

Washington University Law Review

Volume 1976

Issue 1 *Symposium: The First Amendment and the Right to Know*

January 1976

The Right to Know: First Amendment Overbreadth

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Recommended Citation

Walter Gellhorn, *The Right to Know: First Amendment Overbreadth*, 1976 WASH. U. L. Q. 25 (1976).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol1976/iss1/7

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PANEL DISCUSSION

Introduction

Professor Emerson's lecture on "Legal Foundations of the Right to Know" keynoted a daylong symposium on the first amendment held March 3, 1976, at Washington University. At a subsequent panel discussion several distinguished lawyers and members of the press responded to Professor Emerson's address. The remarks of two panel members, Professor Walter Gellhorn and Mr. James C. Goodale, are reprinted below. Transcripts of their responses have been edited slightly for publication.

THE RIGHT TO KNOW: FIRST AMENDMENT OVERBREADTH?

WALTER GELLHORN*

Like other members of the panel, I regard the first amendment as a safeguard against the tyranny of a possibly transient majority. Majorities, although not necessarily malicious, pernicious, or vicious, do tend to be persuaded that they are right and that those who disagree are dangerously wrong. The first amendment is meant to protect against the imposition of restraints upon disagreement, since a minority view may ultimately gain acceptance and thus lead to a different majority.

I disagree, however, with the suggestion that the first amendment was intended to be, and should in fact be treated as, an absolute or a near-absolute. Society does not choose merely between the "good" of free speech or free press and the "evil" of suppression. Rather, society is constantly selecting among competing values to establish its principles governing communication.

Consider, for example, the issue of legally enforced confidentiality. Confidentiality is widely regarded as a social value that sometimes outweighs the social value of unfettered communication. Most lawyers believe that grand jury proceedings should not be publicized because

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many damaging, though ultimately unsubstantiated, statements may be made during a grand jury's investigation. Hence, if the grand jury does not find persuasive evidence of wrongdoing and therefore does not return an indictment, its confidential proceedings are not appropriate subjects for newspaper stories. Lawyers also agree that clients should be able to speak to their attorneys confidentially. Preserving the confidentiality of the attorney-client relationship involves a social value. A social, not personal, choice is made between the desirability of broad communication and the need for restricted communication. Individuals are the direct beneficiaries or objects of the choice, to be sure, but the choice presumably reflects a belief that society as a whole, not merely the immediately affected persons, will gain by restricting communication.

When discussion turns to activities relating to the newspaper business, however, some of my friends begin speaking as though no choices are to be made, and as though every restraint is an assault on the Constitution. Consider the "reporter's privilege" as a case in point. Newspapers argue that a reporter should never, under any circumstances, be compelled to disclose the sources of his information, because to do so would impede the gathering and publishing of information that may be of public interest. No doubt a very good argument can be made for extending to the reporter a nondisclosure privilege analogous to the attorney-client privilege. But in the end a social choice is made, and the first amendment does not dictate the outcome.

In short, many of the choices between unbridled and restricted communication are not, in my estimation, fundamentally constitutional choices. We mislead ourselves by presenting every problem that confronts contemporary society as a justiciable issue to be decided by aloof judges under the rubric of a constitutional principle. Furthermore, the "right to know" principle is itself so broadly and vaguely phrased that it cannot decide cases. Judges must still decide the cases. Recently, a California court held that a state law prohibiting opticians and optometrists from advertising prices for eyeglass frames was unconstitutional. Mr. Emerson's paper refers to a similar case in Virginia concerning the publication of prices for prescription drugs and pharmaceuticals. Both courts reasoned that the state laws were unconstitutional because the Constitution gives people the right to know, whereas the challenged statutes constricted the dissemination of available factual information. This kind of judicial analysis strikes me as simplistic. The

real issue is whether price advertising in connection with the rendering of professional or semiprofessional services generates evils that outweigh the benefits. The answer is not to be found in a slogan like "the right to know" or "freedom of the press."¹

The same is true of libel suits, which newspapermen denounce as a discouragement to the press. Whether more or fewer libel suits would be socially advantageous cannot be determined by considering only the interest of the press. The possibility of recovery can be reduced, as it has been in the case of public figures. At the same time, protection for private individuals can be enlarged, if a social judgment is made that individuals need to be safeguarded against defamatory news reporting. The social judgment should relate to experience, to knowledge of what is happening in society, rather than to a vague phrase in the Constitution.

So also with "gag orders." Certainly an argument can be advanced in favor of delaying dissemination of information of an extrajudicial nature concerning a pending case. A gag order does not forever block critical comment upon the prosecution or the judge. The crucial question is whether, as rival newspapers seem to believe, the health of society is furthered by the speediest possible news reporting.

I come finally to some absolute convictions, some propositions I regard as not within the realm of choice. Equality is one such absolute. Were I to recognize the power of any public organ to limit the dissemination of information, I would further say that limitations must be imposed on an equal basis. For example, a municipality may choose to prohibit mass demonstrations and political gatherings in a public park, so that the park may be preserved for its intended recreational uses. But if political activities are forbidden, the prohibition must extend to everyone and to all political activities. Principles of equality, equally applied, are fundamental.

Secondly, the purpose of the first amendment is not, as some of my journalist friends contend, to assure the early exposure of factual data. Rather, the first amendment is meant to protect the expression of opinion and of opposition to established views. I grant, of course, that

1. Shortly after these remarks were delivered, the Supreme Court found an answer to the Virginia price advertising question in constitutional principles. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976) (affirming that such restrictions violate the first amendment). The author, however, adheres to his belief that the analysis was simplistic.

opinions may grow out of exposure of factual data. The special concern of the first amendment, however, is freedom of debate, expression, and opinion. That kind of freedom is worthy of absolute protection; at any rate, circumstances in which it could appropriately be restricted are not readily apparent.

My conclusion is that the first amendment is being overworked. Some of the tough questions for which answers are being sought in constitutional phrases should not be in the courts at all. Whether the right to know should take precedence over other rights is not to be determined by dogma, but by hard thinking and debate in a proper forum. The proper boundaries of the right to know cannot be fixed by recourse to a single abstract principle. For instance, arguments advanced in support of a reporter's privilege differ greatly, both in weight and in content, from arguments concerning price advertising or gag orders. The limitations must therefore be drawn episode by episode, with full awareness of the competing values to be weighed.