar as the majority in *Jenkins* was concerned, however, was the purposes of the investigative bodies. The aim in *Jenkins* was to probe possible violations of state criminal laws committed by union members or anyone else affiliated with the fledgling labor movement in Louisiana while the purpose in *Hannah* was information-gathering only.[13] Appointed by the governor, the nine-man panel in *Jenkins* was restricted to recommending to either the governor or some law enforcement agency appropriate action if it discovered probable cause. The investigative panel could meet in public or closed sessions, but it retained the prerogative to publish anything occurring in executive session. Like the civil rights commission in *Hannah*, witnesses were denied an unqualified right to cross examine or confront hostile witnesses, or offer evidence on their own behalf.[14]

Two questions confronted the *Jenkins* court: the petitioner's standing to complain, and on the merits, whether the complainant under the circumstances of the particular investigative proceedings was entitled to more adequate protections under the due process clause of the constitution. Underlying these was the

13. The purpose of the *Jenkins* Commission was, according to the majority, "concerned only with exposing violations of criminal laws by specific individuals." It was to be "used to find named individuals guilty . . . and to brand them as criminals in public." 395 U.S. at 427. The *Hannah* Civil Rights Commission, on the other hand, had a function which was "'purely investigative . . . to find facts which may subsequently be used as the basis for legislative or executive action.'" *Id.* at 426.

14. 395 U.S. at 418. The Commission's procedures in *Jenkins* permitted a witness to summon a reasonable number of his own witnesses if the proceedings were in executive session, but during public sessions, he could present only his own testimony and a few written statements from others. The Commission absolutely controlled the privilege of presenting oral testimony from other witnesses summoned by a party. The opportunity to confront and cross examine hostile witnesses was limited to those persons who were actually witnesses summoned by the Commission, and the questioning permitted had to be approved by the Commission beforehand.

important issue of unfavorable publicity stirred by the investigation, and how the existence of such "government-sanctioned opprobrium"[15] modified the minimum requirements of procedural due process set out in *Hannah.*

Although a majority of the justices found that the plaintiff, a union member, had not been called as a witness, nor was he scheduled to be called before the commission, the Court concluded that he had sustained injury enough to afford him standing to complain. This it found from the investigative panel's "concerted attempt publicly to brand him a criminal without trial," threatening the plaintiff's interest in his "own reputation" and his "economic well-being."[16] The Court emphasized that any public opprobrium resulting from commission exposures was not collateral or conjectural as it had been in *Hannah.* On the merits, the three-justice majority[17] was willing to find that the probe for probable cause, when taken in conjunction with the public disfavor, amounted to an adjudication of criminal culpability, thus raising a substantial issue of whether or not the petitioner should be allowed additional due process rights. The Court therefore remanded the case to the district court for a hearing on the merits.

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15. *Id.* at 442. The problem of combatting adverse publicity arising from an administrative investigation was by no means novel with the plaintiff's argument in this case. An interesting study of adverse publicity has pointed out that such publicity or the threat of its use is an accepted administrative device widely used by some federal regulatory agencies, and need be considered as a part of the punishment meted out. Threats of its use are used to settle complaints without formal hearings. The SEC, FTC, and FCC are given as examples. Rourke, *Law Enforcement Through Publicity,* 24 U. CHI. L. REV. 225 (1957) (hereinafter cited as ROURKE).

"Opprobrium" is defined as "something that gives occasion for disgrace or reprobation; public or known disgrace or ill fame that ordinarily follows from or is attached to conduct considered grossly wrong or vicious." Webster's Third New International Dictionary, Unabridged (1965).

16. 395 U.S. at 423.

17. *Id.* at 428. The majority consisted of Justices Marshall. Warren and Brennan. The minority, Justices Harlan, Stewart, and White, found that the plaintiff's nexus with the particular Commission processes complained of was too tenuous to confer standing. It found the connection insufficient because the plaintiff had not been called as a witness to testify, or indicted as a result of any probable cause directly the result of work by the Commission, citing Flast v. Cohen, 392 U.S. 83 (1968). On the merits, the minority challenged the majority's failure to distinguish between two types of interrogative proceedings. The Commission here, it said, was merely a preliminary fact finder and not a final arbiter. Denial of the full panoply of due process protections where a body is basicly "investigative" is not improper, it felt, since the proceeding is not then "adjudicative" of a named person's rights. *Id.* at 433. Justices Douglas and Black concurred in separate opinions. Their concurrence was based on their original disagreement with the *Hannah* result from which they dissented, in that they believed such commissions to be a "tribunal to charge, try, convict and punish people without courts . . . ." *Id.* at 432.

Jenkins shows a willingness to venture beyond the holding in *Hannah*. But faced with a commission tailored to appear virtually the same as *Hannah's*, the majority was hard pressed to accommodate the element of public opprobrium with its *Hannah* due process rationale. The difficulty surfaces when the *Jenkins* majority attempts to characterize the Louisiana commission using its *Hannah* molds of "adjudicative" or "investigative."[18] In *Hannah*, the Court justified denial of more procedural protection by concluding that the interrogation was merely "investigative,"[19] instead of "adjudicative." Yet in *Jenkins*, a similar body is found to be exercising functions "very much akin to an official adjudication . . . ."[20]

II. CHARACTERIZATION OF AN INQUIRY: ACCUSATIVE, ADJUDICATIVE, OR INVESTIGATIVE?

The divergence in opinion by the justices in *Jenkins* appears to be less a polarization of views on the purposes of the commission before the Court than a grappling with how public opprobrium affects the characterization of a commission.[21] What appears to have happened in *Jenkins* is a side-stepping of the

18. *Id.* at 427-28. Justice Warren in *Hannah* distinguished several previous cases involving investigative commissions by concluding that the others had been "adjudicative" whereas the Civil Rights Commission's purpose was merely to investigate and report, leaving affirmative action to other governmental agencies. The *Hannah* distinction between types of agencies is discussed in JAFFE at 837; Newman, 49 CALIF. L. REV. 215 (1961); and Note, *The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings*, 72 YALE L.J. 1227 (1963) (hereinafter cited as 72 YALE L.J. 1227). This last source observes that the *Hannah* result forecloses more due process unless the proceeding eventuates in an "affirmative determination," a "quasi-verdict of guilt." *Id.* at 1233. The *Hannah* failed to go far enough, in that author's opinion, in differentiating between types of commissions.

19. 395 U.S. at 426. "Investigative" by *Hannah* standards, according to one critic, means that additional due process depends not on an affirmative finding of an informing purpose in a proceeding, but whether the proceeding leads to an official determination or punishment. So that even if an informative purpose is not clearly present, a mere non-adjudicative purpose is sufficient to block additional protections. Note, 72 YALE L. J. 1227, 1233-34 (1963).

20. 395 U.S. at 427.

21. The minority opinion recognizes a need for additional due process protections if government-sanctioned opprobrium is present. *Id.* at 442. Its test for the unleashing of such rights is carefully keyed to the purpose of an investigative proceeding. If exposure of named persons is the sole or predominate purpose, then more rights are appropriate. Its method for discovering such a purpose appears to be essentially doctrinaire, inasmuch as the dissenting justices would rely heavily on a commission's announced purpose indicated by its authorizing legislation, rather than on the actual presence of unfavorable publicity. But apparently, they would not be deaf to a request for more rights in the face of opprobrium occurring when an agency begins a series of exposures which are manifestly outside of its statutory authorization. Under exactly what circumstances they would permit such is not clear from the opinion.

term "adjudicative" and perhaps indirectly, of the "stated purpose test." A looser standard, "accusative", is evidently substituted by the majority to help explain its recognition of the effects of public disfavor.[22] Thus, according to the majority, a certain interrogation otherwise "investigative" may become "accusative" through the presence of certain degrees of unfavorable publicity. The problem which the majority is trying to overcome is what Professor Jaffe refers to when he says that "the line between informal investigatory proceedings, and the formal adjudicatory or adversary hearings, is not crystal clear."[23] For example, an illustration of scholarship which does not necessarily clarify this area is shown by Davis' use of the terms "adjudicative facts" and "legislative facts." "Adjudicative facts" are defined as those relating to parties, their activities, businesses and properties. They try to answer questions such as who did what, when, and where, *i.e.* "adjudicative facts are roughly the kind that go to the jury in a jury case."[24] "Legislative" or investigative facts, on the other hand, are described as those not usually concerning immediate parties, but which merely help a tribunal decide a question of law, policy or discretion.[25] Practically applying such definitions to a proceeding of several thousand pages of testimony is one of the difficulties; another is that within the same investigation each kind of fact finding may be present. Is the final characterization of the

22. Whether this is occurring in the majority opinion is not altogether certain. A reading of the majority and dissenting language does reveal a heavy reliance on the descriptive word "accusative" by Justice Marshall for the majority, while Justice Harlan's minority opinion relies almost exclusively on showing the absence of an "adjudicative" purpose. It is probably true that the two terms have often been used indiscriminately to mean the same thing and any adjudicative proceeding is also innately an accusative one. Some distinction may be implied from *Jenkins,* however, other than from word preferences. The majority refers some 16 times in the course of its short opinion to the "public findings" aspect of the Commission's determinations. 395 U.S. at 415-29. It provides excerpts of those portions of the plaintiff's allegations which complain of the Commission's obligation to expose. The majority stresses that the subject matter concerns crime. The targets are named persons. The findings relate to someone's guilt. Important to note is the Court's willingness to recognize that while there is an absence of an adjudicative purpose, there is also an absence of a legislative purpose as well. *Id.* at 416. The opinion admits that the *Jenkins* Commission "does not adjudicate in the sense that a court does, nor does the Commission conduct, strictly speaking, a criminal proceeding." But, it finds, the Commission "exercises a function very much akin to an official adjudication of criminal culpability." *Id.* at 427. The Court concludes that "[e]verything in the Act points to the fact that it is concerned only with exposing violations of criminal laws by specific individuals. In short, the Commission very clearly exercises an accusatory function . . . ." *Id.*

23. JAFFE at 759. *See also* Note, 72 YALE L.J. 1227, 1230 (1963).

24. DAVIS at 413.

25. *Id.*

investigation by a court or reviewing body to be arrived at by viewing one type of fact as predominate?

Justice Frankfurter's concurring opinion in *Hannah* provides a guide on how to determine a commission's function.[26] A panel exercising an "accusatory function", he says,

> is one with a duty "to find . . . named individuals . . . responsible . . . and to advertize such finding or to serve as part of the process of criminal prosecution . . . ."[27] The basic inquiry is whether its objectives, purpose of creation, and true functioning are "charged with official judgment on individuals" or merely "to develop facts upon which legislation can be based,"[28] or "gather information . . . as a solid foundation for legislative action."[29]

Frankfurter would afford a person fuller due process protections if the results of a hearing are likely to be "[j]udgments by the Commission condemning or stigmatizing individuals . . . ."[30]

The weakness of Frankfurter's test, however, is that it is often difficult to determine administrative purpose. For instance, the administrator may want to develop "information" for purposes of formulating policy and concurrently be "laying the ground work for enforcement proceedings, either administrative or judicial."[31] This suggests an underlying weakness of a "purpose" approach to characterizing a commission. Several purposes may be subsumed within the announced one, and there is really no assurance that an investigation's impact will be anything like its announced purpose. A proceeding may be "investigative" at its outset and for one reason or other become "accusatory" during its pendency.[32]

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26. 363 U.S. at 486.
27. *Id.* at 488.
28. *Id.*
29. *Id.* at 489.
30. *Id.*
31. JAFFE at 722.
32. "Accusatory" has the potential for several nuances of meaning beyond the fact of a bald exposure purpose. The need to distinguish between types of non-adjudicative, investigative proceedings has been suggested some time ago. *See* Note, 72 YALE L. J. 1227, 1230, 1236 (1963). The absence of an adjudicative purpose would not necessarily mean an informative purpose or one to generate consent for rule-making or legislative proposals. Any time an investigation draws a bead on a named individual or is involved in the criminal process in any manner, although for all appearances it is only investigative, it may actually be pre-prosecutorial. In any event, the *Jenkins* Court appears ready to make this distinction, particularly where public opprobrium aggravates matters and exposure is a practice of the particular proceeding.

The problem facing the *Jenkins* Court is the retention of judicially manageable standards while at the same time insuring due process safeguards against unfavorable publicity. What then has the Court done by adopting an "accusative test?"[33] One result of its *dicta* seems to be a more flexible standard of characterizing an investigative body. The Court thus attempts to overcome a basic criticism of *Hannah*, that the Court there rigidly ignored the reprecussions of public disclosures by adopting the "purpose" test.[34] Another result of the *Jenkins* holding may be an implied invitation to lower courts to go beyond the "purpose" test to adequately account for undesirable publicity.[35]

The objective of all procedural due process has been described by Newman as "the reliability of the determination-making process," or, "reliable truth determining."[36] The values in such a due process model as the above have been catalogued as (1) insuring the reliability of the guilt-determining process, and (2) insuring respect for the dignity of the individual. The orientation of many due process models toward only the guilt-determining value is the result of over-emphasizing the criminal due process methodology as the basic pattern for all others.[37] The adoption of the accusative characterization by the *Jenkins* majority may well represent a recognition that the guilt-determining (*e.g.*, adjudicative) value is not paramount, and that avoiding the destruction of an individual's dignity may be equally worth preserving.

The remainder of this paper will deal with how to anticipate public opprobrium and briefly with the due process alternatives

33. 395 U.S. at 427-30.

34. JAFFE at 758; NEWMAN, 49 CALIF. L. REV. 215, 218, 221 (1961); Note, 72 YALE L. J. 1227, 1232 (1963).

35. The criteria for determining a commission's purpose are not immutable nor necessarily very clear. Witness the disagreement among the justices in *Jenkins* over that commission's purpose. Purpose may be indicated, according to one commentator, by an announcement at the investigation's inauguration, public statements by its members, or the selection of a certain branch or personnel to conduct the investigation. It has also been suggested that courts permit direct testimonial inquiry into an ambiguously-motivated agency's purpose. Note, 72 YALE L. J. 1227, 1239-49, 1242 (1963). Inherent in this kind of purpose test is the problem of its application to commissions whose grant of authority is so broad that they amount to "fishing expeditions." The federal CAB, among others, has a broad authorization which can lead investigations almost anywhere, as long as the information is deemed relevant. DAVIS at 165, 170 and 230 (1958).

36. 49 CALIF. L. REV. 215, 219 (1961).

37. *Id.* at 218. Facts that defame, degrade, or incriminate a subpoenaed witness merit special treatment even though there are no subsequent adjudicative proceedings. *See* Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness,* 60 MICH. L. REV. 169, 179 (1961-62).

available when unfavorable publicity may create a need for more protections.

III. Publicity and Opprobrium in Investigative Proceedings

The overriding reason for denying the due process protections which guard against unfavorable publicity in any administrative proceeding is a concern for efficiency.[38] It is feared that permitting rights similar to those afforded in an adversary situation tends to slow investigative processes, distract proceedings, and increase public expense. Thus, denial is justified by the expediency of striking a balance—"the balance of individual hurt and the justifying public good."[39] In the same manner, publicity of investigations is held to be useful and to outweigh its harms since it may bring forth new witnesses and inform the public.[40] But such "window dressing" would appear more relevant perhaps to broad-based hearings of general public interest where a consensus is desired, like those concerning loyalty-security, civil rights, or consumer products. The reasons

38. Hannah v. Larche, 363 U.S. 420, 443-44 (1960); *cf.* FFC v. Schrieber, 381 U.S. 279 (1965). In *Schrieber,* the circuit court ruled that a particular interrogation ought to be conducted in non-public sessions. The Supreme Court reversed, holding that the FCC was empowered to conduct its proceedings in a way best conducive to the proper dispatch of business and the ends of justice.

There are other reasons of course for denying additional due process safeguards. One reason given is that frequent court meddling to enforce due process claims will undermine a system which must rely to some degree on the exhaustion of administrative remedies. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938). Another reason given is a belief by many courts that public control over policy-making requires an informed public developed in part, undoubtedly, from free-swinging investigative proceedings. *See* Rourke at 231, 246. The use of publicity as an instrument of public control by government agencies has already been discussed. *Id.* at 227; n.7 *supra.* Yet another reason is that sensationalistic publicity often serves the utilitarian purpose of advancing the popularity of one political interest or personality over another and is very much an accepted part of factional warfare, particularly between the separate departments of the federal government. *Id.* at 228-30. Publicity also plays a useful role in the area of social and economic regulation generally in an informative manner, without the need for attention-getting proceedings. *Id.* at 231.

39. Hannah v. Larche, 363 U.S. 420, 487 (concurring opinion). The clash between the need for information by administrative agencies and the right to privacy is long standing, and has seen a general erosion of the latter. *See* Davis at 159.

40. The waiver of an individual's rights to privacy or protection from defamation must occur when clearly confronted with the informing function of certain hearings. In these, the primary function is to reach an external audience. But merely because an agency feels there is a need for public airing of a subject, one commentator has noted, this determination should not be conclusive of the rights to be recognized, especially if potential participants make an adequate showing of probable "irreparable injury" from any disclosures. A court might well be suspicious of such a claim if the inquiry's scope is limited to economic matters or those matters not widely disapproved by the public. *See* Note, 72 Yale L.J. 1227, 1237 (1963).

for publicity are less compelling in the narrow context of proceedings on workmen's compensation, welfare assistance, public housing evictions, and school discipline. In either type of proceeding above, the risk of notoriety caused by simultaneous news coverage, professional journals, or institutional newsletters is no less real.[41] The points to be made here are that publicity would never seem to be an essential feature of most investigative proceedings (except those investigations where the public need-to-know and an informative purpose are paramount) and is seldom a critical aspect of even the broadest of inquiries. Just as publicity's functional importance may vary with the particular type of investigation, so it would seem also that the ultimate effects of publicity often bear little or no relation to the investigative events deemed significantly investigative.

The degree of publicity accompanying an investigation relies on the operation of two variables: the conduct of the investigative proceedings themselves and the activities of the news disseminating media. Thus, part of the publicity problem is to study, as the courts did in *Hannah* and *Jenkins*, a particular commission's *stated purpose.* Is one of its announced objectives the exposure of certain conduct to the public at large? Are the objectives some form of indictment, administrative censure, or other adjudicative action?[41] A second consideration, which is also favored as a likely indicator of public disfavor, is the *status of participants.*[42] Is, for example, a particular party a witness in chief, corroborative witness, informant, defendant, or perhaps even a non-witness? The type of participation and its duration are certainly relevant matters here. Some occupations although relatively obscure carry with them a residual notoriety, such as that associated with being an informant, federal investigator, labor trouble-shooter, or professional expert. The fundamental error in relying on only these two factors is that alone they may have little direct bearing on the absence or

41. A development of the principles herein discussed as they might affect opprobrium generated in such narrow proceedings is outside of the scope of this paper.

42. Publicity's strength and weakness as an enforcement device in the regulatory process is the variations in influence which it may have, depending on the intensity of public disapproval of particular actions or the nature of the parties concerned. Sensitivity to public opprobrium is governed by the importance of public esteem to the party threatened. *See* ROURKE at 238-40. As indicated above, "status" may also mean the party's relationship to the proceedings. Since secrecy of police informants is now considered elemental, it is difficult to see why a similar protection is not afforded to such sources in this area. *See* Newman, *Federal Agency Investigations: Procedural Rights of The Subpoenaed Witness,* 60 MICH. L. REV. 169, 179, (1961-62).

presence of public opprobrium. Perhaps more indicative is a study of what might be described as the *after-processes* which often occur during or immediately following certain types of investigations.[43] How much broader are these types of results than those stemming from an announced purpose? To determine this, the focus must be on the disconnected processes such as re-assignment, promotion or demotion, delay in promotion, blacklisting, censure, suspension, threats of indictment or involvement in subsequent proceedings, police harassment, and bugging, which may flow out of casual contacts with an investigative commission having an otherwise innocuous purpose. The question remains—is the study of after-processes best developed from a particular investigation in progress or is it found in similar previous investigations? The answer is, of course, both. Since the objective is to anticipate unfavorable opinion, what meager "case law" experience there is on the effects of previous administrative investigations would be helpful.[44] By the same token, there would seem to be nothing to preclude an agency from monitoring its investigations during pendency to detect any after-processes which might signal nascent public contempt.

Another factor is the *subject matter*[45] of particular investigative proceedings. Some subjects, like use of drugs, unionism, or crime, are peculiarly sensitive and have the potential for notoriety no matter when or where investigated. Other subjects may exhibit a high notoriety potential because of the peculiar location of the investigation.

A third category of subjects, innocuous in themselves, take on a charged character because of the timing of events occurring collaterally and independently of the investigation itself. Examples are a riot, a crime wave, or an industrial disaster, whose publicity soon overruns that originally associated with the investigation. These events need not have caused the commission's creation, yet a minor role in any one of the above-described

43. Recognition of similar insidious effects of unfavorable publicity following an investigation is found in Galloway, *Congressional Investigations: Proposed Reforms,* 18 U. CHI. L. REV. 478, 480 (1950-51) (hereinafter cited as GALLOWAY).

44. The problem here is the diversity of non-judicial precedent, suggesting a need for better and more scientific methods of documenting such information. *See* Newman, 49 CALIF. L. REV. 215, 221 (1961).

45. Rourke has noted that the effectiveness of a publicity sanction as an instrument of governmental regulatory control depends to a large extent on the intensity of public disapproval of the activity. For instance, exposure of offenses against economic regulations may appear relatively bland, but in the case of an offender in a monopoly situation or highly competitive industry, such disclosures could be traumatic. 24 U. CHI. L. REV. at 231.

investigations may incur a degree of opprobrium wholly unrelated in intensity to the degree of the participation.

A study of the *investigative methods* of a particular commission is also worthwhile. What kind of treatment is accorded its witnesses? Are the sessions entirely public, without recourse to closed hearings during testimony of an inflammatory nature? Or, conversely, are investigations conducted entirely behind closed doors? Between these extremes there are of course gradations of mixing. Closed session advantages may also be compromised if the commission has the power to release the record publicly, either partially, entirely, or in edited form.[46] Aside from a commission's own authority over its methods at the outset, what actually occurs during a particular investigation may indicate an immediate need for more due process protections. For example, public questioning of a witness may be inadvertently caustic or ridiculing. Its duration may be out of proportion to the relevance of the testimony's contents. The institution of contempt proceedings may also tend to unduly discredit a witness. The testimony of subsequent witnesses may implicate a participant beyond what was expected at the time he first took part.

The activities of the *news disseminating media*, particularly during public sessions, is another important consideration.[47] Live television or radio commentary is one exacerbating possibility. Less spontaneous are techniques relying on the filming, photographing or sketching for later use by television and periodicals; sessions routinely attended and commented on by correspondents; sessions attended by varying numbers of the curious public. Most of these dissemination alternatives, without more, are merely a mechanical means for distributing information and can usually be presumed to be objective. Somewhat different by nature are disclosures made to the media by members

46. An example of a prosecutorial proceeding which through absolute secrecy of its record is able to render inert its potency for severe harm through adverse publicity is, of course, the grand jury. As a result, the absence of almost all but a bare minimum of due process safeguards has not for the most part generated any pre-trial, unofficial sanctions. *See* Note, 72 YALE L.J. 1227, 1231-32 (1963). The *Jenkins* majority considered the grand jury an example of an accusative body which "merely investigates and reports. It does not try." 395 U.S. at 430.

47. "'Here,' said the managing editor, as he circled the item with his pencil, 'is a lie.' 'I know it is a lie, but I must print it because it is spoken by a prominent public official. The public official's name and position make the lie news.'" The quote is by O. K. Bovard of the St. Louis Post-Dispatch, from Dilliard, *Congressional Investigations: The Role of the Press,* 18 U. CHI. L. REV. 585, 587 (1950-51).

of an investigative commission or other participants in the form of post-hearing news conferences, impromptu interviews, public speeches, news releases, or "leaks" of an unspecified origin, as well as reports to subordinate and higher agencies. This type of dissemination is unlikely to be a careful re-publication of the record and will in many instances incorporate facts out of context which have a poorly veiled purpose of persuading listeners and readers. On such occasions, it is likely that an audience will be unable to evaluate the underlying basis of the utterance or document.

A final factor, and one which is less certain in relationship, necessarily, to either the cause or effect in the formation of defamatory matter, is the occurrence of *opprobrium-indicative events*. Inflammatory journalism, acts of social ostracism, loss of a job, and publicized threats or attempts on a participant's life are examples. Such matters would seem to have an accelerative influence on public disfavor. They are also reliable indicators of developing rancor, and as such, are worth acknowledging.

Admittedly, the above considerations are at best a somewhat inexact method for detecting an atmosphere of potential notoriety. The detection of such an atmosphere well in advance of harm is the obligation derived from *Jenkins*, however. Because some of the factors are peculiarly subjective does not mean the area is so speculative as to be unmanageable. The obligation requires that two types of determinations be made. The first, it seems clear, is a preliminary one involving such matters as an inquiry's purpose, the status of its target participants, its subject matter, likely investigative methods, and the potential incidence of news dissemination. The other determination, further along in the inquiry, involves a reevaluation of the foregoing factors as well as consideration of any after-processes and opprobrium-indicative events that have surfaced. To some extent all of these facets are really only part of a "purpose" test. Their thrust, however, is a broadening of that test so that it focuses on more realistic indicators.

Just as the harmless purpose of a proceeding at the outset may not mean that its effects are harmless, so the presence of widespread public knowledge probably does not spell the inevitability of public distaste. The major hurdle in this area is to isolate any factors which will prove reliable. Whatever method of analysis is adopted, it does not appear that it will be a great

deal more free wheeling than that already in use to differentiate between adjudicative and investigative bodies.

Another question is whether these factors are apparent only from the vantage point of hindsight, so that a reviewing court is actually the first body capable of accurately assessing the brunt of opprobrium arising from a proceeding. While this may be true to some degree, an ad hoc determination of similar matters by an administrative agency would not seem useless merely because the evaluation rests on fewer or less certain considerations. Being closer in time to the proceedings is not necessarily a disadvantage when attempting to size up the notoriety potential of the subject matter, collateral events, and unofficial after-processes.

IV. Due Process Alternatives for Confronting Public Opprobrium

The subject of additional procedural due process rights in investigative proceedings has been thoroughly treated by other journals, so that a detailed summary of these proposals is beyond the scope of this paper.[48] The prospects of Court recognition of the less than clear element of public opprobrium, however, suggest a need for recognizing a few of the procedural problems and their alternative answers.

It is not true that any further recognition of individual procedural rights during an investigation must be at the expense of investigative efficiency.[49] A threat of public rancor suggests two alternative responsibilities of due process in this area[50]—control of information reaching the public and opportunity for rebuttal. It merits little more than a passing observation that procedural efficiency remains virtually unaffected by permitting a right to executive sessions,[51] the silent but advisory pres-

48. *See* Davis; Jaffe; Rourke; Galloway; Newman; and Note, 72 Yale L. J. 1227 (1963).

49. The basic inquiry of any court when faced with a request for more due process protections must be how the procedural efficiency will be affected if the request is granted, or rather, will the public interest be served in any manner by following a rights-denying policy. That interest in most cases must be to ensure that "correct determinations" are made, within some tolerable margin of error to avoid cost or delay. The problem, as Newman sees it, is locating the margin of tolerable error. 49 Calif. L. Rev. at 227-28.

50. *See* Newman, *Due Process, Investigations, and Civil Rights,* 8 U.C.L.A.L. Rev. 735 (1961); Note, 72 Yale L. J. 1227, 1241 (1963).

51. The concern that secret hearings are inherently inquisitional is largely mitigated by the presence of counsel, at least in an advisory capacity. *See* Note, 72 Yale L. J. 1227, 1236-37n.44 (1963).

ence of counsel,[52] a monetary fine for improper disclosures of the record outside of the proceedings, and allowing some type of suit for defamation by the ill-timed utterances of investigative or quasi-investigative officials.[53] These are protections which for the most part are unconnected with the efficient course of proceedings toward their objective. Yet these rights are important to the limited flow of information into public channels of consumption.

Rebuttal by a defamed witness (or, for that matter, by a non-witness),[54] on the other hand, will undoubtedly involve damage to the efficiency of any investigative process. The right conjures up at the very minimum the opportunity for confrontation and cross examination.[55] It may involve the privilege of introducing into the record some evidence, sworn statements, or witnesses on one's own behalf.[56] There may be a need also to provide a participant with a copy of the transcript,[57] as well as

52. This right is absolute where an administrative body must adhere to § 6 (a) of the *Administrative Procedure Act.* 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1958). Newman, *Federal Agency Investigations: Procedural Rights of The Subpoenaed Witness,* 60 MICH. L. REV. 169, 170-71 (1961-62). As a result, the FTC now recognizes the right during non-public hearings for counsel to enter objections of record. *See* Note, 72 YALE L. J. 1227 (1963).

53. Disclosure of information to the public by agency employees is a statutory violation in some cases. Other statutes permit disclosures at an agency's discretion, as in the case of the FTC, CAB, and SEC. But the Supreme Court has held that such an agency determination is judicially reviewable. DAVIS at 225.

54. The plaintiff in *Jenkins* was a non-witness with audacity enough to claim injury. He was a member of a labor union which in some way had been adversely reflected upon. The discrimination against non-parties is evident from the fact they are not entitled to a notice of the proceedings even though they provide documents for the investigation. *See* Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look At CAB v. Hermann,* 69 YALE L. J. 131, 140n.71 (1959).

55. *See* JAFFE at 757, 850. A need in this area is a precise definition of what "confrontation" and "cross examination" should consist of in the administrative context. Newman, 49 CALIF. L. REV. 215, 221 (1961). Newman has suggested that no greater rights are needed than already recognized in normal adversary proceedings. He notes that one problem peculiar to the investigative area is that in some instances there will be no one to confront or cross examine, such as when an anonymous tipster provides a lead, or when a witness is being queried about reports which he has submitted. *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness,* 60 MICH. L. REV. 169, 177 (1961-62). He suggests that if allowing cross examination is too costly in time, confrontation alone might be appropriate. *Id.* at 180.

56. GALLOWAY at 491; Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness,* 60 MICH. L. REV. 169, 179-80 (1961-62); JAFFE at 854.

57. The *Administrative Procedure Act* § 6 (b) requires that such be provided to every person required to submit information or evidence, except if it is a non-public hearing, in which case inspection of the official transcript is adequate. 60 Stat. 24 (1946); 5 U.S.C. § 1005(a) (1958).

provide him opportunity to make motions, arguments, and assert privileges.[58] It is in this area of rebuttal, then, that a balancing of the private and the public interests needs to occur. Moreover, the unqualified right to rebuttal seems more appropriate in an open proceeding where the risks of defamation are very great than in a proceeding exclusively in executive session. Recognition of this right with its tendency to convert a proceeding into a slow-moving adversary proceeding is far more likely to draw the fire of critics. A strong point against the recognition of an opportunity for rebuttal here is that, even permitting it to its fullest extent, rebuttal may have little effect on curbing the spread of rampant public opprobrium. Damaging disclosures can easily pre-empt banner headlines or succinct television news commentary, while a later rebuttal or retraction on the record may pass through the media without comment.[59] More importantly, rebuttal is poor protection against disfavor arising from certain inflammatory subjects.[60] A repugnant status such as an infiltrated informant, or the techniques of the more sensationalistic of news media, particularly the "hate literature" distributed by private extremist organizations, may also lessen the value of rebuttal.

Far less likely to be lost in the wash of public disfavor is the other alternative—control of information and in most instances, its denial to the public. Heavy reliance on executive sessions[61] and the other rights mentioned above are only four of several alternatives under this heading. Also useful are such things as[62]

1) prohibiting the filing of any report by a commission without the concurrence of the majority of its members;

58. *See* JAFFE at 754. The danger is that disclosures may be compelled during the hearing to determine the extent of the immunity privilege claimed. *See* Edwards v. United States 312 U.S. 473 (1941).

59. The responsibility of ensuring that this does not occur is that of the follow-up writers of editorials. *See* Dilliard, *Congressional Investigations: The Role of The Press,* 18 U. CHI. L. REV. 585, 588 (1950-51).

60. Particular public antipathy of the involvement with subversive activities and loyalty-security matters has been the spark behind action by many courts in this area. *See* ROURKE at 246.

61. SEC custom is to hold private proceedings unless, in exceptional cases, the investigation has a quasi-legislative purpose. *See* JAFFE at 758. One judge has recommended that secret proceedings not be forced on a party without the concurrence of a majority of a commission. GALLOWAY at 494.

62. The basic source of these recommendations, except as modified slightly, is GALLOWAY at 496-98. According to him, these safeguards are from a listing of 41 of the most common suggestions appearing in some 14 recently proposed codes for the improvement of due process safeguards. Only those particularly applicable to the discussion of unfavorable publicity have been included here.

2) prohibiting publication of any unfavorable statement unless the person reflected on has been advised of its content and given the opportunity of filing a sworn statement in reply;
3) prohibiting the speaking, writing, or lecturing on the topic of the investigation by any commission member;
4) permitting the taking of secret testimony only in the presence of more than one other member of the commission, besides the interrogator;
5) prohibiting public statements by commission members, as well as the photographing or making of moving pictures, televising or recording broadcasts of any proceedings;
6) prohibiting the release to the public of any information taken in executive sessions without the concurrence of a majority of the commission;
7) creation by statute of a civil penalty for false testimony;
8) prohibiting the distribution of a transcript which has been edited or altered for publication;
9) prohibiting any commission member from making any summary or prediction of the outcome before issuance of an official report;
10) release of all testimony on which a report is based concurrently with the report.[63]

The desirable solution should require that a large measure of discretion be left to an administrative agency, in view of the many types of investigative bodies that exist or can be created. Along this same line, it has been suggested that the most resourceful of protectors of due process would be an enlightened body of investigative personnel in the administrative fields,[64] perhaps even a permanent civil service for the conduct of investigations at various levels of government. But such a body would have to be willing to adopt self-imposed restraints.[65] An alternative

63. In *Jenkins,* the majority enumerated a few of its objections to the due process model followed by the Louisiana commission. 395 U.S. at 429-30. Among them are the stringent limitations on the right of a party to confrontation and cross examination of hostile witnesses, since it was limited to those summoned as witnesses themselves. Cross examination was limited to those questions approved in advance by the Commission. The opinion also found fault with the limits on a party's right to introduce evidence or witnesses on his own behalf.
64. GALLOWAY at 483.
65. ROURKE at 243.

would be the imposition by statute of a core of minimum due process standards governing fair hearing procedures.[66] Whatever the solution, as a long term guide it would seem likely that "[t]he elements of a workable code are to be found in the best practices of successful investigating committees."[67]

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66. GALLOWAY at 492.
67. *Id.* at 495.