WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 1976 NUMBER 1

SYMPOSIUM

THE FIRST AMENDMENT AND THE RIGHT TO KNOW

LEGAL FOUNDATIONS OF THE RIGHT TO KNOW*

THOMAS I. EMERSON**

Recent events have brought to our attention, once again, the vital importance in a democratic society of the right to know. James Madison long ago stated the elementary facts:

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.[1]

His proposition has never been more true than it is today, in a world of expanding social controls, lessening moral constraints, and unforeseen possibilities for mutual destruction. The question to which I address myself is whether the right to know can be effectively incorporated into our legal structure, through development of an adequate constitutional theory and workable operating rules.[2]

---

* This paper was delivered as the Tyrrell Williams Memorial Lecture at Washington University Law School on March 3, 1976.

** Lines Professor of Law, Yale University. A.B., 1928; LL.B., 1931, Yale.

1. Letter from James Madison to W. T. Barry, August 4, 1822, in 9 WRITINGS OF JAMES MADISON 103 (G. Hurst ed. 1910).

2. Prior material dealing with this subject includes J. BARRON, FREEDOM OF THE

It is clear at the outset that the right to know fits readily into the first amendment and the whole system of freedom of expression. Reduced to its simplest terms the concept includes two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression.

Moreover, the right to know serves much the same function in our society as the right to communicate. It is essential to personal self-fulfillment. It is a significant method for seeking the truth, or at least for seeking the better answer. It is necessary for collective decision-making in a democratic society. And it is vital as a mechanism for effectuating social change without resort to violence or undue coercion.

Likewise there are many advantages to recognizing the right to know as a legal right independent of, or perhaps supplemental to, the more traditional right of the speaker to communicate. The interests of the listener may not always coincide with the interests of the communicator. The communicator may not always be in a position to assert his rights. The admitted interests of the recipients will be entitled to greater weight when they are based upon an independent legal foundation, rather than being merely derivative of rights of the communicator. Additionally, the right to know focuses on the affirmative aspects of the first amendment and the system of freedom of expression, as well as simply looking at the negative right to be free of government interferences.

For these and other reasons, we ought to consider the right to know as an integral part of the system of freedom of expression, embodied in the first amendment and entitled to support by legislation or other affirmative government action. There has been some dissent from this

---

PRESS FOR WHOM? (1973); Klein, *Towards an Extension of the First Amendment: A Right of Acquisition*, 20 U. MIAMI L. REV. 114 (1965); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Steel, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952); Note, *Access to Government Information and the Classification Process—Is There a Right to Know?*, 17 N.Y.L.F. 814 (1971); Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970).

proposition, at least as to the constitutional status of the right to know.[3] But the argument for starting from this point seems to me overwhelming.

The Supreme Court has, on a number of occasions, recognized a constitutional right to know. The first clear expression of the doctrine came in *Lamont v. Postmaster General*, decided in 1965, in which the Supreme Court upheld the right of citizens to receive "foreign communist propaganda" from abroad without having to notify government authorities that they wished such mail to be delivered to them.[4] Later, in *Stanley v. Georgia*, a 1969 decision upholding the right of a person to read or see pornography in the privacy of the home, the Court said flatly: "It is now well established that the Constitution protects the right to receive information and ideas."[5] Again the same year in the *Red Lion* case, affirming the validity of the fairness doctrine in broadcasting, the Court declared: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[6] Likewise Congress, notably in the Freedom of Information Act, and many states in their sunshine laws, have provided legislative guarantees for the right to obtain information from government.

Nevertheless, the contours of the right to know remain obscure. The Supreme Court has sometimes ignored, or failed to give weight to the guarantee. Examples of this are its decisions in *Zemel v. Rusk*, upholding blanket restrictions on the right of American citizens to travel to Cuba;[7] and in *Kleindienst v. Mandel*, refusing to accord any weight to the right of American citizens to hear a foreign lecturer who has been denied a visa.[8] Nor has the legislature been fully successful in articulating specific rules regarding government secrecy or the right of access to government information. There is thus serious need for the

3. *See, e.g.*, Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971).

4. Lamont v. Postmaster General, 381 U.S. 301 (1965).

5. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

6. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). *See also* statements in Buckley v. Valeo, 96 S. Ct. 612, 632 (1976); Pell v. Procunier, 417 U.S. 817, 832 (1974); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The position was recently reaffirmed by the Supreme Court in a case decided shortly after this lecture was delivered, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976).

7. Zemel v. Rusk, 381 U.S. 1 (1965).

8. Kleindienst v. Mandel, 408 U.S. 753 (1972).

development of a comprehensive theory of the right to know that will give legal content to the concept and reconcile its requirements with the demands of other interests.

It has been suggested that the right to know be adopted as the sole, or at least the principal, basis for the constitutional protection afforded by the first amendment. Alexander Meiklejohn is the primary source of this theory. He took the position that the right of the citizen to receive and obtain information, in his capacity as sovereign master over the public servants who compose the government, is the exclusive justification for according all persons freedom of speech and other first amendment rights. In so far as a communication contributes to the public's right to know, in his view, it is entitled to absolute protection under the first amendment. But other forms of communication can be restricted by government, subject only to due process, equal protection, or similar constitutional guarantees. This theory thus makes the right to know the sole touchstone in the interpretation of the first amendment.[9]

In my view the Meiklejohn approach is not acceptable. In the first place, it neglects the function of the first amendment in protecting the right of the speaker to personal self-fulfillment. The potential of the first amendment in this respect is daily becoming more important as our society moves further and further toward conformity and depersonalization. In the second place, while it is entirely feasible as a constitutional matter to give full protection to speech, as distinguished from action, it is impossible to give absolute constitutional protection to the right to obtain information under all circumstances. Emphasis on the right to know, as distinct from the right of communication, will therefore yield less protection in the end to freedom of expression. Third, the dynamics of the system of freedom of expression rest on the assertion of individual rights by the person desiring to communicate, far more than on pressure from individuals desiring to listen. It is the speaker who is more directly affected, is more highly motivated to secure his right, will press harder to achieve it, and may have more power to succeed. To focus on the more indirect and diffuse rights

9. A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. *See* Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philospher*, 28 RUTGERS L. REV. 41 (1974); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Steel, *supra* note 2. *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

of the listener would likewise tend to weaken the system. Finally, history, tradition, doctrine, and practice have all developed largely on the basis of protecting the rights of the speaker. A change of direction would seem to come too late in the game.

The Meiklejohn thesis rests largely upon his favorite analogy to a town meeting. The essential point about a town meeting, Meiklejohn argued, is not that everyone present be allowed to talk, or to talk as much as he wants, but that everything relevant to the issue worth saying be said (and heard). The analogy seems to me to be inadequate. The town meeting is not the equivalent of a system of freedom of expression, but a limited forum in which the moderator (the government) must allocate scarce facilities among those desiring to speak, and where what the speakers say must be germane to the agenda. Moreover, this process of moderating, as visualized by Meiklejohn, injects the government into decisions on the content, political relevance, and worth of the speech, an area that is no business of government in a free system.

If we do not make the right to know the main basis for the system of freedom of expression, then what should be the role of that doctrine? There seem to be three general areas in which the right to know may be of special importance. One is the use of the doctrine against direct government interference with the system of freedom of expression. A second is its use in situations where the government seeks to regulate or expand the system by some form of affirmative action. And the third is its use in making information available from government or private sources. In addition, the right to know is subject to certain limitations when the right may confront other interests that deserve protection. It is impossible to discuss all aspects of these problems in detail here. But an outline of the issues can be attempted.

The Right to Know as a Defense Against Government Interference with the System of Freedom of Expression

In general, protection against government interference with the system of freedom of expression can be effectively maintained by securing the rights of the speaker. Of course, the value of the communication to the recipient is an important factor defining and supporting the right of the communicator. Moreover, under a balancing test of the first amendment, the interest of the recipient would be given

significant weight in striking the balance. The right to know, however, ordinarily plays a secondary role in the legal handling of these problems.

Nevertheless, there are some circumstances where it is necessary or valuable to carry the analysis beyond this point and to focus directly on the rights of the recipient. In such situations the right to know should receive direct constitutional protection under the first amendment.

One of these situations occurs when the government attempts to control expression by applying a sanction directly against the recipient, in lieu of or in addition to one against the communicator. Such a case is *Lamont v. Postmaster General,* already mentioned, where the impact of the government action fell squarely on the person seeking to receive communications from abroad. Another example is the *Stanley* case, also noted previously, in which mere possession of pornographic materials was made a criminal offense.

With respect to such situations it is possible, I believe, to lay down a firm and simple rule: The right to know should be fully, or absolutely if you prefer, protected. Other first amendment doctrines, including the incitement, clear-and-present-danger, and balancing tests, seem clearly unacceptable. The reasons for adopting this strict principle are similar to those which afford absolute protection to freedom of belief. The right to read, listen, or see is so elemental, so close to the source of all freedom, that one can hardly conceive of a system of free expression that does not extend it full protection. Moreover, any danger to the social order at this point is so inchoate and so unascertainable that it cannot be given substance or taken into account. On the other hand, the injury to the system of free expression from restricting such conduct is so gross that only a totalitarian system could contemplate it.

Fortunately, imposition of direct sanctions upon the conduct of receiving a communication is infrequent in our society. But it is not inconceivable that a government would attempt to control expression by such methods. An official secrets act, imposing criminal penalties upon the mere receipt of classified information, has been urged. Under our loyalty programs mere attendance at a meeting or receipt of a magazine have constituted evidence of ineligibility to obtain a government job. And laws making mere possession of "subversive literature" an offense are not, under conditions of hysteria, beyond the realm of

possibility. All such infringements upon the right to know should be unequivocally rejected as clearcut violations of the first amendment.

A second situation where it may be useful to rely upon the right to know for protection against government interference occurs when the speaker is not in a position to assert his rights. This happened in *Lamont*, where the persons communicating the information were in a foreign country, without access to our courts. It also happened in *Mandel*, since the alien seeking admission had only limited rights under the American Constitution. There may likewise be occasions when the speaker does have standing but fails to take action to vindicate his interests. Thus an exhibitor may fail to challenge censorship of a play or a film, or a publisher may elect not to distribute materials in the face of a threatened obscenity prosecution. Another instance of this occurred recently in the *Virginia State Board of Pharmacy* case, where the court struck down a state statute banning price advertisements by pharmacists, not on complaint of the pharmacists, but at the behest of an individual consumer and two consumer organizations.[10]

In these situations the Supreme Court has normally recognized the right of the recipients to seek direct vindication of their right to know. This should be the accepted rule. Indeed, even when the communicator has standing and undertakes to defend his rights, a person attempting to protect the right to know should also be entitled to raise the issue on his own. Such cases would presumably not arise often, and the issues would usually be the same. But the recipient should be allowed to present his position.

A third use of the right to know as protection against government interference with the system of freedom of expression arises in certain situations when the government itself engages in expression. The government of course is entitled to participate in the system of freedom of expression and, while its contribution may at times tend to drown out others, no constitutional objection can normally be entered. Under some circumstances, however, the government may possess a monopoly, or a near monopoly, of the means of communication. Here restrictions on the government are necessary to prevent a serious distortion of the system. For this difficult task, a limiting principle may be found in the right to know.

10. Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976).

For example, in the field of education, where the government has a virtual monopoly, certain kinds of curriculum restrictions seem to run afoul of the right to know. Thus in *Epperson v. Arkansas*, the Supreme Court considered an Arkansas statute which prohibited teaching the doctrine of evolution in the public schools. A majority of the Court found that the law violated the establishment clause of the first amendment, but the Court might better have placed its decision upon a violation of the right to know.[11] Similarly in the area of public broadcasting, the right to know would seem to compel the public broadcaster to present a reasonably balanced view on issues of public interest. The Supreme Court has not thus far employed right to know doctrines in this way, but the concepts are applicable and should be utilized.

Use of the Right to Know in Formulating Affirmative Government Controls Designed to Regulate or Expand the System of Freedom of Expression

A major current problem in maintaining our system of freedom of expression is that various economic and technical factors tend to distort the system. Like most laissez-faire arrangements, the free market of ideas does not work perfectly. Consequently, it is necessary for the government to step in at times in order to regulate or expand the system. Such action is frequently taken in the name of the right to know.

Government intervention of this sort is often necessary and proper. Yet inevitably it poses a delicate question. There is an alarming paradox in employing government power to support or improve what must ultimately remain a laissez-faire system. One must therefore weigh carefully the role of the right to know and the extent to which its principles justify governmental action.

The one crucial area in which the right to know should play a decisive and directing part is that of government allocation of scarce physical facilities among those desiring to use them. Shortages of communication facilities are not infrequent. Two television stations cannot broadcast on the same wavelength in the same locality; two organizations cannot march down Fifth Avenue at the same time. Without government allocation of facilities the system would become chaotic.

The first amendment does not foreclose government action to deal with the problem. Official intervention may take the form of legisla-

11. Epperson v. Arkansas, 393 U.S. 97 (1968).

tive, executive, or judicial power. But the first amendment does not disappear from the scene. Its mandate must be invoked to impose limits on the government and to reconcile the competing interests of those desiring to communicate. Under such circumstances the guiding principles are found in the right to know.

The most significant, and most sensitive, problem in this area concerns regulation of radio and television broadcasting. Despite argument to the contrary, it seems clear that under present technological conditions there is a shortage of physical facilities for broadcasting, namely wavelengths. It is not possible for all those capable of obtaining the physical equipment to broadcast. The fact that there are more radio and television stations than daily newspapers is not controlling. The appropriate comparison is not with newspapers but with printing presses, or even Xerox machines. In any event, this shortage of physical facilities is the only justification for government licensing of stations, or indeed for any regulation of broadcasting. Without that factor the first amendment would demand that, despite the economic concentration, the government keep hands off broadcasting, just as it must keep its hands off the press.

Since the government must allocate, however, it must do so according to some standards. A first-come-first-served test, allowing a permanent monopoly, would not make sense. The standards must be formulated primarily, perhaps exclusively, according to principles embodied in the concept of the right to know.

There are, of course, many difficult questions. In the first place, it is not even clear whose right to know is involved. Does the right to know belong to the individual in his own right? Or does its possession attach only to groups? If so, what groups are entitled to have their interests recognized? The answers are not subject to easy formulation. Yet basically, the genius of the American system of freedom of expression, as well as the practicalities of the situation, seem to call for principles which locate the right to know in various social groupings—economic, cultural, religious, and the like. These would be overlapping, and perhaps shifting from time to time, but it is along pluralistic lines that the solution must be sought.

Once the beneficiaries of the right to know have been identified, the next problem concerns what specific rights should be guaranteed. The answer has to be found in the values underlying our system of freedom of expression and the function of the right to know concept. There

should presumably be some fusion of the "is" and the "ought." The precise interests and claims of the various groups involved would, of course, be the dominating factor. But divergencies within the group would not necessarily be resolved in favor of the lowest common denominator. At some point, and to some extent, the pull of the ideal, as the system of free expression is currently conceived, would also become a factor.

Following these lines, the right to know would be construed to include a right to broad and adequate information on a variety of subjects. It would require opportunity to hear a multiplicity of opinions. At least some of the material would not be bland but would provoke "uninhibited, robust, and wide-open debate." There would be a diversity of programs. The requirements would be those of an active, alert, and civilized society.

As radio and television broadcasting is presently structured, with license to operate a station conferred broadly upon particular licensees, the right to know seems to conflict with the right of station owners and operators to communicate. Resolution of such conflict must turn upon the capacity in which the licensee is functioning. In so far as he is a trustee or agent for the general public, he is bound to follow government regulations designed to protect the right to know. Here the principles of the right to know prevail over the principles of the right to communicate. But in so far as the licensee is entitled to speak for himself, as he would be part of the time, then his rights as communicator are paramount and he must be accorded full protection against government interference with his communications. Similarly, other users of the broadcast station would be guaranteed full freedom of expression in so far as they are communicators. The impact of protecting the right to know thus falls only on the overall structure, not on the content of particular broadcasts.

Translating these basic principles into more specific forms of regulation, the right to know would clearly justify general programming requirements imposed by the Federal Communications Commission, as indeed was implied in the *National Broadcasting* case.[12] It would also validate the fairness doctrine, as was decided in the *Red Lion* case. Moreover, the principles of the right to know would carry beyond this point. They would justify a limited right of access to broadcasting

12. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

facilities, a form of regulation rejected by the FCC. The Supreme Court upheld the FCC position in the *Democratic National Committee* case, but left open the issue whether a government regulation that required access would be stricken.[13] As a matter of fact, it is hard to avoid the conclusion that the right to know demands a common carrier system of regulation in broadcasting. Only through such a structure can the right to know be effectively achieved.

All of this may well be changed by the advent of cable television. If the technical features of cable television eliminate the scarcity of of physical facilities, so that use of this media is open to everyone who can pay the cost, then the system would revert to an open and unregulated one, like the printed press. Under such circumstances the right to know would again become secondary to the right to communicate, and the system of free expression would operate primarily through protection of the rights of the communicator.

There are other applications of the right to know in this area which can only be mentioned here. An important one is the right of recipients to participate in the decisionmaking process for allocation of scarce facilities. Thus, procedural rights emanating from the right to know have been recognized in cases awarding listeners the right to intervene in FCC licensing proceedings.[14] Similar rights may be available to recipients of other forms of communication. Apart from procedural rights, the substantive principles of the right to know would also govern in other contexts, such as permit systems for parades, demonstrations, meetings, or other forms of public assembly. Allocation problems also arise in connection with press coverage of fires and other emergencies, and in situations involving curfews, press conferences, limited seating capacity in courtrooms, and the like. So long as access is limited by physical conditions, the allocation of scarce facilities must be governed by principles derived from the concept of the right to know.

A second major area where the right to know has been invoked concerns the right of access to means of communication other than broadcasting, primarily to the printed press. The underlying problem here, as already noted, is a critical one. The major instruments for communication in this country are in the hands of a relatively small

13. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

14. *See, e.g.*, Citizens Communication Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

group that uses them largely to expound a single economic, political, and social point of view. The resulting distortion seriously undermines the vitality and value of our system of freedom of expression.

One solution frequently advanced is that the law should provide for a greater degree of access to the available means of communication by compelling owners and operators to share their facilities with others who wish to communicate. This position is usually urged in terms of the right of the communicator to obtain access to the facilities. But proponents of the right of access have also relied heavily upon the right of the public to receive communications, that is, upon the right to know.[15] It is not entirely clear why the right to know should be stressed more here than in other circumstances where it is equally linked to the right of the speaker. Perhaps it is thought that control of the means of communication has an even greater impact on the system of free expression than suppression of individual speakers. Or possibly, since affirmative government action is required to obtain access, it is thought that a broader basis for justification than the right of a single communicator is necessary. In any event the right to know figures prominently in access cases.

One set of issues involves compulsory access to the privately-owned printed press. Since no state action is ordinarily present in this situation, the self-executing features of the first amendment are not applicable. Consequently, any right of access would be dependent upon legislation. Proposals for such legislation have ranged from affording a right of reply in defamation cases, to providing space for answer by a political candidate who has been attacked, to making mandatory the publication of paid advertisements, to a fairness doctrine for the printed press, and beyond.

While the issues are not free of difficulty, my own view is that the right to know does not provide adequate justification for measures of this sort. It should be noted that the problem does not arise from a shortage of physical facilities, as in the broadcasting situation, but results primarily from economic inequalities. An effort by government to eliminate differences based on economic disparities is an infinitely more complex and far-reaching problem than an attempt to allocate facilities in a shortage situation. The government does have some obli-

15. *See, e.g.*, Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

gation to equalize, but limiting the rights of some speakers, instead of raising disfavored speakers to a minimum level, invites disaster. A share-the-facilities program on such a scale can only result in less communication. And it involves a degree of governmental entanglement with the system of expression that is certain to end in severe repression of communication. In this conflict between the right to know and the right to communicate, the latter must be preferred. Such was the position of the Supreme Court in the *Tornillo* case, and in my judgment the Court was absolutely correct.[16]

A second set of issues in the area of access relates to publicly-owned means of communication. For many years the law has recognized a right to use the streets, parks, and other open places for assembly and communication. The right has been extended to some quasi-public areas, such as company towns and shopping centers. Despite recent limiting decisions by the Supreme Court, this right of access is firmly fixed in our constitutional law.[17] On the other hand, a right of access to publicly-owned media, such as government periodicals or public television, remains much more doubtful.[18] In either case, the right to know has hitherto played only a supporting role. The issues have turned almost exclusively upon an appraisal of the needs of the speaker and his right of access to an audience. Greater utilization of right to know principles, however, would facilitate the solution to these problems.

Finally, brief mention should be made of the use of the right to know in a third area of governmental controls, that of disclosure laws. Legislation of this sort seeks to compel those wishing to communicate to disclose various facts about themselves, such as identity, interests represented, source of funds, and the like. It includes not only general requirements for the disclosure of authorship of publications or membership in associations, but also data relating to election campaign

16. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Supreme Court reached a similar conclusion in striking down the ceilings on campaign expenditures incorporated in the Federal Election Campaign Act. Buckley v. Valeo, 96 S. Ct. 612, 649 (1976).

17. *See* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946); Hague v. CIO, 307 U.S. 496 (1939). Limiting decisions include Hudgens v. NLRB, 96 S. Ct. 1029 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

18. *See* Avins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

financing and lobbying activities. The right to know is invoked as the principal justification for these disclosure measures. There is no doubt that disclosure laws do, in most instances, increase the amount of information available upon which to judge the value of a communication. On the other hand they often directly impair the freedom to communicate. In my view, when this conflict occurs, the system of freedom of expression is better served by protecting the right to communicate, rather than the right to know. With the exception of campaign finance and lobbying laws, the Supreme Court has tended to adopt this position.[19]

Use of the Right to Know in Obtaining Information From Governmental or Private Sources

The most potentially significant application of the right to know lies in the area of obtaining information. Here legal doctrine can rely upon and give effect to the central purpose of the right to know. While some of the problems relate to the right to gather materials from private sources, the main issues concern government secrecy and the right to obtain information from government sources. This aspect of the problem will be discussed first.

In my judgment the greatest contribution that could be made in this whole realm of law would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government. There is a firm, indeed overwhelming, theoretical base for accepting this position. While I doubt that the Meiklejohn theory is adequate as a foundation for the whole system of freedom of expression, in this area his theory is clear and convincing. The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible. Whether or not such a guarantee of the right to know is the sole purpose of the first amendment, it is surely a main element of that provision and should be recognized as such.

19. *See* Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). *Cf.* Buckley v. Valeo, 96 S. Ct. 612 (1976); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); United States v. Harriss, 347 U.S. 612 (1954).

A close analogy can be drawn here to the right of the legislative and judicial branches of government to obtain information from the executive branch. In *United States v. Nixon*, the Supreme Court expressly upheld the right of the judiciary to obtain data necessary to a grand jury investigation from the President himself.[20] Similarly, while there is no Supreme Court confirmation as yet, the power of Congress to force the executive to produce materials necessary to the congressional function cannot be doubted. These rights are subject, as the Court ruled in the *Nixon* case, to a right of executive privilege, but the basic constitutional right to information must be regarded as amply established. If one conceives of the citizenry as constituting a fourth branch of government, its right to information would flow from the same premises. Indeed, as the dominant branch of government, the citizens would possess rights superior to those of the other branches.

Moreover, the whole concept of government information as public information has received increasing recognition in recent years. One clear manifestation of this has been the growing number of federal and state freedom of information laws, sunshine laws, and similar legislation. The experience of the nation with Watergate has spurred this development. Clearly the country has come to accept the notion that the ordinary citizen is entitled to access to government information. This concept, so broadly based, is ready to be incorporated in constitutional doctrine.

Indeed, the Supreme Court has given some hint that it is moving in that direction. In its 1974 decisions in *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, the Court considered the validity of regulations which prohibited journalists from interviewing prison inmates. A majority of the Court rejected the contention that members of the press have a first amendment right to interview any prisoner willing to talk to them. But it was careful to point out that the regulations involved did allow substantial access by the press and the public to the prisons and that the purpose of the provision in question was not "to conceal from the public the conditions prevailing in federal prisons." The clear implication was that a total foreclosure of information about the internal operation of prisons would run afoul of the first amendment. Moreover, a strong minority of four Justices made the position explicit. Justice Powell pointed out that "First Amendment concerns encompass

20. United States v. Nixon, 418 U.S. 683 (1974).

the receipt of information and ideas as well as the right of free expression," and concluded that "the underlying right" is the "right of the public to the information needed to assert ultimate control over the political process . . . ." Justice Douglas, in another dissenting opinion, took the same view, contending that it was not the right of the journalists that was involved "but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner."[21]

There is only one other case in which the Supreme Court has dealt with a similar issue. In *United States v. Richardson* the Court held that despite the provisions of article I, section 9 of the Constitution, requiring "a regular Statement and Account of the Receipts and Expenditures of all public Money," a taxpayer and citizen has no standing to demand information about the CIA budget.[22] The case must be accounted an unusual one, in view of the national security problems involved, and of course the Court did not reach the merits. It is hard to believe that government regulations which cut off all access to government information, such as one that totally prohibited the press from talking to government employees, would be sustained under the first amendment.

One would seem to be on solid ground, therefore, in asserting a constitutional right in the public to obtain information from government sources necessary or proper for the citizen to perform his function as ultimate sovereign. Furthermore, this right would extend, as a starting point, to all information in the possession of the government. It is hard to conceive of any government information that would not be relevant to the concerns of the citizen and taxpayer. Moreover, the right should be enforced by giving all parties whose interests are at stake, namely the citizen or taxpayer, standing to assert their rights in the courts. Without delving into the intricacies of standing law at this point, and despite the *Richardson* case, recognition of such a cause of action would not take the courts much beyond the point they have already reached in the *Data Processing, Sierra Club, SCRAP*, and similar cases.[23]

Starting from this initial point, some exceptions would have to be formulated. In theory these exceptions should be scrupulously limited

21. Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974). The quotations are at 417 U.S. 848, 863, 872, 839-40.

22. United States v. Richardson, 418 U.S. 166 (1974).

23. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

to those that are absolutely essential to the effective operation of government institutions. Many would exist only for a limited time. In practice, if one approaches the problem with the view that government information is public information, the exceptions would be confined to a very narrow compass. It is impossible to consider these problems in detail here. In general it may be said that some allowance would have to be granted for sensitive national security data, but only to the extent that tactical military movements, design of weapons, operation of espionage or counterespionage, and similar matters are concerned. Diplomatic negotiations and collective bargaining negotiations might also need some protection, at least temporarily. Criminal investigations and uncompleted litigation, and possibly also trade secrets, may fall into the same category. Beyond this, the major areas in which withholding of information would be justified would be those when it is necessary to protect the right of executive officials to receive full and frank advice from subordinates and colleagues—that is, executive privilege—and those where the privacy of individuals is involved.

Establishment of this much of the constitutional right to know through judicial procedures would, of course, be a long and tedious process. Fortunately, a good start has already been made to achieve the same end through legislation. The Federal Freedom of Information Act adopts much of the basic pattern just outlined. It commences with a blanket requirement that every government agency presented with a request for records "shall make the records promptly available to any person." It then provides for nine exceptions, some of which are excessively broad, but which cover much the same areas set forth above. Equally important, the Act contains detailed provisions for enforcing agency compliance, including judicial review. Some states have passed similar legislation, and others have adopted sunshine laws which provide for open meetings. Recognition of the right to obtain information from the government has thus made substantial progress. Acceptance of the constitutional right would provide a firm foundation for further development and close important gaps in the legislative structure.

Mention should be made of one other area in which the right to obtain information, embodied in a constitutional right to know, becomes important. This concerns the power of government to control the communication of information by its employees and former employees, and to control the dissemination of information that has leaked out of the

government apparatus. Despite the *Pentagon Papers* case[24] and the *Marchetti* case,[25] both constitutional and statutory law in this area remain obscure. Conscientious adherence to right to know principles would remove much of the uncertainty.

There can be no doubt of the power of the government to punish espionage, in the narrow sense of conveying sensitive national defense information to a foreign country with intent to injure the United States. Nor does anyone question the authority of the government to adopt security measures to safeguard that information which it is not obliged to disclose, or to discipline its employees who reveal information in violation of valid security regulations. Possibly the government may also possess a very limited power to apply criminal sanctions to employees who violate security regulations, although I believe that as a matter of policy such legislation should not be enacted. In addition the ordinary sanctions against theft, trespass, burglary, and the like are, of course, justified.

Beyond this point, however, the right to know would protect the circulation of information which has escaped the government's grasp. This constitutional protection is essential for two powerful reasons. One is that the action of the press and other investigators in extracting information from the government is a principal source of knowledge about the inner workings, sometimes devious or corrupt, of the government apparatus. Interference with this kind of information would leave the citizenry exclusively dependent on the bland handouts of government agencies. The second reason is that government efforts to prevent the dissemination of information which has leaked into the public domain would have a stifling impact upon all discussion or circulation of information about public affairs. If the government could extend its controls to specific pieces of information, under the claim that they are official secrets, the system of freedom of expression would be near collapse. As Watergate demonstrated once again, the exposure of questionable or illegal government practices is so vital to the operation of the democratic process that it should be protected not only in terms of the right to communicate but also as a function of the right to know. Indeed, here the right to know would extend protection sub-

24. New York Times Co. v. United States, 403 U.S. 713 (1971).

25. United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

stantially beyond that which would be guaranteed by the right to communicate alone.

The right to gather information from private sources raises several questions which can only be briefly summarized here. The Constitution, of course, does not obligate any private person, that is, nongovernment person, to disclose information to any other private person. Indeed, a private person is protected against unwilling disclosures by a variety of laws against trespass, theft, fraud, and other crimes and torts. There has never been any suggestion that these laws infringe the constitutional right to know.

The more important issues relate to the right to collect information from sources willing to disclose it. Here two problems have come to the fore. One is the right to travel as a means of informing oneself of collecting information for publication. In *Zemel v. Rusk*, a State Department regulation banning travel to Cuba was attacked, among other reasons, on the ground that it infringed the right to know.[26] The Supreme Court, in a divided decision, upheld the regulation, treating the conduct of travel as constituting action and hence outside the parameters of the first amendment. The dissenters expressly recognized the relevance of the right to know and would have given that factor sufficient weight to overcome the national security interests that the State Department was asserting. Although the right to know is certainly an important element in this situation, the problem is better treated as one involving freedom of movement, or the right to travel—that is, as a liberty protected under the due process clause. The right to know is not the main focus, and can influence the decision only as one factor to be taken into account in striking a balance between the interests in conflict.

The other major problem more directly concerns the right to know. That is the right of journalists and other newsgatherers to keep their source of information confidential against the demands of prosecuting attorneys, grand juries, courts, legislative committees, or other government officials. Without question the pledge of confidentiality, and the capacity to honor it, are crucial to most investigative reporting. Whether it be an investigation of organized crime, the drug scene, a militant political organization, corruption or incompetence in government, or any similar matter, much information vital to public decisionmaking

26. Zemel v. Rusk, 381 U.S. 1 (1965).

will not become available if reporters can be forced, often by powerful and hostile officials, to reveal their informants, produce their notes, or otherwise disclose details of their inquiry. Since the result of government intervention is to dry up vital sources of information, the public's right to know becomes a central issue.

There are, of course, important public interests arrayed on the other side of the ledger. Hence the problem is a difficult one. In *Branzburg v. Hayes*, decided in 1972, a majority of the Supreme Court held that the reporter's right to gather news was entitled to some protection under the first amendment, that the issue must be decided by a balancing of interests, and that normally the interest of the public in investigating and prosecuting crime would outweigh the reporter's right to withhold his testimony.[27] In my judgment the Court gave insufficient value to the right to know. Indeed, it treated the issue primarily as one of the reporter's privilege, rather than of the right of the citizenry to obtain hard-to-get information of immense social importance. Moreover, the Court's solution, while it apparently leaves open the possibility that in individual cases a lower court could strike the balance in favor of the reporter's privilege, in effect withholds virtually all constitutional protection. Since the newsgatherer can seldom tell in advance under what circumstances a court will allow him to keep a pledge of confidence, he cannot rely upon any constitutional right in deciding whether to make such a pledge. In that situation the right to know is of little use to him, and investigative reporters must rely upon the power and will of the press to resist encroachment.

Limitations on the Right to Know

Two general and important limitations on the constitutional right to know must be noted. The first of these is the right of privacy, and the second is the right *not* to know.

The clash between the right of privacy and the right to know is obvious. One is almost the exact opposite of the other. Indeed, the right of privacy has been defined by some as the right not to disclose information about oneself to others, or the right to control the dissemination of information about oneself.[28] In my view that definition of privacy is too narrow, but it does illustrate the head-on confrontation

27. Branzburg v. Hayes, 408 U.S. 665 (1972).

28. *See, e.g.*, A. WESTIN, PRIVACY AND FREEDOM 7 (1967).

between the two important rights, each recognized as having constitutional dimensions.

In the legal world, the conflict between the right of privacy and the right to know takes a variety of forms. In one form the question is whether the tort of invasion of privacy, either as recognized by common law or established by statute, is consistent with the first amendment right to communicate or to know. Or the conflict may appear as an issue under the Freedom of Information Act or the Constitution as to whether the government may withhold information from the public on the grounds that disclosure would constitute an invasion of privacy. Again, the issue may be presented in terms of whether the first amendment places any limits upon the sealing of arrest records or upon legislation such as the Privacy Act of 1974. In whatever shape it appears, the issue is bound to arise more frequently and to become more important in the coming years.

There are several approaches available in seeking a reconciliation of the two constitutional rights. One is by the process of ad hoc balancing. Under this favorite constitutional formula, the interests in the public's right to know would be weighed against the interests of the individual in maintaining his privacy. While the courts are more disposed to employ this method of reconciliation than any other, it has the usual serious drawbacks of a balancing test. It is vague, amorphous, and unpredictable, allowing a court to reach any conclusion that it wishes. And it is difficult to apply because there is no common unit of measurement to place upon the opposing sides of the scales. While some element of balancing would probably be found in any test, the balancing formula seems to offer the least useful path to follow.

A second alternative has been proposed by President Edward Bloustein of Rutgers. Starting from the Meiklejohn theory that the purpose of the first amendment is to guarantee citizens the information and ideas they must have in order to govern, Bloustein suggests that the line between the two constitutional rights be drawn in terms of the *need* of the public to know. In so far as the communication is one that is necessary or useful in this governing process, he argues, it should be protected by the first amendment; otherwise, it may be prohibited or curtailed as a violation of the right of privacy.[29] The Bloustein formula has many attractions. One need not accept the Meiklejohn theory

29. Bloustein, *supra* note 9.

as the sole basis for protecting first amendment rights in order to adopt Bloustein's doctrine as the rule for reconciling the two constitutional rights involved here. Moreover, the formula is manageable and functional. Yet it does have significant disadvantages. Most important is that it acknowledges the right of the government to determine the value of particular speech. This violates a cardinal principle of the system of freedom of expression, that the government may not regulate expression on the basis of its content. It is not the prerogative of government to decide whether any communication is good or bad, useful or dangerous, needed or not needed.

A third approach, and the one I favor, would give precedence, in any conflict, to the right of privacy. This formulation is based upon the proposition that the constitutional right of privacy is intended to protect the autonomy of the individual by establishing a zone of privacy within which the individual is protected against intrusion by any rule, regulation, or practice of the society in its collective capacity. The demands of the first amendment, like those of any other rule of the collective, would be subordinate to the requirements of the privacy right. Couched in these terms, the issue would then become one of defining privacy, rather than balancing interests or ascertaining the need to know. Such an approach suffers from the fact that no comprehensive or accepted definition of privacy exists today. But it has the advantage of avoiding balancing, eliminating the need for governmental judgments about the content of expression, and focusing on the real issues. A satisfactory understanding of the meaning of privacy must be developed in the course of time.

However accomplished, the reconciliation of the right to know and the right of privacy is crucial. These two constitutional concepts represent major developments in the progress of modern society. Somehow they must be brought together, so that each can flourish in its own sphere.

The second major limitation on the right to know presents less difficult problems. The right not to know, akin to the right of privacy, protects the individual against communications forced upon him against his will. The Supreme Court has consistently recognized such a right. For example, in *Public Utilities Commission v. Pollak*, the Court fully accepted the proposition that the first amendment protected anyone from being part of a captive audience, although in that case it did not

uphold the claim that music and news broadcasts in District of Columbia buses infringed that right.[30] The Court has several times indicated that materials considered obscene could not be thrust upon an unwilling listener or viewer.[31] And in *Rowan v. Post Office Department*, the Court upheld a federal statute providing that any person who mailed material which the addressee in his sole discretion believed to be "erotically arousing or sexually provocative" would be subject to an order of the Postmaster General to refrain from further mailing of such materials to the objecting addressee.[32]

On the other hand, the Supreme Court has also recognized the first amendment right both to seek out an audience and to be annoying, provocative, and offensive in public places. Thus in *Martin v. City of Struthers* it struck down a city ordinance that prohibited door-to-door canvassing.[33] And in *Cohen v. California* it invalidated the conviction of a young man who walked through the corridors of a courthouse with the message "Fuck the Draft" emblazoned on the back of his shirt.[34]

Drawing these lines is not always easy. In general, however, the conflict is between the right not to know and the right to communicate, rather than the right to know. On the whole, the right to know and the right not to know readily exist together.

Conclusion

This then, in outline form, is the status of an emerging constitutional right. The issues raised are typical of some of the frontier problems of the first amendment. They deal not only with the negative force of the first amendment in protecting against government interference but also with the affirmative use of that constitutional guarantee in expanding the whole system of freedom of expression. The old doctrines remain important when one is considering the right of the government to impose direct sanctions upon the right to read, listen, or observe. But the role of the right to know in formulating govern-

30. Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

31. *See, e.g.*, Redrup v. New York, 386 U.S. 767, 769 (1967).

32. Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

33. Martin v. City of Struthers, 319 U.S. 141 (1943).

34. Cohen v. California, 403 U.S. 15 (1971). *See also* Gooding v. Wilson, 405 U.S. 518 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972).

ment controls to allocate scarce facilities, to provide mandatory access to the means of communication, or to compel disclosure, calls for the development of new doctrine. The use of the right to know in obtaining information from government sources, its significance in analyzing the extent of reporter's privilege, and the reconciliation of the right to know with the right of privacy, all take us into uncharted fields. The effort to formulate a comprehensive theory that will clarify and give substance to the presently amorphous concept of the right to know presents a continuing challenge.