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THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT. By *David M. O'Brien*. New York: Praeger Publishers. 1981. Pp. x, 207. Cloth $21.95; paper $11.95.

> *Pandora's Box*. A present which seems valuable, but which in reality is a curse.
>
> —Brewer's Dictionary of Phrase and Fable

Attempts to construct a constitutional "right to know" either for the general public, or for the institutional press on behalf of the public, typically run into grave difficulties, which accounts for the fact that the Supreme Court's majority has always and wisely refused to do so directly. So runs David O'Brien's major thesis. Why write a book about a doctrine that has not been adopted, especially when the writer disapproves of the doctrine to begin with? I suppose O'Brien has written this book, not only in praise of a wise Court majority, but to help prevent the minority from ever achieving its objective.

That a constitutionally-grounded right to know, or a federally-protected "press privilege," might yet prevail remains a distinct possibility. Justice Stevens, concurring in *Richmond Newspapers, Inc. v. Virginia*,[1] expressed the perception that the Court had decided a "watershed case," "unequivocally" holding for the first time that "an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."[2] And Congress, responding to the Court's decision in *Zurcher v. Stanford Daily*,[3] enacted statutory restraints on non-suspect searches, but limited the scope of these protections to the work-product of journalists, broadcasters, and authors.[4] These devel-

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1. 448 U.S. 555 (1980).

2. 448 U.S. at 582-83 (1980) (Stevens, J., concurring). The case upheld the *public's* right to attend criminal trials absent a compelling reason for exclusion. *Cf.* Gannett Co. v. DePasquale, 443 U.S. 608 (1979).

3. 436 U.S. 547 (1978) (search of newspaper office does not offend fourth or first amendments).

4. Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (Supp. IV 1980). § 2000aa(a) provides in part:

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate commerce.

opments, of course, do not signal the imminent triumph of the right to know; Justice Stevens wrote only for himself, and a statutory press privilege may prove less troublesome than a constitutional one. But these events do emphasize the current flux in this area of law and policy, and the difficulty of predicting what form — if any — the right to know will ultimately assume.

It should be emphasized, however, that O'Brien is not necessarily opposed to a right to know. He admits, and does not severely criticize, the fact that in some cases the Supreme Court has protected such a right — although seldom explicitly. For instance, Justice Blackmun in the *Virginia Pharmacy*[5] case rested much of his argument on the right of consumers to obtain price information about prescriptions. But O'Brien insists that the Court should go no further. He thinks that any broad, direct grant of a right to know should come from legislatures rather than from the Court. Thus he does not appear to disapprove of the Freedom of Information Act, state shield laws, or sunshine statutes. Much of his argument is based on the theory that legislatures, not courts, should make policy about rights which are not enumerated quite specifically in the Constitution.

Reasons for this willingness to accept — even approve — a politically-granted right while opposing the same constitutionally-granted right may not seem obvious. Basically O'Brien seems to feel that politically-granted rights may be easily amended or repealed — "fine-tuned" — when they are seen to be unwise or unworkable. But a constitutional right once granted cannot easily be taken away and only with difficulty changed. O'Brien relies also, of course, on a mild version of what John Hart Ely calls "clause-bound interpretivism."[6] That is, he thinks that the Court should not create rights which are not enumerated in the Constitution. But he seems to believe much more strongly that working out a policy based on a right to know involves serious practical difficulties, and that the courts are not the best place in which to resolve these challenges.

I. Problems of a "Right to Know"

The primary difficulty with a right to know as a constitutional concept is simply that it is not in the Constitution. One may indeed feel that O'Brien's opposition to the addition of unenumerated rights is somewhat exaggerated. After all, there is ample precedent in the first and other amendments: the right to travel is even less obvious than a right to know.[7] And of course

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The statute has been interpreted as creating a privilege against searches only for the press-related classes of individuals enumerated in the text of the statute. *See* National City Trading Corp. v. United States, 635 F.2d 1020, 1025-26 n.3 (2d Cir. 1980) (upholding search of law office, noting that adoption of the act, "which limits the circumstances under which documentary material may be seized from journalists and authors, does not affect the Supreme Court's interpretation of the requirements of the Fourth Amendment in *Zurcher*.").

5. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

6. J. Ely, Democracy and Distrust (1980).

7. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964). Justice Goldberg based the right to travel mainly on the fifth amendment, but found the refusal to issue a passport under Congressional mandate unconstitutional primarily because of First Amendment "overbreadth."

there is the right of privacy, which seems to hover uneasily in mid-air among the first, fourth, fifth, ninth and fourteenth Amendments.[8] Rights can, moreover, be read out of as well as into the Constitution: obscenity is perhaps the most obvious first amendment example.[9] Of course, O'Brien treats these (except the last) as examples *ad horrendum*. But since the right to know is clearly in the first amendment area, his argument is not as persuasive as it might be. Nevertheless, he argues strongly that neither the words nor the history of the amendment justify the creation of such a right.

What one makes of his argument depends on one's own approach to constitutional interpretation. A libertarian-activist (or, to use Ely's pedantic term, a non-interpretivist) such as William O. Douglas would pay such arguments little attention, for to him what matters is what we *should* have, so long as the Constitution does not forbid it and the words can be made to accommodate it.[10] But O'Brien, like Ely, feels that the Douglases go too far; they break completely from the mooring supposedly provided by the words of the Constitution. Unlike Ely, however, he places great stress on the intention of the Framers and on textual analysis.

A second problem with the right to know lies in the impossibility of defining it, or perhaps more accurately, the difficulty of confining it. It is a protean concept which seems to take whatever form its advocates wish it to have. Some of the problems are briefly discussed below.

Most advocacy of the right to know seems to ground it in the necessities of democracy. It is averred that a people holding the right and power to govern must have the information upon which to base wise decisions. But this concept — deriving, perhaps, as O'Brien points out, from Alexander Meiklejohn[11] — seems rather Philistine and anti-cultural, since it places its entire emphasis on the kinds of knowledge needed to make governmental decisions. It leaves out whole realms of human experience as manifested in literature, the arts, and even such mundane newspaper staples as cooking and sports. It would not go far toward justifying the consumer's right to receive information about the prices of prescription drugs.[12]

On the other hand, a right to know framed broadly enough to include all these good things would probably also embrace within its capacious folds other things so banal or perhaps even immoral that most people would not wish them included. After all, the Court's rationale for excluding obscenity from the protection of the first amendment seems to be that at some point the obscene becomes positively noxious.[13] Even Justice William J. Brennan still accepts this idea, at least when the obscene is aimed at

8. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

9. *See* Roth v. United States, 354 U.S. 476 (1957).

10. The best example of Douglas' constitutional free-wheeling is probably his concurring opinion in Roe v. Wade, 410 US. 113, 209 (1973) at 209.

11. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

12. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

13. *See, e.g.,* Chief Justice Burger's opinion for the Court in Miller v. California, 413 U.S. 15 (1973).

or available to children.[14] Few would argue that even the adult general public really has a right to know about the latest devices for sexual self-excitation.

As O'Brien points out, any direct adoption by the Supreme Court of the right to know would inevitably involve it in the same kinds of definitional struggles that have arisen in the obscenity context. One might point to other areas as well, and argue that the Court has mired itself down in its attempts to provide concrete definitions for abstract concepts. Just one — when is picketing protected speech? — illustrates the point.[15] O'Brien clearly believes that for the courts to waste their political capital on such a dubious venture is impolitic, to say the least.

One might add, merely to highlight the complexities of the right to know, that in cases under the National Labor Relations Act the courts have always accepted the law's limitation of the right of employers to present their side in a labor dispute.[16] Evidently, neither Congress nor the judges feel that workers are intelligent enough to choose wisely if they hear both sides. What happens here to the right to know? The Court has also held, at least by implication, that riders on public buses have no right to receive campaign ads;[17] that on certain highways the occupants of automobiles have no right to receive billboard ads;[18] that television viewers have no right to receive advertising for cigarettes;[19] that the public has no absolute right to receive messages via sound truck,[20] or in privately owned shopping malls.[21] All of these involve kinds of information that are in most circumstances perfectly legal. But they are not — at least not always — part of the right to know (so far).

Claims by the institutional press to a position of privilege present a third difficulty in developing a right to know. The press has demanded, and in some states been given, "shield" laws so that reporters need not divulge their sources, even when serious criminal prosecutions are involved. It has urged that reporters be given privileged access to sources such as courtrooms, official meetings, and governmental information. These claims are all grounded in the idea that what the press can't know the public can't know. This is an idea with great persuasive force, but it ignores complications which would result from its application.[22] O'Brien mentions most of these, perhaps too briefly. If a reporter refuses to divulge critical informa-

14. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106-07 (1973) (Brennan, J., dissenting).

15. Some of the Court's perplexity comes through in the shopping center cases. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

16. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

17. *See* Lehman v. Shaker Heights, 418 U.S. 297 (1974).

18. *See* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

19. *See* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), *affg. mem.* 333 F. Supp. 582 (D.D.C. 1971); 15 U.S.C. § 1335 (1976).

20. *See* Kovacs v. Cooper, 336 U.S. 77 (1949).

21. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

22. *See generally* Lewis, *A Preferred Position for Journalists?*, 7 HOF. L. REV. 595 (1979); Stewart, *"Or of the Press,"* 26 HAST. L.J. 631 (1975).

tion during the course of a criminal trial, what happens to the defendant's right to a fair trial? Can government officials negotiate or seriously discuss policy options in front of reporters? How is one to define "the press"?

This last question requires discussion, since it has seldom been raised. Even for presidential press conferences, officials have had to develop a credentialing system which may and probably does discriminate against the occasional publisher, the pamphleteer, or the scholar — all of whose claims to information are at least as good as those of a reporter for the Athens, Georgia, *Banner-Herald*, who would probably be given a press card without question. Those representing the institutional press do not usually raise the issue at all, but this "floodgates" argument is undoubtedly one reason the Supreme Court has been unwilling to grant a newsmen's privilege even for the right to observe trials. And it is significant both that Congress has never passed a shield law,[23] and that when it enacted the Freedom of Information Act the terms of the Act were made applicable generally, not just to the press.

The Freedom of Information Act raises yet another difficulty of the right to know. This is the problem of access. It is one thing to provide that information shall be available, but quite another to make it accessible to those who want it. At the least, it means the possible provision of physical facilities such as study rooms; the maintenance of records and files in such fashion that they are easily accessible; and the hiring of staff to aid those who are searching for information but don't know where it is, how to get it, or even whether it exists. All this must be done at taxpayer's expense, of course, which means that scholars and pressmen are obtaining their information out of tax money. This would add a relatively small but still significant amount to the cost of government.

The last, but hardly the least, of the difficulties with a fully developed right to know has to do with information supply. It is the question whether government agencies have an affirmative obligation to supply knowledge of their decisions and activities, and if so, of which decisions and activities. It is one thing to say that agencies must release information when asked for it: as we have seen, even this has its problems. But it is quite another thing to claim, as some do, that government must actually publicize information. Of course all governments do; but traditionally this has been a matter for agency or executive discretion. Any significant change in the traditional mode would carry with it a pronounced shift in the functions of agency public relations offices. And the problem of scope — that is, of what kinds of information must be communicated — would be well-nigh impossible.

The problems of applying a Court-created constitutional right to know are, then, numerous and complex. It is reasons of the sort adduced above which have led the Court's majority to feel that such a right is outside constitutional protection and that it would be unwise for the Court to espouse it. The minority, on the other hand, doubtless feels that the right is so important that the difficulties must be accepted in order to achieve the greater good.

23. *But see* note 3 *supra* and accompanying text.

II. Who Is To Decide?

In addition to the above difficulties, serious as they are, there is a more basic question of democratic theory and practice involved. While the Supreme Court must be concerned with this question, it is equally important to the general public and to those who think and worry about the viability of democracy under the pressures of modern mass communications and the mediocrity of mass tastes. The most obvious way to state this concern is merely to ask, "What *should* the public know?" A poser, indeed.

In the absence of a satisfactory answer — and I think that we do not at present have one — the question inevitably becomes, "Who should *decide* what the public is to know?" The possible answers to this question — government, the mass media, the courts, the public itself — each pose such great complexities that it is not surprising that no one seems seriously inclined to deal with it. Even O'Brien, while he is perfectly sure that the courts should not do it, is not entirely clear about the alternatives.

In highly authoritarian regimes the obvious answer has always been essentially that "papa knows best" — that, in other words, the people need to know only those things which their governors wish them to know. This answer has never seemed satisfactory in our republican system, in which the governors are not only assumed to *represent* the people, but in a very real sense *are* the people. Despite this, and regardless of forms of government, the motivations and tendencies toward secrecy within governmental institutions are all too well known, and apparently are endemic. Government is, of course, perfectly willing to decide that the public should know how to care for a lawn; but it is understandably less enthusiastic about divulging its own decision-making processes or even (in 1919, for instance) the real facts about the health of the President. Even capable and public-spirited officials often have what seem to them to be (and often may truly be) perfectly valid reasons for wishing to maintain confidentiality. "Executive privilege" is based on sound arguments that have nothing to do with the Watergate episode, for it is difficult not only to negotiate in a goldfish bowl, but also to govern at all. So it is right for "the people" to be suspicious of those who would leave this decision entirely to their rulers, even rulers who have the general welfare at heart.

It is also doubtful *who* in government should decide what is to be known. Through most of our history there has been little in the way of legislative policy in this area, which means that decisions about the public's access to information have been made essentially on an *ad hoc* basis by administrative officials with little or no guidance from even the President or Governor. Lately, the federal Freedom of Information Act has provided some guidance, as have the various state open-records and open-meetings laws within their restricted frames of reference. Whatever their merits, these laws create or reflect the same problems already discussed.

Although we in the United States have to a large extent done so, leaving the decision to government can thus hardly be justified. An alternative would be a press which, like ours, sees itself as the watchdog of the public. Our press likes to think that it (collectively) not only can, but should, decide what the public should and will "know." Journalists typically start from the assumption that the public should know everything, not only about

politics and government, but all else as well. What reason there can be for such an assumption is difficult to see, although this is not the place to discuss the matter. It is sufficient here to say that it is very hard to claim that the intimate details of Xaviera Hollander's sex life are part of any right to know properly construed; to argue thus would be to trivialize the right, and the claim would be counter-productive.

Newsmen are spared the embarrassment of such frivolous claims because, as they all know, the media could not possibly present the public with everything, nor could the public possibly absorb it all. The result is that the media give the public only what it seems to want and is most willing to pay for, plus in a few instances what some exceptionally public-spirited editor thinks it ought to know.

The system that prevails, then, is one in which the working press selects what the public will hear, on the basis of its own judgment about what the public wants. This group is augmented by those writers, scholars and publicists who constitute the American intelligentsia. Add, too, the contributions to the public's store of information made by public-interest institutions like Ralph Nader's organizations and the Sierra Club. What results, finally, is an information-gathering and -editing elite which has selected *itself* as the body to decide. Given limited media time and space, this elite decides largely through what it leaves *out*. No one says or prints everything he knows, and the temptation is, of course, to select the facts one prefers.

In such circumstances, the question whether this system is any more democratic than one composed of the governing elite is hard to answer. The effects of competition among many and various news outlets may well be more satisfactory than would government control. As an ideal, however, media control of the right to know leaves much to be desired. Among its defects is that it would require privileged access by the press to news sources with all its problems, as discussed above.

Since a constitutional right to know would doubtless not be absolute, the courts, by finding such a right in the Constitution, would be saddled with the task of inclusion and exclusion. It seems unlikely that any set of overarching principles could be developed to guide government officials, newsmen and the public, and therefore the courts could decide only on a frankly case-by-case basis, looking openly at the policy considerations involved in each instance. As a consequence, they would be acting primarily in a legislative capacity.

One could say, indeed, that they are already doing so, even without benefit of a constitutional doctrine. Most right to know cases can and do come to court under some other rubric. O'Brien calls attention to the *Pentagon Papers*[24] and *Progressive*[25] cases in this regard. Although the *Pentagon Papers* case was decided on the basis of the Supreme Court's well-known prejudice against prior restraint of publication, there is no doubt that the justices felt that there was no overriding reason that the public should not have the information contained in the papers, while the *New York Times*

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

25. United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed,* 610 F.2d 819 (7th Cir. 1979).

explicitly argued that the public had a right to know the facts about the government's involvement in Vietnam.[26] Even the *Times* agreed that sensitive national security information should not be published, so that the real argument was whether or not this *was* all that sensitive, and it was the Court — not the government or the newspaper — which finally decided the question.

Similarly, in the case involving *The Progressive*, which the Supreme Court never had to decide since it was mooted before it proceeded that far, Judge Warren of the District Court explicitly rested his decision to issue an injunction against the publication of an article on the construction of thermonuclear weapons on his feeling that there was "no plausible reason why the public needs to know the technical details about hydrogen bomb construction."[27]

The series of court decisions regarding the release of the Nixon tapes, first for use in legal proceedings and just recently for general public consumption, illustrates the same point. Judge Sirica, for instance, had to decide which portions of the Watergate tapes should be used at trial. And in *United States v. Nixon*[28] the Supreme Court held that, barring national security matters, there was no executive privilege preventing release of the tapes for trial use.[29] This ruling led almost inevitably to the claim that all the Nixon tapes — even those unconnected with Watergate — must be made public, including those sections dealing with private matters and those which the former President sought to have excluded under the executive privilege doctrine. These tapes are so voluminous that it may take the National Archives two years to prepare them for public use, and it would take an auditor three years on a five-day, eight-hour per week schedule to hear them all. But the Supreme Court nevertheless has mandated their release. Perhaps wisely, the Court did not provide an opinion to go with its decision.[30] But there is no possible rationale except the public's right to know.

One can expect a Court headed by Chief Justice Burger to oppose any doctrine which might lead to throwing open the door of the Supreme Court's conference room, or opening the Court's public proceedings to television (even though some states have already done so). But as the above examples demonstrate, the federal courts, without acknowledging directly a right to know stemming from the first amendment, have in many cases reached the same result.

It is, lastly, conceivable that the right to know might be vested in the general public. In fact, that is the trend of American policy. The theory of the Freedom of Information Act and the various state open-meeting and open-records laws is clearly that the man in the street may walk in and

26. *See* Brief for Petitioner, New York Times Co., at 43, New York Times v. United States, 403 U.S. 713 (1971).

27. 467 F. Supp. at 994.

28. 418 U.S. 683 (1974).

29. 418 U.S. at 711-13.

30. *See* Nixon v. Carmen, 51 U.S.L.W. 3419 (Nov. 29, 1982) (No. 82-218), denying cert. to Nixon v. Freeman, 670 F.2d 346 (1982).

demand as of right whatever kinds of information are covered by them.[31] Obviously, given the difficulties of access and of even knowing what might be available, the press receives the greatest benefit from such laws, although scholars and publicists also benefit. Nevertheless the laws do not in their terms create a privileged access by these groups. The Supreme Court, however, has not participated in the trend toward general public access, largely because the cases have been brought by the institutional press and thus can be decided as "freedom of the press" issues in which the right to know is merely ancillary. Even in the *Virginia Pharmacy* case, although the Court discussed the right to receive information about prescription drug prices, it decided only that pharmacists had the right under the free speech clause to publish the information.

The picture of millions of Americans storming the State Department to discover the "facts" about American policy on Cuba would give one pause were it not that we all know it will not happen. In fact, the claim that individuals seek information directly from government is exaggerated. In general, only those personally involved do so; residents of a neighborhood may indeed flood a zoning board meeting. But even so, they are mostly there not to learn but to exert influence. They are not, in other words, interested in the right to know but in the right to use the only kind of political clout available to them.

In sum, O'Brien is probably largely correct in assuming that the public's right to know is best secured as it has been so far, by a combination of agency discretion, press surveillance, an occasional court decision, and some rights legislatively-granted to the general public. What we do *not* need is a constitutional principle, especially if it is framed in such a way as explicitly to grant the press special access privileges.

Professor O'Brien has not been well served by his editors. The occasional grammatical lapse has been allowed to stand, and the book has frequent typos which a good editor should have caught. Perhaps Praeger's acquisition by CBS has resulted in the application of television's editorial standards to the world of books.

Nevertheless, this is an excellent, sound book. One hopes that our Supreme Court justices read it: they can only profit by its analysis of what they have been doing.

31. O'Brien's appendix reprints the Freedom of Information Act, (P. 173, and lists the states having open-records and open-meeting laws. P. 179).