CHAPTER 6

THE RIGHT TO KNOW

Members of a local school board exclude journalists while they discuss a motion to dismiss a teacher and void her contract. Later, the board chairman urges a newspaper editor not to print the story. Here are two related instances blocking what is often called *the people's right to know*. In the first instance, there is an effort to stop the *gathering* of information; in the second, its *publication* and *dissemination*. As defined by many journalists and some legal scholars, the right to know is the right of the listener to information of public interest and importance. In order for this *right* to be functional, however, information must be acquired and published.

Although it is not specifically stated in the Constitution, there is a widely held belief among journalists and other media personnel that there is a right to know. This right is usually defined as the right of the public to have access to information about government policy and decision making. The press sees itself as the conduit for such information because the average citizen has neither the capacity nor the resources to gather continuing and detailed intelligence about what the government is doing. The people, the argument goes, must have full and robust information about what their government is doing in order to be knowledgeable voters and good citizens. Government secrecy leads to suspicion and a lack of confidence in public officials and their policies. The people's right to know is transformed, however imperfectly, from an abstract principle to a concrete reality in *sunshine acts* that require government bodies to hold open meetings and to have their records open for public inspection. Theoretically, government should operate in the open and should be accountable to the people and the right to know would make that possible. Rights—strong, fundamental rights—almost always trump legislation and privileges. For example, the constitutional right to speak usually overrules a community's concern about protecting the peace in instances of controversial marches by unpopular groups. The media's access to information has traditionally been a

privilege rather than a *right*. Still the belief persists that the public has a right to know, one that the media happily trumpets whether it is constitutionally guaranteed or not.

CHALLENGE

Dennis: There is no right to know.

The right to know is not an inalienable right guaranteed by the Constitution, but is instead something that was invented by journalists and citizens interested in getting information held by government or the private sector. For a number of years journalistic organizations have been badgering the courts and the legislatures in the hope of establishing their right of access to various confidential sources of information. This so-called right now has some modest basis in law, in that on occasion courts have said that under certain circumstances and in very specific areas there is a right to know. But this is something so conditional that it is not a right at all, but a quite limited privilege that depends on the disposition of judges. What they give today they can take away tomorrow. I believe that the right to know is a badly flawed concept that actually interferes with other rights and may do more to impair than to advance First Amendment freedoms. Still, it is important to note that the right to know is frequently a privilege created by the legislature rather than something that someone finds by name in the Constitution. In fact, 31 states as of 2004 had such a journalist's privilege statute, some constructed quite narrowly and others giving journalists considerable latitude not to reveal their confidential sources. Technically, the media and the public do not have a strong right of access to information for one simple reason: The Supreme Court has not seen fit to recognize a constitutional right of access except to the courts. The press and the public do have a constitutional right of access to attend open court proceedings and some other public meetings.

The right to know is most often invoked when media people are asking for rights and privileges that the rest of us do not have. It is a justification for a vague category of corporate rights because the right to know is not put forth as an *individual* right but as an *institutional* right, and here is where the argument gets hazy. The First Amendment guarantees a right to speak that belongs to individuals. Advocates of the right to know say that this new right is derived from the right to listen. Listeners (or anyone receiving the messages of free speech and press) are entitled to a flow of information—hence the right to know. It is notable that most of the rights enumerated in the Bill of Rights are for individuals, but the media would change this by adding a little corporate institutional appendage.

According to Harvard law professor Lawrence Tribe, a leading constitutional scholar, right-to-know advocates would differentiate between the "focused right of an individual to speak" and "the undifferentiated right of the

public to know" (Tribe, 1988, 674). People who take this position, he notes, argue that the First Amendment does not confer individual rights but protects a system of freedom of expression. "This view," he says, "unduly flattens the First Amendment's complex role" (Tribe, 1988, 675). Another leading scholar, Edwin Baker, agrees. A right to know, he says, is never more than a right to have the government not interfere with a willing speaker's liberty.

The right to know is something of a journalistic invention. It began in the early 1950s when the press felt increasingly thwarted by bureaucrats who were standing between them and government information. It began as a quest for access to records and meetings, the so-called sunshine laws, short for government operations *in the sunshine* or open. These journalists wanted access to government records, documents, and proceedings at both the state and federal levels. This was called the Freedom of Information (FOI) movement. The bible for this activist effort was a thoughtful, weighty tome called *The People's Right to Know: Legal Access to Public Records and Proceedings* by Harold L. Cross (1953). The FOI movement had many positive consequences. It brought sunshine laws (open-meeting and open-record legislation) in most of the states, fostered the federal Freedom of Information Act, and opened up many government meetings from which the press and public had previously been barred. The FOI movement was both necessary and desirable, but the journalists did not stop there. Many excesses followed. The press claimed that it should have access to many classified government records and files, including some dealing with national defense and national security. Journalists also asked for greater immunity from libel suits, whether brought by public officials or private citizens. Some reporters asked for a right to rummage through the private papers of individuals to pursue the truth and frequently claimed that the right of privacy was an undue hindrance on the press and public.

Over the years the media and some legal scholars have rightly pressed for the free flow of information, including access to judicial proceedings, open records, and open meetings, all essential to a functioning democracy. But they've also gone further, arguing that a vague right to know, often linked with gossip and curiosity, trumps the right of privacy. Additionally, the media community has been joined by various health crusaders, the environmental movement, and people associated with emergency preparedness, who also argue for a right to know. This has led free press advocates such as Jane Kirtley of the University of Minnesota to assert that "it is generally acknowledged that Americans enjoy this right" (Kirtley, 2003). She invokes a broad interpretation of the First Amendment to justify almost any intrusion of the media into private matters.

In 2004 there were a number of high-profile cases in which journalists were threatened with contempt of court and jail sentences for refusing to reveal confidential sources. Judith Miller of the *New York Times*, for example, got caught up in a bizarre conflict with the courts for refusing to reveal a source related to information about White House aides who allegedly leaked the name

of a CIA agent who was married to an administration critic. In this instance, Ms. Miller had not even published the information, but this didn't stop the courts from insisting that she lift the veil of confidentiality. She truly believes that what she was doing was right, but only on the basis of civil disobedience, not settled law. That's always a journalist's "privilege," of course.

So what if journalists argue for their position? If it were merely the mutterings of media people at the press club, there would be no problem. But all of these claims and many more have been brought to the Supreme Court of the United States. In each case the rationale has been the people's right to know. This approach is what Anthony Lewis calls "press exceptionalism": special rights for the press that are not available for the rest of the public. This approach also introduces a conceptual problem because the rest of the Bill of Rights applies to individuals but the right to know is advanced as an *institutional* right. Efforts have been made to establish a broad constitutional right. And, as good lawyers will tell you, there is always *authoritative support* for any position if lawyers look hard enough. In this instance authoritative support was found in the writings of James Madison, who once said, "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 which knowledge gives." As Justice William O. Douglas once wrote:

> The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen aside as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people. (Douglas, 1972, *Branzburg v. Hayes*, 408, U.S. Reports, 665 at 713)

This has a bittersweet ring for a number of publishers, broadcasters, and Internet entrepreneurs who are clearly in the communications business to make money and who have only the vaguest passing interest in the people's right to know, even though their rhetoric sometimes suggests otherwise.

Although the right-to-know leaders appreciated the support of Justice Douglas, they hankered for something more than mere rhetoric. They thought they had it when Justice Potter Stewart gave a notable speech at Yale Law School. In that now famous speech Justice Stewart said that the "Free Press Clause extends protection to an institution" (Stewart, 1975, 631). This is what the right-to-know advocates were waiting for: the First Amendment as an institutional right, and mighty support for the idea of a people's right to know. But alas, the word according to Stewart seemed to have currency only at Yale. It was not a majority position of the Court (or even a minority view) and thus not the law of the land. The people's right to know was still in the realm of grand theory. Although it has been repeatedly pointed out that the Stewart speech had no standing in the developing law of the First Amendment, it is often invoked as though it were chiseled in stone and blessed by the framers. This position of structural freedom

of the press based on a right to know was and remains one person's opinion and has not become law. The Stewart speech nevertheless gave much fuel to hungry legal and journalistic minds seeking support for the right to know.

The next turn in the debate was a position put eloquently by federal judge Irving Kauffman, who said that freedom of the press was dependent on protection for three aspects of the communication process: acquiring, processing, and disseminating information. This makes perfect sense, and journalists argued vehemently that it is virtually impossible to disseminate information without acquiring it (through news-gathering methods) and processing it (by editing and preparing it for publication). This is logical, of course, but once again journalistic fancy was light-years ahead of legal reality. What Judge Kauffman posited was a theory of freedom of expression and from my point of view a very desirable one, but one without a solid legal foundation.

Most legal scholars agree that there is powerful constitutional support for the dissemination of information; most First Amendment law centers on the right of people to speak and to publish. There is much less legal basis for acquisition of information and, in fact, much of the press's claim in this area is tied to a case that *denied* the press any special privilege to withhold names of news sources in court proceedings. In that case Justice Byron White offered a less than reassuring statement with a double negative construction, that "news gathering is not without its First Amendment protections" (White, 1972, in *Branzburg v. Hayes,* 406 U.S. Reports, 655 at 707). He did not say what they were. On the matter of processing news or editing it, the law is quite thin. Rarely have courts been asked to give special protection to this aspect of media work, and not surprisingly they have not initiated it themselves. In a few instances when they have been asked to grant news-processing rights, they have generally declined to do so. An exception was in May 2001 when the Supreme Court said the press was not liable for ill-gotten tapes and opted for the public's right to know over personal privacy (Greenhouse, 2001).

The press has been inventive and resourceful in trying to establish the right to know as a provision of constitutional law, but to date it has not done so; and from all appearances this idea will have to percolate for a long time before it is allowed to raise conceptual havoc with the rather specific language of the First Amendment. Justice Stewart aside, the right to speak and publish is both an individual right and an institutional right. However, for many years the ability to publish and broadcast really was limited to media owners. This has changed somewhat, first with the advent of desktop publishing allowing cheap and easy communication for ordinary people and even more so with the coming of the Internet and the World Wide Web enabling people to create Websites that can theoretically reach millions. The tension between the little media made possible in a digital age and the still large organizational presence of big media means that controversies over the so-called right to know are usually associated with the economic motives of media companies. In reality, however, media are

mostly large-scale enterprises and getting an individual message through for the ordinary person is pretty difficult.

The right to know is a very limited privilege with many important exceptions, so many that to call it a right is misleading. One of the strongest advocates of the right to know is communication law scholar Franklyn S. Haiman, who says the public's right to know is a vital element of the First Amendment "because much essential knowledge is in the hands of agencies and officials of government who can thwart the democratic process by keeping relevant material secret" (Haiman, 1981, 368). Haiman says the right to know is based on the need of the public for information to exercise its responsibilities of citizenship. "In a fundamental sense, data in the hands of government belongs to the public, having been collected through the use of taxpayers' money and for the exercise of authority derived from the people as a whole" (368–69). All well and good, but then come the exceptions (which Haiman acknowledges and supports) to government disclosures that seriously undermine any right to know:

- The need to protect the privacy and other legitimate personal interests of those about whom information is gathered
- The need to insure candid deliberative processes
- The need to safeguard the public's economic interests
- The need to preserve the physical safety of society and its institutions (Haiman, 1981, 369)

These broad and compelling exceptions blow a hole in the people's right to know, which need not be absolute, but certainly must have a broader reach than Haiman and other scholars envision if it is to be a fundamental right and have real meaning. Rights are not "now you see them, now you don't" propositions.

The right to know has a flimsy legal foundation, which is reason enough to question whether it should be accorded the kind of status journalists want to confer upon it. But there are even more compelling reasons for viewing this so-called right with real trepidation. Journalist and screenwriter Kurt Luedtke, quoted elsewhere in this book, put it succinctly when he told the Newspaper Association of America:

> There is no such thing as the public's right to know. You made that up, taking care not to specify what it was the public had a right to know. The public knows whatever you choose to tell it, no more, no less. If the public did have a right to know, it would then have something to say about what it is you choose to call news. (Luedtke, 1982, 4–5)

Luedtke got it right. If the public really does have a right to know, it surely has a right to determine what information it truly needs to know and to demand that the press (as its surrogate) deliver that information forthwith. Out the window goes the right of the editor and broadcaster to edit and to decide what is news. And here the nightmare begins. If the press is to become the legal representative of the people under a general principle of a right to know, then it

will certainly be told by the courts and legislatures that it has a duty to provide particular information to the public. This definitely would be a shocking intrusion on freedom of the press and is something that I would hope no thinking journalist would advocate. New rights bring new duties, and I have serious doubts that the press will want the baggage that will come with the public's right to know, if such a right should be given full and complete constitutional protection. I say let well enough alone, stop making self-serving claims in the name of this public *need*.

ARGUMENT SUMMATION: *There is no right to know.*

The right to know is not to be found in the Constitution, which preserves individual rights—not institutional rights. The right to know is, rather, a creation of courts and is therefore a privilege that can be taken away. Before rising to constitutional importance it must take on more breadth than is presently recognizable. Originally the freedom of information movement achieved legitimacy by focusing on the need for access to government records, but it has since expanded its aims to include a general right to know. However, even the right of access to government records is severely limited by exceptions such as privacy, economic interests, social stability, and national security.

RESPONSE

Merrill: There is a right to know.

My coauthor contends that the right to know is not an inalienable right guaranteed by the Constitution but is, rather, something invented by journalists or granted to us by benevolent legislative bodies. It is difficult to dispute either of these contentions. Such a right is not overtly in the Bill of Rights, and it does seem that only journalists and public interest advocates have made much, if anything, of such a right.

Nevertheless, even after saying this, I must insist that a right to know for the citizenry of a libertarian (free and open) society does indeed exist—even if such a right is a philosophical right and not spelled out literally in the First Amendment. In my mind a fundamental or natural right exists whether or not there is any provision at the moment for constitutional enforcement. That often comes in due time. Rights, I believe, do eventually emerge and gain legitimacy

in the law, even if the government at the moment (here or elsewhere in the world) temporarily balks at what is really a right.

It may well be that a people's right to know is not explicitly stated constitutionally, but journalists did more than invent it: They inferred from the freedom of the press clause that a people's right to know existed. I suppose that by making such an inference, which seems quite logical to me, they did in a sense invent this right to know. But instead of feeling guilty for such an invention, if such it was, journalists should be proud that they have seen this public right standing in the philosophical shadows supporting a free press.

Why, we should ask, did the Founding Fathers provide for a free press? Simply for the sake of having a free press? Just so future citizens could brag about such a provision? Obviously there was a pragmatic reason for the free press (as well as the free speech) provision in the Bill of Rights. And this reason revolves around what we now call the people's right to know. If the people (the sovereign rulers of the republic) do not know about public affairs and government business, they surely cannot be good sovereigns; they cannot govern themselves well. In the philosophical framework in which they find themselves, they *must* know. Their government is built upon the assumption that they will know; therefore, certainly it is their right to know. They need to know; they have a philosophical mandate to know in order to be consistent with their political purpose. The very reason for a free press is so that the people can know.

Someone will ask: If the people have a right to know, then does not the press share responsibility with government for letting them know? My answer is yes. If the press argues for such a right (and I maintain that the press in a free society, with its press freedom, *must* believe in such a fundamental right), then it must take very seriously its responsibility of providing knowledge about public affairs to the people. If there is such a public right to know, and I believe there is, then the press has an important responsibility to fulfill this right—to see to it that the people are able to know.

At this point the government enters the picture, for the press cannot let the people know what the press cannot get from the government. So, I maintain that the people do have a right to know public business and that both the press and the government have the responsibility to let the people know. Certainly the people cannot know about their government without the cooperation of both press and government. But the fact that the press and government both fail from time to time to let the people know does not eliminate that right.

The concept of the people's right to know has mainly been promoted since World War II, with books such as Harold Cross's (1953) *The People's Right to Know*, Kent Cooper's (1956) *The Right to Know*, Althan Theoharis's edited collection, *A Culture of Secrecy: The Government vs. the People's Right to Know* (1998), and numerous articles declaring such a right and castigating government for infringing on it. No adherent to a libertarian theory of the press can help

admiring and applauding such antigovernment broadsides, but the problem is larger than this. Two other important factors are involved in this business of letting the people know: the people and the press. Too often they are left out of the discussion of this topic.

Frankly, the people either don't know they have a right to know or they don't take it seriously. It appears that they simply don't care. Such a right to know is certainly of great importance—a civil right if ever there was one. Such a right is at the very foundation of American government, of public discussion, of intelligent voting, of public opinion, of the very fabric and essence of democracy. And yet the people appear to have little or no concern for this right. But unconcern does not do away with the right. The only segment of our society that seems really concerned about the people's right to know is the press. Journalists criticize, agitate, and fret about government infringing on the people's right to know. They justify—rightly—their own press freedom by appealing to the public's right to know.

A problem with the press is that it places all the blame on government for denying the people their right to know. This, of course, is not true. The news media themselves participate in the denial of this right. Persons familiar with the typical news operation must recognize that only a very small portion of government-related information gets to the average citizen's eyes or ears. So, in effect, the news media are guilty of the same sins of omission and commission that they point to in government.

Editors and news directors, while promoting the idea of a people's right to know, are busy selecting and rejecting government information. They leave out this story, that picture, this viewpoint. They are, in effect, censors—perhaps with the best of motives, but censors nevertheless. They manage the news just as government officials do. They also play their part in the restriction of the people's right to know. Editors call this practice "exercising their editorial prerogative." They see themselves as editing; they see the government as managing and restricting public information. But the people's exercise of the right to know is being limited regardless of these semantic games.

One who observes the editing operations of a newspaper or magazine is struck by the swiftness with which government news is discarded. While wastebaskets fill with information that the people presumably should be reading, one sees few tears and little gnashing of teeth in journalistic ranks. It is as if these practitioners of journalism obscure their own coverage of government without even realizing that they, like the government officials they criticize, are keeping back information that, in their own words, "the public has a right to know." And though it can be argued that virtually all government agencies have Websites with voluminous material available to the public, I worry about what's not there in that sea of information, the very facts and information that are much needed to make personal and institutional decisions. And all the while press people are hailing the right to know as indispensable for the country.

Media people are correct, of course. The public does have a right to know. This right has always been embedded in the American journalistic context, even though it has not been traditionally as popular as it has been since World War II. Now the emphasis is shifting from the press to the people, from journalistic freedom to journalistic responsibility, from institutional rights of the press to social rights of the citizenry. It is all part of the shift from negative freedom to positive freedom. Part of the social responsibility theory of the press is an emphasis on what the press does positively rather than what the press might be kept from doing by government. The people's right to know is a logical outgrowth of this trend. I maintain that the philosophical rationale for press freedom (interpreted until recently as the press's freedom) all along has been that the people need to know. This need is translated philosophically into a right in our type of pluralistic, open, libertarian society where the people theoretically are the sovereigns.

Professor Kirtley, who is cited by my colleague Dennis, has written persuasively that the right to know is crucial to democracy itself—and I agree. As she puts it, "In any democracy, an informed public is vital. The public votes to elect officials who draft and execute their laws. Without information, citizens would risk being alienated from a government that becomes less and less accountable to them" (Kirtley, 2003). She goes on to quote one of Dr. Dennis's favorites, Justice William O. Douglas, who wrote, "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide open' debate."

Outrageous cases of courts' and judges' effectively blocking the right to know do exist, of course. In 2004, in addition to the Judith Miller–Valerie Plume case involving revelations about a CIA agent that could have put her life in danger, a more typical case of "notebook and shield" occurred in Providence, Rhode Island, where a TV reporter was put on trial for criminal contempt for doing his job. His "crime" was accepting a videotape from a confidential source that showed a city official accepting a bribe. As NBC News president Neal Shapiro wrote of the case, "This is precisely what news organizations are supposed to do. The footage gave the citizens of Providence information they deserved to have about city officials who, since the story broke, have been charged, tried and convicted of criminal activity" (Shapiro, 2004). He adds that "it is high time journalists were added to the list" of shield laws that protect psychotherapists, doctors, lawyers, and the clergy.

In conclusion, despite the sophisticated arguments put forward by Professor Dennis and others who deny this right, I again assert that the people's right to know does exist. However often it is denied—by government and by the press—it is still there, serving as the main underpinning of a democratic society of the American type. It is the justification for press freedom and an absolute requirement for the political viability of the United States.

ARGUMENT SUMMATION: *There is a right to know.*

Certainly there is no explicit constitutional right to know, but there is surely an implied or natural right to know. The concept of press freedom assumes such a right, for obviously the press would not have such freedom for no (or only a selfish) reason. The country's philosophy is based on the people as sovereigns; therefore, there is a need for them to know, and this need is logically translated into a right. Both the press and the government share in the responsibility to let the people know. The people may not think much about such a right, but they instinctively feel they have it, given their type of government. If they do not have such a right, then they see no real reason for a free press.

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Use the following terms and phrases to search for more information on InfoTrac College Edition: *rights, duties, responsibility, sunshine laws, access to information, right of access, individual rights, institutional rights, First Amendment law, censorship, positive freedom, negative freedom, right to know.*

TOPICS FOR DISCUSSION

1. Think about the public's need to know, desire to know, curiosity to know—and consider these alongside a *right* to know. What are your conclusions?
2. If a right to know is not in the Bill of Rights, where do we get such a right? Is it any more than a theoretical or idealistic right?
3. If it is a right of the people to know, why do media themselves withhold information? How can a newspaper editor believe in such a people's right while refraining from giving a quote's source, naming a rape victim, or divulging the source of a government leak?
4. Can press freedom, which *is* in the Constitution, be equated with the public's right to know? Explain your answer.
5. If the invention of the right to know came about in the early 1950s, why do you think it developed so late in American history if the principle on which it rests is valid?

TOPICS FOR RESEARCH

1. Write a paper about forces for and against the right to know. Who have the right-to-know spokespersons been over the years? Who have been their opponents?
2. Prepare a study of the origins, present status, and probable future of the federal Freedom of Information Act.
3. Write a review essay about three or four major books or articles about privacy from the perspective of the right to know. When do privacy rights take precedence over the media's desire to know something?
4. What is intellectual property? How is it connected to the law of copyright? Why is copyright law a part of U.S. federal code? How do copyright and protection of an individual author's rights impair the people's right to know? Should anyone care?
5. Why is there a debate over the right to know? Why is it that media people believe it exists and lawyers say "no way"?

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