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LIBRARY TRENDS

SUMMER/FALL 1990 39(1 & 2)1-185

Intellectual Freedom/Parts I & II

Diana Woodward
Issue Editor

University of Illinois
Graduate School of Library
and Information Science

LIBRARY

TRENDS

Library Trends, a quarterly thematic journal, focuses on current trends in all areas of library practice. Each issue addresses a single theme in-depth, exploring topics of interest primarily to practicing librarians and information scientists and secondarily to educators and students.

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The style and tone of the journal are formal rather than journalistic or popular. *Library Trends* reviews the literature, summarizes current practice and thinking, and evaluates new directions in library practice. Papers must represent original work. Extensive updates of previously published papers are acceptable, but revisions or adaptations of published work are not sought.

An issue editor proposes the theme and scope of a new issue, draws up a list of prospective authors and article topics, and provides short annotations of the article's scope, or else gives a statement of the philosophy guiding the issue's development. Please send your ideas or inquiries to F.W. Lancaster, Editor, Publications Office, 249 Armory Building, 505 E. Armory Street, Champaign, IL 61820-6291.

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Editor's Foreword

DIANA WOODWARD BEGAN TO PLAN this *Library Trends* on intellectual freedom several years ago. She intended two issues, the first dealing with public protection and paternalistic censorship and the second with economic and practical aspects. Each section of each issue was to be preceded by a brief "nutshell"—her overview of the problem addressed in a particular group of papers.

Tragically, Diana Woodward died before her work on this project could be completed. She finished only one of her nutshells and was unable to write her introduction to the two issues, although she requested that a paper she had presented at the Rutgers School of Communication, Information and Library Studies, early in 1989, be used for that purpose.

Regrettably, too, several of the authors who promised to write papers for Professor Woodward failed to honor their commitments. Notable omissions are a paper on economic aspects of copyright and one on economic aspects of the secrecy of information.

Rather than trying to second-guess Professor Woodward's intentions—for example, by having the missing parts written by other contributors—we decided to use the material available to us at the time of her death and to present it, as far as possible, in the way that she had planned.

This double issue of *Library Trends,* then, is offered as a memorial to Diana Woodward and as a tribute to her scholarship.

—F.W. Lancaster

Introduction

DIANA WOODWARD

[*EDITOR'S NOTE:* since Diana Woodward was unable to write her introduction to this issue, the journal editor decided to form a brief introduction from a portion of the paper Professor Woodward presented at a symposium at Rutgers in 1989 and from the "nutshell" she was able to complete. The following introductory commentary was prepared by Jana Varlejs of the Rutgers School of Communication, Information and Library Studies.]

How might a philosopher reason about intellectual freedom? This is the question Diana Woodward would have addressed in her introduction to this issue of *Library Trends.* She had planned to rework a paper which she delivered at Rutgers in 1989 for a symposium on ethics in the information professions. In that paper, she described several approaches to ethical reasoning, and concluded with a discussion of how one could apply two kinds of arguments in a defense of intellectual freedom. The full text of the paper is published elsewhere (Woodward, forthcoming), and should be read by those interested in understanding the broader context of Dr. Woodward's thinking about intellectual freedom. She noted the fact that most people have not thought through the principles upon which they base actions and make choices. Too many, she seemed to feel, were content to respond to a moral or ethical issue on the basis of feeling, rather than reason.

Her concern was not so much with making an elegant case for the defense of intellectual freedom, but rather with demonstrating that one could apply methods of ethical reasoning to intellectual freedom issues. The principle that Diana Woodward adhered to was that clear and logical thought must underlie the behavior of professionals who purport to have a sense of ethics in regard to their practice. She ended her Rutgers presentation by taking her audience

through two types of ethical arguments—the consequentialist and deontological—only to conclude that she had reached a "beginning, not an end, of an ethical investigation concerning intellectual freedom." Tragically, she was not able to carry the investigation forward, for she was grappling with a fundamental issue of concern to the library/information profession, and had much to teach us. The following is an excerpt from Dr. Woodward's paper, which she planned to rewrite and elaborate on for this issue.

—Jana Varlejs

As a case study in reasoning about information ethics, consider how one might defend intellectual freedom. One can give both consequentialist and deontological arguments for intellectual freedom, but the choice of an ethical theory upon which intellectual freedom is based can result in different decisions about what ought to be done in particular cases.

The term *intellectual freedom,* broadly construed, includes both the right to the intellectual efforts of others and a right to distribute one's own intellectual efforts. These efforts include written works, conversation, speeches, and various art forms (e.g., dance or sculpture) that can be used to communicate ideas.

To defend intellectual freedom on consequentialist grounds, one must make the case that it is best for someone (me, everyone except me, or all concerned) if information is broadly disseminated. The best known consequentialist defense of intellectual freedom comes from John Stuart Mill (1951) who made his defense from the negative side—i.e., restricting intellectual freedom is harmful. He argued that if we suppress ideas we may be suppressing the truth. Even if the ideas we suppress are not the truth, there may be some germ of truth in them or something that gives insights into new truths. Furthermore, even if the promoted opinion is the truth and suppressed views are completely false, people will not have as much faith and commitment to the promoted opinion if they do not see it openly debated and defended in contest with other views. For all these reasons, intellectual freedom is needed to make certain the truth is both discovered and believed.

The assumption behind this reasoning is that people are better off if the truth is known. Not everyone agrees with this. The whole point of paternalistic censorship (whether it be censorship of pornographic or racist material in the United States or censorship of political news in the Soviet Union), is that it is better for society in general and often better for individuals themselves if they are not exposed to certain sorts of ideas, even if there is some truth to those ideas. The consequentialist defense of intellectual freedom then depends upon first establishing whether or not people are better off

when they are exposed to all intellectual efforts. The typical result is that one starts dividing up intellectual efforts into those that are good for people and those that are not. Defending the distribution of the former only is not defending intellectual freedom in principle.

To defend intellectual freedom in principle, and not merely in those cases where it can be shown to be of benefit to someone, one needs to provide a deontological defense of intellectual freedom. One method of providing such a defense involves deriving the right to information from the nature of man. Another method involves demonstrating that one could not consistently will that information be withheld from people.

It would be inconsistent to will that the *truth* be withheld from people. If the truth were withheld from everyone, including you, then you would not have enough evidence to decide what are the truths that are to be withheld. Withholding all information, not merely the truth, does not lead to inconsistency. There does, however, seem to be some silliness in the suggestion that we might adopt the maxim: *Withhold all information from everyone.* Adopting the maxim: *Withhold harmful information* sounds more like a maxim that a censor might wish to act upon. While I cannot demonstrate that there is any inconsistency involved in adopting such a maxim, I would like to point out that it returns us to consequentialist reasoning as we must determine what information has harmful consequences. The defender of intellectual freedom can reply that one can consistently act upon the maxim: *Withhold no information.* To adopt this maxim is to refuse to censor information even when that information is regarded as harmful. To adopt this maxim is to say that no one needs to justify his or her request for information on any consequentialist grounds. Thus this is a "safer" ethical theory for defending intellectual freedom than is consequentialism.

One can obtain similar results if one provides a deontological defense of intellectual freedom based not on Kantian criteria for a maxim, but on rights derived from the nature of man. Assuming for the sake of argument that man's nature (or essence) is his rationality, one may argue that any attempt to limit man's ability to reason is an attack on man's very nature, his primary mode of survival. Next, one argues that limiting man's access to the ideas of others would limit man's ability to reason. The conclusion is that limitations on intellectual freedom are attacks on man himself. By this reasoning, all people have a right to all information regardless of whether or not that information might be harmful to them. Again, one need not justify any request for information on consequentialist grounds. Thus this deontological defense of intellectual freedom is also a "safer" defense than consequentialist defenses.

A "safer" defense is one that admits of fewer exceptions to the principle being advocated. To say that deontological defenses of intellectual freedom are "safer" is not to say that they are more ethically valid. Perhaps, as consequentialist ethics allows, there should be limits to intellectual freedom based on consequences. To say that deontological defenses of intellectual freedom are safer is not to say that they admit of no circumstance in which censorship is justified. It is possible that the maxim: *withhold no information* may conflict with another maxim, such as those protecting personal privacy or those protecting private property. As was stated earlier, establishing a deontological right to information is the beginning, not the end, of an ethical investigation concerning intellectual freedom.

The Problem in a Nutshell—Paternalistic Censorship and Privacy Protection

If intellectual freedom is understood as the right both to disseminate one's own views and to obtain access to the views of others, then censorship is one (of several) activities that may conflict with intellectual freedom. When people have strong negative reactions to censorship, often it is because they are identifying censorship with those cases designed to hide crime or to increase the power of someone "underserving." By controlling information, one may get away with treason, extortion, even murder. But these cases of censorship do not provide ethical dilemmas. The censorship is as wrong as the activities it is hiding.

Censorship becomes an ethical issue when there is some "good" reason for censoring that is set in opposition to a "good" reason for not censoring. As noted in the introduction to this series of articles, the value of intellectual freedom is always a "good" reason for not censoring or otherwise restricting the flow of information. Two conflicts that arise are between intellectual freedom and the right to information and between intellectual freedom and paternalistic censorship.

Paternalistic censorship is the censoring of information for the sake of the public (as opposed to the sake of the censorer). If one believes it is bad for society if children grow up reading books that portray women or blacks in subservient roles, then one may be inclined to limit children's access to such reading material. This is paternalistic censorship. If one believes that certain news stories will merely make people feel frustrated and fearful, avoiding printing those stories for that reason is paternalistic censorship. The difficulty about paternalistic censorship is that it is applicable if and when one is one's brother's keeper. This is clearly appropriate if the brother

is a child. Children need guidance in many matters including what they should read at what age. But for those who believe that adults should have autonomy to read whatever they wish (even if it makes them sad or perverted), the difficulty is determining at what age different sorts of reading material might be no longer censored—at what point is society no longer its brother's keeper with regard to what material is read.

There is a long history to paternalistic censorship, much of which has been misunderstood. Our image of the Spanish Inquisition tends to be of evil men censoring the beliefs of others even to the point of tormenting or even killing those whose beliefs could not be changed. This is not likely to be the way in which they saw themselves. If there was no smallpox vaccine, then we would try to keep those infected away from the rest of society because of the physical damage it would do to others if they were exposed to the pox. We would attempt to cure them (if possible), if that failed we would attempt to isolate them, and if that failed we would kill them to keep them away from ourselves and friends. We would do all this to protect ourselves from physical harm. How much more important it would be to keep society from the spiritual harm that could damage one for all eternity. The Inquisitors attempted to cure the disbelievers, if that failed, to isolate them, and if that failed, to kill them before they could infect good people. The attempt to cure dissenters from their beliefs was seen as to the dissenters' advantage as well as to that of society. The remainder was to society's advantage. But even this paragon of evil censorship, the Spanish Inquisitor, can be understood as doing his work not out of meanness, but out of concern for society. He was his brother's keeper to both the dissident and the innocent.

The ethical problem lies not so much with the Inquisitor's motive, as with the information on which he based his reasoning. We no longer agree that one is likely to spend eternity damned if one is exposed to the beliefs of dissenters. For one thing, many people do not believe they will spend eternity damned regardless of what beliefs they hold. Furthermore, even if holding some beliefs could lead to damnation, mere exposure to those beliefs may do more to innoculate one against them than to cause one to succumb to them.

Finally, it may be that the interesting question for salvation versus damnation is not what one does believe, but what one would have believed if subjected to certain dissenter opinions. In this last case, our brother's keeper cannot help us by governing what we are exposed to, but only by helping us understand and evaluate the material to which we might be exposed. In this last analysis, not only the Inquisitor, but also any paternalistic censor has the job of helping

the public analyze and evaluate potentially harmful materials so that exposure to them is innoculating and not disease-producing. The difficulty is in determining for what sorts of people at what ages this process is possible (assuming that for those sufficiently young, emotionally disturbed, or mentally retarded the analyze-and-evaluate techniques will not work). The problem for the paternalistic censor is to determine for what people (if any) which materials (if any) should be withheld (by whom) and with what justifications and procedures to ensure that only these materials are withheld from only these people.

The other area where the value of intellectual freedom comes into conflict with other ethical values is in the area of privacy protection. When something I want to read is something you want kept private, then a conflict has arisen. These conflicts can be very difficult to sort out in part because it is difficult to say what material should receive privacy protection in what circumstances.

Together these two ethical concerns, intellectual freedom *versus* privacy protection and *versus* paternalistic censorship, make up the first section of this *Library Trends.*

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A Framework for Deciding Issues in Ethics

DIANA WOODWARD

ABSTRACT

DISCUSSES THE ADVANTAGES and disadvantages of two ethical theories—consequentialism and deontology—as bases for reasoning about ethical principles in general and intellectual freedom in particular. Concludes that a deontological defense of intellectual freedom is safer than a defense on consequentialist grounds.

INTRODUCTION

When one asks, "Why did person *P* do action *A*?" one may be asking a question about *P* or a question about *A*. If one interprets the question as asking what caused *P* to do *A*, then we are asking for information about person *P* such as was he abused as a child, stressed by his job, or suffering from a brain tumor. If one interprets the question as asking what reasons *P* had for doing *A*, then we are asking about the nature of the action *A;* on what basis might *P* (or anyone else) justify doing *A*? This article will be concerned with the latter problem: How can we provide reasons for or against a course of action?

One hundred years ago this topic was better understood than it is today. Perhaps you have watched episodes of the TV series *Ethics in America.*[1] What you saw was a discussion leader posing moral dilemmas to distinguished guests and then asking them how they felt about the problem or what they thought they would do. The guests would introspect to see how they felt or guess what they might do. This is not reasoning about ethics. Only a few of the guests were explicitly committed to sets of principles against which they

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tested their options. Their reasoning from principles to choices was not the focus of the program and a more abstract reasoning about the principles themselves was not part of the show. To many of our contemporaries, ethics is no more than it is on that series—introspecting how one feels about morally significant choices.

It was different before our culture felt the influence of Freud in particular and the social sciences in general. It is these influences that prompt us to construe the question "Why did *P* do *A*?" as a question of causes (with which the social sciences deal) instead of a question about reasons. This perspective has become so common that people often forget that there is another issue to be considered. Never mind what caused *P* to do *A*, should she have done it? This question asks if there are reasons for *P* to do *A* (whether or not *P* is aware of those reasons). If there are justifying reasons, then those reasons apply to us as well. The results we obtain when looking for reasons tell us not only what *P* should have done but also what anyone relevantly similar to *P* should do.

Unfortunately, the perspective of the social sciences has become so prevalent that it is common to find people who question whether or not it is even possible to reason about ethics. It will be demonstrated here that it is and, at the same time, introduce a method of ethical reasoning. Consider the Golden Rule: Do unto others as you would have them do unto you. People who do not reflect much on these matters often cite this as an acceptable moral principle. It isn't and I hope that I can lead you to uncover its flaws. The most obvious problem is that this should not be the guiding moral principle of a masochist who would hurt others because he wishes them to hurt him. What we have done is find a counterexample to the proposed moral principle. A counterexample is an example of the principle (the masochist who hurts others is treating them as he wishes to be treated) but counter to personal intuitions about ethics or to another the purported moral principle that one should not harm the innocent.

Counterexamples to the Golden Rule are not limited to those involving people such as the masochist. Otherwise it could be said that for all who are not masochists the Golden Rule is an acceptable moral principle. Another counterexample to the Golden Rule is that, if obeyed as a moral principle, it would prohibit putting criminals in jail since we do not wish to be placed in jail. In this case we find a practice that ethical intuitions tell us is just (penalizing the guilty), and note that this runs counter to the principle in question—i.e., the Golden Rule. The method of counterexample will not prove that the purported ethical principle is a poor one. If one can produce a counterexample to a purported ethical principle, then either the principle is wrong or else the example counter to the principle is

wrong. (Perhaps the Golden Rule is an acceptable moral principle in which case it is okay for the masochist to harm people and it is wrong to penalize the guilty.) The method of counterexamples demonstrates a conflict to be resolved without itself determining which side of the conflict is right and which is wrong. Note also that the method of counterexamples cannot prove that an ethical principle is true. If we attempt to produce a counterexample to the principle and fail, perhaps that is because the principle is invulnerable to counterexample, but then again it may be that counterexamples exist and we have failed to find them.

The point of this discussion about counterexamples to the Golden Rule is that we can reason about ethical principles. Moreover, the methods employed are similar to those of the research scientist who is reasoning about a purported scientific principle. If a counterexample can be found then there is something wrong with the principle or with the counterexample. If no counterexample can be found, then the principle is still not proven (perhaps a counterexample exists but we did not discover it), but when a principle withstands serious attempts to develop counterexamples, it is said that the principle is confirmed.

Many people base ethical judgments on principles that are prescribed by their religion or culture. However, accepting such principles as a starting point does not eliminate the need for ethical reasoning. One may accept the principle, "Thou shalt not kill" but have to decide whether letting someone die counts as an instance of killing. One may accept the principles "Thou shalt not kill" and "Thou shalt not lie" but have to resolve a conflict when the only way to prevent a killing is by telling a lie. Furthermore, the decision to accept principles prescribed by culture or religion involves ethical reasoning. The Ten Commandments are widely accepted (in part) because they seem ethically reasonable and not simply because they are religious teachings. The Ten Commandments would not have been so readily accepted if they had stated "Kill all siblings" or "Lie to all strangers."

To assess a purported ethical principle, one needs an ethical theory. There are two important types of theory and they often—but not always—yield the same results. The theories can be used to evaluate principles and to evaluate particular courses of action. The first to be discussed is based on consequences and the second is based on a system of rights, duties, and obligations.

The theory based on consequences is often called consequentialism.[2] There are several varieties depending on what consequence is deemed desirable and on what parties are being considered. If one seeks the best consequences for everyone except herself, she is an

altruist. If one seeks the best consequences for everyone including herself she is a utilitarian. If one seeks the best consequences for oneself only then she is an egoist. It is generally agreed that the consequences to be sought are some sort of long range well being (as opposed to short term pleasure). There is, however, considerable disagreement about what constitutes long-term well being. For instance, is a person better off contented or discontented, cared for by others or taking care of himself.

It should be mentioned that some ethicists regard egoism as unacceptable as an ethical theory on the basis that it is merely a concern with one's own well-being and not with that of others. However, the enlightened egoist will realize that to promote her own happiness, she must promote that of others as well. In defense of egoism one might note that it is the only ethical theory that can answer the question (which the Greeks considered important), "Why should I be moral?"[3] The answer that egoism alone can give is that it is to your advantage to be moral.

The great difficulty with consequentialist ethics is that it requires a large database of facts and huge amounts of processing time. How can one determine what is best even for oneself let alone what is best for everyone? The answer is that one never really can. Consequentialist ethics merely directs one to do one's best at the relevant cost-benefit analyses. This can be particularly difficult if one must make a decision in a short time.

A version of consequentialism has been developed to deal with this difficulty. Rule utilitarianism[4] is a version of utilitarianism that directs us to use utilitarian principles to develop a set of rules. The rules can be developed at our leisure and then be quickly applied even in an emergency situation. It is granted that the rules may result in the wrong decision in a few cases. The suggestion is that they will serve us better than a hastily done consequentialist analysis of each individual ethical problem.

There are two pitfalls to be avoided when consequentialism is used as a basis for decision making in professional ethics. The first pitfall is to analyze benefits without attention to costs. As a consequentialist deciding whom to promote to a higher position, one must consider not only what the benefits would be of having each different candidate in the higher position, but also the costs of losing that person at the lower position and the costs of not promoting other candidates. The second pitfall is to determine the ideal state of affairs without considering the problems of how to get from here to there. One's consequentialist analysis might confirm that it would be best to have the proportion of librarians that are women and minorities equal to their proportion in the population.

One must then do a second analysis of each proposed method for achieving this goal. If there is no good way of achieving the goal, then one may have to sacrifice the goal. One cannot say the ends justify the means and thus endorse any means to a consequentially confirmed ideal goal.

The other type of ethical theory—the one based on rights, duties, and obligations—is called deontology.[5] It is as ancient as Homeric Greece where a person's moral character was judged by how well that person carried out the duties of the person's station in life. The duties of a nobleman, a wife, and a slave were all different. Socrates then wondered what duties might be expected of any citizen, and eventually the Lutherans and Calvinists speculated on what duties God might require of any person.[6] It is, however, with the moral philosophy of Immanuel Kant[7] that deontology is most closely associated today.

Early in his reasoning, Kant concluded that the only thing good without exception was a good will. A person acting from good will was doing the right thing even if the consequences proved disastrous. Then Kant reasoned that a person is acting from good will if the person bases his action on what Kant called the "Categorical Imperative" (because it was not a hypothetical command such as, "If you want *A*, do *B*," but simply a command "Do *B*"). He had four ways of formulating the Categorical Imperative of which the best known is probably that you should act so that you could consistently will that everyone act the same.

For example, I cannot consistently will that everyone always lie. To do so would merely change the meaning of negation. For instance, "I am happy,"' would mean, "I am unhappy," etc. Furthermore, I cannot even consistently will that people sometimes lie. If we could not assume that others were speaking the truth, no language community would evolve and thus lying (at least verbally) would be impossible. A child cannot learn the meaning of the word "red" if there is no reason to presume that a person saying "This is red" is telling the truth. Since we cannot consistently will that people always, or even sometimes, lie, we must adopt the maxim that one must never lie.

Similar reasoning can lead one to establish a number of maxims to guide one's ethical decision making. One problem that arises is how to phrase the maxim: I do not want to refrain from making love to my spouse on the grounds that I cannot consistently will that everyone do so. Instead of testing the maxim, "Make love to my spouse," I want to test the maxim, "Make love to one's own

spouse" or perhaps even "Make love to one's own spouse if both parties are healthy, willing, and co-located." It's sort of difficult to know how to phrase the maxim.

There are other forms of deontology besides that of Kant. for example, the American Constitution refers to the rights of man[8] that were developed by another line of reasoning. One begins with the question, "What is the nature of man?" If the answer is that man is essentially rational, then one draws conclusions about the ethical implications: that man has a right to that which he needs in order to exercise his rationality. Thus we have a right to life, a right to assemble and discuss, a right to read and publish. Also, the rights to assemble and discuss mean we have a right to liberty.

One problem that arises with any claim concerning a person's rights, is how to specify what is included. The best way to test a purported right is by considering the corresponding obligation. When we say, "Mary has a right to life," do we mean merely that we are all obliged not to kill her or do we mean that we are all obliged to keep her alive? If her health care is expensive, then her right to life construed in the latter way conflicts with our rights to our own property.

Resolution of conflicts is a problem for deontological theories. One may reason out what rights a person has or on what maxims one ought to act, but this is piecemeal support for each purported right and maxim. When two maxims come into conflict (one must lie to protect the innocent), then the deontologist has no further level of reasoning to which she can appeal to resolve the problem. Each maxim is categorical and must be obeyed under all circumstances.

One hybrid ethical theory has arisen to deal with this problem. The concept of "prima facie" duties is that we can use deontological reasoning to determine what duties we all clearly have. However, in those cases where our duties come into conflict with each other, we may turn to consequentialist reasoning to resolve the conflict.

One such conflict that occurs frequently in professional ethics for information managers is between one person's right to information and another person's right to privacy. The suggestion is that each right can be defended on principles deriving it from, for instance, the nature of man; but when the two rights come into conflict because *A* wants information about *B* that *B* wants kept private, then the issue is to be resolved by an appeal to consequences. This might be done on a case by case basis or by reasoning out a rule utilitarian solution that would apply to all cases of a given sort.

There are both theoretical difficulties with deontological theories and pitfalls to be avoided in using these theories. One theoretical

difficulty lies with basing rights and obligations (what ought to be the case) on any version of the nature of man (what is the case). Some philosophers have argued that what *is* never entails what *ought to be*. Others point out the difficulty of establishing any such thing as the nature of man. One of the two main pitfalls of using deontological ethical theories is, as mentioned earlier, the problem of phrasing the maxim to be tested by the Categorical Imperative. The other pitfall to be avoided is claiming that there is a right without making clear its limitations. This can best be done by specifying the corresponding obligations. If you have a right to information, what is my corresponding obligation: (1) not to take information from you, (2) to provide information to you for free, (3) to provide information to you for an affordable price, (4) to educate you so that you can understand the information provided, (5) to provide a machine or person to read to you if you are blind? Am I obliged to do that? Establishing a deontological right to information is the beginning, not the end, of an ethical investigation concerning intellectual freedom.

As a case study in reasoning about information ethics, consider how one might defend intellectual freedom. One can give both consequentialist and deontological arguments for intellectual freedom, but the choice of an ethical theory upon which intellectual freedom is based can result in different decisions about what ought to be done in particular cases.

The term *intellectual freedom,* broadly construed, includes both the right to the intellectual efforts of others and a right to distribute one's own intellectual efforts. These efforts include written works, conversation, speeches, and various art forms (e.g., dance or sculpture) that can be used to communicate ideas.

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The assumption behind this reasoning is that people are better off if the truth is known. Not everyone agrees with this. The whole point of paternalistic censorship (whether it be censorship of pornographic or racist material in the United States or censorship of political news in the Soviet Union), is that it is better for society in general and often better for individuals themselves if they are not exposed to certain sorts of ideas even if there is some truth to those ideas. The consequentialist defense of intellectual freedom then depends upon first establishing whether or not people are better off when they are exposed to all intellectual efforts. The typical result is that one starts dividing up intellectual efforts into those that are good for people and those that are not. Defending the distribution of only the former is not defending intellectual freedom in principle.

To defend intellectual freedom in principle, and not merely in those cases where it can be shown to be of benefit to someone, one needs to provide a deontological defense of intellectual freedom. One method in providing such a defense involves deriving the right to information from the nature of man. Another method involves demonstrating that one could not consistently will that information be withheld from people.

It would be inconsistent to will that the *truth* be withheld from people. If the truth were withheld from everyone, then you would not have enough evidence to decide what are the truths that are to be withheld. Withholding all information, not merely the truth, does not lead to this inconsistency. There does, however, seem to be some silliness in the suggestion that we might adopt the maxim: Withhold all information from everyone. Adopting the maxim: Withhold harmful information sounds more like a maxim that a censor might wish to act upon. While it cannot be demonstrated that there is any inconsistency involved in adopting such a maxim, it should be pointed out that it returns us to consequentialist reasoning as we must determine what information has harmful consequences. The defender of intellectual freedom can reply that one can consistently act upon the maxim: Withhold no information. To adopt this maxim is to refuse to censor information even when that information is regarded as harmful. To adopt this maxim is to say that no one needs to justify his/her request for information on any consequentialist grounds. Thus this is a "safer" ethical theory for defending intellectual freedom than is consequentialism.

One can obtain similar results if one provides a deontological defense of intellectual freedom not based on Kantian criteria for a maxim but based on rights derived from the nature of man. Assuming for the sake of argument that man's nature (or essence) is his rationality, one may argue that any attempt to limit man's ability

to reason is an attack on man's very nature, his primary mode of survival. Next, one argues that limiting man's ability to receive criticism of his own ideas and/or limiting man's access to the ideas of others would limit man's ability to reason. The conclusion is that limitations on intellectual freedom are attacks on man himself. By this reasoning all people have a right to all information regardless of whether or not that information might be harmful to them. Again, one need not justify any request for information on consequentialist grounds. Thus this deontological defense of intellectual freedom is also a "safer" defense than consequentialist defenses.

A "safer" defense is one that admits to fewer exceptions to the principle being advocated. To say that deontological defenses of intellectual freedom are "safer" is not to say that they are more ethically valid. Perhaps, as consequentialist ethics allows, there should be limits to intellectual freedom based on consequences. To say that deontological defenses of intellectual freedom are "safer" is not to say that they admit to no circumstance in which censorship is justified. It is possible that the maxim: Withhold no information may conflict with another maxim such as those protecting personal privacy or private property. As stated earlier, establishing a deontological right to information is the beginning, not the end, of an ethical investigation concerning intellectual freedom.

NOTES

1. The public television series *Ethics in America* was produced by Columbia University Seminars on Media and Society. Three books are available to those who wish to use the series in teaching ethics: a source reader, a study guide, and a preview packet. These have been published in 1989 by Prentice Hall, Englewood Cliffs, NJ.
2. Any ethics textbook will have information on both consequentialist and deontological theories. One good source for further reading is *Modern Moral Philosophy* by W.D. Hudson, published by Anchor Books Doubleday and Co. Inc., Garden City, NY in 1970. Another good source on ethics (or any other philosophical topic) is *The Encyclopedia of Philosophy* edited by Paul Edwards and published by Macmillan Publishing Co. Inc. and The Free Press, NY, 1967.
3. This topic is discussed at length in the *Republic* by Plato. In the *Nichomachean Ethics,* Aristotle assumes that it must be to our advantage to be ethical and develops an ethical theory consistent with this assumption. More recently the advantage of being ethical was a major topic in *The Moral Point of View* by Kurt Baier published by Cornell in Ithaca, NY in 1958.
4. While many versions of this theory have been developed in the last thirty years, the terminology used here was introduced by R.B. Brandt in his book *Ethical Theory* published by Prentice Hall, Englewoods Cliffs, NJ in 1959.
5. The term *deontology* derives from the Greek words *deon* for duty and *logos* for science. Thus deontic ethics is the science of duty.
6. This story is told in *A Short History of Ethics* by Alasdair MacIntyre published in 1966 by Macmillan Publishing Company, NY.
7. Kant's theory is developed in the *Fundamental Principles of the Metaphysic of Morals* written in 1785. There are many English translations. The translation by L.W. Beck was published by the Library of Liberal Arts, New York, in 1963.

8. The natural rights theory that influenced the authors of the U.S. Constitution was developed by John Locke in *Two Treatises of Government,* first published in 1690. For an excellent modern discussion of natural rights theories, see William Frankena, "Natural and Inalienable Rights." *Philosophical Review*, vol. 64, 1955, 212-232.
9. The theory of "*prima facie* duties" was developed by W.D. Ross in *Foundations of Ethics,* Clarendon Press, Oxford, 1939 and *The Right and the Good,* Clarendon Press, Oxford, 1930 and by H.A. Prichard in papers that were published in the collection *Moral Obligation,* Clarendon Press, Oxford, 1949.
10. Mill's discussion of this topic is found at the end of the section titled "Of Thought and Discussion" in *On Liberty* which was first published in 1859. This work can be found in many collections including, *Utilitarianism, Liberty, and Representative Government,* by John Stuart Mill published by E.P. Dutton and Company, NY in 1951.

Censorship: Current Issues in American Libraries

R. KATHLEEN MOLZ

ABSTRACT

TWO TYPES OF CENSORSHIP pervade contemporary society. The first, regulative censorship, aims at the suppression of values inimical to the safeguard of such orthodoxies as religion, the protection of the state, or personal morality and purity. As a result, books or other media professing alleged blasphemy, heresy, sedition, or immorality are liable to be banned. A second form of censorship, existential censorship, is linked to monopolistic domination by either the state or the market to subvert or deny public access to some forms of knowledge and information. The protection of the state may lead to a control of information under the aegis of national security, and then needs of the market may lead to a delimitation of information through the imposition of fees and charges. The author sees evidence of the first form in the attacks on materials deemed unsuitable for young readers (school library censorship) and of the second in stricter governmental controls over the dissemination of information (the FBI Library Awareness Program). She believes that a distinctive change from a liberal to a conservative stance in American regime values has contributed to the present state of censorship activity in this country.

INTRODUCTION

Like the word *pornography,* which Justice Potter Stewart said he found difficult to define although he knew it when he saw it, the word *censorship* is equally difficult to delimit. Conjured up by one of its oldest meanings is the work of the ancient Roman magistrates assigned to take the census of the citizens and to supervise their moral

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conduct. Time, however, has considerably extended the boundaries of this original surveillance and today the invocation of the word *censorship* summons up entire chapters of history ranging from the Spanish Inquisition or the New England witch hunts to the book burnings of Nazi Germany.

Because this article must of necessity address a "climate" of censorship rather than serve as a mere iteration of seemingly random acts of proscription—either of a governmental or nongovernmental nature—no precise definition of censorship will prove to be wholly adequate. But since some limits to the terrain which is to be subsequently explored here are necessary, it may prove helpful at the outset to use a distinction made by Sue Curry Jansen in her book on censorship. In distinguishing between two types of censorial activity, Jansen defines the first as regulative and the second as constitutive or existential. The one most familiar is regulative censorship, which refers to those exercises of power summoned up in defense of ideations imbued with auras of orthodoxy, such as religious deities, public safety, the protection of the state, or even personal purity. Throughout history, values seemingly inimical to the safeguard of such concepts are suppressed (hence accusations are leveled against blasphemy or heresy, sedition, obscenity, or immorality), with the consequence that the proponents or followers of these heterodoxies "can be identified, profiled, and evaluated in terms of humanistic standards," such as the level of violence needed to maintain control, the degree of tolerance for unorthodox ideas, or the severity of the purgation needed to remedy the situation. "Regulative censorships," she notes, "can be amended or revolutionized in ways that raise or lower bodycounts, numbers of books banned or citizens ghettoed or gulaged" (Jansen, 1988, p. 8).

In contrast to this overt and documentable battle between orthodoxy and heterodoxy, constitutive or, as I prefer to call it, existential censorship, is far more pervasive and invidious. Elite interests, whether those in control of the state, the market, or increasingly, those in which the interests of the state and the market are allied, exhibit a form of monopolistic domination in which public access to some forms of knowledge and information is either subverted or denied. Evidences of this latter type of censorship in which knowledge and power are inextricably linked abound in the recent decade, beginning with the concept that knowledge produced in the public interest has become a purchasable commodity subject to the regulation of the market and leading to private-sector control of information even though it was initially gathered in the public interest and paid for through public taxation (Jansen, 1988, pp. 167-72).

Historically, the literature of librarianship has been dominated by aspects of regulative censorship; only recently has existential

censorship with its recognition of the commodification of information/knowledge emerged as a topic of discourse. If any recent year might be selected to mark a coincidence of events dealing with both regulative and existential censorship, it might be 1977, the year in which the final report of the Commission on Federal Paperwork was issued and also the year in which plaintiffs in the case of *Pico v. Board of Education, Island Trees Union Free School District* began litigation alleging violation of their First Amendment rights. The first of these actions led to the passage of the Paperwork Reduction Act of 1980, which was subsequently used to sanction a singular role for the U.S. Office of Management and Budget as the national czar of federal information resources, and the second resulted in the first major decision of the U.S. Supreme Court involving the holdings of a school library and the rights of its students to have access to them.

The year 1977 is also interesting in that it witnessed the admixture of the American Library Association (ALA) film, *The Speaker,* dedicated to the concept that tolerance must be extended even to the most detestable ideas, and the protest of holocaust survivors in the Village of Skokie, Illinois, to the threat posed by the National Socialist Party of America in planning a demonstration there in spring 1977. The defense of the Nazis by the American Civil Liberties Union resulted in a severe diminution of its national membership, and the pros and cons relating to the ALA's continued sponsorship of the film occasioned national attention in both the press and on television. The ideological conflicts involved in both of these incidents are still matters of debate (Berry, 1978; Downs, 1985).

This article will explore the trajectories of both regulative and existential censorship during the decade of the 1980s as they have influenced the perspectives and perceptions of the American library profession. It is written at a time when world response to *The Satanic Verses* by the Indian-born novelist Salman Rushdie was a dominant front page feature and when the closing salvos in the trial of Oliver North were heard in the federal courts. Of these two developments, the alleged insult to the sacred writings and religious beliefs of Islam was suggested as the rationale for the first while the protection and defense of United States "national security" was raised as a central issue in the second.

Regulative Censorship in the Schools: The Pico Case

Although many notable lower court decisions regarding the censorship of books in school libraries had been issued prior to 1982, such as *Minarcini v. Strongsville City School District* (1976), the *Right to Read Defense Committee of Chelsea v. School Committee of the*

City of Chelsea (1978), and *Salvail v. Nashua Board of Education* (1979), the Supreme Court had not substantively addressed the question until it heard the case of *Pico v. Board of Education.*

The Pico case arose out of an incident in the fall of 1975 involving several members of a Long Island, New York, school board. Three board members, including its president and vice-president, had attended a conference sponsored by a conservatively oriented group called Parents of New York United (PONY-U). They obtained excerpts selected from books deemed by PONY-U as "objectionable." Several books were subsequently removed either from the school libraries or from use in the curriculum. Included were the anonymously published *Go Ask Alice;* Alice Childress's *A Hero Ain't Nothin' But a Sandwich;* Eldridge Cleaver's *Soul on Ice;* Oliver LaFarge's *Laughing Boy;* Bernard Malamud's *The Fixer;* Desmond Morris's *The Naked Ape;* Piri Thomas's *Down These Mean Streets;* Kurt Vonnegut's *Slaughterhouse-Five;* Richard Wright's *Black Boy;* an anthology, *The Best Short Stories by Negro Writers,* edited by Langston Hughes; and *A Reader for Writers,* edited by Jerome Archer, which included the text of Jonathan Swift's *A Modest Proposal.* The school board subsequently issued a press release making reference to the books in these terms: "anti-American, anti-Christian, anti-Semetic (sic), and just plain filthy." In justification of their actions, the board noted that "we who are elected by the community, are the eyes and ears of the parents. It is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers" (*Pico v. Board of Education,* 474 F. Supp. 387 at 390, 1979).

In January 1977, several students in the school and their parents who represented them as "next friends" filed an action for injunctive and declaratory relief alleging violation of their rights under both federal and state constitutions. In its initial ruling in the case, the U.S. District Court for the Eastern District of New York found in favor of the school board in deference to "the school board's substantial control over educational content...." In citing precedence for the decision, District Judge George C. Pratt quoted from a prior case: "The very notion of public education implies substantial public control. Educational decisions must be made by someone; there is no reason to create a constitutional preference for the views of individual teachers over those of their employers" (*Pico v. Board of Education,* 474 F. Supp. 387 at 397-398, 1979).

In 1980, the U.S. Court of Appeals for the Second Circuit, 638 F. 2d 404 (1980), reversed the lower court decision and found in favor of the students. The judgment of the court cited examples of the "erratic, arbitrary and free-wheeling manner" in which the school board had proceeded in the case, and noted the "substantive confusion,

not to say incoherence," which had typified the board's rationalizations in removing the material (*Pico v. Board of Education,* 638 F. Supp. 2d 404 at 416-417, 1980).

The school board appealed the decision of the appellate court, and the Supreme Court, in a five to four opinion, handed down their decision in 1982 (*Board of Education, Island Trees Union Free School District no. 26, et al. v. Pico,* 457 U.S. 853, 1982). The plurality (Justices Brennan, Marshall, Stevens, Blackmun, and White) held that the case should be remanded back to the district court where, if tried, evidence should be introduced to determine if the board's actions were based on "constitutionally valid concerns" rather than on what appeared to be the rash and injudicious personal convictions of school officials. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor dissented, finding that the school board was the proper vehicle for the determination of decisions affecting the education of the children within the public school system.

History links this case with another and equally historic school censorship controversy, the bitter dispute in 1974 over the decision of the Kanawha County (West Virginia) Board of Education to adopt a collection of books for use with the curriculum which were subsequently characterized as "anti-Christian, anti-American, anti-authority, depressing and negative (Teacher Rights Division, 1988, p. 2). Almost unprecedented in terms of its violence (actions by protestors included firebombings, phone threats to intimidate parents from sending their children to school, gunshot blasts at school buses, assaults, and spraying with MACE), the Kanawha County incident ground to its unhappy end in 1975 when an uneasy truce took place between the educational establishment and the protest movement, members of which were largely drawn from the rural areas of the county. It was a resident of this county who was later to speak on the topic of litigation involving the control of textbooks and library books in the schools at the PONY-U conference attended by three officials of the Island Trees School Board.

The polarity in the value systems held by both the plaintiffs and the defendants in the Island Trees case is comparable to that which distinguished the urbanized Charleston residents from their fundamentalist rural neighbors in Kanawha County. These value systems are not unrelated to what political scientists call regime values—those principles that in fact sustain a sociopolitical vision of society from one administration or regime to another. Since World War II, revolution has dramatically changed the contours of the globe, including the overthrow of governments in Eastern Europe, China, Cuba, the majority of African nations, and much of Asia. By contrast, the United States has been characterized by comparative stability,

although the ideological dichotomies between value systems have contributed greatly to the experience of stress and the expression of discontent by many Americans during the last few decades.

In a 1972 published analysis of American regime values, political scientist Donald J. Devine (1972) held that, although consensual support for the liberal values of the American regime still existed, future events could change their position:

> Political leaders may ignore member values; environmental stress may make political or other social structure unworkable; elites may organize non-mass-based revolution or *coups d'état;* foreign forces may come to dominate the system; members may come to "rationally" reject the values; or the values may not be transferred to the next generation. (pp. 368-69)

It is my contention here that the liberal values of the American regime have been considerably eroded within the past decade and that the 1988 presidential campaign revealed many of the polarities and differences in American sociopolitical perceptions: conservative versus liberal; support of or opposition to the death penalty; a predisposition for a stronger as opposed to a weaker role for the federal government; pro-life versus pro-choice in the matter of abortion; and others. In particular, Presidential Candidate Bush's oft-repeated references to the "l————" word (almost making the term *liberal* offensive of itself) symbolized the alleged weakness of his opponent's position and was used to support the charge that Governor Dukakis was unpatriotic, soft on crime, and prone to overspending and "big" government.

The shaping of these regime values is complex, induced by such factors as age, sex, ethnicity, education, class, political affiliation, religious preference, place of residence, and many others. It is interesting to note, for example, that several of these differentials figured in the Island Trees case. Of the books banned, one dealt with the teenage drug culture; several were written or edited by African-Americans; *Down These Mean Streets* was the work of a Puerto Rican; *Laughing Boy* dealt with a Native American child; and Barnard Malamud's *The Fixer* was written by a prominent Jewish author. The generation gap was also apparent in the case, the students being themselves products of a more religiously and ethnically integrated society than that known to the older generation represented by the school board officials. At present, the incidences of school library censorship continue to dominate proscriptions of library materials, an indication, perhaps, of parental dissatisfaction with the more permissive lifestyle of today's youth (*Attacks on the Freedom to Learn,* 1989).

The issues of regulative censorship that sprinkle the pages of the *ALA Newsletter on Intellectual Freedom* are linked to the censors' perception of threats to their personal or community value systems. Because American society does not readily lend itself to the coercion

of its dissident members (*coups d'état* are usually accompanied by the incarceration or slaughter of the regime's opponents), those threatened seek their redress through a variety of means: protest, litigation, legislation, and, in some cases, the actual suppression of the offending artifact be it book, movie, radio broadcast, or telecast.

The Commissions on Pornography

As a further illustration of the differences between regime values, one might cite the two national commissions on obscenity and pornography that have been appointed within recent memory. The first of these resulted from legislation passed in 1967 in which Congress directed that a commission be empaneled to study the causal relationship of obscene and pornographic materials to antisocial behavior and to advise Congress on the means by which the traffic in pornography and obscenity could be regulated "without in any way interfering with constitutional rights." The following year, President Johnson nominated eighteen members from the judiciary, the publications media, academe, the clergy, and the law and medical professions. Because of the resignation of one of the Johnson appointees, President Nixon later named Charles H. Keating, Jr., founder of Citizens for Decent Literature, to the commission. The commission's chairman was William B. Lockhart, dean of the University of Minnesota Law School and a liberal theorist on the interpretation of the First Amendment; the vice chairman was Frederick H. Wagman, librarian of the University of Michigan and former president of the American Library Association.

To many observers, the commission's findings were stunningly simplistic: repeal all federal, state, and local legislation which might "interfere with the right of adults who wish to do so to read, obtain, or view explicit sexual materials." Legislative regulations were recommended in the case of minors, and precautions were also suggested to protect the public from having sexually explicit material thrust upon them either through the mails or through public display. Twelve of the commissioners supported these recommendations, several others supported them conditionally, while two commissioners openly dissented, both of them clergymen. Keating, the maverick commissioner, did not participate in the commission's final deliberations but concurred with the opinions of the two dissenters and additionally submitted his own report in which he described the majority's findings: "Credit the American public with enough common sense to know that one who wallows in filth is going to get dirty. This is intuitive knowledge. Those who will spend millions of dollars to tell us otherwise must be malicious or misguided, or both" (U.S. Commission on Obscenity and Pornography, 1970, p. 622).

In references to the commission's final report, made while he was campaigning in Maryland on behalf of Republican candidates for Congress, President Nixon announced that he would "categorically reject its morally bankrupt conclusions and major recommendations" ("Nixon on Commission," 1971, p. 22). The Senate voted, in a 60-5 decision, to reject the report.

Over fifteen years later, President Reagan called for the establishment of a new commission, and Attorney General Edwin Meese announced the appointment of the eleven-member panel in May 1985. Again the membership included representatives of the judiciary, the clergy, the communications and publications media, the medical profession, and the law. Unlike the Johnson Commission, no librarian was invited to serve. In a little over a year, the Meese Commission made its final report, calling for tighter controls over sexually explicit material and a stringent enforcement of obscenity laws. As with the first commission report, the Meese Commission's findings had their dissenters, interestingly, both of them women, one a clinical psychologist and the other a journalist with particular interest in women's issues (statement of Dr. Judith Becker and Ellen Levine, 1986, vol. 1, pp. 195-212).

Although their minority report contains no reference to the Johnson Commission, its description of the conduct of the Meese inquiry panel provides some clues as to the different way in which the two commissions operated. Granted two years to conduct its investigation, the Johnson Commission had at its disposal almost $2 million for contracted behavioral studies. By contrast, the Meese panel was allowed one year for its deliberations and a more modest appropriation of $400,000. As a result, the Johnson Commission was able to rely heavily on empirical data from a series of studies conducted at American universities, studies which found no evidence of causality between pornography and anti-social conduct. Lacking the wherewithal to commission research, the Meese panel largely depended on public hearings where victims of anti-social acts opined about the dangers of pornography. As the dissenters commented, since few persons would come forward willingly to reveal their personal consumption of erotica or pornographic materials, the testimony provided was of necessity one sided.

The choice of commission chairmen was equally apposite: the Johnson chairman, William B. Lockhart, a law school dean, had done considerable legal research prior to his appointment on issues involving the obscene; his successor under Meese was Henry Hudson, prosecutor for Arlington County, Virginia, whose background was in the area of law enforcement. Another distinction between the two commissions was the fact that the earlier commission could concentrate on print (magazines and books) or on film and broadcast, while the later one was confronted with still newer means of delivery,

namely, home video and cable, the dimensions or effects of which in the distribution of pornography are still largely unknown. Then, too, considerable change in American social patterns differentiated the periods in which the two commissions were called: an escalating divorce rate; a nationwide medical crisis over the advent of AIDS; the widespread use of birth control devices; and the legalization of abortion had all shaped attitudes toward sexuality in significant ways between 1970 and 1986.

If the majority of the Johnson commissioners represented values of liberalism, freedom of choice, and individual rights of conscience, the majority of the Meese panelists spoke for the values of the new right. Crusaders in their moral cause, they associated pornography with sexually deviant crimes, although the causalities that provoke rape or assault may come from a host of other variables, both behavioral or environmental. If there was one small constant between the two commissions it was, perhaps, that the testimony of the witnesses for the American Library Association communicated a strikingly similar message: no censorship (Krug, 1970, 1985).

Although with very few exceptions American libraries buy little in the way of obscene or pornographic literature or other forms of media, the position of the ALA is remarkably permissive.

> In general terms, the American Library Association rejects anti-obscenity laws as unwarranted intrusions upon those basic freedoms which Justice Cardozo once described as the matrix of all our other freedoms. Anti-obscenity laws, which are directed not at the control of anti-social action but rather at the control of communication, represent a form of censorship ultimately aimed at the control of the thoughts, opinions, and basic beliefs of citizens in a free democracy. ("ALA Protests..., 1977, p. 144)

The libertarian stance of the association has not been taken without criticism from some of its members.

The issue is exacerbated by two quite distinct phenomena: (1) the wholly differing opinions concerning the causality between antisocial behavior and pornographic listening, viewing, and reading; and (2) the identification of the anti-pornography movement as a feminist concern. In regard to the first of these, the two national commissions took totally opposite positions. The Johnson Commission found "no evidence to date that exposure to explicitly sexual material plays a significant role in the causation of delinquent or criminal behavior among youth or adults" (U.S. Commission on Obscenity ..., 1970, p. 27). By contrast, the Meese Commission concluded that "the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence, and, for some subgroups, possibly to unlawful acts of sexual violence" (U.S. Attorney General's Commission on Pornography ..., 1986, p. 326). Since the acceptance of either of these positions is a somewhat subjective matter, the question of causality remains moot.

The second matter, the perception by prominent feminists that pornography is a principal means by which women are subjugated and degraded, has precipitated a very active literature (Griffin, 1981; Dworkin, 1981; MacKinnon, 1987; Morgan, 1989; Millett, 1970) and the initiation of a number of local ordinances that have seldom been upheld in higher courts of jurisdiction on the grounds of their "chilling effect" on First Amendment rights.

A recent scholarly assessment of this issue, *The New Politics of Pornography,* analyzes the works of two prominent feminists, Catherine MacKinnon and Andrea Dworkin, in support of anti-pornography ordinances introduced in two municipalities, Minneapolis and Indianapolis in 1983 and 1984 respectively. Written by Donald Alexander Downs (1989), a professor of political science, this carefully researched and balanced argument attempts to restore civility to public discourse, a civility that has been threatened in late years by the intolerance expressed by both liberals and conservatives alike on the issue of the obscene. Although the author holds that "violent obscenity"—depictions of murder, dismemberment, brutality, or violence in the context of obscene acts—should be disallowed constitutional protection, he rejects the feminist proposition that all pornography be denied free expression:

> The position one takes on the pornography issue reveals how far one is willing to go in tolerating human weakness. The best position, in my estimation, is a compromise....Social policy in a liberal democracy should recognize the higher ideals of equal respect and reason but should also tolerate the human need for remissive relief and retreat. If some behavior must be restricted, thought and imagination must remain free. (p. 188)

In reflecting the dichotomy between the conservative and liberal spirit in American life, the issue of pornography has been increasingly politicized. As Downs points out, branches of the American Civil Liberties Union in both Minneapolis and Indianapolis reacted violently to the proposed feminist ordinances, "denouncing them as assaults on the very foundations of free speech." At the same time, activists for the ordinances "espoused largely monolithic interpretations of pornography, so public debate assumed an 'all or nothing' quality." These "emotional, symbolic, and polarizing stands" render public discussion almost impossible (Downs, 1989, p. xvii).

One interested policy actor in the debate over the pornography issue has been the Freedom to Read Foundation, which has taken up a number of cases challenging the constitutionality of anti-obscenity ordinances. In 1984, for example, the foundation filed a friend-of-the-court brief on behalf of the Indiana Library Association and the Indiana Library Trustees Association in the case of *American Booksellers Association, Inc., et al., v. William Hudnut, III,* 598 F. Supp. 1316 (S.D. Ind. 1984). Hudnut, mayor of Indianapolis, supported

the ordinance in that city, unlike Mayor Donald Fraser who vetoed a comparable ordinance in Minneapolis. The foundation also filed a brief the following year when the *ABA v. Hudnut* case was appealed in the Seventh Circuit Court 771 F. 2d 323 (7th Cir. 1985), which, like the court of original jurisdiction, ruled the ordinance unconstitutional, a decision affirmed by the Supreme Court. Through this and similar actions, the foundation, and, in some cases, ALA have taken their stance against the chilling effect that may result from over-repressive legislation.

The screening of books for school libraries, the debate over the suitability of specific materials for a student curriculum, or the effort to delimit the production and dissemination of pornography or obscenity are all examples of regulative censorship; as such they are matters that can be publicly scrutinized and, depending on one's point of view, supported or attacked. But existential censorship is not so easily identified, operating in a covert manner and in some cases protected by one of the most powerful shibboleths of all times, the concept of "national security." A particularly virulent form of existential censorship has been the so-called Library Awareness Program, which is still occasioning national press coverage and attention.

The Library Awareness Program

Instigated by the Federal Bureau of Investigation of the U.S. Department of Justice, visits by federal agents were paid to specialized scientific and technical libraries in search of information about foreign nationals capable of exploiting these collections for the use of Soviet intelligence services.

Among the first to blow the whistle on these activities was Paula T. Kaufman, then acting university librarian at Columbia University. On June 7, 1988, two FBI agents approached a clerical staff member of the Mathematics/Science departmental library at Columbia. Within a few days, Kaufman met with the agents herself, at which time they alerted her to what has subsequently been called the Library Awareness Program, an investigative device through which federal agents seek information on foreign threats to American national security. Citing violations of First Amendment guarantees to protect the right of patron privacy, the laws of New York State which guarantee anonymity to library users, and university policies inimical to such revelations, Kaufman refused to cooperate.

A front-page story in the *New York Times,* "Libraries Are Asked by FBI to Report on Foreign Agents," published on September 18, 1987, was among the first of many articles in the national press that were, for the most part, sympathetic to the rights of library users and laudatory of the librarians' resistance to the program. An early report of the Office of Intellectual Freedom of the American Library

Association cited FBI inquiries besides Columbia in the following institutions: New York University; George Mason University; Pennsylvania State University; the State University of New York at Buffalo; and the Universities of Maryland, Kansas, California at Los Angeles, Michigan, Houston, Cincinnati, Utah, and Wisconsin; the Broward County (Florida) Public Library; the Brooklyn Public Library; the New York Public Library; and the Information Industry Association ("FBI Library Program Still in Crossfire," 1988, p. 113).

On May 17, 1988, William Sessions, FBI director, testified before the Senate Judiciary Committee as part of an FBI oversight hearing. At that time, Sessions presented an unclassified report entitled "The KGB and the Library Target: 1962-Present," in which the bureau alleged that agents of the Soviet Intelligence Services (SIS) had been using American technical libraries for subversive purposes since 1962. According to Sessions, the Library of Congress, scientific and technical sections of public libraries, specialized departments of university libraries, and large information clearinghouses had all been prominent targets of the SIS intelligence collection effort (U.S. Federal Bureau of Investigation, 1988, p. 4).

Although many contemporary news accounts date the beginnings of the Library Awareness Program to the 1960s, there is evidence to suggest that it (or at least some form of a prototype) has a much earlier provenance. Through the courtesy of one of my Columbia colleagues, I received a copy of a letter obtained through the Freedom of Information Act. The letter, dated September 25, 1941, is signed by E. E. Conroy, special agent in charge of the Newark (New Jersey) FBI. In the four-page document, Conroy informs the FBI Director, J. Edgar Hoover, in Washington of a suggestion "which could be of value to the Bureau in connection with its National Defense investigations." The suggestion arose in a conversation between a bureau special agent (name deleted) and an employee (name deleted) of the Newark Public Library, who "stated that their library, together with other business libraries, has a world of information concerning the United States, some of which she feels would be most valuable to a person bent on subversive activities." Such information included data concerning Army and Navy contracts, locations of manufacturing plants, and their ability to generate products. She further advised the agent that "often times suspicious persons come into the library and ask for information of this type." The library employee also said that libraries could take "the names and addresses of all persons desiring information of a particular type," and if this procedure proved undesirable, names and addresses could be obtained on a register "with appropriate notations by the librarian as to the kind of information requested by each individual." The library representative is further quoted as having "stated that she felt that if the Bureau would explain the situation to all libraries and request

that they do what has been set forth in this letter that they would be more than glad to do so." In addition, she furnished the agent a list of the business and technical departments in the major public libraries of the country, including among others those of Baltimore, Boston, Cleveland, Hartford, Los Angeles, Nashville, New York City, Pittsburgh, Providence, and San Francisco. Special Agent Conroy included the list, with addresses, in his letter to Hoover. He also noted that in the case of plant explosions it would prove particularly helpful to the bureau to have lists of the names of all persons who had done "considerable reading" on explosives. In concluding his letter, Conroy commented that these library registers "may prove valuable to the Bureau in investigations of espionage and sabotage."

The exchange of correspondence between Conroy and Hoover suggests another example of distinctive regime values. Consider the date of the letter: September 25, 1941. The United States is poised on the brink of a world conflict; Hitler's armies portend great destruction to the democratic ideal; England, our natural ally, is already at war and France has already surrendered. Small wonder that the employee in the Newark Public Library was offering her assistance to the national defense effort.

A half-century in time separates this unidentified 1940s' librarian from the present generation of her peers. It is almost unthinkable that any librarian today would give similar advice to an FBI agent. The reasons for this reversal are many and complex, but some are suggested by Evelyn Geller in her work on library censorship. Geller traces the growing liberalism of the library profession from 1876, the year of the ALA's founding, to 1939, the year in which the Library Bill of Rights was adopted by the association. Eschewing its original censorial stance of forbidding the inclusion of certain books in library collections, the profession gradually adopted a more open stance and came to the defense of works that in earlier periods would probably not have been added. Geller (1984) attributes this change in part to "a new perspective [that] meshed freedom with the advocacy of a host of democratic values—civil liberties, pacifism, antifascism, racial equality" (p. 164).

The adoption of governmental loyalty oaths following World War II also contributed indirectly to the liberalization of the library profession. In 1947, the same year which witnessed the establishment of the National Security Council, President Truman issued Executive Order 9835 creating the Federal Employees Loyalty Program, a device by which the patriotism of government employees could be probed. State loyalty programs were also begun. Among those heard in excoriation of these measures of dubious constitutionality were the librarians ("It is the Loyalty Oaths that are Subversive," 1950, p. 82; Berninghausen, 1950, pp. 16-17; "ALA Resolution on Loyalty Programs," 1950, p. 306). The subsequent witchhunts carried out

by Senator Joseph McCarthy of Wisconsin, in which innuendo and allegation were used to discredit innocently accused persons, were also resisted by library leaders. The then prevailing climate of fear and repression occasioned the publication of the Freedom to Read statement in May 1953 by the Westchester Conference of the ALA and the American Book Publishers Council, a statement subsequently revised in 1972 and adopted by many national organizations (ALA Office for Intellectual Freedom, 1983, pp. 77-91; Moore, 1971, pp. 1-17).

The Cold War, which dominated and indeed ironically fueled the worst excesses of the McCarthy era, continued to cast its influence on the activities of the federal government. Secrecy became more pervasive and it was systematized and bureaucratized in many ways, including surveillance, classification, intelligence and counter-intelligence, and covert operations. Although unaccountable government as revealed in the disclosures of the Watergate scandals ultimately brought Richard Nixon to resignation, the Irangate or Iran-Contra affair seems to have little damaged the popular estimate of President Reagan's Administration.

The Price Tag of Public Information

Central to the current unrest expressed by many civil libertarian groups and representatives over the increasingly repressive apparatus of government is the role of information (see ALA, 1988; Benton Foundation Project ..., 1989; Demac, 1984; Demac, 1988; Curry, 1988; Katz, 1987; Pell, 1984). Not only are the interests of various political administrations best served by keeping the operations of their governments secret, in part through the absence of information and in part through deliberate misinformation, the interests of the information capitalists also have a stake in its control. Jansen perceives this latter development as a contributory factor in the growth of existential censorship. She argues that the classic liberal model of democracy was based on a concept of knowledge as a public good. "Even the much criticized Utilitarian image of a 'free-market of ideas' protects the belief that access to knowledge is a right rather than a privilege," she comments, but that right is currently being threatened by the growing recognition that knowledge should be regarded now as a commodity. Hitherto regarded as communal property, knowledge can only produce profit when: (1) it is removed from the public sphere, and (2) when the channels available for its distribution are limited. Since the new information capitalists have vested interests in keeping information privileged, they have brought pressure on the federal government to limit its supply. Since 1980, federal information policy has been shaped by at least eight responses to this economic pressure. Drawing largely on the earlier research of Donna Demac, Jansen lists these as follows: (1) "deregulation"

has eliminated much of the responsibility of private industry to report to the government; (2) information gathered and analyzed by the federal government for local governments has been curtailed; (3) classification of government documents has been made more stringent; (4) information made available through the Freedom of Information Act has been made more expensive; (5) the number and volume of publications available from the Government Printing Office have been reduced, and decisions concerning future publications have been made contingent on cost; (6) prior censorship has been invoked over the writings and publications of over 100,000 current or former government officials; (7) access to nonstrategic scientific and technological information produced in universities under government contract has been reduced; and (8) cuts have been made in the budget of the Library of Congress affecting its services to users (Jansen, 1988, p. 169), and one could, in addition, cite the continuing Reagan Administration posture of no fiscal support for federal library programs. Literally hundreds of supporting examples for Jansen's iteration have been identified by the ALA Washington Office in their serial publication, "Less Access to and Less Information by and about the U.S. Government," now in its fifteenth semi-annual number (ALA Washington Office, 1990).

There are those who would, of course, question alluding to the Reagan Administration's efforts at privatizing information as censorship, but in Jansen's words, "the marketplace of ideas is no longer a public utility which serves all who seek its goods. Increasingly it becomes a private enterprise which serves only those who can afford to pay a price for the commodities it markets to citizen/shoppers" (Jansen, 1988, p. 168). The threat to that very marketplace was the rationale for the establishment of the Coalition on Government Information in 1986, a coalition initiated by ALA members and headquartered at the ALA Washington Office. This federation of some fifty organizations serves as a clearinghouse "to collect and disseminate information about attempts to limit the right to know and to ensure that member organizations are aware of actions which might result in a reduction of access to government information (Coalition of Government Information, n.d.). Among the concerns of its members are the cessation of statistical compilations published by the federal government, the contracting out of federal libraries, the repressive classification of government documents inhibiting historical research, the questionable requirement that federal employees should sign lifetime prepublication contracts, and the revision of OMB Circular A-130 which places untoward responsibility on the U.S. Office of Management and Budget for the development of government-wide information policy.

Whether or not the member organizations of the coalition agree with Jansen that censorship is "the knot that binds power and

knowledge" in the current economy, they are all aware that during the 1980s the notion of information as a public good and the concept of assuring equitable access to information/knowledge came not only under review but also, and more unfortunately, under attack.

That attack has come for the most part from a conservative regime, and the dichotomy separating the values of conservative and liberal regimes can serve as a useful device to inform our dialogues about censorship. It influences almost every instance of proscription cited in the newspaper or broadcast over the airwaves. Should arts and humanities projects supported by federal funds be subjected to prior censorship? Should the FBI's surveillance of the users of scientific libraries have been extended to the very librarians who resisted the investigation and rose to the support of the privacy rights of their patrons? Are objections to such books as *The Catcher in the Rye* or *The Grapes of Wrath* really based on their alleged profanity or obscenity or do such objections mask deeper community concerns that are more difficult to express (Honan, 1989; People for the American Way; L. F. Crismond, personal communication to S. J. Markman, Dec. 1, 1989; Mydans, 1989)? As distinctive as each of these questions is, they are all marked by invisible Maginot lines separating the left from the right.

At this writing, it is impossible to foresee any resolution of this dichotomy, one which has deep roots in the American ethos, but it is important to realize that what distinguishes this dualism from similar ideological differences in past eras of American history is the celerity with which the censorious power of liberalism's critics grows. In quoting from Thomas Jefferson, Walter Karp observes:

> "Every government degenerates when trusted to the rulers of the people alone," Jefferson warned us two centuries ago, and "even under the best forms, those entrusted with power have, in time and by slow operations, perverted it into tyranny," The operations are no longer slow. They have become ominously swift, and they leave us no time. (Demac, 1988, p. xii)

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The New Age Rage and Schoolbook Protest

EDWARD B. JENKINSON

ABSTRACT

EXPLORES "MYTHS, LEGENDS, and misunderstandings" surrounding attempts to remove textbooks and library materials from public schools, reviews related legal decisions, and presents conclusions on the schoolbook protest movement that are based on seventeen years of studying the issues involved.

INTRODUCTION

Myths, misconceptions, and misunderstandings surround the public schools. These can serve as the basis of attempts to remove textbooks and library books, courses, and teaching methods. They can become planks in platforms for potential school board members. They can even be perpetuated by administrators, librarians, and teachers who object to the inclusion of certain materials in classrooms and libraries.

During the seventeen years that this author has studied "the schoolbook protest movement," the following myths, legends, and misunderstandings were discovered.

1. *The belief that all schools and all courses are alike.* Thus, if values clarification is included in the curriculum in school *A*, some critics think that it must be in schools *B*, *C*, and *D*. If an allegedly "sexually explicit" film is shown in school *J*, then citizens might challenge its use in schools *K*, *L*, and *M*. The facts may be that the film would not be labeled sexually explicit by more than a handful of people and that it was never seen by students in any of those schools.

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2. *The myth that students accept uncritically all that is included in any book but especially in a textbook.* This myth encompasses the belief that teachers teach every page of a textbook, that they, too, are uncritical of its contents, and that most schools use exactly the same textbooks. Some critics of the schools are convinced that textbooks exert tremendous influence on children. Two of the leading textbook protesters in the United States have expressed their creed in these two statements: "Until texts are changed we must expect a continuation of the present epidemic of promiscuity, unwanted pregnancies, VD, crime, violence, vandalism, rebellion, etc." (Gabler & Gabler, 1981). "TEXTBOOKS mold NATIONS because textbooks largely determine HOW a nation votes, WHAT it becomes and WHERE it goes" (Gabler). Those same protesters for years have singled out one particular textbook in their speeches leading listeners to believe that it is in nearly every elementary school in America and helping to perpetuate the myth that all schools use the same books. But, at its peak, that textbook captured only 4 percent of the school market, and it has been out of print for more than a decade (Hefley, 1976, p. 122).
3. *The myth that anything that is in a book is endorsed by the school system.* According to this belief, if a book contains any "objectionable" language, the school endorses that language. If a character in a novel or short story lies or steals, it is alleged that the school system sanctions those activities because school officials permitted the book to be in the library or classroom.
4. *The myth that all teaching is indoctrination.* Some schoolbook protesters seem to believe that whatever teachers talk about in class, they want students to believe. Thus if teachers explain communism or socialism, they allegedly want students to accept those forms of government. In the case of books, poems, stories, plays, and songs, it is alleged that whatever an author, poet, lyricist, or playwright includes in a work is there to be taught, to be spread through indoctrination. Thus a nationally prominent minister charged that the public schools "were teaching pure Communism, Red Chinese style" because he found in one story in a course on global education a lttle Chinese girl who revered Chairman Mao and memorized his sayings. Apparently the reverend thought that the readers were expected to do the same. (The Reverend Greg Dixon is pastor of the Indianapolis Baptist Temple and former national secretary of the Moral Majority. He and this author have debated 12 times including appearances on the *Today* show and other television programs broadcast from Indianapolis and Bloomington, Indiana. He made the charges quoted here in television appearances and in a formal debate sponsored by the Indiana State Teachers Association.)

The minister also declared in several speeches, debates, and sermons that "public schools encourage children to commit suicide." One basis for his charge was that a music teacher allowed students to bring their favorite music to class as a reward for their performance in a concert. One student brought the theme song from *M*A*S*H** which contains the line, "Suicide is painless." The minister charged that public school teachers are working with environmentalists to reduce the population so that there will be enough clean air and water for an overpopulated planet at the turn of the century.

5. *The misconception that a book should be judged equally by external factors and its contents.* Schoolbook protestors frequently cite an author's background and political and religious affiliations as sufficient reasons to reject a book. Some of the protestors care little about what is actually in the book itself; in fact, some do not bother to read books they consider to be objectionable. Instead, they concentrate on the author's activities and/or affiliations or on what someone else has said about the book. Thus it is not uncommon for a book to be condemned by a person who has neither read it nor, in some cases, actually seen it.
6. *The myth that "alien" religions have invaded the schoolhouse.* Several of the major organizations protesting books and courses have declared that, since the Supreme Court "threw prayer out of" public schools, students are being indoctrinated in the religions of secular humanism, New Age, and globalism (this charge will be examined later in this article).

Misunderstandings about academic freedom also abound. They stem partly from the fact that some teachers think they are free to teach anything in any manner they deem fit. On the other hand, some critics believe that public school teachers may teach only what is in a textbook—and nothing else—in the manner prescribed in the teacher's manual. Both are wrong.

Teachers should be "aware of the relationship between the particular materials or teaching methods employed and the course being taught. If methods or materials are completely unrelated to course objectives, their use would not be viewed as legally protected" (McCarthy & Cambron, 1981, p. 49). Noting that the courts have treated academic freedom for public school teachers as more of a protected "interest" than a "right," Martha McCarthy and Nelda Cambron caution that the courts have preferred to view each case individually. "Therefore, teachers must rely on the various judicial decisions for general guidance only" (p. 49).

The courts have frowned upon teachers who have departed from their assigned subject matter or who use unacceptable teaching methods. For example, the courts held that a teacher could not discuss sex in an all male speech class *(State ex rel. Wasilewski v. Board*

of School Directors), that a teacher could not talk about politics in an economics class *(Ahern v. Board of Education,* 1971), that a teacher could not express his disapproval of ROTC in an algebra class *(Birdwell v. Hazelwood School District,* 1972), and that teachers have no constitutional rights to use unorthodox teaching methods *(Adams v. Campbell County School District,* 1975). But in *Keefe v. Geanakos,* the court held that a teacher had been improperly dismissed for assigning an *Atlantic Monthly* article that contained a taboo word. The court concluded that the principles of academic freedom embodied in the Constitution barred the teacher's dismissal *(Keefe v. Geanakos,* 1969). In its decision, the court included this quotation from the Supreme Court case of *Wiemann v. Updegraff* (1952): "Such unwarranted inhibition upon the free spirit of teachers affects not only those who...are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice...."

In *Parducci v. Rutland,* 1970, pp. 352-58), a high school teacher of English was dismissed for being insubordinate when she refused to comply with her superiors' orders that she never again teach Kurt Vonnegut's short story, "Welcome to the Monkey House." Two of the administrators in the school district called the story "literary garbage," and they claimed that its "philosophy" favored killing old people and practicing free sex. They also told the teacher that three students asked to be excused from the assignment and that several parents complained about the story. When the teacher did not follow the administrators' orders, the school board dismissed her on the grounds that the story had a "disruptive effect" on the school and that she had refused "counseling and advice of the school principal" and was therefore guilty of "insubordination" *(Parducci v. Rutland,* 1970, pp. 353-54).

The court upheld the teacher's right to teach the story and denied the school board the right to dismiss her. The court found that the story was appropriate for high school juniors and that it was not obscene. The court also noted that Vonnegut was not advocating the killing of the elderly but that he was satirizing the depersonalization of man in society (pp. 355-56).

In a significant case involving the academic freedom of secondary school teachers, Judge Richard P. Matsch wrote:

> To restrict the opportunity for involvement in an open forum for the free exchange of ideas...would not only foster an unacceptable elitism, it would also fail to complete the development of those not going on to college, contrary to our constitutional commitment to equal opportunity. Effective citizenship in a participatory democracy must not be dependent upon advancement toward college degrees. Consequently, it would be inappropriate to conclude that academic freedom is required only in the colleges and universities *(Bob Cary, et al. v. Board of Education,* 1977, pp. 945-56).

Judge Matsch noted that if teachers must follow only the wishes of the majority as reflected by the school board and school authorities, the result would be tyranny. "The tyranny of the majority is as contrary to the fundamental principles of the Constitution as the authoritarianism of an autocracy" (p. 952).

During seventeen years of studying the schoolbook protest movement, this author has made a number of discoveries—discoveries that other scholars probably made years before—and has drawn some conclusions that may be worth sharing.

First, parents have the right to know what their children read and study in school. As a parent, I believe there is an obligation to keep informed about what my children are studying in school and what they are reading both for school and on their own. But I also believe that my parental rights extend solely to my own children. Therefore, if I should decide that my children should not read a particular novel in English class, for example, I believe that I have the right to ask for an alternate assignment. But I do not believe that I should demand that no student in the class or in the school can read the book. However, if I am very upset about the novel, I have the right to challenge it so that it can subjected to reconsideration by a duly authorized committee that will report to the school board. But it should be the recommendation of the reconsideration committee and the decision of the school board—not my opinion—that would precipitate the novel's removal from the school. Other parents should also have the right to object to, or to endorse, the novel before final action is taken on it.

Second, citizens who object to a text or library book should read it. I am appalled by the number of people who object to books and courses without knowing anything about them except that "they are bad." Such people rely on others for their information. What is most unfortunate is that some administrators and school board members have agreed with the protestors and have removed books without reading them.

Third, to prevent the kind of removal described earlier, all school systems must have established policies for selecting classroom and library materials and must have procedures for handling complaints. Several years ago, I carefully examined 222 sets of policies and procedures for school systems in Indiana. I believe that my findings are applicable to all states. It was discovered that less than 15 percent of the school systems had both policies and procedures that protected intellectual freedom and, at the same time, guaranteed a fair hearing to all who might protest. In many instances, school systems had edited documents such as the Library Bill of Rights and procedures for handling complaints (published by the National Council of Teachers of English or some other professional organization) so that they would neither be controversial nor strong. In a few cases, the school systems

had simply removed any statements that mght be considered controversial. As a result, what was left almost guaranteed success for the protestor.

Fourth, according to the results of surveys conducted by Lee Burress, professor of English at the University of Wisconsin at Stevens Point, parents file the majority of complaints about books. Then come administrators, teachers, clergymen, librarians, English department chairpersons, school board members, and students (Burress & Jenkinson, 1982). An emerging group consists of "concerned citizens" who may or may not have children in school but who belong to organizations that plan to "clean up" the schools.

Organizations proliferate. In a book that I wrote a decade ago, it was stated that I could name at least 200 organizations at the state, local, and national levels that, among other things, protest school textbooks, courses, and library books. Now I believe that there are more than 2,000 such organizations because of the ever-increasing number of local affiliates of the Eagle Forum, Concerned Women of America, Citizens for Excellence in Education, National Association of Christian Educators, the John Birch Society, and other state and national organizations.

Fifth, closet censorship is everywhere. Examples abound. An English department chairperson locked up all classroom sets of Steinbeck's *Of Mice and Men* because he read that it had been removed from a high school in another state. Members of his department had taught it without complaint for more than a decade. A librarian decided not to order a replacement copy of Shel Silverstein's *Where the Sidewalk Ends* because of a complaint in a neighboring district. An administrator quietly told a teacher that it would be prudent for her to remove several novels from her recommended reading list because of objections he had heard about (for additional examples, see later discussion).

Sixth, the number of incidents of schoolbook protest seems to be rising. During the early seventies, approximately 100 were annually reported to the American Library Association's Office for Intellectual Freedom. By 1976, the number had risen to slightly less than 200 and climbed to nearly 300 in 1977 (*Indianapolis Star,* 1978, p. 1; *Los Angeles Times,* 1978, p. 1). Shortly after the 1980 presidential election, Judith F. Krug of the ALA reported a fivefold increase in incidents reported to her office. She later revised her estimate to a threefold increase, which would mean roughly 900 reported incidents a year (Krug, 1983).

But reported incidents are only a small part of the attempts to remove school materials and methods. Very early in this study, I read an article by a librarian in Wisconsin who estimated that, for every incident reported in the newspapers or to a professional organization, at least twenty-five go unreported. After talking with teachers,

librarians, and administrators in meetings in more than forty states, I believe that for every reported incident of censorship at least fifty go unreported.

Seventh, approximately 95 percent of the schoolbook protests studied have been precipitated by persons who would be classified as being on the far right politically. Protest comes from the left as well. Several years ago, two school librarians in Indiana reported two incidents that merit mentioning here. The first involved a directive from a school administrator ordering the librarian to search the shelves for any books unfavorable to blacks and to remove them. Her carefully drafted response to the directive pointed out that, if she searched the shelves for books that might be construed to have statements offensive to any group, the library's shelves would be decimated, at least. She then pointed out that teachers can teach children how to handle such books, and that such handling is the hallmark of an educated person.

In the second incident, a local group requested that the librarian remove all of the "Little House" books since they contain sexist stereotypes. She refused to comply with the request.

The principal of the Mark Twain Junior High School in Fairfax County, Virginia, removed *The Adventures of Huckleberry Finn* from the school because he charged that it was racist. He had done the same thing when he worked in a school in Illinois. But the school board in Virginia restored the Mark Twain classic to the school named for the author.

Individuals and groups that could be classified as being on the left have protested such works as *To Kill a Mockingbird, Daddy Was a Numbers Runner, Mary Poppins, Back to School with Betsy,* and the Harlequin romances. They have also protested plays such as *Show Boat* and *The Merchant of Venice* which they charge are offensive to one group or another.

Eighth, when this author first began to study the schoolbook protest movement, an attempt was made to identify the major objections of the protestors. After three years of study, twenty-five such objections were discovered; today there are more than 200. The following forty are the most common:

1. "Education in human sexuality, including pre-marital sex, extramarital sex, contraception, abortion, homosexuality, group sex and marriages, prostitution, incest, masturbation, bestiality, divorce, population control, and roles of males and females; sex behavior and attitudes of student and family" (Schlafly, 1984, appendix B).
2. "Values clarification, use of moral dilemmas, discussion of religious or moral standards, role-playing or open-ended

discussions of situations involving moral issues, and survival games including life/death decision exercises" (Schlafly, 1984, appendix B).

3. Courses on drug and alcohol abuse.
4. Preventive guidance programs, especially those that include "contrived incidents for self-revelation; sensitivity training, group encounter sessions, talk-ins, magic circle techniques, self-evaluation and auto-criticism; strategies designed for self-disclosure (e.g., zig-zag)" (Schlafly, 1984).
5. Programs that enhance self-esteem.
6. "Death education, including abortion, euthanasia, suicide, use of violence, and discussions of death and dying" (Schlafly, 1984).
7. "Organic evolution, including the idea that man has developed from previous or lower types of living things" (Schlafly, 1984).
8. Stories about, or discussions of, the supernatural, the occult, magic, witchcraft, Halloween, etc.
9. "Autobiography assignments; log books, diaries, and personal journals" (Schlafly, 1984).
10. "Anti-nationalistic, one-world government or globalism curricula" (Schlafly, 1984).
11. World geography if there is mention of "one worldism."
12. Histories that mention the United Nations, that refer to this country as a democracy instead of as a republic, that point out weaknesses in the founders of this nation or in any of the nation's leaders.
13. Human development and family development programs usually taught in home economics classes.
14. Novels, stories, poems, or plays that portray conflicts between children and their parents or between children and persons in authority. Also, literary works in which children question the decisions or wisdom of their elders.
15. Literary works that contain profanity or any "questionable" language.
16. Literary works that contain characters who do not speak standard English. Such characters, it is alleged, are designed by the authors to teach students "bad English."
17. Black literature and black dialect.
18. Literary works and textbooks that portray women in nontraditional roles (anything other than housewife and mother). On the other hand, some feminist groups object to illustrations in basal readers and other textbooks that show women in the so-called traditional roles.
19. Mythology—particularly if the myths include stories of creation.
20. Stories about any pagan cultures and lifestyles.

21. The humanities. Several organizations have objected to the humanities because they "are part of the religion of secular humanism." The groups also reject "humanistic education" for the same reason.
22. Passages that describe sexual acts explicitly or passages that refer to the sex act.
23. Invasions of privacy. Any questions, theme assignments, or homework that asks students to examine their personal backgrounds—e.g., family, education, religion, childhood experiences.
24. Literature written by homosexuals, literature written about homosexuals, any favorable treatment of homosexuals.
25. Books and stories that do not champion the work ethic.
26. Books and stories that do not promote patriotism.
27. Negative statements about parents, about persons in authority, about the United States, about American traditions.
28. Science fiction.
29. Works of "questionable writers." Writers so labeled include Langston Hughes, Dick Gregory, Richard Wright, Malcolm X, Eldridge Cleaver, Joan Baez, and Ogden Nash.
30. "Trash." Examples: *The Catcher in the Rye, Go Ask Alice, Flowers for Algernon, Black Boy, Native Son, Manchild in the Promised Land, The Learning Tree, Black Like Me, Daddy Was a Numbers Runner,* and *Soul on Ice.*
31. Any books or stories that do not portray the family unit as the basis of American life.
32. Critical thinking skills.
33. Books and stories that are perceived to be unfavorable to blacks.
34. The use of masculine pronouns to refer to both male and female.
35. News stories that deal with the harsh realities of life—war, crime, death, violence, and sex.
36. Magazines that contain advertisements for alcoholic beverages, birth control devices, or trips to countries like Cuba.
37. The swimwear issue of *Sports Illustrated.*
38. Nudity. Examples: the little boy in Maurice Sendak's *In the Night Kitchen* and reproductions of paintings showing half-clad gods and goddesses.
39. Depressing thoughts and negative statements about anything. Two of the most prominent schoolbook protestors objected to the inclusion, in a basal reader, of P. T. Barnum's statement, "There's a sucker born every minute," because it is a depressing thought. Those two protestors also have a special category for negative thoughts in their guidelines for reviewing textbooks.
40. Any psychological or psychiatric method practiced in the public schools. Any psychological principle used in teaching.

At least a dozen of the targets listed can be placed under the umbrella charge of secular humanism. During the last decade, the religion of secular humanism, which is commonly and intentionally confused with humanism by ultra-conservative schoolbook protestors, became a major objection of organizations critical of public school teaching materials.

The charge is that secular humanism is faith in man instead of faith in God and that the tenets of secular humanism are spread throughout the schools in all subjects. The Supreme Court allegedly "ruled" that secular humanism is a religion with these words in a footnote in the case of *Torcaso v. Watkins* (1961): "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

Tim LaHaye, a California minister and a founder of the Moral Majority, attacks humanism in his best-selling books, sermons, speeches, and television appearances. In *The Battle for the Mind* (1980), he declared: "Most of the evils of the world today can be traced to humanism, which has taken over the government, the UN, education, TV, and most of the other influential things of life" (p. 9). In *The Battle for the Public Schools* (1983), LaHaye charged that humanists have invaded public classrooms, brainwashing children with ideas about evolution, sex, death, socialism, internationalism, and situation ethics. Humanists, according to the writer of the "battle" series, are "secular educators who no longer make learning their primary objective. Instead our public schools have become conduits to the minds of youth, training them to be anti-God, antimoral, antifamily, anti-free enterprise, and anti-American" (p. 13). LaHaye lists these "hallmarks" of secular humanism: the look-say method of reading, values clarification, death education, global education, evolution, sex education, total reading freedom, the "negation" of Christianity in the schools, and socialism—among others (LaHaye, 1983, p. 13).

But, regardless how much is written about secular humanism and how many definitions are circulated, it is interesting to note that few persons in local school districts can define the religion of secular humanism even though they believe it is corrupting youth. One organizer of parent protest groups defined the religion on a national television program as "the philosophy of anything goes" (Janet Egon of Parents of Minnesota, Inc., on the *MacNeil-Lehrer Report,* February 20, 1980). Another school critic told a school board that humanism is the "belief that if something feels good, do it." Others believe that the Supreme Court established secular humanism as the religion of the public schools when it "removed God" from classrooms in the case of *Abington v. Schempp.* That belief is supported by Senator Jesse Helms (1979), who wrote:

> When the U.S. Supreme Court prohibited children from participating in voluntary prayers in public schools, the conclusion is inescapable that the Supreme Court not only violated the right of free exercise of religion of all Americans; it also established a national religion in the United States—the religion of secular humanism. (p. 4)

Secular humanism as the alleged religion of the schools has been taken to court four times. In the first case, *Grove v. Mead School District* (1985), a parent in the State of Washington claimed that the school system promoted the religion of secular humanism by allowing an English teacher to have his students read and discuss Gordon Parks's *The Learning Tree* in an elective course. After the teacher had given the plaintiff's daughter an alternate assignment, the mother filed a complaint against the book, seeking its removal from the school. The reconsideration committee approved the book and the teacher's syllabus, and the school board voted to keep both the course and the book. The mother then took her case to federal court.

The district court judge dismissed the suit without a trial. The plaintiff appealed the decision, and the Ninth Circuit Court of Appeals upheld the lower court, finding no violations of either the establishment or free exercise clauses of the First Amendment. The Supreme Court denied certiorari, thus upholding the appellate court decision.

The second case, *Bob Mozert, et al. v. Hawkins County Board of Education* (1987), started out as a case against secular humanism and the violation of First Amendment rights of the plaintiffs. But when the district court dismissed the suit without trial, the plaintiffs amended the complaint and appealed to the circuit court which remanded the case for trial by the district court. Humanism became only one of seventeen categories of objectionable ideas that the plaintiffs charged offended their "sincerely held religious beliefs." The case involved a series of basal readers in grades one through eight, and the judge said the plaintiffs had so many objections to the stories and poems in the readers that he ordered the school system to allow the children to "opt out" of reading class and be taught at home. The circuit court reversed the decision, and the Supreme Court denied certiorari.

At first examination, *Edwards v. Aguillard* (1987) does not seem to be about secular humanism. But evolution, the issue in the case, is considered a hallmark of secular humanism. Louisiana had enacted a law that called for the balanced treatment of evolution with creation science. The lower courts held the teaching of creationism to be a violation of the First Amendment establishment clause, and the Supreme Court upheld the lower courts. The Court noted that the Louisiana legislature "sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution" (p. 592).

The fourth case, *Smith v. Board of School Commissioners of Mobile County* (1987), ultimately became a clear-cut decision about secular humanism. Originally, the case involved Alabama's school prayer law which the district court judge upheld as constitutional. When his decision was reversed, he realigned the parties and conducted a trial on the religion of secular humanism. The new plaintiffs charged that the state advanced the "anti-religious" religion in forty-four textbooks in science, social studies, and home economics. The judge restrained and enjoined all parties named in the suit from using the books except as a "reference source in a comparative religion course that treats all religions equivalently" (p. 989). He ordered the Alabama State Board of Education not to furnish the listed books to any school system. His decision prompted an immediate outcry throughout the nation with attorneys noting that this was the first case in which a federal judge censored books. Members of the new religious right celebrated the decision, but their joy was shortlived. The circuit court of appeals reversed the judge's decision, and the plaintiffs did not appeal to the Supreme Court.

Those four decisions were cheered by many advocates of First Amendment rights who thought that secular humanism as an issue was no longer defensible. However, the secular humanism charge is far from dead. In the meantime, two other so-called religions—New Age and globalism—have moved to center stage.

In Gibson County, Indiana, three teachers joined four other women to form a group dedicated to removing a thinking skills program from the public schools. The seven women believe that these three exercises in *Tactics for Thinking* (1986), a critical thinking skills program published by the Association for Supervision and Curriculum Development, could cause students to fall into hypnotic trances:

1. Have students focus their attention on some stimulus (e.g., a spot on the wall). Explain to them that you want them to focus all of their energy for about a minute and ask them to be aware of what it is like when they are trying to attend to something.
2. Again have students attend to some stimulus for a short period of time. However, this time have them identify the physical characteristics they associate with raising their energy level (e.g., sit up straight, raise your head off your neck).
3. Have students practice the attention control process periodically throughout the day (p. 11).

The seven women tied *Tactics* to the New Age Movement and to globalism, both of which they maintain are religions that have invaded the public schools. They charge that these religions are attempting to impose one religion and one government on the entire

world. By making a highly emotional case against *Tactics,* they succeeded in removing it from one of the two school systems in which they launched their full-scale attack.

Tactics also fell to a group of irate citizens in Battle Ground, Washington, for its alleged New Age connections (Hoskins, 1987, p. 2). In Putnam City, Oklahoma, one woman objected to PUMSY, a self-help, decision-making program used by one elementary school counselor. She described one activity in which the student is told to relax and imagine walking in a meadow and gazing into a pond. She charged that using such "mind pictures" is a tool of occultists and New Age believers. She also objected to the suggestion that students were to listen to their inner voices. Even though the reconsideration committee found nothing wrong with PUMSY, the school board voted 3-2 to remove it from the school (Letters to the Editor, 1989).

Those are only three incidents involving New Age and/or globalism. Others will definitely follow since books denouncing both are being hurried into print. For example, Texe Marrs's first book, *Dark Secrets of the New Age* (1987), was so successful (my copy is from the sixth printing) that he had a second, *Mystery Mark of the New Age* (1988), ready for publication one year later.

Each of the books denouncing the New Age states directly or implies that New Age (and/or secular humanistic or globalistic) ideas pervade public school classrooms. The message is clear: anything that can be labeled New Age is evil. And the New Age mission is to work toward control of the world through a one-world religion and a one-world government. But the books do not make it clear how New Age and globalism operate since there is no central headquarters, since everything from channeling through holistic health to UFOology has been labeled New Age, and since many so-called New Agers do not even know they are New Agers. (It must be noted again that many teachers who were accused of being secular humanists did not know the term.)

One theologian critical of the New Age noted:

> As a working definition, the New Age Movement is a broad coalition of various networking organizations that (a) believe in a new world religion (pantheism), (b) are working for a new world order, and (c) expect a New Age Christ. Of course not all who participate in the New Age Movement are necessarily conscious of all these aspects. (p. 82)

But books accusing New Agers and global educators of spreading their religions in the schools continue to be published. Here are just a few:

William M. Bowen, Jr. (1984). *Globalism: America's Demise.* Shreveport, LA: Huntington House.

Constance E. Cumbey. (1983). *The Hidden Dangers of the Rainbow.* Shreveport, LA: Huntington House.

———————. (1985). *A Planned Deception: The Staging of a New Age "Messiah."* East Detroit, MI: Pointe Publishers.

Douglas R. Groothuis. (1986). *Unmasking the New Age.* Downers Grove, IL: InterVarsity Press.

Dave Hunt. (1983). *Peace, Prosperity, and the Coming Holocaust.* Eugene, OR: Harvest House.

Texe Marrs. (1987). *Dark Secrets of the New Age.* Westchester, IL: Crossway Books.

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H. Edward Rowe. (1985). *New Age Globalism: Humanist Agenda for Building a New World Without God.* Herndon, VA: Growth Publishing.

Charges that the public schools are advancing a religion—be it secular humanism, globalism, New Age, or something else—will continue into the next century. Why? If critics of the public schools can convince the courts that the schools are violating the establishment or free exercise clause of the First Amendment, then the critics can expect the courts to make one of two decisions: (1) to order the schools to stop teaching any of the tenets of the religion, or (2) to order state, local, and national governments to provide equal funds to private schools for their religions.

New religions will be named. As recently as May 1989, the Reverend Dr. D. James Kennedy, pastor of the Coral Gables (Florida) Presbyterian Church, announced on his national television program that psychology is a religion. It seems that as long as the religion charge excites followers, critics will continue to use it effectively, and some school boards will respond to the charge by removing books, courses, and other teaching materials willy-nilly.

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Moral Autonomy, Censorship, and the Enlightened Community

DAVID WEISSBORD AND PAUL MCGREAL

ABSTRACT

IN LIGHT OF THE WAVE of attacks on constitutional freedoms and rights in the 1980s, it is perhaps an opportune moment to reflect on the arguments offered in support of broad discretion granted to local school boards in determining the contents of school library shelves. Students, especially those in secondary school, are guaranteed constitutional rights; those rights, however, are balanced against the competing interests of a community in general or a school board in particular. In this article we will examine this balance as it has been struck in the courts and we will argue that a more enlightened conception of community interest would involve narrower discretion in school board and community actions.

INTRODUCTION

There are three ways in which the government may manipulate a library's holdings. First, a librarian, school board, or local government can create a biased literary selection in its libraries through the systematic addition of books catering to a particular ideological perspective (hereinafter referred to as the "addition problem"). Through careful forethought, government can prevent politically and socially "incorrect" ideas from entering libraries in the first place, hence avoiding the need to engage in noticeable and controversial removal of those books at a later date. The industrious government censor can avoid public clamor against the librarian's actions if he/she can plan ahead and carefully screen books he/she

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finds objectionable. The efficient censors are thus rewarded for their efforts with little or no public opposition. (The conscientious censor has also been rewarded by the United States Supreme Court. In *Board of Education v. Pico,* Associate Justice Brennan stated that the addition of books to libraries did not present constitutional problems as did the removal of books from libraries. For an article that shows the logical inconsistency of Brennan's position see Van Geel [1983]. "The Search for Constitutional Limits On Governmental Authority to Inculcate Youth.") The addition problem—because it occurs continuously, gradually, and covertly—poses an insidious threat to our libraries and liberties.

A second type of manipulation is the labeling of books and other library material by the government (hereafter referred to as the "labeling problem"). The labeling problem occurs when the government attempts to characterize the content of a book or issues a warning with regard to its subject matter. By labeling such material, the government maintains the appearance of noncensorship since the material remains available to the public, while sending a message that the public interprets as official disapproval. (An example of such government action is the Foreign Agents Registration Act [FARA] which allows the Department of Justice to label some foreign material entering the United States as "political propaganda." What FARA in fact does is to allow the government to place a non-neutral label on foreign films entering the United States. The label of political propaganda is to be given to all foreign films "reasonably adapted to...prevail upon, indoctrinate, convert, induce, or in any way influence a recipient or any section of the public...with reference to the political or public interests, policies, or relations of a foreign government or political party or foreign policy of the United States" [Tribe, 1988]. In popular usage, "propaganda" has a much more negative connotation than the standard in FARA. Lawrence Tribe of Harvard Law School finds FARA's labeling provision troublesome because "the word 'propaganda' has long been an explosive, value-laden term with such pejorative connotations that the registration process necessarily does more than simply label the source of a film of foreign origin; rather, it almost certainly discourages audiences from viewing the film by branding tit as a product of half-truths and distortions" [p. 810]. The FARA label stigmatizes a work with an apparent mark of official government disapproval.)

A third type of manipulation is the removal of books from library shelves (hereafter referred to as the "removal problem"). Selective addition and removal can be differentiated on the basis of the effect they have on public attitudes. With removal, the public knows what material has been removed because the government's actions are

affirmative and overt. The result is that specific material (the removed material) is branded with the official stamp of government disapproval. Thus the full effect of removal may be to close off a large segment of the population from the removed material. The perceived evils of the material may generate the attitude either: (1) that the government would not have removed the material if it was worth reading, or (2) that since the government does not approve of the book, I should not read it, even if I want to: if I do read it I might be labeled subversive or anti-American. While some educated adults may be able to assess critically and reject the government's actions, impressionable children and less informed/concerned individuals may uncritically accept the government's assessment of the removed material.

Selective addition, on the other hand, works no such broad slanting of public perception. The public still has access to the material not selectively added; however, there is no longer the stigma of seeking material banned by the government as there is with the removal problem. We believe that removal poses a greater magnitude of harm because it carries the added threat of a *de facto* complete removal of the material that is not a danger with selective addition.

Some instances of removal, or what is in many cases outright banning, of books have culminated in landmark legal cases. Some of these cases provide an excellent starting point and context for an extended analysis of the rather uneasy balance struck between community interest and individual liberty. These cases raise fundamental questions concerning the very nature and function of school libraries in our society and they help to more clearly define the role of school libraries in maintaining a fully functioning representative democracy with an electorate capable of full and meaningful political participation.

The Cases

In *Evans v. Selma Union High School* (Bosmajian, 1983, pp. 3-5), the California State Supreme Court decided that a high school district was permitted to purchase twelve copies of the Bible in the King James version for the Selma Union High School Library. The plaintiff claimed that the King James version of the Bible is a book of sectarian character and, as such, should not be purchased for the library of a public school. It was argued that purchase of it would be contrary to constitutional provisions against discrimination or preference and against public aid of any religious sect, church, or creed. And it was argued that such purchase would be contrary to statutory provisions in the state prohibiting use, or distribution, of any publication of a sectarian, partisan, or denominational character.

The court argued, however, that the King James version of the Bible was not sectarian but was, instead, a "widely accepted translation of the Bible," a "recognized classic" of literature (p. 4). More important, the court noted the following: "The mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself, except as a work of literature fit to be included in a reference library" (p. 5). This work's classic stature and widespread approval and readership were taken as sufficient evidence of what constitutes "fitness" or "appropriateness." In subsequent cases, we see less consensus on the question of a book's status and a corresponding argument to prevent a book's appearance on library shelves.

In *Rosenberg v. Board of Education of City of New York* (Bosmajian, 1983, p. 5), the New York Supreme Court decided that *Oliver Twist* and *The Merchant of Venice* cannot be banned from New York City schools, libraries, or classrooms. There were three main grounds adduced for the ruling: (1) there is a "public interest in a free and democratic society [based upon free inquiry and learning that] does not warrant or encourage the suppression of any book at the whim of any unduly sensitive person or group of persons, merely because a character described in such book as belonging to a particular race or religion is portrayed in a derogatory or offensive manner" (p. 5). The exception noted is when a book is written maliciously with the purpose of promoting "bigoted hatred" against a particular racial or religious group. (2) If evaluation of any literary work were based on a requirement that it be free from derogatory reference to any religion, race, and so on, endless litigation would probably ensue. (3) Censorship and suppression are not particularly effective at removing religious and racial intolerance; in fact, they may lead instead to "misguided readings and unwarranted inferences" (p. 5). Arguing that there was no "substantial reason" which would compel the suppression of the two books, the court found that the Board of Education acted in the best interests of the school system.

What constitutes an "unduly sensitive person" is left unclear, as is what would constitute a "whim" of such a person. When does a whim become a good argument? When does an unduly sensitive person become a reasonably tolerant but reasonably offended one? How does one determine authorial intent to malign? Should intent be necessary, or could we reasonably point to consequences (i.e., to the fact that persons are maligned)? These are questions that become central in subsequent cases.

In *President's Council v. Community School Board* (1972), we see the convening of the first federal court ever to adjudicate the

conflicting claims of high school students and a local school board. The case concerns the removal by a school board of *Down These Mean Streets,* a novel by Piri Thomas in which there is a violent and ugly depiction of a Puerto Rican youth growing up in the East Side barrio of New York City. There are descriptions of criminal violence, sex, and drug shooting; the presumed educational value of the work (in this educational setting) is to acquaint the predominantly white, middle-class junior high school students of Queens with the harsh life in Spanish Harlem (Bosmajian, 1983, p. 18). The school board removed the book in light of complaints from parents that the vulgar language and explicit sexual descriptions in the book would have an adverse moral and psychological effect on eleven- to fifteen-year-old children. The plaintiffs (parents, teachers, and children) challenged this action in federal district court claiming that there was a violation of their First Amendment rights and arguing that the book was valuable educationally and had no adverse effect on the development of the children. The court rejected the plaintiffs' claims and asserted that the school board had acted permissibly. The court reasoned that the board had not prohibited the book's discussion in class, parents could borrow the book for their children, and there was only a "miniscule" intrusion of the board on any First Amendment constitutional right (Bosmajian, 1983, p. 19). The issues in this case are complex and space does not allow a detailed comment. Some of the claims made in various petitions for a writ of certiorari are noteworthy—although the writ was denied. It is to those claims we now turn.

Some Salient Reasons Offered for and Against Granting the Writ

1. The U.S. Supreme Court ought to decide to what extent school professionals should be at the mercy of politically responsible lay boards of education in determining what their students may read, learn, and have access to in the schools.
2. Parents, students, and professionals ought to be able to rely on the judiciary when school libraries are stripped of politically disfavored books by a shifting majority of the school board.
3. The federal courts ought to prevent our nation's schools from becoming instruments of majoritarian propaganda.
4. Constitutional principles of academic freedom limit the power of school boards even over allegedly educational matters.
5. The removal of the book deprived students of their First Amendment right to know.
6. The students claim no unqualified First Amendment right of access to books but make, instead, three claims: (a) they no longer have

access to a book previously available to them; (b) their right to know has been impaired; and (c) there is no compelling state interest justifying that impairment (pp. 21-24). The unlimited power of selection or banning gives the transitory majority of a board great opportunities to impose their personal, social, and political views on the teachers and public of the school district.

Dissenting from the U.S. Supreme Court's decision to deny certiorari, Justice Douglas wrote:

> What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems? (Bosmajian, 1983, p. 35)

There were fascinating arguments presented in a brief in opposition to the petition for certiorari. Some main points included the following:

1. The power of selection of books for educational purposes must include the "power to choose between books and to exclude those which are found inadequate, irrelevant, or otherwise inappropriate for the particular children to be served, and not merely the power to exclude those books which have been held to be illegal for sale to minors" (Bosmajian, 1983, p. 26).
2. The limitation to the librarian's right to choose the selection of books does not violate the librarian's professional freedom, as the library remained in possession of the book and she may lend it to parents who request it.
3. "That a parent may disagree with that [librarian's right to choose] does not give him a constitutional right to compel the purchase or retention of any particular book, or to compel that it be available directly to students rather than to their parents" (Bosmajian, 1983, p. 27).
4. The students have not been deprived of any "right to know." There has been no ban on the discussion of any field of study.
5. The age of the children (eleven to fifteen) is sufficiently immature to warrant some limitation on the kind of books made freely available to them (p. 27).

Minarcini v. Strongsville City School Dist. (Bosmajian, 1983, pp. 43-47) presents the case of a school board removing Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch-22* from the school library against the faculty recommendation that authorized them as library books or textbooks. Further, the board passed resolutions limiting discussions of the books in class and their use as supplementary reading.

After a trial in district court, the judge dismissed Minarcini's original complaint finding that the school board's actions had not violated rights protected by the First and Fourteenth Amendments. The case was then appealed to the U.S. Court of Appeals, Sixth Circuit.

The court of appeals sided with the high school students, invoking concepts of academic freedom and a First Amendment right to know and, correspondingly, to have access to information. The students, then, could establish a prima facie constitutional violation upon the removal of a book from the school library.

The court's discussion of the book banning issue contained critical factual information. First, both Minarcini and the school district agreed that the banned books were of some "literary value" and that none of those books contained "obscenity as defined in the Supreme Court's cases (*Miller v. California,* 1973). (The Supreme Court announced its obscenity standard in the 1973 case *Miller v. California,* 413 U.S. 15: "The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Thus, by conceding that the banned books were of literary value, the school district also admitted that the material was *not* obscene under (c) of the Miller standard.) With these admissions, the court had to look in the minutes of the school board's meeting concerning the offending books to find the motivation behind the district's actions. The minutes reflected the school board's judgment that Vonnegut's writing was "completely sick," and that the book was "written by the same character (Vennegutter) who wrote, *using the term loosely, God Bless You Mr. Rosewater.*" The court concluded from these statements that "the School Board removed the books because it found them *objectionable* in content" (Bosmajian, 1983, p. 45).

Minarcini highlights the conflict that arises in any instance of the removal problem: the student's interest in receiving continued exposure to a variety of literary materials is pitted against the government's interest in providing a "proper" education. Each side deserves some weight. The pivotal task in evaluating the removal problem is to strike the correct balance between student and government interests. In the *Minarcini* case, the school board found the banned material to be "objectionable." In striking a balance, we need to examine the substantive content of this "objectionable"

standard (e.g., social mores, community values, national standards, individual preferences) as well as what variety is sufficient to protect students from a "pall of orthodoxy" in school curricula. (Associate Justice William Rehnquist of the United States Supreme Court, in his dissent in *Board of Education v. Pico, infra.* [the next removal problem case we will look at], used the phrase "pall of orthodoxy" to describe the educational atmosphere the government would have to create in order for him to feel that students' interests were being harmed.) Further analysis of the student government conflict will be delayed until after we review the issues in the first removal problem case to come before the U.S. Supreme Court.

Board of Education, Island Trees Union Free School Dist. v. Pico (Bosmajian, 1983, pp. 93-118), arose from the attempt by a local New York school board to remove books from the shelves of high school and junior high school libraries. Several members of the school board had attended a conference sponsored by Parents of New York United (PONY-U) where they received a list of books that school board members described as "objectionable" and "*improper* fare for school students" [emphasis added]. (Associate Justice Brennan's majority opinion in *Pico* described PONY-U as "a politically conservative organization of parents concerned about education legislation in the State of New York" [Bosmajian, 1983, p. 94]). However, the school board did "concede that the books [on the PONY-U list] are not obscene" (*Pico v. Board of Education,* 479 F. Supp. 387, 392 [EDNY 1979]). Nine of the books on the PONY-U list were found in the Island Trees High School. (The nine books in the high school library were: *Slaughterhouse-Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories of Negro Writers* edited by Langston Hughes; *Go Ask Alice* of anonymous authorship; *Laughing Boy* by Oliver LaFarge; *Black Boy* by Richard Wright; *A Hero Ain't Nothin' But a Sandwich* by Alice Childress; and *Soul on Ice* by Eldridge Cleaver.) After appointing a committee to recommend to the board whether the books on the PONY-U list should be retained, taking into account the books' "'educational suitability,' 'good taste,' 'relevance,' and appropriateness to age and grade level" (*Pico v. Board of Education,* 1979, at 857), the school board ignored the committee's recommendation to keep five of the books and ordered all nine books removed from school shelves. (Of the other four books, the committee recommended that one "be made available to students only with parental approval" [*Pico v. Board of Education,* 1979, at 858]. The recommendation of a parental approval condition on book circulation can be considered a form of governmental labeling of books.) In removing the books, the school board described them as "anti-American,

anti-Christian, anti-Semetic [sic], and just plain filthy," and justified their actions by claiming that "it is our [the school board's] duty, our moral obligation, to *protect* the children in our schools from this moral danger as surely as from physical and medical dangers" (*Pico v. Board of Education,* 1979, Supp. 387, 390 [emphasis added]).

The U.S. Supreme Court ruled, in a confusing plurality opinion, that school boards could not remove disfavored books from school libraries with "absolute discretion." The Court, while embracing the notion that school boards have a substantial legitimate role to play in the determination of school library content, argued that boards could not play that role if they did so in a "narrowly partisan or political manner" (Bosmajian, 1983, p. 98). The key for the Court was in determining the motivation behind the school board's actions. If the board's *intent* is to deny students access to ideas with which the members of the board disagreed, and if the *intent* is the decisive factor in the board's decision, then and only then does the board violate First Amendment rights of the students. The rationale seems to be based on an aversion to "prescribed orthodoxy." Permitted censorship would involve books "pervasively vulgar" or educationally unsuitable, not books thought inimical to the board's moral, political, religious, or social taste. (This case did not affect the addition or labeling of books but rather concerned solely their removal.)

The tension between student and governmental interests in *Minarcini* are equally present in *Pico.* The books in both cases were *not* claimed to be obscene (and thus not automatically denied the protections of free speech) but only found "objectionable" by the members of the school board. The delicate balance implicated in *Pico* concerns the extent to which the school board may follow its desire to "protect the children in our schools" from "objectionable" material before such efforts begin to suppress access to ideas to which students have a right. In striking this balance it will again be necessary to discuss various interpretations of "objectionable" material, an understanding of which will help to delimit the proper boundaries of the government's discretion in cases of the removal problem. (Of course this definition will also carry implications for the addition problem and the labeling problem, as will be seen later.)

Implications of School Book Bannings

We can learn a lot from the way in which the *Pico* and *Minarcini* courts handled their respective cases. These two cases placed much emphasis on the fact that book bannings in *school* libraries implicate questions of education. The courts that have grappled with the removal problem have recognized the importance of such libraries

to education when they described a school library as a "storehouse of knowledge," "a mighty resource in the free marketplace of ideas," and a place where "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum....Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom" (as cited in *Minarcini v. Strongsville School District* [Bosmajian, 1983, pp. 43-47]).

School libraries represent a relatively voluntary, informal forum (as opposed to the compulsion involved in normal class work) in which students may continue their education by seeking out material suggested implicitly or explicitly by their formal education. (The *Minarcini* court recognized a function similar to this for libraries when it stated that a teacher has a right to express an opinion about a book in class and that there exists a corresponding right on the part of the student "to hear [the teacher] and to find and read the book" [*Minarcini, supra* at 582].) Schools should teach their students how to use those "storehouses of knowledge" so that they can expand their horizons through independent exploration of library material long after the structure of the classroom is gone. If government and schools are allowed to manipulate the contents of school libraries at will, then students are sent a message that libraries exist solely to provide books essential to the immediate educational function of their school libraries, and that libraries are *not* for after school exploration and experimentation. Thus school libraries appear to serve a dual function: (1) to provide easy access to materials that will supplement students' immediate education, and (2) to teach students how to pursue reading material on their own so that they do not feel that a library's usefulness ends with their formal education but, rather, that libraries should serve as one of the foci of their ongoing informal education.

But what should the contents of these libraries be? The foregoing suggests that the contents should bear some relationship to the mission of education. We shall limit our consideration to a brief discussion of the function of education, and thus libraries, as it relates to our nation's commitment to a democratic form of government.

Education plays a large role in shaping informed citizens. The U.S. Supreme Court has long recognized the importance of education to the proper functioning of our government. (See e.g., *Meyer v. Nebraska,* 282 U.S. 390, 1923. ["education and the acquisition of knowledge as matters of supreme importance"]; *Abington School District v. Schempp,* 374 U.S. 203, 1963 ["the public schools as a most vital civic institution for the preservation of a democratic system of government"]; *Ambach v. Norwick,* 441 U.S. 68, 1789 [as a way

of communicating "the values on which our society rests"]; and *Wisconsin v. Yoder,* 406 U.S. 205, 1972 ["necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"].) Without education we lack the tools to make use of the choices a representative government presents.

A humanistic education provides an understanding of the traditions and cultures that make up our society, an understanding that is crucial to making informed choices in the political arena. Essential to a humanistic education are many materials widely available to the public only through the country's libraries. By allowing the unfettered removal of such material from our libraries we risk an overwinnowing of our libraries and the creation of an uneducated, uninformed electorate. If such an electorate were to emerge, we would need to fear the decisions of the majority more than before, because such decisions would be uninformed and uneducated. If such majority decisions became the rule, we would have to fear the very majority rule that forms the basis of our democratic governmental system. Thus libraries and their role in education are critical to the functioning of our government and society (McGreal, 1989). (Some of this analysis draws directly from McGreal, P. [1989], "'I Don't Recall Senator,' A Critical Analysis of Robert Bork's Neutral Principles Theory" [unpublished manuscript].)

Our emphasis on providing a broad humanistic education for American citizens leads us to object strongly to any removal that does not arise from a desire to keep obscene material from younger children. The school boards in the *Minarcini* and *Pico* cases obviously felt differently. Both school boards cited a number of different criteria for what they felt were "objectionable" books, while agreeing that the books in question were not obscene. An analysis of these boards' motivations and goals, as well as the implications of their actions, is necessary to understand the harm their actions can inflict on youth.

We agree with Justice Brennan's statement in *Pico* that education in all its forms is "vitally important 'in the preparation of individuals for participation as citizens'" (*Pico v. Board of Education,* 1979, at 864). However, agreement ends with Brennan's next statement that such "preparation" includes '"inculcating fundamental values necessary to the maintenance of a democratic political system'" (*Pico v. Board of Education,* 1979, quoting *Ambach v. Norwick*), and that such values include "community values" as well as "respect for authority and traditional values be they social, moral, or political" (*Pico v. Board of Education,* 1979, quoting Brief for Petitioners). Where we advocate a broad, humanistic education for the proper preparation of informed citizens, Brennan argues that each

community must be allowed to inculcate students with its own values in order to promote democracy. And, of course, Brennan's narrower view of education implies a narrower selection of material to supplement that education in our libraries.

Other than citing Supreme Court precedent, Brennan offers little or no argument in support of his finding that community values are the proper subject of primary and secondary education. But we need not end the discussion with Brennan's silence. Patrick Devlin (1959) takes up the subject in his article "Morals and the Criminal Law."

Devlin's "Morals and the Criminal Law" was written mainly as a reply to the Wolfenden Report, also known as the Report of the Committee on Homosexual Offenses and Prostitution. Devlin asks "what part of the moral law should be embodied in the criminal" (p. 1)? Devlin's project becomes relevant to our immediate task when we rephrase the question as "what part of a community's morals should be embodied in our children's education?" Keeping the rephrased question in mind, we will explore Devlin's article, searching for arguments that support inculcation of community values.

Devlin's theory of community is stated very concisely in one paragraph.

> society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far released the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price. (p. 10)

Devlin concludes from the above that "societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions" (Devlin, 1959, p. 13). Devlin's theory of community reduces to the view that "deviation from a society's shared morality...[is] capable in [its] nature of threatening the existence of society..." (p. 13n).

The analogy from Devlin to education becomes apparent when we recall the motivation of the school boards in removing books. Devlin would probably argue that education, and libraries that serve that purpose (and we cannot forget that nonschool libraries serve

the important function of informal, continuing self-education), should be used to inculcate the community's shared values lest that community loosen its moral bonds and disintegrate from within. Under Devlin's argument, banning books that are "objectionable," or against the community's shared values, is necessary to the survival of the community itself. The marketplace of ideas represented by libraries becomes the marketplace of "shared ideas" necessary to strengthen the bonds of society.

One reason we find Devlin's argument problematic is because of an unexplained assumption: that there exist shared ideas of a community. Devlin's assumption is difficult to maintain in a society that is irreducibly diverse such as the United States. Perhaps a majority's views ought to be considered the consensus. But such a reply assumes the legitimacy of the majority's authority to make such a decision, which is one of the initial questions posed by the removal problem. The reply also brings us to Devlin's contention that enforcement of community values is necessary for the continued existence of society.

Also implicated in this critique is Justice Brennan's assertion that "respect for authority and traditional values, be they social, moral, or political," are "fundamental values necessary to the maintenance of a democratic political system" (*Pico v. Board of Education*, 1979, quoting *Ambach v. Norwick* and Brief for Petitioners). However, Brennan recently upheld the right of individuals to burn the flag, an act that would seem to run contrary to respect for authority and traditional values. If education has as its purpose to foster that respect, then those who burn flags appear to have been failed by American education as Brennan conceives it. Wouldn't prohibiting flag burning then also promote the respect for authority Brennan sees as so necessary to democracy? Are Brennan's positions in *Pico* and the flag burning case reconcilable on this point? It is rather odd that the Constitution would protect conduct (flag burning) that works against the values necessary to the maintenance of a democratic political system. The above indicates either that flag burning should thus be considered an insidious threat to the maintenance of democracy in America, or that an education that fosters Brennan's values is not necessary in maintaining our government.

In his article "The Search for Constitutional Limits on Governmental Authority to Inculcate Youth," Tyll van Geel (1983) presents convincing empirical and theoretical arguments that refute Brennan and Devlin (pp. 262-88). In *Ambach v. Norwick*, the Supreme Court cited several studies in support of its assertion that schools

properly inculcate students. Interestingly, the relevant portions of this work contradict the Court's finding. For example, Dawson and Prewitt (*Pico v. Board of Education,* 1979) argue at one point that:

> It is doubtful...that basic political loyalties and attachments are substantially developed or altered through such formal civic education. If the civic training in the curriculum is inconsistent with what is learned about the political world from adults, peer groups, and other agents of political socialization, it may not be very effective. (p. 152)

One of the Court's authorities suggests that we should be more concerned with setting good examples for our children in the political realm than with teaching them what they should do.

Patrick Devlin's argument that society is held together by shared values is met and turned back by several studies discussed by Van Geel. The first study, by Ronald Rogowski, draws from economic utility theory. Rogowski argues that a person will choose to support the present form of government over alternative forms of government only if the present form of government maximizes her expected utility. (This notion is consistent with John Rawls's difference principle, according to which social and economic inequalities are just if and only if such inequalities give rise to advantages [expected and real] of the representative person in the least well-off group in society [see Rawls, 1971].) Individuals derive a measure of utility from outcomes that they desire. Many favorable outcomes will all have positive utility values.

Under Rogowski's theory, the cement that holds the bonds of society together is expected utility and not shared ideas. The utility maximization theory depends on individuals being self-interested actors. For such individuals to maximize their expected utility, they would have to be within a government that allows the greatest probability of (freedom to pursue) their preferred outcomes. Rogowski's theory implies that a community is held together by assuring freedom to pursue personal preferred outcomes rather than Devlin's idea of emphasis on shared ideas.

If freedom is one of the elements that holds society together, then we should be concerned about preparing our young to use that freedom wisely. For this task, access to varied forms of human discourse and ideas is necessary. And this education should begin as early as possible.

Some Tentative Conclusions

Students are recognized to have a legitimate claim to First Amendment rights. The nation, individual states, local communities, and individual school boards are thought to have a legitimate indoctrinative interest in permitting, and in some cases encouraging, public schools to transmit particular values to its students. Judicially,

the problem has been one of developing a coherent doctrine under which the various fact patterns could be subsumed. There have been commentators who have suggested that this lack of coherence reflected a fundamental incompatibility of First Amendment values and the values basic to public education; that what was most basic was the indoctrinative character of education; and that the U.S. Supreme Court ought to recognize the priority of education's mission whenever that mission is to be weighed against First Amendment rights. (Tussman [1977] argues that the state has an important "teaching power" which involves inducting children into the community, and thereby makes notions such as children's free speech or state ideological neutrality irrelevant and condemns the Supreme Court's *Tinker and Barnette* opinions as "weaken[ing] the tutelary power of public authority" [pp. 51-85, 167]. Diamond [1981] argues that the Court is wrong in trying to reconcile public education with First Amendment values because the school's indoctrinative functions should preclude recognition of children's first amendment rights. Goldstein [1976] argues that the scope of permissible state indoctrinative interests in public education should preclude any in-class expressive activity by teachers that is contrary to the wishes of the school authorities [taken from Kamiat, 1982/83, p. 499].) Other commentators, supported in part by the *Minarcini* and *Pico* lower court decisions, have argued that, in such a conflict, library censorship violates a student's individual right to have access to information or that censorship is unjustified given its "chilling effect" on the overall in-school expression of students and teachers.

Proponents on each side of this debate, however, attempt to validate their position on the strength of an appeal to an ideal of communal self-government. If indeed there is such an (often tacit) appeal, the question becomes more readily defined: namely, is emphasis on individual rights or community indoctrinative interest the best means of attaining the end of communal self government? If indeed communal self government is and ought to be the end toward which both a healthy respect for fundamental liberties and justificatory indoctrinative interest can be invoked, then part of our problem is solved.

This claim, of course, is rather controversial. Many proponents of the Bill of Rights adopt a much more individualistic and atomistic perspective, arguing that liberties are basic given the nature of the individual and her capacities (e.g., a Kantian approach), or that fundamental rights ought to be respected given the beneficial consequences to the greatest number of individuals over time (a variant of rule utilitarianism). Interestingly, though, each approach can be employed by those who argue for an ideal form of communal

self-government. However, one might remain agnostic on the question as to whether Kantian or utilitarian grounds are more justifiably invoked to support basic rights so long as the ultimate foundation for such rights rests on a vision of communal self-government, moral education, and the value of self-direction and respect for various conceptions of the good.

Justice Brennan, in his plurality opinion in *Pico,* claimed that the "public schools are vitally important in the preparation of individuals for participation as citizens" and, in that very sentence, continues by noting that the schools are also important "as vehicles for inculcating fundamental values necessary to the maintenance of a democratic system" (Bosmajian, 1983, p. 95). Here, for the first time in these cases, we see judicial recognition of the view that participation as citizens and maintenance of a democratic system are the basis for evaluating conflicting claims. But, of course, how much weight one gives to participation or system can shift the balance in these censorship cases. We have seen some ways in which one may emphasize one value or the other. The central question to ask about this conflict in values is: "to what end participation or system?" or "according to what criteria may we resolve this set of conflicting values?"

We would argue that this entire debate ought to be seen in light of one fundamental value: moral self-direction and self-expression. Rather than thinking of all values as subordinate to communal self-government (Kamiat, 1983), we would suggest all values, including communal self-government, should be seen as often a necessary means to moral autonomy, responsibility, and expression. (This claim is somewhat stronger than that of Rosemarie Tong's: "To the degree that we are able, we are required to take part in governing ourselves. We must do so not only because values such as justice, freedom, minority rights, and even life itself will be protected only if people are vigilant and active, but also because such participation is a form of moral self-expression. By thinking and speaking, by deciding and acting, we reaffirm that we are morally responsible persons" [Tong, 1986, p. 135].) In this way there is a self-sustaining dialectic of civic action and participatory community building that would nourish freedom and moral equality and create the context within which moral self-expression can take place. (The goal, then, would be to create a form of political community similar to that sketched by Benjamin Barber [1984, chs. 8 & 9].)

The main problem, then, rests in deciding how one ought to adjudicate the type of conflict evident in the kinds of cases discussed earlier. Let's focus on the *Pico* decision to see how the aforementioned considerations could be used in arguing the case for the students.

The U.S. Supreme Court's plurality opinion in *Pico* maintained that there are "special characteristics of the school library" that limit the state's pursuit of indoctrinative interests. Such limitations may not be evident in curriculum decisions; but the library has a unique role to play in providing a context for student freedom "to test or expand upon ideas," for the "fostering [of] individual self-expression," and for "affording public access to discussion, debate, and the dissemination of information and ideas" (Bosmajian, 1983, pp. 96-99). Now one might argue (as the Court in part does) that the above benefits of an unfettered library collection and the general access to ideas make "it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner" (Bosmajian, 1983, p. 97). Or one might argue (as the Court in part does) that "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members" (Bosmajian, 1983, p. 97). The first appeal (to the freedom to exercise rights of free speech) is just to assume that such rights, if not absolute, should always trump state interests. That, however, is to beg the fundamental question at stake in these cases and, as such, is an unsatisfactory way to proceed. The second appeal (to preparation for active and effective participation in a pluralistic and contentious society) is not question begging but is, nonetheless, inadequate. For it remains to be shown whether in fact an unfettered library collection would best accomplish that goal. It would seem equally plausible to assume that the transmission of societal values through a careful censorship policy in the schools would equally serve the end of "active and effective participation."

If, however, we shift the focus away from those two concerns to a conception of moral flourishing for which a societal context is created, it becomes, or so we would argue, harder to maintain that censorship is justified. There is both individual and community benefit in respecting each person's attempt at (moral) self-realization and conception of good: individual benefit insofar as individuals are given a context in which autonomous moral agency and self-direction are viewed as central to moral growth; collective benefit insofar as the community is more likely to progress and flourish with morally self-realized individuals. Individuals and communities are more likely to realize these ends by affording students: (1) exposure to a vast range of (often competing and potentially subversive) ideas, and (2) experience with autonomous choice. Such access to ideas and experience with choice are important means to the limited goal of communal self-government and are a vital means to the more expansive goal of moral self-realization. If the preceding considerations are compelling, it would follow that future court adjudication

in school library censorship cases ought to focus more on the value of moral development and less on the virtue of participatory government.

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The Ethics of Privacy Protection

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ABSTRACT

THE CONCEPT OF PRIVACY is a widely accepted legal and moral notion but has uncertain legal and philosophical foundations. Prominent legal accounts, such as the nonintrusion theory and the freedom to act theory, are inadequate. The control of information theory and the undocumented personal knowledge theory are philosophically better accounts but are open to counterexamples. A restricted access theory of privacy is developed and defended.

INTRODUCTION

The right to privacy is widely acknowledged and well-supported in the United States. Many familiar legal and ethical arguments pivot on an appeal to the right to privacy. A charge that a government, a corporation, or an individual has invaded someone's privacy is regarded as a serious matter. The concept of privacy seems so obvious, so basic, and so much a part of American values, that there may seem to be little room for any philosophical misgivings about it. However, substantial philosophical controversy about the nature of privacy exists. The philosophical debate focuses largely on two major questions: What is privacy? and Can the right to privacy be philosophically justified?

Given the considerable role that privacy plays in moral and legal argumentation, one might expect that assertions about the right to privacy are emblazoned in a prominent position in the earliest philosophical and legal documents of our nation. However, the right to privacy is not explicitly mentioned or clearly discussed in the

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Declaration of Independence or the Constitution of the United States. The Declaration of Independence lists some well-known inalienable rights such as life, liberty, and the pursuit of happiness, but it does not mention privacy. The only hint of a concern for privacy occurs in the document when the signers mentioned grievances against the king such as sending "swarms of Officers to harass our people, and eat out their substance." Of course, it is understandable that privacy is not discussed in the Declaration of Independence, for the primary purpose of this document was, after all, to declare independence and not to provide a thorough and well-reasoned philosophical account of human rights.

What is surprising is that privacy is not explicitly mentioned in the Constitution of the United States. There are parts of the Constitution that support conceptions of privacy. For example, the Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause...." This amendment provides important protection of individuals from government interference and surveillance, but it is far from a general statement of the right to privacy. Aspects of privacy are supported in other amendments. The First Amendment grants the right to peaceably assemble, the Fifth Amendment grants a right against self-incrimination, and the Fourteenth Amendment prohibits states from abridging the rights of citizens of the United States. But, all things considered, neither the Declaration of Independence nor the Constitution provides a clear philosophical conception of, or even a solid legal foundation for, the right to privacy.

Philosophical Critique of Some Legal Conceptions of Privacy

The concept of privacy has played a large role in legal discussions and judgments during the last century. Unfortunately, much of the legal work on privacy is either too eclectic, such as William Prosser's (1960) historic list of the various kinds of privacy cases, or too narrowly focused, such as the Fair Credit Reporting Act of 1970 and the Electronic Communications Privacy Act of 1986, to be philosophically revealing. However, some of the classic legal accounts of privacy are truly philosophically inspired. Here, attention will be directed to the two legal landmarks on privacy that are philosophically richest.

Privacy as Nonintrusion

In their famous 1890 *Harvard Law Review* article, Samuel Warren and Louis Brandeis provided a sensible analysis and evolutionary justification for the right to privacy. They argued that privacy was

an emerging right that needed to be recognized. They claimed that common law is not static but undergoes continuing growth as culture develops. As they put it: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth grows to meet the demands of society" (p. 75). This was a century ago, and some rather intimidating technology had been developed. The distrusted technology then was not the dreaded computer but the insidious camera:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops." (p. 76)

For Warren and Brandeis (1984) the right to privacy was not something that is found by squinting at the Constitution but by admitting that cultural values and new technology play a large role in developing new understandings of our rights. They assigned great significance to this new right of privacy and treated a violation of privacy as a harm worse than some physical injury:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. (p. 77)

Warren and Brandeis regarded the violation of a person's privacy as a kind of spiritual harm that should be addressed by the law and could not be addressed by then existing laws that focused on material damages.

Though their article is ground breaking and insightful, Warren and Brandeis do not provide a clear and explicit account of privacy. They cite Judge Cooley's remark that it is right to be let alone, but privacy so analyzed seems both too broad and too narrow to count as a successful definition. On the one hand if *A* approaches *B* on a public street and *A* asks *B* what time it is, *A* has not let *B* alone but neither has *A* invaded *B*'s privacy. Striking up a normal conversation on a public street is not regarded by most as an invasion of privacy. On the other hand, if unknown to *B* and without *B*'s permission, *A* looks through *B*'s personal files, then *A* has invaded *B's* privacy, but, strictly speaking, *A* has let *B* alone. It is uncertain whether Warren and Brandeis thought that actual publication of information was required in order to have an invasion of privacy. They were concerned, of course, about preventing the publication

of gossip. But, in some situations simple eavesdropping without any thought of publication is a clear invasion of privacy. Therefore, the specific publication of information or passing it along in other forms is not a necessary condition for an invasion of privacy.

Privacy as Freedom to Act

Another philosophical conception of privacy is deeply embedded in constitutional law as it has developed during the last quarter of a century. Privacy is understood in this context as liberty or freedom to act in personal matters. The relevant cases considered by the courts usually have been about sexual and reproductive freedoms. The most famous case in this regard is, perhaps, *Roe v. Wade* in which a woman's right to have an abortion was successfully argued on the grounds of privacy. To understand better how the concept of privacy is philosophically connected in constitutional law with sexual and reproductive freedoms, it is useful to look at the 1965 landmark case *Griswold v. Connecticut* in some detail. In this historic case the appellants were Griswold, the executive director of the Planned Parenthood League of Connecticut, and Buxton, a licensed physician who was the medical director for the league at its center in New Haven, Connecticut. They gave married couples advice on preventing conception. Fees were normally charged for their services which included medical exams and dispensing information about contraception and related materials. Their activity was in direct conflict with the General Statutes of Connecticut. In §§ 53-32:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

And in §§ 54-196:

> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants to the Supreme Court had been found guilty under the Connecticut Statutes and had been fined $100 each. Justice Douglas, who was philosophically inclined, wrote for the majority opinion that overturned the Connecticut statute. Douglas believed that privacy is grounded by the Constitution. He said: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy." Douglas asked rhetorically: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship" (Grey, 1983, p. 43). Douglas

perceived the right of privacy with regard to the marital relationship as a deep cultural right predating the Constitution. He proclaimed: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."

The other justices who agreed with Douglas's opinion disagreed with his justification. Justice Goldberg agreed that: "Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy" but he argued that it is the Ninth Amendment that guarantees such privacy. The Ninth Amendment says that the other amendments do not exhaust the basic and fundamental rights of the people. The Ninth Amendment is a catchall amendment originally put forward by James Madison. Madison's purpose in proposing this amendment was to satisfy those who were concerned that no bill of rights would be broad enough to specifically enumerate all essential rights and that those rights not specifically mentioned might be interpreted as being denied. Justice Harlan, who agreed with Douglas's opinion, offered still another interpretation. Harlan agreed that the Connecticut statute was an unjustifiable invasion of privacy but appealed to the Fourteenth Amendment for support. Specifically, Harlan believed the due process clause of the Fourteenth Amendment was the appropriate basis for overturning the Connecticut statute. The due process clause has never been given a clear elaboration and it is far from a formula, but roughly the clause has been used to protect a wide range of liberties and Harlan maintained, as Justice White did as well, that the freedom of a husband and wife to use contraceptives is a liberty which requires such protection.

In light of *Griswold v. Connecticut,* what should we conclude philosophically about the right to privacy? This case demonstrates that any constitutional guarantees to the right to privacy depend a lot on the eyes of the beholder. Justice Douglas saw privacy in the penumbra of the Bill of Rights, Justice Goldberg saw it in the Ninth Amendment, and Justice Harlan saw it covered by the due process clause of the Fourteenth Amendment. The problem with this kind of defense of the right to privacy is that some may not see it at all. Justice Black, while agreeing with the majority that the Connecticut law was offensive, said in his dissenting opinion: "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any laws ever to be passed which might abridge the 'privacy' of individuals. But there is not."

The *Griswold* decision rests on an even deeper confusion of the concept of privacy with the concept of liberty. The real issue in *Griswold v. Connecticut* is the question of whether a married couple should have the freedom to obtain information about contraception and to use contraceptive methods. All of the constitutional arguments

about privacy in this case can be replaced with arguments about contraceptive liberty. This liberty can be placed in the penumbra of the Bill of Rights or included in the protection of the Ninth Amendment, or covered by due process stated in the Fourteenth Amendment. Or one might hold that the issue of contraception isn't a constitutional matter at all, and that the people of Connecticut should persuade their legislators to repeal such an asinine law. But on any of these views the issue remains a question of liberty. Ironically, the state of Connecticut could never have enforced this law if it were violated privately. It was only the *public* flaunting of the law that gave rise to the court case.

The separation of the concept of privacy from the concept of liberty is important because we do not want the right to privacy to become a screen to protect truly harmful actions. A married couple, *A* and *B*, should have a right to privacy, but their privacy does not give *A* the freedom to beat *B* or *B* the liberty to poison *A* or *A* and *B* the right to torture their children. Distinguishing privacy from particular freedoms allows us to argue for privacy without licensing abuse. A common motivation for citing privacy in cases like *Griswold* is to protect individuals against intrusive laws for victimless crimes. As important as this may be, the conflation of personal freedoms with privacy only confuses the discussions of both and can put the defense of the important right of privacy in the service of protecting violent crimes.

A Philosophical Look at the Concept of Privacy

The concept of privacy has been analyzed extensively by contemporary philosophers. Philosophers, like everyone, have been struck by the broad dissemination and the forceful impact of information technology during the last few decades. Therefore, it is not surprising that most contemporary philosophical accounts of privacy tie it closely to the concept of information.

Privacy as Control of Information

Privacy is frequently defined in terms of control of information. For example, Charles Fried (1984) states: "Privacy is not simply an absence of information about us in the minds of others, rather it is the *control* we have over information about ourselves" (p. 209). Alan Westin (1967) says that privacy is the claim that individuals and groups determine for themselves when, how, and to what extent information about them is communicated to others. Elizabeth Beardsley (1971) suggests that persons have the right to decide when and how much information about themselves will be revealed to others (p. 65).

Although control of information is clearly an aspect of privacy, these definitions emphasizing control are inadequate for there are many situations in which people have no control over the exchange of personal information about themselves but in which there is no loss of privacy. Consider some examples. *A* can tell *B* widely known personal information about *C* in a situation in which *C* has no control but in which *C* suffers no loss of privacy. For instance, in normal situations, *A* can tell *B* *C*'s name or where *C* lives or that *C* likes the Boston Celtics without diminishing *C*'s privacy. Moreover, if control is construed to mean direct, personal control of information, then on the control theory of privacy we are giving up privacy whenever we tell anyone anything about ourselves if there is no direct control over what the other person will do with the information. This seems at best counterintuitive. For instance, personal information confided to a doctor will be passed on to other doctors and to nurses in normal medical practice beyond a patient's control and yet without any invasion of the patient's privacy. Furthermore, because personal information about us is stored in computer databases, most of us have no control over how that stored information is used. Of course, these data banks are a potential threat to privacy if the stored information is improperly released. However, if the information in these databases is properly used or, even more clearly, not used at all, then privacy is not diminished by the simple lack of control over that information. For these reasons the very popular control theory of privacy is not an adequate conception of privacy.

Privacy as Undocumented Personal Knowledge

An interesting definition of privacy involving information has been proposed by W.A. Parent (1983). Parent states: "[P]rivacy is the condition of a person's not having undocumented personal information about himself known by others" (p. 346). Parent maintains that "personal information" properly refers to facts that most people in a given society choose not to reveal about themselves (except to friends, family, advisors, etc.) or to facts about which a particular person is extremely sensitive and which he therefore does not choose to reveal about himself" (pp. 346-47). Parent explains that height may be personal information for someone who is ultra-sensitive about being short and who tries desperately to conceal his actual height even from his closest friends. Parent does not explain in detail what counts as undocumented personal information but gives as an example of documented information an item in an old newspaper. Thus, according to Parent, if *A* finds out by browsing through an old newspaper that *B* was a convicted felon, then *A* has not invaded *B*'s privacy for this information is documented.

Parent's definition of privacy focuses on the content of information, not the control of information. As a result, his definition avoids some of the criticisms of the control theory of privacy. To criticize the control theory, Parent imagines a situation in which *A* has a fantastic X-ray device that allows *A* to look through walls. If *A* aims the machine at *B*'s house but doesn't look through the machine, then *A* has deprived *B* of control of personal information but has not invaded *B*'s privacy (p. 344). In Parent's example, *A* threatens *B*'s privacy but has not gained any undocumented personal information about *B*, and so on Parent's account, *B*'s privacy remains intact. But there are other cases in which Parent's undocumented personal knowledge theory fares less well than the control theory. Suppose while *B* is away from her personal computer, *A* uses it to call up *B*'s personal diary and lists the contents of the diary on the screen. Also suppose *A* is distracted so *A* does not read the screen and does not gather any undocumented personal knowledge of *B*. This surely seems to be a violation of *B*'s privacy and would be so classified by the control theory of privacy but not by the undocumented personal information theory.

Parent's personal information view not only misses some cases of privacy violations but also includes some cases which do not seem to be privacy violations at all. If in a public meeting *A* notices that *B*, who happens to be ultra-sensitive about his height, is wearing elevator shoes and *A* concludes that *B* is short, then *A* has gained some undocumented personal knowledge about *B*, but clearly *A* hasn't invaded *B*'s privacy. If *A* learns from casual conversation a widely known, but undocumented fact that *B* is an alcoholic, then *A* has gained some undocumented personal knowledge about *B*, but again *A* has not invaded *B*'s privacy.

Privacy as Restricted Access

The conception of privacy that is most defensible is the conception of privacy in terms of restricted access. Anita Allen (1988), Ruth Gavison, and others have offered variations of restricted access definitions. The core idea of restricted access accounts is that privacy is a matter of the restricted access to persons or information about persons.

By my definition, an individual or group has privacy in a situation if and only if in that situation the individual or group or information related to the individual or group is protected from intrusion, observation, and surveillance by others. The vague word *situation* was deliberately chosen with the intent that it would range over the kinds of states of affairs to which we normally attribute privacy. A situation may be an activity in a location such as living in one's home, or a situation may be defined by a relationship such as a

lawyer/client relationship or a situation may be the storage and use of information related to people such as information contained in a computer database. The paradigm example of a private situation is a situation in which one is protected from the prying eyes of others. Private situations are islands of epistemological sanctuary.

There are two kinds of private situations—*naturally private* and *normatively private.* Naturally private situations are situations in which people, because of the circumstances of the situation, are naturally protected from intrusion or information-gathering by others. Thus, if, for example, a family is alone hiking in the woods, they are in a naturally private situation. Nobody else is around and they are naturally protected by the forest from observation by others. Now, if a troop of girl scouts suddenly appears in the woods on the trail in front of this family, they lose their natural privacy. The girl scouts intrude and observe them. Of course, they are doing nothing wrong as they have every right to be there. A loss of natural privacy is not automatically an invasion of privacy. However, in addition to naturally private situations there are also normatively private situations. In normatively private situations the protection may be natural but is essentially legal or moral. In normatively private situations, some people (the outsiders) are morally or legally forbidden from intruding or gathering information about others (the insiders) who are allowed in the situation. Thus, if a family is enjoying a videotape in their home, they are in a normatively private, as well as a naturally private, situation. If a troop of girl scouts comes to a window of their house and the girl scouts secretly peer through the window to watch this family, privacy will be lost. Because in this situation there is normative protection, the family has a right to complain. The girl scouts are outsiders to the situation, and they have violated the right to privacy. The distinction between natural and normative privacy is crucial in defending a restricted access account. Not every situation in which one observes someone else or gathers information about someone else does or should count as a violation of privacy. When walking down a public street, one may give up some natural privacy but not normative privacy.

Which situations are normatively private and which are not? One answer to this question is that the nature and kind of situations that are private is culturally determined. Obviously, cultures do vary about what is considered a (normatively) private situation and what is not. Moreover, the boundaries of private situations for one culture will likely change over time. However, another more complex, but equally true, answer to the question is that the nature and kind of situations which ought to be private is open to rational and moral argument. In general, privacy allows one to gain goods such as enhancing liberty and controlling personal development and to avoid

evils such as suffering psychological and economic losses. But, privacy is not an unalloyed good for it has its costs as well. One cost of privacy is that it makes social and political institutions less effective which in turn may be detrimental to individuals. For example, treating the use of medical records as a private situation will protect patients but may retard the general search for medical information by epidemiological researchers who would use such information to isolate the causes of diseases.

The restricted access conception of privacy just discussed has advantages over the other conceptions of privacy without sharing their disadvantages. The key notion in this view of privacy is the concept of a private situation. Compare this concept with the notion of undocumented personal information in the following cases. On the one hand, suppose *A* is taking a shower at a public bath which has no shielding partitions for the bathers. Now *B*, a member of the same sex, walks into the public bath. *B* suddenly gains a lot of undocumented personal knowledge about *A*, and yet *B* has not invaded *A*'s privacy. In our culture this is a situation in which *A* is not protected from someone else of the same sex from making observations. If *A* has undocumented personal information *A* wishes to keep secret but which would be revealed by public showering, then *A* should shower in a more private situation. Of course *B* would invade *A*'s privacy if *B* came uninvited into *A*'s private bath at home to view *A*. It is the situation that makes the difference in the judgment of privacy and not the kind of information. Consider another example. Suppose *A*, outside of *B*'s hotel room, looks through the keyhole at *B*. *B* is dressed and reading the evening newspaper. Here *A* is invading *B*'s privacy, for one's hotel room is regarded, at least in this culture, as a private situation. It is not the undocumented personal information that *A* gains that matters. Indeed, it may be widely known and documented that *B* always reads the evening newspaper at that time in her hotel room. It is the unauthorized surveillance by *A* of a private situation that counts as the invasion of privacy.

Control of information is important for privacy, but again it is the notion of a private situation that makes the difference. Here is an example that contrasts the two theories. Suppose *A* confesses personal information to a priest *B*. Though *A* has no control over what *B* will do with the information, confessions are regarded in this culture as a private situation. The loss of control does not entail any loss of privacy. Clearly, if the confessional moment had been recorded clandestinely by someone else, then there would have been an invasion of a private situation and a corresponding loss of privacy.

The restricted access view of privacy clarifies some of the legal intuitions about privacy discussed earlier. The notion of a private situation is not unlike Douglas's concept of a "zone of privacy." A

normatively private situation, such as living in one's home, fosters personal freedoms since insiders cannot be intimidated by the presence or observations of outsiders. Private situations give us zones of protection to do what we want to do within the limits of personal freedom. Again, note the crucial distinction between privacy and liberty. Privacy provides an umbrella under which to act freely, but there are limits. Child molesting, for instance, is not a freedom protected under the umbrella of privacy. Hence, although it is important not to conflate privacy with liberty, it is equally important not to underestimate the degree to which privacy, understood as normative private situations, provides a supportive environment for personal freedoms.

Finally, the restricted access view is compatible with portions of the nonintrusion account. The restricted access view, as presented here, counts intrusions as violations of privacy only so long as they interrupt private situations. Intrusions on public streets are not invasions of privacy. But, unauthorized manipulations of computer databases by using personal computers and modems are intrusions into private situations, and therefore, these are invasions of privacy. Because invasions of privacy can involve more than intrusions, the restricted access view is more comprehensive than a simple nonintrusion account.

A feature that is particularly attractive about the restricted access theory of privacy is that it gives technology the right kind of credit for enhancing privacy and the right kind of challenge for protecting privacy. Giving technology credit for enhancing privacy acknowledges that we owe a lot of privacy today to modern technology. Technology has generated the possibilities for many normatively private situations. This technology is so common that we take it, and its consequences for privacy, for granted. For instance, the technology for food production, distribution, and preservation enables us to be in private situations for extended periods of time. Central heating and better insulation allows rooms in houses and businesses to be enclosed and private. Modern water, power, and sanitation systems support lives of privacy. Even computer technology, which is often portrayed as the greatest threat to privacy, can enhance it. Withdrawing money from an automatic teller after banking hours is more private than talking to a human bank teller in the middle of the day. Without all of these modern technologies, our lives arguably would be much less private than they are now.

The restricted access theory also suggests the right questions for keeping technology in check. As technology develops, we need to ask what kinds of restrictions should be put on the access to individuals and information about them in order to protect privacy. What kinds of restricted situations—zones of privacy—will give us

better lives? Rather than asking abstract questions about personal control of information or undocumented personal information, we should ask whether and how specific situations should have restricted access. For example, as library circulation records become more computerized, the resulting circulation databases ought to be regarded as zones of privacy. The issue is not whether a borrower should have control of his or her lending record in the database, but whether there is restricted access to the data so that borrowers feel the freedom to read what they please without scrutiny from the FBI or other outside organizations. One of the features of computers is that circulation records can be even more restricted than the traditional paper records. In a typical situation using computerized circulation records, a librarian need not have access to information about who has borrowed a particular item in the past. Computer technology can protect zones of privacy as well as invade them.

Justifying Privacy

Philosophers have offered a variety of justifications of privacy as an important value. Stanley Benn suggests that privacy is grounded in respect for persons. As Benn puts it: "To *respect* someone as a person is to concede that one ought to take account of the way in which his enterprise might be affected by one's own decisions." This type of justification for privacy is both popular and at least initially plausible. One problem with giving respect for persons as a justification for privacy is that it does not distinguish between times in which privacy is justified and times in which it is not. For instance, a mother might have respect for her baby as a person, conceding that she ought to take account of the way in which her baby's enterprise might be affected by her own decisions and still not give her baby privacy. Now the mother might conclude that she will not give her baby any privacy just because she does respect her baby as a person! In general, *A* may have respect for *B* as a person and not grant her privacy, for *A* may conclude that, at least in certain circumstances it is in *B*'s best interest not to have privacy—e.g., *A* decides to save *B*'s life by rushing into her private home at night to save her from a fire. Respect for persons is at most a general background principle for justifying privacy and not a sufficient principle by itself for deducing the need for privacy in particular cases.

Other philosophers have offered more straightforwardly instrumental justifications for privacy. Charles Fried (1984) says that privacy is necessary for love and friendship (pp. 207-09). James Rachaels (1984) suggests that privacy is needed to create diverse social relationships (p. 292). Deborah Johnson (1985) argues that privacy

increases personal autonomy (p. 67). All of these are certainly plausible justifications for privacy, for private situations do foster diverse kinds of relationships and autonomous decision making.

These instrumental justifications of privacy are the overwhelming philosophical favorites and may be adequate to ground the moral notion of privacy. However, I believe that for some people privacy may be valued intrinsically, that is, valued for its own sake. Of course, to claim that privacy may have intrinsic value is compatible with claiming that privacy is also instrumentally valuable. The possibility of intrinsic value is worth exploring. As a thought experiment, consider someone who has his entire life under surveillance by others. These others do not interfere with his life and he doesn't know that the surveillance is taking place. In effect, all private situations for this person are invaded, but his life is no different with regard to making decisions and having diverse relationships than it would have been without the surveillance. The only thing different about his life under surveillance is that he has no privacy. This person seems morally wronged by the invasion of his privacy though no special harm comes to him other than the invasion of his privacy. This thought experiment suggests that privacy has an intrinsic justification as well as an instrumental one. If this is the case, then, philosophically speaking, privacy is that much more secure.

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Philosophical Issues in Censorship and Intellectual Freedom

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ABSTRACT

THIS ARTICLE SURVEYS A VARIETY of philosophical arguments concerning censorship and intellectual freedom in relation to specific contemporary events. The paper argues that deontological considerations concerning censorship and intellectual freedom take precedence over consequentialist arguments.

Recent times have seen a startling variety of events involving issues of free expression. Salman Rushdie has been condemned to death for writing a book allegedly insulting to Islam; his publisher and bookstores carrying *The Satanic Verses* have also been threatened with violence. A significant political battle has erupted following a Supreme Court decision which held that burning the American flag is a protected form of expression under the First Amendment. Some feminists have joined with those elements of the political Right wishing to ban pornography. The distribution and display of two recent films, Scorsese's *The Last Temptation of Christ* and Godard's *Hail Mary,* have been attacked as has the subsidy of a exhibition by publicly supported institutions of photographs by Robert Mapplethorpe and Andres Serrano. The University of Michigan and the University of Wisconsin, among the other colleges and universities, have adopted restrictions on speech deemed degrading or racist, and a number of school libraries have been pressured to remove books ranging from Cleaver's *Soul on Ice* to Twain's *Huckleberry Finn* alleged to be unsuitable for children because of

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their political or sexual content. On national security grounds, the government of Great Britain attempted to block the publication of Peter Wright's *Spycatcher.*

The often confused nature of the public discussion of these and other events, as well as their increasing frequency, suggests that we are unclear about the underlying principles at stake, and shows the need for a re-examination of the philosophical underpinnings of freedom of expression, with careful attention to the distinction between what is, and what is not, properly regarded as a problem of intellectual freedom and censorship. That reexamination is the primary purpose of this article.

The first task is to lay out the ethical theories under which issues of censorship and free expression can be evaluated. There are two basic types of moral theories: consequentialist theories and deontological theories. This discussion will regard utiltarianism, the pre-eminent consequentialist theory, and a variety of deontological concerns.

Consequentialist moral theories are those which hold that the rightness of an action is determined solely by the degree to which it produces good consequences. Utilitarianism is a consequentialist theory which holds that the best actions are those which produce the greatest amount of good (understood as pleasure or happiness) for the greatest number of people. It is the moral theory underlying modern cost-benefit and risk-benefit analysis, according to which we are directed to choose the action with the most favorable ratio of cost or risks to benefits.

Deontological theories, the most important alternative to consequentialism, hold that the rightness of an action depends upon factors other than the consequences of the action. These include such things as whether the intentions with which the act is done were good, whether the action is just, whether it respects the rights of those affected by it, whether the action is consistent with the demands of duty, and whether, whatever its consequences, something in the nature of the action makes it intrinsically wrong. There are a variety of deontological theorists, from the first deontologist, Immanuel Kant, to W. D. Ross in the twentieth century. This discussion is neutral among them for our interest is in the deontological form of argument rather that in the specifics of any particular deontological theory.

Our first major problem is whether issues of intellectual freedom are to be decided primarily by appeal to utilitarianism or to deontological considerations. That is, we must determine which of the two ethical theories expresses the more fundamental and overriding moral concerns.

The classical objection to utilitarianism is that it makes insufficient provision for considerations of rights and justice. Utilitarianism, it is argued, would countenance, even mandate, actions which violated individuals' rights or which were unjust in other ways, so long as those actions maximized utility. This objection is a sound one. Rights take precedence over utility; thus, deontological theories take precedence over consequentialist theories.

This is not to say that utilitarian arguments are wrong or worthless, only that they do not express the most fundamental truths about ethical issues. In disputes in which injustice or violation of rights is not at issue, or in which equally balanced rights claims offset each other, it is often the case that utilitarian arguments determine the issue. Additionally, utilitarian arguments can be used in support of deontological arguments. The claim that deontological concerns take precedence over considerations of utility means only that in cases of conflict, rights and justice are more important than is maximization of utility. Deontological arguments cannot be answered by utilitarian counter-arguments, but need to be dealt with directly in deontological terms. This will prove of great practical significance when we begin to apply these ethical theories to a number of recent controversies involving freedom of expression. First, however, we must lay out the arguments concerning freedom of expression from both ethical perspectives.

In *Utilitarianism, Liberty, and Representative Government,* J. S. Mill (1950), the leading proponent of utilitarianism, gives an elegant and detailed defense of freedom of expression. He offers four arguments against censorship. The first is that:

> the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. (pp. 104-05)

Second, even if the opinion some wish to censor is largely false, it may contain some portion of truth, a portion denied us if we suppress the speech which contains it.

The third reason for allowing free expression is that any opinion "however true it may be, if it is not fully, frequently, and fearlessly discussed, ... will be held as a dead dogma, not a living truth" (Mill, 1951, p. 126). Merely believing the truth is not enough, Mill points out, for even a true opinion held without full and rich understanding of its justification is "a prejudice, a belief independent of, and proof against, argument—this is not the way in which truth ought to be

held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth" (p. 127).

Fourth, the meaning of a doctrine held without the understanding which arises in the vigorous debate of its truth, "will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience" (p. 149).

Censorship, then, is undesirable according to Mill because, whether the ideas censored are true or not, the consequences of suppression are bad. Censorship is wrong because it makes it less likely that truth will be discovered or preserved, and it is wrong because it has destructive consequences for the intellectual character of those who live under it.

Deontological arguments in favor of freedom of expression, and of intellectual freedom in general, are based on claims that people are *entitled* to freely express their thoughts, and to receive the expressions made by others, quite independently of whether the effects of that speech are desirable or not. These entitlements take the form of rights, rights to both free expression and access to the expressions of others.

Natural rights theories, such as John Locke's, grounded these entitlements in God-given natural rights. According to Locke, human rights are founded on "natural law," and in *Essays on the Law of Nature* he holds that natural law derives ultimately from God's will. The concept of natural law is exceedingly vague, but in general the doctrine held that persons may come to know by reason the fundamental principles of morality which are otherwise known by Christian revelation.

The view that human rights derive from Divine grant enjoyed only a brief flourishing in philosophy, from the middle of the seventeenth into the early eighteenth centuries, to be replaced first by utilitarianism and later by positivism.

The idea that rights were granted by the Creator was rejected in part because it is unverifiable in principle. It introduces a particularly murky form of mysticism into political philosophy. Just which rights did God grant to humans? If one theorist's claims about which rights humans possess by nature conflict with those of another thinker, how in principle could such a dispute be resolved?

But the relatively brief life of natural rights theory occurred at just the right time to influence the political ideas of the American founding fathers, who built the doctrine of natural rights, now largely

regarded as a quaint philosophical curio, into the Constitution and Declaration of Independence. It is, for instance, the Lockean view of natural rights which impelled both Jefferson and Madison to their absolutist views of the First Amendment. Jefferson carried the view so far as to hold that: "Libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."

Other rights theories eliminate the controversial theological step, claiming only that rights follow from the nature of human beings (whether God is responsible for that nature or not). Consider the following argument, which Kant did not make, but which I take to be implied by his views. Humans are ends in themselves, Kant says, and the most important fact about them is that they are autonomous, self-determining, rational agents. Restrictions on the transmission of information or ideas which interfere with the exercise of this rational autonomy are thus incompatible with a fundamental feature of human nature, and so are impermissible.

In any case, whether grounded in Divine grant or not, a deontological theory of rights holds that individuals have them independently of the consequences of their possession and exercise.

I turn now to comment on the relevance of these philosophical ideas to some of the recent disputes which are referred to in this article. The first issue is the recent attack by some feminists on the legal availability of pornography. Historically, the arguments over pornography pitted a deontological rights argument in favor of permitting freedom of expression and the legal distribution of pornography against a consequentialist one opposing its legal distribution. The major argument against pornography was its putative bad effect on the morals and behavior of those exposed to it. Pornography was alleged to result in sexual violence and other undesirable sexual behavior. Not surprisingly, the rights arguments protecting free expression usually won out over these consequentialist objections, for, as we have seen, rights take precedence over utility. The consequentialist opponents of pornography were in a very weak position, for not only were their claims about the effects of pornography contentious and controversial, but even if the alleged bad consequences were shown to result from pornography, it would not follow that is was permissible to ban it. The exercise of one's rights does not depend on the felicitousness of the consequences of that exercise.

The recent feminist arguments have introduced new elements into the debate. In addition to the traditional argument that pornography should be banned because it causes harm (e.g., violence against women), we have the new claim that pornography violates

human rights because it is degrading to women. That is, the deontological rights argument in favor of free expression is now being challenged by an opposing rights argument, rather than by the *prima facie* weaker consequentialist objections to pornography.

The argument is in some ways similar to objections raised by some Muslims to the publication of *Satanic Verses*. The claim was that publication of this book was wrong because the novel was insulting to Islam, that it degraded that religion. These are serious deontological objections, and in both cases require a straightforward response.

Some have attempted to answer these objections by claiming that *Satanic Verses* is not insulting to Islam or that pornography is not degrading to women. But this strategy just misses the central point which is that neither a gender nor a religion have the right not to be insulted or degraded.

I would argue that pornography, at least that depicting the violent subordination of women, not only degrades women but men as well by depicting them as enjoying the violent subjugation of women. But this just does not entail that such pornography should be banned. A good deal of protected speech is arguably unfairly insulting or degrading or demeaning to some identifiable group or other, but, excepting the cases of literal slander and libel (in which specific individuals are identified), people have no right not to be insulted or characterized in degrading terms. The cure for such bad speech, as often pointed out, is good speech, not prohibition. In fact, elevating the undesirability of the degrading nature of pornography to the status of a right not to be degraded is a danger to the power of rights to protect legitimate human autonomy. The broader our rights claims are, whether for education, welfare, employment, housing, or freedom from the insulting nature of some pornography, the less plausible those claims are, for the more frequent their conflict with other, equally plausible rights claims. In general, claims of so-called "positive" rights, such as a "right to a job" are less plausible than those of "negative" rights, such as the right to free speech. This is because the former require that others take positive steps toward providing the right-holder with the object of the right (in the example, a job), while "negative" rights require only that others refrain from interfering in the actions of the rights-holder. The right to free speech is the right not to have one's speech interfered with. Requiring that other members of society not interfere with a person's speech in no way violates or even threatens to violate their rights. However, requiring members of society to take positive action to provide a job, or education, or health care, etc., may conflict with their rights.

The upshot of this is that the pornographer and the consumers of pornography (as well as the author and readers of *Satanic Verses*), are in an extremely strong philosophical position. They claim only the right not to be interfered with in their expression and consumption of expression. It would take a strong argument indeed to supersede this rights claim, an argument which has so far not been forthcoming.

The second issue in this discussion is the controversy surrounding the grant of public money from the National Endowment for the Arts to support an exhibition of photographs by Robert Mapplethorpe and Andres Serrano. Several of the photographs in the exhibition, including Serrano's *Piss Christ* (in which a crucifix is shown immersed in what the artist says is urine), and a number of sado-masochistic homoerotic images by Mapplethorpe (including one depicting one man urinating into the mouth of another, as well as erotic images of children), provoked great controversy. A number of federal legislators objected to the use of public funds for the support of artistic expression which they (or their constituents) found offensive or obscene, and they proposed legislation to prohibit the National Endowment for the Arts to subsidize obscene art in the future.

Whatever the merits of exhibitions of Mapplethorpe's or Serrano's work, this case is not properly construed as a freedom of expression issue. No one (at least no responsible person) in the furor surrounding the exhibition of these photographs suggested that the artists had no right to produce them, or that anyone had the right to forbid the exhibition of these works. What was at issue was whether taxpayers' money should be used to support these artistic expressions. Subsidy, not censorship, is the issue in this case. And failing to subsidize expression is not the same as suppressing expression. Freedom of expression is the right not to have one's speech coercively interfered with; it is not the right to be provided with the resources necessary to produce and distribute speech. Freedom of the press, in other words, is not the right to be provided with a printing press, but only the right not to have others interfere with the operation of one's press.

No one's rights are violated by failing to subsidize the exhibition of Mapplethorpe and Serano's photographs. The artists had no right to such a subsidy, nor did the institutions which produced the exhibition, nor the prospective audience for the exhibition. The legitimate claim of right here has to do with the right of the citizens in a democratic society to choose (through their legislators) which art they wish to support and which they do not. The mandate of the National Endowment for the Arts (and other such bodies) derives from an expression of the popular will through the legislature. This mandate therefore can also be modified or rescinded by popular will,

in the form of legislative act, as it was in this case. It would be hard to argue, in other words, that the taxpayers did not have the right to determine what they are and are not willing to support be it artistic expression or any other service or commodity.

This is not the same thing, though, as arguing that the popular will is wise in what it chooses to support. One might argue that an enlightened electorate would choose to support artistic expression, even controversial expression, not because the artist or audience has a right to subsidy but rather on the sorts of utilitarian grounds provided by Mill.

This line of reasoning has consequences for what I take to be a more important issue than the subsidy of controversial works of art. That is the issue of removal or banning of books from publicly supported libraries (including public school libraries) because of their political, sexual, racial, or ethnic content. What is the ethical position for the librarian in such cases? The libraries in question are publicly supported. Doesn't this give the public the right to determine which books will and will not be included in the collection? Isn't the librarian a public employee, obligated to carry out the public's will, as expressed through the appropriate elected officials?

The answer to these questions is "yes," but an importantly qualified "yes." It is true that no one's rights are violated if the taxpayers remove *Huckleberry Finn* or *Soul on Ice* from a tax-supported library. The taxpayers are exercising their acknowledged right to decide what they will and will not support, just as in the Mapplethorpe/Serrano case. And the librarian, if he or she is to remain in that position, must acknowledge the public's rights to be selective about what it wants in libraries it pays for.

This does not mean that we, or the librarian, must agree with the public's position. What librarians can do in such cases is to articulate the important consequentialist reasons for not removing books. In the passion of the moment, the public might rashly choose to ban what it regards as a particularly outrageous book from the public library with no thought to the difficult to discern and serious long-term costs imposed by a policy which allowed such removals. The librarian is in a special position to aid the public in understanding that, while it has the *right* to remove or ban books from publicly supported institutions, doing so is *unwise*. Such removals are wrong and constitute bad public policy just because the long-term consequences may be disastrous.

The points of this article can be summarized in a few succinct ideas. Deontological rights-based arguments for intellectual freedom and against censorship are stronger than, and take precedence over, consequentialist considerations. Utilitarian counter arguments fail

against arguments based on justice or rights. This precedence however must not serve as a motive for attempting to turn all that is desirable into a right. The inflation of rights, by conflating the merely desirable with the obligatory, dilutes the rights which protect us all.

But when rights issues are not at stake, or when conflicting plausible rights claims produce a "deontological stand-off," consequentialist arguments, especially those of Mill, are authoritative. To say that such arguments are secondary to deontological considerations in no way diminishes their validity in those situations where they correctly apply.

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Copyright, Derivative Rights, and the First Amendment

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ABSTRACT

THERE IS AN INERADICABLE CONFLICT between the First Amendment and even the narrowest copyright. Recent changes in copyright law have exacerbated the conflict by extension of rights over derivative works that could result in ownership of ideas, supposedly ruled out by copyright law. Minimal copyright in works of fact as opposed to works of fiction would reduce though not eliminate copyright interference with freedom of information.

INTRODUCTION

There is a basic, built-in conflict between intellectual freedom and intellectual property which is directly reflected in a conflict between the copyright law and the First Amendment to the Constitution. A property right is a right to exclude others from some use of something; giving property rights to one is at the same time putting limitations on the freedom of others, and expanding property rights means contracting others' areas of freedom. Intellectual property is in this no different from other kinds of property, though the particular nature of some of the main "objects" of intellectual property leads to unique problems of drawing the line between excluded uses and permitted uses, and to problematical consequences no matter where the line is drawn. The justification for limiting the use of intellectual objects is presumably this: property rights in intellectual objects are granted as an incentive to the production of more intellectual objects; some freedom is given up as the price

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for the future enjoyment of a larger pool of valuable objects. "American intellectual property law can be thought of as a bargain between individual creators and the public. In exchange for granting authors and inventors exclusive rights in their writings and inventions, the American public is to benefit from the disclosure of inventions, the publication of writings, and the eventual return of both to the public domain" (U.S. Congress, 1986, p. 188). The question about any such bargain is whether the terms are fair. The bargain is a bad one if it fails to enlarge the pool of valuable objects beyond what it would otherwise have been, or if it grants more exclusionary power than needed to yield the same increase in the size of the pool, or if it grants exclusions that should not be granted because the grant conflicts with more fundamental values. The extent of property rights granted under copyright appears to have been expanded considerably in the 1976 revision of the copyright law; the terms of the bargain have changed. Before discussing this expansion, let us take a fresh look at the basic restrictions that copyright law has, in the past, placed on the use of intellectual products; the bargain may be an odd one in ways not quite realized.

Copying and Describing

The "writings" of an "author" are the objects subject to copyright, both "writings" and "author" being understood in unusual ways (17 U.S. Code, § 102). The category of writings includes "literary works," which are any works expressed in verbal or numerical symbols and not just works of "literature"; but it also includes musical, choreographic, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, and sound recordings. The notion of an author is correspondingly expanded. Here we will consider only "literary works" because they are arguably basic to any question of conflict between property and intellectual freedom and have special characteristics that make them uniquely problematical.

To be protected, a literary work must be fixed in a "tangible" medium of expression—i.e., it must exist as a written-down sequence or array of symbols, a recorded text. And what it is protected against is, at the very least, unauthorized literal copying—i.e., reproduction by others, without permission, of the same sequence or array of symbols. This only begins to describe the extent of protection; but even this basic protection against literal copying raises a basic problem.

The publication of the text of a literary work counts as a public *event* and sometimes a major event. One way of describing such events is that the event is the making of a public statement to the world.

This is accurate at least for works that claim to tell something true about the world. Such works say: This is the way things are or were, or, This is the way people should think of the world or this is the way things should be or should not be. Such public statements are particular kinds of extended *speech acts* with the speaker addressing an indefinite and unknown audience (Austin, 1962; Searle, 1969; Levinson, 1987, pp. 226-83). Such speech acts can be described in countless ways, but there is one particular, uniquely privileged, kind of description. We can describe the particular type of speech act, or its topic or subject matter, or its major thesis—for example, that it offers a plan for protection of tropical rain forests, that it expounds a new theory of irregular phenomena, and so on. We might summarize the things said briefly or at length. But any other description we give, if challenged or questioned, will ultimately be backed up by repeating some or all of what was actually said or written—i.e., the very words used in the very order in which they were used. The person to whom we report on others' speech acts can always, and frequently will, press us by asking, "But what did they actually say?" and the standard response—the response called for—is to quote verbatim from the utterance or published text. This is basic to the description of speech acts; verbatim reproduction of the words used furnishes a unique standard description of the act which is an appropriate test of the accuracy of most other kinds of reports on speech acts.

But of course the production of a verbatim repetition of the words used in performing a speech act is just what is controlled by copyright law. It is the production of a copy. If a published text is protected by copyright, it is protected against others reporting on it using the unique standard description of the text, but this is certainly odd. For whatever the bundle of rights associated with the ideas of freedom of speech and of the press, it surely must be thought to include the right to read and watch and listen, and the right to tell others what one has read, seen, and heard, and specifically the right to tell others as precisely and accurately as possible what one has read, seen, and heard. There are further rights such as to criticize, for example. But the further rights seem to presuppose a prior right to report. The right to criticize would be of little value if one were not free first to describe what one was criticizing. And it is at least a bizarre rule that would allow reporting—but not reporting that was as precise and accurate as possible—that would allow reports of public statements to the world only so long as those reports were not "too accurate." Yet this seems to be what basic copyright does—it forbids certain descriptions of speech acts as impermissibly accurate.

One might say that this odd property of copyright was of no practical importance whatever—i.e., that no one cares if reporting is done in private, and that there is no *need* to engage in such "maximally precise and accurate reporting" in public. Even if that were true, it would still leave us with a prima facie conflict between copyright and the First Amendment. By restricting the freedom to produce a certain kind of description of a certain category of public events, the copyright law certainly looks like a law that abridges freedom of speech and of the press. But the First Amendment of the Constitution says that Congress shall make no law that does this.

Note that we cannot, by verbal description, produce copies of the other kinds of objects protected by copyright; "literary works" really are in a different category. A verbal description, no matter how detailed, never becomes a copy of a painting or motion picture. Only musical works—scores and not recorded performances—share this feature with literary works, that decribing (note by note) can amount to producing a copy, though a verbal description of a score is an unusably awkward sort of copy of the score (compare Goodman, 1968). It is this special characteristic of symbolic systems that is at the root of the sharpest conflict between intellectual freedom and intellectual property. The very nature of symbolic systems guarantees the conflict.

It might be argued that the story discussed earlier is mistaken about "making a public statement." Publication should not be described that way. Publication is rather an invitation to the public to buy a copy of what the author has to say—i.e., not a public saying but a public offer to "say" privately. But this simply relocates the basic problem, for now what is forbidden is an overly accurate description of what is up for sale. In other cases of goods for sale it would seem crazy to forbid a maximally accurate description of what was for sale. Here, however, it is explicitly forbidden. You may not be told what is being offered for sale except in general terms lest, by being told what is for sale, you come to acquire it and therefore lose interest in buying it (Arrow, 1971, p. 148). Copyright forbids certain kinds of description of public events.

As defenders of copyright are quick to point out, copyright is far from being the only limitation on freedom of speech that the courts have permitted (Patry, 1985, p. 467; Pool, 1983, pp. 55-74; Stone, 1983, pp. 1425-31; Levy, 1987, pp. 238-42; U.S. Congress, 1988). Laws against blasphemy, obscenity, seditious libel, fraud, deceit, misrepresentation, limitations on the rights of scientists to publish or even publicly discuss their research have regularly been enacted by legislatures and upheld or not overturned by courts. Almost no

one reads the "no" in "no law abridging freedom of speech and of the press" to mean "not any at all." The Constitution does indeed *say* "no law," but the Constitution requires interpretation, and under judicial interpretation, "no law" is found consistent with many laws limiting intellectual freedom. Not being lawyers or judges, we may be permitted to wonder how this can be.

Idea and Expression

Legal scholars argue that two factors eliminate any real conflict between copyright and the First Amendment. The first is that copyright extends only to expression and not to ideas expressed; the second is that fair use allows some unauthorized use even of protected expression.

The first of these factors was given statutory recognition in the 1976 Copyright Revision Act; copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such works" (17 U.S.C. § 102 [1976]). It is generally understood that this means that *information* is not subject to copyright; facts, data, and pieces of information cannot be copyrighted (Francione, 1986). People cannot be prevented from borrowing and using the concepts and facts presented in a work, though they can be prevented from copying the text itself. If copyright did protect ideas, "there would certainly be a serious encroachment upon first amendment values," said the chief authority on the subject, Melville Nimmer (1970), but since ideas are "free as air" (Brandeis cited in Gorman, 1982, p. 577), since copyright places no restriction on the use of the information contained in a work, it imposes no significant limit on First Amendment freedoms (Denicola, 1979; Nimmer & Nimmer, 1990).

The idea/expression distinction is not, however, an easy one to make clear or to apply in practice. If the term *expression* referred to the text of a literary work—that is, the bare string or array of symbols—while the term *idea* referred to the meaning or content of the text, there would be a real distinction; one, moreover, that corresponds to commonsense notions of the relation between words and ideas, words being thought of as vehicles for the communication of ideas from one mind to another (Reddy, 1979). Copyright would protect the vehicle, not the ideas (concepts, propositions, notions) conveyed.

But this cannot be the distinction. If it were, copyright would not protect against paraphrase or translation, both of which are attempts to express the same ideas but to express them differently, in the same or different language. A translation from English into

Hungarian may not share a single word with the original, and, if copyright protected only the original verbal surface, unauthorized translation would be no infringement, but it is. And "in copyright law paraphrasing is equivalent to outright copying" (Nimmer & Nimmer, 1990, vol. 3, pp. 13-202 quoting Donald v. Meyer's TV Sales and Service, 426 F. 2d 1027 [Tex. Cir. 1970]). Hence the idea/expression distinction is not a straightforward one between a text (string of symbols) and its content. Long ago, Judge Learned Hand wrote that "copyright cannot be limited literally to the text, else a plagiarist would escape by immaterial variations" (*Nichols v. Universal Pictures Corporation,* 1930). If expression is protected, but (expression) is more than the text of the protected work, what is it and how is it distinguished from unprotectable idea?

The reigning view seems to be that idea and expression represent two poles of a continuum of overall similarity (Nimmer & Nimmer, 1990, vol. 3, sect. 13.03). Surface verbal similarity is part, but only part, of the reckoning. Beyond verbal similarity, a work may be found to infringe on copyright because it resembles another work too closely in, for instance, the structure of character and action portrayed (at least if it is a work of fiction). Two stories might be held to be "impermissibly similar" though their texts had no words in common and though one was not a translation of the other, because the subject matter of the one tracked that of the other too closely—e.g., involving similar characters doing similar things, or "similarities of treatment, details, scenes, events, and characterization" (*Reyher v. Children's Television Workshop,* 1976, p. 91). Too much "borrowing" not only of verbal surface but of content counts as borrowing "expression" rather than "idea." Judge Learned Hand's "abstractions test" is usually referred to as expressing the distinction (*Nichols v. Universal Pictures Corporation,* 1930): a work can be described in terms of patterns or schemata of increasing abstractness, and two works may resemble each other by both instantiating a pattern at one level of generality or abstractness while differing at the next level of specificity. If they resemble each other only at a high level of abstractness, they resemble only in "idea," while if they resemble each other at a low level of abstractness (high level of concreteness or specificity), their resemblance is one of "expression."

So how do we distinguish using "expression" (forbidden) from using "idea" (permitted)? The answer is discouraging: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression' ... the test for infringement of a copyright is of necessity vague ... [and] decisions must therefore be inevitably *ad hoc*" (*Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,* 1960, p. 489). This is not surprising if what is required

is not to distinguish uses of material from different realms (form versus content, symbols versus what they symbolize, words versus concepts) but to judge degree of overall similarity of form *and* content. It has the consequence that Judge Hand noted: "Nobody has ever been able to fix that boundary, and nobody ever can...the line, wherever it is drawn, will seem arbitrary" (*Nichols v. Universal Pictures Corporation,* 1930, p. 122). And no general line can be drawn; each case must be considered ad hoc. What is allowed and what is forbidden cannot be told in advance; appeal to an idea/expression distinction simply amounts to asserting that copyright permits uses that result in works that are not too similar to the original without giving us any rule for telling how similar is too similar. It is hard to see how this distinction could guarantee that there will be no serious conflict between copyright and the First Amendment. It is not going to be comforting to be told that we are free to borrow the "ideas" expressed in a work if that means only "the most general ideas" and not the "specific details"; and can it be satisfactory that the boundary between the permitted and the forbidden cannot be described or predicted in advance even in principle?

Derivative Rights

"There has been a quiet revolution in copyright law and the copyright industries. Copyright, which once protected against only the production of substantially similar copies in the same medium as the copyrighted work, today protects against uses and media that often lie far afield from the original" (Goldstein, 1983, p. 209; compare Brown, 1984). The 1976 revision of copyright law has many notable features, some of which are well known and some not (for an extended review see Zissu, 1986). Copyright was made automatic upon the first production of a "tangible expression." The term of copyright was extended to life plus fifty years. Protection was granted not just to works of specified kinds, but to "original works of authorship fixed in any tangible medium of expression, *now known or later developed,* from which they can be perceived, later reproduced, or otherwise communicated, either directly or with the aid of a machine or device (17 U.S.C. § 102 [1976]). Rules were laid out for library photocopying, and supplemented by guidelines on interlibrary provision of photocopies proposed by the National Commission on New Technological Uses for Copyrighted Works (CONTU). The "idea/expression" distinction was formally incorporated into the law, as was the fair use doctrine. The 1976 act hedged on treatment of computer programs, and CONTU was charged with formulating proposals for subsequent action. The CONTU proposals, extending copyright protection to computer programs, were adopted by

Congress in 1980 as an amendment to the 1976 act (National Commission on New Technological Uses of Copyrighted Works, 1979). These changes are highly significant, but for our purposes the most striking change in the law is this addition to the list of exclusive rights conferred by copyright: "to prepare derivative works based upon the copyrighted work" (17 U.S.C. § 106 [1976]). The act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, *or any other form in which a work may be recast, transformed, or adapted*" (emphasis added) (17 U.S.C. § 101 [1976]). This is a long way from the simple right to make copies. It was not until 1880 that copyright law even recognized a copyright holder's exclusive right to "dramatize or translate their own works," a German translation of *Uncle Tom's Cabin* having been held noninfringing in 1853 (Goldstein, 1983, p. 213). In 1909 the right to abridge was added, along with the right to "make any other version thereof, if it be a literary work" (Copyright Act of 1909, sect. 1). As the 1976 act extended the scope of copyright to works in any tangible medium of expression, *now known or later developed,* so it extended the rights of the copyright holder not just to make particular types of derivative works, but to produce works based on an earlier original and subjected to *any* kind of recasting, transformation, or adaptation. Taken at face value, this represents a huge extension of proprietary rights, and a correspondingly huge restriction on others' freedom to make use of a work. And it casts doubt on the claim that copyright protects only expression and not the ideas expressed.

Let us try to imagine how we might proceed if we did want to grant ownership in the ideas expressed in a literary work (for a different view see Hopkins, 1982). To be at all plausible, our procedure would either have to require a proof of the novelty of ideas expressed (similar to the patent system's requirement of novelty but sharply different from copyright's minimal requirement of "originality" which is simply "not copied"), or else would have to give rights not to particular ideas but rather to a complex structure of ideas. A person who writes an article about copyright is not going to be given property rights in the bare idea of a work, or of a copy, or of a right; it will have to be either a demonstrably new idea or else a particular structure of ideas—say, the entire conceptual structure expressed in a written work (the "unique and protected mosaic" as Judge Kaufman puts it [*Harper & Row Publishers v. Nation Enterprises,* 1983]). Let us put aside the case of the "demonstrably new idea" (interesting though it be) and concentrate on the case

of the structure of ideas. How would we go about protecting the ideas, the conceptual structure, the intellectual content, of a literary work? The first things we would prohibit would be: translation, paraphrase, summarization, reorganization or rearrangement of content, making popularizations, writing expanded versions of the original, writing "imitations" of the original in which one tried to "translate" the original into a new subject area or apply it in a new way. One would try to prevent other uses as well—indirect uses such as doing other things that necessarily assume or presuppose the protected ideas. But prohibition of copying and of making derivative works would come first. To cover all bases, one would forbid not just a specific list of prohibited types of use but would include an indefinite omnibus clause prohibiting "any other form in which a work may be recast, transformed, or adapted." In other words, one would take one's wording from the 1976 Copyright Act. The steps one would take, in what almost everyone would agree was an unconstitutional grant of property in ideas, are largely the same steps that have already been taken. The more unauthorized transformations of a text we forbid, the greater the control we are giving the copyright holder over the content of the text; if we forbid *all* transformations of a text, we are giving, as nearly as we practically can, complete control over the content. When we remember that copyright forbids not only copying of whole works but of any quantitatively or qualitatively substantial part (and what is substantial can be a couple of hundred words out of hundreds of thousands), we see that what is forbidden now looks like this: it is forbidden to produce works containing "substantial" parts copied from or based on parts of an original or any transformation of the original. This cannot be compatible with any ordinary understanding of intellectual freedom.

Fair Use

If the idea/expression distinction fails to resolve the First Amendment conflict, and if new derivative rights appear to exacerbate it, the whole burden now falls on the doctrine of fair use which has, in the past, been seen as a "cure-all" for such problems (Francione, 1986, p. 522). The 1976 Act, for the first time, codified the doctrine, saying that "the fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching...is not an infringement of copyright" (17 U.S.C. § 107 [1976]). There is no precise rule for determining fair use; a non-exhaustive list of factors to be considered in deciding fairness of use includes purpose, the nature of the work, the amount and "substantiality" of the portion used in relation to the whole work, and the effect of the use on the potential

market for, or value of, the copyrighted work. Other factors are taken into account at times (the public interest, "good faith," "fair dealing"), but it is generally agreed, by commentators and recently by the Supreme Court, that the effect on the market for the copyrighted work "is undoubtedly the single most important element of fair use" (*Harper & Row, Publishers v. Nation Enterprises,* 1985, 2233). The fact that only a small part of a copyrighted work is copied will not suffice to satisfy courts of fair use; in the important case of *Harper & Row v. Nation,* the majority of the Supreme Court found that the *Nation* had infringed the copyright in ex-President Ford's memoirs by publishing an article that quoted 300 of the more than 200,000 words of the original. Even a small amount of quotation and paraphrase can be found detrimental to the market for the original work. It is important to remember that there are two distinct elements in the question of market effect: potential (not necessarily actual) effect on the market for the work allegedly infringed, and potential effect on the market for derivative works based on that original. Courts have apparently not so far taken markets for derivative works much into account, but have "generally inclined to identify potential markets with the market in which the work was first introduced," a "persistent error" according to Goldstein (1983, p. 233). Uses of copyrighted works that might be considered fair when only the effect on the original was considered could be thought unfair if they might have an effect on a derivative work that the author of the original has made, intends to make, or might sometime intends to make.

The limitations of the fair use defense in resolving conflicts between intellectual freedom and intellectual property (application of the fair use doctrine being primarily concerned with protection of markets) is suggested not only by Harper & Row but also by the case of *Wainwright Securities v. Wall Street Transcript Corp.* (1977). Wainwright produced reports on corporations, analyzing finances, profit expectations, strengths and weaknesses, etc.; the *Transcript* published abstracts of the Wainwright reports. Wainwright sued, alleging copyright infringement and unfair trade practices. The *Transcript* argued that its use of the reports was a fair use, that publication of the abstracts was simply "financial news coverage entitled to the protection of the first amendment" (*Wainwright Securities v. Wall Street Transcript Corp.,* 1977, p. 95). They pointed out that *The Wall Street Journal* also reported the Wainwright publications as news events, including accounts of the analyses and conclusions of the original reports. Admitting that "the question of the first amendment protections due a news report of a copyrighted research report is a provocative one" (p. 95), the court held on appeal that "the Transcript appropriated almost verbatim the most creative

and original aspects of the reports" (p. 96), and that it had "the obvious intent, if not the effect, of fulfilling the demand for the original work" (p. 96). This was not legitimate news coverage or fair use but rather "chiseling for personal profit" (p. 97).

It is clear (and emphasized in the Supreme Court decision on Harper & Row) that the fact that an abstract is offered as a news report is not sufficient to establish that it is fair use; "the fact that an article arguably is 'news' and therefore a productive use is simply one factor in a fair use analysis" (*Harper & Row, Publishers v. Nation Enterprises,* 1985, p. 2231), and not necessarily a determinative one. *The Wall Street Journal* had presumably not adversely affected Wainwright's market even though it too quoted extensively from the originals and reported significant findings. Denicola (1979) thinks that the *Transcript* made "significantly greater use of plaintiff's expression than was necessary" to report on the publication (p. 312. Compare with Gorman, 1982, pp. 576-78). This suggests that paraphrase would have been acceptable instead of direct quotation, but it was the reporting of significant findings ("the most creative and original aspects of the reports") that produced the putative effect on the market, and paraphrase would have had the same effect (and paraphrase is equivalent to "outright copying," though Gorman [1982] suggests that "even substantial paraphrasing" might have been tolerated if the abstracts had incorporated critical assessments of Wainwright's reports [p. 578]).

Given decisions such as this, it is clearly in the interest of producers and publishers of abstracts to claim that abstracts are not derivative works and do not substitute for the originals (see Lieb, 1980; Cambridge Research Institute, 1973, pp. 164-65; Weil et al., 1983a; Weil et al., 1983b). This is, of course, clearly false in many cases. An abstract (an informative abstract at any rate, as opposed to an indicative or descriptive one) is a short abridgement, which implies either that it is a derivative work or that only length makes the difference between (derivative) abridgements and (nonderivative) abstracts, which is implausible. And for the user, abstracts, like review articles and syntheses, do indeed often substitute for the originals; that is their great merit (Bernier, 1968). If abstracts are derivative works and so forbidden unless authorized, or if they are not derivative works but may nevertheless be forbidden because they adversely affect a market, the conclusion seems inescapable that appeal to fair use will not suffice to avoid damaging limitations on the freedom of information. The system of communication that we depend on requires not only the production of original intellectual products, but of the communication of various forms of information about those products. The system of communication cannot be subject to

the limitation that nothing flowing through it may adversely affect the market for any original work; if anything is an impermissible limitation on freedom of speech, this looks like it. As Denicola (1979) says, the fair use defense removes "those barriers to use that are not needed to preserve the economic incentive to produce," but "the first amendment, however, demands much more...when the objective of free speech requires access to the expression of another, the property interest created by copyright law must yield, regardless of the economic impact" (p. 303). It would be a mockery to say that free speech is protected just up to the point at which it begins to affect commercial interests.

There is a way of reconciling copyright and the First Amendment, however, at least for one great category of copyrighted works—i.e.,the "factual" as opposed to the "fictional."

Fact, Fiction, Function

The development of new information technology has exacerbated the conflicts inherent in copyright law in ways described in a wide-ranging survey by the Office of Technology Assessment (OTA), *Intellectual Property Rights in an Age of Electronics and Information* (1986). The vastly increased ability of private citizens as well as commercial and noncommercial organizations to copy, manipulate, and transmit vast quantities of information quickly and cheaply has changed the copyright environment in ways still not well understood. The ability of copyright holders to enforce their rights to copy is lessened by the widespread availability of computers and digitally-stored information. The ability and the incentives to create new information products have increased stupendously, but the copyright ban on unauthorized production of derivative works makes it dangerous to take advantage of the ability (Office of Technology Assessment [OTA], 1986, pp. 162-65. See also Warrick, 1984). These are central, but by no means the only, problems of copyright in the information age.

The OTA report bravely raises the question of whether copyright should be thought of as proprietary at all, rather than as regulatory, confined to the commercial exploitation of intellectual products (Office of Technology Assessment, 1986, pp. 190-93. See also Zimmerman, 1986). (If regulatory, private use would not be limited by copyright while, if proprietary, private use would be subject to control.) It proposes that the time may have come to abandon a uniform system of copyright protection for all types of works, and suggests the need to consider different treatment for works falling into the three categories of works of "art," works of "fact," and "functional works"—i.e., those that describe procedures or, like

computer programs, both describe and actually implement a procedure (Office of Technology Assessment [OTA], 1986, pp. 64-88). This suggestion seems particularly appropriate in the context of First Amendment conflicts (though that was not one of OTA's concerns).

The writers of the OTA report were thinking of a trichotomy of all the kinds of copyrightable objects, but let us confine our attention only to "literary works," excluding computer programs from that category (to which they were assigned as a result of the CONTU recommendations, which may turn out to be a mistake), and consider only a dichotomy of works of "fact" and works of "fiction." (The category of works of "fiction" is intentionally narrower than that of works of "literature"; historical works, for instance, may well be considered works of literature but will count as works of "fact.") Let us suppose that works of fiction are given the full range of protection currently given them subject to the "idea/expression" limitation in its incorrigibly vague form (and let us admit frankly that this amounts to protection of ideas in an everyday nonlegal sense). For works of fact, let us suppose that no protection is granted beyond protection against substantially complete and literal copying, thus returning to the earliest understanding of copyright protection.

One might justify "thick" protection of works of fiction on the following grounds: the characters and incidents of a novel or play are (at least in prototypical cases) invented by the author, and the speech act in which they are presented to the world has the somewhat paradoxical characteristic of "bringing truths into existence" (this is not the orthodox view of speech acts. For that orthodox view, see Searle, 1979). That is, if the author writes that the character George murdered his brother, this is now a "fact" in the imaginary world created and populated by the author; it would make no sense for subsequent writers to try to show that George "really" did not commit a murder. That is a distinguishing feature of imaginative, as opposed to "factual," works. If you can be said to have created a world, you might plausibly be given rights not only over the text of the work that presented that world, but over the "world" itself, the particular imaginary world of the work. Protection might thus be "thick," extending not just to the verbal surface but to the "world" behind that surface.

For works of fact, a new standard of infringement would have to replace the idea/expression distinction—say, a "fact/expression" distinction: the facts presented are not copyrightable, only the very words used to present or express them. (Here one could appeal to the "clear distinction" test of the case of *Baker v. Selden,* a test very

different from the idea/expression distinction [101 U.S. § 841. Compare the discussion in OTA, 1986, pp. 62-63].) On that understanding, if we take the facts presented in a work and use them to create a new work, we cannot infringe copyright, for the facts are not subject to copyright. Questions of fair use do not arise if what was used was factual matter rather than the verbal surface of the work. Infringement would be a matter of "substantial taking" of expression—i.e., verbatim text. The idea/expression distinction as usually understood would not apply: substantial similarity of overall content would not constitute infringement, since content (the factual matter itself) was not copyrightable at all. "Infringement of copyright must [in such cases] be based on a taking of literary form, as opposed to the ideas or information..." (*Harper & Row, Publishers v. Nation Enterprises,* p. 2242). Francione (1986) argues at length that "for logical and practical reasons the infringement standards for fictional and factual works must be different," as "the distinction between fact and expression is simply different from the distinction between idea and expression" (p. 566). He may not be right in claiming that the standards *must* be different; the proposal here is that they *should* be different in order to avoid the conflict between intellectual property and intellectual freedom.

To some degree, this distinction between "thin" protection for factual works and "thick" protection for works of imagination is already recognized by the courts, the protection afforded factual works being generally "thinner" than that afforded works of imagination (see especially Gorman, 1982). But protection for works of fact is far from the minimum proposed. Presumably the "thinning" of protection for factual works could come about by the evolution of judicial interpretation (on this subject, see Levi, 1949; Dworkin, 1986). But working against the recognition of only "thin" protection for works of fact are at least three distinct features. First, there is the courts' apparent inclination toward a "labor theory of copyright," affording protection to works of fact to compensate for the labor expended in their preparation even though their contents are, in theory, unprotectable. Despite their overt recognition that facts and information are not protectable, courts have often, explicitly or implicitly, decided for relatively "thick" protection of factual works as a way of recognizing the effort going into their production. There will be no copyright incentive to produce works like directories, the contents of which are preeminently pieces of unprotectable information if others are allowed to take the information and rearrange it at will, but incentives must be protected. Francione describes in detail the strategies by which protection is granted to bodies of information that could not be granted to separate pieces

of the "body." There is a fatal analogy between surface and content that may be at work here. Words are not separately copyrightable but strings of words are. Why not also say that, though individual pieces of information are not copyrightable, collections of such pieces are? So "Although individual facts and their unadorned expression are not protected by copyright, the law has chosen to ignore the dictates of algebra and affords to the summation of one hundred or one million such elements a significant measure of protection" (Denicola, 1981, p. 527). He thinks that is appropriate; but protecting a body of information against copying, reformulation, and transformation is protection of content, and it is clear to others that in many cases courts "have in a pragmatic sense afforded protection to simple ideas" (Hopkins, 1982, p. 405).

Which leads directly to the second point, that of derivative rights. Standard copyright doctrine has it that "compilations," which are collections of facts or pieces of information, are copyrightable but that only their arrangement and, at least in some cases, their selection is protected (Denicola, 1979; Francione, 1986, p. 593). The lay observer would conclude that rearrangement and reorganization of a compilation would not be infringing, and some court decisions lend support to this view. For instance, in the case of *New York Times Co. v. Roxbury Data Interface, Inc.*, Roxbury prepared a cumulated personal name index to the *New York Times* Index and the *Times* sued for infringement but lost (434 F.Supp 217. Compare Gorman, 1982, pp. 574-75; Denicola, 1979, pp. 532-33). But could one count on such re-uses of data being regularly allowed? No, for another court might well find such an index to an index to be a derivative work, "and that the right to create that new index was within the plaintiff's copyright monopoly" (Gorman, 1982, p. 575). The problem is a general one in that even if the content of a work consists of unprotectable facts or information, if there is a clear relation of transformation between an original work and another work, the other may be held to be an impermissible derivative work. It is futile to try to guess how judges are going to interpret the derivative right clause of the copyright act; but the prohibition against unauthorized derivative works stands, as Gorman (1982) notes about the First Amendment, as a "brooding omnipresence" over the copyright environment (p. 586). The idea of one work being a copyright infringement because it is *based on* another, and hence a derivative work, is a rich potential source of conflict.

The third and perhaps the major barrier to full recognition of a different status for works of fact and works of fiction is the copyright doctrine that paraphrase is equivalent to copying. Again the special nature of symbolic products complicates the picture; for if the text

of a factual work is protected *against paraphrase,* the ability to make use of the content of factual works is restricted.

The way this works is as follows. Suppose one text presents a series of "facts." Since facts are not copyrightable, it must be permissible to use them, in particular to communicate these facts to others. But if both the new text and the original text succeed in communicating the same facts, then the new text will look like a paraphrase of the first text. For the main test of a good paraphrase of a text is whether it serves as well as the original to communicate the information conveyed by the original; and conversely, if one text serves as well as another for that purpose, it stands in the relation of being a paraphrase to that other text. If the fact to be conveyed is that George murdered his brother, then any text that does convey that fact (directly at least, not just by implication) will do so because it is another way of saying that George murdered his brother. But then, by copyright doctrine, it is impermissibly similar to the original. But *any* text that managed to convey the fact in question would be impermissibly similar; if all impermissibly similar expressions are forbidden, it is not permitted to use the *fact* that George murdered his brother except indirectly or nonverbally.

Copyright doctrine has long recognized, at least in a few cases, that there is no practical alternative to allowing direct quotation: idea and expression "merge," and one must allow use of verbal expression on pain of granting monopoly ownership in a fact (see Francione, 1986, p. 573). But the generality of the problem seems not to have been acknowledged, though at least one court has come close, noting that: "Factual works are different. Subsequent authors wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression" and noting, significantly, about one statement that "just about any subsequent expression of that idea is likely to appear to be a substantially similar paraphrase of the words with which Landsberg expressed the idea" (*Landsberg v. Scrabble Crossword Game Players, Inc.,* 1984, p. 488). But no one seems to have made the point in full generality (Francione comes closest but apparently cannot bring himself to talk bluntly in terms of paraphrase. See Francione, 1986, pp. 570-75). The court's odd phrase "substantially similar paraphrase" is telling; for outsiders, the whole point of paraphrase is to convey the information of the original, and the idea of a paraphrase that was not in that sense "substantially similar" is the idea of a *poor* paraphrase. The better a paraphrase, the worse it is in copyright. But it has to be stated as bluntly and forcefully as possible: forbidding paraphrase, or forbidding *good* paraphrase, amounts to forbidding use of the fact or information conveyed by the text paraphrased. The ban on

paraphase is flatly inconsistent with the ban on copyright in fact or information. As long as the ban on paraphrase continues, copyright in factual works will continue to present conflicts with the First Amendment.

Conclusion

The extenion of derivative rights to apply to "any...form in which a work may be recast, transformed, or adapted" is potentially the means of drastic further curtailment on the freedom to use ideas and information presented in copyrighted works—only potentially, for all depends on how courts come to understand the new wording of the law. When it comes to works of art and entertainment, we may not find the expansion of property rights of much concern from the point of view of intellectual freedom; does it matter, from that point of view, that we are forbidden to make rock videos or interactive computer graphics based on someone's short story or poem? When it comes to works of fact, however, the matter is different. The freedom to use and, in particular, to inform others about information is not one we can afford to see curtailed.

But as we have seen, even the thinnest copyright does have that effect—i.e., the inability to quote prevents the most accurate description of others' speech acts. The conflict between intellectual freedom and intellectual property is guaranteed by the basic character of linguistic communication—that accurate description produces a copy or a paraphrase of what is said. In the past, the fair use doctrine was held to provide the needed loopholes that would mitigate the conflict. Recent constricted applications of that doctrine reduce the number of loopholes (without closing them all, to be sure). As long as copyright in works of fact is granted, the conflict will continue. Since those with economic interests in copyright are certain to keep up pressure wherever and whenever possible to preserve and extend the range of protection, those concerned with intellectual freedom have to face the prospect of perpetual struggle to preserve the freedom to communicate and to use publicly available information.

It is inevitable that the question of incentives for the production of factual works should arise, however, whenever it is proposed that copyright protection for factual works should be thin and protect only against exact copying. The idea was, as we saw at the beginning, that copyright was a bargain made to increase production of intellectual products; but if copyright does not extend to factual information, it hardly provides incentives to the production of new factual information. And in fact this is so; scientists and scholars do not do original research they would otherwise not do in the expectation of making money by the sale of copies of their books

or journal articles (or of movie rights). Basic scientific research is directly subsidized, mostly by governments; scholarly research is subsidized too by academic appointments that allow time and provide some resources for research (often insufficient, but not seriously supplemented by sale of copies of books). Government itself collects basic economic and social information and supports applied research in agriculture and medicine. In these areas it is not research that is supported by copyright but the publishing industry. If the copyright bargain was made in the hope of thereby increasing the supply of new factual information, of new knowledge, it is a bargain that was badly made for it does not have that result. And if the result of the bargain is that rights to use information are restricted, it is doubly bad, giving away what should not have been given away without any return.

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Freedom and Equality of Access to Information: The Lacy Commission Report

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ABSTRACT

THE COMMISSION ON FREEDOM AND Equality of Access to Information was an independent commission appointed in 1983 by American Library Association President Carol A. Nemeyer to re-examine some of the basic tenets that determine how the American people gain access to information in order to enable them to function as citizens and as productive members of society, with the focus on future access to information. This article examines the recommendations of the commission which focus upon dissemination of and access to information (particulary the broadcast industry, electronic information, and government publications), reports the ALA membership's responses to the commission report, and notes benchmark publications and activities since 1986.

INTRODUCTION

The democratic experience in the United States has depended heavily upon a free flow of information. First Amendment protections have, however, been oriented toward print distribution of information. There has been growing concern about the effects of technology upon access to information. In response to this concern, Carol A. Nemeyer, president of the American Library Association (ALA) in 1982-83, appointed the Commission on Freedom and Equality of Access to Information in April 1983. The commission's goal was "to reexamine some of the basic tenets that determine how the American people gain access to information in order to enable them to function as citizens and as productive members of society" (ALA, 1986, p. xi).

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The 1986 report that resulted from the commission's deliberations has become known as the Lacy Report, a reflection of the leadership of the commission's chair, Dan Lacy.

The commission was charged to contribute its best thinking to the problem of future access to information. It was an independent commission composed of notable leaders with authoritative expertise in many different aspects of the issues of access to information with membership drawn from both the public and private sectors. The resulting report was, therefore, a reflection of commission members' thinking, not a reflection of the American Library Association's policies or positions. The commission presented its report to the ALA Council with the intent of stimulating further examination of the issues. The Lacy Report clearly succeeded in that regard as ALA membership debated vigorously the content of report drafts in various open hearings during the commission's deliberations, and a variety of actions have resulted subsequent to the submission of the final report. In a number of instances, ALA positions do not agree with recommendations or statements in the Lacy Report. The debate within ALA generated by the commission's report has generally been acknowledged as healthy, important, and timely.

The Lacy Report

The Lacy Report is important to the discussion of intellectual freedom in that people must have access to information if there is going to be a free flow of ideas in a democratic society. The thrust of the commission deliberations was not on censorship but rather upon dissemination of, and access to, information. In that context, the commission looked at three aspects: (1) the appropriateness of First Amendment coverage to broadcasting and electronic information delivery systems; (2) the physical, financial, educational, and technical barriers which technologically based systems pose for citizens; and (3) distribution of, and access to, government information, particularly in light of increasing government reliance upon electronic information delivery systems. These elements, as presented by the commission, are summarized in the following discussion.

The First Amendment and the Federal Communications Act

With the exception of film, which originally was viewed by the courts as an entertainment medium and therefore not covered by the First Amendment (but which now enjoys full First Amendment protections) (ALA, 1986, pp. 22-23), other new technologies have not been viewed as appropriate to First Amendment protections. Public policy in the United States veered from the First Amendment approach of an earlier paper communications environment and began to rely

instead on anti-trust law and licensing of channels, cables, or wavelengths. While the various media allow for very broad public access at output, they also narrow access at the point of input, since those who control the channels, airwaves, and cables also control what is broadcast or transmitted. Rather than applying the First Amendment to radio, television, and telephony, as in the case with print and films, the United States has adopted a policy of licensing whereby licensees must observe a "fairness doctrine" which requires that they afford a reasonable opportunity for the presentation of differing points of view on important controversial issues. In addition, political candidates must be afforded equal time and reasonable access to station facilities, and licensees cannot censor the content of a candidate's presentation. The Federal Communications Commission (FCC) has no censorship authority over the content of programs, but it has the power to vacate or refuse to renew a license if the licensee fails in its responsibilities as a trustee. Those responsibilities include ascertaining issues that are important to the community and offering contrasting points of view. This approach invests the licensee with a public trust to use the licensed segment of the spectrum in such a way as to serve the public interest (ALA, 1986, p. 7). In addition to licensing, anti-trust law has become increasingly important by creating competition (p. 7).

An argument can be made that the First Amendment is appropriate to the broadcast environment.

> Any restraints the licensee placed on, for example, political access to the public through radio or television were in a sense restraints imposed by, or at best licensed by, the Government itself. Hence, the First Amendment could be considered not as enfranchising the station owner to determine program content, but rather as restraining the owner, as it restrained the Government itself, from inappropriately abridging the freedom of those who might wish to speak over the radio or television. Common carrier treatment of broadcasting is both conceivable and consistent with the First Amendment. (pp. 23-24)
>
> Broadcasters themselves and many civil libertarians have thought it wrong that the First Amendment should not be applied to broadcasting in the same way it is to print and to films. They believe that licensees should be freed from the obligations of the fairness doctrine and the equal-time provisions of Section 315 [of the Federal Communications Act]. Their argument is that these requirements in fact narrow rather than enlarge access; broadcasters may decide to avoid controversial topics and political campaigns altogether rather than deal with these restrictions. The argument for not applying the First Amendment to broadcasting as it is to print has been based primarily on the scarcity of broadcast channels. That is, in a medium not inherently open to all, the Government must license the few. The Supreme Court has indeed stated that it is because of this scarcity argument that it has upheld the constitutionality of the content-regulatory provisions of the Federal Communications Act. (p. 25)

The Lacy Report, in looking at technological developments broadly, concludes that new telecommunications developments (increased

numbers of channels, cable systems, and electronic information delivery systems such as teletext) are modifying the structure of broadcasting and enhancing the opportunities for access to the media, which argues for reconsidering the appropriateness of First Amendment applicability to broadcasting.

> in every city there is a far wider choice of television channels than of newspapers, and that there is no reason why the rights of a television station owner should not be as fully protected by the First Amendment as the rights of a newspaper publisher. Moreover, it is argued that the journalistic ethics of accuracy, objectivity, and fairness are as fully recognized and adhered to by broadcast as by print journalists. (ALA, 1986, p. 35)

The report argues that requirements of equal time for all candidates for office may actually restrict, not extend, access to the medium, that broadcasters may simply avoid such topics or not make free time available to any candidate for fear of having to provide it for many candidates (p. 36).

The commission acknowledges four arguments for regulation: (1) the exclusive use of a television channel still has a great scarcity value as evidenced by purchase prices of channels; (2) the public must have means of assuring the fulfillment of the station's responsibility imposed by the use of a license in the public interest; (3) the fairness doctrine and equal-time provision protect the First and Fourteenth Amendment rights of the public and are intended to assure access to information as well as diversity of viewpoints; and (4) that broadcast television is so pervasive that it requires special consideration, and precedents from the field of print should not be automatically extended to it (p. 36). Though acknowledging these arguments and recognizing areas in which broadcasters have not been responsive to the public good (children's programming, programming for the information-needy poor, elderly, or non-English-reading populations), the commission comes down on the side of deregulation.

> There would thus be an end to the governmental effort to seek fairness on all issues, case by case, that represents such a deep intrusion into daily editorial processes. There is a "letting in" process driven by technology but commendably furthered by government policy that is resulting in an explosion of new services, commercial and pay, terrestrial and satellite. This process should be accompanied by a "letting go" of excessive governmental restrictions on broadcast journalism. (p. 38)

An eloquent dissenting opinion by Ben H. Bagdikian (p. 19) was entered into the record, and it became a focal point for critics of the commission's report. In his minority opinion, Bagdikian states:

> I disagree with my colleagues on the deregulation of television. I do not share their optimism that cancellation of equal-time provisions will result in a substantial increase in responsible public affairs programming on a local and national level. I believe that the main deterrent to such programming will continue to be the preference of commercial broadcasters for more profitable entertainment programs. There are other

> methods to permit stations to hold political interviews and discussions while still being held to fair standards such as debates held by the League of Women Voters. I believe equal-time provisions should apply to both paid and unpaid programs. I do agree that fairness standards should apply to patterns over a license period rather than on individual programs, but this requires that license challenges should be practicable for citizen groups with serious complaints. (p. 115)

Going beyond television and radio, the commission examined the question of whether the electronic transmission of data and texts should be governed by the regulatory requirements of the Federal Communications Act or have the First Amendment freedoms of print. Drawing heavily from Ithiel de Sola Pool's (1983) *Technologies of Freedom,* the commission took the position that: "Much of the problem will be solved if this type of regulation is very largely ended for television itself; but if not, the commission believes that teletext and similar transmissions of text and data electronically should have full First Amendment protection (i.e., the same as print)" (pp. 41-42). As with broadcasting, the commission bases its stance on the proliferation of alternatives.

Electronic Information Delivery Systems

Apart from the issue of First Amendment protection for electronic information discussed earlier, the Lacy Commission divided its concern for access to electronic information into three broad areas: (1) access to telecommunications systems; (2) impediments to users of electronic systems; and (3) need to create an infrastructure to support electronic information similar to that which exists for print resources such as defined publishing services, bibliographies, catalogs, organized distribution mechanisms, review services, and clear legal bases (p. 54). The concern about telecommunications networks are very much like those pertaining to publishers, broadcasters, or common carriers in the ability of the owners of such facilities to control access in a discriminatory way.

> Historically we have sought to assure equitable access by competition among numerous facilities for the dissemination of ideas, as among book publishers; by a sense of professional responsibility when there is imperfect competition among facilities for dissemination, as in the case of the Associated Press or dominant newspapers; by federal regulation when there is governmental licensing of scarce facilities, as in the case of broadcasting; and by a common-carrier requirement when there is a franchised monopoly, as in the case of telephone services. (p. 42)

Like the analysis of First Amendment issues, few would argue with the description of the problem as provided in the commission report, but many do argue with the commission's conclusions. The report identifies the fundamental changes as follows:

> Fundamental changes are now being made in public policy in this area. Competition is to be relied on in place of de facto regulated monopoly

> for long-distance telephone service. Though local telephone service remains a franchised monopoly with common-carrier status, its monopoly is challenged by unregulated competition, particularly for data communication. New kinds of dissemination facilities, notably cable television networks, have arisen which have an unresolved regulatory status. Private networks of large corporations play an increasingly important role. (p. 42)

The commission generally supports deregulation of the telephone industry and supports the resulting competition (p. 43). And yet, the commission took a quite different stance on cable systems that have the capacity to move data as well as video and thus potentially become information providers or joint venturers in information provision, giving cable systems the opportunity to discriminate against or exclude competitive information providers. Because the user of a cable network is tied to one specific cable system, the user is a captive to that system in a way that the user of satellite or telephone networks is not, since the latter user has multiple options. For this reason, the commission recommended that cable systems come under sufficient regulatory control to assure nondiscriminatory access to some reasonable extent, following the general approach of the Cable Act of 1984, which generally eschews broadcast-type regulation of cable in favor of a combination of print and broadcast approaches (pp. 44-45).

Whereas the discussion of First Amendment protections for radio, television, and cable systems referred little to the library as a major factor in access, the portions of the report which deal with information delivery, as opposed to broadcast journalism, recognize the central role that libraries will play in making electronic information available to the public. In this respect, it equates access to electronic information with that of print, in which public policies at the federal, state, and local levels have been enacted to overcome or reduce barriers to print resources, primarily through educational and library programs. The commission sees print and electronic information as analogous in terms of policies on what to provide, librarians acting as intermediaries to help patrons using these and other resources.

> It should be emphasized that these policies and practices [of providing access to databases] are not departures from but continuations, in another medium, of the policies and practices governing access to printed materials and that they have the same basic objectives: not to exclude users or narrow access, but to broaden access and make it more equitable and in particular to maintain the library's services to those most in need of them...keeping in mind always that the objective is to provide the broadest and the most equitable access possible within resources that are or can be made available. (p. 50)

The commission points out that user fees imposed by libraries to offset costs of electronic database access are "inherently discriminatory

in publicly supported institutions and may constitute, for some individuals, a significant barrier to access to the best available or most appropriate information technology" (p. 50). Thus chapter 6 of the report deals with recommendations for sources of funding which would not pass the costs on to the library patron.

The one area in which the commission recognizes access to databases as being different both in degree and kind from access to print is in the lack of an infrastructure to support that individual access or interlibrary cooperation.

> We have indicated in other sections of this report our sense of the urgent necessity of the library profession, in cooperation with others, undertaking to create a bibliographical, cataloging, and institutional infrastructure for electronic data bases comparable to that for print. As a part of that infrastructure an arrangement will be badly needed that will allow state or regional libraries or networks to supplement the service of private online vendors in brokering access to national data bases; these might be analogous to the arrangements by which regional networks facilitate local library access to the Online Catalog Library Center (OCLC). (p. 51)

The report goes on to discuss the capital investment needed for libraries to have the necessary equipment required to provide access to databases, the need to upgrade librarians' skills in provision of electronic information services, and the need for user education in learning to use such systems; it describes roles for public, academic, and school libraries in these areas. The overall tone of the report continues to stress the need to balance legitimate private sector products and services with the need for public access.

> Marketplace forces that are propelled by the exotic and expensive new information technologies must be tempered by consideration for public interest and public need. Of course the free enterprise system must be allowed to function, indeed to flourish, but it must be understood that an information need is not always synonymous with the existence of an information market. Neither is it in the national interest to permit the development of a two-tier society incorporating a permanent underclass of print and information illiterates. As noted before, those who are denied access to information resources in either traditional or electronic formats are in a very real sense denied thereby the opportunity for full and effective participation in modern democratic society....In particular...some major categories of government information are already accessible only electronically. This has profound consequences for libraries which have long served a social function to assure at least minimum citizen access to government information by means of the depository library program. (p. 100)

An important suggestion of the report regards extension of the concept of postal subsidies for higher education and libraries to telecommunications networks, including the possibility of a dedicated satellite network or subsidy of telecommunications costs. (p. 114)

Access to Government Information

The Lacy Commission dwells at some length on the role of the federal government in collection, availability, and dissemination of its own information, taking the position that access to government-controlled information—that created and collected by the government—is essential to the public understanding of national issues and often to the conduct of private business. The analysis is from four perspectives: (1) policy issues having to do with increasing restrictions to government information, particularly under the Reagan Administration; (2) policy issues pertaining to public versus private roles in packaging and distributing information gathered by the government; (3) increasing use of security labeling or classification of documents to restrict the flow of scientific information and the publication of information by former governmental employees; and (4) increases in access costs under the Freedom of Information Act via administrative interpretation. The commission cites a study issued by the Committee on Government Operations of the U.S. House of Representatives which identified two potentially conflicting policies regarding federal statistical services, one which maintains that wide and ready access to basic information is essential to a democratic society and free market economy and thus supports the importance of a federal role, versus a second policy which maintains that federal data collections can be justified only to meet specific federal administrative or policy needs. The latter, narrower, policy has governed recent cuts in statistical services and suggested policy modifications in OMB Circular A-130 (p. 57).

The commission tries to set out guidelines for public versus for-profit roles in dissemination of electronic information. In particular, it tries to distinguish what role the private sector plays in enhancing government electronic data through value-added software for retrieval and manipulation of information and data. While the commission concludes that "it is the responsibility of government to formulate and apply principles in the dissemination of government information that preserve a broad and balanced mix of public and private channels of access and distribution, and that enhance rather than diminish, citizen access" (p. 79), the specific list of seven principles which the commission sets forth in hopes of providing a basis for policy decisions created much controversy upon release of the report to the ALA Council with many ALA members feeling that the principles (listed below) were biased toward the private sector:

1. The federal government should take a leadership role in creating a framework which would facilitate the development and foster the use of information products and services.

2. The federal government should establish and enforce policies and procedures that encourage, and do not discourage, investment by the private sector in the development and use of information products and services.
3. The federal government should not provide information products and services in commerce except when there are compelling reasons to do so, and then only when it protects the private sector's every opportunity to assume the function(s) commercially.
4. The federal government, when it uses, reproduces, or distributes information available from the private sector as part of an information resource, product, or service, must assure that the property rights of the private sector sources are adequately protected.
5. The federal government should make governmentally distributable information openly available in readily reproducible form, without any constraints on subsequent use.
6. The federal government should set pricing policies for distributing information products and services that reflect the true cost of access and/or reproduction, any specific prices to be subject to review by an independent authority.
7. The federal government should actively use existing mechanisms, such as the libraries of the country, as primary channels for making governmentally distributable information available to the public. (pp. 79-80)

The commission stressed that: "More than change in any particular law or regulation, we need a consistent policy to maximize the availability of information from the Government to its citizens" (p. 80). Specifically, the commission suggested that: "The National Commission on Libraries and Information Science and the American Library Association and its allies should set up a means to give steady and continuing attention to the development and achievement of public policies in the light of the goals this report has tried to state (pp. 114-15).

ALA Response

The Lacy Commission Report, in its final form, was submitted to the ALA Council at its 1986 Midwinter Meeting. After much discussion, which centered around the concern over the disparity between philosophical views of members of the library community and some of the positions represented in the Lacy Report, the following resolution was passed by the Council:

> VOTED, that the report of the Commission be received with thanks, printed with a statement about ALA policy in this area and explicit clarification in the preface and cover layout that this is a report TO

> ALA, not a statement of ALA policy, and refer it to all units of the Association for review and discussion at the 1986 Annual Conference. (ALA. Special Committee, 1987, p. 2)

The ALA Executive Board, at its spring 1986 meeting, authorized the formation of a committee to coordinate the review of the Commission Report; the seven member committee was charged to: (1) define and clarify access to information, resources, and service; (2) recommend appropriate actions to the ALA Executive Board and Council relative to "access" specifically in terms of ALA committees, divisions, and other units, ALA programs and policy; (3) review the Lacy Report and other documents which may pertain to that report for implications for ALA programs and policy; (4) coordinate the review by all ALA units of the Lacy Report; and (5) submit a final report to the Executive Board (p. ii). A rigorous two-year review was undertaken by the Special Committee, which included interviews with ALA staff, open hearings, written reactions to the Lacy Report from ALA units, a review of the ALA planning process and ALA priorities as they pertained to access issues, a review of the ALA structure, and a review of ALA policies.

A summary of unit responses was presented to the ALA Council in an *Interim Report* (June 28, 1987; 1987-88 Council Document #37). The Special Committee found that a significant majority of the recommendations in the Lacy Report were in alignment with current ALA policies. ALA units responding to these recommendations usually supported the recommendations and current ALA policy. Three of the Lacy Report recommendations appeared to be in conflict with ALA policy: (1) its recommendation for telecommunications-broadcast deregulation; (2) copyright and the cost of access to electronically stored information; and (3) availability of government information. Seven areas were not specifically addressed in ALA policy (p. 4). Because the ALA Legislative Committee was in the process of revising its *Federal Legislative Policy,* these areas were referred to that unit for development of appropriate policies. Most of these areas are now reflected in the new *ALA Federal Legislative Policy* (ALA, 1987). Unit responses included appreciation to the Lacy Commission for its role in bringing important issues to the forefront for discussion, but also expressed concern with the lack of consistency in some instances between the text of the report and the final recommendations in the appendix. There was also serious concern expressed about the text drifting into subjective and undocumented style, with conclusions not supported by analysis or fact (ALA. Special Committee, 1987, p. 4).

In reviewing ALA unit activities, the ALA Intellectual Freedom Committee and the Executive Director of the Office of Intellectual Freedom expressed the opinion that all access issues were a subset

of intellectual freedom issues. However, the Special Committee eventually interpreted intellectual freedom as a subset of access issues as illustrated in the following definition and Figure 1:

> Library users are central to ALA's concern about access. To focus attention on this centrality, the Special Committee developed a model which graphically conveys the multiplicity of factors and activities related to serving the users' needs. At the center are "users" and various political, economic, and social constraints which affect the individual's ability to access information. Surrounding the users are institutional and environmental factors impacting access. The outer circle represents the impact that laws, regulations, public policies, standards, and ALA policies have on the access issue. The diagram illustrates the complexity and interrelationship of issues that fall within the domain of "access to information." (ALA. Special Committee, 1988, p. 4)

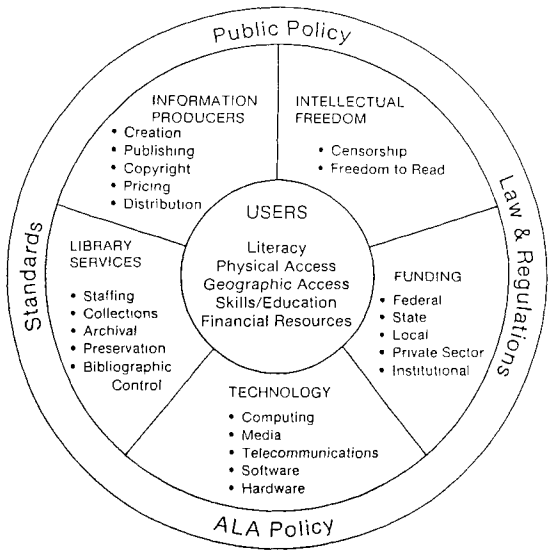

Figure 1. Intellectual freedom as a subset of access issues

Further, the Special Committee found that:

> Historically, intellectual freedom and federal library legislation have been major and compelling issues for the Association. Although we have forged strong action-oriented programs in these two areas, the attention paid to access by the units and offices interested in intellectual freedom and legislation has been necessarily bound by their particular focus. Other units have addressed some specific access issues such as standards, bibliographic instruction, and library automation. However, to fulfill its mission statement, ALA needs an infrastructure to allow an association-wide concern and ability to respond rapidly and more extensively than the current primary focus on federal legislation and intellectual freedom allows. (p. 5)

The Special Committee recommended formation of a standing committee of the ALA Council as an initial step in developing an association-wide infrastructure for confronting access to information issues (pp. 8-9). This recommendation was approved by Council at its annual conference in June 1988. That standing committee has since been activated. In addition, recommendations were also accepted for an annual inventory of ALA activities pertaining to access issues, for a periodic survey of national access issues by the Office of Research, for an annual "town meeting" forum for ALA members to discuss access issues, and for an annual article on access in the *ALA Yearbook*.

Subsequent Benchmark Publications and Activities

The Lacy Commission was astute in identifying the elements of the national debate pertaining to access to information which has continued to occupy the library profession. Those issues have received intensive scrutiny since 1986, resulting in a number of important subsequent publications which are summarized below:

1. *1987 ALA Federal Legislative Policy.* The ALA policies were updated to include sections on public access to federal information, equal access to library service, and a new section on policies surrounding information technologies. Specific references are made to national library and information networks, technical standards and copyright protection, telecommunications and broadcast media, and information technology education.
2. *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview.* This report by the Committee on Government Operations of the U.S. House of Representatives (1986) identifies problems raised by electronic information systems and suggests how the new technology can be employed without undermining the objectives of government information policy. The report recommends that:

> Agencies use the new information technology to broaden and improve public use of government information; more administrative guidance on the development and use of electronic information systems be provided; agencies consult regularly with those affected by electronic information systems; competitive procurements be used for the acquisition of automated information products and services; and laws that have been interpreted to allow agencies to maintain exclusive control over electronic data bases be modified. (p. 2)

3. *Technology & U.S. Government Information Policies: Catalysts for New Partnerships.* This report of the Association of Research Libraries Task Force on Government Information in Electronic Format (1987) focuses on the issue that technology, moving faster than policy development, has left U.S. government information programs resting on uncertain foundations. The report tries to develop a framework for understanding philosophically, function-

ally, and fiscally the patterns that exist for government information and the shifts in those patterns resulting from the introduction of government information in electronic formats. It presents a taxonomy to acknowledge distinctions and categorize the characteristics of government information in electronic format and a model that identifies potential value-added processes for an information system. It urges studies on the budgetary mechanisms that support government information creation, delivery, and usage and the impact of different electronic formats on these mechanisms, which should contribute to a clearer picture of present and prospective public and private financing of government information programs (p. v). This report draws heavily on concepts in Robert S. Taylor's (1986) *Value-Added Processes in Information Systems.*

4. *Informing the Nation: Federal Information Dissemination in an Electronic Age.* This critical work published by the U.S. Congress, Office of Technology Assessment (1988), surveys a wide range of governmental issues including the Government Printing Office, the National Technical Information Service (NTIS), the Superintendent of Documents, and depository libraries. It provides an overview of federal information dissemination, key technology trends relevant to federal information and dissemination, alternative futures for the Government Printing Office, alternative futures for the Depository Library Program, electronic dissemination of congressional information, and an analysis of the Freedom of Information Act in an electronic age. In the words of the report:

> OTA has concluded that congressional action is urgently needed to resolve Federal information dissemination issues and to set the direction of Federal activities for years to come. The government is at a crucial point where opportunities presented by the information technologies, such as productivity and cost-effectiveness improvements are substantial. However, the stakes, including preservation and/or enhancements of public access to government information plus maintenance of the fiscal and administrative responsibilities of the agencies, are high and need to be carefully balanced by Congress. (p. 3)

5. *ARL's Executive Briefing Package, "Linking Researchers and Resources: The Emerging Information Infrastructure and the NREN Proposal."* This packet describes the National Research and Education Network (NREN), a proposed advanced computer network that would link universities, research libraries, national laboratories, nonprofit institutions, government research organizations, and private companies engaged in government-supported research and education. The NREN would consolidate and build upon existing interconnected telecommunications networks, commonly known as the Internet. It presents material

on the evolution of the proposal, pending legislation through July 1990, and benefits which would accrue to researchers and to the U.S. competitive position vis-à-vis other countries through development of new technologies.

6. *Coalition for Networked Information.* This voluntary coalition was initiated in 1989 and is composed of member institutions that belong to the Association of Research Libraries, CAUSE and EDUCOM. Its mission is to promote the creation and utilization of information resources in network environments by formulating and promulgating policies and protocols that enable powerful, flexible, and universal technical infrastructures (ARL, 1990, p. 1). This mission addresses the concern for lack of an infrastructure similar to that for print which was addressed in the Lacy Report.
7. *Helping America Compete: The Role of Federal Scientific & Technical Information (STI).* According to this report by the U.S. Congress, Office of Technology Assessment (1990), electronic media offer the only way to manage the massive volume and complexity of federal scientific and technical information, but state that the transition to electronic formats will be difficult for many users. It goes on to say that:

> Progress on STI also depends on resolving governmentwide information dissemination policy issues. During the 1980's, OMB [Office of Management and Budget] used its authority under the Paperwork Reduction Act to favor private-sector responsibility for Federal information dissemination. The OMB view was controversial and sent mixed signals to the Federal R&D agencies about whether electronic STI should be aggressively pursued. Legislation pending before Congress would rebalance government policy to emphasize that Federal agencies (including the R&D agencies) have the primary responsibility for dissemination of information generated for agency missions, with an important supplementary or complementary—rather than preemptive—role for the private sector. This legislation also addresses information management, pricing, public access, due process, and other policy matters that would directly affect STI. (pp. 2-3)

Conclusions

The issues raised by the Lacy Report provided the library profession with a full agenda for years to come. The issues are very complex, and the technology is changing faster than the profession's ability to grapple with the legal and policy implications which come with each new product or advance. While the federal deficit will continue to restrict availability of public funding and therefore encourage contracting out and privatization of information, the release of *Informing the Nation* indicates an increasing awareness that the policy issues cannot be ignored. New approaches to copyright of electronic information to protect intellectual property rights must still be sought, and experimentation with new definitions of public/

private roles in information production and dissemination suggested by the Association of Research Libraries' study and Robert Taylor's value-added models await the concerned librarian.

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Resolving Conflicts between Information Ownership and Intellectual Freedom

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ABSTRACT

THE TENSION BETWEEN information ownership and intellectual freedom emerges both from the balancing of economic and political interests and as a result of the underlying structure of communications and information industries. This theme is addressed in the context of a review of the articles by Eaton, Milevsky, and Wilson which appear in this issue of *Library Trends.*

INTRODUCTION

The current legal and economic view of the statutory mechanisms by which we establish and enforce ownership rights in intellectual property—copyright and patent—is that they seek to balance the incentives for authors, artists, and inventors to create new works with the benefits to society from having such works available freely (Braunstein et al., 1977; Bush & Dreyfuss, 1979). But the origins of copyright are not based in this balancing approach nor does this logic necessarily carry over to other forms of protection—e.g., trade secrecy rights, in the commercial context, and national security restrictions such as "classification."

The tension between ownership of (the exercise of property rights in) information and the concept of intellectual freedom arises from two foundations: The first is the perceived need for state power and the desire of the state to exercise control—and sometimes limit the control of others—over communications media and messages; the second is the underlying economics of the production and distribution of information, especially the interplay of communications

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technology and economics. This article describes the nature of this tension and, in so doing, analyzes several of the points raised in the articles by Eaton, Milevski, and Wilson which appear in this issue of *Library Trends.*

The Role of the State in Disseminating or Restricting Information

The potential for conflict that Wilson sees between intellectual freedom and ownership rights in intellectual property is not new. One can go back to the original meaning of "copyright"—the privileges granted to certain printers by the Crown. In England, prior to the Statute of Anne in 1710, copyright referred to the exclusive rights given to members of the Stationers' Company and was seen as a legal means of restricting unbridled use of the new printing technology. Starting with the Statute of Anne, copyright in Europe was transformed into a means of protecting the rights of authors. That this transformed notion of copyright is meant to provide incentives for the creation of literary and scientific works can be seen in the provision in the United States Constitution: "The Congress shall have power to...promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (U.S. Sect. 8, Para. 8).

But the tension between dissemination and control has never been eliminated. We currently consider it to be mostly between competing economic interests—rewards for authors versus benefits to society. Wilson shows that the recognition of "derivative" rights, the right "to prepare derivative works based upon the copyrighted work" (17 U.S.C., § 106, 1976) in the revision of the U.S. Copyright Law moves the conflict between property rights and intellectual freedom from merely an abstract concern to reality.

Wilson believes that a uniform system of copyright (across all levels of originality and all technologies) is a primary factor in the tension between rights in intellectual property and intellectual freedom. He draws on an Office of Technology Assessment (OTA) analysis of the difficulties in applying copyright law to new technologies to support his view. The OTA report distinguishes between works of art, works of fact, and functional works, and argues that different degrees of protection may be appropriate across these three classes (U.S. Congress, OTA, 1986).

In that the OTA report focuses on the technological origins of the distinctions across the classes, it owes much to John Hersey's (1979) dissent from the software recommendations of the National Commission on New Technological Uses of Copyrighted Works (CONTU). Hersey primarily distinguishes communications which

have human beings as both sender and receiver from those with machines, but it is clear that he sees further problems raised by the existence of "adaptations." In this, his concerns parallel many of those raised by Wilson.

We are reminded by Milevski (in this issue of *Library Trends*) that governments continue to restrict the flow of information. One might question her contention that the need for national security controls on the flow of information is noncontroversial and wish for the debate to be put in the broader context of restrictions in the flow of information. Nevertheless, her discussion of the changes in the approach to, and methods of, implementation provide a useful overview of the topic.

The Role of Economies of Scale in Media Structure

The major economic factor influencing both the structure of communications and information industries and the pressure for government regulation of many of these industries is economies of scale. Loosely speaking, economies of scale is the low cost of serving another user given one has made the investment in production and/or distribution facilities (or both); its presence or absence is, at least partially, determined by the underlying technology. Scale economies are often known by industry-specific names such as high "first-copy costs" in printing and publishing, and "network economies" in point-to-point telecommunications. The presence of economies of scale, even if unchecked by government action, does not immediately lead to monopoly production or distribution. Among the factors that influence the number of competing entities in a given market are the distribution of tastes of the consumers, the relationship between the size of a firm with low production costs and the overall size of the market, and the viable technologies utilized and the mix of products and services produced (see Baumol et al., 1988; Scherer, 1980).

Economies of scale and related phenomena have been cited as the primary reasons for the need for a single ubiquitous telephone network, the death of competing large city newspapers, the growth of newspaper chains, and the dominance of the three commercial television networks. Ignoring for the moment that the technologies in many of these areas are changing, the traditional policy responses generally include licensing and public utility regulation. For example, Eaton states in this issue of *Library Trends:*

> With the exception of film, which originally was viewed by the courts as an entertainment medium and therefore not covered by the First Amendment (but which now enjoys full First Amendment protections) (ALA, 1986, pp. 22-23), other new technologies have not been viewed as appropriate to First Amendment protections. Public policy in the United States veered from the First Amendment approach of an earlier

> paper communications environment and began to rely instead on antitrust law and licensing of channels, cables, or wavelengths. (Eaton, this issue of *Library Trends).*

But this statement ignores the significant differences between common carriers on the one hand and broadcasters on the other. This is the fundamental choice as to whether the medium is to serve primarily as a conduit for messages and programming provided by others or whether the owners of the medium are to be able to exercise editorial control. Furthermore, it leads one to an erroneous dichotomy as illustrated in Eaton's next statement:

> While the various media allow for very broad public access at output, they also narrow access at the point of input since those who control the channels, airwaves, and cables also control what is broadcast or transmitted. (Eaton, this issue of *Library Trends*)

In other words, while the limits on access (at the point of input) and control appear to be determined by technology and economics, they are fundamentally determined by the policy choice of how a given communications medium is to be organized. The Communications Act of 1934 has two major sections, one relating to broadcasting and the other to common carriage (47 U.S.C., § 151, 1970). Although the policy choice to view and regulate radio (and, by extension, television) as other than a common carrier was made prior to the 1934 Act, this question was partially reopened with the emergence of cable television. Cable television, it has been argued, has characteristics of both a broadcaster and a common carrier, and, as a result, was considered by the FCC to "fall between the cracks." Without legislative guidance, the ultimate decision on which regime to apply was left to the courts (see *FCC v. Midwest Video Corp.,* 1979).

The distinction between broadcasting with its editorial control and common carriage can define the terms of access. This is true both of access by program producers to the means of distribution and of access by the public to a diverse mix of programming (see Owen, 1970). However, it has been shown that while mandated access by programmers at rates fixed by regulation may increase access by programmers, it has the potential of reducing the diversity of offerings available to viewers (Besen & Johnson, 1982).

Vertical Relationships

Analyses of economies of scale focus on the appropriate size and number of entities at only one level in the production-distribution-usage chain. But often we find a single entity that operates at more than one stage on this chain, possibly through common ownership of divisions that operate at two or more levels. Furthermore, it is possible that exclusive relationships might keep a supplier at one

level from selling to a distributor at another level (or vice versa). While these vertical relationships have the possibility of restricting access, it is also argued that they enable new material to be produced. This can be the result of the financial resources that the multidivisional organization can bring to the market or the reduction in risk and transactions costs that result from having a guaranteed source of supply (or guaranteed market, depending on one's perspective).

The Lacy Commission argued for dropping any restrictions on the entry of American Telephone & Telegraph (AT&T) into the information services market (ALA, 1986). Eaton, on the other hand, worries about the risk of competitors being overwhelmed by AT&T (this issue of *Library Trends*). The divestiture of the Bell System may have reduced any need for concerns about bigness per se; however, the specific issues that are raised by vertical integration are still present in a world where the "Baby Bells" (the former Bell System local operating companies and their seven regional holding companies) are mounting a new drive to provide a variety of information services. Unfortunately, these more complex issues are not covered well in either the Lacy Report or Eaton's article.

What Does Free Access Mean?

Both Eaton and the Lacy Commission appear to move between two different concepts when discussing "free access" to information (see Eaton's article in this issue; ALA, 1986). This is most likely due to the dual meaning of the word *free* in the English language. We use the same word to mean "unhindered" and "without charge" while many other languages use two different words for these separate concepts (compare "liber" and "gratis" in French, for example). This problem of dual definition appears in the discussion of government user fees restricting access to federal data sources and in the notion that it is "inherently discriminatory" for a library to charge for access to electronic databases. (Eaton, this issue. See also, ALA, 1986).

The Lacy Commission seems implicitly to be aware that the imposition of fees can, under certain circumstances, improve access by encouraging entry of additional information providers and by providing libraries with funds that are often otherwise unavailable (ALA, 1986). Eaton points out, however, that such views are in conflict with stated ALA policies.

Conclusion

As Eaton points out, the Lacy Commission argues for "a consistent policy to maximize the availability of information from the government to its citizens" (Eaton, this issue. See also, ALA, 1986). But this consistency should be limited. If we accept the premise that, at least in some instances, user fees can generate revenues that

allow producers of information to expand or at least continue their operations, it is reasonable to support the imposition of such fees so that more information is made available. But should this policy be extended to fees charged by public libraries? If not, is the rationale based on sound logic or simply on a bias toward having a base level of service provided without charge?

Similarly, should the desire for consistency prevent us from having different forms of property rights for different types of information even if, as Wilson shows, maintaining consistency can lead to a reduction in intellectual freedom? It may be time to reconsider the notion of a single form of copyright which is applicable across works that may have far different levels of originality and that are produced in a variety of technologies.

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Federal Policy-Making and National Security Controls on Information

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ABSTRACT

[*Author's Note:* The views expressed in this article are those of the author and do not necessarily reflect those of the U.S. National Commission on Libraries and Information Science.]

THIS ARTICLE REVIEWS the roles of the three branches of government in making policy for national security controls on information. It reviews legislative actions (statutes, appropriations, hearings) and executive actions (executive orders, regulations, contract provisions) in the post-war era with a focus on developments during the Carter, Reagan, and Bush presidencies.

INTRODUCTION

All three branches of the federal government—legislative, executive, and judicial—have a role in making information policy and, more specifically, in making policies governing national security controls over information. Such controls are most frequently exercised over technological data, data of a sensitive military nature, or information critical for trade considerations. In providing the various controls in effect today, the three branches have acted within the broad operational bounds provided by the Constitution—i.e., the legislature makes laws which are then interpreted and enforced by the executive with the judiciary having powers of final oversight.

HISTORY

A brief review of major national security actions since World

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War II traces the development and expansion of the concept. In the period immediately preceding and including the war, national security considerations were strictly limited to military affairs. The year 1940 marked the first in a series of Executive Orders (E.O.) issued by the president to establish policies and procedures for classifying information; E.O. 8381 (Roosevelt) served as the basis for all later executive revisions of the national security information classification system. In 1946, Congress took a more extreme stance than the president with enactment of the Atomic Energy Act, which was born of the secretive wartime Manhattan Project. This law provided that, unlike other military information which was to be reviewed and then classified, all nuclear-related information was automatically classified from its creation, regardless of its ownership and whether it was created in the public or private sectors. The 1950 Espionage Act provided for communications secrecy, including cryptography, and certain patent applications were to be delayed to protect them from public disclosure under the Invention Secrecy Act.

In 1947 the omnibus National Security Act revamped the organization of the entire defense establishment. It established the National Security Council (NSC) and the Central Intelligence Agency (CIA) and gave the latter responsibility for intelligence operations. In 1951 President Truman issued E.O. 10290 which stirred some controversy because it included in the national security classification system, for the first time, nonmilitary as well as military agencies. The emphasis was slowly changing from a wartime to a post-war mentality, and by 1954 the Atomic Energy Act was revised to meet the needs and concerns of private enterprises involved in the nuclear industry.

Over the next two decades, four Executive Orders refined the classification system: E.O. 10104 and 10501 (Eisenhower, 1953); E.O. 11652 (Nixon, 1972); and E.O. 12065 (Carter, 1978). The Nixon E.O. marked an expansion of the concept of national security by adding "foreign relations" (a vague term exceeding policy considerations to include diplomacy and operations) to the national defense formula to comprise national security. The Carter E.O. limited the extent of classification by introducing two new criteria for classification: (1) damage to national security had to be identifiable and not just potential, and (2) when deciding whether to declassify a previously classified document, officials were to apply a "balancing test" of whether the value of the information to the public exceeded the threat to national security.

The executive has perhaps more leeway in establishing national security controls than the other two branches of government because

of its dominance in the foreign relations domain, its many agencies writing regulations that interpret the laws of Congress, and its ability to act quickly and seize the initiative when compared with the legislature and the judiciary. Harold C. Relyea (1987) has said that "national security remains a largely ambiguous concept often appearing but otherwise undefined in Federal statutes, given considerable deference and latitude by the judiciary, and affording the executive enormous power and broad discretion regarding its application" (p. 22).

The federal agencies most frequently involved in national security controls include the Departments of Commerce (export controls), Defense (contract provisions), Energy (nuclear information), and State (immigration). National security considerations have prompted these agencies, as well as components of the Executive Office of the president such as the National Security Council, the Central Intelligence Agency, and the Office of Management and Budget, to classify information and impose other secrecy restrictions, limit the export of goods and information, delay or prevent the issuance of patents, and attempt to censor the communications of certain classes of citizens, such as scientists and federal employees and contractors.

Over the past decade in particular, the content and manner of implementation by the executive branch of various national security controls over information have engendered controversy because of their circumscription of national traditions of intellectual freedom and international traditions of open scientific communication. This trend began in the late 1970s during the Carter Administration when various scientific, educational, and other types of exchanges between the Soviet Union and the United States were curtailed; when the administration sought to forestall publication of the (unclassified) memoirs of a former CIA operative and of information on assembling a hydrogen bomb, and when the unprovoked Soviet invasion of Afghanistan in December 1979 brought detente to a crashing halt. A series of "spy scandals," unfolding over several years, followed. During this time the first attempts by the government to limit scientific communication were begun, and the Supreme Court in *Snepp v. United States* (1980) decided that secrecy agreements imposed upon the intelligence community are constitutional.

Concern over the outflow of U.S. technological information was genuine and widespread among those knowledgeable in the area; it was not a creation of overzealous government censors. In the late 1970s commercial competitors and hostile military parties stepped up their efforts to acquire such data. The Soviet Union in particular shifted from an exclusively military focus to an all-inclusive one,

targeting the civilian sector and universities as well. These efforts prompted Admiral Bobby R. Inman (1982) to utter his famous remark about the "hemorrhage of the country's technology." Various professional societies reviewed the situation, and the American Council on Education recommended voluntary prepublication review for sensitive manuscripts in the field of cryptography. A 1976 Department of Defense task force chaired by J. Fred Bucy, president of Texas Instruments, had already emphasized the need to hold back the technology but not the basic science. It was the Bucy Report (Dept. of Defense, 1976) which introduced the concept of "critical technologies" which was the basis of the 1979 Export Administration Act. Thus controversy surrounding national security controls stems not from their need, but from the degree and methods of implementation.

The federal government's statutory authority to impose national security controls is elaborated by executive branch administrative regulations, contract provisions stemming from them, and presidential directives. Pertinent statutes include the aforementioned Atomic Energy Act, the Invention Secrecy Act, the Arms Export Control Act, the Export Administration Act, the Immigration and Nationality Act (McCarran Act), plus the federal agency-generated regulations governing their implementation. The well-known Freedom of Information Act does not apply to national security considerations as explained later.

Statutes and Companion Regulations

Enacted in 1946 and amended in 1954, the Atomic Energy Act establishes a category of data—"restricted data"—dealing with atomic weapons and nuclear materials over which the federal government has exclusive jurisdiction, regardless of the creator of the data. Private individuals or enterprises creating such data with private funds as well as federally funded contractors and federal employees are equally liable under this law, which was the authority cited in 1979 when the Carter Administration opposed *The Progressive,* which published directions for assembling a hydrogen bomb. In 1981 Congress further amended this act to allow the Secretary of Energy to halt the dissemination of unclassified information if it could have a negative effect on the common defense or on public health and safety. In April 1985, the Department of Energy completed work on and issued the final regulations accompanying this amendment which prohibits the unauthorized disclosure of "Unclassified Controlled Nuclear Information" (UCNI).

The Invention Secrecy Act (1951) is designed to allow the federal government to control private technological data revealed in patent

applications if it might harm national security. Developed for wartime situations and made permanent in 1952, it charges the Patent Commissioner with reviewing patent applications and if, in his opinion, their disclosure might be detrimental, passing them on to the defense agencies for review. The agencies may decide for secrecy, in which case the Patent Office may withhold any given patent for one year. This period of time may be extended, but the applicant may also appeal to the Secretary of Commerce and make claims for damages and compensation through the court system.

The Arms Export Control Act (1976) controls the export of goods and materials from the United States and the access which foreign citizens may have to the same within this country. Such controls have been in place for over fifty years, first under a joint resolution of Congress (1935), then under the Neutrality Act (1937-39) and the Mutual Security Act (1954). The International Traffic in Arms Regulations (ITAR) that accompany the act include certain scientific information—"technical data"—as a category of exportable (or nonexportable) good, and, in addition, define the term "export" so broadly as to encompass release of the information within the United States. The Department of State, with the assistance of the Department of Defense, maintains the companion list of embargoed goods—the U.S. Munitions List. The term "list" is a misnomer since its size approximates that of the Manhattan telephone directory.

The more recent Export Administration Act (1979, as amended in 1981, 1985, and 1988) has a similar function and is implemented through the Export Administration Regulations. The Department of Commerce maintains the accompanying Commodity Control List for dual use items, while Commerce along with Defense and Energy compile the Militarily Critical Technologies List. The latter list, over 700 pages long, is itself a classified document.

The original Export Administration Act was due to expire automatically during the 98th Congress. As the Congress progressed and lawmakers realized that they would not be able to complete a full reauthorization before the act lapsed, they twice passed legislation temporarily extending it from September 30, 1983 to October 14, 1983 (PL 98-108) and again from February 29, 1984 to March 30, 1984 (PL 98-222). However, Congress failed to pass a permanent law before its expiration on March 30 and before the conclusion of the 98th Congress, and President Reagan issued an Executive Order (E.O. 12470) on that same day, just as he had in the interim period between October and February. Both Executive Orders declared a state of national emergency and invoked the International Emergency Economic Powers Act to continue the export controls. When the 99th Congress finally passed the Export Administration Amendments

Act of 1985 (PL 99-64), the president revoked the state of emergency with another E.O. (12525). This seesaw serves to illustrate the superior speed and flexibility which the executive enjoys over the relatively lumbering pace of Congress.

As of this writing, the most recent revisions to the rules governing the Commodity Control List were published by Commerce's Bureau of Export Administration in the February 28, 1989 *Federal Register.* Amendments made to the Export Administration Act by the 1988 Omnibus Trade and Competitiveness Act (PL 100-418) called for changes that include enhancing multilateral controls over technology exports, easing exports to the People's Republic of China, simplifying licensing requirements, reducing processing times, reducing the size of the list, and defining the roles of the various agencies involved (the act also provided penalties for Toshiba Machine Company and Kongsberg Vaapenfabrik, which sold controlled technology to the USSR). Other changes in the regulations stemmed from recommendations of the Secretaries of State and Energy and from multilateral strategic controls reviews held by the United States and allied countries through the coordinating committee (COCOM).

A recently enacted law expands the two export control acts explained earlier. The Department of Defense Authorization Act for fiscal year 1984 (PL 98-94) allows DoD to withhold technical data under its control from domestic public disclosure if those data fall under nonexportable categories on any of the lists or if they require a license or approval for export. Two DoD directives issued in November 1984 elaborate on the law. This provision reinforces the earlier regulations' broad interpretation of the definition of "export," which includes the domestic dissemination of information to be kept from foreign nationals. The key terms within the context of these three statutes are "technical data" and "export"; any data or information falling under these terms need not undergo the classification process for dissemination to be prohibited. The 1985 regulations provide for a system of seven levels of markings (unclassified/unlimited; DoD; DoD and contractors; federal government; federal government and contractors; special class; subject to export control) on documents to identify the type of source and to expedite release of the information without the need to trace the originating organization (Young, 1985).

A final statute providing authority for the application of national security controls within the United States is the Immigration and Nationality Act ("McCarran Act," 1952) which allows the Department of State to deny entry to this country to foreign nationals because of their political and ideological beliefs. Upheld by the Supreme Court in *Kleindienst v. Mandel* (1972), this act serves as the basis

for actions started in the late 1970s by the Department of State, sometimes in conjunction with Commerce in its export control capacity, to prevent foreign scientists, students, and others from acquiring sensitive information through participation in conferences, attending classes in certain subjects, or performing laboratory research.

The first well-known incident occurred in February 1980 when the American Vacuum Society was forced to rescind invitations to its international meeting. Early in 1981 the State Department informed Cornell University that certain East European foreign visitors would be limited to classroom activities. In the fall of that year, the State Department advised university administrators to exclude students from the People's Republic of China from studies and/or research in certain fields.

The limitations on scientific communication and academic freedom which these visa conditioning and campus policing requirements represented mobilized the science and academic communities, which have released a series of reports on the matter. Early examples are the landmark September 1982 National Academy of Sciences (1982) report "Scientific Communication and National Security," based on findings of a panel chaired by Dale R. Corson and the April 1984 American Association for the Advancement of Science compilation of all visa and import control incidents affecting professional societies and their meetings. In September 1985, the presidents of twelve scientific and engineering societies sent a letter to the Secretary of Defense to state that their organizations would no longer allow restricted meeting sessions. The government has responded to these concerns through a number of mechanisms—such as a 1982 Defense Science Board Task Force on University Responsiveness to National Security Requirements report, a 1983 statement by the State Department on applying appropriate McCarran Act restrictions when denying or restricting visas, an ad hoc DoD-University Forum chartered in 1984 as a permanent advisory committee to the DoD. Later presidential directives do not indicate a change of direction.

Although this listing indicates major laws from which the executive agencies derive authority to promulgate national security controls regulations, it is not exhaustive. Some narrower statutes, in turn, elaborate on actions derived from the president's authority. One example is the Classified Information Procedures Act which governs the introduction of classified information in open court and was recently an issue in the Oliver North trial (Lardner, 1989).

Although the Freedom of Information Act (1966) is the best known vehicle for obtaining from the federal government what

otherwise might be closely held information, it does not apply in cases with national security considerations. Thus national security information is excluded from FOIA requests as a category. The FOIA codifies the citizens' right to know as based in the First Amendment right to petition; previously, the release of federal information was at the agencies' discretion, which frequently operated on a need-to-know basis. However, the law specifies nine categories of information which may be (but do not necessarily have to be) protected from disclosure. These include categories: (1) information already properly classified as secret under an executive order; (3) information excepted from disclosure by a statute which specifies withholding in either a nondiscretionary manner, or according to particular criteria, or by broader categories or types; and (4) trade secrets or privileged or confidential commercial or financial information (most FOIA requests are from commercial enterprises seeking information about their competitors). Thus national security information is excluded from FOIA requests as a category.

The FOIA was amended and strengthened in 1975 to provide the same kind of court review for national security information as for other information, but in the 98th Congress an exemption from FOIA requests was granted for certain CIA operational files. Because the FOIA applies exclusively to the executive branch of the government (Congress having exempted itself from FOIA requirements, as it frequently does with other legislation), it sets up a situation of ongoing tension between the people's right to know and the exercise of the chief executive's executive privilege, a doctrine of refusal to divulge state secrets practiced by every president since George Washington.

Contract Provisions

A third source of authority within the federal government for instituting national security controls stems from its power of the purse. The ultimate power to allocate funds lies with Congress, which can, however, authorize a program but in effect kill it by not providing an appropriation of funds for its operation. For national security applications, however, this power is most often exercised on a daily basis by the Department of Defense through its spending in support of research and development and on various commercial contracts. Thus the department may impose secrecy requirements on the results of research conducted not only by federal employees but also by private parties in industry or academe whose projects are even partially federally funded. According to experts at the American Physical Society, some 75 percent of all federally funded research and development performed in this country is DoD-sponsored, and the

DoD share of basic research and academic science, where it is not dominant, is steadily increasing (R. L. Park, Director, Office of Public Affairs, American Physical Society, to author, personal communication, November 1987). Even when the agency does not impose its own restrictions through contract provisions or cannot invoke the export licensing requirements or security classification, a contractor who fails to comply with agency wishes in such matters decreases his chances of being awarded subsequent contracts.

Presidential Directives

The series of executive orders mentioned earlier established and developed the classification system and identified seven categories of information which could be classified. These are listed in E.O. 12065 (1978) as: (a) military plans, weapons, or operations; (b) foreign government information; (c) intelligence activities, sources, or methods; (d) foreign relations or foreign activities of the United States; (e) scientific, technological, or economic matters relating to national security; (f) U.S. government programs for safeguarding nuclear materials or facilities; or (g) other categories of information which are related to national security and which require protection against unauthorized disclosure.

In April 1982, the Reagan Administration issued the latest presidential revision of the classification system as E.O. 12356 to take effect that August. This executive order reversed the previous trend toward greater openness by introducing a number of changes. The executive order:

—removed the presumption in favor of a less restrictive classification or no classification in cases of "reasonable doubt";
—removed the "identifiable damage" criterion and replaced it with a reasonable expectation of damage;
—cancelled the automatic declassification of documents after six years and provided for classification as long as required by national security considerations;
—removed the requirement to balance public interest with the need to protect national security ("balancing test");
—provided new authority for officials to reclassify after a document had been declassified or was already in the public domain;
—added the option, at agency discretion, of classifying privately funded basic research, which was previously excluded.

Developed without the opportunity for public comment and the object of extensive Congressional criticism in oversight hearings (U.S. Congress, 1982), this E.O. now defines the classification process and serves as a basis for further executive branch agency actions.

In December 1982, the administration extended its nondisclosure efforts from classified to unclassified information by establishing an interagency task force to review the vulnerability of sensitive information which did not meet classification guidelines. The following March, the administration issued National Security Decision Directive (NSDD) 84, which targeted federal employees as potential sources of sensitive information but also included federal contractors in its scope. In its original form, NSDD 84 mandated lifelong nondisclosure agreements for federal employees with security clearances, prepublication reviews of works written by employees with the highest security clearances (i.e., access to "Sensitive Compartmented Information" [SCI]), polygraph examinations in the course of investigations, and strictures on contacts between employees and the media.

That same fall, Congress placed over a dozen limitations on NSDD 84 including prohibition of polygraph examinations and limitations on several SCI provisions. Undaunted, the administration tried again in November 1985 with NSDD 196, itself a classified document. This directive, administered by the CIA, required all agency personnel with access to SCI (estimated at over 182,000 federal employees and contractors) (ALA, 1986) to submit to polygraph examinations. The controversy aroused was sufficient to prompt the administration to rescind the directive in September 1986. (Congress followed up by passing PL 100-347 which the president signed into law in June 1988. The law restricts the use of polygraph examinations by private sector employers, but federal and state governments as well as national security agencies and their contractors are among the exemptions.)

In the meantime, Standard Form 4193, a lifelong prepublication agreement for those with access to SCI, had been introduced to supplement the much more common Standard Form 189, the result of NSDD 84. This pledge not to reveal classified or *classifiable* information applies to all federal employees with security clearances and introduced the concept of "sensitive but not classified information." The definition of classifiable information provided in the *Federal Register* (1987a) elicited sufficient negative comment to be later revised (1987b) to eliminate currently unclassified information which might, at some future time, become classified. By December 1987, Congress had taken temporary action to bar the use of both of these standard forms (language in 1987 and 1988 appropriations bills prohibiting the use of appropriated funds to produce or disseminate SF-189), but many previously signed pledges are still extant.

Under President Bush, SF-312, developed in 1988 to succeed SF-189, defines classified information as including written and *oral* communications that, if they were written, would be classified or in the process of being classified. It provided for punishment of federal employees who divulge information that they know or *should know* is classified or is in the process of being classified. In the 1990 Treasury, Post Office, and General Government Appropriations bill, Congress again prohibited the use of federal funds to print or disseminate SF-312; President Bush protested that language but signed the bill into law nevertheless.

Another presidential directive of September 1984, NSDD 145, dealt only with information in electronic format and focused on security safeguards for telecommunications, computer systems, and other automated information systems handling sensitive but unclassified government information. It promoted a comprehensive, coordinated approach on the assumption that isolated items of unclassified information, when aggregated with other such items, could, in sum, reveal sensitive matters. However, the directive did not define what such sensitive but unclassified information is.

An October 1986 memorandum signed by then-National Security Adviser John M. Poindexter (NTISSP #2 "National Policy on Protection of Sensitive but Unclassified Information in Federal Government Telecommunications and Automated Information Systems") implemented NSDD 145 and "defined" sensitive but not classified information by leaving what was deemed sensitive to the discretion of each federal department and agency. This Poindexter memorandum also gave the National Security Agency the preeminent role in federal computer/communications security matters.

Government agency representatives soon started acting on NSDD 145 and NTISSP #2 provisions. In 1986, Mead Data Central and other database creators and vendors were reporting visits by DoD, FBI, and CIA representatives seeking to limit foreign access, through legal and technological means, to databases which might contain easily aggregated sensitive information. Widespread protests against this practice and the Poindexter memorandum resulted in the rescission of NTISSP #2 by Poindexter's successor, Frank Carlucci, in March 1987 (it is commonly believed that the rescission was largely decided by a desire to disassociate the Poindexter name from further controversy in the wake of the Iran-Contra scandal). Congress also responded definitively with the Computer Security Act of 1987 which limits the National Security Agency's role in federal computer security to military agencies and assigns the National Bureau of Standards

(now National Institute of Standards and Technology) responsibility for computer security in all civilian agencies. However, NSDD 145 still remains in effect.

Future Prospects

The administration's continuing concern with national security and its increasing control over related and potentially related information during the past decade appear to be continuing from the Carter to the Reagan and now into the Bush presidencies. Two days before his departure from office, President Reagan signed E.O. 12267 which establishes "policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records..." (U.S. Office of the President, 1989, p. 1). The order sets up procedures to review records of the present and former presidents and to invoke the executive privilege of secrecy by either if "disclosure...might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch" (p. 1). According to this E.O., only a final court order can override an incumbent president's claim of privilege.

Press reports early in the Bush presidency state that the administration is circulating a draft executive order on classified information which would establish uniform standards for granting security clearances throughout the executive branch. It would also eliminate the requirement that agencies provide a reason for denial and the chance to respond for those federal employees and government contractors who are denied such clearances. This would remove all rights of due process in such instances.

Congressional reaction to the draft proposal has been negative. Representative Don Edwards, chair of the House Judiciary Subcommittee on Civil and Constitutional Rights, urged Bush not to sign the draft version: "a person denied a clearance on the basis of erroneous information...would never have an opportunity to correct it (Marcus, 1989, p. A4). The chairmen of six major House committees wrote to Bush to express their concern over the potential violation of civil rights and promised legislative action to counter that threat. Subsequently, in a March 24 memorandum, Bush authorized a complete review of the proposal by an interagency working group of lawyers who had not previously worked on the issue (Devroy & Marcus, 1989, p. A13). However, the final word on this question may be spoken by the judiciary. In *Department of the Navy v. Egan,* the Supreme Court decided that no one has the "right" to a security clearance and therefore "procedural safeguards derived from the common law may not be appropriate in security-clearance cases."

However the saga of national security controls over information continues to unfold, the mechanisms for policy-making in this field at the federal level remain unchanged: Congressional statutory authority and supplemental "pressure" through oversight hearings, appropriations, and histories of legislative intent; executive initiatives such as presidential directives, executive agency development of regulations to accompany statutes, and contract provisions; and the relatively rarely applied powers of review of the judiciary. It remains for the interested citizen, both proponent and opponent of the many forms of control now in existence, to monitor the actions of government and lobby in appropriate places to effect an optimal balance of needed security controls with freedom of information.

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The Impact of Peer Review on Intellectual Freedom

MARY BIGGS

ABSTRACT

THE NATURE AND HISTORY of peer review are described and its positive and negative effects considered. It is concluded that although peer review tends to penalize innovation and nonconformity, it is indispensable to scholarly publishing.

INTRODUCTION

"Peer review" connotes genteel collegial cooperation, while "refereeing" suggests the boxing ring, the football field, the objective mediator pressured by impassioned opponents. Yet the terms are often used synonymously as they will be in this discussion. Though both collegial and objective in theory, in practice the process is corruptible by ignorance, timidity, envy, greed, bias, and other common sins. It is this gap between the ideal and the real, coupled with peer review's extraordinary impact on scholars' professional futures and immediate feelings, that makes it so controversial. Yet the real danger, and strength, of peer review lies not in its consequences for the authors reviewed but for prospective readers of their work. Can peer review, which should help protect access to sound ideas, actually impede access? If so, under what conditions, and how can these be prevented?

Before tackling these questions, we must understand the nature of the process.

HISTORY AND NATURE OF PEER REVIEW

Essentially *peer review* means what it says: the review of a person's work by one or more people qualified to be called professional peers. When restricted to the evaluation of research and writing, peer review

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involves the scrutiny of grant proposals, or of article or book manuscripts, by two or more people with suitable subject and methodological expertise. These people, individually, then recommend acceptance, revision, or rejection to whomever controls the process—usually a grants administrator or editor. The recommendations are handled in various ways: from automatic adoption of the majority's view to careful study of each recommendation as advisory only, followed by a relatively independent final judgment. It all depends on the particular journal's or publisher's or agency's selection policy, which isn't necessarily clearly communicated to the public.

Here the focus will be on peer review in journal publishing, which differs in its details, though perhaps not in the broad issues raised, from peer review in grant funding and book publishing.

Several scholars have described the history of scholarly journals, including, with admirable concision, sociologists Harriet Zuckerman and Robert K. Merton (1971). According to them, seeds of the peer review process were sown with the founding in 1665 of the first English-language scientific journal, *Philosophical Transactions*. The Council of Britain's Royal Society, which instituted the journal, stipulated that prior to publication, each monthly issue should be "reviewed by some of the [Council] members." The purpose, then as now, was to guard quality (p. 69). Over the centuries, journal peer review was systematized but never made uniform and was widespread but never universal. It is used in all disciplines, though with considerable variation in underlying assumptions, implementation, and results. And, despite the long history supporting peer review, its value continues to be debated.

Several journals, most of them in science and medicine, have published detailed explanations of their peer review practices (e.g., see Editorial staff, 1988, pp. 412-14; Enos, 1987; Carney & Lundberg, 1987, p. 87; Lundberg & Carney, 1986, p. 3286; Stossel, 1985, pp. 658-59; Rubin & Carroll, 1981, pp. 103-04; "The Refereeing System...," 1978, pp. 9-10). In a succinct monograph, Stephen Lock (1985) synthesized every substantial publication through the early 1980s dealing with peer review in medical journals. And in 1978, Michael Gordon (1978) reported his thorough survey, based on interviews with editors, of peer review methods used by thirty-two London-based research journals in several disciplines. Title by title, he set forth his findings. The validity of many of these data depends, of course, on the honesty, clearsightedness, and comprehensiveness of the editors' presentations. Still, a good deal of anecdotal information and some solid research findings have appeared in print.

To summarize: manuscripts are checked in; are usually screened—cursorily or carefully—in-house; and some percentage—ranging from

less than half to nearly all—is sent on to two or more referees. They are selected according to information gathered through every conceivable means, from personal knowledge to "invisible college"-generated referrals to literature reviews to broad-scale questionnairing that enables "profiling" and the building of a formal referee database. And the information is stored in every possible way, from the editor's memory to a card file to a computer. Accompanying each review request may be detailed evaluation guidelines, a referee's report form to fill out, both, or neither. Some sort of review deadline is likely to be specified, though it may not be enforced. The time allowed to the referee varies. Authors' names may or may not be disclosed to referees. Referees' comments may be passed on to authors whole and unrevised, excerpted, paraphrased, or not at all. When deciding on the final disposition of a manuscript, the chief editor may work alone or in consultation with other editors or a board; may or may not feel constrained by referees' judgments; and may or may not work closely with authors of basically sound, but not yet publishable, manuscripts. This will depend to some extent on the age, the prestige, the depth of the manuscript pool, the number of staff, and the sheer size of an annual volume of the particular journal. It will depend even more on the editorial understanding of the journal's purpose—that is, whether it exists to vent all serious work of any potential value or to exclude all but the very best manuscripts, thereby guaranteeing the highest possible quality in what is published and the certain rejection of some worthy but middling work. Rejection rates, which range from less than 10 percent to more than 90 percent, vary in response to all of those factors—but equally influential, and especially interesting, is the impact of a journal's subject matter.

Generally speaking, humanities journals reject the largest proportions of submissions, social sciences the next largest, and hard sciences the smallest. There is, of course, great variation, and a particularly prestigious scientific journal, especially one of fairly broad subject scope, may reject most of the manuscripts it receives. For example, in 1978, *The Lancet* claimed a rejection rate of 83 percent and *Nature* a rate of 65 percent, which were remarkably high for scientific journals. However, such rejection rates are standard in even the less distinguished social sciences journals and would be quite low for any humanities journal. In the same year, *Economica* and *Mind* were rejecting 90 percent of submissions and *Philosophy* 92 percent (Gordon, 1978, p. 37).

One obvious reason for these differences is the much larger number and size of scientific journals. But the reason for *that* is the sciences' different attitude toward research and publication. For anything to remain unpublished if it has the slightest chance of contributing to the advancement of knowledge is anathema—

publication must occur and quickly. This attitude is shared to a considerable extent by social scientists, especially those in the more self-consciously scientific disciplines such as psychology; but it makes much less sense to humanists who tend to be more concerned with arriving at illuminating interpretations than with unearthing facts. John S. Rigden (1986), editor of the *American Journal of Physics,* has pointed out that:

> the humanist brings subjective criteria to the review process. The quality of the writing, the perceived significance of the thesis developed, the inherent interest of the subject, the appropriateness of the context chosen for the subject, and the treatment of the subject-context interaction all influence a recommendation....A review that baldly states, "This looks all right to me," would be unacceptable in the humanities. (p. 491)

Also, of course, timeliness may matter less, and book publishing more, to the humanist. While humanists build on one another's work, the procedure is usually not so linear, the link not so direct, and the related evidence not necessarily so exhaustively assimilated. At the same time, and for the same reasons, absolute factual accuracy and full description of methodology, while expected in the humanities, are far more critical in the sciences, as readers assess the authors' accuracy and often plan costly research projects that build on the authors' work. So, although less is screened in the sciences, the effectiveness of screening may be thought to matter more. Not surprisingly, most critiques of peer review have been written by scientists, with fewer by social scientists, and only an occasional published comment by humanists.

Many of these critics have focused on the question of anonymity in peer review, or as it is typically called, using a peculiarly inapt metaphor—"blindness."

The "Blindness" Controversy

As we shall see, peer review is censured for, among other things, its alleged corruption by referees' personal loyalties and biases favoring well-known authors and prestigious institutions. Put another way, it is said to penalize women, minorities, the young, the obscure, and those affiliated with third-string colleges and universities (to say nothing of "independent scholars"). To solve this problem, or simply to forestall any suggestion that it exists, some journals "blind" their referees—that is, conceal from them the identity of manuscripts' authors. When combined with the much more common practice of hiding referees' names from authors, this is called "double-blind" peer review. Both stages of blinding have been questioned.

Referees' names are concealed allegedly to assure that their judgments will not be compromised by reluctance to alienate their

peers or, in the case of younger scholars reviewing the work of those older and better-known, by a natural desire to protect their professional futures. Manfred Kochen (1978) has pointed out that an eminent author who knew his work to have been substantially criticized by his junior might take offense (p. 241). Quite possibly he would dismiss both the criticism and the journal, to no good effect and to everyone's detriment. Indeed, any author able to shift focus from the soundness of the criticism itself to the person behind it may do so.

Jean D. Wilson (1978), of the American Society for Clinical Investigation, has suggested that known referees might be subjected to "face-to-face or telephone encounters with irate authors (p. 1700). See also, Manheim, 1973, pp. 534-35). Michael Gordon (1978, p. 240), and Norval D. Glenn (1976, p. 182) are among those who have warned that, ordered to sign their reviews, some prospective referees would refuse to write any, which could create serious problems for the many journals that find it difficult to attract and retain competent reviewers. Payment for their service ranges from token to none with none prevailing, so the journal peer review system depends upon referees' sense of professional obligation, generosity, and good humor.

However, several commentators insist that, if forced to sign their names, referees would be more thorough and responsible and could be challenged directly by authors, with often fruitful results for both specific manuscripts and general scientific discourse (see, for example, Mirman, 1975, p. 837; Lindley, 1984, p. 59; Raza & Preisler, 1985, pp. 470-71; Nield, 1985, p. 65; Bardach, 1988, pp. 516-17); some have gone so far as to recommend that referees' reports be published alongside the papers in question much more often than is permitted by the occasional symposia seen now (see, for example, Armstrong, 1982, p. 87). Also, authors may be best able to evaluate and profit from criticism if they know the background of the critic (Newman, 1966, p. 980). And if reviews were to bear their signatures, high-status, over-committed referees would presumably be less likely to hand off the chore of writing them to subordinates, unacknowledged (Douglass, 1985, p. 270).

Perhaps the most eloquent opponent of referee anonymity has been scientist-activist Barry Commoner (1978). He sees reviewers' mistakes as equal to authors' errors in their ability to impede scientific progress, and, because they reflect publicly on no one's name, as less likely to be corrected (p. 26). And R. Douglas Wright (1970), an Australian physiologist, demands: "Why should the wish to publish a scientific paper expose one to an assassin more completely protected than members of the...Mafia?" (p. 404). Still, virtually all journals blind authors to referees' identities or at least leave the matter up to the referees if only to avoid offending them and losing their

service. For example, the new *Journal of General Internal Medicine* disapproves of anonymous reviews, yet only encourages—does not require—referees to sign them (Editorial Staff, 1988, pp. 412-14).

Whether authors' names should be concealed from referees is a question less firmly settled in practice, though surveys across a variety of disciplines have found that more journals do not conceal names than do (see, for example, Budd, 1981, pp. 77-81; Miller & Serzan, 1984; pp. 683-84; Weller, 1987, p. 34; Cleary & Alexander, 1988, pp. 1001-02). It may be difficult given authors' tendency to self-cite and drop other identifying clues. And it is often asserted that in very small fields or "cutting-edge" research areas, qualified referees will be able to guess whose work confronts them. However, Moossy and Moossy's (1985) study, which found that referees for the narrowly focused *Journal of Neuropathology and Experimental Neurology* correctly named authors of submitted manuscripts only 34 percent of the time, casts doubt on this "truism" (pp. 225-28). It can also be argued that an author's status and experience are not irrelevant to assessing the authority of his remarks, and it is best that the referee know his name.

The National Enquiry [Committee] into Scholarly Communication (1979), formed with some fanfare over a decade ago, was skeptical of whether benefits accrued from authorial anonymity but concluded that it might be desirable even if it served only to reassure young, or female, or poorly "connected" authors that peer review was fair: "The credibility of the process is of great importance" (p. 48. For an opposing viewpoint, see Evans, 1986, p. 158). This is true, of course, because the development of new knowledge must proceed from what is already known, which is most widely disseminated through journals authenticated by peer review systems. Forward movement of research and analysis requires well-founded faith in these systems: faith that what they include has merit and what they exclude does not.

The Positive Impact of Peer Review on Intellectual Freedom

Standing, theoretically, between scholarly editor and author are the author's expert "peers"—though actually few referees are perfect peers, having rather more or less knowledge than the author. Beholden, again in theory, to no one and caring about nothing but the value of the author's work, referees form a defense against carelessness and corruption. Whether or not the editor is obliged to heed their advice, he certainly tends to be influenced by it. Thus referees protect authors from editors—from their whims, biases, and ignorance—and protect readers from both. This is most true, of course, if there is little editorial screening of papers to be refereed (few journals

send out *all* submissions), if referees are chosen well and objectively, and if they then perform well and objectively. An editor managing submissions alone or with the help of a small staff would soon crash against absolute limits of time and knowledge, with the likely result that, when screening manuscripts, she would seek easy cues such as trendiness of subject, author's status, even his/her own friendship with the author. D. A. Pyke (1976), a London physician and referee, points out that even within his specialty of diabetes, there are vast areas about which he knows little—which leads him to speculate that the editors of *Diabetes* and *Diabetologia* use referees partly because, despite the narrowness of their journals' scope, they simply do not know enough to evaluate all the manuscripts they receive (p. 117). Geneticist James V. Neel (1988), concerned about the effects of an editor's not knowing what she or invited editorialists do not know, called for the extension of peer review to editorials (p. 981).

Offering, as a group, not only diverse knowledge but wide-ranging backgrounds and alliances, referees are thought to inhibit the development of a "charmed circle" around an editor. Although some repetition of authors published and commonality of style and research approach can enrich a journal, shaping its identity, too small, tight, and dominant a circle of like-thinking scholars may stifle it, thereby closing off fresh ideas and methodologies.

Most obviously, however, referees are employed to prevent readers from being damaged (and editors from being embarrassed) by the dissemination of untruth as fact. The most egregiously harmful results may be seen in professional practice—when, for example, a physician misdiagnoses or mistreats a patient (for examples of harmful medical misinformation, see Knapp, 1988, pp. 371-72; Robin & Burke, 1987, p. 253), or an educator selects the wrong approach to teaching a learning-disabled child. But equally essential is the prevention of futile, costly attempts to replicate faulty research. And, ideally, the peer review process sifts out what would become the trivial, useless, and misleading components of "information overload"—a phenomenon which, in our time of proliferating publication, forms a peculiarly insidious constraint on intellectual freedom. Trying to detect which few items in the onslaught are true and crucial, readers may become captives to an impossible intellectual task, not knowing how to proceed, where to stop, what they are missing, or how or when or whether to act on what they learn. They lack confidence in their ability to access scholarship effectively, and, lacking confidence, cannot assert control, cannot be free.

On the other hand, conscientious peer review may release ideas and information that would otherwise languish in an author's desk, or be published with such severe deficiencies in presentation as to discourage or even mislead most readers. While referees are sometimes

criticized for demanding pointless changes, they are also lauded for helping authors shape poorly written manuscripts with worthy content into readable, persuasive, important journal articles (see, for example, McCartney, 1973, p. 440; Nowell, 1978, p. 844; Bailar & Patterson, 1985, p. 654; Last, 1985, p. 455; Spodick, 1986, p. 3862). Through his survey of 361 statisticians and psychologists, James V. Bradley (1981) discovered much discontent with referees but general approval of their work as advisors on revision. Seventy-two percent of his respondents thought they had improved their writing by following referees' recommendations, while only 5 percent claimed to have had work degraded by referee-induced changes (pp. 32-33).

Peer review, then, is intended to open doors and clear pathways for authors and readers, liberating them from editors' biases and limitations; pre-screening inaccurate assertions, silly interpretations, and data drawn from unsound research; and facilitating the exposure of material that can advance their knowledge. The system ensures that work will be accepted based only on its merit, objectively determined, and guards against decisions influenced by fashion, friendship, and reputation. These, at least, are the justifications for peer review. In practice, quite different things may happen.

Negative Impact of Peer Review on Intellectual Freedom

Minor Factors

First, peer review adds days, weeks, or, if poorly managed, even months to the period between manuscript submission and acceptance or rejection. Though publication delays are not the greatest threats to intellectual freedom, they become significant to authors when timeliness of research and the establishment of priority—that is, of "ownership" of a discovery—weigh heavily. The related authorial desire for rapid publication to support bids for promotion, tenure, or grants, would not, in an ideal world where research and writing were pursued for only their inherent satisfactions, affect the journal or, indeed, exist at all. However, the academic world is no closer to ideal than any other, and extreme delays in publication can jettison chances for grant funding for young scholars or even cost them their job; either result will, of course, greatly undermine their freedom to pursue their intellectual interests.

To reader-researchers positioned outside scholarly networks or working in areas tangential to their usual specialties, any delay in publishing the new findings of others may inhibit their progress and place them at a disadvantage relative to colleague-competitors in their fields. Any constraint on access to needed information fetters intellectual freedom. When the constraint is perceived as unnecessary,

it becomes intolerable, and many critics believe that peer review takes far longer than it must. The number and time span of published discussions of this straightforward issue are surprising (see, for example, Newman, 1966, p. 980; Rodman, 1970, pp. 351-57; McCartney & Leavy, 1973, pp. 146, 287-88; Meadows, 1977, pp. 787-93; Azbel, 1978, p. 82; Stieg, 1983, pp. 106-07; Sattelmeyer, 1989, pp. 173-77), as are some time-lag study findings. For example, authors of manuscripts published in *Physical Review* in the early 1980s received acceptances in anywhere from 16 days to 666 days, or nearly two years after submission; mean time lag for all manuscripts accepted by *Physical Review* and *Physical Review Letters* (1979-1980) was 125 days, or more than four months (Dehmer, 1982, p. 96). Brackbill and Korten's (1970) survey of psychologists, taken more than ten years earlier, presented respondents with a list of twenty-two suggestions for revising journal review procedures and asked them to indicate agreement or disagreement with each. Strongest agreement (4.55 on 1-5 scale) was with: "Measures should be taken to insure speedier review of articles" (p. 938). But John Budd (1988) found that seventy-four humanities journals took an average of three months to decide on acceptance or rejection but twelve months from acceptance to publication (p. 183). A second Budd (1988) survey of library and information science journals repeated his earlier finding that producing takes longer than deciding (p. 127). Still, time to acceptance may be especially important to the author, though not to prospective readers. Some journals seek ways to reduce review time—e.g., by computerizing selection of referees and enforcing short deadlines for their reports. However, as long as the number of submitted manuscripts remains at its present almost overwhelming level or (more likely) continues to grow, qualified reviewers will be in short supply and will continue to be so burdened that even the most cooperative may sometimes delay sending reports.

Posing a more serious threat to intellectual freedom when it occurs, but apparently occurring only rarely, is outright referee bias. Though editors may be biased, too, they are carefully screened for their jobs, and they are known and answerable to authors and readers, which tends to make them avoid overt discrimination on bases other than quality. So while peer review may correct for editors' biases as suggested earlier, it is not itself a bias-free process. At journals where editors accept reviewers' recommendations more or less unquestioningly, there may be no corrective for their biases except, of course, other reviewers' opinions.

Often alleged, though rarely if ever proven, is prejudice against women and minorities (few research projects purporting to explore this question have gone beyond simple tabulations of authors' sex. One that did, a study of manuscript reviews for *Rural Sociology,*

"did not indicate that gender was related to editorial decision outcomes...." See, Warner et al., 1985, p. 618). One of the several reasons for "blinding" referees is to avoid this. Partly, perhaps, to disarm criticism of its treatment of women authors, *PMLA* instituted blind review in 1980 (Showalter, 1984, p. 851). But even this does not, of course, eliminate prejudice against women- or minority-focused research topics, which is sometimes thought to be a greater problem. For example, *PMLA* has also been assailed for printing few articles *about* women authors (Gale, 1987, p. 8). To help right both inequities, special efforts have been urged to recruit female and minority referees (APA Committee on Women in Psychology, 1980; Exum, 1983, pp. 127-28).

Also more often claimed than documented is clear-cut political bias—that is, against research or analyses obviously generated by a "left" or "right" viewpoint. Systematic research on this question, as on other questions raised by peer review, is scant. An experiment conducted by Abramowitz, Gomes, and Abramowitz (1975) found that referees, especially liberals, tended to favor work that dovetailed with their political sympathies. However, the evidence was not extremely strong, and the United States of the early 1970s may have been insufficiently typical of other times and places to permit generalization.

Biases favoring the referee's own institution, alma mater, or country have sometimes been hypothesized and would seem to be quite likely outgrowths of natural human weaknesses. But again, direct evidence is lacking, and *positive* biases stir less ire than *negative* biases except when competition for page space is very fierce and grossly inferior work is finding print.

Of much more concern are instances of bias describable as idea-based. These arise from intellectual and commercial conflicts of interest that compromise the referee's objectivity and could even extend to "stealing" the author's work: Steven H. Gale (1987) warns, "sometimes experts are the worst people to ask to serve as referees" (p. 12). That is, they almost invariably have strong opinions, sometimes quite emotionally held, about what should be studied and how, which findings and interpretations are plausible, who should be cited, how the writing should be styled, and conversely, what is impermissible. D. A. Pyke (1976) finds it necessary to caution his colleagues "to resist the temptation to advise acceptance of a paper merely because it makes frequent (and favourable) reference to your own work" (p. 1118), though one would expect a sharp-eyed editor not to select a cited authority as a referee. In any case, references to a reviewer's friends, mentors, or co-authors can easily show up and may be seductive to him if the author is approving, or infuriating

if the author is negative. Of course the referee may also be influenced by affection or animosity toward the author himself if he is not "blinded" or is able to guess the author's name.

Physicists Henisch and Roy (1977) point out that in the ever more specialized world of the sciences, few people may be capable of understanding any given piece of work, so: "The chances are overwhelmingly that a submitted paper, handled along traditional lines, would go to a direct professional rival" (p. 105). And a rival can, if he wishes, attempt to torpedo even the strongest argument. In his send-up of peer reviewers' behavior, psychologist Richard Nisbett (1978) writes:

> If the study engages the subjects' interest and deals with matters that are important to them, then assert that the findings were obtained only because of the motivations or defenses that were aroused by the procedures....If the study does *not* engage the subjects' interest, then so much the better. It may be claimed that the phenomenon under study would not hold up under any but the barren laboratory situations studied....If the instructions to subjects were long and complicated, assert that the subjects probably didn't understand them. The same criticism may be applied if the instructions were brief....any reviewer worth his salt can think up as good a theoretical position as the author's in a few minutes' time. The author may then be criticized for failing to take this position into account.... (pp. 519-20)

In the darkest scenarios painted by peer-review critics, a referee-rival may advocate rejection of sound work either because it disagrees with his preconceptions or to gain an advantage by undercutting the author's career (see, for example, Wilson, 1978, pp. 1699-1700; Wright, 1970, p. 404; Gordon, 1977, pp. 342-43; Oppenheim, 1980, p. 7). In gross ethical violations, the referee may procrastinate or demand trivial revisions in order to delay publication until after the appearance of his own article on the same subject (see, for example, Rodman, 1970, p. 355; Meadows, 1977, p. 791). Or, if involved in related research, he may take unfair advantage of having early access to the author's findings. He may even plagiarize the manuscript, a hilarious happening in Kingsley Amis's college satire, *Lucky Jim*, but deadly serious when it occurs in real life. "Who has not heard of or been the victim of a review in which a view that was...antithetical to the reviewer's preconceived notions or prejudices was suppressed merely by giving the article a bad review?" Harry C. Nottebart, Jr. (1982), a physician, once demanded. "Who does not know of situations in which a reviewer has used data from someone else's work that was being reviewed" (p. 480)? Finally, and perhaps most egregiously, a referee may turn the still-confidential information contained in a manuscript to immediate financial advantage, an increasing possibility in areas like biotechnology where many researchers have undisclosed links with business (see Maddox, 1984, p. 497; Vevaina, 1987, p. 958).

All of these potential problems, however, from sex and race discrimination to conflict of interest, are reassuringly straightforward and probably very infrequent compared to the more subtle and pervasive controls imposed by peer review. Before we consider those, however, a simpler issue presents itself: are valid, reliable judgments even possible under peer review?

Major Factors

In any gathering of scholars where the conversation turns to peer review, stories will be told of incompetent reviews—careless, cursory, uninformed, uninformative—used to assault manuscripts representing months or even years of painstaking work (for examples of such stories, see Lindley, 1984, pp. 56-58; Commoner, 1978, p. 25; Wright, 1970, pp. 403-04; Glenn, 1976, pp. 179-80; Raza & Preisler, 1985, p. 470; Sommers, 1983, p. 92; Engler et al., 1987. For a pointed, amusing satire of referees' tactics, see, Remus, 1980). Astute reviews, which are rarely discussed, are probably more numerous. But the fact remains that, even allowing for authorial egotism, some very poor judgments seem to be made by referees and presumably cause at least occasional rejections. According to Robin and Burke (1987): "For some [medical] journals, even one unfavorable review may diminish the priority and result in disapproval" (p. 254). In James V. Bradley's (1981) aforementioned survey of statisticians and psychologists, 74 percent asserted that for the most recent of their articles published in a refereed journal after compulsory revision, at least some factual errors were made by the referees; 42 percent of all respondents had found errors in important facts while another 32 percent found only trivial errors. In addition, 67 percent claimed that at least some of the referees appeared not "to be at least as competent and sophisticated" in the article's subject area as they, the authors, were; 40 percent said that at least some referees did not seem "to have read the article carefully" (p. 32).

Editors try to avoid such problems by inviting high-status scholars to serve as referees in the belief that they know the most and will render the best reports. Thomas P. Stossel (1985), editor of the *Journal of Clinical Investigation,* carried out a fascinating experiment that stands this assumption on its head. Stossel counted review requests, analyzed the professional status of those to whom requests were sent, and evaluated the quality of completed reviews. He found that the highest-status scientists were the most likely to refuse his requests and, when they did comply, were the most likely to provide low-quality reviews. Conversely, the lowest-status scientists were likeliest to grant his requests and to write high-quality reviews

(pp. 658-59). His conclusions raise some alarm as high-status people routinely referee and their reports are routinely accepted and not scrutinized and assessed.

Striking signs that something is amiss with peer review are the low levels of agreement among referees and, after publication, between referees and readers. That is, just about as often as not, those refereeing the same paper make different recommendations, and there seems to be no correlation between strength of referee endorsement and numbers of times cited after publication. In their survey of 138 refereed education journals, Smith and Gough (1984) asked editors to estimate "the percentage of manuscripts that provoked significant disagreement among the referees" and received answers ranging from zero to 90 percent with seventeen declaring that their referees rarely agreed (pp. 638-39).

Nor are the social sciences unique. For instance, biological scientist-referees are said to show a rate of agreement about the same as would be reached through chance alone (Wilson, 1978, p. 1698). William C. Roberts (1987), editor of the *American Journal of Cardiology,* who uses two referees per submission, observes that it is unusual for both to write "definitely accept" or "definitely reject," and occasionally, perplexingly, one will write the first recommendation and one the second (p. 922). In the physical sciences, referees are much more consistent, presumably because their methodologies and rules of evidence are more firmly fixed, their research material by its nature more stable, and true objectivity is more easily attainable. However, even physicists and mathematicians tell of startling conflicts among reviewers (e.g., Lindley, 1984, pp. 57-58; Wallace, 1983, pp. 11, 13; Thompson, 1983).

In what is probably the most famous and controversial study ever conducted of peer review reliability, Douglas P. Peters and Stephen J. Ceci (1982) randomly selected one prestigiously-authored article published recently in each of twelve major psychology journals. They then changed the title and author's name (but not gender) of each article, invented a low-prestige institutional affiliation, altered the abstract slightly, retyped the article, and submitted it to the journal where it had appeared. All were journals that made it a practice to reveal authors' names to reviewers. In only three cases did any editor or referee recognize the article as previously published, and in eight of the remaining nine cases, the article was rejected. This suggests, of course, not only stunning unreliability in editorial decision-making, but the failure of referees to keep up with the literature, the failure of editors to read even their own journals, and probably institution-based discrimination—though it is unclear whether authors from low-prestige institutions were being wrongly penalized or authors from high-prestige institutions wrongly favored.

Controversy swirled around the method, ethics, and significance of the Peters-Ceci study, but at the very least it raised questions about peer review that were difficult to dismiss.

Two reasons are most often hypothesized to explain the system's weaknesses—unmanageably heavy demand for referees and lack of concrete guidelines. Stossel's (1985) study mentioned earlier, correlating reviewer status with review quality, suggests the first of these. The numbers of journals, journal pages, monographs, and grant proposals seem to have been growing faster than the number of experts with ample time to referee. A few of these numbers suffice to sketch the problem: Fifteen years ago, *American Sociological Review* was receiving about 800 manuscripts each year, *American Journal of Sociology* about 700, and together they needed 3,000 referees' reports in order to dispose of the load (Glenn, 1976, p. 180). Eleven years ago, *Physical Review Letters* was soliciting approximately 8,000 referees' reports each year (Adair, 1979, p. 101). In 1985, the *Journal of the American Medical Association* received 3,446 manuscripts, all of which were screened by the editors, 1,413 of which were refereed (Lundberg & Carney, 1986, p. 3286). Five years ago, Jay H. Lehr of *Ground Water* assured his readers that the journal's referees were not overburdened: "No referee receives more than two papers a month [or] more than eighteen papers a year" (p. 148). One assumes that the readers were not reassured. It seems to take close to a full working day for thorough review of an exacting paper (see, for example, Carney & Lundberg, 1987, p. 87; Curtis, 1982, p. 9), and capable reviewers may have their opinion solicited regularly by more than one journal.

On first consideration, the lack of written standards to serve as review guidelines seems much easier to rectify, and indeed many journals do supply them. However, they are hard to win agreement upon; hard to word specifically yet flexibly enough to cover all submissions; hard to formulate so as to yield valid judgments; hard to enforce; and almost certain to be variously interpreted (for examples of guidelines, see, Forscher, 1980, pp. 166-67; Bishop, 1984, pp. 59-67).

If, as seems true, substantial numbers of peer reviews are compromised by prejudice, ignorance, carelessness, hurry, or uncertainty or misapprehension about the journal's values, many authors and many more readers are being arbitrarily denied opportunities to be heard and to learn. This, however, is not the greatest threat of peer review to intellectual freedom. Even when the system seems to work smoothly—perhaps especially when it does—it may subtly and harmfully control not only what is published and read but what phenomena are investigated and what ideas pondered.

Resistance to the New and Unconventional

The peer review process is inherently conservative because of the way reviewers are selected. Chosen by, and answerable to, an editor or editorial board (sometimes after consultation with colleagues or other reviewers), they are most often scholars with research degrees, affiliations with well-known academic or research organizations, and publishing histories of their own. The more famous and established they are, the more likely they are to be asked for reviews. Zuckerman and Merton (1971) discovered, for example, that: "Relative to their numbers, lower-ranking physicists do little refereeing altogether and also referee far fewer papers by the intermediate and highest ranking physicists than would be the case under a populistic allocation" (p. 89). This is understandable, of course, but it guarantees that the vast majority of reviewers will have many years' experience as students and employees of mainstream learned institutions, and probably as writers for refereed journals and as successful grant applicants. They will have absorbed the associated values and norms, acquired distinct theoretical and political perspectives, and formed opinions about the appropriate credentials for researchers and directions for research—they will have become, in other words, what Peter Gibson (1987) has called "the Enid Blytons of the scientific fraternity" (p. 63). However open-minded they strive to be, their judgments are bound to be shaped by powerful past influences and present expectations. That is, they not only have certain backgrounds but share them with those who request and receive the reviews, because scholarly editors are drawn from the same general population (though perhaps slightly more elevated ranks of it) as reviewers are (on referee selection, see, Stieg, 1983, pp. 102-05; Gordon, 1978). An interesting assertion was made by the editor of *Journalism Educator* when he initiated a refereeing system: "Manuscript reviewers will be chosen from the ranks of established scholars and professors who are likely to offer innovative ideas about the field" (Crook, 1988, p. 56).

When consensus among reviewers, or even a majority "vote," is required for acceptance of a manuscript, the tendency toward safe, unexceptionable decisions and avoidance of intellectual risk-taking is likely to be especially marked. And in high-rejection journals where, to use Zuckerman and Merton's (1971) terms, the "decision-rule" is "when in doubt, reject" (p. 78), adventuresome manuscripts must be anathema. As a result, unconventional subjects and ideas, novel research designs, findings that challenge long-standing beliefs, and anything controversial—even when persuasively presented—may find the road to print rough and darkened by shadowy obstacles. "Novelty," states Dennis V. Lindley (1984), "is always on dangerous ground with referees" (p. 57). Physicians Robin and Burke (1987) observe: "Almost

every expert reviewer has a conflict of interest; he or she represents their discipline as it now exists and unconsciously tends to defend it" (p. 254). And Barry Commoner (1978) warns:

> The peer review system threatens not so much the bulk of more routine research, but precisely those sweeping, novel advances that are the growing points of science. The real danger in the system is that it threatens to blunt the cutting edge of scientific progress. (p. 29)

Also, of course, this blunts progress and path-breaking exploration in the social sciences and humanities. Convincing research on the subject is difficult to plan and carry out since so many variables may affect what is finally a qualitative decision, but some investigators have made the attempt with provocative results. For example, Zuckerman and Merton (1971) found that high-status physicists were likelier than their intermediate- and low-status colleagues to have manuscripts submitted to *Physical Review* accepted at all, to have them accepted immediately, and less likely to have them rejected immediately (p. 91. See also, Crane, 1967). Of course, high-status authors may simply do better work than others, hence their high status.

Steven H. Gale (1987), a literary critic with an axe to grind, subject analyzed twenty-two consecutive issues (1978-83) of the *Publications of the Modern Language Association (PMLA)*, containing 146 scholarly articles, and concluded that, "the referees tend to look for the same kind of material that has already appeared in the journal..." (pp. 4-9). (It is not irrelevant that Gale's specialty is the contemporary English dramatist Harold Pinter and that his Pinter articles were rejected by *PMLA*). There were, for example, disproportionate numbers of articles on pre-twentieth century English literature, on French literature, and specifically on Shakespeare and Chaucer. Largely neglected were drama and American literature—and only eight articles dealt with women writers of any country or period (Gale, 1987). The issue is not clear cut, of course: in an earlier *PMLA* editorial, English Showalter (1984) had emphasized that what he published simply reflected what was submitted (for example, 46 percent of manuscripts received in 1973-83 dealt with English literature) (pp. 851-53)—though it does seem odd that, in the period Gale studied, so few manuscripts about women's writing would have been submitted to one of the field's most prestigious and broadly subject-defined journals.

Michael Mahoney attracted considerable attention with his studies of social science journals which showed that experimental data and conclusions that supported conventional theory were much likelier to win referees' approval than those that conflicted with it—and that articles citing work "in press" from the author were more often accepted than those that did not. "Even in science," Mahoney

(quoted in Joyce & Pearce, 1986, p. 23) lamented, "nothing succeeds like success. Publication begets publication, recognition begets further recognition, and the rich get richer" (p. 23). It is the phenomenon that Robert K. Merton (1973) famously labeled "the Matthew effect."

In the American Council of Learned Societies' 1985 survey of 3,835 humanists and social scientists, 77 percent of the respondents asserted that the "peer review refereeing" systems in their fields were at least sometimes biased in favor of "scholars who use currently fashionable approaches" and "established researchers in a scholarly specialty." Seventy-three percent believed that "scholars from prestigious institutions" were often or sometimes favored, and 37 percent felt that "males" were favored. Women were likelier than men to detect "frequent" bias of any type (Morton & Price, 1989, pp. 69-71). (What was not asked was whether respondents saw the biases as justified. In a follow-up study of educators in ALA-accredited programs, 67 percent, 71 percent, and 67 percent of respondents perceived at least some bias favoring authors in the first three categories respectively, but several added marginal notes to the effect that discrimination in favor of the established and prestigiously employed makes sense [Biggs & Biggs, 1990].)

Suffering most in such circumstances will be younger scholars without influential mentors, substantial bibliographies, or impressive institutional ties; writers in developing fields and new interdisciplinary specialties; intellectual innovators and rebels of all stripes; and, some suggest, authors reporting applied or apparently "simple" research. (See, for example, Grassman's [1986] amusing critique of mathematical journals. Based on rejections of his articles on queueing theory, Grassman formulated "Joe's theorem": "Nothing is published in the area of queueing theory unless it is mathematically interesting. Nothing is applied in industry unless it is mathematically trivial. Since trivial results are not interesting, and since results that cannot be applied are not useful, nothing useful will ever be published in queueing theory" [p. 44].)

Some may respond that there is no problem, that most papers rejected by prestigious journals will still find print, if their authors are persistent, through less-known, perhaps unrefereed, outlets. This is true (see, for example, Stieg, 1983, p. 115; Yankauer, 1982, p. 239 [footnote]; Slater, 1984, p. 455; Rennie, 1986, pp. 2391-92). But it may be that in this age of bewilderingly prolific publication, to appear in an obscure journal, especially one that is not refereed, is to remain invisible and not really to "appear" at all. Unable to read every journal in their fields, scholars seek external clues to aid selection; among the most prominent are the related factors of a journal's reputation and whether it is peer reviewed. Peer review is assumed to ensure

adherence to scholarly standards. When it doesn't work well, readers are misled, as are academic search committees and tenure and promotion review groups. And authors who publish in unrefereed journals may suffer wrongly by comparison with their counterparts who publish in refereed, but not better, journals.

Impact of Peer Review on Intellectual Freedom: Summary

Through referee procrastination, carelessness, ignorance, or cupidity, peer review may deny authors the chance to publish in the most appropriate and widely read journals. And when authors' names are revealed to referees or when referees can guess them, such essentially extraneous factors as authorial fame (or lack thereof), institutional affiliation, and sex may affect publication decisions.

Even the most vocal defenders of peer review concede that it penalizes innovation and nonconformity. Of course, this harms individual scholars, authors, and readers who are interested in the new. More broadly, it retards the advancement of knowledge, not only impeding progress but undermining hope of progress. For thoughts that cannot be voiced will less often be thought; subjects that cannot be published will virtually cease to be explored; and research approaches scorned will be abandoned. Self-censorship is necessary for the scholar wishing to succeed in academe. That this is so can largely be laid to the account of the peer review system.

Conclusions and Recommendations

But what would we do without peer review? Unrestrained publication of everything, which is quite possible in the computer age and is advocated by some, would probably result in true publication of little. That is, as the flood of supposedly available information increased, ever less would actually be accessed and read. And a prestige ranking would surely emerge—probably based on criteria even less valid than presence of peer review—because scholars would have to find some way to differentiate among publications in order to choose which to read and how to assess colleagues' credentials.

In most unrefereed periodicals, manuscripts are screened but by an editor rather than referees. To substitute unaided editorial judgments for referee-assisted judgments in scholarly journals seems not an improvement and essentially absurd in an age of extreme specialization. Another possibility is to limit reviewing responsibilities to an editorial board of scholars in necessary specialties; they would be compensated, their names known, and their expertise and conscientiousness proven. At many journals, however, they would soon be overwhelmed by the volume of submissions, and the inherent

conservatism of peer review would only be enhanced if a small circle of people took charge of all decisions. Alternatively, such a board might divide responsibility, according to specialty, for screening manuscripts and selecting reviewers. Each specialist would then carefully read and evaluate the reviewers' reports and make the decision to accept, reject, or request revisions. Constructive suggestions drawn from the reports could be conveyed to authors, with editors committing themselves to helping authors improve their manuscripts.

Reviewers' competence and care are crucially important and often criticized. Computerized referee files, which now are easy to set up, allow editors to store and retrieve large amounts of information on thousands of potential referees, thus drawing on the opinions of a far wider range of people than personal acquaintances and "invisible college" referrals can provide. Also, their performance can be monitored closely, with careless, uninformed, and dilatory referees identified at once and removed from file. Some editors have created huge databases of prospective referees through questionnaires and literature searches. Editorial involvement is the key: to selecting good referees, using their reports well, and guiding and controlling the entire process.

Guidelines for peer review are probably necessary, though they are tricky to write and may shape and constrict referees' thinking, thereby closing off spontaneous reactions and novel ideas. Certainly deadlines should be imposed on reviewers and self-imposed on editors.

Though judging the authority of an anonymous manuscript can be difficult, the arguments for "blinding" referees are persuasive. And while people may indeed devote more care to reports that bear their names, revealing referees' identities seems likelier to cause problems than to solve them. Younger and more vulnerable scholars, in particular, would either decline invitations to review or avoid harsh judgments of their seniors. This would only strengthen the grip of established scholars and ideas. Intelligent, sensitive editorial use of referees' reports would circumvent most of the problems associated with reviewer anonymity.

Among interesting possibilities are to encourage voluntary signing of reviews; to ask that authors suggest appropriate referees for the articles they submit as well as referees to avoid; and to publish symposium-style, immediately following an article, any particularly insightful referees' reports (with their writers' permission).

Finally, though, editors and readers should realize that peer review is fundamentally hostile to intellectual invention and rebellion. It is the price we pay for reliance on established expertise—a necessary price, but a high one.

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Impact of Collection Management Practices on Intellectual Freedom

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Abstract

The purpose of this article is to identify practices of collection management that either impede, or have the potential to impede, the freedom of access to information. An underlying assumption is that such impediments are inadvertent or at least so subtle to the librarian perpetrator that they are not intended. This hinges on a further assumption, perhaps equally naive, that the librarian's responsibility is, as Asheim (1983) reminds us, "the defense of access to ideas, to information, esthetic pleasure, to recreation in its literal sense of re-creation, and to knowledge or at least to the process that leads to knowledge" (p. 184). Decisions made by agents beyond the control of collection management, such as by publishers and the government, define the domain in which collection management practices are engaged, and this article will address itself to that domain only. In any event, the relationship between collection management and intellectual freedom surely is a most complex and often ambiguous one. Yet the two are so inherently and inextricably intertwined that intellectual freedom cannot be discussed meaningfully as a discrete consideration in collection management.

Premises and Definitions

As used in this article, the term *collection management* is defined as a process of information gathering, communication, coordination, policy formulation, evaluation, and planning that results in decisions about the acquisition, retention, and provision of access to

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information sources in support of the intellectual needs of a given library community. It is treated as a positive process, functioning as a social system that is influential on its environment and that is also influenced by its environment. The term *information* as used in this context is highly generic, having a great many ramifications in collection management, especially in consideration of the range of involvement of collection management throughout any library and also in consideration of the ways in which technology and electronic services are changing our understanding of collections and collection management. That collection management is both central in library operations and pivotal in library relations with the surrounding community is a fundamental consideration in exploring the impact of collection management practices on intellectual freedom.

Information is essential to human evolution, as are, consequently, the information systems that put it to human service (Osburn, 1986). Censorship, the antithesis of intellectual freedom, is a logical attempt to gain possession of, and control over, that force that is vital to life and its continued evolution. Like other social influences, censorship evolves and survives through successful selection and adaptation. As a negative force it can be seen as the antithesis also of collection management. But censorship creates a dialectic in humanity's information system and in the system of collection management that stimulates the positive thrust of both in the long term. For dialectic leads to choices upon which evolution is dependent, and the need for the broadest information in making choices at all levels of the information hierarchy—from biological and individual to social and institutional—is fundamental to the human condition.

By far, most of the literature on the subject of collection management and intellectual freedom focuses on book selection. Book selection is the nucleus of collection management and is the purest manifestation of collection management. In that context, most of the literature on collection management and intellectual freedom has to do with overt public pressure that is either experienced or expected, and a lot of it treats specific censorship cases. This article attempts to examine all aspects of collection management in terms of the principle of intellectual freedom in order to determine where present and potential problems reside.

The purpose of collection management is contained in the mission of the parent library or agency and that varies broadly by the type of library in question. Their area of commonality seems to lie in the notion of service to an identifiable community, a principle that can fairly safely be interpreted as positive and good. The supporting principles, however—those that guide daily management

of collections—vary by type of library and constitute the areas in which the principle of intellectual freedom is either enforced or assailed. Before proceeding with the discussion of how in practice these principles are rendered vulnerable to attacks on intellectual freedom, it may be useful to examine them more closely.

Principles of Collection Management

The basic principles behind collection management present themselves as sets—that is, as a continuum of ideals about the purpose of the collection that extends from one pole to the other. It is not just the point along that continuum that determines whether or to what extent the principle of intellectual freedom has been violated, for that does not necessarily occur even at the poles; it is not that simple. The principle of intellectual freedom can be violated at any point along the continuum of the sets of collection management principles, depending upon the motive of the individual collection manager and the way in which that individual invokes the applicable set of collection management principles.

Guiding collection management are three sets of principles, the weight of each being determined by the type of library and its mission. The one that is evidenced most often as the area for violation of intellectual freedom is the set of principles that can be expressed as the value set. Here the continuum extends from a decision based on an internally derived judgment of the general good a title is anticipated to contribute to the community, to a decision based on an externally derived expression of community demand, either positive or negative. No matter the basis for the decision, it ultimately is made by the collection manager. And, on whichever basis the collection management decision is made, it reflects a judgment of value; in the one instance an assertive judgment and in the other a responsive judgment.

Because collection management functions as a social system, with all the systems implications, most collection management decisions are made at some point along the continuum from one pole to the other, not usually at either pole. Along that continuum are a number of questions whose answers can help assess the quality and nature of judgment being applied: To what extent is the internally derived judgment of value just speculation? To what extent does it reflect a preconceived notion of the ideal collection that is formed more by technical preparation than by knowledge of the community? To what extent does the judgment of value based on explicit demand take into account the implicit values and needs of the community?

The second set of principles guiding collection management is also frequently the terrain on which the struggle for intellectual

freedom is waged, and that is the set of principles that can be expressed as the diversity set. Here the continuum extends from a decision that a particular title contributes to the overall diversity of subjects and views represented in the collection, to a decision that a particular title will help in the balance of a collection's equal representation of diverse subjects and all views. Balance can be achieved without special regard for the extent of diversity, while broad diversity can be achieved without attention to balance. The concept of diversity in a collection is relatively easy to comprehend because it is single dimensional, unlike the concept of balance, which, being relative and multidimensional, requires many qualifiers. In practice, balance is a limiting factor for diversity, just as the reverse can also be true, and the implementation of the principle of balance always brings with it the potential to violate the most pure interpretation of intellectual freedom, which says that it "promotes no causes, furthers no movements, and favors no viewpoints" (ALA, 1983, p. 36). Balance tends to be an ideal that is difficult to describe and impossible to achieve except in the most narrow of situations, yet it is a very traditional notion in the discussion of all but special libraries because it suggests a rich combination of breadth and depth. By nature it is highly susceptible to successful challenge, however, and is therefore a field on which intellectual freedom is unsteady. By contrast, the principle of diversity in a library collection offers a simple and straightforward goal, yet it is, for all practical purposes, unachieveable because implementation is endless; almost anything that is published conceivably offers something new, however slight, thereby contributing to diversity.

The primary problem with the principle set of balance and diversity is that it tends more than most other collection management principles to be a platitude. As these terms are not defined for practical use—and they almost never are—so the principle of balance encourages the most subjective exclusion just as the principle of diversity encourages the most subjective inclusion. Left undefined, these principles focus on the collection rather than on the community, for which provision of access is the purpose of collection management.

The third set of principles guiding collection management is the set of principles that can be expressed as the conservator set. Here the continuum extends from a decision that a particular title contributes to the cultural continuity and intellectual stability of society (as personified by the community) as it evolves, to a decision that a particular title contributes to individual self expression and realization, which in the aggregate is required to advance social evolution (as personified by the community). It is in conjunction with this set of principles that is used the term *library of record,*

meaning a collection that incorporates as great a sample as possible of the record of human expression and achievement, both past and present.

This set of principles represents only an ideal, of course, one whose realizability has diminished steadily since the days of the famed Alexandrian Library. Since then, the problem increasingly has been the division of the simple, comprehensive principle of the library of record into two competing principles. One occupies itself with tradition and the other with innovation—it is the break of the present and future from the past. As manifested in its collections, the conservator role of the library conflicts increasingly with the innovator role, and in this tension, library collection management most closely mimics the society that surrounds it. Embedded in this situation is the struggle of old and new, of the individual and the masses, of conformity and nonconformity.

Each of these three sets of principles behind collection management—value and demand, diversity and balance, conservator and innovator—is invoked on a sliding scale, moving from one extreme to the other in practice. Many variables, influences, and considerations are involved in determining the point on the scale at which a decision will be made. Making matters even more complex is the fact that these three sets of principles are almost certain to be brought to bear at once on any collection management decision. For these reasons, and always bearing in mind that the basic principles present themselves as polarized sets, practical implementation of the very best principles of collection management can be considered hazardous to intellectual freedom.

Organization and Staffing

Practical implementation of collection management principles is affected by a staff of librarians whose organization and its structure are, therefore, quite relevant to the maintenance of intellectual freedom. It may be useful at this juncture to recall that, regardless of the process through which a collection management decision is reached, it is in the end made *de juris* or *de facto,* by a collection management librarian. Generalizing the organization and staffing of collection management for the purpose of discussion is made difficult by the fact that collection management is organized and staffed in almost as many different ways as there are libraries. For that reason we will suppose that someone in the library is formally assigned overall responsibility for that function and that if others are involved the person responsible overall is the coordinator of at least the collection management efforts of those individuals. This model is general enough to apply both to a small library situation

where the head librarian is solely responsible and to a large research library where an assistant director for collection management supervises a large hierarchical staff dedicated to collection management.

Organizational structure may at first not appear to have much impact on intellectual freedom in collection management, but structure can either facilitate or impede communication and, therefore, the influence of organizational ideals and principles. There are two fundamentally different structures for collection management: one wherein the chief collection management officer also bears responsibility for other library functions, and one wherein that individual's sole functional responsibility is collection management. In the former model, problems reside in goals of the other areas of the collection management librarian's responsibilities that may very well be in conflict with the goals of collection management. For example, the difficulty of cataloging certain items may dissuade that individual from pursuing an intended acquisition; or, being responsible for reference, that individual may be dissuaded from either a positive or negative decision on any collection management matter, knowing only too well the manner in which certain critical patrons manifest their dissatisfaction on a daily basis at the reference desk. The most serious consequence likely to follow from the model of mixed responsibilities that leave insufficient time for full consideration of options is the decision simply to permit all and only those recommendations for collection management action that come forward from any source. The decision not to make a decision is still a decision.

The alternative structure of collection management—wherein collection management is the single responsibility of the chief collection management officer—presents the potential conflict with intellectual freedom in a slightly different light. For here the issue is one of determining the appropriate level of authority for the individual within the organization and the function, and therefore the appropriate influence, of collection management ideals and principles throughout the library. For example, the development of those ideals and principles, as well as the influence upon the extent to which they are realized in practice, may differ considerably if the collection management officer reports to the library director, or to the head of public services, or to the head of technical services. In this model, collection management is by design not integrated into library operations with the result that it can be viewed as separate and apart and, therefore, as a meddler or even an intruder in the affairs of other functional units. In that environment, the ideals and principles of collection management often are not understood but

instead are undermined. All these concerns apply as well to subordinates whose collection management activities are coordinated through one or the other of these structures.

Few if any collection management librarians are formally prepared to manage the ideals and principles of collection management. Few if any are formally prepared to interrelate those basic principles with local collection management needs and criteria and with the subtleties of intellectual freedom. What they tend to have some preparation for is defense against the censor in specific kinds of cases. In short, the profession is confronted with the unfortunate combination of inadequate preparation in the fundamentals of collection management and inadequate preparation in the considerations of the positive thrust of intellectual freedom.

In the absence of such firm grounding, the trends toward specialization and professionalization are not well channeled. Specialization and professionalization thus serve as distractions from attention to the full significance of intellectual freedom, tending in the case of specialization to foster proclivities toward certain subjects, treatments, or views and, in the case of professionalization, to emphasize ideals of a technical nature. Like others in the profession, collection management librarians have not yet fully recognized that their job is the management not just of people, dollars, stock, and technology, but of more than that; it is the management of ideas.

Collection Management Policy

Policy on collection management is intended to regulate the management of ideas in the best interests of the community served by a given library. Traditionally, it has applied to only the selection function of collection management, although more recently it seems to be intended to have broader application, as the range of collection management responsibilities becomes better understood. Whether written or not, collection management policy is the theoretical basis for the relationship between the community and the library, for it summarizes the goals, priorities, criteria, principles, and, in general, the institutional mind of the library. In practical terms, policy guides the nature, breadth, and depth of community access to information, the more so as technology occupies a larger part in the provision of access.

The presence of policy, especially when written, makes the collection management librarian accountable and therefore responsible. This is crucial in maintaining the principle of intellectual freedom because it is the sense of a larger responsibility—engendered also in less formal ways, of course—that creates the intellectual context in which specific elements of the policy are

interpreted in and applied to daily collection management decisions. Consequently, the more the policy genuinely does represent the institutional mind, and the more widely that is understood, and the more closely policy is followed by the collection management librarian, the more influential will be the principle of intellectual freedom. The converse is equally true.

The chief problem with collection management policy at present is that it focuses almost entirely on an intangible, albeit a developing, assemblage of information sources, rather than on the whole, which is a living social organism. Too often we neglect, in planning policy, to incorporate substance as suggested earlier in generating policy, to engage a process through which attendant process values will benefit both the library and the community, and, in adopting policy, to establish the means by which to enforce it. Our penchant seems to be toward making of the collection management policy an internal code rather than a channel of communication between the library and the community. Therefore, we look to written policy as a defense against specific instances of censorship rather than as an instrument of process through which bias and prejudice both within and outside the library can be addressed in a more general context, in advance and in the positive spirit of intellectual freedom.

As selection is at the heart of collection management and policy is at the heart of selection, the criteria for selection are the heart of policy. Whether implicitly or explicitly, most policies incorporate very similar considerations in matters of criteria, common among them being: format, treatment, author, publisher, national origin, age or date of publication, language, and relationship to the existing collection or to the wider accessibility of information. One can easily imagine the rich variety of bias or prejudice that could be applied to any of these categories of criteria in a number of different settings. In fact, if one were to list the bases upon which information sources could conceivably be subjected to censorship, this would be the list.

Here lies the delicate balance between collection management and censorship. The differences are subtle, because although polarized, they are polarized on a scale; for the tone of one is positive while the tone of the other is negative; the goal of one is to be inclusive while the goal of the other is to be exclusive; the motivation of one is to enhance access while the motivation of the other is to prescribe access. Motivation is the pivotal difference between collection management (which implies the principle of intellectual freedom) and the influence of censorship. Collection management is motivated by the goal of implementing policy as a whole with each decision made in that total context. Censorship is motivated by the goal of implementing a specific part of the policy, and decisions so influenced

are made in disregard of the policy as an integral whole. The delicate balance between intellectual freedom and censorship in collection management decisions is tested every day as motivation converts policy into practice.

PRACTICE

Before "collection management" was "collection management," a term that did not come into use until the latter 1970s, it was called "collection development," which now is considered a part of the former set of responsibilities. And it was only for the period of about one decade preceding that the term collection development was used. The evolving perceptions within the profession of a coherent set of functions led to the use of these terms, each more explicit yet more comprehensive than its predecessor. The functions that now routinely are counted among collection management responsibilities number about two dozen, many of which as recently as two decades ago were not recognized formally or were taken for granted (for a list of nineteen responsibilities accepted by the profession, see, Bryant, 1986, p. 154). In any case, it is a major step forward and an advantage for vigilance over intellectual freedom that, generally, throughout the profession, a range of collection management responsibilities is addressed directly. Where it is not, the principle of intellectual freedom is at greater risk.

In a wholly rational situation, the fundamental principles and purposes of collection management would pervade policy, which in turn would translate them into criteria for selection decisions, while serving as an essential tool of communication binding together the library and its community. Thus, in a rational setting, both the letter and spirit of that policy would be implemented in daily practice. But a hazardous journey is traveled from principle to practice. We have discussed the perils inherent in collection management principles and policy, and there is ample documentation of the psychology and sociology behind professional decisions that may be influenced by either personal bias or prejudice. It may be useful at this point, then, to identify eight of the most common categories of decisions in collection management and indicate the types of threat to intellectual freedom held by each.

Budget justification and allocation are plans for action related to, but separate from, policy, stating the parameters surrounding implementation of policy. There is not a clear correlation between policy criteria and dollars, although there is what easily appears to be a correlation between dollars and priority, and this special kind of ambiguity opens the way to manipulation of policy. The situation is further skewed by differentials in the distribution of the information

universe among formats and subjects and by differentials of cost, both extremely complicating factors. Coordination of collection management decisions, another responsibility of collection management, enables censorship through laxness. For only overt action expressly in defense of intellectual freedom—and this is most extraordinary in the course of daily events—can correct censorship that devolves from a situation in which no one bears assigned responsibility for a particular area and all involved are negatively predisposed toward it.

Liaison with the community is probably the single most important function of collection management for it is through this medium that a variety of decisions are made, ranging from those required by the creation of policy to its daily interpretation. Because there are few librarians to undertake this responsibility relative to the size of the community, the collection management librarian must of necessity be highly selective in communicating. This selectivity suggests the likelihood that that person will choose the path of least resistance, thereby gathering information, tastes, perceptions, and proclivities from kindred spirits holding one world view.

Deselection of materials, which amounts to cancellation and weeding, comes the closest of any collection management function to acting in the negative spirit associated with censorship. So premised, the invocation of collection management principles and the application of its policies to this function clearly place the principle of intellectual freedom at risk. The same is true of decisions on transfer of materials to remote or storage locations, although the effects of such decisions made for inappropriate reasons at least are not of definitive consequence. In that connection, it should be noted that collection management decisions on the preservation—either intellectual or physical—of information sources very likely are the decisions with greatest potential impact on the principle of intellectual freedom.

Collection evaluation is a very significant function of collection management because it can lead to revision of policy and of financial planning, and because it can become a useful tool of communication with the community. The basis of the evaluation is of some concern in consideration of intellectual freedom because that very basis could reflect bias or prejudice. Two of the most common bases for evaluation are standard lists and use studies. It is obvious that great care must be taken in choosing the list that is to serve as the basis for evaluation. Perhaps less obvious but equally important as an unobtrusive influence on intellectual freedom is the relationship between a collection's use and its potential value to the community. For, at best, collection use may only reflect convenience in the community,

while at worst it may reflect only the biases and prejudices of a small minority of the community. Of direct concern to the interests of intellectual freedom is the fact that collection evaluation can be very influential in matters of policy, finance, and community relations.

As observed earlier, the selection function is the nucleus of collection management, just as it is the nexus of intellectual freedom concerns in the library. Because a great deal has been written on that subject, and because everything in this article addresses in one way or another the selection-censorship issue, comment here will be limited to a few specific issues. First are the extraordinary implications for intellectual freedom that can accompany gifts, whether financial gifts or gifts in kind. While, in theory, decisions about gifts in kind should be screened through the same policy considerations as are any other acquisitions, there is no ignoring the fact that they present themselves quite differently, and in some cases must be treated differently, thus attenuating the forces for intellectual freedom. The same can be said for financial gifts for restricted acquisitions, which circumvent the collection management system and which must be treated specially.

The other aspect of selection that is noteworthy in its connection with intellectual freedom is the influence of selection tools. Depending upon what is included or excluded in the media employed by collection management to scan the information universe, and depending upon how those tools classify or label their contents, and depending upon the nature of explicit judgments they may include in the form of reviews, annotations, or advertising, the librarian can unwittingly become a collaborator in subtle expressions of censorship. This is but one of the many environmental influences on collection management that have potential to restrict intellectual freedom.

Environmental Concerns of Collection Management

As a system, collection management can be expected to influence and be influenced by its environment. In a general sense, environmental forces include all aspects of civilization and all do exert influence, but some have a very direct and immediate effect on collection management. Chief among these are: the publishing industry, which we can refer to more generally as the information and knowledge universe; technology, which at the present time is a powerful enough influence to be considered a separate environmental factor, although that should not always be the case; economics; and the community. From a systems perspective, one system is not neatly distinguishable from another or from its environment, but for purposes of discussion here a system will be treated as a discrete

entity. Of those four primary environmental concerns just listed, the last two, economics and the community, are of most constant concern in the relationship between collection management and intellectual freedom.

The influence of economics on collection management is rooted in the simple fact that no library can financially afford all the materials and all the accessibility implied in the extreme interpretation of the principle of intellectual freedom. That always has been true, and it surely will continue to be true for a long time. In recent decades this condition has been aggravated by a universal increase in the production of information, in the broadest sense, and by concomitant surges in cost. If cost were of no consideration in collection management there would still be issues of censorship to deal with, to be sure. But consideration of cost is a basic function of collection management, and tensions surrounding intellectual freedom often are commensurate with economic constraint. The manifestations of this phenomenon range from very gross and subtle shifts in emphasis to the determination that a specific book title cannot be acquired. In each case representing the extreme, the justification for the collection management decision is economic constraint, which may be quite valid, or may be subterfuge for censorship, or may be the reflection of nondecision-making (nonfeasance).

The extreme example of determining not to acquire a particular book on grounds of insufficient funds needs no explanation, but the example of gross yet subtle shifts in emphasis in collection management probably does require explanation. This is a situation common to most academic libraries during the past two decades, and perhaps familiar in other settings as well. It is a situation whereby journals, because of their nature in combination with price increase differentials, gradually occupied a greater and greater part of the acquisitions budget, causing a diminishment of access to books and, with it, a diminishment of access to certain kinds of information that are conveyed more appropriately in the book medium. Along with this shift in local libraries, which then was extrapolated nationwide, a shift in subject emphasis took place because of the differences in the way scholarship functions among disciplines. At issue here is not the judgment of whether these shifts were for the better or worse, but the idea that they were effected because of economic forces rather than because of planning deliberations engaged in jointly between the library and the community or even within the library. While these shifts continue, a new economic force has entered the arena, and that is the growing corpus of electronic

sources. What gross and subtle shifts in the provision of access will this new format stimulate? Will we be in a position of control or one merely of observation?

The community is the single most important source of information for collection management policy and practice. At the same time, the community is likely to constitute the single greatest threat to intellectual freedom. Therefore, the more society (the aggregate of communities) becomes dependent upon information, and the more information that is produced and at greater cost, the more critical becomes the role of library collection management in ensuring intellectual freedom through the provision of access. Institutions and professions hold the public trust and can survive as institutions and professions only if they keep that trust. For many reasons, however, not the least of which is the influence of economic considerations, the public demands ever greater accountability in exchange for trust. Trust must be earned. Having evolved from the time when its community was composed of patrons—a word whose root meaning is protector, defender, and advocate—to a time when that community is composed of clients—meaning those who are defended—collection management has attained a station toward which the community looks for the guardianship of its intellectual freedom. But this position is tenuous. Community expectations for access have been heightened in recent years by the prevalence of information technology. Collection management has not yet devised the kinds of mechanisms needed to communicate effectively with a broad segment of the community. Collection management interacts largely with a select minority of the community, sometimes referred to as an elite that supports the library that serves it. In this situation, the distinction between patron and client may seem obscure, but it is clear that the roles are reversed when a collection management decision is biased or prejudiced by a patron (in the original sense).

Interlibrary Cooperation

In response to pressure exerted on collection management by increased publishing production, increased cost of materials, rapid introduction of technology, and heightened demand and expectations of the community, collection management has gradually become dependent on various forms of interlibrary cooperation. Among the various and interlocked manifestations of this dimension of librarianship is the cooperative development of collections, which is an approach that means that agreements other than those between the library and the community will determine the breadth and depth of immediate local accessibility. From a community perspective, the idea of formulating local policy, at least in part on the basis of

agreements established to serve other communities, must be something like learning that the earth moves around the sun, rather than the reverse. To whatever extent collection management may have focused on the needs, goals, and ethos of the local community prior to the adoption of cooperative policy, that focus thereafter was diverted. Cooperative collection management is not a strategy to economize, it is a strategy to expand accessibility. Quite the opposite of saving money, it is certain to cost more money, if only in administrative overhead. Therefore, as a program with a dimension of cost, cooperation further tightens the parameters in which local collection management decisions are made. The dilemma that emerges from this set of conditions is that a decision against cooperation is equally a decision against greater general accessibility, while the decision in favor of cooperation is one that heightens the tension surrounding intellectual freedom because of greater specific economic constraints locally. This is because the concept of regional or national resources is not yet accepted fully by the profession, much less understood by the community, thus setting the stage for an ironic conflict between accessibility and intellectual freedom. In these terms, agreement to the goal of enhanced access is not achieved easily. For one thing, agreement on programs of cooperation assumes agreement on increased expenditures, and more so as technology and access become almost synonymous. Again, economic concerns are an inhibiting factor. Of greater concern to those whose agreement to this kind of enhancement of accessibility must be garnered is agreement to specialize locally in some way, which is implicit in the concept of resource sharing. Guiding deliberation in this matter is the principle that the elimination of browsability is tantamount to the diminishment of accessibility, a principle that takes on added weight when it is understood that the local core of resources will steadily shrink as a proportion of the total accessibility to resources afforded by the library.

Bearing in mind the potential for negative influence on the maintenance of intellectual freedom in collection management decisions that is wielded by the community—or a select part of it—cooperative collection management programs can pose threats to intellectual freedom at two levels. One is at the local level where it always has been, but generating increased tension in decisions about the local core as it shrinks proportionally and, perhaps, absolutely. Another threat is introduced by a new tension surrounding collection management decisions, a tension similar in nature to that experienced at the local level, but extrapolated at a high level of complexity with far-reaching implications when collection management decisions

determine accessibility nationwide. It is likely that advances in information technology will enhance the ease of, and extend the ramifications of, decisions that would limit intellectual freedom.

The System Evolved

Three interrelated shifts are driving an evolution in the social system called collection management. The first is the evolution in the physical matter of collection management, or the media, which is an evolution that has gone from a book centered system to a journal centered system to an electronic centered system. The second is the evolution in professional perspective, which has proceeded from a goal of ownership to one of access in collection management. The third is the evolution in public or community attitude toward the collection management system, which has taken us from an attitude of trust to one requiring accountability, to an attitude of heightened expectation.

The coincidence of these three evolutionary changes has the potential to place the already unsettling intersection of intellectual freedom and collection management in an environment whose most characteristic attributes are the ethereal pervasiveness of the electronic format, the abstractness of access, and the expansive dimensions of expectation. Surely such an environment renders that intersection of collection management and intellectual freedom even more subtle and ambiguous and, therefore, more hazardous.

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