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Leonard Hitchcock

Idaho State University, hitcleon@isu.edu

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Do You Really Want to Be a Forum?

Leonard A. Hitchcock

**Eli M. Oboler Library
Idaho State University
Pocatello, ID 83209**

Consider a Park

In a small, mid-western town, there's a park that's been there as long as anyone can remember. It's a typical city park, open to the general public, with play equipment for children, trees and grass and benches along curving paths. At one end of the park, where several paths converge on an open, graveled space, a sign informs the stroller that this area is called "The Rostrum." The sign then explains, somewhat condescendingly, that, in Roman cities, long ago, the rostrum was a speakers' stand in the city's Forum, and that the surrounding open space in this park is, itself, just such a forum, a place where citizens are invited to exchange views with one another without hindrance, in complete freedom.

As is often the case with signs, this one doesn't tell the entire truth. To begin with, the park is encircled by a fence with gates and, for reasons of public safety, is only open during the day. Naturally, public speaking at any other time is impossible. Furthermore, it turns out that would-be speakers cannot simply go to The Rostrum, step atop their soap boxes, and address the passing crowd. A permit is required. And permits are not issued simply upon request. Quite the contrary; the would-be speaker must appear before a city official whose title is "The Selector." Questions are asked the applicant about his or her background, about his or her qualifications to speak to the subject chosen, about the degree of his or her success in previous public fora appearances, about reviews of past performances. And the speech must even be rehearsed, right there in the Selector's office.

It has never been completely clear how the Selector chooses those who will receive a permit. Sometimes the official judgment seems to be that the speech's subject matter is of little potential interest to the citizenry, sometimes that the rhetorical devices are in poor taste, sometimes that the topics addressed are more than sufficiently dealt with already by the local media. Whatever the reasons, the decisions of the Selector are not open to appeal.

For those speakers who succeed in acquiring a permit, their trouble in doing so is somewhat recompensed by the city's rules regulating the behavior of the park's visitors. A speaker's audience is required to be well behaved. No loud talking, no heckling, no marching with signs, no obstreperous antics of any kind that might distract other members of the audience. Even those whose mere physical presence disturbs the listeners, like vagrants and homeless individuals, may be ushered out of the forum.

If an audience member has strong objections to a speaker, he or she may lodge a protest with the city by filling out a form. To do so satisfactorily, the offended listener must be able: 1) to establish that the speech in question was personally heard in its entirety, 2) to quote exactly those remarks that were felt to be offensive, and 3) to explain, cogently, why what was said ought not to have been publicly spoken. These protests rarely succeed in causing the city to take any action. The Selector, after all, issued a permit on the basis of careful deliberation and is a trained professional, committed to promoting the best interests of the community. The judgment of the Selector usually prevails.

It might seem that, on balance, the rules of the park favor the speaker. But that's not really the case, for any speaker's permit can be withdrawn at any time, at the discretion of the Selector. Gaining the public's ear is a privilege, it would seem, and not a right. Understandably, the public rarely notices when a permit is cancelled. One voice missing from the ongoing babble of the speakers attracts little attention.

Residents of the town have grown accustomed to the park's regulations. They even come to their defense when outsiders, claiming to know about "First Amendment Law," tell them that the Rostrum's rules are egregiously unconstitutional, that they give the city government virtual control of the forum and deny the citizenry its full right to free speech. Over the years, a standard response to such criticism has evolved. A resident now usually answers a critic in words like these: "Look, we value freedom of speech as much as the next town does. Our park rules may be different, but that's because there isn't just one kind of public forum, one single way to honor and celebrate the freedom of speech. We gave a lot of thought to the sort of forum that we wanted, and chose the one that best suited our needs. We call it, for obvious reasons, 'The Library Model.'"

Libraries, the First Amendment, and the Forum

Libraries and the First Amendment are often spoken of together, especially by librarians. In fact, librarians would have us believe that they are among the staunchest supporters of the First Amendment, dedicated to intellectual freedom and the right of all citizens to speak their minds and hear others speak theirs. Publications of the American Library Association, such as the Intellectual Freedom Manual, flourish the text of the Library Bill of Rights and describe it as the document that "serves as the library profession's interpretation of the First Amendment to the United States Constitution." (Intellectual Freedom Manual, xvii) The Library Bill of Rights itself takes a vigorous stance against all those who would censor the content of public discussion and affirms, in its first sentence, "that all libraries are forums for information and ideas." (Intellectual Freedom Manual, 57)

Kreimer v. Morristown

When the topic of the library as a forum arises, reference is usually made to the well-known, Third Court of Appeals decision in *Kreimer v. Morristown* in 1992. (Kreimer). This ruling, according to the Intellectual Freedom Manual, places "public libraries squarely within the First Amendment realm," and recognizes "that libraries have a unique position in the fulfillment of the First Amendment right to receive information." (269)

To review briefly the case, Mr. Kreimer was a homeless man who had been ejected from the Morristown Public Library because his behavior and habits of personal hygiene were judged to violate library regulations for patron behavior. He sued the library, claiming that his First Amendment rights had been denied. In the Kreimer case, the Court applied the legal doctrine of the “public forum”¹ to libraries, and declared that they were “designated” public fora. We should note that, as the case made its way through the Court of Appeals, the library argued that the First Amendment had *no relevance* to the suit. Only if there had been an incident of *ensorship*, the library insisted, would the First Amendment have come into play. The court saw things differently, expatiating upon the “right to access to information” that was implied by the First Amendment² (a right that the library community came to celebrate as the “freedom to read”). In the end, the court decided that the library’s regulations were, in fact, constitutional and that Mr. Kreimer’s rights had not been violated.

To bring public forum analysis to bear on the Kreimer case, the court drew upon Supreme Court decisions in which a typology of “public fora” had been created.³ That typology makes a strong distinction between “traditional” and “designated” public fora. Public property that qualifies as a “traditional” forum consists of properties such as parks and sidewalks that have traditionally been regarded by the public as places where the exercise of free expression should be largely unfettered and, moreover, encouraged. In such fora, government regulations that inhibit speech must not only be carefully constructed so as to avoid any discrimination based upon the content of the speech or the views of the speaker, they also must serve a “compelling governmental interest.” Moreover, they must be “narrowly focused” on the achievement of that “interest” and not affect behavior that is irrelevant to it. Together, these criteria for the constitutionality of regulations are often referred to as judicial “strict scrutiny.”

Strict Scrutiny in the Park

In the case of speakers in a public park, a regulation that forbade speeches condemning the mistreatment of poultry would, presumably, run afoul of the “content” (or “viewpoint”) test. A rule that prohibited speakers from wearing non-matching socks would also be unlikely to pass muster, however earnestly the government argued that there was a compelling government interest in the maintenance of sartorial standards. On the other hand, a rule that appealed to a compelling governmental interest in preventing damage to the hearing of visitors to the park caused by orators using bullhorns set at maximum volume, might be found acceptable, insofar as reasonable “time, place and manner” regulations are acceptable. But if a rule commanded that no park visitor should speak above a whisper, that rule would be struck down for failing to be narrowly focused on achieving the aforesaid worthwhile end.

In “traditional” public fora, the effect of strict scrutiny is that government must go to extraordinary lengths to justify any regulations that deter speech. Effectively, the government is obligated to *facilitate* the free exchange of information by the citizenry. It must neither unduly inhibit, nor manipulate the content of, that exchange. It must not impose any restrictions concerning *who* can participate or *what* a participant may choose to discuss, or *how* arguments must be formulated – in other words, any restrictions that could infringe the speech rights of those lawfully present or in any way tailor the discussion to conform to the viewpoint or opinions of the government would be forbidden.

Obviously, the park rules devised by the fictional city government described earlier fail these tests. While there may be no discriminatory rules regarding who may enter the park and *receive* speech, the right of the audience itself to speak is sharply curtailed, and the government's control of both *who* is allowed to speak and the *content* of the speech is virtually total. No "traditional" public forum could operate constitutionally under the regulations established by that city. What, then, is the "Library model" that this imaginary government claims to have adopted?

The Library Model of a Forum

It seems plausible to assert that the Rostrum and the typical public library exhibit many similarities. The Rostrum's speakers are equivalent to the library's books and magazines. Speakers and library materials are selected by government employees in accordance with established professional standards. Visitors to the Rostrum are like visitors to the library. In both cases, they are admitted freely and are allowed to "listen to the speakers" (i.e. read books and magazines, in the case of the library), as long as they behave themselves in such a way that they do not interfere with other visitors' use of the facility. They, themselves, have no rights as speakers (or sign-wavers or picketers or demonstrators). If they dislike a speaker or book that the government has chosen they may file a complaint, according to an established procedure, asking that it be banned from the premises. Yet the government itself can silence speakers (or discard materials from the library's collection) at its discretion.

That the Rostrum's rules were modeled on those of the library is therefore credible. But how can either the Rostrum or a public library be a kind of public forum when each differs so dramatically from the "traditional" forum? Or, to ask the same question in a different context, how could the court in *Kreimer* reach the conclusion that a library belongs in the "forum" category?

How was the Kreimer Decision Reached?

The *Kreimer* court concluded that a library was a "designated" public forum. This type of forum, as defined by the Supreme Court in *Perry Education Association v. Perry Local Educator Assn.* (*Perry*), is a forum intentionally created by the government to serve as a locus for information exchange. Unlike the traditional forum, the government has considerable discretion in determining how this kind of forum operates, including *who* may utilize it, and what *subjects* can be discussed there; it may also choose to close the forum, if it so wishes. However, even if the government chooses to specify the category of people who may make use of the forum, and the topic that may be discussed, "strict scrutiny" still applies to any further regulations on what speech takes place in the forum. That is to say that the government may not discriminate against any point of view or exclude speakers based upon the content of their remarks on allowed topics.⁴

In *Kreimer v. Morristown*, the court explicitly based its categorization of the public library on the Supreme Court's analysis in *Perry*. The court reasoned as follows: the library is not, like a public park, a venue that "immemorially"⁵ has served as a forum; rather, it has been created by the government with the clear intention of being a place for expressive activity.

Therefore it cannot be a traditional public forum, but it fits the description of a “designated” public forum.

What is the intended “nature” of the forum, the court then asked itself. No restrictions are placed upon topics subject to discussion, or upon those who are admitted to utilize the facilities. The citizenry as a whole is invited in, without discrimination. As to the specific character of library usage, the court quotes an earlier decision in which a library is said to be “a place dedicated to quiet, knowledge, and to beauty.”⁶ It adds its own judgment that the specific purpose of a library is to aid “in the acquisition of knowledge through reading, writing and quiet contemplation. The Library has not opened its door for the exercise of all First Amendment activities” (Kreimer, 1260). The library has a constitutional right to regulate usage in accordance with its intended purpose, as long as such regulations, affecting time, place and manner of speech, do not conceal or invite viewpoint restrictions. The regulation that Mr. Kreimer violated had no such bias; it merely prohibited patrons from talking loudly, staring at other patrons, or otherwise being an offensive distraction to those around them.

But what about the other participants in this forum, the authors and their books, who are the only “speakers” that the forum allows? Are they all welcomed to the forum without discrimination as to content and viewpoint? The court fails to ask itself this question, probably because it didn’t need to do so in order to settle the case before it. If it had chosen to look into this matter, it would have encountered a decidedly awkward problem: in all “designated” forums, strict scrutiny is required. The process whereby “speakers” are selected for the library forum therefore is subject to judicial review. The court, in other words, would have found itself put in the position of overseeing the selection of library materials, at least in the sense that it could be called upon to adjudicate suits involving such selection. Tacitly, the court rejected this role, “deferring” to the librarians’ expertise as selectors of the forum’s “speakers.”

Kreimer Corrected

The incongruity of a public forum in which all the speakers are chosen by the government did not seem to register with the Third Circuit Court in *Kreimer v. Morristown*, and subsequent court decisions utilized it as a precedent. Then, a Supreme Court case remedied the situation. The now notorious case of *United States v. American Library Association (U.S. v. ALA)*, otherwise known as the CIPA case, established that public libraries were neither traditional nor designated fora. They were, rather, in the puzzling phraseology of legal usage, “nonpublic fora,” i.e. places where expressive activity is, indeed, intended and allowed to take place, but where the government may regulate speech in a “reasonable” manner (not subject to “strict scrutiny), as long as it does not exercise viewpoint bias.

What was at issue in *U.S. v. ALA* was precisely the materials selection process that had been ignored in *Kreimer*. The Supreme Court began by echoing the Third District Court in describing a library’s mission. It used the words of the Library Bill of Rights to assert that the mission of the library was that of providing “books and other library resources...for the interest, information, and enlightenment of all people of the community the library serves,”⁷ but it then looked closely at the nature of collection development and selection and observed that “to fulfill their traditional missions, public libraries must have broad discretion to decide what material to

provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide universal coverage. Instead, public libraries seek to provide materials that would be of the greatest direct benefit or interest to the community.” (U.S. v. ALA, 204) The Court cited, as an important precedent, an earlier Supreme Court case involving a political candidate who had brought suit against an Arkansas public, non-commercial station for its refusal to include him in a series of televised debates (Arkansas). In that case, the Court had reasoned that the station had an established right to exercise legitimate editorial control over its programming, hence to choose who would and who would not appear in the debate and that it had violated no First Amendment rules that did apply, insofar as it had not excluded the candidate in question because it disagreed with his opinions. Another precedent cited was National Endowment for the Arts v. Finley (NEA) a case in which the Court upheld the right of the NEA to make content-based decisions regarding grants. Forum analysis, the Court found, would “conflict with NEA’s mandate...to make esthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support.” (U.S. v. ALA, 205, internal quotes omitted).

The Court then drew the following conclusion: “Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.” (U.S. v. ALA, 205) Applying this conclusion to the case at hand, i.e. the issue of whether the congress could legally require filtering of Internet access by libraries that receive federal support, the Court said “A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.” (U.S. v. ALA, 206)

No doubt many librarians would respond to this last dictum with outraged denial. They would insist that that’s exactly why they do collect books: to create a public forum for authors. Article Two of the Library Bill of Rights seems to demand exactly that. Yet would those same librarians be willing to accept the consequences of operating a legally-defined public forum? Would they, in other words, accept judicial oversight of their selection decisions?

A Dilemma: Conflicting Motivations

Librarians seem to find themselves in something of a dilemma. On the one hand, they resent any attempt to interfere with their right to determine the contents of their collections. They may accept a suggestion for a new book from a patron, but the patron is expected to understand that he or she has the right only to suggest, not to compel, a purchase. Gift books, too, are accepted only if the library sees fit to do so. Patrons who suggest the withdrawal of materials are viewed with self-righteous irritation. If they carry their protest beyond the circulation desk, they are required to jump through hoops that would frustrate a circus dog and, if they still persist, they are publicly belabored with the commandments of the Library Bill of Rights in front of the library’s governing board. At the same time, librarians believe that they have the right to “weed” their collections without seeking approval from anyone.

It seems very unlikely, therefore, that if book selection were subjected to judicial scrutiny, such oversight would be any more warmly received than the congress's insistence that filters be installed on workstations, or a fundamentalist sect's campaign to rid the collection of the Harry Potter books. Of course, libraries welcome the support of the court when they are fighting attempts at censorship, but the thought that courts might be called in to judge every selection decision would not be greeted gladly.

On the other hand, libraries seem to genuinely want to be fora. They have always imagined themselves as strongholds of free speech, as islands of informational and viewpoint diversity in a media sea of depleted and manipulated opinions. They regard themselves as the quintessential market places of ideas, the parliaments from which truth emerges in the clash of opinion and argument. The slogan of librarians is: Let all voices be heard! And in the book stacks and periodical racks of libraries everywhere, those innumerable voices do, indeed, wait to speak to inquiring readers.

Between librarians' desire to control, and their commitment to promoting First Amendment values, there is not only an inevitable tension, but also the potential for hypocrisy. Librarians seem to wave the banner of free speech from behind battlements that they have erected to prevent outsiders from making their voices heard. The ambivalence of their stance may not be generally noticed, but it constitutes, I believe, a threatening fault line beneath the foundations of the library.

If You Really Want to be a Forum, Try to Act like One

I do not wish to suggest that an ultimate reconciliation of these two inclinations is easily achieved or perhaps even possible. I do believe, however, that libraries could reduce the degree of incompatibility between their actions and their declared principles, and could do so without catapulting themselves into the legal category of public fora and suffering the consequences of doing so. They could, for example, demonstrate their commitment to being a genuine forum, i.e., a real place for public discussion, simply by *giving their patrons a voice*.

Within the reach of every library with an online catalog is the ability to create a database linked to the catalog in which the library's patrons could comment upon books in the collection and those comments be made publicly accessible to all catalog users. Technically, this is a relatively simple thing to do. Each catalog record could contain a link labeled "Comment on this Book." A patron that has strong feelings or opinions about the book could click on that link and be given a screen containing a comment form. That form would replicate the bibliographic information for the book and provide space in which the patron could type a comment and provide his or her name. When the patron clicked on a "submit" button, the completed form would be sent to a file from which a library staff member would retrieve and review it (primarily for the presence of speech which is not constitutionally protected). When the comment had been reviewed and accepted, the librarian would add another clickable link to the book's catalog record labeled "Read Patron Comments." That link would take any curious patron to the text of the comment on a separate web page.

This method of giving a voice to the patron solves at least one traditional problem: compatibility of the form of expression with the nature of the forum. In previous cases where the court has discussed libraries as forums it has always accepted the premise that vocal speech could not be reconciled with the quiet environment that is essential to the intended function of the library⁸. Written “speech” would clearly not have this drawback.

It might be argued that this scheme would bring about an undesirable “labeling” of library materials. In other words, patrons would encounter, in the catalog, biasing commentary that, even if not authored by the library staff, had been encouraged and transmitted by it. The argument has merit, yet it is noteworthy that librarians’ attitudes toward ALA’s labeling doctrine seem to be undergoing some changes. A new version of the Library Bill of Rights’ “Interpretation” on labeling has been approved by ALA and will appear in the next edition of the Intellectual Freedom Handbook (Labels). This revision was prompted, one supposes, by such developments as the now-common inclusion in catalog records of dust jacket blurbs—texts that are hardly unbiased appraisals of the books that they discuss. Though the revised version does not, in my view, provide much clarification of the distinction between permissible and impermissible catalog notes, I would suggest that book commentary that is clearly understood to represent individual patrons’ views (and probably conflicting ones at that) seems unlikely to impair the ability of other patrons to exercise their own judgment concerning library materials.

What might be the effects of offering to patrons the opportunity to speak via the online catalog? It is commonly said that patrons who heartily dislike a book in the collection and bring that book to the attention of a librarian often want nothing more than to complain to someone about it. Yet library policies for book-challenge channel such displeasure into a request for the book to be removed from the collection. If one enabled patrons to make their complaints publicly, might not the existence of such a forum for patron opinion reduce the likelihood of requests to censor? And in any case, don’t patrons have a right to express their opinions about the books and magazines that we librarians supply for them?

I would argue that if libraries continue to see themselves as essentially classrooms without teachers, where the librarians choose the informational materials and the patrons are simply invited to take them or leave them, then the true spirit of the forum will never exist in the library. The Internet has revealed that ordinary citizens crave a voice. In innumerable personal web pages and blogs, people are demonstrating their desire to be more than passive consumers of others’ words; they are eagerly grasping the opportunity to speak in their own voices. But in the library, a self-proclaimed exemplar of the forum, they are given no such opportunity. In the library, silence still reigns.

A Forum is a Forum is a Forum?

ALA says that a public library is a forum, but, in many ways, a library more closely resembles an information-dispensing government agency like the local U.S. Department of Agriculture’s Service Center than it does Hyde Park Corner. Does ALA use the term “forum” in some restricted sense? It certainly doesn’t do so explicitly. On the contrary, the Intellectual Freedom Manual takes every opportunity to emphasize, when speaking of intellectual freedom, not just the freedom to receive information but the freedom to deliver it. In one of its

interpretations of the Library Bill of Rights, ALA quotes Article 19 of the U.N.'s Universal Declaration of Human Rights, which states that "Everyone has the right to freedom of opinion and expression...[including the right]... to seek, receive and impart information and ideas through any media.," and then declares that this principle "should be applied by libraries and librarians throughout the world." (Intellectual Freedom, 194) This doesn't suggest to me that ALA really believes that the realm of free expression is conveniently divided into speakers (i.e. writers of books), and listeners (i.e. library patrons), and that the library is nothing more than a one-way "forum" where the first group speaks to the second.

Yet libraries seem to be just that. The Supreme Court, which appears to pay closer attention to what libraries really are than ALA does, classifies them as "nonpublic fora" just as, presumably, it would classify USDA Service Centers. This classification carries with it so restrictive a definition of a forum that one hesitates to regard nonpublic fora as fora at all. Of course, the library community gave ample evidence that it disagreed with the final judgment of the Supreme Court in the *U.S. v. ALA* case. Was that because it rejected the narrowness of the "nonpublic" forum categorization that led to that decision? Perhaps so, yet it may be that the library community is quite content to see itself just as the Supreme Court sees it, and simply doesn't like being interfered with when it comes to collection development decisions. And perhaps it actually fears the possible loss of control over its collections that might result from opening libraries to public speech. On the other hand, it might wish to be true to its professional proclamations and welcome the opportunity to make the library a place where real dialogue with the public takes place. If so, it might refuse to accept the claim that libraries are fora simply because they say they are. It might choose to believe, instead, that "a forum is, as a forum does," and act accordingly.

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Notes

1. The phrase, "public forum" originated not with a court decision but with a seminal article by legal scholar, Harry Kalven (Kalven). The interpretation and utilization of public forum doctrine has subsequently been discussed by legal scholars frequently, and at great length. The majority of articles have been critical of the way in which public forum doctrine has been formulated and employed in the courts. This group of scholars tends to favor an activist role for the court in promoting the exercise of First Amendment rights. It sees the "categorical" approach that public forum analysis entails as failing to address the real free speech issues that have been brought before the courts. Among the many important contributors of this ilk are: Stone; Farber; McGill, Cramm; Fischer. Lillian BeVier, on the other hand, has vigorously defended the doctrine in two articles (BeVier). She supports a more conservative view of the court's proper role.

2. "...the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas... the right to receive information is not unfettered and may give way to

significant countervailing interests...however, this right...includes the right to some level of access to a public library...” (Kreimer, 1255)

3. The first extensive formulation of the types of public fora occurs in *Perry*. That formulation drew primarily upon *Hague v. CIO* for the definition of a traditional public forum, and upon *Widmar v. Vincent* for the description of designated and limited public forums.

4. “...although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum; reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.” (*Perry*, 46)

5. This is the word used in the oft-cited phrase in *Hague v. CIO* where streets and parks are said to be “immemorially...held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” (*Hague*, 515)

6. Quoted from *Brown v. Louisiana*. (*Brown*, 142)

7. Quoted from the first article of the Library Bill of Rights (*Intellectual Freedom Manual*, p. 57).

8. E.g. in *Kreimer*, the court stated that “...the exercise of other oral and interactive First Amendment activities is antithetical to the nature of the Library.” (*Kreimer*, 1261)