INTELLECTUAL FREEDOM:

A REFLECTION

by Sheila Suess Kennedy, Assistant Professor of Public and Environmental Affairs Indiana University School of Public and Environmental Affairs, Indiana University Purdue University Indianapolis (IUPUI)

Not long ago, I had a conversation with a librarian involved professionally with issues of intellectual freedom. "Sometimes," she said, "I get so tired of it. I wonder why I continue to fight." I have thought about that conversation several times. If I could do an instant replay, I think I would tell her that I know why she keeps at it. It is because it is so important.

I spent six years as Executive Director of the Indiana Civil Liberties Union (ICLU). Of all the lessons I learned during that time, the most profound was this: the future of Western liberal democracy rests on the preservation of intellectual freedom. If this statement seems extravagant, consider both the ideological basis of liberal democracy and the nature of contemporary threats to that tradition.

Our national history would have been impossible without the Enlightenment concept of the individual as a rights-bearing, autonomous being. This concept is integral to our legal system; it is the foundation upon which our nation's forebears erected the Bill of Rights. The Founders envisioned the good society as one composed of morally independent citizens, whose rights in certain important circumstances "trumped" both the dictates of the state and the desires of the majority.

Current assaults on this view come primarily, although certainly not exclusively, from communitarians of both left and right. Michael Sandel, Mary Ann Glendon, and others complain that the American emphasis on individual rights has gone too far, that it is time to readjust the balance between individual liberty and the "common good." The "common good" is presumably to be defined collectively; that is, by the majority. There is enormous appeal to this argument. In a world that seems increasingly complex, impersonal, and litigious, a world over which individuals have less and less control, the notion of "community," like "family," offers nourishment and empowerment. Who does not long, in some part of her psyche, for a warm family, friendly neighborhood, and supportive tribe, where one is valued and/or unconditionally accepted, and where everyone shares the same life goals and values? Freud suggested that the need to lose oneself in a collective identity is the most ancient, persistent, and universal force operating on the human species. The problem, of course, is that majorities can be every bit as tyrannical as solitary despots. There is no guarantee that *my* family's values will be the ones that prevail or that *my* tribe's ways will be the ones that are followed. The fundamental issue in every society is where to strike the balance between human liberty and communal norms. Ultimately, the debate comes down to a conflict between libertarian and collectivist visions of the good life.

In this war over competing views, intellectual freedom is the battlefront. Discussions of the First Amendment often proceed as if the expressive freedom provisions are separate from the religious liberty clauses. They are not. In fact, the First Amendment rests upon a magnificent unifying premise: the integrity and inviolability of the individual conscience. The First Amendment is really an integrated whole, protecting our individual rights to receive and disseminate information and ideas, to consider arguments and theories, to form our own beliefs, and to craft our own consciences. It answers the fundamental social question - *who shall decide* - by vesting that authority in each individual, subject to and consistent with the equal rights of others.

Our whole experiment with democratic governance rests on that foundation. As Alexander Mieklejohn famously observed, a nation that is afraid of an idea - *any* idea - is unfit for self-government. Implicit in the First Amendment is the legal system's concept of personal responsibility, the University's commitment to academic freedom, the moral authority of the clergy, the independence of the media, and the legitimacy of the political process.

Those who oppose free expression rarely, if ever, see themselves in opposition to the Western liberal democratic tradition. Most people who want to ban the

book or painting, or to protect the flag or the Virgin Mary from desecration, are simply acting on their belief in the nature of the public good. Censors see unrestrained freedom as a threat to the social fabric, while civil libertarians believe the greater danger consists in empowering the state to suppress "dangerous" or "offensive" ideas. Censors see no reason to protect expressions of low value and no point in protecting the marketplace for the exchange of shoddy goods. They have enormous difficulty understanding the difference between protection of the principle of free speech and an implicit endorsement of the offensive material at hand. They have little or no appreciation for the argument that once one hands over to the state the authority to decide *which* ideas have value, *no* ideas are safe.

I spent my years at the ICLU battling the usual, recurring attempts to control what others might read, hear or download. I attended a public meeting in Valparaiso, Indiana, where an angry proponent of an ordinance to "clean up" local video stores called me "a whore." I was accused of abetting racism for upholding the right of the Ku Klux Klan to demonstrate at the Indiana Statehouse. I was criticized for failure to care about children when I objected to a proposal restricting minors' access to library materials. In each of these cases, and in dozens of others, the people who wanted to suppress materials generally had the best of motives; they wanted to protect others from ideas they believed to be dangerous. To them, I appeared oblivious to the potential for evil. At best, they considered me a naïve First Amendment "purist," at worst, a moral degenerate.

My introduction to the politics of free speech really came several years before my stint at the ICLU, when I was retained as local counsel to the plaintiffs in *American Booksellers v. Hudnut* (598 F. Supp. 1316, 1984 U.S. Dist.; 650 F. Supp. 324, 1986 U.S. Dist.; 771 F.2d 323, 1985 U.S. App.; 475 U.S. 1001; 106 S. Ct. 1172, 1986 U.S.; 475 U.S. 1132, 106 S. Ct. 1664, 1986 U.S.). The case involved a challenge to an ordinance drafted by Catherine MacKinnon, a law professor, and Andrea Dworkin, a feminist author. Both are well known crusaders against pornography, which they define quite differently than the law defines obscenity, and which they argue is more harmful to women than to men. Their ordinance attempted to define as action (rather than expression) sexually explicit materials depicting the "subordination of women." Such "action" was then treated for legal purposes as sex discrimination. ("When *I* use a word," said Humpty Dumpty, "it means exactly what I *say* it means!") MacKinnon and Dworkin had shopped their proposal around the country without much success before they found eager proponents in Indianapolis.

While the courts would make short work of the ordinance, the politics of its passage was an eye-opening experience. Bill Hudnut, the mayor at that time, was, and remains, a close personal friend; in fact, I had been the Corporation Counsel (chief lawyer) in his administration. To this day, despite lengthy conversations, he does not see the implications of the ordinance he signed. Mayor Hudnut had been an active Presbyterian minister before assuming office and was simply appalled by materials that he felt degraded women. When MacKinnon and Dworkin enlisted a local female Councilor on behalf of their pet project to "protect" women, he was supportive. The Councilor, Buelah Coughenour, has not been identified with women's causes either before or after her sponsorship of the ordinance. She has, however, been supportive of efforts to restrict children's access to videos in the public libraries and has generally been an ally of the religious right. Her alliance with MacKinnon and Dworkin, widely considered to be "radical feminists," was surreal.

On the evening that the vote was taken, busloads of people from fundamentalist churches filled the Council chambers. To the eternal credit of Indianapolis' women's organizations, there was no support from local feminists. Only three people had been given permission to speak against passage: me, as a courtesy shown to a former member of the administration; Bill Marsh, a professor of Constitutional law who was then Vice-President of the ICLU; and Sam Jones, the Executive Director of the Indianapolis Urban League. Even Councilors who had great qualms about the ordinance were unwilling to stand against the sea of faces from area churches. The trouble with representative government, as a friend once bitterly remarked, is that it is representative. One after another, uncomfortable Councilors rose to "explain" their votes. My favorite came from a longtime friend, who said that although he had "great respect for Mrs. Kennedy's legal opinion, he wanted the record to show that he was "against pornography." The crowd cheered approvingly.

Most of those who voted for the ordinance knew it stood virtually no chance in court. They were willing to spend some tax dollars to defend it, in order to avoid the pain of opposing the righteous folks who had taken the time and trouble to attend the meeting. The courts did as expected. Judge Sarah Evans Barker issued an eloquent, ringing endorsement of the principles of free speech in her District Court opinion, striking down the measure. The Seventh Circuit and Supreme Court each affirmed, and the case has since become a staple in courses on free speech and Constitutional law.

In many ways, *American Booksellers v. Hudnut* is a perfect example of what the Founders feared when

they warned of "the tyranny of the majority" and the need to guard against popular passions. The majority of citizens saw the debate in very simple terms, as did my Councilor friend. One is either for or against "pornography." Quibbles about what pornography is and concerns about vagueness or overbreadth were dismissed as lawyer weaseling. Like Potter Stewart, they might not be able to define pornography, but they knew it when they saw it.

For civil libertarians, the issue was very different. We were not arguing for the value of pornographic speech, although we were more open to the possibility that pornographic expression might, in fact, have some value. The issue was — and is — our right to decide for ourselves what books we shall read, what ideas we shall consider, and what opinions we shall hold, free of government interference. Once the state asserts a prerogative to determine which ideas we may entertain, the balance has shifted from the right of the individual to the power of the government. At that point, citizens no longer have rights, but privileges that may be revoked whenever the political winds shift. For me as a civil libertarian, the issue is not which books I read; the issue is *who decides* which books I read. The Western democratic tradition literally depends upon the answer to that question.

Those of us who understand the nature of the debate over intellectual freedom in this way must contend with a formidable deficit in citizenship education. Both at the ICLU and at IUPUI, where I currently teach law and public policy, I have encountered widespread ignorance of the most basic elements of the American constitutional system. We desperately need to improve understanding of the theory of limited government and individual rights, not so that people will necessarily come to the same conclusions I reach, but so that we can at least argue about the same issues.

People try to remove materials from library shelves or the corner video store because they find the materials offensive. They try to prevent Klan marches because they disagree strongly with the hateful message of the Klan. Their arguments are against *these particular ideas.* They are not generally trying to strengthen the power of the state, nor intending to circumscribe the exercise of personal moral autonomy. Civil libertarians see those outcomes as inevitable consequences of censorship, however, so these are the issues we address. In a very real sense, it is a case of cultural warriors talking past each other.

People like my librarian friend, who see the fundamental relationship between the marketplace of ideas and self-government and who recognize the holistic nature of individual rights, simply must keep trying to make those connections visible to the general public. We must all work to raise the level of familiarity with the underlying principles of the Constitution and the Bill of Rights. We must agitate for more and better government instruction in our schools, and we must insist on more honest discourse from our political leaders and the media. We must constantly reinforce the lesson that the proper response to a bad message is not government censorship, but free citizens offering a better message.

Somehow, we must get the general public to understand that when we use the power of the state to decide what citizens may read or view, we are not censoring smut, protecting children, prohibiting blasphemy or respecting the flag. We are undermining the values that lie at the very core of our national identity.