

Fall 1993

Free to Be You and Me: Librarians and Freedom of Expression

Jill Anne Farmer

1993 Call For Papers

Free to Be You and Me: Librarians and Freedom of Expression*

Jill Anne Farmer**

Ms. Farmer suggests that the ALA's Library Bill of Rights adheres to a flawed concept of first amendment rights, and suggests that the civic republican movement in jurisprudence offers promise for a new conceptual framework by which librarians can order their profession, to remedy the defects of the liberal model.

You can surely judge for yourself, O
Lord, our difficulties, living here
In the dark of the mind's vengeance,
Where all that we once knew for certain
Has been de-constructed¹
—Michael Blumenthal

Introduction

As many scholars currently observe, we live in a society characterized by widespread concern over the extent to which our social system can enhance or protect the quality of our lives and help us achieve a sense of "self-fulfillment." As Richard Fallon, Jr., writes, "[M]eaningful participation in national politics is no longer open to most of us. And among the experiences that are most widely shared is that of disagreement over moral and political issues of the most fundamental importance."² The dissolution of certainties in both science and philosophy has obtained no less in jurisprudence. Thus, we find in legal scholarship today significant theoretical movements that question not only the legitimacy of formation of law, but the very conception of human nature itself, and whether

* © Jill Anne Farmer, 1993. This is a revised version of a winning entry in the 1993 AALL Call for Papers competition.

** Assistant Librarian, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington, D.C.

1. *Prayer to Be Recited After a Jacques Derrida Lecture*, in MICHAEL BLUMENTHAL, *AGAINST ROMANCE* 56 (1987).

2. Richard H. Fallon, Jr., *Commentary: What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1734 (1989).

different understandings of human needs and values are either well- or ill-served by the current configuration of law-making bodies. Frequently, these discussions focus on fundamental rights, for as Hutchinson and Monahan suggest, "The problem of rights is simply a restatement of the problem of individual human fulfillment."³ Questions debated range from whether individuals have "natural" rights,⁴ to whether rights should be defined independently of the conception of what "ought to be,"⁵ to whether it is even legitimate to separate private rights from what is good for the entire community.⁶ Often, an individual's freedom to pursue self-interest is directly at odds with the self-interest of others, and/or some notion of the good of the collectivity. To liberals, achieving the optimal "mix" between the power of the individual and the power of the state is the fundamental dilemma of political organization.⁷ To poststructuralist scholars, however, the liberal dilemma is chimerical in two senses. First, poststructuralists maintain that individuals cannot necessarily ascertain their own interests because they internalize preferences as conveyed by dominant hierarchies. Second, they deny there is an "objective" way to determine if the "good" of one collectivity is "better" than that of any other.⁸

The philosophical debate over rights is of concern to both lawyers and librarians, in our professional as well as personal capacities. The freedom to learn, to know, and to express ourselves, individually and as part of a group, are rights we are both called upon to facilitate. Although we articulate our concerns in different vocabularies, we are joined in the

3. Allan C. Hutchinson & Patrick J. Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1489 (1984).

4. Ronald Dworkin, for example, while acknowledging that legal truths are not timeless, nevertheless maintains that all legal questions have one right answer, owing to the moral theory underlying our constitutional system. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 119-45 (1985).

5. The distinction between "law as it is" from "law as it ought to be" was advanced most influentially by the leading positivist H.L.A. Hart in *The Concept of Law* (1961) and elsewhere. The advantage of keeping these areas separate is alleged neutrality, guaranteeing that no matter what the subjective preferences of judges may be, legally defined rights would still be protected. See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 6-9 (1988). Some critics charge, however, that insisting rights rest not on moral principles but on positive rules has deleterious results for the protection of individual rights. See Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 47-60 (1990).

6. According to the "civic republican" point of view, "the existence of realms of private autonomy must be justified in public terms." Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1551 (1988).

7. Hutchinson & Monahan, *supra* note 3, at 1484.

8. Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 828-33 (1993).

cooperative venture of helping human beings realize the full flower of their intellectual potential.

This article reviews the understanding of individual rights by librarians as revealed through their position on freedom of information, and compares it to the evolving visions of rights that appear through the kaleidoscope of legal theory. It is the thesis of this paper that the picture drawn by librarians is simplistic and monochromatic, in that it does not account for nuance in either life or in the law.

Freedom of Expression and the ALA

As expressed by the American Library Association (ALA),⁹ librarians conceive of rights in the traditional liberal manner as absolute and personal--a reflection of the American ethos of political pluralism. In this worldview, value is produced through the attainment of an individual's self-interests. Accordingly, the optimal mode of social organization is that which maximizes the exercise of individual choice. Politics becomes nothing more than the pursuit of private ends in the public sphere. The substantive content of these ends is irrelevant; as Feldman writes, "[T]he only normative standard for resolving any political issue is to determine which viewpoint emerges victorious from the political battleground."¹⁰

This I-versus-others paradigm militates against an empathic sense of community, and works against an understanding of freedom that enlarges one's own possibilities through provision of a collective good. Furthermore, as Mary Ann Glendon suggests, an absolutist idea of rights, in its "relentless individualism," contributes to a climate "inhospitable to society's losers."¹¹ Finally, even aside from the question of whether such a conception of rights is desirable, the fact is that an absolutist definition has never been sanctioned by the Supreme Court. As Calvin Massey observes, "Not all speech is created equal. The constitutional law of free expression is rife with categories of speech, each receiving a differing quantum of constitutional protection from suppression depending on the Court's perception of the value of the speech involved and the harms that it inflicts."¹²

9. See *infra* notes 16-17 and accompanying text.

10. Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835, 1835 (1992).

11. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

12. Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 135 (1992).

Moreover, in recent years, the conservative Court has significantly reduced the ability of people to express themselves. According to David Kairys,

[T]he media and public have been inexplicably silent as the Rehnquist-Burger Court has experimented with what may be a dismantling of the basic system of free speech. . . . [T]he Court has increasingly narrowed and restricted the free-speech rights available to people of ordinary means, enlarged the free-speech rights of wealthy people and corporations, and erected a free-speech barrier to public access to the media and to important electoral, economic, and social reforms.¹³

I believe that by participation in the scholarly conversations of the legal community, librarians can gain insights into a broader conception of rights, which may bring a much-needed fresh perspective to their position on intellectual freedom.¹⁴

Librarians have become some of the most vigorous defenders of intellectual freedom in the United States.¹⁵ The ALA Library Bill of Rights, a list of policies to guide library services, states, "In no case should library materials be excluded because of the race or nationality or the social, political or religious views of the authors. . . . Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times"¹⁶ The ALA Freedom to Read Foundation adds in its "Intellectual Freedom Statement": "[We will] make available the widest diversity of views and expressions. . . . [O]nly through the constant activity of weighing and selecting can the democratic mind attain the strength demanded by times like these. . . ."¹⁷

It is my contention that, on close examination, the concept of freedom of expression as expressed by the ALA does not hold up as either descriptive or even realistic. Because, however, the creed, or set of guiding principles, is transmitted to librarians as *given*, this paradox exists unchallenged; defining their particular rights rhetoric as professional

13. David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 237, 262 (David Kairys ed., rev. ed. 1990).

14. Michael Harris has done an extensive critical analysis of the approach to freedom of expression taken by librarianship. See Michael H. Harris, *The First Amendment and Extremist Speech: ALA's Position on Intellectual Freedom Revisited* (unpublished manuscript, on file with the author). This present article attempts to expand upon his ideas and ally them with insights afforded from other disciplines.

15. LEE BURRESS, *BATTLE OF THE BOOKS: LITERACY CENSORSHIP IN THE PUBLIC SCHOOLS, 1950-1985*, at 34 (1989).

16. *Library Bill of Rights*, adopted as amended by ALA 6/27/67, reprinted in *INTELLECTUAL FREEDOM MANUAL* 10-11 (4th ed. 1992).

17. *Intellectual Freedom Statement* endorsed by the Freedom to Read Foundation 6/18/71, and adopted by the ALA 6/25/71, reprinted in *id.* at 122.

dogma precludes serious analyses of the actual situation.¹⁸ We are oblivious to internal inconsistencies because we never even see them.

I advance three arguments to show how the library profession's understanding of freedom of expression helps to obscure some basic problems with contemporary practice: (1) that the theoretical underpinnings of the ALA's position are based on faulty assumptions about the availability of information and the "marketplace of ideas"; (2) that the ALA's adherence to a conception of rights as defined by liberalism is ultimately exclusionary; and (3) that a broader understanding of the concept of rights by librarians may help resolve the gap between theory and practice in libraries by changing the focus of the profession away from problems to solutions. I will begin, then, with a discussion of the difficulties that are exposed when the ALA's theoretical assumptions are put to the test of reality.

The Myth of the "Marketplace of Ideas"

The central concern that emerges from the ALA statements on intellectual freedom is the high value placed on individual expression. The ALA interprets freedom of expression by individuals as an essential component of the healthy maintenance of democratic society. That is, in order for a democracy to function effectively, the citizens whose decisions control its operation must be able to acquire the necessary information to exercise their responsibilities.¹⁹

The assumption that informed citizens are necessary for the optimization of the democratic process, however, may only be a self-serving myth for those in power. As political economist Albert Hirschman demonstrates, a successful organization (in this case, democratic society) is one which contains a mixture of "alert" and "inert" participants--the former to serve as a corrective mechanism and the latter to provide a cushion of support and stability.²⁰ The "alert" element of the population receives the information it needs to attempt to make small-scale qualitative changes, increasing its sense of satisfaction as well as efficacy. The "inert" element is comparatively uninformed but still believes the system is open and "democratic" because it theoretically will provide information to anyone.

18. Harris, *supra* note 14, at 22 n.2 (also citing other critics within the profession who have noted the extent to which the absolutism of the ALA suppresses discussion of the theory and practice of intellectual freedom in librarianship).

19. Preamble to *Intellectual Freedom Statement*, *supra* note 17, at 121-22. For a theoretical discussion of this view, see generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

20. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 24-25 (1970).

It is not really in the polity's best interest for this balance to change. If too many citizens were "informed," they might demand systemic changes beyond the scope and speed of that which a democratic process is capable.²¹

Furthermore, the realities of modern decision-making demand that a majority of citizens are *not* informed of their "best interests;" our social machinery is fueled by corporate capitalism, which by its very nature is based on unequal distribution of resources and unequal distribution of consequences (rewards as well as punishments). Yet, for the profit motive to continue to operate successfully, all must subscribe to the myth of its equal opportunity and access to rewards, lest they attempt preventive political action.²² Thus, the fact that many people can't or won't obtain sufficient information to engage in deliberative politics may be the most stabilizing situation.²³ After all, the political and economic systems are well-served by perpetuating the myths that sustain them without allowing a serious challenge to be generated.²⁴

Compounding what might be a misperception in believing that all citizens should be extensively "informed" for the preservation of democracy, librarians aver that this goal is best achieved by ensuring there is a "free marketplace of ideas," which librarians must endeavor to "preserve and enhance."²⁵ There is, however, considerable evidence that today there is no such thing as a free marketplace of ideas. Stanley Ingber, summarizing a large body of literature on "real world conditions," observes,

21. Jonathan Rauch makes a convincing argument that we suffer from "demosclerosis," "postwar democratic government's progressive loss of the ability to adapt," calling it "the most important governmental phenomenon of our time." Jonathan Rauch, *Demosclerosis*, NAT'L J., Sept. 5, 1992, at 1998, 1998.

22. As Katznelson and Kesselman write:

Most Americans get fragmented, low-quality information. They are misled about their interests by schools, media, and government. Since they lack the resources, education, and time to analyze the interests in depth, they are often misinformed. An important consequence of the dominant ideology is to mask the connection between people's problems and the actions of government.

See IRA KATZNELSON & MARK KESSELMAN, *THE POLITICS OF POWER* 396 (1975). As Hirschman notes analogously, speaking of market efficiencies, "[I]f all were assiduous readers of *Consumer Reports*, or determined comparison shoppers, disastrous instability might result and firms would miss out on chances to recover from their occasional lapses." HIRSCHMAN, *supra* note 20, at 25.

23. Michael Fitts goes further to propose that vagueness by political actors can facilitate acceptance of more "civic" programs that might not otherwise make it past self-interested constituents. Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 923 (1990).

24. Information by its very definition has a remarkable capacity to be totally secret and unable to be anticipated by those who are not informed. Thus, it could be argued that these groups literally don't know what they are missing.

25. Propositions 5 and 2, *Intellectual Freedom Statement*, *supra* note 17, at 49 & 48. Supreme Court Justice Oliver Wendell Holmes, Jr., first used the concept of the marketplace of ideas in 1919 to define the intent of First Amendment protection. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

"[S]ophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals."²⁶ In particular, the money and clout behind corporate-sponsored messages help drown out less affluent voices. One result is that the ideas that are most heavily subsidized are the ones that become recognized, in this unequal competition, as "truth."²⁷ This is, of course, counter to the true definition of a "free marketplace of ideas." Yet, by focusing on whether each individual can legally have his or her say, librarians miss the point. While all citizens may have a legal *right* to the marketplace, there is an incredible inequality of opportunity to *use* it. The rich and the powerful have greater access, not only to the marketplace itself but to the educational and cultural opportunities that allow them to use the marketplace to full advantage.²⁸ The poor, who, as Cornel West emphasizes, are in situations of sparse resources, degraded self-images, and depoliticized sensibilities, have few real avenues for expression except rebellion and anarchy. Psychological barriers compound physical and social constraints to the advantage of dominant groups: "The status quo lives and thrives on the perennial radical dilemma of disbelief: ordinary citizens find it hard to believe that their actions can make a difference when resources, wealth, and power disproportionately are held by the corporate community."²⁹

Despite this bias, those in the middle and upper classes who accept traditional values see the "marketplace of ideas" as a viable construct,

26. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5.

27. Daniel Farber asserts this is not a problem, because "[I]f individuals are rational, they will usually screen out false information or refuse to rely at all on a communication if they cannot assess its reliability." Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 560 (1991). He gives us no indication, however, as to how these "rational" individuals will be able to tell when information is false, especially if all their sources for data are mainstream, and therefore likely filtered through corporate-owned processes. And in any event, as Ingber notes wryly, "On the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind." Ingber, *supra* note 26, at 7.

28. Moreover, the social inequalities are self-perpetuating. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES* 79-80 (1991) (describing the egregious conditions in mostly black, inner-city schools). As Kozol points out, "Like grain in a time of famine, the immense resources which the nation does in fact possess go not to the child in greatest need but to the child of the highest bidder--the child of parents who, more frequently than not, have also enjoyed the same abundance when they were schoolchildren."

29. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1800-01 (1990). Furthermore, as Sunstein points out, individuals will respond to the socially produced absence of sufficient opportunities by lowering their expectations of what is available to them. Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 19-24 (1991).

because for *them* it represents a system that "works."³⁰ Not only does this belief ignore those who are outside conventional bounds of society, but it affords a veneer of "genuineness" to the opinions and perspectives of the mainstream that may be unwarranted. A fairly large and influential body of epistemological theory holds that the views of individuals are dictated by social forces.³¹ This is so because, as Peller writes, "what gets called reason and knowledge is simply a particular way of organizing perception and communication."³² More importantly, according to many scholars, meanings are organized, conveyed, emphasized, and sustained in a way that is largely determined by the groups controlling the economic and cultural forums of society.³³ Thus, what is presented as "true" or "valuable" in the marketplace of ideas may also be described as particular constructions of experience or thought promulgated by dominant social groups. As claimed by Richard Delgado, "Normative orderings always reflect the views of the powerful."³⁴ He adds, "If the powerful are *really* powerful, they will teach everyone that the rules are 'objective,' that is, do not emanate from [the powerful], but are in the nature of things."³⁵ And because language "mediates perception and communication by shaping ways of thinking about the world,"³⁶ likewise metaphors, such as, "the marketplace of ideas," help *create* our realities.³⁷ Just as metaphors can enhance understanding, however, they can also trap us in outworn explanatory models that limit the ways we see what is before us. All of us share a tendency "to make facts amenable to ideas, and ideas to facts, in

30. Ingber, *supra* note 26, at 49. Allowing a talented few from the lower classes to "make it" acts to persuade both dominant and subordinate groups in society that upward social mobility is mainly a function of "evolutionary individualism." The belief that if you just work hard enough, or are a better person, you can succeed regardless of class, race, or gender, lends much more security to the dominant classes than would a rigid separation. One reason is that the focus shifts from the society or the system to the individual as the source of the problem. Another is that the subordinate groups are deprived of potential leadership, since the best and brightest are "co-opted." See HIRSCHMAN, *supra* note 20, at 106-19.

31. See generally, e.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966).

32. Gary Peller, *Reason and the Mob: The Politics of Representation*, *TIKKUN*, vol. 2, no. 3, 1987, at 28, 30. At an even more elementary level, "Language itself is a prism, it splinters what is, in order to make (up) the discrete meanings that constitute our sense of self, other, and world. Indeed, upon closer scrutiny we discover that the conceit of language lies in the concept even as it lies in metaphor." Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 *GEO. L.J.* 1785, 1816 (1990).

33. A number of important modern philosophers share this view. See, e.g., STANLEY ARONOWITZ & HENRY A. GIROUX, *POSTMODERN EDUCATION: POLITICS, CULTURE, AND SOCIAL CRITICISM* 93 (1991).

34. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 *U. PA. L. REV.* 933, 951 (1991).

35. *Id.* at n.75.

36. Peller, *supra* note 32, at 29.

37. Gregory S. Alexander, *Talking About Difference: Meanings and Metaphors of Individuality*, 11 *CARDOZO L. REV.* 1355, 1357 (1990).

order to support a convincing and coherent image of the world."³⁸ We become, in effect, captives of our metaphors.³⁹

Yet, there is another way in which the marketplace model is deficient. Holmes spoke of the market as a "free trade in ideas," in which the only barrier to *acceptance* would be a lack of "truth."⁴⁰ The fact is, however, that there are various means by which a diversity of views never make it into the "flow." A number of studies document such phenomena as selective dissemination of information by the government, the influence of advertising and profit concerns on content formulation, and preemptive censorship as factors that affect availability of information.⁴¹

One Truth or Many Truths? Liberalism as Exclusionary Politics

There is an additional problem with the ALA's understanding of freedom of expression in terms of the marketplace metaphor, and that is the assumption that even if all people had equal access, and were given adequate exposure to a diversity of ideas, that they could discover "truth," or make "better," more "rational" choices. As indicated above, the epistemological concept of "objective" truth has been widely rejected in intellectual circles.⁴² Contributing to the "conceptual lenses" with which one views the world are such factors as one's socioeconomic background, personal experiences, the structure of one's language, one's position in history, and the media through which we receive our messages.⁴³

38. Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 214-15 & n.67 (1984) (footnote omitted) (summarizing literature on the relationship between ideology and attitudes).

39. Indeed, as Roger Bromley argues, this process is so pervasive that even the forms of cultural representation are functionally connected with dominant ideologies, so that the means by which we think about our lives are structured subconsciously. For example, in television and books, the construction of the subject as the place of intelligibility and extensive use of the first-person narrator reinforce an individualistic rather than systemic ordering of events. That is, problems encountered are depicted as personal ones, with no hint that the problem may be societal or historical, or the system unfair. Thus, Bromley charges, it is not through content only that popular culture supports dominant ideologies. In a much more subtle way, textual mechanisms employed provide the tools by which we learn to think about the future. See ROGER BROMLEY, *LOST NARRATIVES: POPULAR FICTIONS, POLITICS AND RECENT HISTORY* 126-27 (1988).

40. Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

41. See, e.g., Walter Karp, *Who Decides What Is News?*, HARPER'S MAGAZINE, July 1989, reprinted in UTNE READER, Nov./Dec. 1989, at 60, 61; Daniel Lazare, *Being FAIR to the Media*, IN THESE TIMES, Mar. 15-21, 1989, at 12; BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (4th ed. 1993).

42. See discussion *infra* notes 31-39 and accompanying text. For a clear and in-depth exploration of the philosophical premises of this current intellectual trend, see Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992).

43. BERGER & LUCKMANN, *supra* note 31.

This observation about the sociology of knowledge undermines the assumption of rationality and discernment of universal truth required by the marketplace model. If people's perspectives and understanding are greatly influenced, if not determined, by their experiences, social status, and so on, even the most inclusive dialogue cannot in fact eliminate divergent notions of "truth." What is truth for one person will not necessarily be so for another.⁴⁴ Some theorists contend that what is defined as truth has a "positional" quality, depending on one's location in the hierarchical organization of society.⁴⁵

Judith Fetterley demonstrates this principle through her analysis of Susan Glaspell's "A Jury of Her Peers," a story that tells of a woman who has killed her husband; the men on the case can't solve the murder, but their wives are able to figure it out.⁴⁶ The worldview with which they enter the situation frames the picture for each group in a different way. Sometimes, the scene in one group's viewfinder is totally out of the other's range:

The danger, the violence, and the fear with which women live and which informs our self-definition are invisible, which is the . . . reason they are misunderstood. They are not a part of men's world, externally or internally. . . . [W]hen men accompany women, as all women know, harassment stops. For the same reason, they do not see women sexually harassed at work. They do not see women battered in the home. They do not see women being raped, by strangers, dates or husbands. . . . It is not surprising that the claim that women's lives are ruled by fear is heard by these men as wildly implausible. They see no evidence in their own lives to support it.⁴⁷

"Truth" also varies according to different historical contexts: what is considered true can change over time. For example, Delgado and Stefancic surveyed racism and racial depiction throughout the course of American

44. A particularly vivid example is given by Timothy G. Ash, *The Life of Death*, N.Y. REV. BOOKS, Dec. 19, 1985, at 26, 39, who, in discussing the Holocaust Documentary film *Shoah*, writes, "If German, Jewish, and Polish survivors try to remember exactly the same event, they simply cannot remember it the same--almost physically cannot"

45. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990) explains, "Truth is situated in that it emerges from particular involvements and relationships. These relationships, not some essential or innate characteristics of the individual, define the individual's perspective and provide the location for meaning, identity, and political commitment."

46. Judith Fetterley, *Reading about Reading: "A Jury of Her Peers," "The Murders in the Rue Morgue," and "The Yellow Wallpaper,"* in GENDER AND READING: ESSAYS ON READERS, TEXTS, AND CONTEXTS 147-64 (Elizabeth A. Flynn & Patrocínio P. Schweickart eds., 1986).

47. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L.J. 81, 94-95 (1987).

history.⁴⁸ They point out that images we consider today to be grotesque and appalling simply did not appear to be so at the time they were disseminated in the marketplace of ideas. Rather, they were facets of "objective reality."⁴⁹

Interpretation of events is not only variable, but subject to cultural manipulation by virtue of its uncertainty. Thus, it happens that control of sources of knowledge can be used in an oppressive manner, since language and the norms for its use are controlled by the dominant group.⁵⁰ An important aspect of using power in an oppressive manner is to define reality in such a way that subordinant groups believe their ongoing exploitation is justified.⁵¹ Deborah Rhode cites research showing how negative stereotypes, because accepted by society as "true," diminish individuals' sense of their own worth.⁵² Robin West offers a poignant description of the way in which the construction of language and therefore experience by dominant groups contributes to the self-images of subordinant groups. Speaking of the recently "identified" phenomena of sexual harassment and date-rape, she writes,

An injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality. Consequently, the victim as well as the perpetrator will transform the pain into *something else*, such as, for example, punishment, or flattery, or transcendence, or unconscious pleasure. . . . [The consequences of this are that] [w]e change our behavior in response to the threat of what we perceive as

48. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

49. *Id.* at 1259-60.

50. Murray Edelman emphasizes, "Government affects behavior chiefly by shaping the cognitions of large numbers of people in ambiguous situations. It helps create their beliefs about what is proper; their perceptions of what is fact; and their expectations of what is to come." MURRAY EDELMAN, *POLITICS AS SYMBOLIC ACTION* 7 (1971).

From this perspective, Michael Lipsky contends, "[P]olitics does not begin with mass emotion or policy preferences but with conceptual structures into which people receive information and transform it into a world view from which action (or inaction) proceeds." Michael Lipsky, *Introduction*, in MURRAY EDELMAN, *POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL* at xxi (1977).

51. See Williamson B.C. Chang, *Zen, Law and Language: Of Power and Paradigms*, 16 N.M. L. REV. 543, 570-71 (1986) (discussing historical examples of the use of false distinctions to justify the "necessity" for oppression).

52. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L. J. 1731, 1775 (1991). But see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 346 (1987) (indicating that if, for people of color, the "voice of truth" is often inaudible "in the corridors of the law schools and libraries where we work," those on the bottom come to know other sources of "truth"). Cf. Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358-59 (1988) (observing, "It matters little whether [a] coerced group rejects the dominant ideology and can offer a competing conception of the world; if they have been labeled 'other' by the dominant ideology, they are not heard.").

punishment; we diminish ourselves in response to injuries we perceive as trivial; we reconstruct our pasts in response to injuries we perceive as subconsciously desired; we negate our inner selves in response to injuries we perceive as consensual and we constrain our potentiality in response to injuries we perceive as inevitable.⁵³

And, in fact, different conceptions of truth lead to different conceptions of justice, and therefore, rights. In spite of living within the same liberal paradigm, truth is different for men than for women, and what looks like a "right" on paper metamorphoses out in the cultural milieu. Though they may theoretically have "choices," women have learned to deny their own self-interest and subsume their own pleasure for that of others, especially men. In particular, as Robin West claims, women will give up their basic rights out of physical fear and the need for emotional and/or financial security.⁵⁴

In part, this need stems from developmental differences. Janet Mendelsohn, in her research with Carol Gilligan on adolescent girls, found that attachment remains a high priority for girls after childhood (in contrast to findings on adolescent boys). They seek independence, but want it situated *within* the context of relationships of love and care.⁵⁵ Adolescence becomes a critical time for girls because it is a time marked by changes, which puts them in danger of losing their connection with others.⁵⁶

One way this loss can happen is because of girls' desire to retain their "voices"; that is, to be able to speak and be listened to, and know the listener will not leave in the face of conflict or disagreement.⁵⁷ Yet, young girls face the threat of "loss of voice" in two ways as they reach adolescence. At the societal level, adolescent girls attain the necessary degree of cognitive development to understand the position of women in society; i.e., that their voices will not be equal in value to those of males.⁵⁸ If they suppress their own voices, they are in danger of losing their identities. If they don't, they risk rejection and/or isolation in a patriarchal society, and this threat can be overwhelming in its power.⁵⁹ At the individual level, girls are encouraged, by mothers and teachers, to see the choice between

53. West, *supra* note 47, at 85.

54. *Id.*

55. Janet Mendelsohn, *The View from Step Number 16*, in MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL 233-57 (Carol Gilligan et al. eds., 1990).

56. Gilligan, *Preface*, in *id.* at 6, 24-25.

57. *Id.* at 24.

58. The concept of voice points to the ideological and cultural dynamics that enable people to define themselves and speak as part of the wider sociopolitical formation. See ARONOWITZ & GIROUX, *supra* note 33, at 100-01.

59. *Id.*

either privileging their own needs and rights or sacrificing them for those of others as a choice of being the ideal girl who is nice and kind, or the selfish, bad girl who thinks only of herself. By denying their own perceptions and experiences, the result is "self-doubt, confusion, ambivalence, pain, and loss."⁶⁰ Yet, they get very little social support from anywhere to retain their voices and somehow endure the consequences. On the contrary, there is a great deal of societal support for giving up themselves for someone else. Through such mechanisms as socialization, persuasion, imitation, custom, and even force, women learn to redefine themselves in relation to others.⁶¹

Liberalism, based on the pursuit of individualism (as opposed to relatedness) and the positivist notion of objectivity (as opposed to the more subjective contextuality borne of women's focus on connection), reflects "a male way of relating to the world."⁶² As Lorraine Code argues in her historical analysis of the development of our dominant epistemologies, "knowledge is a construct that bears the mark of its constructors."⁶³ She claims, "[P]hilosophical practices that extol ideal objectivity and ascribe to a scientific model of knowledge manifest persistent associations with the characteristics of ideal masculinity."⁶⁴ Jane Flax argues further that the ideals of objectivity and self-sufficiency stem from a denial of relatedness and dependence, which is socially necessary for male children (but not females) to separate from their mothers. She concludes, "The consequent self-sufficiency accounts for the belief that reason must triumph over the senses, just as the male should govern the female, and sustains the reason/emotion, male/female, subjective/objective dichotomies."⁶⁵ These dualities correspond to those fostered by liberalism, in its vision of society as isolated individuals whose freedom is in opposition to that of others.⁶⁶

60. Lyn M. Brown, *A Problem of Vision: The Development of Voice and Relational Knowledge in Girls Ages Seven to Sixteen*, 19 WOMEN'S STUD. Q. 52, 66 (1991).

61. See Cynthia Fuchs Epstein, *Ideal Images and Real Roles*, DISSENT, Fall 1984, at 441. See also Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (arguing that the political struggles over abortion rights are in part efforts to constitute what women are, both by defining their choices and by predisposing society's reaction to those choices).

62. Elizabeth Fee, *Women's Nature and Scientific Objectivity*, in WOMAN'S NATURE: RATIONALIZATIONS OF INEQUALITY 9, 13 (Marian Lowe & Ruth Hubbard eds., 1983).

63. LORRAINE CODE, WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE 55 (1991).

64. *Id.* at 54.

65. *Id.* at 69 (summarizing the work of Jane Flax). See also Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 591 (1986) (holding that "development of the nation's ideology has paralleled the individual moral development in the male pattern").

66. Jonathan Turley, *The Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 NW. U.L. REV. 593, 602 (1987). This theme is echoed by feminist jurisprudence, which criticizes as androcentric both the legal system and the liberal philosophy on which it is grounded. See, e.g., Christine A. Littleton, *In Search of a*

The public/private distinction insisted upon by liberalism is further reinforced by the individualist orientation of capitalism. The two ideologies act as pillars of support for reductionist explanatory theory, which denies the reality of group dynamics as well as the effects of systemic outcomes.⁶⁷ Likewise, a coherent communitarian social vision is precluded by this causal model.

In sum, the traditional rights model of liberalism is not only inadequate in terms of its misguided assumptions about the contingent nature of objectivity and truth, but it also does not take into account the pervasive effects of patriarchy, which precludes women from enjoyment of rights even if they have de jure legal sanction.⁶⁸ Thus, the evidence indicates that even diversity in the marketplace does not guarantee a hearing for differing views. The ALA's dependence on the integrity of a free marketplace of ideas to support the right to free expression cannot, therefore, be justified on an empirical level. Nor can it be justified as a normative preference, in that it ignores the way in which the male constructs of liberalism and positivism are phenomenologically opposed to the self-actualization of women.

Librarians and a "Plurality of Visions"

I now turn to my final contention, that a broader understanding of the concept of rights may revitalize the library profession by resolving the gap between its expressed creed and actual practice.⁶⁹ As one writer observes, "Even leaving aside the institution of judicial review, the principles of liberal tolerance and equality call for an incredible degree of self-restraint

Feminist Jurisprudence, 10 HARV. WOMEN'S L.J. 1 (1987).

67. The effects of choosing this interpretive framework can be far-reaching. For example, David Ben-Gurion, founder of the state of Israel, charged that the liberal framework which couched the atrocities of World War II in terms of "crimes against humanity" obscured the direct relationship of anti-Semitism to the Final Solution. See generally Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555 (1992). Certainly, how the Holocaust is "explained" has critical repercussions.

68. See also Feldman, *supra* note 10 (arguing that political pluralism also discounts the social psychology of racism: as with sexism, "rights talk" can obscure unspoken barriers that vitiate authentic realization of freedom for minorities).

69. Because of space limitations, this article focuses on theory rather than practice, but the literature on censorship problems in libraries is voluminous. See, e.g., Lester Asheim, *Not Censorship but Selection*, WILSON LIBR. BULL., Sept. 1953, at 63. For an excellent overview of this subject, see Harris, *supra* note 14. Many court cases discuss this issue as well, notably *Board of Education v. Pico*, in which Justice Blackmun noted that the difference between removing a book and not acquiring a book was the "practical and evidentiary distinction" in how such actions appeared. See *Board of Education v. Pico*, 457 U.S. 853, 878-79 n.1 (1982). That this verbal legerdemain between "censorship" and "selection" should be taken seriously by so many librarians is truly an indictment on their actual commitment to free expression, and an indication that they seek easy pathways to continue a discriminatory praxis that diverges from ALA's stated standards. Regardless of the method used, or the motives behind it, the perspectives contained in the affected books are denied to the library user.

on the part of those who think of themselves as a majority--silent or vocal."⁷⁰ Yet, even librarians, dedicated as they are to free expression, often find it difficult to extend tolerance to those whose lifestyles offend them.⁷¹

One proposal to overcome the perceived deliterious aspects of the liberal-pluralist emphasis on individualism and competition is the civic republican movement in jurisprudence.⁷² This movement is characterized as an attempt to revive ideas that were important in the founding period of our constitution. In general, as defined by Sunstein, basic republican commitments involve: "(1) deliberation in government; (2) political equality; (3) universality, or agreement as a regulative ideal; and (4) citizenship."⁷³ Deliberation refers to open and inclusive discussion and debate that would emphasize empathetic understanding of the needs of others. The motivating force for this type of political behavior is not self-interest but a higher value placed on civic virtue, which de-emphasizes individual rights in favor of individual responsibility to the community.⁷⁴ Political equality is defined in terms of equal access; republicans seek to ensure that barriers to participation be removed.⁷⁵ Universalism refers to a belief that a common conception of the public good can be arrived at through deliberation.⁷⁶ Citizenship flows from the first three tenets and is reinforced by decentralization and therefore increased opportunities for political participation.⁷⁷

There are fundamental difficulties, however, with the communitarian and collectivist premises of civic republicans.⁷⁸ Most importantly, although many civic republican scholars are members of the political left, their concept of a polity that subsumes individual preferences to a common good invites disturbing comparisons to totalitarian regimes. Moreover, their quest for universalism threatens to privilege the status quo and suppress alternative voices. Some theorists also maintain that the roots of cruelty and intolerance lie too far beneath the surface to be eradicated by political

70. Philip Green, *A Few Kind Words for Liberalism*, NATION, Sept. 28, 1992, at 309, 324.

71. A recent example of this phenomenon was the tremendous negative reaction to the July/August 1992 cover of *American Libraries*, which featured library marchers in the San Francisco Gay Pride Parade. See Tom Gaughan, *Ed. Notes*, 23 AM. LIBR. 612 (1992).

72. Some of the best-known works advocating this approach include J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); Sunstein, *supra* note 6; and Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

73. Sunstein, *supra* note 6, at 1539.

74. *Id.* at 1550, 1554-55.

75. *Id.* at 1552.

76. *Id.* at 1554.

77. *Id.* at 1556.

78. For a thorough and systematic critique, see Gey, *supra* note 8.

or even social mechanisms. And last, civic republicans seem to ignore the fact that at the most basic level, with any legal system there will be "the imposition of violence upon others."⁷⁹ Even apart from repercussions of the distinction between legal and illegal acts, to the extent that rights privilege some behaviors to the exclusion of others, we still encounter the face of violence:

The convoluted wording of legalisms grew up around the necessity to hide from ourselves the violence we intend toward each other. Between depriving a man of one hour from his life and depriving him of his life there exists only a difference of degree. You have done violence to him, consumed his energy.⁸⁰

Yet clearly, whether one's vision of republicanism's outcome is dark or bright, this popular theoretical movement demands our attention. It is the intellectuals, after all, who are often at the forefront of historical changes, in that they capture and systematize the mood of the population. What republicans express is a dissatisfaction with the destructive struggles of liberalism, and a longing for a "true" community that will both shelter and nurture its inhabitants and meet their spiritual needs in a way that materialism cannot. And indeed, the altruism required for this system to work is not an entirely untenable possibility. Studies in a large variety of animal groupings, which allow us to gain insights into behavior without the obfuscation of language and cultural overlays, have led scientists to conclude that animals do engage in altruistic behavior, *in spite of* the fact that often it is not conducive to enhanced survival.⁸¹ A more pessimistic view comes from political and legal economists, who posit that individuals have no incentive to contribute independently to a collective good once it is already available.⁸² Economic theories, however, are based on the premise of a world populated with "rational" individuals.⁸³ As suggested above, whether individuals can be defined as rational is questionable enough. But a distinction between "rational" and "irrational" is hardly

79. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986). Cover declares that "Legal interpretation must be capable of transforming itself into action; it must be capable of overcoming inhibitions against violence in order to generate its requisite deeds; it must be capable of massing a sufficient degree of violence to deter reprisal and revenge." *Id.* at 1617.

80. FRANK HERBERT, *DUNE MESSIAH* 183 (Berkeley Medallion ed. 1970).

81. For example, in F. Fraser Darling's seminal study of red deer, he found that the leader of the herd spends more time than any other in the group performing a watch and alert service while the rest of the group feeds. Clearly, the leader's behavior is not directly self-serving. See F. FRASER DARLING, *A HERD OF RED DEER* 68-73 (1937).

82. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 28 (1971).

83. *Id.* at 2.

foundational. As Leff points out, evaluation necessitates an evaluator, and there are only two sources by which an evaluator can claim superior knowledge: (1) a belief in God (and somehow gaining knowledge of God's will); or (2) arbitrary standards (i.e., normative choice).⁸⁴

Nevertheless, as Gabel laments, in the end, "we are left with the real world," where we find isolated, unhappy, and impotent individuals who are experiencing frustration and conflict in our current sociopolitical system.⁸⁵ What is missing in our analyses, he contends, is an evaluation of human quality.⁸⁶ The civic republican movement seeks to redress this omission and inspire us to transform our ties to one another in a shared task informed by humanity and understanding.

Few republican theorists give concrete suggestions for how their vision might be actualized. Robert Cover, however, in his advocacy of the transformative possibilities of law, suggested that we might approach law from a different conceptual framework altogether.⁸⁷ Drawing from Jewish rabbinic hermeneutics, he presented an alternative to the search for a single authentic truth, substituting instead "a plurality of equally legitimate constitutional visions," with all diffuse voices accepted as reflective of God's truth.⁸⁸ In an ideal order, according to Cover, diverse interpretations are seen as a creative and meaningful process, one now abrogated by liberalism's stifling of competing normative perspectives.⁸⁹ The republican's emphasis on persuasive argument through discourse represents an attempt to eschew the intention to discover "true meaning," and expand the social agenda to embrace creative interpretations.

The realization of republican goals might help resolve the dilemma of the lack of fit between women's *relational* lives and the autonomous ideal of liberalism. If the importance of interdependency and connection were recognized and adopted by both genders, it would no longer be translated into one-sided self-sacrifice.⁹⁰ Further, insofar as discourse encourages narrative and inclusion, the telling of stories may help members of

84. Arthur Allen Leff, Book Review, 29 STAN. L. REV. 879, 888 (1977).

85. Peter Gabel, Book Review, 91 HARV. L. REV. 302, 311 (1977).

86. *Id.* at 311-14.

87. Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

88. See the discussion of Cover's work by Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

89. *Id.* at 829 (summarizing Cover). See also Cover, *supra* note 87, at 68 ("We ought to stop circumscribing the *nomos*; we ought to invite new worlds.").

90. But see Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1293-94 (1991). She argues that women focus on responsibility and care because they have few other adaptational options open to them. While this may be so, it does not necessarily follow that an ethic of care could not be the ethic of choice.

dominant groups relinquish some of their biases and lack of understanding. Sometimes knowing how one's actions touch the lives of others can help redesign the fabric of individual consciousness.⁹¹

Librarians, by focusing on republican objectives, will conceivably develop a different perspective on the censorship/selection paradox. In the interest of increasing empathetic relations, they can play an important role in making sure that different groups have the opportunity to tell their stories, and that programs are fostered so that people will hear them.⁹² In realizing the republican ideal, it is important that both of the philosophies currently guiding selection--i.e., "give them what they want" vs. "give them what they need" no longer enter into the equation as diametrical opposites. Rather, the guiding principle might be how many more voices can we bring into our choir, to enrich the harmony of the songs we sing.

Several scenarios can be advanced to argue that the civic republican vision will resist dark transformation. One is that the proliferation of personal computers and interactive networks will militate against uniformity from too much control of information. The current largest electronic bulletin board, the Internet, at this writing links more than 8,000 computer networks and some 10 million people worldwide. And there are thousands of smaller, more individualistic bulletin boards as well.⁹³ As one bulletin board participant claims, "The important trend is technology abetting the grassroots distribution of information rather than the information being the domain of huge institutions to dole out according to their agendas."⁹⁴

Another likely scenario is that the sheer complexity of modern transactions will continue to generate the need for a multiplicity of laws and interpretations of these laws to account for contextual variation. A third possibility comes from feminists, who hope to push through a change in the philosophy underlying our prevailing order to a more female-centered one that would transform both theory and practice. Linda McClain believes that "a legal and social system informed by the 'connection thesis' and the insight that life is lived in a web of relationships would not simply protect persons from each other through rights such as the right to be let alone but might also recognize rights to connection and care."⁹⁵ Finally, we

91. See, e.g., Jack M., *Confessions of a Date Rapist*, CHANGING MEN, Winter/Spring 1993, at 34 (graphically describing his sexual assault of a woman, and how he came to understand what he did to her and its effects).

92. Compare the advocacy of "multiple consciousness" in jurisprudence through telling stories of the silenced. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615-16 (1990).

93. Jon Katz, *Bulletin Boards: News from Cyberspace*, ROLLING STONE, Apr. 15, 1993, at 35, 36.

94. *Id.* at 35.

95. Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*,

may hope that we, as a people, might no longer affirm acts of repression or violence without rebellion or rejection of actions so perceived.⁹⁶

But the building of a new form generates fear, which in turn can lead to suppression. Embracing chaos is sometimes necessary to preserve freedom and choice. The alternative is a life of anomic mediocrity or worse. Insofar as librarians and lawyers do their part to ensure full and unfettered deliberation and equal access, we will move that much closer to universal respect for the right to be ourselves.

65 S. CAL. L. REV. 1171, 1183 (1992).

96. Philosophers such as Hegel and Unger view human history as the development of ever closer steps toward a more ideal embodiment of subject (person) and community. See, e.g., Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 332-42 (1985).

