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# Official Secrets and the Right to Know

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Professor Schauer's study presents a clear explication of the general concept of "rights" and the "right to know" in particular. This commentary will focus on two of the points presented in Professor Schauer's study and explore them in an effort to find more unequivocal answers. First, Professor Schauer correctly observes that the right to know, like the right of privacy that appears to be antithetical to it, is not explicitly included among the guarantees in the Bill of Rights. If such a right exists, it must be inferred. Second, most of what are commonly called "rights" are negative guarantees. They are the right not to be interferred with or to be subjected to governmental actions that our society has agreed are unfair or improper. On the other hand the right to know appears to be a "thou shalt" rather than a "thou shalt not" command requiring positive action by the government. These two problems will be explored separately and in the order stated.

## I

First, a philosophical and legal basis can be found for the idea of a right to know. One of the fundamental concepts underlying our whole system of participatory democracy--and the theoretical underpinning of the First Amendment--is that the participants, the electorate, do participate fully and intelligently in the decision-making process on all public issues. To do so necessitates being informed. The basic principle has received repeated expression in writings on the theory of representative government from John Milton through John Stuart Mill to Zechariah Chafee, Jr., Thomas I. Emerson, and Franklyn Haiman.[1] Often this theoretical concept is presented and discussed in terms of the metaphor of a "marketplace of ideas." This marketplace of ideas is described as a free, competitive one in pure Adam Smith terms in which ideas flow freely and in which the consumers, all of us, are free to select those ideas we feel are best. Alexander Meiklejohn said as well in Political Freedom: "At the bottom of every plan of self-government is a basic agreement, in which all citizens have joined, that all matters of public policy shall be decided by corporate action,. . . We, the people, acting together, either directly or through our representatives, make and administer the law."[2]

One problem with the marketplace metaphor is the clear evidence of history that people do make wrong choices. Consumers can and do make errors in judgment and select ideas that

historically prove to be wrong. However, this problem can be resolved by recognizing that those who use the marketplace metaphor in a political context usually do not extend it to include Adam Smith's concept of the "hidden hand" that ultimately always makes the right choice. Only Milton seems to suggest this idea, and then only in a very limited context. Rather the core of the metaphor is that people are free to choose from all the available options. It is even argued that wrong choices are the direct result of restricted options and manipulations that inhibit choice. This view is at the heart of criticism of the performance of the mass media emanating from all points of the political spectrum. On a more profound level Herbert Marcuse has argued that the very structure of our society is purposely designed to prevent the majority from making the right choice.[3]

The philosophical concept of a marketplace of ideas in a participatory democracy is confirmed both by implication and explicit statement in a variety of Supreme Court opinions dealing with matters of freedom of expression. In Lamont v. Postmaster General, a rare instance in which the Court declared an act of Congress unconstitutional on First Amendment grounds, Justice William Brennan stated in his concurring opinion, "It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[4] Here Justice Brennan clearly states a constitutional right to know and even expresses that right in terms of the marketplace of ideas metaphor.

Another example can be found in New York Times v. United States. The majority's per curiam opinion simply affirmed the view of the appelate courts that the attempt to restrict the free flow of information through prior restraint was unconstitutional. In one of the signed concurring opinions Justice Hugo Black stated, "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. . . . Only a free and unrestrained press can effectively expose deception in government."[5] Here Justice Black expressed clearly both the rights of free access to information for all the electorate and the role of the news media in conveying that information to the public.

A third example from yet another context, that of obscenity, can again be found in the words of Justice Brennan, this time in Roth v. United States: "All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the guaranties

(of the First Amendment) . . . .[6] Once again there is the clear implication that a right to know exists. It should be noted that in this case, like the others, this right to know is viewed as an extension of the freedom of communication protected by the First Amendment.

Finally, the philosophical concept of the right to know has been explicitly recognized as a statute right by the Freedom of Information Act of 1966. At the signing of this law President Lyndon Johnson called attention to "one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits." He went on to express "a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."[7]

In sum, a right to now can be found in the philosophical principles that underlie our participatory democracy system of government. This right has been recognized both by implication and explicitly in opinions of Justices of the Supreme Court dealing with First Amendment issues as well as in a specific act of government—the 1966 Freedom of Information Act.

## II

Turning now to the second issue, is the right to know really qualitatively different from other constitutional rights? Most recognized constitutional rights prohibit the government from doing something rather than requiring that it do something, and the right to know seems to suggest that government is required to do something. However, the language of the 1966 Freedom of Information Act clearly states that the right to know is in fact a prohibition of specific government actions—the acts of keeping things secret. The principle that underlies here is the one noted earlier that the people as a whole in our system of government are both the governed and the governors. Government acts in the name of the people for the people. Thus, the government's business is the public's business, and it should therefore remain public. The right to know simply prohibits government suppression of information. As Justice William O. Douglas observed in his concurring opinion in New York Times Co., v. United States, "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information . . . . Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion are vital to our national health."[8]

In his study Professor Schauer characterizes the right to know as "almost trivial" when simply viewed as a negative right against government secrecy. However, a recognition of the magnitude of the problem of government secrecy leads to the conclusion that this negative right is far from trivial.

Official secrecy today appears as a major threat to the proper working of our system of government. In their review of the problem of secrecy Harold Nelson and Dwight Teeter trace this public-government conflict to the Second World War era. "Access to meetings was denied, reports, papers, documents at all levels of government seemed less available than before officialdom's habits of secrecy developed in the passion for security during World War II."[9] They see the 1966 Freedom of Information Act as the direct result of the growth of abuses--positive acts of concealment by government.

The impulse to conceal is understandable. Knowledge --information--is power. Anyone who has worked in even the smallest business or academic community immediately recognizes this fact as do our elected political leaders. The result is that neither Justice Douglas' vision nor the stated objectives of the 1966 Freedom of Information Act have been realized. As Burt Neuborne, national legal director of the American Civil Liberties Union stated in a recent interview, "Information in the modern world is power, and some of Reagan's people understand this in a very sophisticated way. They view information as a weapon and are attempting to institute a whole range of governmental controls in order to fight Communism."[10] Today by executive order the basic premise of the free flow of information has been changed. Today there is a system of document classification that allows government officials to conceal whatever they, our servants, decide that we, their masters, do not <u>need</u> to know. In addition these regulations require prior approval by all affected government agencies of any article or book written by any present or even former government employee.[11] The negative, non-trivial, "thou shalt not" right to know should prohibit all such governmental interference with our philosophical, constitutional, and statutory right to know. If our system of government is to survive, this conduct must be stopped.

It needs to be clearly stated at this point that this argument deals only with governmental acts of secrecy. This right, like other constitutional rights deals solely with acts of government rather than those of private parties. It does not reach to the acts of secrecy of private individuals, even those who are identified in the law as public figures. It must however, be recognized that the distinction between governmental and private is not always clear. When a large corporation engages in violations of the law, illegal dumping of toxic wastes for example, are these private acts not reached by the right to know or are they semi-official, quasi-governmental activities? If a public utility, a private corporation operating with a government license, is guilty of improper conduct, are these public, governmental acts about which the public has a right to know? The answers to these questions require a clearer definition of what is governmental as opposed to non-governmental than now exists.

III

Finally, where does this argument for a philosophical, constitutional, and statutory right to know leave the information media. Are information gatherers to be afforded some special place or role in this scheme? The answer repeatedly given by the Supreme Court is no. In Branzburg v. Hayes the court clearly stated that reporters have the same rights and obligations as any other citizen.[12] Two years later, writing for the majority in Pell v. Procunier, Justice Potter Stewart declared unequivocally, "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."[13] In effect, in this scheme, the information gatherers have a non-trivial right to obtain information without the limitations of governmental secrecy that is co-extensive with the right of all other citizens. However, with the division of labor that exists within modern, complex society, it has become the special task of the information gatherers to perform this function for the rest of us and to report their findings to us. It should be recognized that neither is this gathering function completely performed nor are the findings fully and accurately reported. Even at this level the marketplace of ideas does not function in a manner that even approaches the ideal and perfect market in the Adam Smith model.

NOTES

1. John Milton, Areopagitica; John Stuart Mill, On Liberty; Zechariah Chafee, Jr., Free Speech in the United States (Cambridge: Harvard University Press, 1941) and other works; Thomas I. Emerson, Toward a General Theory of the First Amendment and The System of Freedom of Expression (New York: Random House, 1963 and 1970); Franklyn S. Haiman, Speech and Law in a Free Society (Chicago: University of Chicago Press, 1981).

2. Alexander Meiklejohn, Political Freedom (New York: Harper & Row, 1948), pp. 13-14.

3. Herbert Marcuse, One-Dimensional Man (Boston: Beacon Press, 1964); see also A Critique of Pure Tolerance (Boston: Beacon Press, 1969).

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

5. New York Times v. United States. 403 U.S. 713 (1971).

6. Roth v. United States, 354 U.S. 476 (1957).

7. Quoted in Harold L. Nelson and Dwight L. Teeter, Jr., Law of Mass Communications, 4th ed. (Mineola, NY: The Foundation Press, 1982), p. 400.

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

9. Nelson and Teeter, p. 394.

10. "Why He Wanted to be A C L U Legal Director and What He's Going to Do Now That He Is," Civil Liberties, February 1983, p. 3.

11. Robert Pear, "Wide Power Given on Classified Data," New York Times, March 14, 1983, p. D12.

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

13. Pell v. Procunier, 417 U.S. 817 (1974).