

## **Actores No Estatales y Multilaterales: examinando roles y responsabilidades**

Richard Calland

En años recientes se han dado avances considerables en el ejercicio del derecho al acceso a la información pública, con la promulgación de muchas leyes de acceso a la información alrededor del mundo y un reconocimiento generalizado de la importancia del principio de transparencia para el fortalecimiento de otros derechos, la profundización de la responsabilidad gubernamental y el fortalecimiento de la intención determinada y la “voz” ciudadanas. Esta tendencia positiva ha ocurrido en un contexto en el que ha habido una transferencia del poder público hacia el sector privado, ha crecido la importancia de la noción de responsabilidad social corporativa y ha aumentado la participación de las instituciones multilaterales en la gobernación global y el desarrollo de políticas públicas de desarrollo.

Por lo tanto, se está dando una importante conversación para encontrar la mejor manera de aplicar el principio de transparencia a los actores no estatales—en lo que se refiere a actores multilaterales y corporativos, incluyendo las instituciones financieras internacionales. Hay una serie de preguntas que ameritan un debate serio. Primero, existe una pregunta legal: ¿se puede aplicar el derecho de acceso a la información a los actores no estatales? Antes de responder esta pregunta es necesario distinguir y delinear los dos grupos de actores, pues el argumento tiene matices diferentes para cada uno de ellos. La mayoría de las entidades multilaterales son instituciones públicas. Es decir, aunque tengan nombres que sugieran una orientación hacia el sector privado, como por ejemplo La Corporación Financiera Internacional (IFC, por su siglas en inglés) que hace parte del Grupo del Banco Mundial y que fue establecida por estados que además son sus “dueños”, es una institución pública que debería estar sujeta a los mismos principios de responsabilidad y transparencia públicas.

Aunque las entidades multilaterales existen en una especie de limbo en la ley internacional, y su posición legal precisa es tema de discusiones considerables, se puede hacer un argumento sólido proponiendo que la ley internacional se aplique a dichas entidades. De hecho, existe actualmente un importante precedente (el caso de Chile en la Corte Interamericana de Derechos Humanos) para decir que el derecho al acceso a la información pública está contemplado por la ley internacional. Por ende, en el caso de las entidades multilaterales y especialmente las instituciones financieras internacionales, el tema a definir es cómo lograr el nivel de transparencia apropiado. Si bien es cierto que algunas instituciones financieras internacionales han introducido políticas de divulgación de información, existen amplias diferencias en los estándares de las mismas, y puesto que estas políticas son voluntarias, se presentan serias dificultades a la hora de hacerlas cumplir, ni qué decir de la independencia y eficacia de los procedimientos de apelación.

El tema de la transparencia en relación con las corporaciones es un poco más complicado, y probablemente implica para muchos un salto conceptual mucho más difícil. El sistema de democracia liberal y capitalista que prevalece en estos momentos está construido, al

menos parcialmente, sobre la base de la protección al capital privado. La noción de lo “privado” genera un aura que para muchos es difícil de penetrar. Lo “privado” es “privado”, y por consiguiente debe permanecer en secreto. El tema de la divulgación debe ser únicamente la decisión de los dueños de la información *privada*, y no se debe entender en términos del derecho al acceso. Este, por lo menos, es el argumento.

Pero las cosas han cambiado muchísimo durante los últimos 20 o 30 años. Primero que todo, hoy en día las corporaciones están sujetas a un sinnúmero de exigencias de divulgación de información, por lo general resultantes de la regulación para proteger al consumidor—que van desde obligaciones en el etiquetado para los proveedores de alimentos y supermercados, pasando por las pruebas que se les exigen a las compañías farmacéuticas y llegando hasta la información de salud y seguridad de aerolíneas y fábricas. Segundo, muchas de las funciones “públicas” que solían llevar a cabo las entidades estatales son ahora realizadas por compañías privadas—luego de un auge a nivel mundial en las privatizaciones y contrataciones externas. Tercero, se ha dado un movimiento de la sociedad civil que es cada vez más poderoso y que ha presionado, algunas veces de forma muy eficaz, para acabar con el secreto en la información corporativa—la campaña Publish What You Pay (Divulgue Cuánto Paga) es un claro ejemplo de esto. Cuarto, esto a su vez ha conducido a iniciativas innovadoras que incluyen múltiples partes interesadas, como la Iniciativa para la Transparencia en las Industrias de Explotación Minera. Estas iniciativas buscan construir un consenso entre los actores principales—tanto estatales como no estatales—en torno a cuál es la información que se debe divulgar, quién debe hacerlo, para quién, y cuándo y cómo. Y por último, algunos regímenes legales visionarios recientes han hecho del acceso a la información en poder de entidades privadas un derecho constitucional y estatutario según el cual el acceso es *necesario para el ejercicio o la protección de algún otro derecho*.

Entonces la gran pregunta no tiene nada que ver con decidir si la información “privada” debe estar sujeta al principio de divulgación en nombre del interés del público—puesto que esta pregunta ya se respondió—sino más bien con determinar cuál es la información que debe estar sujeta a dicho principio. En otras palabras, no es mucha la diferencia con la información pública. Ya se cruzó el Rubicón; la verdadera pregunta que nos tenemos que hacer ahora es, ¿hasta dónde debemos llegar con todo esto?

Este es el resumen de las preguntas clave para la deliberación:

1. ¿Quién debe estar cobijado bajo una ley de acceso a la información o una política de divulgación y a través de qué medios y mecanismos?
2. ¿Cómo se debe establecer el principio de divulgación transparente en relación con la información en poder de actores no estatales para que obtenga el mismo estatus del derecho al acceso a la información pública?
3. ¿Hasta qué punto es necesario diferenciar entre distintos tipos de actores no estatales—corporaciones por un lado y entidades multilaterales por el otro? ¿Qué efecto tienen estas diferenciaciones en el diseño de instrumentos legales que se deberían aplicar?

4. ¿Cómo se puede motivar a los actores no estatales para que se involucren en el proceso cuando estos se sientan amenazados por una ley de divulgación o una política pública del mismo tipo?
5. ¿Qué papel juegan las iniciativas de transparencia sectoriales (EITI, iniciativas de transparencia presupuestal, MeTA)? ¿Se deben fomentar este tipo de iniciativas? ¿Qué se puede aprender de estas iniciativas sectoriales para aplicarlo en regímenes integrales?
6. ¿Cómo se puede asegurar la continuidad y la constancia entre las políticas y los requisitos de las agencias multilaterales?
7. ¿Cuál es la mejor forma de garantizar que el “derecho” al acceso—ya sea voluntario o estatutario—se haga cumplir a fin de que tenga sentido para la persona en busca de información?
8. Y con base en el punto anterior, ¿cuál es la mejor manera de garantizar el cumplimiento del sector privado, los donantes bilaterales, las instituciones financieras internacionales, y las ONGs?



## **Grupo Tres**

### **Actores No-Estatales y Multilaterales: Examinando Roles y Responsabilidades**

#### **Lista de Participantes**

*Facilitador: Richard Calland*

*Relator: Patrick Schmidt*

Emma Back  
Ana Bellver  
Matt Bigg  
Lawrence Bropleh  
Chad Dobson  
Ronald Krall  
Toby Mendel  
Carlos Monge  
Tavinder Nijhawan  
Edetaen Ojo  
William Orme  
Nana Oye Lithur  
Marta Oyhanarte  
Suchi Pande  
Graeme Ramshaw  
Atila Roque  
Marta Sacasa  
Emmanuel Shears-Moses  
Ousmane Sidibe  
Dario Soto-Abril  
Tom Susman

conclusion. Feiser lists the seven approaches thus, from the most favorable to public access to the least favorable (Feiser 2000:864):

The nature of records approach (six states): allowing access to records as long as the records pertain to some aspect of government;

The public function approach (ten states): allowing access when the private entity is performing a government function;

The totality of factors approach (six states): allowing access as long as the presence of certain factors outweighs the absence of other factors (such as public funding, control, independence, etc.);

The public funds approach (six states): limiting access to those cases where the requisite level of public funds is present;

The public control approach (one state): limiting access to those cases where the requisite level of government control is present;

The possession approach (one state): limiting access to those cases where the public entity is in possession of the documents;

The prior legal determination approach (four states): limiting access to those cases where there has been a legal determination (statutory or constitutional) that the entity should be subject to access.

30. Sweden, USA, Norway, France, Australia, New Zealand, Canada, Denmark.

31. Section 2(3), Act on Free Access to Information and Amendments of Certain Acts, 2000.

32. Section 4(5), Act on the Openness of Government Authorities, 1999.

33. Calland and Tilley, *The Right to Know*, 109.

34. *Andrew Christopher Davis vs. Clutchco (Pty) Ltd.*, in the High Court of South Africa, Cape of Good Hope Provincial Division. Unreported; judgment: June 10, 2003.

35. *Ibid.*, at page 16 of the judgment.

36. Halton, Chiodo and D. Davis, "The Application of the 1996 Constitution in the Private Sphere," *South African Journal on Human Rights* 13 (1997): 44.

37. Danwood Chirwa, "Non-state Actors' Responsibility for Socio-economic Rights: The Nature of Their Obligations Under the South African Constitution," *ESR Review* 3 (3) (2002) (University of Western Cape, Community Law Centre), [http://www.communitylawcentre.org.za/esr/esr2002/2002nov\\_nonstate.php#nonstate](http://www.communitylawcentre.org.za/esr/esr2002/2002nov_nonstate.php#nonstate).

38. Roberts, "Structural Pluralism," 29.

## Chapter Eight

# The Struggle for Openness in the International Financial Institutions

Thomas Blanton

One of the greatest challenges to democratic governance in the globalized world lies in the growing gap—the "democratic deficit"—between the power of the international organizations to affect human lives throughout the planet and the power of the people so affected to exercise any control over those institutions. International organizations, from the World Bank to the International Monetary Fund (IMF) to the North Atlantic Treaty Organization (NATO), have grown dramatically in power and scope since they were designed decades ago. The World Bank has more than doubled its annual commitments since 1979 and now lends in more than 100 countries, including the previously off-limits territory of the former Soviet Union. The other development banks have emulated it in the growth of their own regional portfolios. The World Trade Organization (WTO) replaced the earlier General Agreement on Tariffs and Trade in 1995 with a more restrictive set of rules and binding dispute settlement

procedures. The end of the fixed exchange rate system in the 1970s and the debt crisis of the 1980s changed the International Monetary Fund from the world's exchange rate fixer into a key provider of development assistance as well as ultimate arbiter for many countries of whether international capital will be available at all. After 1991, the North Atlantic Treaty Organization expanded to take in the former Warsaw Pact countries of Eastern and Central Europe, and now has troops on the ground in Afghanistan. But the governance structures of these international institutions have not changed to reflect their new size, power, and responsibilities.

At the root of the issue is the genealogy of the international financial and trade institutions (IFTIs) and the intergovernmental organizations (IGOs). The former descend directly from central banks, which even in the most democratic countries tend to be the least directly accountable governance institutions. The latter derive from alliances of nations with different governance systems, which tended to leave each IGO with a level of accountability equal to the lowest common denominator of its members. In both cases, diplomatic confidentiality served as the norm for communications among nations that established these institutions; such norms—although somewhat eroded—continue to shroud them today.

Discussion of the resulting “democratic deficit” is no longer limited to the protest movement that gave the place names Seattle and Genoa significance, both as a generic antiglobalization reaction and as a more sophisticated challenge to the legitimacy of international institutions.<sup>1</sup> In fact, these institutions face a legitimacy crisis, within which the problem of secrecy is the threshold issue and perhaps the most promising opportunity for change. One cannot underestimate the ameliorative effect of embarrassment, or as this book's editor has termed it, “regulation by revelation.” Such exposure has compelled the IFTIs in particular over the past fifteen years gradually to expand the documentation available to the public and to improve their communication with stakeholders and other target groups. In fact, the public relations and publications functions of international institutions may well be the fastest growing such bureaucracies in terms of budget and employee positions.

But critics allege that the new transparency more resembles a sophisticated publications scheme than an actual “revolution” in accountability. In general, IGOs find meaningful transparency a hard

sell to their member states. At the World Bank, for example, some of the larger emerging-market countries have proved particularly resistant to calls for greater transparency about their World Bank-funded projects. Now that they are becoming major players in the world, they do not want international institutions in which they have relatively little voice to decide for them what information is to be disclosed.

Even so, there are at least four reasons to believe that more fundamental change may be possible—if civil society seizes the opportunity, and the institutions themselves internalize the need for change. First, what was once a marginalized, placard-expressed, protester critique of international institutions' secrecy and lack of accountability has risen to the level of conventional wisdom. When the dean of Harvard's Kennedy School of Government compares the IFTIs to “closed and secretive clubs,” the European Union's commissioner for external affairs (the former chair of Britain's Tory party) pronounces in passing that international institutions “lack democratic legitimacy,” and the World Bank's former chief economist describes increased openness as “short of a fundamental change in their governance, the most important way to ensure that the international economic institutions are more responsive to the poor, to the environment [and] to broader political and social concerns”—one sees the makings of an emerging elite consensus on the problem and the potential role of greater openness in addressing the “democratic deficit.”<sup>2</sup> In this formulation, openness becomes the next best thing to democratic governance, and when it is unlikely because those in control are unlikely to give up power, transparency will serve as the most important alternative control mechanism.<sup>3</sup>

Second, as a result of outside pressure and the emerging conventional wisdom, international institutions themselves are acknowledging, at least rhetorically, the need for greater openness, and in some cases, have actually achieved significant progress toward more transparency. Each of the multilateral development banks, for example, has promulgated formal policies on access to their internal documentation, and a wide variety of records that were previously secret are now routinely provided to the public—although host government veto power and ingrained bureaucratic self-preservation instincts still prevent the routine publication of the most controversial information. Starting in 1999, the almost simultaneous emergence of the left-wing anti-neoliberalism critique featured in the Seattle and

Genoa demonstrations, among others, and the right-wing pro-market critique offered by the Republican-dominated U.S. Congress and its Meltzer Commission about the banks and the IMF, pointed toward greater transparency as one of the few strategies that addressed both wings of the debate.<sup>5</sup> It certainly was not lost on the professional staff of the IFTIs that the IMF and World Bank's so-called "Washington consensus" model of market-driven economic development required free flows of information to make markets work—thus adding efficiency arguments to the moral and political critiques by activists. The real importance of these developments, however, is that the pro-openness rhetoric from inside the institutions and formal disclosure policies provide extensive leverage points for activists willing to test specific instances of secrecy and to pursue an "inside-outside" strategy of working with internal reformers and external watchdogs.<sup>6</sup>

Third, as many of the case studies in this book make clear, civil society organizations around the world have seized on openness as a threshold goal in struggles over the whole panoply of social issues, ranging from the environment to AIDS to poverty reduction to corruption. In India, for example, as Shekhar Singh's chapter describes in detail, the Mazdoor Kisan Shakti Sangathan (MKSS) grassroots movement based in Rajasthan began in 1990 with a focus on securing the legally required minimum wages for poor farmers and rural laborers, but soon realized that access to official records was key not only to that goal but also to preventing corruption and enforcing a connection between government expenditure and human need.<sup>7</sup> It was no coincidence that the leading international network trying to address corruption issues took as its name "Transparency International."

Fourth, the past decade witnessed an extraordinary international movement for freedom of information, including successful campaigns for national FOI laws in more than thirty countries. While there is enormous variation in the effectiveness of these laws and major difficulties remain in the implementation of such rights in transitional democracies with limited rule of law, one hallmark of the campaigns has been their attentiveness to other national models and their outreach for international connections and support. In the process, international FOI campaigners have identified the problem of IFTI and IGO secrecy as a major priority for future work, and have begun reaching out beyond the traditional FOI community to NGOs and civil society activists experienced in the various IFTI

accountability efforts. Over time, these new networks are likely to develop even more dramatic reform proposals for openness and accountability in the international institutions, ranging from potential international treaties as an overarching framework based on human rights arguments to notice-and-comment requirements for projects and policy changes.<sup>8</sup>

This chapter provides a brief and necessarily selective history of the struggle for openness in the international institutions, a discussion of the founding secrecy norms and their erosion over time, summary descriptions of a few of the more important battles and campaigns in that struggle, an analysis of current transparency policies and institutional structures within the institutions, an overview of current issues and debates, and an outline of the two most likely areas for future transparency developments—the growing interest and role of parliamentarians, and the potential for restraining the power of international organizations through the development of global administrative procedures such as notice-and-comment. One major limitation derives from the limitations of the available scholarly and popular literature on transparency in the international institutions, that is, the preponderance of focus on the World Bank rather than on the regional development banks, the IMF, the WTO, NATO, or others. While the latter do feature in a number of significant studies, and the chapter draws on that material for illustrative purposes, it is the World Bank that has occupied the central place in the protest movements of the past twenty-five years as well as in the international openness reforms of the past decade.

### The Roots of Secrecy in International Institutions

Diplomats, central bankers, generals, and corporate lawyers founded the international institutions that exercise power in the globalized world today. It is no wonder that the habits of confidentiality ingrained in these men (and they were almost all men) became the ethos of the institutions they started. Government-to-government discussions in those days were supposed to stay secret for fifty years or more after they took place, and freedom of information law existed only in Sweden and in the former Swedish province of Finland (for reasons peculiar to bourgeois-versus-noble competition in the

late 1700s). Over the years since World War II and its immediate aftermath—the incubator period for the global order—those founding conventions of confidentiality eroded in the face of scandal, political challenge, and efficiency arguments.

The first to lose their luster were the diplomatic norms; central banker imperatives took longer, and both still persist in varying degrees of force. Diplomatic theorist Hans J. Morgenthau wrote in 1954 about the “vice of publicity” in diplomacy, and multiple other commentators have testified to the “ethos of confidentiality” in intergovernmental affairs.<sup>17</sup> The U.S. Supreme Court commented in 1936 that “The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”<sup>18</sup> Even Justice Stewart, in his concurring opinion in the Supreme Court’s 1971 decision not to enjoin publication of the leaked Pentagon Papers, wrote, “It is elementary that the successful conduct of international diplomacy . . . require[s] both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept.”<sup>19</sup>

But the Pentagon Papers represented a turning point for diplomatic secrecy. Secretary of State William Rogers had entered an affidavit saying that foreign diplomats had specifically told him relations would be damaged by the disclosures in the papers, but then the government overreached. At a key appeals hearing, the government presented a sealed affidavit enclosed in three sealed manila envelopes, one inside the others, all three within a double-locked briefcase; the affidavit explained how certain cable intercepts in the papers showed that the United States had broken the North Vietnamese codes. One of the temporarily enjoined journalists sitting with the *Washington Post* legal team, reporter George Wilson, “stunned everyone by pulling out of his back pocket a verbatim record of the intercept, in an unclassified transcript of Senate Foreign Relations Committee hearings.”<sup>20</sup> Years later, the Solicitor General who argued for the government in the Pentagon Papers case concluded that the arguments for diplomatic secrecy were vastly overstated: “I have never seen any trace of a threat to the national security from the publication. I have never even seen it suggested that there was such an actual threat.”<sup>21</sup>

The U.S. executive branch continues to assert diplomatic secrecy and to take a maximalist position, but with mixed success. For

example, in 1999, the Department of State opposed disclosure of a British consul’s letter related to an extradition case, arguing that “it is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. . . . Diplomatic confidentiality obtains . . . even with respect to information that may appear to be innocuous.”<sup>22</sup> The letter involved was so innocuous, however, that the consul had previously disclosed its contents to the plaintiff, unbeknownst to all involved, and the government, to its consternation, had to moot the case. As this case suggests, today there coexist uneasily both the proof of persistence of the secrecy norm (most prominently in the imposition by NATO of its information security policies onto new members, helping state secrecy trump new freedom of information laws)<sup>23</sup> and previously unthinkable expressions of the norm’s erosion (the CIA’s National Intelligence Council carried out its three most recent fifteen-year threat assessments in a series of unclassified workshops and a series of unclassified final reports posted on the Web).<sup>24</sup>

Similar erosion is under way for secrecy arising from the norm of central bank confidentiality. Perhaps the classic expression of the central banker attitude came from U.S. Federal Reserve Board chairman Arthur Burns Jr. in a 1976 speech reacting to the U.S. Freedom of Information Act and what he called a decade of “profound changes in the attitudes of Congress, the courts, and the public generally towards ‘secrecy’ in government.” Under the title “The Proper Limits of Openness in Government,” Burns said, “It has been my purpose to question the premise that disclosure is a desirable end in and of itself. I particularly question the premise that disclosure is the cure for bad government.” He cited the tradition of “elaborate safeguards” in bank examination “to protect the privacy of bank customers and to preserve public confidence in individual banks and the banking system as a whole.” He noted with approval that “Very few of the world’s central banks regularly inform their national legislature of their plans for the future course of monetary policy” and argued that “premature disclosure” of Fed strategy would produce “greater short-run volatility in interest rates” and “exaggerated shifts in market expectations,” thus making “speculators” the “chief beneficiaries of immediate disclosure.” Most troubling to Burns was “the prospect



that Board deliberations prior to decision may be opened to public scrutiny," since that would convert reasoned debate into "theater."<sup>77</sup> Each of these arguments has been challenged in the years since, with nonsecretive policy alternatives put forward to accomplish the same ends, sometimes more effectively or efficiently. For example, the U.S. Congress decided that bank examination secrecy was less effective than deposit insurance in preventing runs on banks, and passed laws forcing transparency on bank practices such as "redlining" (discriminatory mortgage lending), money-laundering, and savings-and-loan accounting. The U.S. courts have reduced secrecy over bank customer data and taxpayer information by ordering disclosure in aggregate formats, stripped of personal identifiers, but allowing researchers to assess bank examiner and even IRS audit rates by income levels, geographic regions, job categories, and industries, and thus hold regulatory bodies far more accountable.<sup>78</sup> The most prominent claim by Burns—that releasing more information about deliberations of the Federal Reserve would benefit only the speculators, the insiders, and thus contribute to volatility in the markets—has largely been demolished by the school of information economics, with studies showing more information from regulatory bodies actually stabilizes the markets and creates more of a level playing field, and that information asymmetries are the real problem underlying bank runs, capital flights, and crashes.<sup>79</sup> As the Nobel Prize-winning economist Joseph Stiglitz has commented on the International Monetary Fund, "The IMF holds that transparency could undermine its effectiveness, a view it shares with the central bankers who play such a large role in its governance. With few exceptions, most of them are committed to the proposition that public discussions of monetary policy would not contribute to economic stability and believe that even public disclosure of the IMF's deliberations would be counterproductive. Remarkably, there is little empirical evidence in support of these strongly held views. On the contrary, few untoward consequences have resulted from the Bank of England's movement towards improved transparency and disclosure."<sup>80</sup>

Professor Stiglitz may be surprised to find that leaders of the IMF now agree with him on this point. Thomas Dawson, then the IMF's director of external relations, commented in 2003 that "information once guarded as closely as state secrets is now routinely published.

And fears in some quarters that the release of this information would shake the pillars of modern civilization seem to have been unfounded. Financial markets are happy getting a steady stream of information from us and from our member governments. And they like it better than the old system when a sudden deluge of information which had been bottled up would come out and destabilize markets and countries." Dawson described an IMF colleague who had come from a career in the British Treasury to work on the IMF's Code of Fiscal Transparency, and joked that he "spent the first 25 years of his career assisting ministers in hiding what was going on and the next five years trying to unveil what was actually happening."<sup>81</sup>

### The Checkered History of Transparency at the World Bank

For many years, people affected by IFI programs and policies have raised questions about the legitimacy, efficiency, and accountability of these institutions. Such questions are particularly relevant at a time when several of these institutions are grappling with basic questions about their future, given the rise of Asian economies and long-standing resentments about what is widely seen as inadequate representation of developing countries in the governance structures of these institutions. But these issues are nothing new.

The World Bank's own authorized history of its first half-century mentions that direct contact with the people affected by bank decisions "seemed to contradict two of the Bank's constitutional principles: that it would deal with citizens and legislators of member governments through the designated representatives of those governments on the Board of the Bank; and that it would maintain a fiduciary relationship with member governments, a relationship of confidentiality in which the responsibility for releasing information pertaining to a borrower lay with the borrowing government."<sup>82</sup> A leader of the Philippines-based Freedom from Debt Coalition stated the problem more directly and colorfully: "When we complain to the World Bank and the IMF, they tell us, 'So sorry, we don't talk to people. We only talk to governments. We only talk to your president. We only talk to your central bank governor. We only talk to your minister of finance.' This is a joint production of the international finance community with the cooperation of local

elites and leaders in our own country. The majority of the people are shut out of the negotiations."<sup>21</sup>

But this opacity, insularity, and secrecy would change—not completely by any means, but markedly. Struggles over thirty years and in countries ranging from Brazil to India forced the change, and the struggle continues. Leadership came from nongovernmental organizations, the environmental movement, growing associations of indigenous peoples, and national parliaments, especially the U.S. Congress. The World Bank became the first international institution targeted and the first to change.

Activists targeted the bank for many reasons. It had global impact and tangible projects. It received contributions from the U.S. government over which taxpayers and the Congress had the right of oversight. It was handily based in Washington, DC, within walking distance of many U.S. and international NGO offices. It was not a foreign government that could exercise nationalist appeals in its defense. And it already had at least rhetorical commitments to the environment and to ameliorating the conditions of indigenous peoples. The bank was chosen not because its practices were worse than those of other development banks or institutions but because there were more handles with which to grip it.<sup>24</sup>

But the other institutions soon followed. After the financial crises in Mexico (1994), Asia (1997), and Russia (1998), IMF delegations found themselves surrounded by housewives beating tin cups and economists bearing hemlock. The IMF's Thomas Dawson summed up the lessons learned in a 2003 speech: "It was widely accepted that in reporting their financial positions some of the crisis countries had been, shall we say, 'economical with the truth' . . . Not only were countries under pressure to come clean, but the IMF itself came in under unprecedented pressure to reveal its policy advice to countries, that is, to be less secretive."<sup>25</sup> Soon the IMF moved almost all of its documents onto the Web and began reaching out to parliamentarians and NGOs, although its decision-making process remained extremely problematic from an accountability perspective.<sup>26</sup>

In 1999, the WTO ministerial meeting in Seattle became the scene of violent and nonviolent street protest, so subsequent location choices for WTO meetings favored islands separated from demonstrators by causeways, barricades, and police. By 2002 the WTO was issuing press releases about its quicker release of restricted docu-

ments, sponsoring regular NGO seminars, and spending core budget funds to include lower-income countries in its Geneva proceedings.<sup>27</sup> In 2004, the former chairman of the WTO's Appellate Body called for opening "the proceedings of the panels and the oral hearings of the Appellate Body, both to press coverage and to overall public observation" and "the same for meetings of the General Council, the Dispute Settlement Body and all of the other major councils of the WTO," because otherwise "it's unlikely that members of the WTO will ever secure the public support needed to maximize the many gains to be made from trade through a rule-based world trading system."<sup>28</sup> The WTO has not yet adopted these suggestions, nor would they amount to a transparency revolution, only a "partial revolution," in Alasdair Roberts's phrase. But already the transparency changes have opened serious discussion of accountability and governance questions at the WTO and the other international organizations.

For the World Bank openness struggle, the start date that activists point to is 1966, when the General Assembly of the United Nations passed resolutions condemning the apartheid regime in South Africa and the continuing colonial subjugation of Angola and Mozambique by Portugal as violations of the UN charter. Despite its UN affiliation, the bank insisted that Article IV, Section 10 of its own charter, prohibiting interference in the political affairs of its members, required it to disregard the resolutions. It proceeded with a US\$10 million loan to Portugal and a US\$20 million loan to South Africa, even after a personal plea from UN Secretary-General U Thant to the bank's president, George Woods.<sup>29</sup> This was hardly the first, but certainly the most flagrant, of World Bank actions that raised the question of accountability. If the UN charter itself did not apply, then the bank had set itself up as an entity above national law but without international law. As activist David Hunter described it, because the bank was insulated from any legal responsibilities to the people directly affected by its actions, it was a "lawless institution."<sup>30</sup>

The first effective resistance by affected peoples came in the Philippines, only two years into the martial law imposed by Ferdinand Marcos in 1972. The World Bank had made the Philippines a priority, lending US\$2.6 billion for 61 projects between 1973 and 1981. In particular, the Chico River dam project in the Cordillera would have provided hydroelectric power in the wake of the oil crisis, but only by flooding nearly 3,000 hectares of rice terraces belonging to the

indigenous Kalinga and Bontoc peoples. They only found out about the dam a year after project approval, when survey teams came to the valley. Protests escalated, from petitions to the government that were ignored, to a regional pact among indigenous leaders against working in the construction, to incursions by the New Peoples' Army guerrilla forces, to direct protest at the IMF Manila conference in 1977, where bank president Robert McNamara felt compelled to say that "no funding of projects would take place in the face of continued opposition from the people." Ultimately, the bank withdrew, and the Philippine government postponed the dam indefinitely. "It was a silent retreat, but this did not detract from the fact that the Bontoc and Kalinga had accomplished something exceedingly rare in the Third World: the Bank's withdrawal in the face of popular resistance."<sup>10</sup> In partial response, the bank developed its first policies on indigenous peoples, but it would be years before those policies explicitly mandated informed consent and self-determination as core principles.<sup>11</sup>

In retrospect, the Polonoeste road paving and forest colonization project in Brazil starting in 1982 may have been the paradigm case of controversial World Bank projects and of effective NGO opposition. Polonoeste featured enormous environmental and social damage and no consultation with indigenous peoples, while internal bank warnings were ignored and government and extractive industry interests drove the process. The project's road paving, paid for with US\$457 million from the World Bank, doubled the population of the region in a decade, while deforestation pulped the rain forest. The experience stirred up powerful emotions. Of the development forester fostered by the Polonoeste road building, a professional forester wrote: "Visiting such areas it is hard to view without emotion the miles of devastated trees, of felled, broken and burned trunks, of branches, mud and bark crisscrossed with tractor trails—especially when one realizes that in most cases nothing of comparable value will grow again on the area. Such sights are reminiscent of photographs of Hiroshima, and Brazil and Indonesia might be regarded as waging the equivalent of thermonuclear war upon their own territories."<sup>12</sup>

But there's more to the Polonoeste story. NGO protest, social networks of Brazilian and foreign anthropologists, and the first Washington-based international NGO campaign persuaded the U.S. Congress to intervene with hearings and an unprecedented meeting with the head of the World Bank. In March 1985, the bank sus-

pending the loans. "It was an extraordinary double precedent: for the first time, the Bank was forced to account to outside NGOs and a legislator from a member country for the environmental and social impacts of a lending program; also for the first time, a public international financial institution had halted disbursements on a loan for environmental reasons."<sup>13</sup> Perhaps equally important for the future of openness struggles against the bank and the IFIs, international activists forged close connections with the rubber tappers from Acre, Brazil, and their leader, Francisco "Cáico" Mendes, whose subsequent assassination in 1988 by the hired guns of irate landowners put the rain forest issue on the front page of *The New York Times*. The connection transformed both activists and tappers, placing the human dimension of environmental change at the heart of the argument, adding sustainability proposals like Mendes's "extractive reserves" to the development debate, giving the tappers new access to international leverage, and giving the international activists new approaches to environmental debates that were grounded in social relations rather than technical expertise.<sup>14</sup>

More profound institutional change came about due to the Narmada dam project in India, which resulted in mass protest and ultimately catalyzed two major reforms at the bank—the new information disclosure policy and the Inspection Panel. Approved by the bank in 1985 with a loan of US\$450 million, the Sardar Sarovar (Narmada) project was slated to displace more than 150,000 people—most of whom found out not from timetables or resettlement locations but from the markers placed in their villages indicating the submergence level of the prospective reservoir. NGOs and individuals such as Medha Patkar (a social worker originally from Bombay) insisted on access to information, and by 1988 the grassroots movement known as Narmada Bachao Andolan (NBA, or Save the Narmada Movement) had mobilized thousands of the "oustees" in opposition to the dam. A special U.S. congressional oversight hearing in 1989 featuring NBA testimony proved a turning point, when connections between the congressman who chaired the hearing and members of the Japanese Diet, plus media coverage of a subsequent NGO forum in Japan, persuaded the Japanese government to end its support for the project. Gradually, bank executive directors began questioning the version of events provided by their operations staff because it differed so strongly from the reports from the affected

people themselves. The NBA launched a December 1990–January 1991 march to the dam site, but were stopped at the state border by police, which led to a 26-day fast by Patkar and other activists, and even more pressure on the bank.

Finally, the bank appointed an independent review team (the Morse Commission), but then voted to continue the project despite the Commission's findings that resettlement was "not possible under prevailing circumstances," that environmental impacts had "not been properly considered or adequately addressed," and that "progress will be impossible except as a result of unacceptable means," that is, police force. The bank's approval of continuing the dam, according to Patrick Coady, the U.S. executive director, at the October 1992 board meeting, signaled "that no matter how egregious the situation, no matter how flawed the project, no matter how many policies have been violated, and no matter how clear the remedies prescribed, the Bank will go forward on its own terms."<sup>6</sup> But Narmada catalyzed protests in Madrid at the 1994 World Bank–IMF annual meetings, multiple congressional inquiries, and a highly successful NGO campaign working with the U.S. Congress to hold back funding replenishment for the World Bank Group. Ultimately, the bank responded by creating the Inspection Panel and a new disclosure policy, and withdrew from Narmada. Reform at the bank, however, did not produce reform on the ground in India because the Indian government proceeded with the dam, which continues under construction today with reservoir levels rising and resettlement incomplete.

A similar episode of international campaign pressure occurred with the Bio-Bio River dam controversy in Chile—it produced major institutional reform, but too little and too late for the affected people at the local level. The case focused attention for the first time on the lack of accountability in the rapidly growing private sector side of the World Bank's operations, specifically the International Finance Corporation (IFC), while severely testing the nascent democratic processes in a country transitioning from the seventeen-year Pinochet dictatorship after 1990. The state-owned utility started planning for a series of dams on the Bio-Bio, a center of indigenous Mapuche/Pehuenche culture as well as a world-class whitewater-rafting destination, in the mid-1980s. But neither the IFC (which approved the first dam, Pangue, in 1992; it was finished in 1996) nor the power company carried out serious environmental or social impact studies,

A burgeoning protest movement brought together Chilean and international environmentalists and anthropologists with members of the indigenous groups and forced a series of significant reforms on the IFC, including its first compliance ombudsman, expanded environmental impact reviews, and a new disclosure policy. Remarkably, the Bio-Bio debates forced the IFC for the first time to release publicly an environmental assessment before the board's review, thus allowing debate about the assessment's deficiencies.<sup>17</sup> But secrecy habitually die hard. The independent review ordered by the World Bank's president, James Wolfensohn, and carried out by the former head of the National Wildlife Federation, Dr. Jay Hair, ended up heavily censored by the bank, with almost a third never made public. According to the July 25, 1997 letter from Hair to Wolfensohn, "numerous deletions . . . appear to have been made for no other reason than to avoid embarrassing the individuals who made certain decisions regarding the Pangue project or how it was supervised by the IFC."<sup>18</sup> At the same time that the Bio-Bio campaign produced reforms at the IFC and even some significant success at the national level for the development of democratic institutions in Chile, it failed at the local level because the dams went forward, the power company succeeded in its divide-and-conquer tactics and dominated the local foundation set up to benefit the indigenous community, and only a handful of Pehuenche families were able to hold out for their original goal of stopping the dams.

Campaigners achieved more success against the Arun III dam project in Nepal, which became the poster child of the fiftieth-anniversary campaign against the World Bank and the first claim presented to the new Inspection Panel, in 1994–1995. The Arun case ultimately obliged the new bank president, Wolfensohn, to take a side in the preexisting internal debate over the project's viability and revealed how transnational advocacy networks can sometimes tip the balance. The claim and the Inspection Panel's report provoked Wolfensohn to withdraw the bank's support for Arun III (the Nepal government has not since been able to finance it) and established the Inspection Panel as a viable accountability institution. Even so, the bank attempted to prevent the release of the final panel report in August 1995, but its hand was forced because portions had leaked out, "causing distortion of the facts and embarrassment to the Bank."<sup>19</sup>

The China Western Poverty Reduction Project was perhaps the most recent "turning point" case in the transparency struggle at the World Bank. Starting in 1999, the bank sought to support the Chinese government's plan to resettle some 58,000 poor farmers onto lands traditionally roamed by nomadic Tibetan and Mongolian peoples. Local people sent letters seeking international support against the plan, and Tibet solidarity groups worked with the Bank Information Center and other bank watchdogs to generate skepticism in donor governments and intense media coverage—including television images of protesters scaling the façade of the bank building with their signs. The campaign led to high-level diplomatic tensions between the bank, its largest donor (the United States), and its largest borrower (China): an unusually intense level of board engagement; a scathing report by the Inspection Panel; and ultimately the cancellation of the project. The panel report not only documented the project's systematic violation of the bank's "safeguard" policies but went further to reveal weaknesses across the bank's entire system for avoiding and mitigating environmental and social risks. The bank responded with a new commitment to the safeguards and a series of checks and balances to ensure compliance.<sup>10</sup> Yet this victory for transparency did not ameliorate conditions for the Chinese and Tibetans affected by the project, because the Chinese government went ahead without the World Bank, whose president, James Wolfensohn, argued that "at the end of the day it would have been better if we were involved in the project than if we were not at all."<sup>11</sup> The Tibetan support groups disagreed, given the inadequacies of the bank's performance, the limitations imposed by China, and the legitimacy bestowed by bank sponsorship.

Crucially, these struggles over controversial projects from the Polonoeste to Tibet catalyzed a remarkable pro-openness dynamic—directed internally rather than externally—among the professional staff of the bank and the other institutions. For example, in the authorized history of the bank's environmental dealings, based on almost complete access to its files, the author subtly demigrates what he terms the "extreme" rhetoric of the NGO activists, but reserves his deepest scorn for the internal deception and secrecy evident from the bank's own documents, and often deployed by its staff against management and even its board. For example, two years after the board had approved the first phase of the Amazon highway proj-

ect, "some Board members expressed concern about Polonoeste. To each the staff gave reassuring replies that concealed much contrary information. And the staff misled not only the Board but also the president. In a briefing paper on Polonoeste to [A.W.] Clausen in December 1983, the staff wrote: '... Implementation of the Special Project [for Amerindian protection] is now satisfactory.' ... Evidence from the files shows that the division chief was busy telling the Brazilian government that implementation was very unsatisfactory. Few of the thirty-seven Indian reserves had been demarcated and registered, and many had been invaded by squatters, loggers, and others."<sup>12</sup>

This critique suggests one significant component of a growing commitment by the World Bank to greater openness: its own realization that internal barriers to information sharing led to bad decisions and trapped the bank in bad projects. For example, after NGO critics had shown the myriad ways the Narmada dam project failed to meet stated bank policies, the bank staff began to fool itself. The authorized history described the situation this way, in a remarkable soliloquy: "Retrofitting is difficult. The effort to do so in Narmada as NGO pressure built up then began to produce apparently deceitful behavior on the part of the operational staff [of the World Bank]. Their logic went like this. 1. We know things are not going well in the project. 2. But do we want to pull out or suspend? 3. No, it is potentially a damn fine project, and things will go better if we are in. (Anyway, management will not allow a pullout, for 'country relations' reasons.) 4. Therefore we need to justify staying in. We do so by sending up reports that things are going well or at least improving, making sure that if anything is said about things that are not going well the phrasing implies that they are minor or on the way to being fixed. The trick is to make the aroma of words do the work that the evidence cannot."<sup>13</sup>

One result of the openness battles at the World Bank has been an institutional commitment to encourage national and local freedom of information laws. The World Bank Group has produced a series of readings and training manuals for its country staff on government openness, organized seminars and video conferences in dozens of countries, included transparency in its governance recommendations and conditions for financing, and produced extensive research showing that "countries with better information flows also govern

better."<sup>44</sup> Summarizing a host of papers and studies, the World Bank Institute's Daniel Kaufmann has concluded that transparency is "key to minimizing the risks of financial crises," "fundamental for enabling sustained development and growth" by encouraging competition and more efficient resource allocation, "a major deterrent to corruption" and state capture, and "a basic democratic right" that serves as a "major 'empowering' tool for the citizenry and, through it, for redistribution and poverty alleviation."<sup>45</sup> Of course, having made these arguments abroad, the bank has more difficulty resisting pressure for greater transparency within its own functions.

But the bank's pro-transparency proselytizing is not the only model for international institutions. In sharp contrast, the North Atlantic Treaty Organization has encouraged greater secrecy among its members. In 2002, NATO held its first-ever summit in the capital of a former Warsaw Pact nation—Prague—and formally announced the entry of seven new members from Eastern Europe and the Baltics. In the case of Romania, *The Times of London* commented that the invitation came "despite its endemic corruption, a systematic lack of government transparency and poor progress towards a Western-style civil society." Romanian president Ion Iliescu chose to emphasize that joining NATO would allow Romania "to be integrated into the civilized world, and to receive necessary support for internal reforms"; and NATO officials complimented the Romanian military for "satisfying its Membership Action Plan, a detailed set of changes in both the military and civilian sectors that NATO assigns applicant countries" including "promoting the rule of law."<sup>46</sup>

One of the most significant NATO assignments, however, has almost completely undercut Romania's halting progress toward greater freedom of information by forcing it to adopt a state secrets law that conforms to NATO's own information security system, which itself dates back to Cold War secrecy thinking. Romania's new secrecy law, enacted in 2002, creates a broad authority to withhold information that has been deemed sensitive by government officials and trumps its 2001 Law Regarding Free Access to Information of Public Interest. In fact, the NATO accession process has contributed to new state secrets laws in eleven Central and Eastern European countries that otherwise had been in the vanguard of the international freedom of information movement in the 1990s. Yet NATO has refused to make its standards publicly available and has instructed member

countries to decline requests for its policy under national FOI laws.<sup>47</sup> New intergovernmental cooperation in the war on terrorism is likely to deepen and expand this emphasis on information security rather than openness on the part of NATO, other regional security alliances, and international governmental organizations (IGOs). As Alasdair Roberts's chapter in this volume demonstrates, that emphasis may undermine not just democracy but also the security that secrecy is intended to protect. The various investigations of the September 11, 2001 terrorist attacks indicate that excessive secrecy was part of the explanation why the intelligence community failed to prevent the attacks. Greater openness rather than reflexive secrecy may well make a better strategy against terrorism.<sup>48</sup>

### Policies, Laws, and Institutional Structures

Unlike NATO's information policies, those of the international financial institutions are largely on the public record and susceptible of analysis. Each of the international financial and trade institutions has promulgated a formal disclosure policy, and several have gone through two or more revisions of their policies based on actual experience and input from outsiders.<sup>49</sup> Several have also included transparency procedures in their compliance requirements for host governments, yet these often fall far short of achieving openness—stated policy is one thing, actual practice is another. Likewise, experts based in Washington, DC or other financial centers enjoy levels of access to IFTI information far greater than that of indigenous people in the forests of Cambodia, to take only one recent example. Also, institutions that rank highly in one area may fall in others. The country of Singapore, for example, ranks at the top of the Transparency International index (measuring corruption perceptions) and serves as the baseline for the PricewaterhouseCoopers "Opacity Index" (which measures lost foreign investment in relation to perceived opacity in given countries), yet when journalists affiliated with the Southeast Asian Press Alliance asked 8 countries in the region for 45 specific items of government information, Singapore provided less than 50 percent, about equivalent to Cambodia.<sup>50</sup>

Despite the progress toward greater disclosure described above, none of the financial institutions qualifies as transparent when

analysts examine institutional openness using the three most important criteria: *participatory disclosure*, *review mechanisms*, and *governance*. *Participatory disclosure* means openness that empowers participation in the decision-making process of the institution, rather than end-stage disclosure of decisions that have already been made. All of the international financial institutions are demonstrably better at the latter than at sharing detailed information early in the deliberative process. For example, at the World Trade Organization, trade negotiations and arbitrations that have the force of law take place behind closed doors. *Review mechanisms* involve process guarantees such as requirements that information refusals be made in writing, that refusals be subject to a "harm test" or "public interest test" as in many national freedom of information statutes, and that requesters have the right of appeal for independent review of the withholding. *Governance* means simply the level of meaningful public oversight for the governing bodies of the institutions. At the multilateral development banks, for example, almost total secrecy surrounds the operations of the boards of directors.

A comparative approach is essential to identify best and worst practices, to allow the institutions to learn from one another, and to raise the overall standards of openness. However, the core problem for comparative analysis along any dimension, not only openness, arises from the institutions' differences in form, function, governance, process, and financial instruments. For example, an IMF loan serves a very different function than does a World Bank loan; the Asian Development Bank has a very different decision-making process (dominated by Japan) than does the Inter-American Development Bank (dominated by the United States); and the World Trade Organization has no lending cycle at all.

To begin the process of measuring and comparing the international institutions, a team of analysts from the Bank Information Center, a leading NGO in the campaigns for greater accountability at the World Bank and other financial institutions, and [freedominfo.org](http://freedominfo.org), a virtual network of international freedom of information advocates, created the IFI Transparency Resource, a "matrix" database compiling policy and practice information on openness. The initial versions of the database, released in draft form in April 2004 and revised for release in February 2005, focused on 10 key financial institutions: the World Bank, International Finance Corporation, Multilateral In-

vestment Guarantee Agency, European Investment Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Inter-American Investment Corporation, African Development Bank, Asian Development Bank, and International Monetary Fund. This 255-item matrix made possible the most sophisticated comparison ever of IFI transparency policies and practices.<sup>51</sup> The matrix breaks down the banks' processes into categories such as "general institutional information," "the lending cycle," "bank-wide policies, guidelines, procedures and strategies," "evaluations and audits," "country-specific analysis and strategy papers," "governing bodies," "accountability mechanisms," "process guarantees," and "archives-websites-information centers." Within each category may be as many as 30 different information types. For example, "the lending cycle" includes social and environmental review procedures, early identification of potential loans, project preparation including feasibility and environmental assessments, pre-approval notification and approval discussion, implementation and supervision reporting, and completion and evaluation reporting.

The findings of the IFI Transparency Resource indicate many common weaknesses that undermine both the operational efficiency and effectiveness of the organizations and render democratic accountability and participation difficult—few open meetings, the delayed release of many documents, the confidentiality of many documents, and no clear procedures for requesting information. The contrasts indicate that there are some areas where one or more institutions have moved ahead, such as the fact that the Asian Development Bank and the African Development Bank are the only institutions to release certain environmental information 120 days prior to project approval for both public and private sector lending, and the Inter-American Development Bank has become the first to release its board of directors meeting minutes. While none of the banks stands out across all the transparency categories, the matrix does show the World Bank with the highest disclosure standards generally—no small testament to the focused campaigns on the bank as well as to its internal forces for reform.

But the "presumption" of disclosure, claimed by many institutions as cornerstones of their policies, is seriously undercut by a plethora of exceptions that turn disclosure on its head and only allow those documents specifically listed as releasable to come out. Nor

are there procedural avenues for those who feel access has been unfairly denied, or "process guarantees" such as clear standards on what should be disclosed, a promise of timely response, or a right of appeal. The policies are not tested on any scale for balancing the legitimate need for confidentiality with the public interest in transparency. The disclosure policies also appear to reflect substantial deference to private corporations. The matrix data reveal that there is little coherence in the transparency of institutionwide policy development; disclosure tends to come after decisions have been made, little information is released during project implementation, financial intermediary lending is generally exempt from disclosure rules, and some dissemination efforts lack procedures. The study indicates that basic institutional information is consistently released, but that the institutions are generally weak when it comes to giving the public specific information on how to contact directors or staff members. Meanwhile, the governing bodies are almost completely closed to public scrutiny, with no minutes, voting records, or transcripts available, except at the IADB. The meetings of the major decision-making bodies are uniformly held in private, and postponing announcements come in different forms and levels of specificity.

None of the ten IFIs included in the matrix study has clear procedures regarding the transparency of policy review and development processes. None of the institutions releases external comments made during a policy review. Drafts of proposed policies are not made available consistently before board action. Financial statements and audits are generally available, but more specific reporting or evaluations is often not disclosed. Most IFIs disclose the final economic reports or analyses for specific countries, but the preparation of them is largely opaque. As for project lending, none of the IFIs releases the draft board reports on potential projects, and background feasibility and technical studies are difficult to obtain. Policies on the release of environmental information vary widely. Project implementation and supervision is arguably the most secretive phase. Similarly, the lending activities of financial intermediaries are subject to a much lower standard of disclosure. Only a few institutions have accountability mechanisms—the systems that may allow IFI employees or outsiders to raise grievances—and few live up to the most transparent mechanism, the Inspection Panel found at the World Bank. None of the IFIs has an institutionwide, bind-

ing translation policy that would allow information to be disclosed to non-English-speaking people affected by their policies and programs. Many of the IFIs have archive policies with timelines for declassifying materials, among which the Asian Development Bank is the most progressive, with a five-year declassification period, but disclosure is still subject to government consent. In sum, the matrix study demonstrates that the highly touted disclosure policies of the international financial institutions are more akin to sophisticated publications schemes than they are to the new national freedom of information laws.

### Contemporary Issues and Debates

Of late, a debate has emerged around the hangover of "business confidentiality" in the IFIs. Before the campaigns and reforms of the 1980s and 1990s, this presumption of a fiduciary responsibility on the part of the IFIs toward borrowers and contractors overrode all other considerations during decisions about transparency. This has changed somewhat, but the hangover continues, despite all the openness commitments. In November 2002, for example, it required no less than a Supreme Court decision in Uganda to break the World Bank's version of this barrier, with significant consequences. A Ugandan High Court justice overruled the Ugandan government and the World Bank to order the release of a key document defining the commercial arrangements relating to a controversial Nile River dam project supported by the bank. The US\$550 million-dollar Bugali dam project will commit the already heavily indebted country to pay billions of dollars to the private corporation that will own and operate the dam for the resulting electricity, whether or not Uganda can resell the power elsewhere in Africa. Yet the World Bank refused to require release of the Power Purchase Agreement between the corporation and Uganda. An internal World Bank ombudsman report in September 2001 noted that if the project's sponsor "wants to maintain a degree of secrecy consistent with a private sector project, perhaps public institutions should not be asked to provide guarantees for or subsidize the undertaking." Concerned citizens and civil society groups in Uganda went to court, citing Article 41 of the Ugandan Constitution as requiring release of the document, and



High Court Justice Egonda-Ntende agreed with them. A subsequent NGO analysis of the document concluded that Ugandans "will pay hundreds of millions of dollars in excessive power payments" as a result of the project.<sup>52</sup> Yet the biographer of the World Bank's president was able to interview a number of Ugandan families who would receive cash compensation for their land from the dam builders and to conclude therefore that the story was a "tragedy for Uganda" because the protests were holding up electric power that would supply "clinics and factories"—never mentioning the excessive payments to the private corporation or the bank's own internal critiques.<sup>53</sup>

The blame game of shifting responsibility between international organizations and the host governments also provides cover for continued opacity. In Phnom Penh, about forty villagers from several Cambodian provinces showed up in front of the World Bank office on Monday, November 11, 2002, and vowed to sleep on the sidewalk until they received copies of the logging plans for the areas in which they lived. That Monday was the beginning of a nineteen-day public review period required by the World Bank for the plans, which indicate where and how cutting is to occur over the next twenty-five years. But the government's Department of Forestry and Wildlife apparently provided the World Bank—its biggest single funder—with only two copies of the plans, both in black and white, which obscured the color-coding that specifically outlined logging areas. Villagers demanded color copies to take back to their communities and told the bank that neither the logging companies nor the forestry department had consulted with them about which areas should be protected as community forest. Bank officials attempted to negotiate greater access but simultaneously affirmed the release of a US\$15 million loan that had been held up while it pressed the government for the public review. An NGO observer called the review process "a farce," but a bank official told reporters, "it's a first, it's a start . . . not insignificant."<sup>54</sup>

The Cambodian villager confronting her own authoritarian government faces an even more difficult task. The links from citizens to international institutions remain tenuous even in robust democracies, where elected representatives form governments that appoint high officials who then select directors for the World Bank or the IMF. For underdemocratic countries, there is no chain of accountability, and the attenuation of representation involved in arrangements

like the IMF's, where a single executive director represents a whole group of countries, demolishes any notion of answerability.<sup>55</sup>

In response to the answerability problems in both directions (national and international), reformers inside and outside international institutions have welcomed the emergence of parliamentarians as a new source for dialogue, engagement, oversight, and even, to a limited but growing extent, participatory representation. For example, the World Bank hosted in 2000 the first-ever formal meeting of parliamentarians with top bank leaders, including 50 individuals from about 30 countries, and the Parliamentary Network on the World Bank subsequently separated itself from bank sponsorship, set up independent offices, and greatly expanded its reach. Its 2004 annual meeting attracted 183 parliamentarians from 70 countries, and the network has pressed the bank not to approve Poverty Reduction Strategy Papers unless governments have them reviewed by their legislatures.<sup>56</sup> The IMF has experienced a wide range of parliamentary interaction, ranging from the "very hard oversight" exercised by the U.S. Congress in making the release of approved funding conditional on certain IMF reforms, to "soft oversight" such as the U.K. House of Commons's questioning of IMF officials in 2002, to the rejectionist positions taken by several national parliaments against IMF agreements in which they had no voice (such as the Turkish parliament forcing the national government to break its promise to the IMF in 1998 about holding down public sector salaries).<sup>57</sup> Even the former director general of the WTO has called for greater national engagement with the international institutions, especially through parliamentarians: "A group of senior parliamentarians, serving in their national legislatures, should form a democratic caucus to provide systematic oversight of international institutions, focusing particularly on increasing the transparency of these organizations. . . . Not [to] replace national governments, but only strengthen their role in holding these agencies to account."<sup>58</sup>

National openness analogies also offer some interesting principled approaches that hold great promise for application to the international institutions. Many commentators have described the rise of the administrative state in the twentieth century as a major challenge to democratic governance in many of the same ways that analysts now criticize the international institutions, as secretive

and capricious bureaucratic power unaccountable to those affected. The twentieth-century reform response to the administrative state was to limit, regulate, and legitimize that bureaucratic power through more open and participative rule-making procedures, appeal mechanisms, requirements for reasoned decision making, and substantive standards like proportionality, judicial review, and the expansion of citizen rights even more than legislative or executive responsibilities.<sup>32</sup> A classic example of this reform approach was the 1946 Administrative Procedures Act in the United States, which included in nascent form what became in 1966 the Freedom of Information Act. The APA compelled a notice-and-comment procedure by federal agencies for any regulation or policy change that would affect private parties or state and local governments. The procedure included litigation rights if the agency failed to provide notice or failed to take into account public comment, or otherwise flouted the participatory intent of the statute. Today, an entire section of the American Bar Association specializes in administrative law, and additional notice-and-comment-type provisions routinely show up in U.S. regulation and legislation (as the legal basis for environmental impact statements, for example). The experience has "not been a source of unmitigated joy in American rulemaking," since comment periods have "often taken on the look of an Internet poll where those interest groups with the most time and ambition can collectively submit thousands of replies about a proposed rule" and agencies spend "months and sometimes years responding in a substantive way to every individual comment no matter how trivial to pass judicial scrutiny."<sup>33</sup>

Yet the development of administrative law has dramatically restrained bureaucratic power and increased public participation in rule making and governance in the United States, so much so that debates over its application to international institutions have become central to the discourse about answerability and participation in the globalized world, both inside and outside those institutions.<sup>34</sup> For example, the first decision of the WTO's appellate body in the 1996 Shrimp/Turtle case criticized the United States for curtailing shrimp imports without giving any of the affected countries the "formal opportunity to be heard, or to respond to any arguments that may be made against it."<sup>35</sup> A recent set of recommendations for reform of the WTO capped its list of proposed changes with the

idea of a global "Federal Register" where all international organizations, not only the WTO, would post notices of pending decisions, declarations, and agreements, and seek comment from the public.<sup>36</sup> Some of the international institutions themselves have taken such suggestions: for example, the Basel Committee of central bankers solicited comments from banks, industry groups, and other interested parties through a largely public process of establishing a new capital adequacy framework starting in 1999 (the final policy was issued in June 2004).<sup>37</sup>

Clearly, the international institutions have already built a global administrative space, populated with dense regulatory regimes such as the WTO, the Organization for Economic Cooperation and Development, the committees of the G-7 and G-8, the financial regulation carried out by the IMF or the Basel Committee, and the product and process rules adopted by the International Organization on Standardization (ISO), to name only a few. Even this short list gives a sense of the wide variety of global administration, which is carried out by formal international and treaty organizations, transnational networks of government officials taking collective action, private institutions with regulatory functions, hybrid private-intergovernmental arrangements, or national regulators under treaty regimes or cooperative standards. The logic of applying administrative procedures restraints to the growing regulatory power of the international bodies seems widely accepted, even by many of the institutions themselves, but the debate has moved to a more complicated level where many of the most important issues remain outstanding. For example, at the basic level of review, what new arrangements will be required to provide the equivalent of judicial review to the international organizations? After all, even the UN Security Council has failed so far to establish an independent body to scrutinize its sanctions decisions. At the normative level, what is the democratic basis for global administrative law in the absence of electoral or other models of direct representation at the global level, or put another way, through what mechanisms can global participation or deliberation actually occur? And would global administrative accountability actually aggravate the north-south cleavages and distributional issues already present in the globalized world, by empowering primarily northern populations, market actors, social interests, and states?<sup>38</sup>

## Lessons Learned

The history of constant struggle for the past thirty years over issues of openness and accountability at the World Bank and the other international institutions holds significant lessons for activists, analysts, citizens, and the institutions themselves. The extraordinary pattern of grudging reforms preceded and enveloped by clouds of rhetorical commitments suggests that the eloquent abolitionist and former slave Frederick Douglass had it right: "Power concedes nothing without a struggle." The authorized history of the World Bank's interaction with environmental issues contains a constant refrain of pressure and reform: "governance reforms of the mid-1990s, intended to make the Bank more transparent and publicly accountable, reforms that were once again prompted mainly by environmental NGOs."<sup>66</sup> "Outside pressure was critical in getting the Bank to take action: 'There were a number of outside groups who were quite vociferous . . . in bringing this to our attention . . . groups like Amnesty International, the Harvard group of Cultural Survival . . . and others. They were quick to chastise us and rightly so."<sup>67</sup>

The lesson is that pressure works, and money pressure works especially well: the World Bank finally installed the Inspection Panel and issued its information disclosure policy after the U.S. Congress threatened to hold up refunding its capital accounts. Also important are rhetorical commitments, which provide leverage: it was the bank's successive and nearly continuous violations of its own stated policies that gave activists and affected populations the evidence to force accountability and openness. Such policy commitments may seem empty at first or subject to systemic flouting, yet they empower challenges to power in unexpected ways (as did the Helsinki agreements of 1975 and the impetus thus given to the dissent movements that brought down the Berlin Wall).<sup>68</sup> Today, the primary dynamic is that of keeping up with the neighbors: in openness consultations with IFTI staff, the constant refrain is not about "best practices," but about what other IFTIs are doing. In this regard, the focused pressure on the World Bank has had significant ripple effects on all the regional development banks, to the point that several have gotten ahead of the others on one or more measures of openness (such as the Inter-American Development Bank releasing its board meeting

minutes). Now activists are producing report cards rating and comparing the banks as a key tool pushing toward openness reforms.

The biggest change occurs when external critics gain internal allies, who then change the organizational culture. This is what the World Bank leadership did when it set up the Inspection Panel in 1993–94. Similarly, the anticorruption unit within the bank has challenged the general counsel's office over continued secrecy around the contractors banned or penalized by the bank for corruption. In the European Union, the Scandinavian countries countered the initial lowest common denominator secrecy assumptions and moved the EU toward formal process guarantees on openness. This internalization process is vital to success. The Congressional Research Service analyst who has followed the transparency struggle most closely has commented: "The main problem with seeking transparency, in my experience, is finding a way of getting information without pushing the real decision process into another place where it is away from the window and only the cleaned-up results are transparent. The institutions have to want to be transparent because they believe it is in their best interest. A hard nut to crack."<sup>69</sup>

The most successful openness campaigns bring human faces to esoteric policies and projects, link activists and analysts across national borders, and apply the same demands for transparency and accountability at every level of governance, from the local project to the national government to the international institution. More and more often, this struggle is based on a rights discourse,<sup>70</sup> much to the dismay of the international institutions. The World Bank's James Wolfensohn, for example, commented to a 2004 meeting of Greenpeace activists in London, "If I talk about a rights-based approach, I get letters [from board members] saying I have exceeded my authority because we are a financial institution. Many countries on our board have signed the declaration of human rights but say this is not the job of a financial institution."<sup>71</sup> But the democratic deficit is compelling all the international institutions to take on the job of establishing legitimacy, while their critics and those affected by their decisions will continue to contest divergent notions of legitimacy and justice. The struggle for global transparency, like the history of administrative law reforms, demonstrates that all such change is the function of the power relations of various actors, who create new procedures and new openness as new actors gain power, particularly in moments of legitimacy crisis, like now.

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## Chapter Nine

# Transparency and Environmental Governance

Vivek Ramkumar and Elena Petkova

### A New Paradigm in Environmental Governance

In December 1984, a factory explosion released a lethal toxic chemical among unsuspecting citizens in the north Indian city of Bhopal, killing some 2,000 people within hours and leaving several thousand others permanently handicapped. Another 15,000 died prematurely due in part to the aftereffects of their exposure. The explosion occurred in a local Union Carbide factory—a subsidiary of the American company Dow Chemicals. An investigation of the disaster revealed that the company's management had ignored warnings about the poor conditions of the Bhopal factory's infrastructure.<sup>1</sup>

The Bhopal gas tragedy provoked international condemnation.<sup>2</sup> Under the glare of public outrage, American legislators passed the Emergency Planning and Community Right to Know Act in 1986. Among other things, this law required industries to disclose the volume of certain chemicals released annually by them into the environment. As required by the law, the U.S. Environmental Protection Agency (EPA)—the agency in charge of environmental regulation



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## Chapter Seven

# Prizing Open the Profit-Making World

Richard Calland

Transparency is now a generally accepted norm for the democratic state, understood to be essential for democracy, of significant instrumental value in enhancing efficiency in public administration, and crucial to the effective exercise of other rights.<sup>1</sup> There has been a huge amount of activity and progress in recent years, with government action matching civil society activism to promote the right to know. More than fifty laws creating some sort of legal right to access public information have been passed since 1995.<sup>2</sup>

This focus on the public sector leaves out large, and growing, amounts of relevant and important information held by private entities. For while the case for transparency in the public sphere has been successfully made and in many places implemented, public power has seeped into a new range of institutions and bodies. Because of the massive trend toward privatization, goods and services once provided by the state, or at least considered to be state responsibilities, are now provided by private firms under various arrangements with governments. As Roberts notes, in the last quarter of the twentieth century “authority has flowed out of the now-familiar bureaucracy

and into a new array of quasi-governmental and private bodies. The relocation of authority has provoked another doctrinal crisis: the old system of administrative controls, built to suit a world in which public power was located within government departments and agencies, no longer seems to fit contemporary realities.”<sup>3</sup> Like archaeologists who finally locate the buried tomb of Egyptian King Rameses II but, when they prize open the door, find that the riches within have been long since looted, advocates for government transparency will now find that much public information has been spirited away into the hands of the private sector.

In addition, there is growing awareness that the public effects of many private sector activities (e.g., environmental effects) warrant public scrutiny, and disclosure is increasingly seen as a potentially effective regulatory tool. Many corporations have begun to operate voluntary disclosure regimes in response to civil society demands and the “corporate social responsibility” (CSR) context. Yet disclosure of private-sector information is haphazard at best, with little consensus on what business should be required to disclose. This presents a significant challenge to the advocates for transparency, from both an instrumental and a philosophical, human rights–based perspective.

These two issues—privatization and the trend toward disclosure of environmental, labor, and other information in the CSR context—raise powerful questions. Should corporations that are playing quasi-public roles and providing public goods and services be held to the same standards of public transparency and accountability as their public sector brethren? Does voluntary disclosure of environmental and other social impact information adequately fill the existing regulatory gap, or should such disclosures be standardized and made mandatory? Who decides, and on what basis?

This chapter addresses these questions in turn. It lays out the history of and reasoning behind corporate secrecy and describes the trends that have occasionally pushed for greater openness. It then takes in turn the concerns raised by privatization and by civil society demands for greater corporate social responsibility. It explores the rapidly changing legal regimes concerning corporate transparency in many parts of the world, with special attention to the case of South Africa, one of the few countries that specifically extends its right-to-know law to cover the private sector.

## The (Old) Case for Corporate Secrecy and the Shift Toward Disclosure

Corporations are bureaucracies, and as such are prone to adopt a culture of secrecy, as often a matter of subconscious impulse as deliberate strategy or policy. As Max Weber argued in his classic essay on bureaucracy, a preoccupation with secrecy is an inherent characteristic. As Weber also notes, secrecy has tended to be regarded by managers and directors as a major power resource in maintaining a competitive advantage over rival organizations.<sup>4</sup> As more farsighted corporations have come to recognize, however, this may be a counterproductive approach. While the control of information may be the *sine qua non* of twentieth-century corporations, as J. K. Galbraith asserted, the modern view is more likely to see disclosure as good for *competition* rather than for *the competition*. Secrecy is the friend of unfair or uneven market access; in contrast, openness supports the search for fair and competitive markets.

The old case for corporate secrecy is built mainly on the dated model for the profit-making world generally. The private sector makes profits, along the way creating jobs and wealth as well as providing goods and services people want, and governments regulate corporate activities to protect workers, communities, shareholders, and the environment. Corporate law, at least in the Anglo-Saxon world, explicitly forbids corporations to pursue anything else but their own self-interest: “Corporate social responsibility is illegal—at least when it is genuine.”<sup>5</sup> But the model is breaking down. Not only was it never very effective at reining in corporations, as a long line of corporate scandals, most recently at Enron and Worldcom, shows, but it is even less effective in the current era of new globalization, where corporations can “shop” for the least onerous regulations and many governments lack the capacity to enforce regulation.

Disclosure in the private sector raises many of the same questions as it does in the public sector. To further the debate on for-profit transparency, it is important to recognize the legitimate concerns of business and the origins of its traditional preference for secrecy over openness. There are also reasonable concerns about cost and the potential damage to reputation that disclosure might cause. And

it is important to recognize that secrecy may serve not only the narrow self-interest of the corporation but also, indirectly perhaps, the interests of society. Some degree of corporate secrecy is necessary to protect concerns touching the general interest: incentives for innovation, the functioning of the market, the integrity of the decision-making process, and personal privacy.<sup>6</sup>

Mary Graham, in her book *Democracy by Disclosure*, characterizes the case for secrecy—or the conflict between competing values and interests, as she puts it—in a similar way, but with important sense of nuance. As with public/government information, there is a spectrum. Some information should clearly be withheld: releasing information about a planned police raid on an organized crime syndicate beforehand would incontrovertibly not be in the public interest. Equally, at the other end of the spectrum, many pieces of information clearly should be provided because no possible or conceivable harm to the public interest could be contemplated.

Thus, the real debate, as with public information, is in the middle ground—the gray areas of information. Corporations have long considered information of this sort as proprietary: “This is a private company, therefore, ipso facto, this information is mine/ours and not yours. I have no duty to disclose it.” This attitude can be traced back to the history of corporations and later developments in jurisprudence that encouraged a culture of secrecy by “humanizing” the corporation.

Early corporations of the commercial sort—such as the Dutch East India Company—were formed under legal frameworks by state governments to undertake tasks that appeared too risky or too expensive for individuals or governments. Corporations were therefore created as an extension of the government, chartered by the monarch (and later the state) to “promote the general welfare.” Corporations were given privileges such as limited liability because their sole purpose was to improve civic life through such enterprises as building highways and postal service. In short, the public, through its elected representatives in government, created corporations and granted them special legal status. Limited liability proved to be especially important; the role of the for-profit world expanded drastically as a result.<sup>7</sup>

Subsequently, not only was the corporation’s original purpose abandoned, but the constraints that once operated on these entities were forsaken as well when they won “human rights” in a U.S.

Supreme Court ruling in 1886.<sup>8</sup> In contrast, government has never been afforded the same “legal personality.” Making the legal case against governmental secrecy has, therefore, been far easier. In the case of public access to information, laws have sought to deal with the question of where to place the “transparency line” by first identifying categories of exempt records and second, in the better laws, balancing them with what is known as a “public interest override provision.” Public interest overrides declare that if the harm that would be done to the public interest by withholding the information is greater than the harm contemplated by the exemption that justifies withholding the information, then the information should be disclosed.

Conceptually and legally, a similar approach could apply to corporations. Access laws that cover state information are subject to exemptions that capture the public interest in keeping some things secret. If a law were to cover private entities in similar fashion (such as the South African access to information [ATI] law, which is discussed in more detail below), it too could contain exemptions to public disclosure. There are legitimate reasons for keeping some information secret, and this need can be articulated and protected in law. But this is not because the company is a privately owned entity, but because there is a public interest to be protected in permitting the withholding of information.

Because laws dealing with access to information have not generally been extended to cover private entities (see below), there is no guidance as to how to deal with the range of information that they hold and control. But this does not mean that there is no spectrum. Few, if any, would argue against the most obvious legitimate secret of a corporation, namely, its trade secrets. Should Coca-Cola be required to disclose its original recipe? No. To do so would be to totally undermine the impetus and incentive for entrepreneurial endeavor and for the necessary investments in capital that are required to develop new products. But as Graham points out, trade secrets represent a relatively small cluster of data at one end of the spectrum.<sup>9</sup> Personal privacy would occupy a similar location: no one could sensibly or legitimately suggest that the personal health data of an individual employee, his or her HIV status for example, should be disclosed publicly. At the other end, Graham asserts, lies another cluster of data that lies indisputably in the public domain—

basic financial information required by federal and state laws and health, safety, and environmental data required under traditional regulatory regimes.

This reflects the major shift toward transparency that has stealthily but steadily occurred over the past 100 years. Invariably these positive developments have been provoked by a crisis or disaster, and in response to greater understanding of risks to the public. The 1929 stock market crash led to a very detailed program of structured disclosure, in order to reduce financial risks to investors. After the Bhopal disaster in 1984 in India, the U.S. Congress required U.S. manufacturers to begin revealing the amounts of dangerous chemicals they released into the environment. The Toxics Release Inventory (TRI), supported by the Environmental Protection Agency (EPA), represents one of the most striking and now widely imitated examples of government regulation and private sector disclosure (see the chapter by Ramkumar and Petkova in this volume).

The Enron collapse in 2001 has led to a drastic overhaul and strengthening of disclosure requirements by the accounting sector, specifically the far-reaching Sarbanes-Oxley legislation in the United States.<sup>10</sup> Nutritional labeling, airline safety rankings, and reporting of workplace hazards are further examples. As Graham says, “Stated simply, *such strategies employ government authority to require the standardized disclosure of factual information from identified businesses or other organizations about products or practices to reduce risks to the public*” (her emphasis).<sup>11</sup>

There are four observations to be made in response to this background and to this proposition. First, valuable though these regulatory trends are, their piecemeal nature should not be ignored. They do not yet add up to a comprehensive system of transparency in relation to the for-profit world. Second, although the environmental protection disclosure regime is often described, at least in the United States, as a “right to know” system, the derivative history of these laws and regulations means that their philosophical grounding is at best uncertain. In other words, they have come about not because a new social norm, premised on the notion of a human right of access to information, has emerged and prevailed, but because corporations have been compelled to make limited disclosures in response to enunciated risks. Third, this sort of regulatory environment exists and is most likely to succeed in developed societies with relatively

strong state authority and capacity. What about less developed societies and those with very weak state authority and capacity, where often for-profits, especially transnational corporations, exert huge influence over policy, markets, and social and economic conditions?

But there is no broad-based consensus for determining what corporations should disclose from the middle-ground, gray area of the spectrum identified above. This is a pivotal dispute. Are corporations “juristic persons” with “human rights” as the jurisprudential trend has held, with no responsibility to the public interest and with the predominant purpose of maximizing value for their shareholders? Or are corporations social actors, with quasi-governmental responsibilities to disclose information in the public interest? It is an irony of the logic of the argument in favor of transparency in the for-profit sector that in order to protect human dignity in wider society, it may be necessary to “dehumanize” corporations. This is to ensure that when balancing privacy and proprietary ownership with duties to disclose, we do not apply the same approach as we would with a human being. Corporations are not human beings. They have legitimate interests that deserve to be protected, including a responsibility to withhold information in some cases, but they are not *personal* interests—human rights are for people and not bureaucracies, whether governmental or for-profit. So it is to the relationship between people and for-profit corporations that this chapter now turns.

## **The (New) Arguments on Corporate Transparency**

### ***The Impact of Privatization on the Right of Access to Information***

While privatization may take many forms, the philosophy that underpins it has a uniform quality: to remove from direct state control public services and to place them, to some degree, within private control or ownership. Throughout the world, privatization and related, variant policies such as the “contracting out” of public services and so-called “public-private partnerships” (PPPs) have radically altered the landscape of public power.

Local public services, such as waste collection, are now in the hands of private contractors. Major public works and systems are elaborate partnerships between government and large companies:



food services, repossession agencies, drug treatment facilities, road and rail maintenance, personnel record keeping. As has been noted, a “dizzying array of governmental agencies has engaged private entrepreneurs to perform government functions on a for-profit basis.”<sup>12</sup> You name it, somewhere in the world it will have been privatized through contracting out. Even some prisons have been placed in the hands of the private sector. The notorious conduct of employees of private security contractors in the Abu Ghraib prison in Iraq in 2004 provides a potent example of both the range and the dangers of contracting out state functions. Private contractors working side by side with military intelligence officers were responsible for the abuse of prisoners by military police at Abu Ghraib, according to a fifty-three-page report prepared at the direction of the senior U.S. commander in Iraq, Maj. Gen. Ricardo Sanchez, and obtained by Seymour Hersh of *The New Yorker* magazine. The report, written by Maj. Gen. Antonio Taguba, found that there were numerous instances of “sadistic, blatant, and wanton criminal abuses” at Abu Ghraib, and recommended disciplinary action against two CACI International employees, according to the article. The use of private contractors in this role is called “insanity” by former CIA officer Robert Baer, who says, “These are rank amateurs, and there is no legally binding law on these guys as far as I could tell. Why did they let them in the prison?”<sup>13</sup>

Of all privatizations, water delivery has had the biggest impact on people’s ordinary lives and has provoked the most controversy. Because water is so fundamental, some minimal level of access is a basic human right, but rules of privatizations to date have often removed accountability. In many cases, the privatization or contracting out provides the corporation with a monopoly. The user has no exit option. To him or her, the ownership of the service provider is immaterial; central concerns are access and cost. What matters to the individual is whether they and their family can access clean water and be able to afford it. From the green rolling mountains and valleys of the Cochabamba province in Bolivia to the dry, poverty-stricken townships of South Africa, citizens are resisting the increased costs of water that have sometimes followed fast on the heels of privatization.

Transparency in the operation of the service becomes even more important, potentially the main breakwater against abuse of the monopoly and protection of the rights of the users, as a South African case involving water privatization in Johannesburg, South Africa’s largest

city, attests. In 2000, the City of Johannesburg decided to privatize its water supplies and put in place a complicated train of corporations that ended with the giant transnational corporation, Suez.

This sort of legal arrangement is common in the sphere of public service privatization, including both the presence of a major multinational (Suez) and an attempt by the public authority to retain some element of control through its share ownership and the management contractual arrangement. An antiprivatization activist requested an array of records from the various entities, including items such as the bid for the management contract, the report of the evaluation committee on the winning bidder, evaluations by two entities established on behalf of the city, the water and wastewater master plans, and the minutes of various meetings. The requests were refused.

The applicant's evidence relies heavily on the history of Suez as a basis for the exercise of the right to access information, specifically with regard to its record of overcharging the citizens of Paris and Buenos Aires. Johannesburg appears to be heading in a similar direction. The latest tariff rates released by Johannesburg Water show that low-end users (i.e., poor communities) face a 30 percent tariff increase, versus a 10 percent increase for high-end users (i.e., rich communities and corporations), which is far above inflation. The applicant's founding affidavit concludes that in this context:

the residents of Johannesburg cannot, if they are dissatisfied with the provision of water and wastewater services, democratically remove those who are responsible. The consequences of outsourcing the provision of these critical municipal services . . . is that this company will continue to perform vital public functions, for as long as the Management Agreement endures. It follows that other means must be found and fostered to ensure that [they] are in some measure accountable to the residents of Johannesburg. That will be achieved by ensuring that there is transparency . . . policies related to the disconnection of water services, including policies regarding pre-paid meters, directly implicate the right to water [contained within the South African constitution]. . . . Access will, furthermore, promote the ability of local communities to properly participate in the setting of key performance indicators and targets in relation to the provision of water and wastewater services.

## ***Civil Society Activism: The Demand for Change and Corporate Social Responsibility***

As *The Economist* noted in 2001, “In the next society, the biggest challenge for the large company—especially the multilateral—may be its social legitimacy, its values, its missions, its vision.” In recent years, there has been increasing civil society activism campaigning for transparency in the corporate sector, often directed to ensure that transparency occupies a pivotal place in the development of the understanding and practice of CSR. Multilateral institutions, and some corporations, have responded positively. The UN Global Compact is an often-cited example of the new, multilateral, macro approach to corporate social responsibility. Principle One of the UN Global Compact states that “Businesses should support and respect the protection of internationally proclaimed human rights.” A tenth principle on anticorruption practice, which reads “Businesses should work against corruption in all its forms, including extortion and bribery,” was adopted in June 2004.

On August 13, 2003, after a four-year consultative and drafting process involving the private sector, academic institutions, human rights nongovernmental organizations, and intergovernmental bodies and states, the UN Sub-Commission on the Promotion of Human Rights adopted resolution 2003/16 (the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights).<sup>14</sup>

The Norms, together with their commentary, form the major product of the Sub-Commission’s Working Group on the Working Methods and Activities of Transnational Corporations. The Norms help to clarify the assertion that business enterprises have human rights obligations. Yet curiously, the draft “Principles Relating to the Human Rights Conduct of Companies” fails to mention either transparency or any right to access information.<sup>15</sup> This shows that although thinking on the multilateral response to the power of the for-profit sector is growing, transparency is not yet a core part of the agenda.

Civil society, however, is further along the conceptual road toward transparency. Pressure from stakeholders for accountability on social and environmental issues is a major driver of companies’ self-interested efforts to be good corporate citizens. Government,

customers, community groups, or nongovernmental organizations (NGOs) can significantly impede a business plan if a company is not responsive. That is why citizenship reports are littered with terms like “license to operate,” “license to grow,” and “license to innovate.” Being good corporate citizens gives companies a license to be successful. The report that accompanies the draft “Principles Relating to the Human Rights Conduct of Companies” refers to the voluntary approach adopted by some companies, often spurred by NGO pressure. The footnote to the section (note 25) refers to around fifty such codes, the majority of which are NGO-inspired. An excellent example of NGO activism on transparency is the work that has been done in recent years by the Publish-What-You-Pay coalition of more than 190 northern and southern NGOs. The coalition is calling for laws to require extractive companies to disclose their payments to all governments. As Global Witness, a key member, argues on its Web site, “This crucial first step would help citizens in resource-rich-but-poor countries to hold their governments to account over the management of revenues. In addition, by a level playing field through regulation, companies’ reputational risks will be mitigated and they will be protected from the threat of having contracts cancelled by corrupt governments.”<sup>16</sup>

The Global Witness report “Time for Transparency—Coming Clean on Oil, Mining and Gas Revenues” starkly illustrates how secrecy provides a perfect cloak to the unscrupulous, on both the host government and the corporations’ side. Examining the cases of Kazakhstan, Congo Brazzaville, Angola, Equatorial Guinea, and Nauru, the report asserts that “In these countries, governments do not provide even basic information about their revenues from natural resources. Nor do oil, mining and gas companies publish any information about payments made to governments.”<sup>17</sup> A theater of the absurd plays out under cover of the opacity: Kazakhstan President Nazarbayev receives US\$78 million in kickbacks from Chevron and Mobil (as they then were). In Congo Brazzaville, Elf Aquitaine (now Total) treated the Congo as its colony, buying off the ruling elite, yet according to the IMF did not pay a single penny into the government’s coffers. In Angola, as much as US\$1 billion per year of the country’s oil revenues—about a quarter of the yearly income—has gone unaccounted for since 1996. In the case of Equatorial Guinea, recent investigations show that major U.S. oil companies simply

paid revenues directly into the personal account of the president at Riggs Bank in downtown Washington, DC in return for mining concessions. Finally, “the opaque and unaccountable management of phosphate reserves has transformed Nauru from the richest nation in the world (per capita) to a bankrupt wasteland.”

Beyond the anticorruption initiatives, the international community has begun to see disclosure as a useful tool for dealing with what social scientists call externalities—the often negative but unintended social and environmental impacts of corporate behavior. There has been a substantial increase in corporate reporting on nonfinancial performance. Two best practice guidelines have emerged. One, the Global Reporting Initiative (GRI), established in 1997, provides guidance on the substantive issues to be included within a sustainability report, while the second, AccountAbility1000 (AA1000),<sup>18</sup> launched in 1999, provides a framework to guide the establishment of an inclusive engagement process. More than 270 companies and institutions are now using the GRI guidelines.<sup>19</sup>

More recently, the UK government initiated a new forum called the Extractive Industries Transparency Initiative (EITI) to promote action by governments and companies. The principal weakness of the EITI, according to its critics, is that it relies entirely on voluntary reporting. The Publish-What-You-Pay coalition of NGOs continues to call for mandatory reporting based on common norms and standards across home and host countries, and among the companies themselves. In 2004, the London-based NGO Save the Children: UK, a leading member of the Publish-What-You-Pay coalition, developed a set of indicators that attempt to measure transparency across all three actors.<sup>20</sup> By investigating information from each, a triangulation exercise can be performed to help verify information relating to revenue streams in particular. The intention is to assess levels of opacity, identify leaders and laggards, diagnose solutions, and set new standards of good practice. Phase I having conceptualized and piloted the Measuring Transparency Index, phase II of the project tested the transparency of companies in the oil and gas industries and the transparency standards and requirements set by home countries—that is to say, (generally First World or wealthier) countries where oil and gas companies are based.

The project coincides with the biggest reform of accounting standards in more than twenty-five years, following the Enron and

Anderson scandals, prompting significant reviews and reforms in other financial regulations, such as securities. Category A of the index measures transparency in relation to revenue payments, category B measures general corporate reporting (“supportive disclosure”), and category C measures policy, management, and performance of Access to Information laws. The index is two-dimensional, permitting a more diagnostic reading of the data based on an analysis of policy, management systems, and disclosure performance. Twenty-five companies with operations in six countries were assessed, with the Canadian companies Talisman and TransAtlantic Petroleum topping the table, and PetroChina and Petronas, the national petroleum corporations of China and Malaysia respectively, propping it up.

From the index and the data collected, the report makes clear recommendations for reform and lays out an extensive agenda for civil society advocacy. It concludes that, overall, transparency in the oil and gas sector is poor—23 of the 25 companies score less than 30 percent—showing the need for stronger measures, and that home government regulation of company reporting is vital as the “key driver” for disclosure performance. The three Canadian companies included in the study rank first (Talisman), second (TransAtlantic Petroleum), and fifth (Nexen, Inc.). As the report notes, “The strong results for Canadian companies indicate the role that home government regulations can play in increasing transparency in host countries. They demonstrate that at a global level, home government regulation is an efficient way to improve transparency.”<sup>21</sup> In this context, it is noteworthy that in the sister report on home government transparency regulation of companies, Canada ranked first of the ten countries covered and was the only one to score more than 50 percent (58.1), thus inviting the conclusion that there is a compelling causal link between corporate transparency and mandatory regulation by government.

### ***Voluntary Corporate Transparency***

Nonetheless, some corporations are coming to believe that transparency is in their interests. Talisman’s voluntary commitment to openness is evident in its comprehensive and extensive approach to both the scope and the manner and method of its transparency policy,

ensuring, for example, that the disclosed information is presented in clear tables. Open—and accessible—disclosure promotes business confidence, among customers, shareholders, regulators, and investors.<sup>22</sup> It instills a sense of accountability throughout the company, from the most junior employee to the biggest shareholder. Organizations work best when their stakeholders—internal and external—know what is going on. Good communication requires a good information flow. An illuminating example is the British nuclear waste company Nirex, which provides advice on waste treatment and packaging relating to the disposal of nuclear waste—an important and controversial public health and safety issue. Mirroring government-led shifts toward openness, Nirex's own epiphany arose from a commercial and public relations disaster. In the mid-1990s the company aimed to get government permission to investigate whether the underground rock formations near Sellafield—a very beautiful part of the English countryside—were suitable for the safe disposal of nuclear waste. Local communities did not believe that the purpose was exploratory; they believed that Nirex had already made up its mind. In turn, the company was unable to persuade them otherwise and barely made the effort to do so. Just before the 1997 British General Election, the government refused the company's application.

Nirex realized that it was perceived as closed and secretive: it was slow to respond to public requests for information, it communicated badly, and it was unwilling to recognize the importance of social issues. It was seen as too close to the nuclear industry, as part of the problem and not the solution. From this analysis came the revelation that trust was the company's core business, and openness was identified as the means of achieving it. A transparency policy was drawn up, with five specific commitments: fostering openness as a core value, listening as well as talking to people who have an interest, making information readily available under a Publications Policy and responding to requests under a Code of Practice on Access to Information, making key decisions in a way that allows them to be traced so people can see and understand how they were arrived at, and enabling people to have access to and influence on [its] future program.<sup>23</sup> Moreover, the board of directors appointed a Transparency Panel chaired by a leading human rights activist, Jenny Watson, to oversee the operation of the policy and to scrutinize and assess the extent to which Nirex is meeting its five commitments.<sup>24</sup>

The notion of independent, external scrutiny is probably essential for the credibility of a voluntary initiative; otherwise, it may well be regarded as a mere public relations exercise. Where such voluntary initiatives exist and are complied with, they represent a very valuable contribution toward the necessary social consensus that must be found if transparency as a value is to flourish in the private sector. Leadership by champions such as Nirex will be very important in shifting the attitudes of CEOs and their boards. It will also allow the sector to lead the debate and to formulate an approach that takes its legitimate needs for secrecy into account. Nonetheless, there will always be policy advocates who are skeptical of the voluntary effort; they will argue that nothing short of a full legal, mandatory obligation will suffice. But how blunt or sharp can the law be?

## **The Challenge to Freedom of Information Regimes: The Governmental Response**

### ***The Legislative Response Around the World***

Historically, freedom of information acts as they were originally generally termed provided for a “vertical” right of access—that is to say, from the citizens “upward” to the state. The earliest ATI laws tended to only cover “pure” state information, that is to say, the information to which the requester was entitled access was defined narrowly to limit requests to information owned, held, and controlled by the government.

The United States has one of the oldest freedom of information laws and arguably the most developed and effective system for facilitating citizen access to public documents, although it has been undermined by chronic delays in handling requests. The country also has extensive experience of a diverse range of privatization efforts. Its federal structure means that there have been an equally wide range of attempts to deal with the policy consequences, which provides some useful lessons. During the first main wave of privatization in the United States, little attention was paid to the freedom of information problems that might arise.<sup>25</sup> But later studies indicate an obvious difficulty: “Professors Matthew Bunker and Charles Davis have pointed out that by creating, maintaining, and controlling previously public records,



private companies are controlling access, and that they are often ‘at odds with the very purpose of public records laws.’”

As the media has argued, “once-public information has disappeared behind the curtain of corporate privacy”;<sup>26</sup> Bunker and Davis note that corporations performing privatized governmental functions have attempted to deny the public access to a wide variety of records.<sup>27</sup> They cite a private contractor transporting pupils to and from public schools in Atlanta, the capital of the U.S. state of Georgia, unsuccessfully fighting a request for the personal driving records of its bus drivers (in terms of criminal convictions). In California, a waste disposal company contracted by a municipal government attempted to halt the release of financial records used to evaluate a rate increase that city officials granted it. In South Africa, a large, formerly publicly owned steel utility, ISCOR, attempted (albeit unsuccessfully<sup>28</sup>) to use its new, private legal status as a shield to avoid releasing documents relating to its environmental performance during the apartheid era.

Moreover, in the United States, the effect has been not only generally but also unequally negative; information flows depend on where exactly the person makes the request. Because of the failure of legislatures to meet the problem head-on—although all fifty U.S. states have right to know statutes, state legislatures have universally failed to amend their laws in the face of privatization—courts have had to interpret state openness laws and have done so in different ways in different states. “These decisions have ranged from flexible, access-favoring applications of freedom of information statutes to more restrictive, access-limited applications due to more explicit definitions found within the statutes themselves.”<sup>29</sup>

The general failure of the (U.S.) courts to hold private entities accountable under the Freedom of Information Act means that government can frustrate the public disclosure purposes behind the act by delegating services to the private sector. This represents a major threat to transparency and to the exercise of the right of access to information. In terms of the traditional policy response, of the eight<sup>30</sup> countries to have passed laws prior to 1990, only one, New Zealand, passed a law that provided for a right of access to records other than “pure” public documents. In its interpretation chapter, the New Zealand Official Information Act 1982 offers a convoluted expansion of “pure” official information, to include state-owned corporations

and public quangos (regulatory agencies organized outside the civil service but appointed and financed by the government, such as unincorporated advisory boards).

The explosion of access to information laws after 1990 was a part of the new “good governance” agenda and, in some cases, a response to citizen demands for openness. Of the new wave of ATI laws, two of the first batch—those of Italy and the Netherlands—contain provisions that offer at least some semblance of “partial” access to nonstate information. Article 23 of the 1990 Italian law states the right of access to information applies to “the administrative bodies of the state, including special and autonomous bodies, public entities and the providers of public services, as well as guarantee and supervisory bodies.” This is far from clear or explicit in its intentions. Section 3(1) of the Dutch law is clearer. It states that “anyone may apply to an administrative authority or an agency, service, or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter.”

This is the first reference in an ATI law that captures the concept of public accountability in the context of privately held information. Since then, a significant trend has emerged. Of the forty-six ATI laws surveyed for the purposes of this chapter, only seventeen have partial coverage of this sort, thirteen of them in laws passed since 1999. Eight of the thirteen are from the Central and Eastern European region, an area that has, of course, seen massive structural adjustments to the state and huge amounts of privatization of public services since the political changes of the post-Berlin Wall early 1990s.

The laws offering “partial coverage” do so in variety of ways, all variations on the core theme of public accountability. The Slovak law, for example, covers entities that “manage public funds or operate with state property or the property of municipalities.”<sup>31</sup> The Finnish law covers private entities “appointed for the performance of a public task on the basis of an Act, a Decree or provision or order issued by virtue of an Act or Decree, when they exercise public authority.”<sup>32</sup> The Bulgarian law goes further: article 2(1) defines public information as “any information of public significance, which relates to the public life in the Republic of Bulgaria”; article 2(3) states that the right to access extends to “public information relating to such public services, which are provided by either natural persons or legal entities, and are financed by the state budget or budget funds.”

The Jamaican law offers a rather different approach. Section 5(3)(b) of its Access to Information Act 2002 gives the responsible minister the authority to declare that the act's right of access apply to "any other body or organization which provides services of a public nature which are essential to the welfare of the Jamaican society." The Jamaican law has only recently come into effect (January 5, 2004) and so there are no examples yet of the minister exercising his or her discretion in this way.

### ***A Comprehensive Right of Access to Private Information: The South African Experiment***

The South African law adopts a unique policy solution to the problem. It goes far further than any other ATI law, providing for a comprehensive right to all private information where access to the information is necessary for the protection or exercise of another right. Although it is still relatively early in the implementation of the law to draw detailed conclusions, the experience so far provides a glimpse into how a comprehensive legal right to access private information might transform requirements for disclosure by the profit-making sector and how such a regime would work in practice.

The first democratic election in South Africa in 1994 that swept Nelson Mandela into power marked the beginning of a halcyon age in constitutionalism and human rights. In the two years that followed, South Africa's entire political and governance structure was reformed and placed within the framework of a new Constitution, whose purpose is to drive a profound social and economic transformation away from the brutal iniquities of the apartheid era. Between 1994 and 1996, a special Constitutional Assembly met to write the new founding document. An interim Constitution, agreed upon during the all-party negotiations that led to the 1994 election, included a right to access public information where access was necessary to protect or exercise another right.

During the public participation process of the Constitutional Assembly, the Open Democracy Campaign Group argued for an open-ended right to public information and, moreover, the inclusion of a right to private information. This argument proved attractive to key members of the ruling African National Congress (ANC)'s

representation in the Constitutional Assembly committees. They were alert to structural changes in state power around the world, cognizant of the fact that their own government was embarking on a course of privatization, and acutely aware of the immense wealth and power of both South African corporations and transnational companies. For one of the members of the campaign group, the umbrella trade union organization Congress of South African Trade Unions (COSATU), it was an issue of fundamental political and strategic importance. As its representative, Oupa Bodibe has argued: "Workers require information to exercise and protect their rights. If unions or workers could request information vital to the protection or exercise of the right to fair labour practices . . . this would strengthen the enforcement of human rights throughout South Africa. . . . Information is required to exercise and protect the right to equality, to ensure the absence of discrimination in hiring, promotion and salaries, and generally to promote democratization of the workplace."<sup>33</sup>

Thus, the version of the access to information right that emerged in the final Constitution represented a radical new path: section 32 provides for a right to access not only "any information held by the state" but also "any information that is held by another person and that is required for the exercise or protection of any rights." Elsewhere, "another person" is defined to include both natural and juristic persons, so section 32 unequivocally covers private companies. The Constitution required that national legislation be passed to give effect to the right; accordingly, in 2000, the Promotion of Access to Information Act was passed.

Despite its potential, usage of the South African act has been limited in relation to private records. Awareness of the legislation generally is poor, and understanding the potential in relation to private power, even more so. The Open Democracy Advice Centre (ODAC), a specialized NGO established in 2000 to help ensure effective implementation of the act, operates as a public interest law center and has been involved in a number of cases that test the "horizontal" reach of the act. In *Pretorius v. Nedcor Bank*, a former senior officer in the South African army sought the records relating to the bank's policy when evaluating loan applications. Pretorius had applied for a loan and had been turned down without any explanation. He wanted to know why. ODAC's interest was in testing the private information provisions of the law in order to establish a precedent

that would be valuable for people who suspected they were subject to what is known as “redlining”—discrimination against particular communities or social groups. In South Africa, it is suspected that banks and other credit agencies discriminate against certain areas that they regard as high risk. Risk aversion is, of course, a perfectly legitimate commercial strategy. Blanket discrimination against people from a particular area or social group offends the South African Constitution’s right to equal access, however, and the right to not be unfairly discriminated against. In the Pretorius case, the bank, having taken counsel’s opinion, were anxious not to go to court and settled the case by providing the applicant with a range of papers setting out their policy and the reasons for the refusal in his case.

In another, more complicated case, on behalf of indigent fisherfolk, ODAC obtained the “transformation plans” of a number of fishing companies that had been set up to win contracts for fishing quotas, the main economic driver along the western and southern coasts of South Africa. In essence, a series of old, white-owned fish companies had executed a neat “legal fraud” by reconstituting through subsidiaries as “empowerment” companies—companies owned by blacks and/or with substantial black shareholding—in order to win quotas that had been earmarked for empowerment companies as a part of the new government’s general strategy of economic transformation. Black fishermen and women had been duped into signing the shareholding forms and had received absolutely nothing in return. Accessing the “transformation plans” that set out the details of their black empowerment exposed the companies’ fraud, revealed it to the fisherfolk so they could seek legal remedy, and reported it to Marine Coastal Management, the government’s regulatory body. A national investigative television program, *Special Assignment*, reported on the fraud and the effort to unravel it. Transparency has compelled accountability for a series of local communities; without the right to access private information, it would not have been possible for ODAC to have prompted the exposé.

Secrecy is used to hide the hidden influence of big business over democratic politics. In a third case, ODAC is acting as attorney for one of its founder NGOs, the Institute for Democracy in South Africa (IDASA). IDASA is running a campaign calling for regulation of party political funding. At present, there is no regulation whatsoever; despite attempts to develop an anticorruption infrastructure, there

is a lacuna in which a number of funding scandals have erupted. In one, the Italian millionaire industrialist Count Agusta entered into a plea bargain with the National Prosecutor, admitting in 2002 paying a R400,000 (about US\$70,000) bribe to get planning permission for a golf estate. The bribe was paid into the coffers of the National Party, which was then in power in Western Cape provincial government. In a more serious scandal, a former ANC Member of Parliament (MP), Andrew Feinstein, told Swedish television and radio that a consortium between the Swedish company SAAB and the UK company British Aerospace, which in 1999 won a massive contract to supply fighter aircraft to South Africa, had paid the ruling ANC a US\$35 million inducement.

In late 2002, IDASA made a series of requests under the Access to Information Act for records of private donations made by the biggest thirteen companies in South Africa to the thirteen political parties represented in the National Assembly. None of the political parties acceded to the request, but three of the companies accepted their duty to disclose and supplied records of donations that they had made since 1994. Another company, AngloGold Ashanti, has responded by compiling a voluntary code of disclosure. After that ground-breaking step, in the first quarter of 2004 in the run-up to the April general election, a further twelve major corporations followed suit, disclosing donations worth approximately R40 million (\$5 million).

Very few cases have been heard in the High Court. As part of its campaign, in late 2003 IDASA launched proceedings under the Access to Information Act against the four biggest political parties—the ANC, the National Party, the Democratic Alliance, and the Inkatha Freedom Party—claiming the public's right to know about the private donations in order to be able to make an informed choice at election time and seeking a declaration of the principle of transparency in relation to substantial private donations and an order requiring disclosure of donations of R50,000 or more since January 1, 2003. A fifth party, the African Christian Democrat Party (ACDP), agreed shortly before the launch of the proceedings to open its books to public scrutiny and thereby declared the identity of all its recent substantial private donors. The case raised important, ground-breaking issues related to private transparency and attracted considerable international attention. In its April 2005 judgment, the Cape High

Court held that political bodies are private bodies but, applying the test very narrowly, found that access to the donations records was not necessary to protect and exercise the right to political freedom contained in section 19 of the South African Constitution. Nonetheless, as part of its submissions to the court, the ruling ANC introduced legislation to regulate private funding on the basis of the principle of transparency (in line with Article 10 of the African Union Anti-Corruption Convention, ratified by South Africa in November 2005). In the light of this undertaking, IDASA decided not to appeal the judgment, despite its restrictive interpretation of the right.

In another case, *Davis v. Clutcho (Pty) Ltd.*,<sup>34</sup> a minority shareholder requested access to certain company accounts for the purpose of determining the value of his shares. Although the case concerns a modest-sized car repair business, the principle involved has very far-reaching implications for businesses of any size: when majority and minority shareholders fall out, as they often do, what rights of access to information can the minority fall back on? In *Clutcho*, the applicant became concerned about the manner in which the respondent was being managed when he discovered that various companies had closed the respondent's credit facilities. Existing company law was of little use to the minority shareholder; in fact, it had been used against him: he had been lawfully removed as a director of the company by resolution of the majority shareholders, which cut off his main supply of information. At the hearing, the respondent argued that in order to fulfill the need to show that the information was "required for the exercise or protection of any rights," the applicant needed to show an antecedent legal right to such information. Carefully cataloguing the various company law provisions that might apply, the respondent's counsel concluded that there was no such statutory right to information. Judge Meer disagreed and ruled that:

The Companies Act cannot . . . limit the right of access to information at section 32 of the Constitution . . . and nor can it be interpreted to exclude such right, which would thus be contrary to the spirit of the Bill of Rights. To the extent that the Companies Act does not provide for access to information, section 32 of the Constitution, and the Act, must be read into the Companies Act. It could never have been the intention of the legislature that a shareholder aggrieved by financial statements, as in this case, should be barred from access to the information

required to shed light on such statements in order to exercise his rights to sell shares or even prosecute a case against the company in terms of the remedies available to him in terms of either the Companies Act or the common law.<sup>35</sup>

## **Shifting the Legal and Human Rights Paradigm**

This line of legal authority has potentially far-reaching implications for corporate transparency in South Africa and in other countries grappling with similar issues. In short, it is likely that the traditional approach of the law to the legal personality of a corporation will be tempered by the normative imperative of the Constitution. The application of the principle of the right to know in cases such as these articulates a potentially different legal and political paradigm from the one that prevailed in the nineteenth century and that constituted the foundation upon which corporate secrecy was built. Then, in contrast to the traditional view of the vertical relationship between citizens and the state, relationships in the private sphere were regarded as being based on a degree of parity between free and autonomous parties. Politics and ideology contributed to the dominance of this paradigm, and legal theory mirrored these traditions.

A fresh look at the relationship between human rights instruments and protections and corporate legal identity is needed. It is important to take account of the nature of the right and the nature of the duty imposed. The right to dignity, to freedom of security and person (tort), to privacy, to a clean environment, to property, and children's rights all "infringe" upon the private sphere without any or much controversy.<sup>36</sup> The fact that legislation is commonly used to give effect to rights assists this inquiry, for example in the case of antidiscrimination rights, which intrude on labor relations and on the "private nature" of the employer-employee relationship.

The idea of universal human rights is premised on the notion of correcting inequalities of power so as to prevent harm and protect people from abuse, thus enabling them to sustain their human dignity. The concept of human rights has traditionally been applied to relations in the public sphere. The dominant view has been that the state/individual relationship involves unequal power dynamics between parties. A state's potential to abuse its position of authority to the detriment of an indi-



vidual's interests was the basis for human rights to insulate the latter against state interference.<sup>37</sup> Muddying the waters, confusion between *personal* information and *private* information has served to constrain fresh approaches. There may be natural and appropriate concerns that rights of access to private information should not breach the right to privacy. But personal information is a legally defined category, generally exempt from right of access (whether in the public or private sphere). *Personal* information—such as an individual's HIV status or personal credit card details—must be carefully distinguished from private information where access is needed to protect or exercise a right—such as information about the side effects of an antiretroviral drug produced and sold by a multinational pharmaceutical company.

### **Conclusion: Crossing the Rubicon**

Concepts of human rights first arose in an age of relative state omnipotence. Limiting the application of human rights to vertical relationships between the individual and the state is no longer sufficient to ensure their protection. The public sphere has changed dramatically in the past twenty-five years. Democratic control of public resources and goods and services became ideologically unfashionable. Much public power has, as a result of the policies of privatization and contracting out, been ceded to privately owned entities. The relative impact of the for-profit sector has grown, as has understanding of the harm as well as the good that the private sector can do to the lives of ordinary citizens everywhere and to their environment.

A great surge in access to information legislation around the world has largely failed to provide for granting access to information essential to citizens wanting to enforce accountability from the entities that affect their daily lives—through the provision of water and health services, transportation, waste collection and other local services, and telecommunications and financial services. Some laws have tried to adapt by defining “public records” in such a way as to cover entities fulfilling a public function. In the United States, state-level courts have applied a wide variety of tests to try to ensure that the public policy intentions of access to information laws are not defeated by structural changes in government.

An earlier trend in regulating private corporations in response to crisis and disaster has resulted in a plethora—at least in developed societies—of piecemeal law and regulation requiring disclosure of information controlled by for-profit entities in relation to specific identified social risks.

But these efforts approach the problem from the wrong angle. Even if the state could foresee all the possible risks that may arise and effectively require relevant disclosure in advance of disaster or crisis, few states and societies around the world could cope with the demands that such a regulatory responsibility would place on their capacity, resources, and weak authority. Equally, rather than attempting to extend coverage with convoluted legal gymnastics intended to cover the multitude of possible forms that “public, private information” may take, a more comprehensive approach is needed. As Alasdair Roberts argues, this requires a departure from the liberal framework that drives a wedge between public and private and insists on differential treatment of the two spheres.<sup>38</sup>

Once attention switches to the idea of unjustifiable harm and whether countervailing mechanisms such as disclosure and transparency requirements could prevent it, a paradigmatic evolution can gather pace. The South African experiment is a significant departure from the old paradigm. In essence, it says: why should private entities be ring-fenced from the same sort of responsibilities to which public entities are subjected, since they can have just as much, sometimes more, negative impact on the human dignity of citizens? When they pollute rivers, discriminate against social groups, fix prices in cartels, they undermine many human rights—the right to a clean environment, the right to equal treatment and equality, the right to water. This new thinking attaches the right to access information not to any evaluation of the functionality of the information or the entity that owns or control it, but instead to the need to protect or exercise a right.

Whatever the final, chosen formulation, the Rubicon must first be crossed. The psychological and legal barriers that have hitherto tended to encourage opacity deserve to be reconsidered in the light of corporate social responsibility trends and new global standards for disclosure and reporting. The arrangements society has made to encourage capital to multiply and create wealth—namely, the legal notion of the for-profit corporation—should not operate as a justification for continued secrecy. Corporate leaders are recognizing their

responsibilities in this regard, sometimes as a result of NGO activist pressure and sometimes out of enlightened self-interest: there is growing understanding that trust is a precious commodity and that transparency can strengthen it and thereby protect or build reputation and brand. The voluntary approach of companies such as Nirex exemplifies this new thinking. In other words, there is also a strong business case for transparency.

Transparency has a profound instrumental value as a bridge to other rights. Accessing information so that social actors can play a full part in a vibrant society and economy is the underlying purpose. This is the case for extending the right to access information to information held not just by the state but also by the for-profit, private sector. Both activists and policy makers are finding that it is crucial to end what has become a false divide, increasingly irrelevant and confusing given the blurred lines between the two sectors and the transfer of power, functions, and responsibilities from one to the other.

## NOTES

1. Richard Calland and A. Tilley, eds., *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Cape Town: ODAC, 2002).

2. Thomas Blanton, "The World's Right to Know," *Foreign Policy* 131 (2002): 50; David Banisar, "Freedom of Information and Access to Government Records Around the World" (Washington, DC: freedominfo.org, 2004), [http://www.freedominfo.org/survey/global\\_survey2004.pdf](http://www.freedominfo.org/survey/global_survey2004.pdf).

3. Alasdair Roberts, "Structural Pluralism and the Right to Information," in Richard Calland and A. Tilley, eds., *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Cape Town: ODAC, 2002), 42.

4. Mark Nadel, "Corporate Secrecy and Political Accountability," *Public Administration Review* 35 (1975): 15.

5. Joel Bakan, *The Corporation* (New York: Free Press, 2004), 37.

6. R. Stevenson, "How Much Privacy Does Business Need?," *Business and Society Review* (2001):47.

7. See also Ann Florini's reference to the history of corporations in *The Coming Democracy: New Rules for Running the World* (Washington, DC: Island Press, 2003), 94-99.

8. Corporations are legal fictions that exist for the sole purpose of building wealth. They can live forever, change identity in a day when it suits

them, live without a real home, own others, cut off parts of themselves, and grow new parts (Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* [Emmaus, PA: Rodale Books, 2002]). But should they have the rights of the individual if they do not behave like individuals? Since the Supreme Court ruling, corporations have assumed the Bill of Rights for themselves, pushing in court for the right to free speech, which allows them to contribute money to politicians and political parties and effectively buy votes and rewrite laws for their benefit. They have won the right to privacy, which allows them to deny government agencies access to their papers and properties and, he says, hide crimes in the process. They have also secured the Fifth Amendment right against self-incrimination and the Fourteenth Amendment right of equal protection, allowing them to exist even in a community that objects to their presence on the grounds that they destroy small businesses.

9. Mary Graham, *Democracy by Disclosure: The Rise of Technopopulism* (Washington, DC: Brookings Institute Press, 2002), 147.

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. Among other things, the act limits the extent to which an accountancy firm can serve as both an auditor of and consultant to the same corporation, due to the intense conflict-of-interests difficulties that arise.

11. Graham, *Democracy by Disclosure*, 138.

12. Matthew Bunker and C. Davis, "Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance," *Journalism and Mass Communication Quarterly* 75 (3) (1998): 465.

13. Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004.

14. Sihaka Tsemo, speech on privatization of basic services, democracy, and human rights at Conference on Privatization and Human Rights, University of Western Cape, South Africa, December 2003.

On June 24, 2004, UN Secretary-General Kofi Annan added a tenth principle to the UN global compact not specific to transparency but nevertheless showing a commitment by the UN: "Businesses should work against corruption in all its forms, including extortion and bribery."

15. E/CN.4/Sub.2/2000.WG.2/WP.1.

16. "Time for Transparency—Coming Clean on Oil, Mining and Gas Revenues," *Global Witness* (March 2004):6, <http://www.globalwitness.org/reports>.

17. *Ibid.*, 1.

18. <http://www.accountability.org.uk>.

19. Global Reporting Initiative (GRI), "Organisations Using the GRI Guidelines," <http://www.globalreporting.org>.

20. Save the Children UK, "Beyond the Rhetoric: Measuring Revenue Transparency: Company Performance in the Oil and Gas Industries," *Save the Children UK*, March 17, 2005. Published in tandem with a second report focusing on home government transparency: "Beyond the Rhetoric: Measuring Revenue Transparency: Home Government Requirements for Disclosure in the Oil and Gas Industries." Note: the Measuring Transparency Index was developed by the writer, with another consultant, Mohammed Ali, during an earlier phase of the project, and the Access to Information component of the home government report was undertaken by him and his colleague at the Institute for Democracy in South Africa (IDASA), Catherine Masuva.

21. Save the Children UK, "Beyond the Rhetoric: Measuring Revenue Transparency: Company Performance in the Oil and Gas Industries," 33.

22. As an example, see the first principle of ethical investment enunciated by Fraters Asset Management in South Africa: Communication and Disclosure: <http://www.fraters.co.za/principles>.

23. <http://www.nirex.co.uk/index/ifo.htm>.

24. The panel is now chaired by Andrew Puddephatt, another prominent human rights activist and former Executive Director of the international freedom of information NGO, ARTICLE 19. Its other two members are Professor Patrick Birkenshaw, a freedom of information academic, and James Amos, who works for an NGO specializing in constitutional reform.

25. Craig Feiser, "Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law," *Florida State University Law Review* 27 (2000).

26. Don Noel, "Privatization Shouldn't Reduce Public Information," *Hartford Courant*, April 16, 1997, A11.

27. Bunker and Davis, "Privatized Government," 465.

29. In a judgment handed down by the Pretoria High Court in early 2005 (*Hlatshwayo v. Iscor Limited*), it was ruled that at the time that the documents were created, ISCOR was performing a public function by virtue of the extent of state control and that it could not use its new privatized status to keep the documents secret.

29. Feiser, "Protecting the Public's Right to Know," 836. Feiser's analysis of the response of U.S. state courts to the problem demonstrates the extent and depth of the confusion; seven different approaches have been taken by the courts of the thirty-four states in which cases have been decided. In

conclusion, Feiser lists the seven approaches thus, from the most favorable to public access to the least favorable (Feiser 2000:864):

- The nature of records approach (six states): allowing access to records as long as the records pertain to some aspect of government;
- The public function approach (ten states): allowing access when the private entity is performing a government function;
- The totality of factors approach (six states): allowing access as long as the presence of certain factors outweighs the absence of other factors (such as public funding, control, independence, etc.);
- The public funds approach (six states): limiting access to those cases where the requisite level of public funds is present;
- The public control approach (one state): limiting access to those cases where the requisite level of government control is present;
- The possession approach (one state): limiting access to those cases where the public entity is in possession of the documents;
- The prior legal determination approach (four states): limiting access to those cases where there has been a legal determination (statutory or constitutional) that the entity should be subject to access.

30. Sweden, USA, Norway, France, Australia, New Zealand, Canada, Denmark.

31. Section 2(3), Act on Free Access to Information and Amendments of Certain Acts, 2000.

32. Section 4(9), Act on the Openness of Government Authorities, 1999.

33. Calland and Tilley, *The Right to Know*, 109.

34. *Andrew Christopher Davis vs. Clutchco (Pty) Ltd.*, in the High Court of South Africa, Cape of Good Hope Provincial Division. Unreported; judgment June 10, 2003.

35. *Ibid.*, at page 16 of the Judgment.

36. Halton Cheadle and D. Davis, "The Application of the 1996 Constitution in the Private Sphere," *South African Journal on Human Rights* 13 (1997): 44.

37. Danwood Chirwa, "Non-state Actors' Responsibility for Socio-economic Rights: The Nature of Their Obligations Under the South African Constitution," *ESR Review* 3 (3) (2002) (University of Western Cape, Community Law Centre), [http://www.communitylawcentre.org.za/ser/esr2002/2002nov\\_nonstate.php#nonstate](http://www.communitylawcentre.org.za/ser/esr2002/2002nov_nonstate.php#nonstate).

38. Roberts, "Structural Pluralism," 29.



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## Rethinking the ownership of information in the 21st century: Ethical implications

Tomas A. Lipinski<sup>1</sup> and Johannes J. Britz<sup>2</sup>

<sup>1</sup>Center for Information Policy Research, School of Library and Information Science, University of Wisconsin – Milwaukee, USA. E-mail: [tlipinsk@csd.uwm.edu](mailto:tlipinsk@csd.uwm.edu); <sup>2</sup>Department of Information Science, School of Information Technology, University of Pretoria, South Africa 0002. E-mail: [britzh@postino.uzp.ac.za](mailto:britzh@postino.uzp.ac.za)

**Abstract.** This paper discusses basic concepts and recent developments in intellectual property ownership in the United States. Various philosophical arguments have previously been put forward to support the creation and maintenance of intellectual property systems. However, in an age of information, access to information is a critical need and should be guaranteed for every citizen. Any right of control over the information, adopted as an incentive to encourage creation and distribution of intellectual property, should be subservient to an overriding need to ensure access to the information. The principles underlying intellectual property regimes in the United States recognize and embody this. In addition, the philosophical/ethical dimensions of this debate could also be structured to support this attitude as well. Intellectual property is fast becoming digital property. New technologies allow owners to extend their control of both legitimate uses and misuses of the intellectual property. Recent trends demonstrate that the access principle has not always been paramount in judicial or legislative applications. The trend rather is to allow a proprietarianism factor to dominate the analysis. Finally, several principles are forwarded which would assist adjudicators and policy makers in reaffirming the basic purpose of the intellectual property law, which is to benefit the public at large.

**Key words:** access, copyright, ethics, intellectual property, new media, ownership, patent, trademark, trade secret

### Introduction

This paper presents an analysis of the intellectual property system of the United States.<sup>1</sup> It is a system, however, that is not uncommon to many countries, and therefore, this discussion should have wide appeal. Since “[p]roperty institutions fundamentally shape a society,”<sup>2</sup> this analysis accomplishes several purposes. First it identifies the philosophical basis for ownership of information, specifically intellectual property. The discussion recognizes the dual nature of information ownership as expressed in the intellectual property system. This dual nature functions both to support an ownership or control right, yet in return promises access to subsequent users of that intellectual

property. An extended discussion places these two concepts within the philosophical/ethical debate and offers several considerations of how resolution might be achieved in a modern information oriented society.

Next, several intellectual property regimes (patent, trademark, trade secret and copyright) are discussed with respect to this apparent duality. Information owners pressure the system in an attempt to secure threats (real or perceived) to their interests. Branscomb<sup>3</sup> observes this trend as well as Severson: “The information age has put enormous stress on the legal mechanisms for protecting intellectual property.”<sup>4</sup> This stress is realized as a dangerous development in the intellectual property laws. This section identifies how the proprietarianism of intellectual property is becoming the determining factor in resolving intellectual property ownership problems. Both Branscomb<sup>5</sup> and Drahos<sup>6</sup> have observed this commercialization (“proprietarianism” to use Drahos’

<sup>1</sup> While the examples used to assess the concept of intellectual property are taken from American law, the principles would apply to most legal systems based on “Western” or European origins. The authors have chosen to “case study” the United States because that is where Mr. Lipinski’s legal experience lies. In addition, a number of recent developments in intellectual property law insightful to the general discussion have occurred in United States court and legislative systems.

<sup>2</sup> E.C. Hettinger, Justifying Intellectual Property, 17–37, in *Intellectual Property: Moral, Legal, and International Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997, p. 7.

<sup>3</sup> A.W. Branscomb, *Who Owns Information: From Privacy to Public Access*. Basic Books, New York, 1994, p. 7.

<sup>4</sup> R.W. Severson, *The Principles of Information Ethics*. M.E. Sharpe Press, Armonk, New York, 1997, p. 32.

<sup>5</sup> Branscomb, 1994.

<sup>6</sup> P. A. Drahos, *Philosophy of Intellectual Property*. Dartmouth Press, Aldershot, United Kingdom, 1996.

term). It is suggested that this development is inconsistent with the original intent of the intellectual property laws. This is so because it upsets the “balance” created by the dual nature of control and access rights. It is also irreconcilable with ethical principles of information ownership.<sup>7</sup> Finally, a set of principles are proposed to guide policy and decision makers in determining how the intellectual property laws can or should be interpreted to reestablish the proper societal information goals inherent in the original intellectual property schema.

Perhaps it is a tremendous supposition to suggest that one should not steal what others have created. Yet, in some ways that principle is what the intellectual property laws imply we honor. However, the matter is not that simple in its application. We may have a basic sense of right and wrong. And we may have the intellectual property system to support that sense but there may also be in practice little harmony between the two. Greedy elements may wish to control information that others may consider essential to their ability to function in society. As Severson observes in an extended comment: “In order to narrow the gap between morality and the law, we must turn to ethics, which has an edifying function. The purposes of ethics, recall is to make our morality more effective. Respect for intellectual property is an ethical principle that can enhance the common goals of intellectual property and our moral instincts. It is similar enough to our morality to be able to boost in into action. Principled ethics, in this instance, must stand half way between the law and morality.”<sup>8</sup>

### The philosophy of information ownership and intellectual property

The philosophical basis for the intellectual property systems is undetermined, though many theories have been forwarded. It is important to arrive at some resolution or at least understanding of these divergent views. This is so for two reasons. First, it can serve in an assessment of the current system, identifying underlying goals and concepts and as a litmus test in measuring the success or failure of the various intellec-

<sup>7</sup> J. A. Rawls, *Theory of Justice*. The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1971. and J. Van Den Hoven, *Distributive Justice and Access to Information: Simple vs. Complex Equality*, paper presented at CEPE, Computer Ethics and Philosophical Enquiry, London School of Economics, London, UK, December 14–15, 1998, 1998.

<sup>8</sup> Severson, 1997, pp. 36–37. and J. Moor, *Just Consequentialism and Computing*, paper presented at CEPE, Computer Ethics: an Philosophical Enquiry, London School of Economics, London, UK, December 14–15, 1998, 1998.

tual property regimes. Second it can mold future alterations to the intellectual property system and assist in the design of new goals.

### *Information ownership: Control and access*

The assumptions that underlie our intellectual property systems are derived from basic concepts of property ownership, albeit intangible property. The ethical question about the ownership and right of possession of information rests on the assumption that each individual has stated rights, but specifically with relation to the right to property and its use. In *Two Treatises of Civil Government* (1689), John Locke observed that every human being has fundamental human rights, and these rights can not be estranged or alienated. These rights are threefold: the right to live, the right of freedom and the *right of ownership*. The government has, according to Locke, then the responsibility to protect and ensure these rights. Locke also forwarded that an individual has the right to profit from the efforts of their labor. This is a property right, and it extends to intangible property, i.e., intellectual property.

The ethical question with respect to ownership of information is connected with its legal application. This problem of social justice and can be explained in the following manner: anytime a society determines that the distribution of goods is inequitable or it must settle a dispute involving information controllers and users, it involves a potential question of social justice. These judicial decisions should be determined according to various principles regarding equity and fairness, i.e. *social justice*.

A leading proponent of this approach to ownership and the (re)distribution of goods (including information) is John Rawls. Rawls<sup>9</sup> argues that one can think in terms of a social contract made from a primal position. This primal position is a situation in which no individual knows his or her personal station in society, but agrees to a contract that divides goods based on abstract fair principles from behind a veil of ignorance. One argument related to capitalist (proprietary) society is that everyone might agree to have some people better off than others if that situation also made them better off than they would otherwise be. In terms of information, one can think in terms of minimal information standards that everyone would wish to be maintained. Stated in opposition to the capitalist position Rawls might hold that no action is taken unless it places the least in a better position. For example, Van Den Hoven<sup>10</sup> has articulated an application of Rawls that provides ethical support for the closing the information rich – information poor gap.

<sup>9</sup> Rawls, 1971.

<sup>10</sup> Van Den Hoven, 1998.



As a society becomes increasingly information-centered, the minimum information base might be raised since information is central to an individual's ability to be comfortable and capable in such a society. This argument also applies to the protection of intellectual property. If it is not protected (both in terms of control and access rights) it can lead to the constraint of creativity and the dissemination of knowledge. Applying Rawls it could be argued that intellectual property laws should not secure any ownership rights unless at the very least a right of access is also available.

This specific proposition is forwarded by Drahos.<sup>11</sup> Ownership rights that operate only to prohibit or proscribe should be "excluded [from consideration] because such arrangements constitute a deep interference in the distribution of information, a primary good which by its nature is not a scarce resource."<sup>12</sup> The concept of information ownership if only viewed in its "control" aspects, i.e., without its access aspects, may arguably tend to curtail the available flow of information. In fact, Palmer<sup>13</sup> observes that "[I]ntellectual property rights, however, do not arise from scarcity, but are its cause." Referring to this perspective of ownership, the concept of information is tested in terms of its unique properties (duality) as institutionalized in our constitutional and judicial notions of intellectual property.

#### *Varying perspectives on property ownership*

One commentator observed that ownership rights in intellectual property "cannot depend for their justification solely upon statutory or constitutional provisions."<sup>14</sup> Likewise Justice Stewart commented in *Board of Regents v. Roth* that "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules and understandings that stem from an independent source . . ." (408 U.S. 564, 577 (1972)). Before the dual nature of information ownership – exhibiting both a control right in the creator and an access right in the public – can be considered the origins of the ownership must be examined. Both concepts are

articulated in the Constitution: "The Congress shall have the power . . . To promote the progress of science and useful arts [access], by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries [control]." (U.S. Constitution, article 1, §8, clause 8) However, the basis of justification for the concept intellectual property has many viewpoints.

Ownership of information refers to any tangible matter (property) over which one has stated rights, namely: to use it, to enjoy it, to alienate it and to exclude others from it. The reason for awarding and acknowledging a person's right to property is primarily to ensure order and harmony in the community.<sup>15</sup> McEvoy<sup>16</sup> also shows that the law on property is designed to preserve the importance of the individual and the community and therefore essential to the social order and structure. In addition, property maintains an economic value. This accumulation right is an economic interest that provides the owner with a certain level of economic power. This economic interest is articulated in the intellectual property laws; for example, as the fourth factor of a copyright fair use analysis and elsewhere as a general revenue or royalty right of copyright owners. It is argued that this economic interest in property ownership underlies the Constitution. This position was articulated by Beard<sup>17</sup> in his seminal work entitled, *An Economic Interpretation of the Constitution of the United States*, and more recently by Currie, Tushnet, Posner, and Boudreaux and Pritchard.<sup>18</sup>

A number of philosophical elements have also been identified in providing justification for intellectual property. For example, Hughes<sup>19</sup> sees both a Lockean

<sup>15</sup> Hughes, 1988, p. 290.

<sup>16</sup> A. McEvoy, Market and Ethics in United States Property Law, 94–113, in *Who Owns America? Social Conflict Over Property Rights* (ed. H.M. Jacobs), 1998, p. 99.

<sup>17</sup> C.A. Beard, *An Economic Interpretation of the Constitution of the United States*. Macmillan, Boston (originally published in 1913), 1963.

<sup>18</sup> D.P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*. *University of Chicago Law Review*, 52, 324–380, 1985; M.V. Tushnet, (1987) *The Constitution as an Economic Document: Beard Revisited (The Constitution as an Economic Document: A Symposium Commemorating the Bicentennial of the United States Constitution)*. *George Washington Law Review*, 56, 106–113; R.A. Posner, *The Constitution as an Economic Document (The Constitution as an Economic Document: A Symposium Commemorating the Bicentennial of the United States Constitution)*. *George Washington Law Review*, 56, 4–38, 1987; D.J. Boudreaux, and A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*. *Fordham Law Review*, 62, 111–162, 1993.

<sup>19</sup> Hughes, 1988, p. 290.

<sup>11</sup> Drahos, 1996, pp. 171–193.

<sup>12</sup> Drahos, 1996, p. 193.

<sup>13</sup> T.G. Palmer, Are patents and Copyrights Morally Justified? The Philosophy of Property Rights And Ideal Objects. *Harvard Journal of Law & Public Policy*, 13, 860–861, 1990. and T.G. Palmer, Intellectual Property: A Non-Posnerian Law and Economics Approach, 179–224, in *Intellectual Property: Moral, Legal, and International Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997.

<sup>14</sup> J. Hughes, *The Philosophy of Intellectual Property*. *Georgetown Law Journal*, 77, 287–366, 1988, p. 288.

“labor theory” and a Hegelian “personality theory”. Nance<sup>20</sup> views Locke and Hegel within the “moral rightness” approach of the deontologists, in opposition which sit the consequentialists (“good consequences”). Both elements are apparent in Western intellectual property laws. According to Nance the consequentialists may be further divided into utilitarianism and teleology. The former focus on the incentive and reward component (grant of monopoly rights) of the copyright and patent laws as evidence of their claims. Meiners and Staaf<sup>21</sup>, however, argue against the characterization of the patent and copyright ownership right as monopolistic. The teleologists appear to represent a community benefit approach, a sort of institutionalized paternalist response. Davies notes that any categorizations are “cumulative and interdependent”<sup>22</sup> (using four categories: natural law, just reward for labor, stimulus to creativity, and social requirements).

The more recent law and economics movement continues this cost/benefit market oriented approach. Landes and Posner, Mackaay, and Dam are representative of this perspective.<sup>23</sup> Mackaay asks “[w]hether the compromise embodied in these rights is in some sense optimal, that is, leads to the ‘optimal’ rate of innovation in society, is a vacuous question considering the ubiquity of transaction costs and the fundamental openness to the future.”<sup>24</sup> Moore articulates that “if no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted,” [therefore] “there seems to be little room for rational complaint.”<sup>25</sup> A market analysis is also promoted by Child<sup>26</sup> who borrows the concept of Pareto equi-

librium efficiency from economics. Child states that the process of intellectual property production and accumulation is a “Pareto-improving process,” it is “value creating” because it “makes some better off while making no one worse off.”<sup>27</sup> In the property oriented analysis of the law and economics approach this inability to prevent all illicit uses of the copyrighted work is identified as a transaction cost: “Property rights in abstract objects create transaction costs (costs of enforcement and contracting).”<sup>28</sup> Finally, Hardin’s<sup>29</sup> “tragedy of the commons” approach (property rights as a solution to a negative externality) was recently adopted by Hardy<sup>30</sup> in discussing property rights (trespass) of virtual space (web sites).

A Rawlsian application might counter that the goal is not to be sure that the increase in one position does not harm another (Pareto economic approach), a sort of negative action approach, but that any change should make the least better off, a positive action approach. Bouckaert<sup>31</sup> identifies a slightly different taxonomy of justification: consent (Bouckaert does not believe the Rawlsian variant provides a “firm basis for intellectual property rights”), convention, utilitarian, and ownership (Lockean). In a similar formulation Palmer<sup>32</sup> articulates four possible theories: labor-desert (Locke), personality (Hegel), utility and “piggy-backing” on rights to tangible property. Hettinger, for example rejects both Lockean and utilitarian support themes and suggests rather a theme of “social utility.”<sup>33</sup> Hettinger would promote “public financial support” and “public ownership” of intellectual products as a viable alternative. The counterpoint presented by the pro-Lockean, property oriented proponents might be characterized as a “realist” response. For example, Child believes that simple human nature stands in the way of any issue of “distributive justice,” therefore, “we cannot all be equal in access to resources” because some individuals will naturally want to own more.<sup>34</sup> Paine offers the same criticism of Hettinger in a discussion of trade secret protection: there is the human tendency to retain information (keep secrets)

*tional Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997.

<sup>27</sup> Child, 1997, p. 72.

<sup>28</sup> Drahos, 1996, p. 125.

<sup>29</sup> G. Hardin, The Tragedy of the Commons. *Science*, **162**, 1243–1248, 1968.

<sup>30</sup> I.T. Hardy, The Ancient Doctrine of Trespass to Web Sites. *Journal of Online Law*, October, 1996, article #7 (15 pages) (available at <http://www.wm.edu/law/publications/jol>), 1996.

<sup>31</sup> B. Bouckaert, What is Property? *Harvard Journal of Law and Public Policy*, **13**, 775–816; 1990, pp. 809–814.

<sup>32</sup> Palmer, 1990.

<sup>33</sup> Hettinger, 1997.

<sup>34</sup> Child, 1997, p. 69.

<sup>20</sup> D.A. Nance, Foreword: Owing Ideas. *Harvard Journal of Law & Public Policy*, **13**, 757–773, 1990.

<sup>21</sup> R.E. Meiners, and R. J. Staff, Patents, Copyrights, and Trademarks: Property or Monopoly? *Harvard Journal of Law & Public Policy*, **13**, 911–941, 1990.

<sup>22</sup> G. Davies, Copyright and the Public Interest (Studies in Industrial Property and Copyright Law). John Wiley & Sons, New York, New York, 1994, p. 13.

<sup>23</sup> W.W. Landes, and R. A. Posner, An Economic Analysis of Copyright. *Journal of Legal Studies*, **18**, 325–363 (reprinted in (1990) *Intellectual Property Law Review*, **22**, 447–485), 1989; E. Mackaay, Economic Incentives in Markets For Information And Innovation. *Harvard Journal of Law & Public Policy*, **13**, 867–909, 1990; K.W. Dam, The Economic Underpinnings of Patent Law. *Intellectual Property Law Review*, **27**, 1–27 (reprinted from (1994) *Journal of Legal Studies*, **23**, 247–271), 1995.

<sup>24</sup> Mackaay, 1990, p. 906.

<sup>25</sup> A.D. Moore, Toward a Lockean Theory of Intellectual Property, 81–103, in *Intellectual Property: Moral, Legal, and International Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997, p. 85 and 98.

<sup>26</sup> J.W. Child, The Moral Foundations of Intangible Property, 57–80, in *Intellectual Property: Moral, Legal, and Interna-*

with or without any juristic or legal incentive to do so.<sup>35</sup> It could be argued that intellectual property rights developed based upon this principle, i.e., owners gravitate towards the expansion of their ownership rights. Courts and legislatures have intervened to negotiate the balance of control and access rights.

### Perspectives on control and access in practice

How can one then reconcile these seemingly opposite and conflicting positions? Perhaps what is occurring is the identification of the inherent tension of the intellectual property system itself, for it is a system that offers conflicting societal interests to its participants.<sup>36</sup> Therefore, the following working articulation of this duality is promoted: the right of access to information is a fundamental right in an intellectual property scheme. However, in order to promote this right a right of control (intellectual property ownership) is granted to encourage creators to produce and make available their works. "Disclosure is necessary if people are to learn from and build on the ideas of others."<sup>37</sup> In fact the Supreme Court has been moving from a "pure" balance test to a pure public benefit purpose test in the last quarter century. Copyright cases are exemplary of this trend. In *Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 429 (1984) the Court observed that the grant of monopoly privileges was "to motivate the creative activity of authors" while also giving "the public appropriate access to their genius after the limited period of exclusive control has expired." However, recent cases such as *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) have forwarded the preeminence of the public benefit component. "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the law's boundaries be demarcated as clearly as possible." The *Fogerty* Court went on to quote from *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–350 (1991) (emphasis added): "The primary objective of copyright is *not* to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to

build freely upon the ideas and information conveyed by a work." Similarly, Davies reviews the origins of the underlying public interest component of copyright law in other legal regimes (United Kingdom, France, and Germany).<sup>38</sup>

This dual nature of intellectual property ownership has been expressed in a number of ways by various authors. For example, Professor L. Ray Patterson stated that "[c]opyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society."<sup>39</sup> Britz uses the concepts of content and carrier which can be easily adapted to control and access themes discussed herein.<sup>40</sup> Von Neuman discusses the "tension that exists in intellectual property law between the interests of innovators and the interests of competition and how this tension affects the wider public interest."<sup>41</sup> The key to living within the concept of intellectual property is achieving the proper balance between the ownership right to control the physical articulation of the work and societal ownership right, i.e., the right of access to the work.<sup>42</sup> Davies would couch that "copyright protection [itself] is justified by the public interest, the State imposes certain limitation thereto, again in the public interest."<sup>43</sup> Likewise Bettig discusses in detail the deleterious impact of media concentration (carrier control) which undermines the purposes of societal access to information.<sup>44</sup>

This duality offers somewhat of a societal trade-

<sup>38</sup> Davies, 1994.

<sup>39</sup> L. Ray Patterson. Free Speech, Copyright and Fair Use, 90 *Vanderbilt Law Review* 1 (1987), p. 5. L. Ray Patterson and Judge Stanley F. Birch, Jr., Copyright and Free Speech Rights, 4 *J. Intell. Prop. L. I.* (1996).

<sup>40</sup> J.J. Britz, *Inligtingsetiek met spesifieke verwysing na die beroep van die inligtingkundige – 'n Christelike perspektief* [Information Ethics with Specific Reference to the Information Specialist: A Christian Perspective], D.D. Dissertation, University of Pretoria, Pretoria, 1996, pp. 137–139.

<sup>41</sup> J. Von Neuman, Innovation and Competition: Conflict over Intellectual Property Rights in New Technologies, 169–192, in *Owning Scientific and Technical Information: Value and Ethical Issues* (V. Weil and J.W. Snapper eds.), Rutgers University Press, New Brunswick, New Jersey, 1989, p. 169.

<sup>42</sup> Paine, 1997, p. 51; M.A. Hamilton, The TRIPS Agreement: Imperialistic, Outdate, and Overprotective, 243–263, in *Intellectual Property: Moral, Legal, and International Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997a, p. 249.

<sup>43</sup> Davies, 1994, p. 136.

<sup>44</sup> Bettig, 1996, pp. 33–115.

<sup>35</sup> L.S. Paine, Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger, 39–56, in *Intellectual Property: Moral, Legal, and International Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997, p. 50.

<sup>36</sup> R.V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*. Westview Press, Boulder, Colorado, 1996 and Davies, 1994, p. 135.

<sup>37</sup> Hettinger, 1997, p. 21.

off. By allowing some individuals to control or own information and denying access to others, the belief is that more socially useful forms of information will be produced.<sup>45</sup> Whether this trade-off actually contributes to more or less information being produced is unclear from the review of literature presented by Palmer.<sup>46</sup> If the increase in the number of copyright registrations is any indication<sup>47</sup> the incentive component of the system is working rather well. Hamilton also supports this position: “The colonials’ predicted renaissance did not pan out immediately. Yet, as a result of the commodification of intellectual property goods, we have in 1997 a market flooded with information and entertainment items.”<sup>48</sup> Unfortunately, this says nothing about the public access component of the system. Arguably, the ownership right/incentive component of the intellectual property system might be interpreted as simply utilitarian or economic cost/benefit. Still, the economic proscription for the production of only socially valuable resources may still be accommodated under Rawls’ difference principle (Rawls’ second principle of justice). [The first principle asserts that each individual has an equal right to the most extensive liberty consistent with a similar liberty for others.] The second principle “allows inequalities provided that these work to improve the lot of the least advantaged.”<sup>49</sup>

Unfortunately, it might be said that the property right or control aspect of information ownership is today superceding. Drahos identifies four functions of intellectual property: an incentive function, an adjustive function, a control function and an expectational function. “[T]hese functions ground certain kinds of strategies that tend to defeat the welfare gains that intellectual property rights are meant to bring.”<sup>50</sup> Measured in terms of the two criteria of ownership – that one must have the right to control the creation of its substance (content right) and that others must have the right to **use** and to **enjoy** information – it is proposed that the ownership of information entails both (both content and carrier or access) rights. However, the dominance of economic interests as a global moving force was also identified by Weiss and De Waart: “The question concerns the design, structure and content of the legal and institutional infrastructure

required to permit effective vindication of individual and collective human rights in an increasingly globalized civil society and its market economy.”<sup>51</sup> If, for example, as Lesley Ellen Harris argues that new technologies create a new global economic structure where digital property is in effect the currency of the next century, then the potential for economic control in the hands of those who have access to technology is of critical concern for those interested in the ethics of information.<sup>52</sup>

The fact that the grant of a right of property in some information implies a right to **exclude** others from it calls attention to certain problems in relation to information and the rights of possession thereof. Drahos comments that “when property rights take the form of privileges in abstract objects the invisible hand mechanism may cease to be a reliable guide to the collective good.”<sup>53</sup> The ethical focus is whether or not the intervention of legal institutional actors (courts and legislators) preserves the access component? The next section attempts to provide perspectives and answer to this question.

### Concepts of control and access in the intellectual property laws of the United States

This section is twofold. First it describes how the concepts of control and access have been interwoven into various intellectual property regimes. Second, recent developments within each regime are recounted in order to demonstrate the mounting proprietarianism. “The assumption is that the principal or even sole criterion for evaluating intellectual property law is its contribution to aggregate utility.”<sup>54</sup> These economic interests are beginning to dominate legal thinking, both judicially and legislatively whenever the concepts of control through ownership and access through use are considered. For those unfamiliar with the various regimes within the intellectual property system a table comparing patent, trademark, and copyright is found in Appendix 1. In addition Drahos and Mackaay offer similar comparisons.<sup>55</sup> In addition, the relationship between the control and access aspects of each regime is represented schematically in Appendix 2.

<sup>45</sup> Palmer, 1997.

<sup>46</sup> Palmer, 1997, pp. 209–210.

<sup>47</sup> Annual Report Annual Report of the Register of Copyrights. Government Printing Office, Washington, D.C., 1997.

<sup>48</sup> M.A. Hamilton, Reconceptualizing Ratings: From Censorship to Marketplace. *Cardozo Arts and Entertainment Law Journal*, 15, 403–408, 1997b, p. 405.

<sup>49</sup> Drahos, 1996, p. 177.

<sup>50</sup> Drahos, 1996, p. 125.

<sup>51</sup> F. Weiss, and P. De Waart, International Economic Law with a Human Face: An Introductory View, 1–11, in *International Economic Law with a Human Face* (ed. F. Weiss et al.), Kluwer Law International, London, 1998, p. 1.

<sup>52</sup> L.E. Harris, Digital Property: Currency of the 21st Century. McGraw-Hill Ryerson Limited, Ontario, Canada, 1997.

<sup>53</sup> Drahos, 1996, p. 139.

<sup>54</sup> Palmer, 1997, p. 178.

<sup>55</sup> Drahos, 1996, Table 1.1 and Mackaay, 1990, Diagram 3.

### Patent

The owner of the patent (or assignee) is granted a complete or exclusive monopoly for the duration of the patent.<sup>56</sup> This is a substantial ownership right. In return the patent holder must, as part of the patent application process make a complete disclosure in sufficient detail so that a person skilled in the art to which the invention pertains can practice the invention. (35 U.S.C. §112 (1994)) This is an uncompromising duty. In the patent application one must disclose to the Patent Office all information known to that individual to be material to patentability. (37 C.F.R. §1.56 (1998)) If it is later discovered that full disclosure was not forthcoming, it may be grounds for rejection of the patent application.

The Supreme Court is expanding the rights of patent owners in new technologies by expanding the type of invention subject to patentability. The question of software patentability offers a case in point.<sup>57</sup> The Patent Office also appears to be following this lead. Though commentators such as Samuelson and Oddi are critical of this trend.<sup>58</sup> The important question for the present discussion is whether the grant of patent is of benefit to participants in the information society. Does the grant of a patent offer more harms than good? The harm would arise because while the information is known, the right of ownership granted presents too exorbitant a barrier through license fees, for example, to use or produce the work. These costs would in addition, be passed onto the consumer. The problems of software patents have been discussed in CSTB.<sup>59</sup> More recently, Talbot observed that “[t]he applicability of the patent laws to computer software had been in question from the standpoint of the case law and the underlying debate of the social policy in regard to whether software should be patentable.”<sup>60</sup> In terms of the social benefit principle copyright is considered the preferred protection mechanism for software because

it allows for increased access rights for both users and competitors who build upon unprotected program elements.

Measuring or assessing the potential harm of a patent monopoly is arguably difficult. Consider two recent examples. When Compton's NewMedia, Inc. announced in November, 1993 that it received a patent (U.S. Patent No. 5,241,671) for a basic multimedia search and retrieval method that was at the time standard in the industry, competitors countered that the effect would be catastrophic and stifling for future development.<sup>61</sup> In addition, one of the major markets for a Compton's type product was educational. Schools among others would pay a higher cost for these materials if new product development required economic consideration of the NewMedia license fees. In an unprecedented move, Patent Commissioner Bruce Lehman ordered the patent to be reexamined. Fortunately, in 1994, Examiner Archie Williams rejected the patent. As a result, the concept of a multimedia access mechanism utilizing visual icons in order to retrieve information and navigate through the program is not subject to the patent monopoly right. If this access were not available (the patent was granted and monopoly rights supercede), then most successive programs developers would now owe royalty monies to Compton's.

Another area where the patent owner may gain, in terms of monetary reward through licensing, far more than is given in exchange to society is the in the area of drug research for AIDS. Davis and Slind-Flor have both discussed the potential problems in awarding ownership rights to new drugs.<sup>62</sup> In 1993, a dispute erupted between Burroughs Wellcome and generic drug companies such as Barr Laboratories and Novofarm over the patent rights to the AIDS drug AZT. If the drug was in fact invented at the National Institutes of Health it could mean that a version of AZT could be produced generically, and at less cost for AIDS sufferers. The average AIDS patient takes five AZT tablets a day at a cost of \$2 a pill, which amounts to more than \$3,600 a year. This has translated into huge profits for Burroughs. According to one report, the company has made more than \$592 million in profits

<sup>56</sup> J.N. Talbot, *New Media: Intellectual Property, Entertainment, and Technology Law*. Clark Boardman Callaghan, Deerfield, Illinois, 1997, pp. 4–6.

<sup>57</sup> James V. Vergari and Virginia V. Shue, *Fundamentals of Computer-High Technology Law*, ALI-ABA, Philadelphia, PA, 1991, pp. 541–550.

<sup>58</sup> P. Samuelson, *Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer Program-Related Inventions*, *Emory Law Journal*, **39**, 1025–1154, 1990. and A.S. Oddi, *An Uneasier Case for Copyright Than for patent Protections of Computer Programs*, *Nebraska Law Review*, **72**, 351–453, 1993.

<sup>59</sup> CSTB (Computer Science and Telecommunications Board) (1991) *Intellectual Property Issues in Software*. National Research Council, National Academy Press, Washington, D.C.

<sup>60</sup> Talbot, 1997, pp. 6–17.

<sup>61</sup> E.R. Yoches, *The Compton's Reexamination – A Sign of the Times*, *The Computer Lawyer*, **12**, 14–18, 1995.

<sup>62</sup> M. Davis, *Patents, Natural Rights, and Natural Property*, in *Owning Scientific and Technical Information* (ed. V. Weil and J.W. Snapper), Rutgers University Press, New Brunswick, New Jersey, 1989, pp. 244–246 and V. Slind-Flor, *Biotech Patent Derided: Critics Say It's Overbroad and Will Hinder the Search for Treatment of AIDS*, *The National Law Journal*, April 10, at A6, 1995.

from the drug's sales (from 1987 to 1993).<sup>63</sup> A similar controversy over the AIDS drug 3TC erupted in 1996, when Emory University sued BioChem Pharma Inc. The controversy involved charges of theft and deceit as well. Unfortunately, the true loss will be borne by the AIDS patients.<sup>64</sup> Similarly, the drug manufacturer recorded enormous profits. In 1995 BioChem recorded sales of \$179.8 million, \$300 million (estimated) in 1996. Furthermore, these are expected to increase once the full license structure is in place.

### Trademark

The concept of trademark is not so much concerned with access to the intellectual property of another, but rather to the merit of that information. Specifically, with respect to a trademark, the quality and nature of the good or service the mark is placed upon or represents. While a trademark owner has a property right in their mark, the use by others of the mark will be analyzed by asking whether the new use would tend to harm the value of the mark to the original owner. "The value of the trademark, then, rests entirely on the consumer's perception of that mark and the related association with one source that trademark law requires."<sup>65</sup> The right of ownership is not generated through creation (copyright) or invention/application (patent) but is secured by use of the information (the trademark) in commerce. In return for using the mark in commerce, the owner has the right to control the association of the mark with its products or services and likewise to prevent others from misusing its trademark with competing products and services. In turn the public may rely upon the mark with confidence when it purchases a product or service designated with a familiar mark. It is not surprising that an element of trademark infringement is whether the use of the challenged mark would create a likelihood of confusion among consumers. Thus trademark law does allow for dual-use (for example, Baretta car and hand gun, LEXIS database and Lexus car), and where the competing users have equal economic power this allows for greater access to the intellectual property. However where the parties are not of equal economic relation (Illinois High School Association versus the National Collegiate Athletic Association), Wolfers-

berger observes that such doctrines work against and threaten to extinguish the small trademark holder.<sup>66</sup>

There are several developing issues on the Internet where the use of trademark protection might be viewed as overly restrictive in terms of one's right to have access to the use of information associated with the mark. Obviously if one used another's trademark without permission on a web site, there would be a clear violation of the law. *Playboy Entertainment v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) In cyberspace a problem arises in domain name ownership. This problem occurs because unlike in a traditional market where trademark law allows two companies to share the same or similar mark (LEXIS legal databases and Lexus luxury car), as there is little chance of confusion, in cyberspace there can be only one domain name. This problem was complicated by the fact that the United States previously employed a first come first serve domain name registration system.<sup>67</sup> This prompted some savvy individuals to register various domain names in anticipation that the actual company might want to use the domain name itself. The individual would then offer to surrender ownership to the company, for a substantial fee of course. One individual, Denis Toeppen, at one time was the registered owner of over 240 company related domain names including: northwestairlines.com, britishairways.com, and deltaairlines.com. Toeppen and others like him became known as cyber-squatters and were sued successfully for release of the company name associated domain name. *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227 (N. D. Ill. 1996); and *Panavision International L.P. v. Toeppen*, 945 F. Supp. 1296 (C.D. Cal. 1996), aff'd 141 F.3d 1316 (9th Cir. 1998).

A more difficult question is raised by linking: "Hot links are a problem because they can determine how people perceive a digital resource and how they gain access to it, which interferes with the publisher's right to determine such matters for itself."<sup>68</sup> In cyberspace environs the concept of trademark dilution is of prime importance. There are two geneses of trademark dilution: tarnishment or blurring. Tarnishment occurs when there is some harmful association made, blurring when the distinctiveness of the mark is affected. One case involved the use of the word "candyland" in a domain name "candyland.com." Hasbro alleged that using the title word to one of the most famous

<sup>63</sup> M. Curriden, Patent Law Favors AZT Maker, *American Bar Association Journal*, 79, 30, 1993, p. 30.

<sup>64</sup> P. Brickley, University, Drug Companies Fight Cutthroat Battle Over Anti-HIV Drugs: AIDS patients Real Losers in Intellectual Property Battle. *Corporate Legal Times*, April: 1, 1997.

<sup>65</sup> L.K. Ebling, and K.E. Kreider, Dilution is Remedy for Internet Mark Misuse. *The National Law Journal*, May 18, 1998, C31-C33, 1998, C31.

<sup>66</sup> J.R. Wolfersberger, Illinois High School Association v. GTE Vantage, Inc.: Dual-Use Classification Threatens the Extinction of America's Small Trademark Holder, *Georgia Law Review*, 32(1), 363-392, 1998.

<sup>67</sup> See, K.D. Stuckey, Internet and Online Law. Law Journal Seminars-Press, New York, New York, 1998, pp. 7-46. for discussion of the macdonalds.com and mtv.com controversies.

<sup>68</sup> Severson, 1997, p. 52.

children's board game in the United States in domain name for an adult-porn site would tarnish the image of the original game and product name. *Hasbro, Inc. v. the Internet Entertainment Group*, 1996 U.S. Dist. LEXIS 11626; 40 U.S. P. Q. 2d (BNA) 1479 (W.D. Wash. 1996). Another example of tarnishment in web a setting occurs when a link is made from site to another and the owner of the linked site believes that the association between the two sites (vis-à-vis the link) harms the product or service associated with the second, linked site.<sup>69</sup> Constructing metatags so a competitor's site is triggered in a web search might also support a dilution (blurring) claim. "The value or distinctiveness of the mark is harmed and diluted by the fact that entering a search query in any given search engine does not lead the consumers only to the site associated with the famous mark, but to the competitor's site as well."<sup>70</sup> This is accomplished by hiding the trigger word or trademark name against a same color background, e.g. blue text on a blue background. Repeating the word or trademark numerous times increases the likelihood that the search engine algorithm will determine the site to be relevant and thus recalled, often ahead (in algorithm ranking) of the actual target site. This was the claim made by Playboy when a meta-tag in another site directed searchers to the other site when users were seeking to visit the Playboy site. *Playboy Enterprises, Inc. v. Calvin Designer Label et al.*, 985 F. Supp. 1220 (N.D. Cal. 1997). Use of the mark is again tied to an economic consideration. "To the extent that the use of the mark is permitted under applicable trademark law and the use of the mark does not hold the linked company or person in a bad light [creating the potential for economic harm], it is unlikely that an objection will be raised."<sup>71</sup> These situations function to limit the ability of users to access some information (through linking) in virtual space. Past cases have demonstrated that when economic interests are implicated trademark owners will act to curtail the information access (link).

### Trade secret

Trade secret operates somewhat differently from patent or copyright. It is not so much a right negotiated between the public and the creator (copyright) or inventor (patent) but rather between private parties. Trade secret law rewards the intellectual property

owner only when some one produces and markets a similar or competing product through unfair means. Because one requirement for a valid trade secret is its secrecy one might ask why the law should create a legal property fiction that rewards secrecy. The reason is the premise under which the intellectual property laws have already been said to operate: the encouragement of new enterprise and the benefit to the public of that enterprise. Without trade secret there would be little incentive to create proprietary information, because someone could "steal" it or otherwise misappropriate it. The public benefits because the new product or service is made available. In practice trade secret litigation is difficult. A plaintiff must first establish that the plaintiff owned the secret, then that someone used unfair means to acquire or duplicate the secret in competition with the plaintiff. This is rather hard to accomplish when you must keep the information a secret.<sup>72</sup> In return, the law grants very few rights to the trade secret owner, other than those that arise from the "theft," i.e., there are no license or royalty rights. In addition, the current law preserves the legitimate public access rights to access the underlying information as long as there is no fowl play involved. For example, reverse engineering is allowed in order to understand the workings of a software program. *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F. 2d 1441 (5th Cir. 1991); compare *Mineral deposits Ltd. v. Zigan*, 773 P. 2d 606 (Colo. App. 1988) (reverse engineering not allowed when product loaned in confidence). Recent trends suggest the legitimacy of shrink-wrap and click-on or web-wrap licenses (*ProCD v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996)) which is consistent with the Uniform Commercial Code Article 2B revision.<sup>73</sup> Taking to its illogical but not impossible development, such efforts could result in the protection of traditional information outlets such as shrink-wrapped books.<sup>74</sup> This could shift the balance of rights away from legitimate public users and towards the trade secret software owner.<sup>75</sup> Uses of high technology and information products would be subject to license (private contract), and thus not available for access through reverse engineering or other legitimate access or use concepts if that process or extraction violated the agreed to (by tearing the shrink-wrap or clicking the screen icon) license or contract.

<sup>72</sup> Talbot, 1997, pp. 7–15.

<sup>73</sup> Street, 1997, pp. 34–68.

<sup>74</sup> C.R. McManis, Do Not Support Privatizing Copyright. *National Law Journal*, October 13, 1997, A2, 1997. and M. J. Madison, Legal-Ware: Contract and Copyright in the Digital Age, *Fordham Law Review*, 68, 1025–1143, 1998.

<sup>75</sup> Street, 1997, pp. 341–346.

<sup>69</sup> J. Rosenoer, *CyberLaw: The Law of the Internet*. Springer-Verlag Press, New York, 1997, pp. 102–104 and F.L. Street, *Law of the Internet*. LEXIS Law Publishing, Charlottesville, Virginia, 1997, p. 277.

<sup>70</sup> Ebling and Kreider, 1998, C32.

<sup>71</sup> F.L. Street. *Law of the Internet*. LEXIS Law Publishing, Charlottesville, Virginia, 1997, pp. 291–292.

### Copyright

Copyright is probably the most common intellectual property regime known to the reader. However, the subtleties of American copyright law which attempt to preserve the balance between the right of the owner (to control the copyright) and the public to use protected material may not be as clear. Several examples are in order.

#### *Idea expression dichotomy and the merger doctrine*

Copyright does not protect ideas. If it did, it would be difficult to ever build upon existing work. Copyright protects only the expression of that work once it is fixed in a tangible medium. In some situations there are a limited number of ways to express an idea. Courts have been cognizant of the danger in granting a copyright in these instances because the copyright would in reality be a copyright in the idea. "If an individual could copyright a basic idea such as a computer spreadsheet, a computer game like "Pac-Man," or a story line where a boy meets a girl, then no other person would be able to create a similar idea."<sup>76</sup> Courts deny copyright protection by arguing that the idea and its limited number of expressible alternatives compress and are inseparable. This concept is known as the merger doctrine. Particular aspects of software copyright have generated a new genus of litigation know as the "look and feel" cases. In these disputes courts are asked to examine whether the look and feel of the program to the user is subject to copyright protection.<sup>77</sup> The question is not whether the object or source code was illegally copied, for it has not been copied, but whether the nature of the program interface, the so-called look and feel of the program was duplicated. If there are only a limited number of ways to express what a particular software program can do, how it appears to a user, then the merger doctrine will be applied in the legal analysis. The result is that the duplication of another program's look and feel will not violate the copyright law because the look and feel of that program is not subject to protection. If the look and feel of software were subject to legal protection then software innovation would be impacted. The merger doctrine was at the heart of the *Lotus Development Corporation v. Borland International, Inc.*, 700 F. Supp. 203 (D. Mass. 1992), rev'd 49 F. 3d 807 (1st Cir. 1995), aff'd 516 U.S. 233 (1996) (per curiam). The First Circuit concluded that the Lotus 1-2-3 spreadsheet program much like an on-screen VCR control programming system could not be operated without the pull-down menu structure

and the associated menu commands. There is no other way to present the concept of data cells and menus within the confines of a two-dimensional computer screen. Therefore, the competing program developed by Borland (Quattro Pro) did not infringe the Lotus program. The merger doctrine operates to preserve the access rights of copyright users. The ownership right of the copyright holder was not allowed to supercede the right of access to others to use and build upon the basic concept of spreadsheet design and pull-down menu navigation.

#### *Copyright duration*

The concept of copyright duration is an essential element in preserving the public benefit of the intellectual property system. The copyright is not indefinite, but finite.<sup>78</sup> Works for which the copyright has expired, or that otherwise are uncopyrightable, are said to be in the public domain. This concept guarantees that at some point the copyright owner will no longer have any control over the work. Moreover, because the term of duration is fixed by statute, it allows for users to plan for future unrestricted access. Unfortunately, several bills introduced in 1998 were designed to increase the term of copyright by twenty years (H.R. 2589, Copyright Term Extension Act of 1998, S. 505, Copyright Term Extension Act of 1997; H.R. 604, Copyright Term Extension Act of 1997). Spurred by the death of Sony Bono, Congress passed S. 505 as a lasting tribute to the popular songwriter-entertainer turned Congressman. (Sony Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Statutes at Large 2827.) The result would increase the reward (incentive) to copyright holders. The Senate Report noted that "[e]xtending copyright protection will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public." (House Report, 105-452)<sup>79</sup> It also means that users will have to wait that much longer before works become freely (in terms of copyright) available, it will also increase the time during which the economic interest of the copyright holder continues to operate, i.e., users pay royalties. Some offset for access is provided: exceptions for libraries and other educational users. During the twenty year extension these public access institutions are not bound by the new extension if there is no longer any "normal commercial exploitation." Copyright term extension is contrary

<sup>78</sup> Davies, 1994, pp. 157-164.

<sup>79</sup> House Report 105-452 Copyright Term Extension Act. United States Congress, 105th Congress, 2nd Session, 1998, p. 6.

<sup>76</sup> Talbot, 1997, pp. 4-14.

<sup>77</sup> Severson, 1997, pp. 42-46.



to the purpose of copyright elucidated earlier. It would only be necessary if there were not enough copyrightable works being produced. This does not appear to be the case. Drahos warns “that we should be wary of increasing the period for protection.<sup>80</sup> By doing so we are formally increasing the period for which one important primary good is unequally distributed in society. Unless there are some very clear-cut gains to the least advantaged the difference principle cuts across increasing temporal bars to information.” The extension of copyright duration would mean less access to more information. This is another example of how economic interests are coming to dominate the control versus access landscape.

#### *First sale doctrine*

The first sale doctrine is an attempt to strike a balance between the initial right of the copyright holder in the work and the transfer rights of subsequent users, when the work is legitimately (through sale and purchase) in the hands of another. In essence, it alienates the control right over the work by the original copyright holder when the work, through its physical embodiment, is in the hands of third parties. In other words, once another purchases the work, the copyright holder has no more control over its disposition. The purchaser may use the work, gift it to another, destroy the work, or even resell or rent it. (17 U.S.C. §109 (1994)) “The first sale doctrine represents an important balancing of interests . . . Proposals to reform the first sale doctrine are neither easy nor without controversy. They occur in a shifting legal, technological and economic landscape.”<sup>81</sup> In the late 1980s the software industry persuaded Congress that such a threat to the economic viability of the software existed in the appearance of software resale shops. (The record industry achieved earlier success in restricting the CD resale market).<sup>82</sup> In 1990, the Computer Software Rental Amendments Act of 1990 was passed. (Public Law 101-650, 104 Statutes at Large 5089 (1990)) This essentially added an exception to the first sale doctrine regarding the rental or lease of computer programs. In essence, it restored to the copyright holder the right of subsequent alienation. Congress however, preserved the right of libraries and other educational institutions to rent software programs (an access exception to the alienation exception to the first sale doctrine). “Such institutions serve a valuable public purpose by making computer software available to students [and others] who would

not otherwise have access to it.”<sup>83</sup> The legislation preserved an important access right for libraries and educational organizations, as these are the institutional points of access for many in society. However, there is no guarantee that the access right will be preserved in future legislation. Note also that it was the economic concerns of software industry constituents that brought the issue of legislative reform before Congress.

The Supreme Court recently reaffirmed the sanctity of the first sale doctrine when it prohibited a copyright owner from restricting subsequent transfers. *Quality King Distributors Inc. v. L'anza Research International Inc.*, 118 S.Ct. 1125 (1998). The case involved the importation of a shampoo that one company sold to its United Kingdom distributor. The shampoo found its way to Malta then back to the United States, where the shampoo sold for 35 to 40 percent under the price of domestically distributed version. The Court allowed this underselling. It placed the principle of access underlying the first sale doctrine above the economic interests. However, Brody and Baker argue that this type of balancing is dangerous because it jeopardizes the creative process, i.e., copyright owners may become reluctant to create and market their goods if the economic return (incentive) is suspect. “If the foreign price is low enough to make feasible reimportation of the work into the United States, domestic sales will be challenged by reimported product selling at a price primarily set by a foreign market. As a result, the domestic price structure that made the creative investment in the product profitable is jeopardized, and the incentive to use capital on such projects is undermined in favor of other, less risky enterprises.”<sup>84</sup> Fortunately, the Supreme Court believes that the access principle underlying the first sale doctrine needs to be preserved, in spite of the economic harm imposed.

#### *Fair use*

The concept of balance is at work in the fair use doctrine that allows users to impede upon the statutory rights of copyright holders (reproduction, derivation, distribution, performance and display). The right of fair use is preserved to allow access to the copyrighted work. It is a check on the copyright owner's right of control. The fair use doctrine has been made part of the copyright law. 17 U.S.C. §107 There are four fair use factors (purpose of use, nature of work,

<sup>80</sup> Drahos, 1996, p. 177.

<sup>81</sup> House Report 101-735 Copyright Amendments Act of 1990. United States Congress, 101st Congress, 2nd Session, 1990, p. 7.

<sup>82</sup> House Report 101-735, 1990, p. 8.

<sup>83</sup> House Report 101-735, 1990, p. 8.

<sup>84</sup> M.L. Brody, and D.C. Baker, Trademarks May Thwart Gray Market Importers: Manufacturers Hurt by Recent Supreme Court Copyright Ruling May Turn to Trademark Laws, *The National Law Journal*, May 18, 1998, C6-C7, 1998, C6.

amount, and effect upon the market). Analysis of the purpose factor considers whether the reason for the reproduction, derivation, etc. is commercial or noncommercial, for personal or educational purposes. If it is noncommercial or personal or educational, the use may be fair, but it does depend on the other three factors. The court balances all factors in deciding whether or not a use is fair. This works to preserve the access feature of copyright. In application however, the fourth factor, the impact on the potential market is the primary factor. (*Stewart v. Abend*, 495 U.S. 207 (1990)) More important this tendency is adopted frequently by lower courts. Consider two recent photocopying cases as examples: *Princeton University Press v. Michigan Document Services*, 99 F. 3d 1381 (6th Cir. 1996); *American Geophysical Union v. Texaco Inc.*, 37 F. 3d 881 (2nd Cir. 1994). In both cases the loss of revenue from licensing and royalty fees was considered determinative.

The doctrine of fair use is also under attack from new technologies that will make it possible to track, and perhaps then control, every use of a copyrighted work. Encryption, digital tagging or watermarking are several possibilities.<sup>85</sup> Copyright holders believe that in the digital environment, such capabilities are necessary to capture lost revenues and otherwise control the problem of free riders. Without the assurances that their works will be protected, copyright owners will not venture into the digital environment, thus owners argue that the incentive structure needs to be altered in their favor.<sup>86</sup> This might mean the elimination of fair use concept. These protection technologies are very expensive, and at present only wealthy copyright owners have access to such technology.

There is a far more important concern: "the on-line era raises the possibility that the publishing industry can track every miniscule use of a work and there turn the free use zone into a new opportunity for profit."<sup>87</sup> Copyright users might need to have a pin number, for which they pay a fee, to access copyrighted works in digital environments.<sup>88</sup> This pin access mechanism has already been adopted as part of the settlement in

an online music copyright infringement case. *Playboy Entertainment v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) If these trends continue the fair use concept of copyright would be reduced to the equivalent of information pay-per-view. This danger is also observed by Bell.<sup>89</sup> Worse yet, the basic principle underlying copyright would also be altered. "Copyright now helps to constitute negative community. In this negative community many more information exchanges which involve facts become the object of copyright surveillance and enforcement. Copyright comes to function as a private tax on basic information exchanges."<sup>90</sup> Worse, copyright would come to function as a private contract.<sup>91</sup> These developments are contrary to the original purpose of copyright which is to increase information access to the public at large.

### Misappropriation

Even an obscure doctrine such as misappropriation evidences the balance of public interests with economic incentive. Misappropriation is not an intellectual property right per se. In fact, it is invoked as a legal remedy when other intellectual property regimes, such as copyright have failed. Because misappropriation may be used to protect an idea or underlying information; courts are hesitant to recognize it often. Typically the idea will be protected only if it is concrete, novel and useful. Most cases arise in the entertainment industry where the idea for a game, television program, movie, book, commercial or advertising campaign is misappropriated. Several more famous examples include the controversy over Milton Bradley's Dark Tower game (*Burten v. Milton Bradley Company*, 763 F.2d 461 (1st Cir. 1985)), the underlying story for the movie Philadelphia (*Cavagnuolo et al. v. Rudin et al.*, No. 94 Civ. 0585 (S.D.N.Y. 1994)), and the idea for the long running television hit comedy the Cosby Show (*Murray v. National Broadcasting Company*, 844 F.2d 988 (2nd Cir. 1988)). Other cases involving the original idea for 24-hour court TV,<sup>92</sup> an interactive telephone game,<sup>93</sup>

<sup>85</sup> Bell, 1998.

<sup>90</sup> Drahos, 1996, p. 208 and D'Amato and Long, 1997, p. 54.

<sup>91</sup> McManis, 1997.

<sup>92</sup> Entertainment Law Reporter Recent Cases: Action Claiming that Court TV Misappropriated Idea for 24-Hour Courtroom Cable Television Channel is Rejected. *Entertainment Law Reporter*, 16, no pagination, 1993.

<sup>93</sup> Entertainment Law Reporter Recent Cases: Interactive Telephone Game Creator Fails to Show Novelty and Originality Required for Misappropriation Claim. *Entertainment Law Reporter*, 16, no pagination (available in the LEXIS-NEXIS Legnew Library), 1994.

<sup>85</sup> White Paper Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (Information Infrastructure Task Force), 1995, pp. 183-189.

<sup>86</sup> White Paper, 1995, p. 178.

<sup>87</sup> M.A. Hamilton, The TRIPS Agreement: Imperialistic, Outdate, and Overprotective. In A.D. Moore, editor, *Intellectual Property: Moral, Legal, and International Dilemmas*, pp. 243-263. Rowman & Littlefield, Lanham, Maryland, 1997.

<sup>88</sup> T.W. Bell, Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine. *North Carolina Law Review*, 76, 557-619.

and the “Cadbury Kids” candy bar promotion<sup>94</sup> failed to succeed on a claim of misappropriation. In each case the appropriated idea was determined not to be novel or unique. Rather the idea or commercial concept was either based on existing work or on basic common and “generic” ideas, and exhibited little creativity. Employing a novelty factor ensures that only unique commercially exploitable ideas are protected. Other ideas are freely available for other to build upon.

The tort of misappropriation also emphasizes the competing commercial use. The concept focuses on the initial investment by the original “creator,” the subsequent taking and use of the information by a competitor in a competing product at little or no cost (the concept of “free-riding”), and economic harm, a sort of “commercial immorality.” (*National Basketball Association v. Motorola, Inc., and Sports team Analysis*, 939 F. Supp. 1071 (S.D.N.Y. 1996, rev’d 105 F. 3d 841 (2nd Cir. 1997)) It only impacts upon the rights of subsequent users if their use (in a competing product or service) is in competition with the existing work. It could be argued that user rights should also include the right to make derivative works, even if it is a commercially competing use. At present the tort of misappropriation is limited in its application. However, recent attempts by the United States Congress (Collections of Information Antipiracy Act, H.R. 2652, 105th Cong., 1st Sess. (1997), H.R. 352, 106th Cong., 1st Sess. (1999)) to expand the misappropriation-like rights may signal a dangerous extension of proprietary rights into the public information space.

### The trend towards proprietarianism

The commercialization of information is gaining “juristic and ideological ascendancy.”<sup>95</sup> The globalization and consolidation of market space only exacerbates this trend.<sup>96</sup> Fortunately the framework for an essentialist approach is inherent in the United States’ intellectual property system. The question may be more one of misguided application. Martin suggests a similar problem in her analysis of First Amendment jurisprudence, i.e., deontological in its constitutional

<sup>94</sup> Entertainment Law Reporter Recent Cases: Hershey Foods Prevails in Action Alleging Misappropriation of Idea for Television Commercial. *Entertainment Law Reporter*, 16, no pagination (available in the LEXIS-NEXIS Legnew Library), 1995.

<sup>95</sup> Drahos, 1996, p. 203.

<sup>96</sup> Hamilton, 1997a and H.C. Hansen, International Copyright: An Unorthodox Analysis, in *Intellectual Property: Moral, Legal, and International Dilemmas* (ed. A.D. Moore), Rowman & Littlefield, Lanham, Maryland, 1997.

origin and principle, but utilitarian (balancing) in its judicial and Congressional application.<sup>97</sup> Law is a tool, and as such it can and should be used to structure information ownership systems not so that the most benefit at the least cost (utilitarian view of information rights). Rather the intellectual property law should be structured so that its incentive attributes and restrictive dynamics work to benefit the least able, i.e., the information poor (Rawlsian view of information equity). Another problem may also be the lack of clear articulation of the public interest in intellectual property regimes, such as copyright, as argued by Davies.<sup>98</sup>

An example of the proprietarian element is obvious in the White Paper, the major blueprint released by the administration on intellectual property reform.<sup>99</sup> The White Paper rejected a blanket exemption for libraries: “The Working Groups agrees with neither those who would delete the exemptions for library copying nor those who would permit wholesale copyright in libraries. It believes that there is an important public interest in exempting certain library uses of copyrighted works and that the public interest is not less important – and, indeed, may be more important – when such use involves digital technology. It also believes that there is an equally important interest in recognizing the legitimate interests of copyright owners in licensing uses of their works through voluntary systems.”<sup>100</sup> This position views the control interest at least equal in importance to the access interest, not subservient to it.

There is however a tendency to evaluate information more from the perspective of a commodity (economic value of information) rather than the benefit to society (common good). The embodiment of intellectual property as property through the device of the legal fiction created the framework for this development. The same legal concept that was used to promote an information rich society is now being used to place greater and greater restrictions on the use of information.<sup>101</sup> The central idea in this view is that information is no longer public property available to all but that it is a commodity that can be sold and bought.<sup>102</sup> Madon indicated that “[c]ommodification has long

<sup>97</sup> Shannon E. Martin, *Bits, Bytes, and Big Brother: Federal Information Control in the Technological Age*, Praeger Press, Westport, Connecticut 1995.

<sup>98</sup> Davies, 1994, p. 4.

<sup>99</sup> White Paper, 1995.

<sup>100</sup> White Paper, 1995, p. 226.

<sup>101</sup> R.T. Nimmer, *The Law of Computer Technology: Rights, Licenses, Liabilities*. (2nd edn.) Warren, Gorham, Lamont, New York, 1992, pp. 15–23.

<sup>102</sup> R.T. Nimmer, and Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law. Law & Contemporary Problems*, 55, 103–130, 1992. and Branscomb, 1994.

been understood as the process of taking goods and services that are valued for their use [use-value] – such as food to satisfy hunger, stories to yield information – and transforming them into commodities that are valued for what they can earn in the marketplace [exchange-value].<sup>103</sup> Two fundamental developments that have accelerated this trend of commodification of information are (1) the changes in technology and (2) changes in corporate and government demand.<sup>104</sup>

Elkin-Koren observed in her discussion of copyright law (but valid for all intellectual property regimes) that this is due to the law's "centralizing effect."<sup>105</sup> The benefits of information transfers in society will be reduced as ownership rights supercede access rights. This might be considered in terms of externalities. Externalities are the hidden costs and benefits in a transaction. In information and network transfers, the externalities are typically positive. For example, information obtained through schooling has considerable positive externalities, because it tends to reduce unemployment and increase general social welfare. Political economist Ronald Bettig suggests that this development is not so much a flaw of the copyright law as designed but rather "highlights the central role of capital in bringing a work to the public."<sup>106</sup> As new technologies make it easier for publishers to control copyright use and misuse vis-à-vis electronic tracking mechanisms "the concentration of ownership of the copyrights to cultural and literary artifacts with the highest exchange value in the hands of the capitalist class" is sure to continue if not expand.

According to Lyotard knowledge (and therefore information as means of transfer of knowledge) will become subjected to supply-demand.<sup>107</sup> "The relationship of the suppliers and users of knowledge to the knowledge they supply and use is now tending, and will increasingly tend, to assume the form already taken by the relationship of commodity producers and consumers to the commodities they produce and consume – that is, the form of value. Knowledge will be produced in order to be sold, it is and will be consumed in order to be utilized in a new production: in both cases the goal is exchange. Knowledge

<sup>103</sup> S. Madon, Information – Based Global Economy and Socioeconomic Development: The case of Bangalore. *The Information Society*, 3(3), 229–239, 1997.

<sup>104</sup> Madon, 1997, p. 229.

<sup>105</sup> N. Elkin-Koren, Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace. *Cardozo Arts and Entertainment Law Journal*, 14, 215–295, 1996, p. 267.

<sup>106</sup> Bettig, 1996, p. 28.

<sup>107</sup> J.F. Lyotard, *The Postmodern Condition: A Report on Knowledge*. Minneapolis: University of Minnesota Press, 1984, p. 4.

ceases to be an end in itself, it loses its use-value." This position is also supported by Gordon.<sup>108</sup>

### Principles of ethical information ownership

Perhaps not explicit in a Western intellectual property system, a societal benefit is implicit in its design. "Thus, in thinking through the design of major social institutions, the Rawlsian designer would use property rights as a tool to preserve political liberties and maximize access to, and the distribution of. Primary goods such as information."<sup>109</sup> Consistent with this idea, several principles of information ownership in the 21st Century are proposed for adjudicators and policy makers to keep in mind when establishing new policy or resolving disputes involving intellectual property.

### Ethical reflection

Various reasons can be presented to justify why the problem of information control (richness) and information access (poverty) should not only be addressed from an economical (i.e., intellectual property mechanisms), but also from a socio-ethical perspective, namely social justice, in order to attain goal-orientated answers.

The first reason is contained in the fact that economic systems do not have a moral imperative built within its structure. Typically it must be imposed externally upon the market, often the extension of public governance or regulation. A morally unregulated economic system may lead to forms of social injustice. It is exactly these manifestations of social injustice that have to be, and ought to be, addressed from an ethical viewpoint. For this reason it is maintained that social justice must be regarded as an attribute which the actions of society, or treatment of people by society, ought to possess.

The disproportionate distribution of products, as well as the possible infringement of basic human rights, forms the basis of the second reason why an ethical reflection is an imperative in the application of moral control on economic systems. It can be explained as follows: where little or no control and management is applied to the outcomes of an economic system (for example the free market system), it leads to an uneven distribution of products and services. However, although this uneven assignment is considered as a given in the free market system, it may lead to disproportionate distribution (the poor become poorer) as well as a possible infringement of

<sup>108</sup> W.J. Gordon, On Owning Information. *Virginia Law Review*, 78, 149–281, 1992.

<sup>109</sup> Drahos, 1996, p. 178.

basic human rights, for example the right of access to information, needed to satisfy basic rights. It is especially applicable to those products and services that are regarded as common goods (information, and its presentation and protection in intellectual property). It follows that the question of distribution has to be critically judged from a socio-ethical perspective, known as social justice.

- The right of access to information for the satisfaction of basic needs is an important right. However, the exercising of this right is being threatened by, among other things, the expansion of the intellectual property regimes and the increased reliance on information technology to access and exploit that property.
- Globalization and the integration of economic systems result in an ever-widening gap between information owners (information rich) and information users (information poor) participants. Barbour points to the fact that the development, implementation and use of information technology by developed countries in particular, contribute to the widening of this gap.<sup>110</sup>
- The commodification of information that was normally seen as a collective good results in a distribution environment in which quality information is only available on proprietary grounds.
- A related characteristic of the information era is that a large quantity of non-essential information is distributed. This implies, in Baudrillard's view, more and more information and less meaning (an implosion of meaning) and refers to this as the death of meaning.<sup>111</sup> Furthermore, economic (property) based legal systems "leave natural law and the play of its forms to enter the realm of the mercantile law of value and its calculations of force."<sup>112</sup> The implication thereof is that the question of social justice concerned with the assignment of information has not only to be limited to the quantitative issue, but it should also have bearing on the qualitative.
- Information technology, as the dominant instrument for access to essential and non-essential information, limits the creation of equal opportunities because of the fact that the largest proportion of the world's population are not information or computer literate. Without these forms of literacy, it has become virtually impossible to

gain access to knowledge. In other words, a form of schizophrenia develops with, on the one hand, the ascertaining of knowledge and, on the other hand, the instrumental empowerment to gain access to that knowledge. Lyotard refers to this as the principle of "performability."<sup>113</sup> According to Lyotard performability implies keyboard skills and performability will replace traditional concepts of knowledge.

- The dominance of technology and information driven determinism renders other economic, political, cultural and social processes submissive and dependent thereon. This leads to a new form of economic totalitarianism.
- The emphasis on information and the access to it for task execution elicits a new relational issue, that of the relationship between information, the accessibility thereof as well as the reality on which the information has bearing. For example, it has almost no meaning to provide access to patent information concerning community water purification to a developing country, if there is no infrastructure to support a public waterworks system.

#### *Ethical framework*

An ethical framework is proposed within which the remodeling of intellectual property systems can occur. As a departure point, it is maintained no ethical model should be prescriptive pertaining to economic processes. When this happens, the ethical becomes an ideology. In Lyotard's terms, such an ethical/ideological approach would be just another "grand narrative."<sup>114</sup> It is forwarded that property-based economies operate on market forces and is, in that sense, regulative while the ethical operates on moral grounds and is a normative directive concerning the different economic processes. A second important aspect in any ethical deliberation is the consideration of economic realities, for instance supply and demand as well as unequal distribution. Ethical models without direct political intervention cannot therefore change economic realities but may serve to redirect those realities. A third consideration is that ethical deliberation of social justice can not be limited to the question of distribution, attention must be given to the production processes, the needs of owners and users, and also policy-makers. In other words the different socio-ethical issues should be viewed from a deontological (production) and teleological (outcomes or needs) perspective.

<sup>110</sup> Barbour, *Ethics in an Age of Technology* (series: The Gilford Lectures, 1989–1991: Volume 2). HarperSanFrancisco, San Francisco, 1993, pp. 3–23.

<sup>111</sup> J. Baudrillard, *Simulations*. Semoitext[e], New York (trans. P. Foss, P. Patton, and P. Beitchman), 1983.

<sup>112</sup> Baudrillard, 1983, p. 96.

<sup>113</sup> Lyotard, 1984, p. 51.

<sup>114</sup> Lyotard, 1984.

The fourth consideration recognizes the inherent tension between equality (in terms of human rights) and inequality (in social and economical benefit terms) in any social system. Social justice comes into play to ensure that equality is maintained (where all people are considered to be equal), but also to lay down ethical guidelines to ensure that the inequality in the company is applied to the benefit of all. Barbour observes that “inequality is justified, in short, only if it helps to correct some other form of inequality or if it is essential for the good of all.”<sup>115</sup> This application of injustice must however not be formulated from a negative perspective. Otherwise it may lead to the dislike of those who are better situated by those who are less so. In this ethical deliberation attention must also be given to the role that government (as a power instrument) should play. On the one hand it is not the task of the government to secure equal positions for all – but rather to create equal opportunities (access to information) for all. The question of social justice is based on a particular anthropological viewpoint that is that all people are of equal value, but not necessarily equal. Furthermore, the basic assumption is held that humans themselves have an internal responsibility to, based on equal opportunities, make use of self created and available opportunities.

#### *Social justice and the intellectual property mechanism*

Based on this broad proposed framework it is now possible to formulate general principles of social justice that may be employed to assess whether an intellectual property system maintains both the rights of information owners and users. Furthermore, assessment must be made as to whether the system accomplishes the underlying goal of societal benefit. These principles are proposed and are based on the work of John Rawls.

First Principle: “Each person is to have an equal right to the most extensive basic liberty with a similar liberty for others.”<sup>116</sup> This principle is based on the view that human beings are all fundamental equal and have equal intrinsic human rights. Barbour reiterates: “People shall be treated equally because they are fundamentally equal.”<sup>117</sup> Applied to information access and control rights it would mean that each individual has a fundamental right of access to information needed to satisfy all basic human rights. Intellectual property systems must contain mechanisms for access to the same collective information. It can therefore be argued that there must be a minimum information standard. Each person must be assured that there

is minimum access to essential information. As a society becomes increasingly information fixated, the minimum information base might raise since information is central to an individual’s ability to be comfortable and capable in society. Equal opportunities should be put in place to ensure the protection of this basic human right. The creation of equal opportunities can be referred to as participatory justice and implies that everybody must have equal opportunities to access of information, in order to participate in the different socioeconomic and political processes.

Second Principle: “Social and economic inequalities are to be arranged so that they are both a) reasonably expected to be to everyone’s advantage, and b) attached to positions and offices open to all.”<sup>118</sup> The adaptation of this principle attempts to make provision for economic and social inequalities in an information based society. It applies to the way in which income and wealth are distributed and pertains to those who are involved in the generation, processing (adding value) and distribution of information products and services (information owners). According to this principle unequal treatment is permissible on two grounds: obtained rights and merits. Under Rawls’ schema, “obtained rights” would guarantee or reward property (ownership) rights to “creators” of information. It is argued that a person has a right to be compensated for the creation, compilation and distribution of knowledge. Such compensation will contribute to the stimulation of future creativity (regarding the creation of knowledge). Merit as a ground for unequal treatment, recognizes that an individual must be compensated according to the work that has been done. This implies a distribution according to outcomes. In other words, compensation among authors or owners may not be equal. The work of some may be more popular or prized by information developers, publishers or users, and the market compensation structure reflects this reality.

There are however certain prerequisites regarding these permissible inequalities in the basic structure of a society. Firstly, it must be to the benefit of all. Rawls emphasizes this fact by stating that inequality is only permissible when each person can benefit from it.<sup>119</sup> Inequalities that are not to society’s benefit are unjust. Barbour even states that we must move away from the utilitarian view that a loss to some people can be justified by greater gains to others.<sup>120</sup> The distribution of (unequal) income and wealth to information producers and distributors must for example lead to the creation and accessibility of essential information

<sup>115</sup> Barbour, 1993, p. 34.

<sup>116</sup> Rawls, 1973, p. 60.

<sup>117</sup> Barbour, 1993, p. 36.

<sup>118</sup> Rawls, 1973, p. 61.

<sup>119</sup> Rawls, 1973, p. 64.

<sup>120</sup> Barbour, 1993, p. 37.

to the benefit of society. The second prerequisite is the creation of equal opportunities. Although there are certain inequalities in society, the goal must however be the creation of equal opportunities (access) for all. There must therefore be equal opportunities for all to take part in the different economic processes of creation and processing of information. The third prerequisite pertains to the higher expectations of those who are better situated. A situation of higher expectation is considered just if it would also improve the expectations of the least advantaged members in society. Finally, it must be stressed that these permissible inequalities are subordinated to the first principle. It can therefore be argued that the right to own information, and the right to gain economic profit from information products and services can never be at the expense of the right of access to information needed to satisfy basic human rights. This is consistent with the original intent of the intellectual property laws and should guide all subsequent adjustments to its mechanisms.

Based on these two principles the following four categories of social justice applicable to a situation of information poverty can be distinguished: commutative justice, distributive justice, contributive justice, and retributive justice.<sup>121</sup> Commutative justice calls for fundamental fairness in all agreements and exchanges between individuals or social groups. In its economic application, it calls for equality in transactions. In terms of access to information, commutative justice underscores the importance of the relationship between buyers and sellers of information, as well as the application of copyright laws in ways that secure the economic interests of authors and publishers. This exchange relationship must be guided by fairness, especially in matters of payments (including royalties) and the quality of the information products and services that are rendered. This form of justice is based on the second principle of Rawls' social justice. Ownership rights must be equal, and must further the underlying purpose of the intellectual property laws.

In its broadest sense, distributive justice is concerned with the fair allocation of the benefits of a particular society (i.e. income, wealth, power and status) to its members. It can be seen as an expression of Rawls' first principle. Distributive justice pertains to the fair distribution of information to people and the accessibility thereof, in order to satisfy basic needs. According to this form of justice, it can be argued that government has a responsibility to ensure the fair

distribution of essential information that people need to exercise their basic human rights. This category of information can be regarded as a 'common good' implying that people can not be excluded from it. For example, the format of the intellectual property should not determine its level of accessibility. Distributive justice also relates to the ethical dilemma regarding intellectual freedom (first principle) and intellectual property (second principle). This is of specific relevance to the educational environment, where it can be argued that government and private sector have the responsibility to ensure the fair distribution and accessibility of knowledge. This implies that the state and private sector should, for example, subsidize educational institutions by means of tax reductions on academic books and the payment of royalties to authors and publishers.

Contributive justice pertains to both principles of Rawls' social justice. Contributive justice implies that an individual has an obligation to be active in the society (individual responsibility), and that society itself has a duty to facilitate participation and productivity without impairing individual freedom and dignity. One of these duties would therefore be the creation of equal opportunities. Regarding the flow and access of information, contributive justice can serve to maximize the use of information for productivity. This form of justice also implies that the generators and distributors of knowledge have a responsibility to add value to, and maintain the accessibility of information that benefits the society.

Based on the viewpoint that contributive justice implies the society's responsibility to facilitate participation and enhance productivity, it can be argued that society also has a responsibility to create an information environment that will stimulate creativity and productivity. Information creators, developers, and disseminators are due a fair economic return on their efforts. This responsibility presupposes the implementation of channels for the effective and equal distribution of information, the quality control thereof, as well as enabling people to create information products in order to benefit the society. This form of justice further suggests the effective enforcement of copyright legislation, to ensure the fair protection of economic interests of both authors and publishers. The rightful protection of economic interests contributes meaningfully towards creating a information milieu that is conducive to creative developers and disseminators.

Retributive justice, also known as punishable justice, refers to the fair and just punishment of the guilty as well as the clear and definite articulation of non-conforming or aberrant behavior. With regard to access of information, this form of justice acts as an important guideline for the protection of intellec-

<sup>121</sup> NCCB. National Conference of Catholic Bishops Economic Justice for All (Pastoral Letter on Catholic Social Teaching and the United States Economy), Washington D.C., 1986.

tual property (Rawls' second principle). Retributive justice is also applicable to Rawls' first principle. For example: this form of justice can be applied to protect the basic human right of access to information needed to exercise other basic human rights.

#### *Articulated standards*

These principles must be based on the norm of justice (as fairness) accommodating both the users of information as well as the creators and disseminators of information products. Based on John Rawls' theory of justice these principles must imply a minimum standard of access to information (Rawls' first principle: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.")<sup>122</sup> Any intellectual property system must also protect the economic interests of the generators and distributors of information. (Rawls' second principle holds that "social and economic inequalities are to be arranged so that they are both (a) reasonable expected to be to everyone's advantage and (b) attached to positions and offices open to all.")<sup>123</sup> Applying these concepts to copyright for example, a property regime would support rights of access to information. This would be viewed as an essential or basic right necessary for each member of society. Second, any (re)distribution of income and wealth must be to everyone's advantage – this would work to protect the economic interest of copyright holders. However, a benefit could not be granted unless the least (informed) would be placed in a better position. Chafee presented similar concepts ("ideals") with respect to copyright as early as 1945<sup>124</sup> (ideals four and five: protection should not extend substantially beyond the purposes of protection and protection given to the copyright owner should not stifle independent creation by others – reflected in our second principle and to a lesser extent in our third and fourth principles). Likewise David poses three questions from an economic perspective which underlie the principles presented here: will the incentive work to create the right amount of information and at the right time, will the information be used productively, yielding maximum social benefits and will social cost be minimized during new information creation (our principle two).<sup>125</sup> Timberg also presents a re-working of

<sup>122</sup> Rawls, 1971, p. 60.

<sup>123</sup> Rawls, 1971, p. 61.

<sup>124</sup> Z. Chafee. Reflexions [sic] on the Law of Copyright (Parts I and II). *Columbia Law Review*, 45: 504–529 and 719–738, 1945.

<sup>125</sup> P.A. David, Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History, 19–61, in *Global Dimensions of*

the four basic fair use factors focusing on the First Amendment and economic equity as "more consistent" with the Copyright Clause and the First Amendment.<sup>126</sup> But what other commentators have missed is a focus on upon the least intrusive means to preserve the incentive structure. In addition, few if any other commentators have addressed the disparate effect of large versus small information stakeholders.

Applying and extending these concepts, the following principles of information ownership are formulated within an intellectual property system.

- **First Principle: Intent.** The original intent and purpose of intellectual property as embodied in the constitutional or historical design should be forwarded and given preeminence; the primary purpose is to enrich the general public through access to creative works. The right of the public to access information should therefore be guaranteed. {Rawls' First Principle and Second Principle: Contributive Justice}
- **Second Principle: Protection mechanisms.** The least restrictive means – no more that is necessary – should be used to protect the ownership rights of creators and preserve the incentive initiatives of the intellectual property rewards scheme. The intellectual property system should not promote or contribute towards a scarcity of information. {Rawls' Second Principle: Commutative Justice}
- **Third Principle: Disparity of users.** Both control and access rights should not be disproportionate among owners or users, i.e., an independent creator should have the same protections as a conglomerate media owner, likewise, individual users should be bound by the same rights of access as a large institutional users. {Rawls' Second Principle: Commutative Justice}
- **Fourth Principle: Market factors.** Monetary or economic considerations in any control versus access controversies should not be determinative. The factors or elements of any articulated analysis (judicial or legislative) should consider equally the positions of information owners and users. {Rawls' First Principle and Second Principle: Contributive Justice}

*Intellectual Property Rights in Science and Technology* (Office of International Affairs National Research Council) (M.B. Wallerstein et al. eds.), National Academy Press, Washington D.C., 1993.

<sup>126</sup> S. Timberg, A Modernized Fair Use Code for Visual, Auditory, and Audiovisual Copyrights: Economic Context, Legal Issues, and the Laocoon Shortfall. In J. Shelton Lawrence and B. Timberg, editors, *Fair Use and Free Inquiry: Copyright Law and the New Meida* (2nd edn.), pp. 305–336. Ablex, New Jersey, 1989.



- Fifth Principle: **Format.** The format in which the intellectual property resides (creation, storage, transfer, and use) should not affect the access rights of users. For example, in distance education settings, students who interact in virtual classrooms (and thus by definition access intellectual property in digital formats) should have the same “fair use” rights as students in traditional or analog settings. {Rawls’ Second Principle: Distributive Justice}
- Sixth Principle: **Normative responsibility.** Any regulatory (normative) adjustments should be made at the most effective and least intrusive place in the intellectual property system. For example, in the Internet environment, should copyright compliance be targeted at the individual or at the online service provider? Infringement should be defined and ownership rights enforced. {Rawls’ Second Principle: Retributive Justice}

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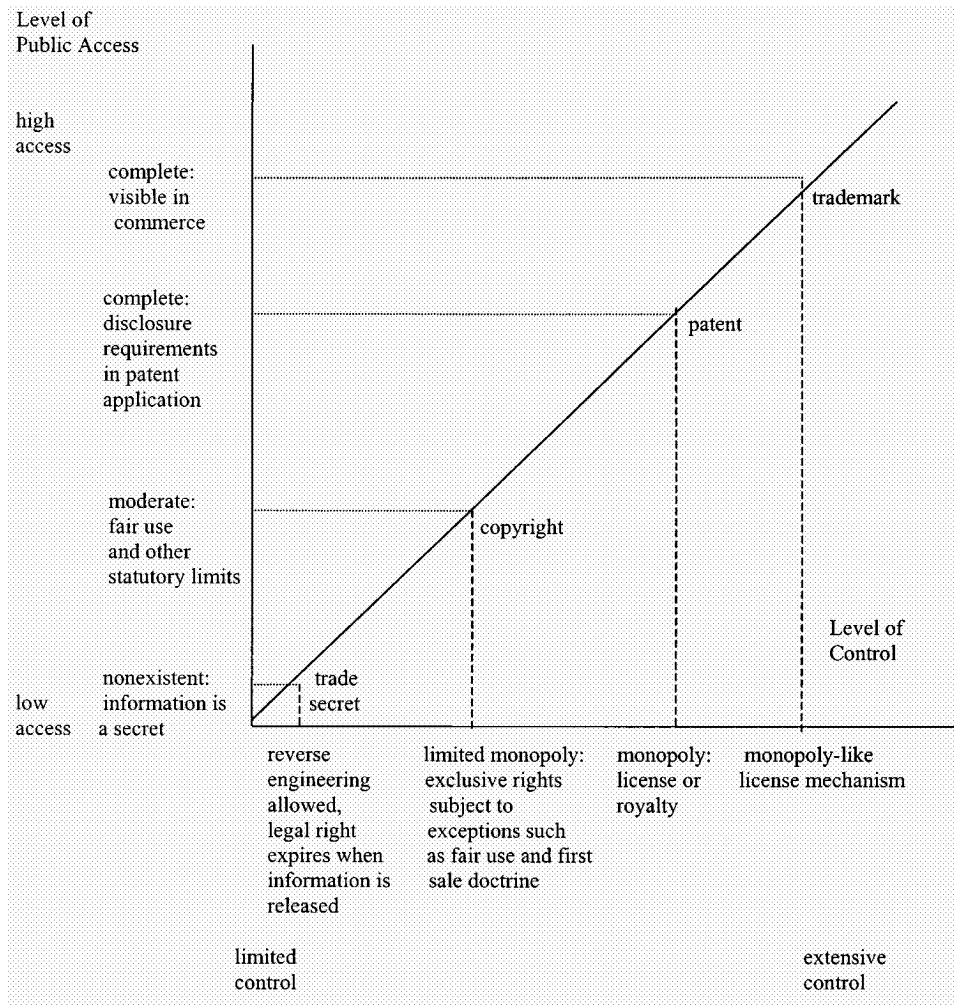
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**Appendix 1**  
Comparison of intellectual property laws in the United States

Origination of right	Rights and factors	Rights protected	Nature of right	Duration of right
<i>Copyright</i>				
Article 1, §8, clause 8 United States Constitution	Protects works of original authorship which are fixed in a tangible medium	Reproduction Derivative works Distribution Performance Display	Rights arise from creation  Federal registration	Life plus 70 years or earlier of creation plus 100 or publication plus 95
Title 17, United States Code	Does not protect ideas, only the expression of the idea		Pre-emption  Exception: Fair Use	Works created during 1923 or later may still be protected
<i>Patent</i>				
Article 1, §8, clause 8 United States Constitution	Prohibits another from making, using or selling another's invention	Process Machine Manufacture Composition of matter	Rights arise from registration  Federal registration	Utility: 17 years Design: 14 years Plant: 17 years
Title 36, United States Code	Utility, novelty, nonobviousness, one year statutory bar			
<i>Trade secret</i>				
Uniform Trade Secret Act (UTSA)	Protects competitively significant information	Protects information that is of independent economic value, secret, and not readily ascertainable by proper means:	Creation? Invention?  State law  Broader than copyright or patent	Indefinite term  Disclosure
Restatement (First) of Torts §757, comment b (1939)	Minimal novelty required	Utility Formula Pattern Compilation Program		
Wis. Stats. §134.90 (UTSA)	Reasonable efforts to maintain secrecy	Device Method Technique Process		
<i>Trademark</i>				
Article 1, §8, clause 3 United States Constitution (Commerce Clause)	Prohibits deceptive or misleading use of marks in commerce	Distinctiveness  Fanciful Arbitrary Suggestive Descriptive (secondary meaning) Generic Impermissible marks	Rights arise from use in commerce  Affixation  Intent to use in commerce  Federal and State Registration	Indefinite term  Abandonment
Title 15, United States Code	Prevent confusion Regulate commerce Protect investment Preserve fair competition			

**Appendix 2**

The dual nature of ownership and access rights in intellectual property



This schematic represents the trade-off between control (owners) and access (users) rights. For example, in trademark law, the owner presents his or her information (the trademark) for all the world to view, in media advertisements, on its product and service labeling, etc. However, to balance this, the ownership right is great. For example, the duration of the mark is indefinite. On the other end of spectrum is trade secret. Here, ownership rights are limited. For example, reverse engineering and independent parallel creation are allowed. To balance this lower threshold of protection, access rights are by definition (a 'trade secret' is in fact a secret) non-existent.



The recent wave of public sector restructuring has been typified by a willingness to experiment with new forms of organization as instruments for the delivery of public services. Large, multi-function government departments have been broken into many special-purpose agencies that have a quasi-contractual relationship with political executives. Commercial functions within government have been transferred to government-owned corporations, which have later been privatized in some instances. Other activities have been given to private for-profit or non-profit contractors or to specially built hybrid organizations that consider themselves to be 'public' in some circumstances but 'private' in others. In a few cases, governments have relinquished all responsibility for production of services, opting instead to create markets populated by private producers who have no structural or contractual links to government at all.<sup>1</sup> The philosophy that undergirds this restructuring is pragmatic and open to experimentation. It has been characterized by Anthony Giddens as a doctrine of 'structural pluralism.'<sup>2</sup>

The diffusion of this new doctrine has provoked fears about the erosion of popular control over the instruments by which public policy is formulated and executed. Critics worry that political executives will be less willing to assume responsibility for maladministration by independent agencies or contractors and that the displacement of the 'public service ethos' by commercial values will breed indifference to fairness and probity. Others fear that private entities will escape constitutional safeguards and other statutory or common law rules of good administration,

\* Associate Professor, Maxwell School of Citizenship and Public Affairs, Syracuse University.

† This paper was prepared for presentation at a conference on Governance and the Public Domain, Centre for Research in Rural and Industrial Development, Chandigarh, India, 12–14 February 2001, and at the IPSA Structure of Governance Section's Conference on The New Public Philosophy, Norman, OK, 30–31 March 2001. The research is supported by a fellowship from the Open Society Institute, New York.

1 These private producers may be regulated by government agencies, but they are not created, owned, or controlled by government, nor do they produce services under contract to government. A voucher-based system of private education is an example: Organization for Economic Cooperation and Development, *Voucher Programmes and Their Role in Distributing Public Services* (Paris: OECD Public Management Service, 27 July 1999).

2 A. Giddens, *The Third Way and Its Critics* (Cambridge: Polity Press, 2000) at 55.

or that the governance structures of new agencies will give powerful client groups too much influence over the content of public policy.

Related to these complaints is a worry about the erosion of freedom of information (FOI) laws, which give citizens a qualified right of access to information held by public institutions. FOI laws have diffused rapidly throughout the advanced democracies over the last thirty years, and their organizing principle – the promotion of transparency in policy-making and operations – has become entrenched as one of the main precepts of good administration.<sup>3</sup> However, the effectiveness of many FOI laws has been undermined by restructuring. These laws have traditionally applied to government departments or to other agencies tightly linked to these departments. As authority has shifted to quasi-governmental or private organizations, the ambit of the law has shrunk. Many public functions now are undertaken by entities that do not conform to standards of transparency imposed on core government ministries. There is little consensus on how to address this problem. Existing laws vary widely in their treatment of the various components of a fragmented public sector. This variation in responses may be evidence of a deeper confusion about how best to think about the proper scope of FOI requirements.

The aim of this paper is to provide a framework for resolving questions about the recognition of information rights. It argues that information rights should generally be recognized where organizational opacity can be shown to have an adverse effect on the fundamental interests of citizens. In fact, this logic demonstrably undergirds many existing information rights, which are established to protect basic rights to physical and economic security, privacy, and political enfranchisement. Transparency requirements could also be established to allow citizens to fulfil correlative duties associated with the recognition of certain basic interests as fundamental rights. This approach to information rights is, like the doctrine of structural pluralism itself, pragmatic and open to experimentation. It rejects the classical liberal insistence on differential treatment of the public and private spheres, recognizes that harm to fundamental interests could as easily arise from either sector, and establishes information rights where these seem likely to avert such harm.

### *I Diversity of responses*

Freedom of information laws vary widely in their treatment of the new structures that emerged out of the break-up of the old public sector. This

<sup>3</sup> The European Ombudsman has found a right to information implied within generally accepted precepts of good administration: *Draft Recommendation of the European Ombudsman on the Own Initiative Inquiry into Public Access to Documents* [616/PUBAC/F/IJH] (Strasbourg: Office of the European Ombudsman, 20 December 1996).



variation of legislative responses shows that the challenge confronting policy-makers is not primarily one of policy design. If policy-makers have the inclination to broaden the ambit of FOI laws, it is clearly feasible to do so. Instead, the diversity of responses is a symptom of the inability to resolve a more basic question: In what circumstances is it desirable to expand recognition of a right to information?

The confusion that has distinguished legislative reactions to the new structural pluralism is remarkable when compared to the consensus that dominates the treatment of core governmental institutions, those ministries or departments that are directly accountable to Cabinet members, funded through appropriations, and regulated by a range of other general management laws.<sup>4</sup> These are typically regarded as institutions that have a substantial role in policy-making or 'steering' functions.<sup>5</sup> These core institutions are almost always included in FOI laws, although there may be broad restrictions on access to certain kinds of sensitive information. Citizens are typically given a right to make complaints about non-compliance to an independent referee or court.

#### A. GOVERNMENT-OWNED CORPORATIONS

Beyond the core public sector, consensus quickly breaks down. For example, there is wide variation in the treatment of government-owned corporations. The Canadian government excluded its major corporations when it adopted its Access to Information Act in 1982 and resisted later proposals by legislators<sup>6</sup> and the federal Information Commissioner<sup>7</sup> to broaden the law by including all federal corporations. At the other extreme is the United States, which included all government-controlled corporations within its 1974 Freedom of Information Act.<sup>8</sup> New Zealand also included state-owned enterprises under its Official Information Act

4 Including laws that regulate the treatment of public servants, the management of money, procurement, and administrative procedures.

5 The distinction between 'steering' and 'rowing' functions is made by D. Osborne & T. Gaebler. *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Plume, 1992).

6 See the recommendations of the parliamentary committee that reviewed the law: Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987). There have also been recent private members' bills that would expand the law to include government-owned corporations: Bill C-206, *Open Government Act*, 2d Sess., 36th Parl., 1999; Bill C-418, *Access to Information Amendment Act*, 2d Sess., 36th Parl., 2000; Bill C-448, *Access to Information Amendment Act*, 2d Sess., 36th Parl., 2000.

7 Canada, Information Commissioner, *Annual Report, 1993-94* (Ottawa: Department of Public Works and Government Services, 1994).

8 A.R. Adler, ed., *Litigation Under the Federal Open Government Laws* (Wye Mills, MD: ACLU Publications, 1997) at 190.

1982, a decision reaffirmed in subsequent reviews of the law.<sup>9</sup> Many jurisdictions follow a middle path.<sup>10</sup> A recent review of the Australian Freedom of Information Act observed that there was ‘no general rule or policy’ regarding the application of FOI requirements to Australia’s government business enterprises, with some entirely included, others included in part, and others excluded from the law.<sup>11</sup>

#### B. QUASI-GOVERNMENTAL ORGANIZATIONS

There is comparable uncertainty in the treatment of quasi-governmental organizations – institutions that may perform important public functions but whose governance structure locates them in a ‘grey zone’ between the private sector and core government departments.<sup>12</sup> Many American laws are restrictive in their treatment of quasi-governmental organizations. Courts have determined that such organizations will be subject to the federal Freedom of Information Act only if there is ‘substantial federal control’ over their day-to-day operations.<sup>13</sup> Close structural similarity to organizations that are unambiguously subject to the law is used as evidence of control.<sup>14</sup> Indeed, a recent decision insists that the law is not intended to encompass ‘quasi-public or quasi-governmental entities’ at all.<sup>15</sup> Courts have adopted the same approach in interpreting many state FOI laws.<sup>16</sup>

On the other hand, several jurisdictions are less conservative. Their FOI laws typically allow one structural attribute – rather than a combination of attributes or other evidence of substantial governmental control –

9 Law Reform Commission of New Zealand, *Review of the Official Information Act* (Report no. 40) (October 1997).

10 On Australian state laws, see Queensland, Legal, Constitutional and Administrative Review Committee, *Discussion Paper on Freedom of Information* (Discussion Paper No. 1) (February 2000). On Canadian provincial laws, see C. McNairn & C.D. Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell, 2000) at s. 4(1)(c).

11 Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Report no. 77) (Canberra: Australian Law Reform Commission, 1995) at s. 16.7.

12 C. Greve, ‘Quangos in Denmark and Scandinavia’ in M.V. Flinders & M.J. Smith, eds., *Quangos, Accountability and Reform* (New York: St. Martin’s Press, 1999) 93 at 93.

13 *Forsham v. Harris*, 445 U.S. 169 at 180 (1980). The critical question under federal law is whether an organization should be considered an ‘agency’ for the purpose of the law.

14 *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

15 *Irwin Memorial, etc. v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981). This view explicitly reverses the view expressed in *Rocap*, supra note 14, that 1974 amendments to the FOI Act were intended to encompass quasi-governmental entities.

16 Such as the Hawaii FOI law, which comprises all state ‘agencies’ (*Uniform Practices Act*, Hawaii Rev.Stat. §92F-3 [2000]); the Maryland law, which includes any ‘unit or instrumentality of state government’ (*Public Information Act*, Md.Code SG 10-611(g)(1)(i)); and the Delaware law, which comprises all ‘public bodies’ (*Freedom of Information Act*, 29 Del.Code §10002(a))

to determine whether an organization is subject to FOI requirements. Kentucky law, for example, includes any organization that derives at least one-quarter of its budget from state or local funds.<sup>17</sup> Missouri law affects any organization that exercises a statutory power to confer favourable tax treatment.<sup>18</sup> Quebec law includes any body whose capital stock is publicly owned,<sup>19</sup> while Manitoba's includes any body whose board is appointed by Cabinet.<sup>20</sup> Australian laws include any body established by statute or regulation 'for a public purpose' – a requirement that is broadly construed.<sup>21</sup>

Other laws make no attempt to define characteristics that would cause an organization to be subject to FOI requirements. They rely, instead, on schedules that name organizations that will be affected by the law. These laws give governments broad discretion in deciding whether quasi-governmental organizations should be included. For example, New Zealand drafted its schedule liberally, including bodies that the Canadian government elected to exclude from its schedule.<sup>22</sup> In fact, the Canadian government has been criticized for refusing to list many new quasi-governmental organizations established as a part of its recent restructuring of national public services.<sup>23</sup>

### C. CONTRACTORS

Beyond this penumbra of quasi-governmental organizations is an expanding range of privately owned businesses that are connected to government through contracts to provide goods or services. Information about contractor performance may be held by the contracting agency or by the contractor itself. Governments typically treat these two pools of information differently, and they are generally more liberal in allowing access to

17 *Open Records Act*, Ky.Rev.Stat. 61 §870(1)(h) (2000). For a comparable approach, see Tenn. Code Ann. tit. 10 §7.503(d)(1) (2001).

18 In addition to organizations that directly receive government appropriations: *Open Records Act*, Mo.Rev.Stat. §610.010(4)(f)(b) (2000).

19 *Act respecting access to documents held by public bodies*, R.S.Q. 1999, c. A-2.1, s. 4.

20 *Freedom of Information Act*, C.C.S.M. 1999, c. F-175, s. 1.

21 See the definitions of 'agencies' or 'authorities' in Commonwealth and state FOI laws. Incorporated companies and associations are typically excluded. In a recent decision, the Queensland Information Commissioner observed that the 'public purpose' restriction 'imposes a requirement that a purpose be one for the benefit of members of the community generally, or a substantial segment of them': *Re Application under the Freedom of Information Act 1992 Qld.* (4 August 1995), 95022 (Office of the Information Commissioner [Qld.]).

22 For example, the New Zealand law includes local airport authorities and national agricultural marketing boards: *Official Information Act*, N.Z.Stat. 1982, c. 156, sched. 1. Proposed legislation will also include the New Zealand Blood Service. By contrast, the Canadian government consciously excluded its recently created airport authorities, as well as the Canadian Wheat Board and the new Canadian Blood Services: *Access to Information Act*, R.S.C. 1985, c. A-1, sched. 1.

23 A. Roberts, 'Canada's Access Law Needs an Overhaul' *Ottawa Citizen* (5 April 2000) A19.

information held by contracting agencies. In either case, there is still substantial variation in policy on disclosure.

All FOI laws acknowledge that governments may sometimes refuse access to confidential information that is provided to public agencies by businesses, including information provided during the negotiation or performance of contracts. But laws vary substantially in their definition of circumstances in which denial of access is justified.<sup>24</sup> Some – including Canada's federal law and many of its provincial laws – compel governments to deny access to confidential commercial information, even when there is no evidence that harm would be caused to contractors by the disclosure of that information. Other laws are less restrictive, denying access only when there is evidence that contractors would be harmed by disclosure.<sup>25</sup>

Even in these cases, however, a subclass of confidential commercial information known as 'trade secrets' is typically withheld regardless of harm<sup>26</sup> – but there is substantial variation in the definition of this term.<sup>27</sup> Some laws allow this restriction on access to be overridden if there is a broader public interest that would be served by disclosure. Others permit such an override only if there is a threat to specified public interests, such as public health or safety; yet others contain no public interest override at all.<sup>28</sup>

This statutory confusion is aggravated by the variation in governmental practices in negotiating contracts. Public agencies may choose to impose terms in tendering processes and contracts that oblige contractors to disclose information, or they may use FOI law as a shield against disclosure. The government of Western Australia recently boasted that it had achieved a 'world first' by publishing a private prison contract with Cor-

24 For a discussion of variation among Canadian laws, see McNairn & Woodbury, *supra* note 10 at ss. 3.1.b, 4.1. On variation among Australian laws, see *Open Government*, *supra* note 11; Australia, Administrative Review Council, *The Contracting Out of Government Services: Access to Information* (Issue Paper) (Canberra: Australian Government Printing Service, February 1997) at ch. 5 [hereinafter *Contracting Out*]; Australia, Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies* (18 June 1996) at 92–5; C. Finn, 'Getting the Good Oil: Freedom of Information and Contracting Out' (1998) 5 *Austral.J.Admin.L.* 113.

25 A harm test has been read into the language of the US Freedom of Information Act. See Adler, *supra* note 8 at 84–7.

26 Although there are exceptions: compare the *Freedom of Information Act 1982* of the Australian state of Victoria (s. 34(2)) with the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, of the Canadian province of British Columbia (s. 21(1)).

27 Adler, *supra* note 8 at 81–2; *Contracting Out*, *supra* note 24 at s. 5.76; McNairn & Woodbury, *supra* note 10 at s. 4(1)(c).

28 In Canada, for example, the laws of British Columbia, Alberta, and Manitoba contain broad public interest overrides; the federal law contains a qualified public interest override; and the laws of New Brunswick and Newfoundland contain none at all: McNairn & Woodbury, *supra* note 10 at 3–4–8.

rections Corporation of Australia on the Internet.<sup>29</sup> More typical is the behaviour of the Australian state of Victoria, which resisted disclosure of its prison contracts until overruled by the courts.<sup>30</sup> It was standard practice for the Victorian government to include confidentiality clauses in its contracts, confounding later attempts to obtain contract information through FOI law.<sup>31</sup> Governments of other jurisdictions, such as the Australian state of Queensland<sup>32</sup> and Scotland,<sup>33</sup> have also resisted disclosure of details of their prison contracts.

There is also broad variation in the treatment of information held by contractors themselves. Older FOI laws generally exclude contractor records unless the contractor's relationship with the contracting agency is so close that the records are effectively under government custody and control<sup>34</sup> or are, in the words of the US Freedom of Information Act, 'agency records.'<sup>35</sup> In some of these jurisdictions, governments have been encouraged to negotiate terms that would establish a right of access to contractor-held information.<sup>36</sup> However, this approach has important limitations. Only the contracting agency, as a party to the contract, has a remedy for non-compliance, and there may little incentive for the agency to enforce the contract.<sup>37</sup>

29 Ministry of Justice of Western Australia, *Setting New Standards in a Prison System* (1999), online: <<http://www.moj.wa.gov.au>> (date accessed: 26 October 2000).

30 A. Freiberg, 'Commercial Confidentiality and Public Accountability for the Provision of Correctional Services' (1999) 22 *Curr.Iss.Crim.Justice* 119 [hereinafter 'Public Accountability']; A. Freiberg, 'Commercial Confidentiality, Criminal Justice and the Public Interest' (1997) 9 *Curr.Iss.Crim.Justice* 125 [hereinafter 'Criminal Justice'].

31 A similar practice is observed in Canada by A. Roberts, 'Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law' (2000) 60 *P.A.R.* 298 [hereinafter 'Less Government, More Secrecy']. The Australian Auditor General has also complained about the abuse of confidentiality clauses: P.J. Barrett, *Auditing in Contemporary Public Administration* (Canberra: Office of the Auditor General of Australia, 1999). See also *Statement of Principles Regarding Commercial Confidentiality and the Public Interest* (Australasian Council of Auditors-General, June 1997).

32 R. Harding, *Private Prisons in Australia: The Second Phase* (Canberra: Australian Institute of Criminology, 1997) at 4.

33 Prison Reform Trust, (2000) 36 *Prison Privatization Report International*.

34 For example, see *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 10(1).

35 Courts have interpreted this provision of the US Freedom of Information Act strictly: N. Casarez, 'Furthering the Accountability Principle in Privatized Federal Corrections' (1995) 28 *U.Mich.J.L.Reform* 249 at 268-84; C. Feiser, 'Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law' (1999) 52 *Fed.Comm.L.J.* 21 at 33-6, 43-54.

36 *Open Government*, supra note 11 at para. 15.13; Information and Privacy Commission of Ontario, *Model Access and Privacy Agreement* (Toronto: Office of the Information and Privacy Commissioner, August 1997).

37 *Contracting Out*, supra note 24 at para. 5.47; Freiberg, 'Public Accountability,' supra note 30 at 144-5.

Other laws take a more expansive view of contractor obligations. One method of encompassing contractor-held information, adopted in New Zealand and Irish law, is to deem contractor records to be held by the contracting agency and thus subject to the right of access.<sup>38</sup> A second method treats contractors as though they were themselves public bodies, with an independent responsibility for complying with FOI requirements. The laws of two American states – Florida and Rhode Island – extend to any ‘business entity acting on behalf of any public agency.’<sup>39</sup> However, these laws have been strictly construed: Florida courts have insisted that contractors should have ‘some additional entanglement with government’ that would justify a right of access.<sup>40</sup> Missouri includes contractors if the primary purpose of the organization is to enter into contracts with government.<sup>41</sup>

38 *Official Information Act 1982*, supra note 22 at s. 2(5) (New Zealand); *Freedom of Information Act*. Stat. of Ireland, Act 13 of 1997, s. 6(9) (Ireland). For a discussion of weaknesses in the Irish provision, see M. McDonagh, ‘Implications of New Developments in Public Sector Management for the Freedom of Information Act’ (2000) 3 *Contemp. Iss. Irish Law & Politics* 54. For a criticism of the New Zealand provision, see *Contracting Out*, supra note 37 at paras. 5.37–38. Australia’s Administrative Review Council proposes a similar provision for the Australian FOI law (*ibid.* at para. 5.43). For an endorsement of the Council’s proposal, see Australia, Senate Committee on Finance and Public Administration, *Contracting Out of Government Services: Second Report* (Canberra, May 1998). The Australian government plans to adopt a limited version of this provision, which will allow access to personal information held by contractors: Australia, Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service* (Canberra, 2 November 2000).

39 R.I.Gen.Laws tit. 38 §2-2(1) (1999); Fla. Stat. tit. 10 §119.011(2) (2000).

40 C. Carlson, ‘Stepping into the Sunshine: Application of the Florida Public Records Act to Private Entities’ [1993] *Fla.B.J.* 71; see also M. Robinson, ‘Detectives Following the Wrong Clues: Identification of Private Entities Subject to Florida’s Public Records Law’ (1993) 22 *Stetson L.Rev.* 785; Casarez, supra note 35 at 298–9. The open records laws of other states (such as Arkansas, Kentucky, and Texas) include organizations that are ‘supported by public funds.’ It has been suggested that such language might be construed to include private contractors (M. Bunker & C. Davis, ‘Privatized Government Functions and Freedom of Information’ [1998] 75 *Journalism & Mass Comm.Q.* 464). However, courts appear to read this language narrowly. The Texas statute has been interpreted to exclude businesses providing goods or services under contract: B. Keeling, ‘Attempting to Keep the Tablets Undisclosed: Susceptibility of Private Entities to the Texas Open Records Act’ (1989) 41 *Baylor L.Rev.* 203 at 223–5. Iowa’s open records law takes yet another approach: it says that government bodies ‘shall not prevent the examination or copying of a public record by contracting with a non-governmental body to perform any of its duties or functions’ (*Open Records Act*, Iowa Code § 22.2.2 [1997]). It, too, is read narrowly by the courts. In a 1989 decision, the Iowa Supreme Court suggested that the law refers only to cases in which governments have transferred a statutory function with the intention of avoiding disclosure requirements (*KMEG Television, Inc., v. Iowa State Board of Regents*, 440 N.W.2d 382 (Iowa 1989)).

41 *Open Records Act*, Mo.Rev.Stat. 610.010(4)(f)(a).

In 1999, the state of Western Australia also expanded the definition of public bodies subject to FOI law to include all contractors and subcontractors.<sup>42</sup> Contractors who 'carry out functions on behalf of a department' were subject to the administrative codes that until recently regulated access to information in the United Kingdom and Scotland.<sup>43</sup> The new UK law and the proposed Scottish law take a more cautious approach, however. Rather than imposing a general requirement, both laws give government the discretion to include contractors who perform government functions.<sup>44</sup> Otherwise, government officials are merely enjoined to avoid the use of excessively restrictive confidentiality clauses while drafting contracts.<sup>45</sup> However, there is one major exception to this policy: all persons or organizations who provide medical services that are paid for by the National Health Service are made subject to the new law.<sup>46</sup>

#### D. THE PRIVATE SECTOR

Citizens are least likely to have a right of access to information held by organizations that lack a structural or contractual connection to government. Indeed, we call this the *private* sector precisely because we are prepared to refuse demands for transparency except in unusual circumstances. However, jurisdictions vary substantially in their willingness to defer to this expectation of privacy. For example, many governments now recognize a citizen's right to access and correct personal information collected by private firms. This narrow piercing of corporate privacy, which is defended as a method of discouraging unfair treatment and unjustified intrusions into personal privacy, is now permitted under data protection laws adopted throughout the European Union and in Canada. These laws typically establish a right of access to personal information held anywhere in the private sector. By contrast, the right of access to personal information is less firmly established in the United States. American laws recognize more limited rights of access to specific kinds of personal data, such as credit information or educational records, held within the private sector.<sup>47</sup>

42 *Freedom of Information Act 1992*, Schedule 2, Glossary, as am. by Act No. 47, 1999, s. 15.

43 *Code of Practice on Access to Government Information* (U.K.), 1994, s. 6 [hereinafter UK Draft Code of Practice]; *Code of Practice on Access to Scottish Executive Information* (U.K.), 1994, s. 6.

44 *Freedom of Information Act 2000* (U.K.), 2000, s. 5(1)(b); Consultation draft, *Freedom of Information (Scotland) Bill*, s. 5(2)(b) (Edinburgh: Scottish Executive, March 2001). The administrative code will remain in force in the UK until the Act is implemented in 2002.

45 UK Draft Code of Practice, supra note 43 at ss. 24–8.

46 *Freedom of Information Act* (U.K.), supra note 44 at Sched. 1, ss. 44 & 45; *Freedom of Information (Scotland) Bill*, supra note 44 at Sched. 1, ss. 31 & 32.

47 The right to access and correct personal information is one of several principles about the handling of personal information that have become widely accepted in the last

Some nations have also recognized broader rights of access to information held by private organizations. South Africa's Promotion of Access to Information Act, adopted in 2000, implements a guarantee in its 1996 Constitution that citizens will have a right of access to information held by another person 'that is required for the exercise or protection of any rights.'<sup>48</sup> Unlike other access laws, the South African law requires citizens to identify the right that would be jeopardized by a denial of access to information held by private bodies.<sup>49</sup> However, courts seem likely to be liberal in defining the range of rights whose imperilment would warrant breaching corporate secrecy.<sup>50</sup> Other laws might subject a few businesses to even broader transparency requirements. The British freedom of information law includes a discretion to include private organizations that perform 'functions of a public nature,' which would create a right of access that is not qualified by an obligation to specify a reason for requesting the information.<sup>51</sup> Similarly, a proposed Jamaican law would include businesses that perform critical public services or hold a monopoly position in the marketplace.<sup>52</sup>

## II Weaknesses in conventional arguments

The broad variation in law suggests that the problem of setting transparency requirements in the grey zone of government is not primarily a technical one. If any government were to decide that certain classes of

quarter-century: R. Gellman, 'Does Privacy Law Work?' in P. Agre & M. Rotenberg, eds., *Technology and Privacy: The New Landscape* (Cambridge: MIT Press, 1998) 193 at 196–7. See also the 1980 OECD *Guidelines Governing the Protection of Privacy*, Principle 7; and 1995 European Union *Directive on Data Protection*, art. 12. C.J. Bennett, 'Convergence Revisited: Toward a Global Policy for the Protection of Personal Data?' in Agre & Rotenberg 99, argues that there is evidence of convergence in national policies regarding the protection of personal information but concedes that the United States remains an anomaly. American laws establishing a right of access to particular classes of information include the Fair Credit Reporting Act, the Family Educational Rights and Privacy Act, and the Cable Communications Policy Act; Gellman, *ibid.* at 202. Many current proposals for a new 'patient's bill of rights' would establish a comparable right of access to personal health information. For a recent defence of the right to personal privacy, see J. Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000).

48 *Constitution of the Republic of South Africa Act*, 1996, s. 32(1)(b); *Promotion of Access to Information Act*, 2000, pt. 3.

49 *Promotion of Access to Information Act*, s. 53(2)(d).

50 G. Pimstone, 'Going Quietly About Their Business: Access to Corporate Information and the Open Democracy Bill' (1999) 15 S.A.J.H.R. 2 at 10.

51 *Freedom of Information Act (U.K.)*, *supra* note 44 at s. 5(1)(a). The law gives the government discretion to include such businesses.

52 T. Munroe, 'Jamaica's Proposed Freedom of Information Act' in L. Neuman, ed., *Combating Corruption in Jamaica* (Atlanta, GA: Carter Center, 1999) 74.



quasi-governmental or private organizations should be subject to access requirements, it would have little difficulty in finding a workable policy design already in use in another jurisdiction. The challenge confronting policy-makers is philosophical rather than technical. The fact that laws deviate so broadly probably reflects an underlying confusion about how the boundaries of access law should be drawn.

The same confusion is reflected in the policy debates that have arisen as restructuring has eroded access laws. Advocates of openness have typically relied on two main arguments to justify the preservation of access rights for new institutions in the grey zone. The first relies on provenance: because a privatized function was once subject to access requirements, these advocates argue, it should continue to be so. This logic impelled policy-makers in Britain to propose the inclusion of recently privatized utilities under the country's FOI law.<sup>53</sup> Courts in some US states have applied the same reasoning, showing greater willingness to extend FOI requirements to quasi-governmental entities or contractors if they undertake functions typically performed by government agencies.<sup>54</sup> In the United States, this way of thinking about the ambit of FOI law is heavily influenced by the dominant approach to constitutional review, which suggests that quasi-governmental agencies are more likely to be made subject to constitutional standards if they perform functions that are 'traditionally the exclusive prerogative of government.'<sup>55</sup> An argument based on provenance is most powerful when a sector is only partly privatized, with some governmental components that remain subject to FOI requirements and other components that are not. There seems to be an inconsistency in allowing a new privately operated school or prison to operate with the benefit of secrecy when its older government-run analogue remains subject to openness rules.<sup>56</sup>

The 'provenance' approach is unsatisfying for several reasons. Above all, it is unprincipled: the approach provides no reason, other than the weight of history, for preserving transparency for privatized functions. Furthermore, it relies on a misreading of history. As critics of the public

53 U.K., *Your Right to Know: The Government's Proposals for a Freedom of Information Act* (Cm 3818) (London: Her Majesty's Stationery Office, 1997). The privatized utilities complained that this unfairly favoured competitors who had never been owned by government.

54 Keeling, *supra* note 40 at 212; Robinson, *supra* note 40 at 793–7, 810–3.

55 Feiser, *supra* note 35 at 60. Feiser and other commentators argue for an explicit adoption of the test used for constitutional review – known as the 'public function' test – to resolve questions about the scope of FOI law: see also Bunker & Davis, *supra* note 40. For a criticism of the public function test's emphasis on 'traditionally' governmental functions, see D. Barak-Erez, 'A State Action Doctrine for an Age of Privatization' (1995) 45 *Sy.L.R.* 1169.

56 Barak-Erez, *ibid.* at 1188–9; Casarez, *supra* note 35 at §51.

function test have observed, there are few functions that have not been undertaken by private actors at some point in the past.<sup>57</sup> This is true even of 'core' functions such as corrections,<sup>58</sup> defence, or tax collection.<sup>59</sup> It may be the recent period of state activism, which relied heavily on direct production of services by governmental actors, that is historically anomalous. Nor does the inconsistency in treatment of analogous public and private entities provide a compelling case for extending FOI rules. It could as easily serve as the foundation for an argument in favour of reducing transparency obligations for governmental entities, particularly when the two sectors are in competition for the right to provide services.<sup>60</sup>

The second method of defending transparency requirements in the grey zone relies on structural commonalities or control. Quasi-governmental agencies should be subject to access requirements, this argument says, if they share the organizational features of the conventional bureaucracy or are directly regulated by the conventional bureaucracy through funding or appointments. As the previous section has shown, many FOI statutes rely on these criteria in determining the boundaries for access rights.<sup>61</sup> However, this approach is also unprincipled: it does not explain *why* the preservation of access rights might be important in a particular case. It relies, instead, on the premise that there are good (but unarticulated) reasons for promoting access for 'core' governmental institutions and that these reasons must also hold equally true for institutions in the grey zone that resemble the core institutions or are directly controlled by them. The approach says nothing about the question of whether transparency requirements should be imposed on organizations

57 R. Gilmour & L. Jensen, 'Public Functions, Privatization, and the Meaning of "State Action"' (1998) 58 P.A.R. 247.

58 J. Gentry, 'The Panopticon Revisited: The Problem of Monitoring Private Prisons' (1986) 96 Yale L.J. 353 at 353; D. Wecht, 'Breaking the Code of Deference: Judicial Review of Private Prisons' (1987) 96 Yale L.J. 815 at 815; Casarez, *supra* note 35 at 252.

59 C. Webber & A. Wildavsky, *A History of Taxation and Expenditure in the Western World* (New York: Simon & Schuster, 1986).

60 Roberts, 'Less Government, More Secrecy,' *supra* note 31 at 312. Privatized utilities used this argument to reverse the British government's proposal to include them under a new FOI law. See the utilities' submissions in response to the government's 1997 white paper: Submission no. 478, 27 February 1998, on-line: <<http://foi.democracy.org.uk>>. Recently privatized Ontario utilities have made the same argument: M. Mittelstaedt, 'Hydro Lobbying Won Change to Law' *The Globe and Mail* (26 January 2001) A17.

61 The same approach is taken in more general discussions about boundaries of 'quasi-government.' For an illustration, see C. Greve, M. Flinders, & S. Van Thiel, 'Quangos: What's in a Name? Defining quangos from a comparative perspective' (1999) 12 Governance 129 at 139-40. Canadian constitutional law also relies on a control-based test to determine whether agencies are 'governmental,' and therefore obligated to comply with the Charter of Rights and Freedoms: D. Jones & A. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1999) at 47-53.

that are not structurally comparable to, or directly controlled by, core institutions.

Ambivalence about the wisdom of relying on structural formalisms is evident in the evolving British law on judicial review. The traditional position of British courts had been that administrative authorities could be compelled to respect the standards of natural justice in their decision-making – which include limited requirements to disclose information<sup>62</sup> – only if those authorities exercised powers derived from statute. More recently, courts have expanded their jurisdiction to permit review of actions by private bodies, such as professional self-regulatory organizations, wielding significant powers that are not derived from legislation. The new approach, says Murray Hunt, seems to base decisions about the availability of judicial review ‘on the consequences of the exercise of the power and the nature of the interests affected by it, rather than the purely formal consideration of the source from which the power emanated.’<sup>63</sup> Hunt himself argues that the important factors for deciding the scope of judicial review

should include the nature of the interests affected by the body’s decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body’s jurisdiction, and the nature of the context in which the body operates. Parliament’s non-involvement ... or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant ... The very existence of institutional power capable of affecting rights and interests should itself be sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court.<sup>64</sup>

A comparable approach is taken in Britain’s recent Human Rights Act, which gives individuals remedies for the violation of rights enumerated in the European Declaration of Human Rights. The Act eschews structural formalities and therefore imposes obligations on private bodies performing public functions.<sup>65</sup>

62 Rules of natural justice are intended to protect individuals who are the subject of adverse decisions by such authorities. The rules may require authorities to give notice of an intention to consider an adverse decision; disclosure of the case to be made against an individual; and access to the proceeding in which the decision will be made.

63 M. Hunt, ‘Constitutionalism and Contractualisation of Government’ in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 21 at 29.

64 *Ibid.* at 33. See also D. Oliver, ‘Is the *Ultra Vires* Rule the Basis of Judicial Review?’ [1987] *Pub.L.* 543.

65 F. Klug, *Values for a Godless Age* (London: Penguin Books, 2000) at 48–9, 167. For arguments in favour of an extension of human rights obligations to the private sector, see A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), and A. Clapham, ‘The Privatisation of Human Rights’ (1995) XX *Eur.H.R.L.Rev.* 20.

III *Harm to fundamental interests*

What is needed is a method of reasoning about the boundaries of access law that builds on explicit propositions about the good that could be produced by improved transparency. A better method of reasoning would focus on the deleterious effects of opacity – that is, on the harms that may be caused when access to information is denied. In particular, we can refer to harm to a citizen's fundamental interests – and more specifically, those interests that undergird the set of generally recognized basic human rights.<sup>66</sup> Under this approach, advocates of transparency would be obliged, with reference to any specific practice of organizational secrecy, to answer satisfactorily two questions: first, whether there is a significant interest at risk of harm if transparency is not assured; and, second, whether the risk of harm is substantial. These questions obviously differ significantly from traditional queries about the provenance or structure of the organization.

In some cases, the connection between access rights and the fundamental interests of citizens is obvious. For example, we recognize a fundamental right to security of the person and, by implication, a right of access to information about potential threats to personal safety. This logic was recently adopted by a Canadian court when it ruled that police forces have a positive obligation to provide information about threats to safety, an obligation rooted in the constitutionally recognized right to security of the person.<sup>67</sup> The European Court of Human Rights (ECHR) adopted similar reasoning in its 1998 *Guerra* decision. It concluded that the Italian government unjustifiably violated the 'physical integrity' of the residents of Manfredonia by withholding information about toxic emissions from a chemical factory in their community.<sup>68</sup> In a subsequent case the Court affirmed this position, ruling that British government agencies engaged in hazardous activities had a positive obligation to establish procedures allowing access to information by persons whose health might be affected by those activities.<sup>69</sup>

The advanced democracies have imposed comparable disclosure requirements on non-government actors. For example, health professionals

66 These rights have been enumerated in several charters in the last half-century: J. Donnelly, *International Human Rights* (Boulder, CO: Westview Press, 1998). For a discussion of the relationship of interests to rights, see J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 165–8, 180–3 [hereinafter *Morality of Freedom*].

67 *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al.* (1998), 39 O.R. (3d) 487 (G.D.).

68 *Guerra and Others v. Italy* (1998), 26 E.H.R.R. 357.

69 *McGinley and Egan v. United Kingdom* (1999), 27 E.H.R.R. 1. The Court upheld this right even though the apparent risk to citizens was significantly weaker than in *Guerra*. It concluded that the government had not violated its obligations.

in private practice also have a duty to disclose information about a serious danger of violence by one person against another.<sup>70</sup> Commercial enterprises, like government agencies, have an obligation to provide communities with information about the release of toxic chemicals by their facilities.<sup>71</sup> Private employers have an obligation to provide their workers with information about hazardous materials used in the workplace, and manufacturers have an obligation to provide information to consumers about hazards posed by defective products.<sup>72</sup> Individuals may also be permitted to disclose privately held confidential information if it would reveal a threat to health or safety.<sup>73</sup> The case for allowing access to information held by private providers of health services also rests on a concern for the physical integrity of citizens.<sup>74</sup>

Policy-makers have established disclosure requirements to protect other basic interests. Canada's Federal Court of Appeal has recently ruled that constitutional guarantees against unjustified invasions of personal privacy imply 'a corollary right of access' to personal information collected by government, so that citizens can check its accuracy.<sup>75</sup> The ECHR has ruled that governments have a positive obligation to establish procedures allowing reasonable access to information contained in foster care files, arguing that individuals are entitled 'to know and to understand their childhood and early development.'<sup>76</sup> In the United States, disclosure requirements have been imposed on many private schools. Students and parents have a right of access to their own educational records and, in some cases, a right to information about a broad range of operational matters, including an institution's fee policies, graduation rates, accreditation, and policing practices.<sup>77</sup> These policies are motivated by an

70 *E.g.*, *Tarasoff v. Regents of the University of California*, 17 Cal 3d 425 (1976). The case considered the 'duty to warn' of psychotherapists.

71 The growing popularity of pollutant release registers is discussed in Czech Republic, Ministry of the Environment, *Discussion Paper for the First Meeting of the UN/ECE Task Force on Pollutant Release and Transfer Registers* (Prague, February 2000).

72 J. McLellan, 'Hazardous Substances and the Right to Know' (1989) 128 Int'l Lab. Rev. 639; T. Tietenberg & D. Wheeler, *Empowering the Community: Information Strategies for Pollution Control* (Waterville, ME: Colby College, Dept of Economics, 1998).

73 Several jurisdictions recognize a public interest defence in actions for breach of confidence. In the United Kingdom, such disclosures are also protected by the *Public Interest Disclosure Act 1998* (U.K.), 1998, c. 23, s. 1.

74 See *Access to Health Records Act 1990* (U.K.), 1990, c. 23. Comparable rules would be established under many of the current American proposals to adopt a 'patients' bill of rights.'

75 *Ruby v. Solicitor General*, [1996] 3 F.C. 134, 136 D.L.R. (4th) 74 (F.C.T.D.) at paras. 165, 169.

76 *Gaskin v. United Kingdom* (1989), 160 Eur.Ct.H.R. (ser. A), 12 E.H.R.R. 36.

77 Access to educational records is provided for in the *Family Educational Rights and Privacy Act*, 20 U.S.C. § 1232g; other disclosure requirements are created by the *Student Right to Know and Campus Security Act*, 20 U.S.C. §1092.

appreciation of the critical importance of education to the development of human capacities.<sup>78</sup>

Individuals also have a right to economic security that may imply the establishment of disclosure requirements. For example, access to information may be permitted to prevent the arbitrary denial of employment. In its 1987 *Leander* decision, the ECHR ruled that a refusal of access to information used to deny a security classification, and thus to limit employment within government, could constitute a violation of fundamental rights.<sup>79</sup> Similarly, the Australian state of New South Wales gives individuals engaged in child-related employment a right of access to records pertaining to disciplinary hearings, regardless of whether the individual works in the public or in the private sector.<sup>80</sup> Many jurisdictions also require businesses to disclose information about plans for plant closings or mass layoffs.<sup>81</sup> The ability to obtain work and borrow money is also protected by obligations imposed on businesses to disclose information about the character or health of applicants for employment or credit.<sup>82</sup>

It is sometimes argued that access provisions such as these are only specific applications of a general principle: that individuals should have a right of access to personal information held by public or private organizations because individuals have a property right in this information and should consequently be entitled to control its use.<sup>83</sup> However, this is not the case. In many instances, these transparency obligations compel disclosure of information that is not 'personal' at all. Consider, for example, Senator John McCain's proposed Patient Protection Act – one of the most recent and prominent efforts to establish a 'bill of rights' for consumers of health services in the United States. In addition to establishing a right of access to information about decisions to deny treat-

78 See *United Nations Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d sess., Supp. No. 13, UN Doc. A/810 (1948) 71 at art. 26.2, and the *United Nations Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 at art. 13.1.

79 *Leander v. Sweden* (1987), 116 Eur.Ct.H.R. (Ser. A) 23, 9 E.H.R.R. 433. The Court determined that the violation was justified in the circumstances.

80 *Commission for Children and Young People Act*, 1998, s. 43.

81 J. Portz, 'Plant Closings and Advance-Notice Laws: Putting the Pieces Together' (1995) 9 *Econ.Dev.Quar.* 356. The European Commission has also made a proposal for a new directive that create a right to notice about proposed layoffs: Commission Doc. 598PC0612, November 1998.

82 In the United States, the relevant law is the *Fair Credit Reporting Act*, 15 U.S.C. §1681i; in Britain, the *Consumer Credit Act 1974* (U.K.), 1974, and the *Access to Medical Reports Act 1988* (U.K.), 1988.

83 'Everyone is the rightful owner of their personal information, no matter where it is held, and this right is inalienable': Canada, House of Commons Standing Committee on Human Rights, *Privacy: Where Do We Draw the Line?* (Ottawa, April 1997). See also J. Litman, 'Information Privacy/Information Property' *Stan.L.Rev.* [forthcoming in 2001].

ment, the law would compel disclosure of much other information about internal procedures, handling of grievances, and physician qualifications and compensation.<sup>84</sup> Little of this is personal information. Nevertheless, it directly affects a fundamental personal interest, and it should be disclosed for that reason.<sup>85</sup>

It is also noteworthy that a concern for basic interests will result in the imposition of access requirements even on private organizations operating in competitive markets. In some instances, citizens can mitigate harms done by secrecy by ending their relationships with secretive institutions. Patients can find other health-care providers; students, other educational institutions; workers, other employers. In the extreme, citizens can move to jurisdictions with less secretive governments. Albert Hirschman calls this the 'exit option.'<sup>86</sup> Policy-makers are clearly attentive to the costs that may be associated with the exit option.<sup>87</sup> In some instances they may also recognize that the exit option should not be relied upon, even if there are low costs to exit. For example, requiring citizens to mitigate certain harms by exiting a jurisdiction would be tantamount to repudiating the idea of citizenship itself.

#### A. POLITICAL PARTICIPATION RIGHTS

A right to information can also be established as a corollary of basic rights relating to political activity. The most familiar argument of this sort typically treats the right to information as an adjunct of the right to freedom of opinion and expression. This connection is made explicitly in the United Nations Covenant on Civil and Political Rights, which says that the right to freedom of expression 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.'<sup>88</sup> In fact, Western nations put great emphasis on the 'freedom to seek, receive and impart information' in the early years of the Cold War as part of their attack on censorship within Communist states.<sup>89</sup> A 1948 UN conference on Freedom of Information ultimately produced a convention recognizing a right of peoples 'to be fully and reliably in-

84 *Bipartisan Patient Protection Act of 2001* S. 283, 1st Sess., 107th Cong., Subtitle C.

85 The same argument could be made with respect to the disclosure requirements under the US *Family Educational Rights and Privacy Act*, *supra* note 78.

86 A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970) at 4.

87 Concern about the lack of an 'exit option' also influences recent UK cases on judicial review: Oliver, *supra* note 65 at 555.

88 *United Nations International Covenant on Civil and Political Rights*, 16 December 1966, Res. 2200 A(XXI), art. 19.2. Comparable language is found in the *United Nations Universal Declaration of Human Rights*, *supra* note 79 at art. 19.

89 Donnelly, *supra* note 67 at 7.

formed.<sup>90</sup> Some commentators began to describe 'freedom of information' as a freestanding human right.<sup>91</sup>

However, few governments were prepared to concede that this 'right to information' implied a right of access to government records. The main aim of Western governments had been to reduce government control of communication between non-governmental actors, rather than imposing a positive obligation on government to divulge its own information. An explicit recognition of such an obligation within the right to freedom of expression was proposed and rejected by governments during the drafting of the 1950 European Convention on Human Rights.<sup>92</sup> The ECHR resisted later attempts to read a right of access to records into the convention's guarantee of freedom of expression, arguing that this guarantee

basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him ... [but] cannot be construed as imposing on a State ... positive obligations to collect and disseminate information of its own motion.<sup>93</sup>

The notion that freedom of expression is purely a negative right – which limits interference by government but does not impose affirmative obligations upon it – has been contested. To illustrate the fragility of the distinction, Holmes and Sunstein cite the 1992 decision of the US Supreme Court in *Forsyth County v. Nationalist Movement*.<sup>94</sup> In that case, the Court struck down a government policy that imposed fees for the use of public space that reflected administrative and policing costs relating to the proposed event.<sup>95</sup> Although it did not do so explicitly, the court

90 *United Nations Convention on the International Right of Correction*, 16 December 1952, Res. 630 (VII), Preamble.

91 C.J. Radcliffe, *Freedom of Information: A Human Right* (Glasgow: Jackson, 1953). For a comparable approach to 'freedom of information' by an American author, see H. Brucker, *Freedom of Information* (New York: Macmillan, 1949).

92 I. Österdahl, *Freedom of Information in Question: Freedom of Information in International Law* (Uppsala: Iustus Forlag, 1992). Article 10.1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5 [hereinafter *European Human Rights Convention*] refers to the 'right to receive and impart information,' while Article 19 of the *Universal Declaration of Human Rights*, supra note 79, refers to the right to 'seek, receive and impart information.' The distinction is thought to weaken the case for recognizing a right of access to government information within Article 10.1 of the *European Convention on Human Rights*: F. Jacobs & R. White, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1996) at 223.

93 *Guerrav. Italy*, supra note 69. For a discussion of the Court's position in this and earlier cases, see S. Sedley, 'Information as a Human Right' in J. Beatson & Y. Cripps, eds., *Freedom of Expression and Freedom of Information* (Oxford: Oxford University Press, 2000).

94 S. Holmes & C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999) at 111.

95 *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).



essentially recognized an affirmative obligation for government to maintain a public space and provide police protection so that citizens have a forum in which to exercise their right to free expression.

In practice, there are many ways in which governments recognize an affirmative obligation to take steps so that the right to free expression can be realized. They enforce rules to prevent concentration of ownership in broadcast and print media, and require cable monopolies to provide community organizations with access to channels. They establish public broadcasting facilities to provide an outlet for voices neglected by commercial media and provide financial support to smaller private media outlets<sup>96</sup> and for artistic expression. They maintain a system of intellectual property law that promotes expression by making it profitable. Reasonable people may disagree about the details of any one of these policies, but most would be surprised if the whole range of governmental interventions were set aside. It is accepted that realization of the right to free expression requires positive governmental action.<sup>97</sup> An obligation to provide access to information does not impose a burden greater than that already imposed by existing policies to promote free expression.<sup>98</sup>

The importance of access to information is clearer when the right to freedom of expression is considered more narrowly. Suppose that our concern is with expression on a specific subject: for example, about government's effectiveness in executing a policy. In some cases, government agencies may be informational monopolists: that is, they may have exclusive control over critical information required for intelligent discussion of the policy. If no right of access to information is recognized, the right to free expression is hollowed out. Citizens will have the right to say what they think, but what they think will not count for much, precisely because it is known to be grossly uninformed. A more sensible

96 Through preferential tax treatment, direct grants, governmental advertising, or preferential postage rates.

97 For an argument that US constitutional law creates a constitutional obligation for state action, see O.M. Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996). Canadian courts have also recognized that 'positive government action' may be needed to give effect to the right to freedom of expression: R. Moon, *Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 175–81. In 1999, the Supreme Court of Canada observed that 'The distinctions between 'freedoms' and 'rights,' and between positive and negative entitlements, are not always clearly made, nor are they always helpful ... [A] situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of ... ensuring public access to certain kinds of information.' *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

98 This is certainly true from the point of view of financial costs. Critics may argue that there is an intangible cost, consisting of a weakened capacity for vigorous state action. However, the same might be said of other policies that permit the expression of dissent.

approach would be to treat governmental monopolists just as we treat private media monopolists, by curbing their monopoly power so that we may promote free expression.

This argument is given added force if it is modified slightly. The right to freedom of expression is important because of the role it plays in the process of self-governance.<sup>99</sup> In a decision that found a right of access to official information implied in the Indian Constitution's guarantee of freedom of expression, the Supreme Court of India explained,

Where a society has chosen to accept democracy as its creedal faith, it is elementary that its citizens ought to know what their government is doing. ... No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy.<sup>100</sup>

This is a common method of justifying a right of access to information. However, the logic suggests that the access right is better understood as a corollary of basic political participation rights, rather than of the right to free expression alone. The Universal Declaration of Human Rights says that citizens are entitled to expect that 'the will of the people shall be the basis of the authority of government.'<sup>101</sup> The UN Covenant on Civil and Political Rights acknowledges a right of citizens to take part in public affairs and a the right to vote in 'genuine periodic elections.'<sup>102</sup> These rights impose substantial positive obligations upon government, such as the burden of organizing elections or maintaining legislatures.<sup>103</sup> However, these rights have little meaning if government's informational monopoly is not regulated. Otherwise, individuals are invited to apply their rational capacities to the task of self-governance but denied the raw material that this task requires.

99 In a recent decision, Britain's Lord Steyn observes that 'freedom of speech is the lifeblood of a democracy.' See Sedley, *supra* note 94 at 240.

100 *S.P. Gupta v. Union of India* (1981), cited in M. Amir-Ul Islam, *Right to Know Is Right to Liberty* (Dhaka, Bangladesh: Legal Education and Training Institute, 1999). See also R. Martin & E. Feldman, *Access to Information in Developing Countries* (Transparency International, 1998), online: <<http://www.transparency.de/documents/>>. Other relevant cases are *State of U.P. v. Raj Narain* (1975); *Gandhi v. Union of India* (1978); *Bombay Environmental Group and others v. Pune Cantonment Board* (1982); *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* (1995).

101 *Supra* note 79 at art. 21.3.

102 *Supra* note 89 at art. 25.

103 For example, the Canadian government spent over \$180 million on the 1997 general election, or about eleven dollars per elector. This figure does not include ongoing costs associated with its election commission and payments made to political parties.

As Stephen Sedley observes, there is also a need for consistency in our treatment of fundamental rights.<sup>104</sup> As we noted earlier, it is already widely accepted that the protection of certain basic interests, such as personal safety or economic security, will demand recognition of a positive obligation to provide access to information. It would be peculiar if we were not prepared to apply the same logic in our treatment of other equally fundamental interests. Rules to assure access to information then become part of the institutional arrangements – the ‘civic architecture’<sup>105</sup> – that must be built and maintained by government so that individuals have the capacity to fulfil their political participation rights.

Although the case for recognizing this implied right of access might seem clearest with respect to core governmental institutions, there is no reason why it should be limited in this way. The execution of a policy may be delegated to a quasi-governmental or private organization, but the act of delegation itself is unalterably public. Proper consideration of the wisdom of this delegation may require access to information held by these quasi-governmental or private organizations. The idea that private entities can be regulated to protect political participation rights is not new: rules to constrain concentration of media ownership are built on the same principle. Indeed, the argument for extending this implied right of access is analogous to that used in defence of free speech rights in the so-called company town or shopping mall cases.<sup>106</sup> In the best-known of these cases, the US Supreme Court ruled that the owners of a company town could not use trespass laws to ban pamphleteering, arguing that a company’s property rights could not be allowed to dominate the community interest in maintaining ‘free channels of communication.’<sup>107</sup> Similarly, another limitation of private property rights – a sort of informational trespassing – might be tolerated if it proved essential to informed public discussion about the propriety of delegating responsibilities to private organizations.

#### B. CORRELATIVE DUTIES

The preceding discussion has been built on the proposition that information rights are generally established as safeguards for generally accepted fundamental interests. To put the same point in different terms, an individual’s right of access to information is often implied by our recognition

104 Sedley, *supra* note 94 at 239.

105 B. Barber, *A Place for Us* (New York: Hill & Wang, 1998) at 37, 67.

106 B.C. Williamson & J.A. Friedman, ‘State Constitutions: The Shopping Mall Cases’ [1998] *Wis.L.Rev* 883; K. Gray & S. Gray, ‘Private Property and Public Propriety’ in J. McLean, ed., *Property and the Constitution* (Portland, OR: Hart Publishing) 11 at 20–31.

107 *Marsh v. State of Alabama*, 326 U.S. 501 (1946). For comparable reasoning in a Canadian case, see the argument of Laskin J. in the Supreme Court’s decision in *Harrison v. Carswell*, [1976] 2 S.C.R. 200.

of that individual's other basic human rights. However, this is not the only way in which information rights might arise.

The recognition that individuals within a community have certain basic rights sometimes imposes correlative duties on other members of that community.<sup>108</sup> For example, our acceptance of the proposition that individuals should have a right to 'life, liberty, and security of person'<sup>109</sup> imposes a corresponding obligation on other members of the community to avoid actions that unjustifiably infringe upon that right. The existence of these correlative duties is acknowledged in key human rights charters, which proscribe conduct by governments, groups, or persons that is 'aimed at the destruction of any of the rights and freedoms' enumerated in those documents.<sup>110</sup>

These correlative duties bind citizens even when they rely on agents to work on their behalf. The task of providing critical public services that affect basic rights may be given to governmental organizations, but citizens cannot evade their own responsibility for ensuring that these agencies do their work properly. This implies the need to monitor these organizations, and the system of monitoring may include a right of access to information about their conduct. This would hold true even if the task of providing critical services were given to private or quasi-private organizations. In any of these cases, the correlative duties of citizens would imply an obligation to monitor the conduct of agencies, and a right of access to information could be justified as a mechanism for allowing citizens to fulfil this obligation.

### C. OPPOSING CONSIDERATIONS

A concern for fundamental interests will not always imply a need for disclosure of information. On the contrary, there are some instances in which these interests are better protected through non-disclosure. As a consequence, the right of access to information will never be unqualified. However, the task of setting limits on transparency is not qualitatively different than that of making the preliminary case for transparency: in both cases an appeal to fundamental interests is necessary.

For example, the disclosure of information might be restricted if it seemed likely to pose a threat to safety of an individual. A recent controversy in the Australian state of Victoria illustrates the potential conflict. A convicted triple murderer attempted to obtain the names of nurses at a local hospital, who, he claimed, could assist in establishing an alibi; the nurses protested that revelation of their identities might lead to a threat

108 For a discussion of correlative duties, see Raz, *Morality of Freedom*, supra note 67 at 183-6; J. Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194.

109 *Universal Declaration of Human Rights*, supra note 79 at art. 3.

110 *Ibid.* at art. 30; *European Convention on Human Rights*, supra note 93 at art. 17; *American Convention on Human Rights*, 22 November 1969, 36 O.A.S.T.S. at art. 29.

upon their lives.<sup>111</sup> Observers differed in their views about the magnitude of the risk posed to the nurses, and consequently about the propriety of withholding information, but none denied the existence of two fundamental and conflicting interests.<sup>112</sup> A similarly stark conflict was evidence in a recent Canadian case, in which a person charged with sexual assault attempted to gain access to the therapeutic records of his accuser. Crafting an appropriate rule on disclosure of the records required a balancing of two fundamental but conflicting interests: the right to a fair trial on one hand, and the right to privacy on the other.<sup>113</sup> Other considerations typically invoked to justify opacity – national security, candour in internal governmental deliberations, commercial confidentiality – can also be connected to the fundamental interests of citizens. It is this connection alone that gives these considerations weight in the calculation of appropriate transparency rules.

A concern for fundamental interests will also influence the design of procedures used to make decisions about disclosure of information. At a minimum, there is an obligation to respect the requirement of ‘second-order publicity’:<sup>114</sup> that is, the policy that is used in making decisions about disclosure should itself be accessible, even if the information that is the subject of contention remains secret. Furthermore, we should question policies that neglect some critical interests or fail to establish fair procedures for balancing these interests. This was the basis of the ECHR’s 1989 *Gaskin* decision. In a dispute over access to adoption records, the Court criticized British government policy for its disproportionate regard for confidentiality of sources and its failure to establish a fair procedure for reconciling competing claims regarding the release of adoption records.<sup>115</sup> A comparable complaint could be made against FOI laws that prohibit access to broad categories of information without regard to the actual harm that would be caused by the disclosure of information within that category.

#### IV *An illustration: Prison privatization*

A proper method of resolving disputes about the boundaries of the right to information is one that emphasizes the consequences of opacity, defined in terms of potential harms to fundamental interests. The usefulness of such an approach can be illustrated by considering a specific

111 M. Hedge, A. Gale, & K. Hughes, ‘Outrage over FOI Naming of Nurses to Triple Murderer’ *AAP Newsfeed [Melbourne]* 14 January 1999.

112 The Liberal government amended Victoria’s FOI law to restrict future disclosures of comparable information, but this was reversed by a Labor government later that year. *Victoria Freedom of Information Act 1982*, supra note 26 at Pt. 3.

113 *R. v. Mills*, [1999] 3 S.C.R. 668.

114 D. Thompson, ‘Democratic Secrecy’ (1999) 114 *Pol.Sci.Quar.* 181.

115 Supra note 77.

application of the doctrine of structural pluralism: privately operated prisons. Prison privatization was largely unknown twenty years ago but has now spread through the United States and the Commonwealth. Everywhere it has bred complaints about erosion of transparency, complaints that are given added weight by stories of disorder or mistreatment within private facilities.<sup>116</sup>

Critics most frequently complain about their inability to obtain copies of agreements between government agencies and private contractors,<sup>117</sup> but this is one part of a much larger problem. Under current FOI laws, governments may rely on commercial confidentiality exemptions to deny access to other information relating to contract execution, such as operating policies, incident reports, or records of penalties for non-performance.<sup>118</sup> Documents in the exclusive possession of contractors are even more likely to remain hidden, unless government agencies have taken the unconventional step of insisting on a right of access within the contract.

In the United States, an even more unusual situation has arisen. Prisons in some states now house inmates from neighbouring jurisdictions and have no contractual relationship with governments of their home jurisdiction at all.<sup>119</sup> For example, Oklahoma's North Fork Correctional Facility, a 1 440-bed prison operated by the Corrections Corporation of America, holds prisoners under a contract with the state of Wisconsin. In such a case as this, there are no contractual records that might be accessible under the law of the home jurisdiction, and no opportunity for the government of the home jurisdiction to impose access requirements relating to other records through the terms of a contract. Some states have also proved reluctant to impose statutory requirements for access to information about the operations of these facilities.<sup>120</sup> In several states controversies have arisen as a result of riots or escapes from poorly managed prisons holding out-of-state inmates.<sup>121</sup>

116 J. Greene, *Prison Privatization: Recent Developments in the United States* (New York: Open Society Institute, 2000).

117 Complaints about the inability to obtain prison contracts in Australia were noted earlier in this paper.

118 C. Gow & D. Williamson, *From Penal Colony to Corporate Colony: Australia's Prison Experience* (People's Justice Alliance, 1998), online: <<http://home.vicnet.net.au/~pjan/news.final.98.htm>>; L. Curran, 'Unlocking the Doors on Transparency and Accountability' (1999) 11 *Curr. Iss. Crim. Justice* 135 at 145.

119 W. Collins, *Privately Operated Speculative Prisons and Public Safety* (Washington, DC: Department of Justice, Office of Justice Programs, 1999).

120 Under Oklahoma law, the state's Private Prison Administration may have a right to monitor such facilities, but there is no general right of access to information (Okla. Stat. 57 § 561(b)). Tennessee law has also been criticized for its failure to provide adequate disclosure.

121 California, Senate Committee on Public Safety, *Analysis of Assembly Bill 1222: Out-of-State Inmates* (Sacramento, June 1999). In October 1999, California adopted a law that prohibits private prisons from holding out-of-state inmates.

Three arguments can be made for piercing the 'corporate wall'<sup>122</sup> that surrounds private prisons, all based on an appeal to the fundamental interests of citizens. The first is premised on the right to personal security that is shared by all members of the community surrounding a privately operated correctional facility. The escape of high-risk prisoners would obviously jeopardize the safety of the prison's neighbours; in this respect, the prison is comparable to the chemical factory that was at the centre of controversy in the ECHR's *Guerra* decision. The right to personal security implies a right to information about the operations of the facility. This might include information about the number and risk-classification of inmates; the number and qualifications of staff; and the prison's emergency response procedures. Safety considerations may warrant an even broader access right. A study of problems at the controversial Northeast Ohio Correctional Center observed that risks of disorder and escape are tightly linked to the prison's disciplinary procedures and the availability of work and educational opportunities, and consequently the public might have a right to know about these subjects as well.<sup>123</sup> Similarly, the public might have a right to know about activities within the prison that are likely to aggravate the risk of recidivism when a prisoner is released into the community.<sup>124</sup>

A second argument for access to information is premised on the political participation rights of citizens in the surrounding community. Corrections policy is a subject of profound importance, involving basic questions about the meaning of justice, the legitimate use of force, and the promotion of public safety. At the same time, it is not an area that is typified by clear and stable societal preferences.<sup>125</sup> On the contrary, popular debate is characterized by profound disagreements on these basic questions and massive uncertainties about the likely impact of policy choices. Individuals and communities resolve these questions through public deliberation – the process of 'civic discovery,' as Robert Reich calls it.<sup>126</sup> But public deliberation will not yield good results unless citizens have a good understanding of how correctional facilities actually work and can observe the effect of their policy choices. An insistence on strict

122 K. Testa, 'Corrections Officers Protest Privatization of Prisons' *Associated Press News Service [Palm Beach Gardens, FL]* (5 February 1999).

123 J. Clark, *Inspection and Review of the Northeast Ohio Correctional Center* (Washington, DC: Department of Justice, Office of the Corrections Trustee, 1998).

124 Neighbours of the facility would have a particular interest in the prospect of recidivism if inmates tended to settle in the surrounding area: Collins, *supra* note 120 at 16.

125 Gentry, *supra* note 59 at 360, 364.

126 R. Reich, 'Policy Making in a Democracy' in R. Reich, ed., *The Power of Public Ideas* (Cambridge, MA: Ballinger Press, 1988) 123. See also J. Mansbridge, 'A Deliberative Theory of Interest Transformation' in M. Petracca, ed., *The Politics of Interests* (Boulder, CO: Westview Press, 1992) 32; P. Stern & H. Fineberg, eds., *Understanding Risk: Informing Decisions in a Democratic Society* (Washington, DC: National Research Council, 1996).

corporate secrecy effectively hobbles the process of civic discovery and denies each citizen his or her right to participate in the government of the community.

A final case for transparency is built upon the correlative duties of citizens. Correctional policy involves a collective decision that the fundamental rights of fellow citizens should be severely restricted. There may be good reasons for imprisonment, but it cannot be denied that the effect is profound: inmates become 'involuntary wards of the state.'<sup>127</sup> Prisoners have no 'exit option,' and their capacity to engage in political protests against excessive harms is curtailed. A collective decision to restrict the rights of fellow citizens so profoundly creates an important correlative duty: citizens have an obligation to ensure that the restriction of fundamental rights does not become excessive.

Although the task of implementing corrections policy can be delegated to government departments or contractors, the task of fulfilling this correlative obligation cannot. This is particularly true when departments or contractors are known to have mixed incentives in their execution of policy. Contractors, for example, may attempt to reduce operating costs by using more brutal disciplinary procedures or stinting on essential services.<sup>128</sup> Government departments will try to draft contracts that minimize this sort of misbehaviour, but contracts cannot anticipate all possible forms of malfeasance. Furthermore, governments may not be effective monitors of contract compliance. They may lack the resources needed for effective oversight and the political will to enforce the terms of the contract. This may be particularly true when the act of privatization was itself controversial, so that government has an interest in suppressing evidence of failure.<sup>129</sup> The danger that contractors and contracting agencies will misbehave is greatest when the misbehaviour is

127 Wecht, *supra* note 59 at 830–1; Curran, *supra* note 119 at 136; Freiberg, 'Criminal Justice,' *supra* note 30 127–8.

128 Gentry, *supra* note 59 at 355–6; Wecht, *supra* note 59 at 829–30; Casarez, *supra* note 35 at 258; L. Hancock, 'The Justice System and Accountability' in B. Costar & N. Economou, eds., *The Kennett Revolution* (Sydney: University of New South Wales Press, 1999) 37 at 44.

129 For general discussions of problems in government monitoring, see Gentry, *supra* note 59 at 355–60; Casarez, *supra* note 35 at 294–5; Finn, *supra* note 24 at 127; Collins, *supra* note 120; Freiberg, 'Public Accountability,' *supra* note 30 at 132. Specific illustrations of monitoring failures are provided by Clark, *supra* note 124; P. Moyle, 'Private Prison Research in Queensland, Australia: A Case Study of Borallon Correctional Centre, 1991' in P. Moyle, ed., *Private Prisons and Police: Recent Australian Trends* (Leichhardt, Australia: Pluto Press, 1994); Office of Senator Gwendolynne S. Moore, *Inmate Transfers to Out of State Prisons: Report to Senator Gwendolynne S. Moore* by L. Fitzgerald (Madison, WI, 3 August 2000).



protected by official or commercial secrecy.<sup>130</sup> An effective remedy may be the establishment of strong transparency rules that allow broad access to information about operations within the privately run facility as well as the monitoring work of the contracting agency.

Of course, there are also arguments against disclosure that can be justified by an appeal to fundamental interests. Excessive transparency may compromise institutional security (and hence public safety) or the privacy of inmates and employees. Too much openness may also erode the private provider's incentive to develop more effective techniques for achieving the aims of corrections policy. Nevertheless, this brief canvass suggests that a concern for fundamental interests would lead us to adopt more rigorous information rights than are currently provided in many jurisdictions now experimenting with prison privatization. Furthermore, the method of arguing in favour of increased openness – or, indeed, against it – does not depend on issues of provenance or structure. There is no need to determine whether correctional services are 'traditionally' a governmental function, or whether the funding and governance arrangements for a prison operator make it appear governmental to outside observer. The central issue is whether information rights must be recognized to avert the harm to fundamental interests that would otherwise be caused by organizational opacity.

#### V Conclusion

Concerns about the 'democratic deficit' caused by recent restructuring are significant but not unprecedented. Western democracies experienced a comparable crisis in the middle decades of the last century. The growth of governmental responsibilities, particularly in response to the Great Depression, entailed an expansion in the number, size, and influence of administrative agencies. Many of these agencies exercised discretion given to them through statutes or applied regulations made under authority of law but without close review by legislatures. Power seemed to shift from legislators to administrators, and this provoked complaints that presaged those now made against the restructured public sector. Administrators, it was said, exercised extraordinary influence – but they did so secretly, and often capriciously. The bureaucracy, Britain's Lord Hewart complained, had established a 'new despotism.'<sup>131</sup> Administrative agencies, said US Supreme Court Justice Robert Jackson,

130 Indeed, Gentry characterizes this as a 'hidden delivery' problem (supra note 59 at 356–7). It can also be characterized as a principal-agent problem with serious divergences in incentives and information asymmetries.

131 G. Hewart, *The New Despotism* (London: Benn, 1929).

had combined to form a strange 'fourth branch' of government, which deranged traditional ideas about the division and control of political power.<sup>132</sup>

Throughout the post-war years, the Western democracies constructed a new regime to regulate and legitimize bureaucratic power.<sup>133</sup> New laws compelled administrative agencies to adopt more open procedures for rule-making and established mechanisms by which citizens could appeal adverse decisions. Courts became more liberal in providing citizens with judicial remedies for administrative malfeasance.<sup>134</sup> The construction of this new regime required an amendment of the long-held belief that the control of administrative behaviour should be the sole responsibility of political executives and legislators.<sup>135</sup> Citizens acquired a new set of rights that could be asserted directly against the new fourth branch of government. One of these was the right of access to information held by departments and agencies. In fact, the precursor of the current US Freedom of Information Act was a provision of the 1946 Administrative Procedure Act, the keystone of the new regime for control of federal administrative agencies.<sup>136</sup>

The last quarter of the twentieth century has witnessed a second and equally profound shift in the structure of political power. In this second period, authority has flowed out of the now-familiar bureaucracy and into a new array of quasi-governmental and private bodies. The relocation of authority has provoked another doctrinal crisis: the old system of administrative controls, built to suit a world in which power was centred within government departments and agencies, no longer seems to fit contemporary realities. Fears about the misuse of power – a second 'new despotism' – may be aggravated because of a second post-war trend. Western democracies have gradually broadened their definition of basic rights – that is, those citizen interests that deserve protection against arbitrary action.<sup>137</sup>

132 D.H. Rosenbloom, *Building a Legislative-Centered Public Administration* (Tuscaloosa, AL: University of Alabama Press, 2000).

133 Critics suggest that this new regulatory regime was actually used by conservative forces to stymie governments pursuing progressive social and economic reforms. The question of which interests are served by the establishment of transparency requirements (and other administrative law rules) is important, but it can only be resolved by observing the actual operation of a particular law. For example, it is possible that the same regime has served more recently as a tool for progressive reformers who want to obstruct initiatives by conservative governments: H. Arthurs, 'Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy' (1997) 42 McGill L.J. 29.

134 Judicial control was expanded in two ways: by liberalizing rules of standing, which determined who could ask for judicial remedies; and by lowering the threshold for judicial intervention in cases of administrative misconduct.

135 In the British context, see Hunt, *supra* note 64 at 22.

136 H.L. Cross, *The People's Right to Know* (New York: Columbia University Press, 1953).

137 Klug, *supra* note 66 at 71–4, 98–111, 127–34.

In short, our understanding of what counts as an abuse of power is expanding, at a moment when power itself is slipping out of the restraints imposed by the post-war regulatory regime.

The erosion of FOI law is part of this larger doctrinal crisis. Like the new approach to governance itself, an appropriate response to the weakening of FOI law must be typified by pragmatism and openness to experimentation. The critical question in determining information rights is not whether an organization 'looks governmental,' or whether it performs a function that was once assigned to a government agency. Rather, the important questions are whether an organization's conduct could cause unjustifiable harm to fundamental interests, and whether transparency requirements might avoid such harm. These questions will provoke a more complicated, but ultimately more constructive, discussion about the ambit of FOI laws.