

# CANCEL [©OPYRIGHT] CULTURE: A LEGAL ANALYSIS OF GEORGE ORWELL'S *NINETEEN EIGHTY-FOUR*

TRACY REILLY\*

## ABSTRACT

*In this article, I present a combined legal and literary analysis of one of the most destructive themes in contemporary intellectual property scholarship: the putative death of the copyright author. For decades, the vast majority of scholars in all academic disciplines have widely accepted that the conceptual death of the author announced in 1967 by French literary theorist Roland Barthes is today a conclusively proven fact. This piece, however, offers a unique and unquestionably controversial challenge to such a purported denouement: it boldly, and not without trepidation, theorizes that the true goal of some anti-author scholars is the outright annihilation of the natural rights principles upon which the Progress Clause of the U.S. Constitution is founded. By examining the canonical principles apparent in George Orwell's twentieth-century dystopian novel, *Nineteen Eighty-Four*, I unravel the cause, effect, and cultural significance of the postmodern phenomenon of the death of the author. I juxtapose universal themes explored by Orwell such as "Newspeak," "Doublethink" and "2+2=5" with the current social trend known as "cancel culture," and reveal—as *Nineteen Eighty-Four's* protagonist Winston Smith did with respect to "Big Brother"—that the true spirit of anti-author copyright*

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\* NCR Distinguished Professor of Law & Technology, Director of the Program in Law & Technology, University of Dayton School of Law. Copyright © 2021 by Tracy Reilly. All Rights Reserved. This article is dedicated to my contemporary intellectual heroes, those fearless mavericks who have revealed the truth about postmodernism and identity politics and provided me with the strength and courage to speak my own truth: Dr. Jordan B. Peterson, Dr. Robert Merges, Dr. Stephen R.C. Hicks, Dr. Gad Saad, Douglas Murray, Dennis Prager, Candace Owens, Lionel Shriver, Mark Levin, Heather Mac Donald, Helen Pluckrose, Randolph J. May, Seth L. Cooper, Mark Helprin, and Professors Daniel A. Farber, and Suzana Sherry. To Dr. William B. Irvine and Dr. Howard Tuttle, for their inspirational books and teachings on stoicism and existentialism, and for taking the time to provide me with a philosophical backdrop within which to frame copyright law and other intellectual property issues. I am grateful to my friends and colleagues for their valuable comments, criticisms, and insights, which helped me refine my thesis: Cheryl Meier, Cynthia Schnaitmann, Dean Andrew Strauss, and Professors Charles Russo, Christopher Roederer, and James Steiner-Dillon.

*rhetoric is based upon collectivist precepts that are dangerously counterproductive to a free society. While copyright scholars routinely provide egalitarian and altruistic justifications for killing the author—primarily for the alleged enrichment of the public domain as a mechanism to enhance opportunities for burgeoning new authors to have a bite at the copyright pie—I shine the light on this deception. By drawing from the profundity of Orwell’s rich literary tradition, which is astoundingly prescient of today’s social climate, I reveal how the anti-author movement is a concerted power play by a band of elitist academicians who effectively wish to “cancel” the natural rights foundation of copyright law in favor of a socialistic leveling of originality and individual creativity.*

*By 2050—earlier, probably—all real knowledge of Oldspeak will have disappeared. The whole literature of the past will have been destroyed. Chaucer, Shakespeare, Milton, Byron—they’ll exist only in Newspeak versions, not merely changed into something different, but actually changed into something contradictory of what they used to be.*

**George Orwell, *Nineteen Eighty-Four*<sup>1</sup>**

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1. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 56 (Everyman’s Library 1949) [hereinafter NINETEEN EIGHTY-FOUR].

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## INTRODUCTION

During the most contentious election in U.S. history between Donald Trump and Joe Biden in 2020—and in the thick of the worldwide Covid-19 pandemic—the social media trend known as cancel culture (“Cancel Culture”) fully exploded.<sup>2</sup> The movement has effectively created a social and political chasm that continues to wedge a deep divide within the cultural framework of the United States. Its proponents argue that Cancel Culture is “about establishing new ethical and social norms and figuring out how to respond collectively when those norms are violated.”<sup>3</sup> Conversely, critics of this trend insist that it has “grown into erasing of history, encouraging lawlessness, muting citizens, and violating free exchange of ideas, thoughts, and speech.”<sup>4</sup> Regardless of where along the political spectrum one sits with respect to the phenomenon of Cancel Culture, it is without doubt a byproduct of our newfound, yet ill-advised, addiction to social media, the conveniently anonymous platform fueling the growth of this craze.

The Merriam Webster online dictionary defines Cancel Culture in the following manner:

to cancel someone (usually a celebrity or other well-known figure) means to stop giving support to that person. The act of canceling could entail boycotting an actor’s movies or no longer reading or promoting a writer’s works. The reason for cancellation can vary, but it usually is due to the person in question having expressed an objectionable opinion, or having conducted themselves in a way that is unacceptable, so that continuing to patronize that person’s work leaves a bitter taste.<sup>5</sup>

The purpose of Cancel Culture, according to the definition, is for the targeted person to lose “cultural cachet.”<sup>6</sup> It has recently become apparent, however, that much more is at stake for those who are canceled.

Whereas Cancel Culture began rather innocuously in 2015 on Twitter—as a joking reaction to someone who acted in a disapproving way—this social media trend “has evolved into a weapon with the potential to ruin lives.”<sup>7</sup> In the wake of Covid 19-induced social isolation, “cancelations appear to have reached a high point,” as the practice found its way into politics, and has

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2. See, e.g., ‘Cancel Culture’ and ‘QAnon’: From the 2020 Election, Some New Political Terms, ABC7NEWS.COM, Nov. 2, 2020, <https://abc7news.com/cancel-culture-qanon-2020-election-vote/7613661/> [https://perma.cc/AF4Z-XWBR].

3. Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX, Aug. 25, 2020, <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate> [https://perma.cc/5FXG-3YA2].

4. *Id.*

5. MERRIAM WEBSTER, <https://www.merriam-webster.com/words-at-play/cancel-culture-words-were-watching> [https://perma.cc/3TK3-X4N] (last visited Nov. 11, 2020).

6. *Id.*

7. Tania Ortiz, *Cancel Culture Gives a Toxic Power to People on the Internet*, THE COUGAR CHRONICLE (Sep. 29, 2020), <https://csusmchronicle.com/20312/opinion/cancel-culture-enables-a-toxic-power-to-people-on-the-internet/> [https://perma.cc/4CWX-BRQW].

even extended to brutal online flogging of non-public individuals.<sup>8</sup> Notably, those who become Cancel Culture victims are not always politicians or other powerful people who expect to be held up to scrutiny in the public eye. They are everyday working folks such as security guards and teachers whose families have suffered devastating harm that is “well beyond the discomfort of merely being disagreed with” including loss of employment,<sup>9</sup> reputational damage,<sup>10</sup> and even loss of life.<sup>11</sup> Indeed, 2020 was a viscous year all around.

The practice of boycotting businesses, movies, and even celebrities themselves is certainly not a novel concept; however, the contemporary Cancel Culture movement has taken such backlashing to the extreme, with the invidious purpose of ruining lives<sup>12</sup> and claiming that the target never even existed in the first place.<sup>13</sup> For these reasons, commentators have observed that the phenomenon is eerily reminiscent of George Orwell’s 1949 novel *Nineteen Eighty-Four*, in which he depicted a dystopian world where free thought and individual speech have been entirely replaced with censorship and groupthink handed down by a totalitarian government rule.<sup>14</sup> Using two-way surveillance cameras positioned in every crevice of society, public or private, in Orwell’s fictive society of Oceania, enemies of the state are watched, captured, and essentially wiped out by the “Thought Police;” their entire existence is essentially eviscerated.<sup>15</sup>

In the novel, Orwell describes those unlucky enough to be caught by the ruling party and robbed of all their power over the material world:

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8. Rachel E. Greenspan, *How ‘Cancel Culture’ Quickly Became one of the Buzziest and Most /Controversial Ideas on the Internet*, INSIDER (Aug. 6, 2020), <https://www.insider.com/cancel-culture-meaning-history-origin-phrase-used-negatively-2020-7> [https://perma.cc/85NF-TNAX].

9. *Id.*

10. Zoe Thomas, *What is the Cost of ‘Cancel Culture’?*, BBC.COM, Oct. 8, 2020, <https://www.bbc.com/news/business-54374824> [https://perma.cc/RJG4-HSV5].

11. Jess Campbell, *Have We Taken Cancel Culture Too Far in 2020?*, Jan. 15, 2020, GQ, <https://www.gq.com.au/success/opinions/have-we-taken-cancel-culture-too-far-in-2020/news-story/0f12503dbf60071a63d7ffd5e29bcce7> [https://perma.cc/2ADE-A5GN].

12. Efreem Graham, *How America’s Toxic ‘Cancel Culture’ Ruins Lives and Ends Careers*, CBN.COM, Jan. 15, 2021, <https://www1.cbn.com/cbnnews/world/2020/september/how-americas-toxic-cancel-culture-ruins-lives-and-ends-careers> [https://perma.cc/VCW7-G5DH].

13. John McWorter, *Academics are Really, Really Worried About Their Freedom*, THE ATLANTIC (Sep. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/> [https://perma.cc/8ZVG-RSQK].

14. See, e.g., Quentin Kopp, *Cancel Culture, George Orwell and Reasoned Debate*, THE GUARDIAN (July 14, 2020), <https://www.theguardian.com/world/2020/jul/14/cancel-culture-george-orwell-and-reasoned-debate> [https://perma.cc/9H59-8NNG]; David Winston, *With Silencing of Speech, is America Entering Orwellian Territory?*, ROLL CALL (July 29, 2020), <https://www.rollcall.com/2020/07/29/with-silencing-of-speech-is-america-entering-orwellian-territory/> [https://perma.cc/S7YF-HFXH]. See also, Greg Diglin, *Living the Orwellian Nightmare: New Media and Digital Dystopia*, 11 E-LEARNING & DIGIT. MEDIA, 608 (2014), [www.worlds.co.uk/ELEA](http://www.worlds.co.uk/ELEA), (“It is my position that 1984 can be read as an allegory for the conditions in which we presently live. I shall argue that other elements of Orwell’s vision have now manifested in our present-day world”).

15. See ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1, at 21 (“It was always at night—the arrests invariably happened at night. The sudden jerk out of sleep, the rough hand shaking of your shoulder, the lights glaring in your eyes, ring of hard faces around your bed”).

When once you were in the grip of the Party, what you felt or did not feel, what you did or refrained from doing, made literally no difference. Whatever happened you vanished, and neither you nor your actions were ever heard of again. You were lifted clean out of the stream of history.<sup>16</sup>

Within the overall setting of the story, and similar to Cancel Culture, “there is an absorbing sense of loss—a feeling that the world has changed, is changing, and that the results make it a struggle to retain the slightest sense of humanity.”<sup>17</sup>

Clearly, Orwell seems to be on everyone’s mind these days: in 2013 after National Security Agency contractor and whistleblower Edward Snowden revealed the immense scale of global surveillance systems employed by U.S. and British intelligence as “Orwellian,” online sales of *Nineteen Eighty-Four* increased by 5,800 percent within a week.<sup>18</sup> As evidence of its enduring value and popularity, the novel reached the top of Amazon’s list of overall best sellers at the peak of the Cancel Culture movement in 2021; it also ranked second at the competing bookseller Barnes & Noble among the company’s top 100 titles.<sup>19</sup> Such record sales of a novel written over seventy years ago demonstrate that the fears I express in this article are not a product of theoretical academic debate or posturing. It is manifest evidence that people in mainstream America are very afraid. And they should be.

Commenting on *Nineteen Eighty-Four*, Orwell once stated that he thought the fictional tyrannical society he created in the novel would not necessarily come into existence.<sup>20</sup> Yet, he also famously expressed his dire concern that it certainly *may*, lamenting that “totalitarian ideas have taken root in the minds of intellectuals everywhere, and I have tried to draw those ideas out to their logical consequences.”<sup>21</sup> This article attempts to do the same, specifically related to the negative influence that academic scholarship has had upon real-world authors of copyrighted works and the free, democratic society that makes their creation possible.

Without doubt, the merciless censorship practices of the Cancel Culture movement have obdurately crept into all levels and areas of society, from the pundit’s platforms to social media sites and, most especially, from behind the professor podiums at universities across the country.<sup>22</sup> In this article, I

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16. *Id.* at 172.

17. KRISTIAN WILLIAMS, BETWEEN THE BULLET AND THE LIE: ESSAYS ON ORWELL 73 (2017).

18. *Id.* at 1.

19. Karen Ho, *George Orwell’s “1984” is Topping Amazon’s Best Sellers*, QUARTZ, Jan. 13, 2021, <https://qz.com/1956937/george-orwells-1984-is-topping-amazons-best-sellers/> [https://perma.cc/FT9K-Y3N7].

20. Matthew Stewart, *Orwell and the Cancellation of Culture*, LAW & LIBERTY (Sep. 20, 2020), <https://lawliberty.org/orwell-and-the-cancellation-of-culture/> [https://perma.cc/DAK3-NF98].

21. *Id.*

22. Conor Friedersdorf, *Evidence That Conservative Students Really Do Self-Censor*, THE ATLANTIC, Feb. 16, 2020, <https://www.theatlantic.com/ideas/archive/2020/02/evidence-conservative-students-really-do-self-censor/606559/> [https://perma.cc/T9C9-U64K].

focus on one example of how Cancel Culture has begun to permeate the university setting and acculturate students toward a deeply disturbing collectivist mindset, which is directly contrary to our country's history and our constitutional system of government: the cancelation of the historic author figure.

This article also examines how and, more importantly, *why* legal academics with collectivist and even openly Marxist agendas<sup>23</sup> have for decades been attempting to sabotage and, in effect, *cancel* not only individuals (although they have also done this), but also the entire culture upon which the Progress Clause of the U.S. Constitution<sup>24</sup> and the Copyright Act<sup>25</sup> is historically based. The primary method by which this “Cancel [©opyright] Culture” sub-movement is accomplished (although there are many) is by adopting the philosophy of the postmodernist French theorists that the traditional notion of authorship must be exposed, deconstructed, and condemned as a mere white-male power structure primarily intended to eviscerate the voices of women and minorities.

This piece is the third in a series of articles in which I critically examine the death-of-the-author (“DOA”) movement from the perspective of copyright law. Guided by the writings of Friedrich Nietzsche, José Ortega y Gasset, Søren Kierkegaard, and Ayn Rand, in *Copyright and the Tragedy of the Common*, I examined the philosophical underpinnings of the DOA movement. There, I demonstrated how the postmodern assault on the author results in not only a scarcity in the authorship of high-quality creative works, but also an eventual moral downslide, or philosophical “leveling” of culture.<sup>26</sup> Focusing primarily on the works of behavioral psychologists, in *Copyright and a Synergistic Society*, I further established that continuing to foster a regime of copyright rights that are exclusively held and controlled by individual authors—as opposed to an elusive collective—will ultimately result in more and better works, as well as contribute to a “synergistic” and happier society overall.<sup>27</sup>

This article analyzes the renowned literary themes in *Nineteen Eighty-Four* to continue my critical, interdisciplinary examination of the

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23. See DOUGLAS MURRAY, *THE MADNESS OF CROWDS: GENDER, RACE AND IDENTITY* 52 (2019) (Noting that in 2006, 18% of professors in the social sciences at universities “happily identified as ‘Marxist’”).

24. Congress has the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, §8, cl. 8.

25. Congress first codified exclusive rights to authors of works in the Copyright Act of 1790. See Donald S. Chisum & Michael A. Jacobs, *UNDERSTANDING INTELLECTUAL PROPERTY* §4B at 4-7 through 4-9 (1992). The Copyright Act of 1976, as amended, is the current law protecting the exclusive rights of original works to their authors. See 17 U.S.C. § 101 *et seq.* (2006).

26. Tracy Reilly, *Copyright and the Tragedy of the Common*, 55 *IDEA* 105 (2014) [hereinafter *Tragedy*].

27. Tracy Reilly, *Copyright and a Synergistic Society*, 18 *MINN. J.L. SCI. & TECH.* 575 (2017) [hereinafter *Synergy*].

phenomenon of the dead author, among other popular copyright tropes employed to etch away at the exclusive rights of copyright holders. I argue here that the goal of Cancel [©opyright] Culture proponents is slowly to introduce ideological conformities that will eventually eliminate individual authorship, as they charmingly integrate socialist visions of groupthink, polyvocal creation, and collective, common ownership of artistic works, all the while attempting to convince their audience of the benevolence and humanity of their supposedly democratic aims.

This article proceeds in five sections. In Section I, I begin with a background discussion of the individualistic, natural rights principles embedded in the U.S. Constitution specifically related to the creation of literary and other artistic works as intended by our constitutional Framers, and upon which the Copyright Act is purposed. In this section, I provide not only the legal backdrop, but also a philosophical and historical view of the importance of the “author” and “authorship” in copyright jurisprudence.

Section II outlines the literary development of the slow, metaphorical death of the author, as promulgated by French theorists beginning in the 1960s and now widely accepted not only by contemporary literary critics, but also by copyright scholars to the point where the DOA is now an unchallenged credo. This second section demonstrates how pervasive the DOA syndrome has become in legal circles and how, in my opinion, it has fueled destructive mainstream movements like Cancel Culture, which threaten the very structure upon which our republic is founded. I explain why collectivist movements such as Cancel Culture and its progeny, the “woke” movement, do not celebrate individual achievement and intellectual progress as intended by the Framers. Further, I show how copyright scholars have similarly jumped on the DOA bandwagon with the covert objective to abrogate the individual rights of creative authors, effectively advancing an academically inspired Cancel [©opyright] Culture movement that is anathema to the exclusive guarantees offered to authors in the Progress Clause.

In Section III, I summarize (with spoilers) the main objective, storyline, themes, and characters in *Nineteen Eighty-Four* in order to provide the foundation upon which I will build a comparison of Orwell’s fictional masterpiece to the unfortunate realities of contemporary copyright law, and the changing culture of our society. Using Orwell’s main themes in *Nineteen Eighty-Four* as a backdrop, in Section IV I provide specific examples of scholarly theories on the DOA movement in copyright law in an attempt to analyze and decipher the deeper meanings and intentions upon which their precepts continue to thrive in the academy.

I conclude in Section V with a warning to these intellectuals—akin to Orwell’s cautioning in *Nineteen Eighty-Four*—that by killing the author and the constitutional foundations upon which authorship was built, we are also destined to alter the spirit and permanently kill the gestalt that guides our



free and artistically productive society. I demonstrate how reclaiming from academia our individual freedoms of creativity and authorship—principles upon which our republic was founded—can restore copyright law to its original, natural rights tenets and *cancel* Cancel Culture in all of its pernicious forms.

## I. CONSTITUTIONAL AND NATURAL RIGHTS ORIGINS OF AUTHORSHIP

In this digitally driven world in which, with a click of a mouse, one can conjure a vast portion of all the works of art, literature, and music *ever* created and published, it may be tempting to dismiss the fact that modern copyright law is largely responsible for making it so. From the software and hardware we use for internet and other digital access, to the very words, notes, and paint strokes which form the works themselves, copyright stands ever ready to assist both those who make, and those who enjoy and use, creative works.

Without doubt, copyright and other forms of intellectual property (IP) law was on the minds of our Framers as they conceived and penned the Constitution. As an incentive for individual authors to produce the literary and other creative works that we all enjoy and learn from, the Progress Clause of the U.S. Constitution provides Congress the power to enact legislation providing “Authors” with “the exclusive right” to their “writings” for “limited times.”<sup>28</sup> The First Constitutional Congress was up to the task, defining the scope of that constitutional directive by legislating the first Copyright Act of 1790, which initially granted authors a maximum of two fourteen-year terms of exclusive ownership and use.<sup>29</sup>

The language of the current Copyright Act of 1976 specifically provides that an “author” is the subject or entity in whom “[c]opyright in a work . . . vests initially.”<sup>30</sup> At the expiration of the exclusive copyright term, authors must fully relinquish all legal rights in their works, which then fall into the commons, or the public domain, for fair and free reuse by any third party.

Due to the exclusive and monopoly-oriented, albeit legally sanctioned and limited, nature of copyright authorship and ownership, at the heart of every debate with respect to copyright laws is the proper theoretical mechanism(s) by which they can fairly balance the rights of authors against

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28. U.S. CONST. art. I, § 8, cl. 8 (affording Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

29. Benjamin Davidson, *Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights in Literary Property, and How Dastar Proves That the Difference Still Matters*, 38 CORNELL INT’L L.J. 583, 603 (2005).

30. 17 U.S.C. § 201(a) (2000).

those of consumers and other third parties.<sup>31</sup> How this balance is properly determined remains a complex question,<sup>32</sup> centering on sophisticated and competing philosophies that serve to validate (or invalidate) individual property ownership. According to Eric Claeys, whose terminology I borrow, the scholarly debate forms two main camps: those who consider IP as a sensible and specialized application of real property law (the “property essentialists”) versus those who remain skeptical as to whether traditional property concepts help institute sensible and fair IP policies (the “property skeptics”).<sup>33</sup>

To justify copyright exclusivity, most property essentialists tend to rely primarily upon John Locke’s natural rights theory of property law, which maintains that a person’s labor provides the proper foundation for claiming property rights, including IP rights.<sup>34</sup> Writing in Great Britain in the seventeenth century, Locke professed that, while God bestowed the earth upon all humans collectively, individual persons may claim exclusive ownership to whatever portions of that commons that their labor is “annexed to” or “mixed with.”<sup>35</sup>

The primary justifications for individual appropriation are twofold. First, the only way to make proper use of the commons is for humans to take hold, control, and labor to make use of things in the commons that will serve to benefit human existence, otherwise such resources would go to waste.<sup>36</sup> Second, in a state of nature in which resources are given to all in equal measure, there is no mechanism by which individuals receive permission to use them “because original acquisition through common consent is unworkable.”<sup>37</sup>

Because all possess a natural right to the fruits of their own labors, including the expression of their creative and other intellectual activities, the government should ensure that no one will deprive them of what they have earned by either force or fraud<sup>38</sup> or, in the case of copyright, by unauthorized reproduction, distribution, and other entitlements of authorship.<sup>39</sup> Lockean philosophy thus links the human capacity for reason to ethical individualism

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31. See, e.g., J. Janewa Osei Tutu, *Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus*, 20 VAND. J. ENT. & TECH. L. 207, 217 (2017) (“Clearly, it is essential to strike a balance between the interests of the rights holder and the interests of the user of IP-protected goods, as well as between the interests of the individual and the interests of the collective”).

32. *Id.*

33. Eric R. Claeys, *On Cowbells in Rock Anthems (and Property in IP): A Review of Justifying Intellectual Property*, 49 SAN DIEGO L. REV. 1033, 1035 (2012).

34. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993).

35. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 34-36 (2011).

36. *Id.*

37. *Id.*

38. RANDOLPH J. MAY & SETH L. COOPER, THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY 4 (2015).

39. 17 U.S.C. § 106 (2000).

and its social consequences, as well as the prohibition of force against another's independent judgement or action, among other rights that are essential to a democratic society.<sup>40</sup>

The Lockean theory greatly influenced our Framers, as “a natural rights perspective was woven into at least part of the fabric of our constitutional inheritance.”<sup>41</sup> With respect to copyright law in particular, Locke's central argument became a powerful message for authors because it “furnished copyright doctrine with a ground in natural right that could justify admitting the author. . . as the legal owner of a property in the work.”<sup>42</sup> In fact, property essentialists have observed that even prior to the drafting of the Constitution twelve colonies had adopted their own copyright statutes, many of which specifically recognized natural rights.<sup>43</sup>

Lockean labor theory is undoubtedly alive and well as it continues to this day to provide a theoretical framework for judicial orders in copyright infringement actions.<sup>44</sup> Moreover, prominent IP scholars such as Robert Merges believe that the Lockean notion of the original commons fits well with both property *and* IP rights.<sup>45</sup> Justin Hughes similarly maintains that “Locke's unique theoretical edifice [may find] its firmest bedrock in the common of ideas.”<sup>46</sup> According to Adam Mossoff, “[t]he legal implication of Lockean property theory is inescapable: if the purpose of the state is to secure property rights, then the law should secure as property the valuable products and services created by original laborers.”<sup>47</sup>

Property skeptics, contrarily, insist that a natural rights approach to copyright leads to an unacceptable broadening of rights for creators at the expense of users; therefore, they instead focus on other non-property related justifications for the doctrine, such as “social relations” theory<sup>48</sup> or human rights theory.<sup>49</sup> Most such claims are rooted in a collectivist approach to copyright, which shifts the focus from the individual author, without whom

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40. STEPHEN R.C. HICKS, *POSTMODERNISM: SKEPTICISM AND SOCIALISM FROM ROUSSEAU TO FOUCAULT* 9 (2011).

41. See MAY & COOPER, *supra* note 38, at xiv. See also, Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2021 (2009) (claiming that the impact of and commitment to Locke's property theory on our Founders, particularly James Madison, “was tremendous”).

42. Davidson, *supra* note 29, at 594.

43. COOPER & MAY, *supra* note 38, at 45.

44. See, e.g., Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against A Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1, 16 (2002) (“Ample evidence of Lockean rhetoric can be found in copyright cases. It is not uncommon for explanations of copyright protection to emphasize the importance of ensuring ‘that men of ability . . . may not be deprived their just merits and the reward of their ingenuity and labour’”).

45. MERGES, *supra* note 35, at 35.

46. Justin Hughes, *The Philosophy of Intellectual Property*, in *INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS* 141 (Adam D. Moore, ed., 1997) (Lanham, Md.: Rowman & Littlefield Publishers, Inc., 1997).

47. Mossoff, *supra* note 41, at 2020.

48. Madhavi Sunder, *Ip3*, 59 STAN. L. REV. 257, 257 (2006).

49. Osei Tutu, *supra* note 31, at 210.

the work would not exist, to that of an unnamed group of third-party users. For example, arguing for “a paradigm shift from a rights-based to a public interest approach,” Carys Craig maintains that “the Lockean account mistakenly finds the justification for copyright in the relationship between an author and her work, rather than in the role played by intellectual works in the processes of *social dialogue*.”<sup>50</sup> She asserts that

[w]hen the creative process is recharacterized as collective rather than individual, it becomes difficult to explain how a property right can be accorded to an individual on the basis of individual labour. According to a property right over the abstract object overlooks the historical, social and cultural components of that object. Once it is recognized that every ideal object is necessarily the “joint product of human intellectual history,” the simple claim to a right over the fruits of one’s labour is emptied of meaning: the fruit of intellectual labour has no definable boundary. This recognition reveals not only a practical difficulty in the application of Lockean theory to intellectual property, but also an important weakness in the deontological justification of property acquisition. As Horacio Spector explains: “[i]f the labour employed by a person does not offer an explanation for the total value of a commodity—and only explains the added value—then Locke’s theory does not justify ownership over the whole commodity.” Paradoxically by focusing on individual labour, the rationale for individual ownership over intellectual creations actually dissipates. The interdependent nature of human culture means that intellectual works are necessarily the products of collective labour and so ought to be owned collectively.<sup>51</sup>

As discussed in more detail in the following sections, the call for a major paradigm shift from individual to collective authorship and ownership in copyright law promulgated by Carys Craig and other scholars is directly contrary to the individual rights-based premises established in the Progress Clause.<sup>52</sup> It is also one of the main characteristics of the totalitarian society depicted by Orwell in *Nineteen Eighty-Four*, in which all property and IP is owned by and for the pleasure, use, and manipulation of the state.

Other property skeptics go as far as exclaiming that the historical record does not at all support Locke’s explanation of the origin of property and that “the argument has been decisively defeated time and again at law.”<sup>53</sup> Contrary to this assertion, though, there is ample early evidence that the constitutional framework of copyright law was in fact grounded in Lockean natural rights, which undeniably recognize that literary authors are “as much

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50. Craig, *supra* note 44, at 1 (emphasis added).

51. *Id.* at 35-36.

52. See MARK HELPRIN, DIGITAL BARBARISM: A WRITER’S MANIFESTO 13 (2009) (“the Founders laid down principles that have served to prevent the transformation of the individual to a mere manipulable quantity, of citizen to subject”).

53. Liam Séamus O’Melinn, *Software and Shovels: How the Intellectual Property Revolution Is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143, 151 (2007).

entitled to the product of [their] labour as any other member of society.”<sup>54</sup> According to Jane Ginsburg,

The Constitution authorizes Congress to “secure” to authors “the exclusive Right to their . . . Writings. . .” In eighteenth-century terms, “exclusive right” meant property. Madison, in the Federalist Papers, supported this measure by emphasizing both the public benefit to be derived from authors’ private rights, and that the authors’ exclusive right had already been recognized in England as “a right at common law.” Copyright was a property right like other property rights, vesting its owner with control over its disposition. The constitutional text’s employment of the word “securing” demonstrates that the property right was not for Congress to create, but rather to reaffirm and to strengthen.<sup>55</sup>

Also contrary to claims by modern scholars that Locke himself did not endorse IP rights, he explicitly recognized that his natural rights theory advocated them.<sup>56</sup> In Locke’s *Second Treatise*, he identifies “Inventions and Arts” as labors that “had improved the conveniences of Life” and that exemplified his insight that “Man (by being the Master of himself, and Proprietor of his own Person, and the Actions of Labour of it) had still in himself the great Foundation of Property.”<sup>57</sup>

Locke also openly endorsed copyright as the “property” of authors, even proposing an amendment to the Bill for Regulating Printing, proposed in Parliament in 1695, in order “[t]o secure the author’s property in his copy, or his to whom he has transferred it.”<sup>58</sup> Therefore, principles of individualism that are at the heart of the Lockean labor theory indubitably prevailed during the post-Enlightenment founding of our country and our Constitution, as witnessed by “the American aspirational ethos of opportunity and social mobility flowing from individual effort” that can be found in many writings of our Founders.<sup>59</sup>

Within this broad framework of individualism versus collectivism in copyright, it is important to note that the DOA debate firmly pits property essentialists against property skeptics regarding the question of who should own and control works that are the subject of copyright law. In accordance with Lockean theory, property essentialists maintain that those individual authors who labor to create works should own them, while property skeptics advocate for the rights of the largely undefined “collective” of others who consume and/or reuse them.

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54. Davidson, *supra* note 29, at 603 (citing the 1834 Supreme Court case of *Wheaton v. Peters*, in which “the Court readily recognized the natural right in an author’s work”). See *Wheaton v. Peters*, 33 U.S. 591 (1834).

55. Jane C. Ginsburg, “*The Exclusive Right to Their Writings*”: *Copyright and Control in the Digital Age*, 54 ME. L. REV. 195, 202 (2002) (citing, THE FEDERALIST No. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961) [hereinafter, *The Exclusive Right*]).

56. Mossoff, *supra* note 41, at 2048.

57. *Id.*

58. *Id.*

59. Stuart V. C. Duncan Smith, *Individualism and Republicanism in the Intellectual Property Clause*, 19 B.U. J. SCI. & TECH. L. 432, 439-40 (2013).

A natural rights approach to IP protection unquestionably supports the individual creator over the amorphous, socialist concept of the masses or collective “others.” Yet, its foundational premises have been under almost constant scholarly assault, “including attacks premised upon the idea that such rights are mere legal conventions that may be readily curtailed or even rescinded.”<sup>60</sup>

It is, without doubt, fashionable today for copyright scholars (and their students) to ambush the natural rights foundations upon which our constitutional Framers drafted the Progress Clause, which demands that exclusive rights are afforded to copyright authors.<sup>61</sup> Still, it is axiomatic that the Framers viewed authors *not* as collectives, but as persons whose individual works “had social significance as well as personal significance.”<sup>62</sup> Similarly, Jane Ginsburg recognizes that because copyright arises out of the act of creating works, authors also have a moral claim over those works that no other third party has. She thus wrote that “much of copyright law makes sense only if one recognizes the centrality of the author, the human creator of the work.”<sup>63</sup>

What, then, is the source of the scholarly dissonance when it seems manifestly obvious that only human beings can create intellectual works, not amorphous collectives? Why is it that modern copyright academicians remain so uncomfortable with the traditional property-rights focused, natural law theory upon which our Framers drafted the Constitution and upon which courts still see fit to frame and focus their inquiries in copyright infringement cases?<sup>64</sup>

Carys Craig rightly observed that “[t]he particular species of justification [scholars] offer . . . defines the extent of the rights that copyright confers, and the kinds of limits that naturally evolve to demarcate those rights.”<sup>65</sup> In the remainder of this article, I demonstrate that the particular species of justification offered by the DOA scholars is a complete negation of the natural rights foundation upon which copyright, and much of our Constitution, is based.

While their postmodern theories are supposedly premised upon a defense of the public domain and the societally marginalized “other,” if one pierces through this veil, the DOA attacks can be seen for what they really

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60. COOPER & MAY, *supra* note 38, at 8.

61. *Id.* at 16.

62. Michael Brandon Lopez, *Creating the National Wealth: Authorship, Copyright, and Literary Contracts*, 88 N.D. L. REV. 161, 178 (2012).

63. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1068 (2003) [hereinafter, *The Concept of Authorship*].

64. MERGES, *supra* note 35, at 3 (“Countless judges begin their IP decisions with one or another familiar ‘stage setter’ about how IP protection exists to serve the public interest . . . [b]ut these utilitarian platitudes quickly give way to doctrinal details, which often show the unmistakable imprint of something more fundamental, something beyond utility. . . That is, courts often wind up talking about IP rights *as* rights”) (emphasis in original).

65. Craig, *supra* note 44, at 2.

are: a means to delegitimize the foundations of individual rights in favor of a collectivist ideology that will eventually devolve into an Oceania-like state of totalitarianism.<sup>66</sup> One small but decisive step that will invidiously lead to this unfortunate result—among others employed by radical progressive postmodernists—is to declare with resoluteness that the author is, in fact, dead.

## II. THE POSTMODERN DECONSTRUCTION OF AUTHORSHIP

Given the constitutional importance of the role of authors towards the progress of “science” (or knowledge), which is one of the twin goals of the Progress Clause,<sup>67</sup> it seems an oversight that the term has never been precisely defined in any iteration of the U.S. Copyright Act.<sup>68</sup> In fact, it was not until 1884 in *Burrow-Giles Lithographic Co. v. Sarony* that the Supreme Court defined the term “author.”<sup>69</sup> Even then, the Court “elided the task of defining authorship by merely citing to Worcester’s Dictionary and positing that an author is ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’”<sup>70</sup>

Certainly, the plain or dictionary meaning of “author” on its face seems to comport well with the concepts of exclusivity and progress as contemplated in the Progress Clause. It also makes perfect sense from a natural rights theory, which as observed in Section I, justifies protection of artistic creations from an individualistic, labor-driven ethos. As such, from a legal perspective, the standard definition of authorship provided by the *Burrow-Giles* court has since been widely accepted by courts in copyright infringement cases without much deviation or controversy.<sup>71</sup>

### A. The Death of the Author in French Literary Theory

Whereas the concept of authorship is hardly contested in the ordinary copyright case,<sup>72</sup> it underwent serious questioning in literary circles in the late 1960s during the postmodern/social deconstructionist movement when French literary theorists Roland Barthes and Michel Foucault metaphorically killed the author within the humanities departments of universities

66. The Jordan B. Peterson Podcast, *Season 4 Episode 3: Douglas Murray*, at 1:15:20 to 1:17:03 (Jan. 25, 2021), [https://www.youtube.com/watch?v=g\\_RrYz85E1A](https://www.youtube.com/watch?v=g_RrYz85E1A) [https://perma.cc/N47S-KYPB].

67. The other is progress of the “useful arts,” which is the subject of patent law, providing inventors the exclusive rights to their inventions and discoveries for limited times. *See supra* note 24.

68. John Tehranian, *Copyright’s Male Gaze: Authorship and Inequality in A Panoptic World*, 41 HARV. J. L. & GENDER 343, 347 (2018) (“the statute tells us nothing about how to pinpoint the identity of an author, especially when there are competing claims of authorship”).

69. *Id.*

70. *Id.*

71. *Id.*

72. *See Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (“In the ordinary copyright case, authorship and fixation are not contested; most works presented for copyright are unambiguously authored and unambiguously fixed”).

worldwide. Together these critics opposed modernist/post-Enlightenment literary theory by launching “a heavy and largely victorious assault on the sensible belief that a text means what its author meant.”<sup>73</sup> In his infamous 1968 essay, “The Death of the Author,” Barthes launched the vicious attack on traditional principles of authorship in which he openly rejected the notion that the author should be celebrated or even considered by society as either the creator or the proprietor of his work.<sup>74</sup>

A year later, in “What is an Author?,” Foucault largely agreed with Barthes that “the function of the author after assembling the final literary work is to disseminate it, at which point the author ceases to exist.”<sup>75</sup> Foucault—in my estimation the most destructive of the French postmodernists—is not only interested in killing off the concept of “author,” but he also existentially and darkly adds that Man is “an invention of recent date” that will soon be erased “like a face drawn in sand at the edge of the sea.”<sup>76</sup> Foucault cynically abnegates the concepts of human dignity, individuality, and achievement that post-Enlightenment natural rights theorists commonly celebrate:

The author—or what I have called the “author-function”—is undoubtedly only one of the possible specifications of the subject and, considering past historical transformations, it appears that the form, the complexity, and even the existence of this function are far from immutable. We can easily imagine a culture where discourse would circulate without any need for an author.<sup>77</sup>

Acknowledging that the replacement of the human author with the cold, machine-like “author-function” can only be gradual, Foucault “claims it would be desirable because authors today serve to constrict, not create, meaning.”<sup>78</sup>

The flock of Foucault’s zealous followers interpret this cryptic, largely nonsensical writing to mean that “the post-structuralists argue that language, not a solitary author, writes texts.”<sup>79</sup> For example, in his DOA scholarship Lionel Bentley touts the French theorists as follows:

Foucault urged us to imagine a culture where discourse would circulate without any need for an author, a world where it did not matter who was speaking. Roland Barthes went one step further and declared the “death of the author.” Barthes argued that, once published, the text is no longer under the control of the author and that the author is irrelevant. Instead, Barthes asserted that the text is merely a product of other texts and can

73. E. D. HIRSCH, JR., VALIDITY IN INTERPRETATION 11 (1967).

74. P. Prayer Elmo Raj, *Author and Text: Reading Michel Foucault’s What is an Author*, 3 THE CRITERION: INT’L J. ENG. 2, 2 (2012).

75. Lopez, *supra* note 62, at 177.

76. See HICKS, *supra* note 40, at 195.

77. Michel Foucault, *What is an Author?*, in THE ART OF ART HISTORY: A CRITICAL ANTHOLOGY 321, 333 (Donald Preziosi ed., 2009).

78. Elton Fukumoto, *The Author Effect After the “Death of the Author”*: Copyright in A Postmodern Age, 72 WASH. L. REV. 912, 913 (1997).

79. *Id.* at 912.



only be understood through those other texts. Individual authorship of works is to be replaced by intertextuality.<sup>80</sup>

Of course, to a rational person, it makes no sense that language (a noun having no agency) can actually write texts or that meaningful discourse can somehow circulate without any need for authors. With their stated goals of eliminating the author and even *erasing mankind*, the postmodernists nonetheless make all manner of ridiculous assertions such as these regarding how art and literature magically come into existence through an undefined functional intertextuality, whatever that may mean. Resonating with Foucault's negative, Marxist-driven view of human individuality, the DOA agenda of today's radical postmodernists is a "sweeping criticism" of traditional genius and creativity, "which claims that the concepts of a subject, an individual, a consciousness, a method, and a meaning are philosophical fictions that have no existence prior to their social constructions."<sup>81</sup>

This deconstructionist view of the world upon which the DOA propaganda depends was born from a postmodern philosophy emanating from the despair of post-World War II European academicians<sup>82</sup> that "rejects the reason and the individualism that the entire Enlightenment world depends upon."<sup>83</sup> It insists that the bedrock principles upon which our democratic republic is premised, such as experience, reason, freedom, individualism, and progress are past "pathologies" that must be replaced with a new model of "linguistic social subjectivism."<sup>84</sup>

It is a dour, pessimistic, and morally relativistic approach which "says that we never know what universal true or false is, what is good or bad, right or wrong; we know only stories about true, false, good, bad, right or wrong."<sup>85</sup> By manipulating the ordinary meaning of language, the deconstructionist movement attempts to redefine "psychological constructs such as the 'mind,' 'self,' and 'emotion' as socially constructed processes that are not intrinsic to the individual but produced by social discourse."<sup>86</sup> Deconstructionists believe that "the content of our consciousness, and the mode of relating we have to other, is taught by our culture and society; all the metaphysical quantities we take for granted are learned from others around us."<sup>87</sup>

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80. Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973, 973 (1994).

81. *Id.* at 912-13.

82. See Helen Pluckrose, *How French "Intellectuals" Ruined the West: Postmodernism and Its Impact, Explained*, AREO, March 27, 2017, <https://areomagazine.com/2017/03/27/how-french-intellectuals-ruined-the-west-postmodernism-and-its-impact-explained/> [https://perma.cc/BM5N-JBSB] ("Decidedly left-wing, postmodernism had both a nihilistic and a revolutionary ethos which resonated with a post-war, post-empire zeitgeist in the West.").

83. HICKS, *supra* note 40, at 14.

84. *Id.*

85. Alexandra Galbin, *An Introduction to Social Constructionism*, 26 SOC. RSCH. REPS. 82, 82 (2014).

86. *Id.* at 84.

87. *Id.*

Anti-individualist and deleterious in its nature, deconstructionism “is a way of thinking and doing that moves away from expertise-based, rational, hierarchical, and result-focused models going toward more participatory, cocreative, and process-centered ones.”<sup>88</sup> For example, Barthes abnegates the entire creative nature of the author, claiming him to be a mere passive “scriptor” who is the unoriginal and unfeeling reporter of our cultural past:

The writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them. Did he wish to express himself, he ought at least to know that the inner ‘thing’ he thinks to ‘translate’ is itself only a ready-formed dictionary, its words only explainable through other words, and so on indefinitely . . . . Succeeding the Author, the scriptor no longer bears within him passions, humours, feelings, impressions, but rather this immense dictionary from which he draws a writing that can know no halt: life never does more than imitate the book, and the book itself is only a tissue of signs an imitation that is lost, infinitely deferred.<sup>89</sup>

By reframing copyright notions of individuality, personal expression, and originality in such an existentially negative manner, Barthes radically attempts to transform all the qualities that have made authorship of our most profoundly meaningful cultural works possible and enduring, reducing them to a common and dispassionate amalgam of nothingness that is the fabric on which totalitarian dreams are weaved. Moreover, “such supposed ‘reconstruction’ of intellectual property is inconsistent with fundamental principles concerning our rights that are firmly embodied in the American constitutional order grounded in classical liberal principles.”<sup>90</sup>

Largely motivated by collectivist precepts, the DOA movement claims to have exposed the fiction of agency and the notion of genius present in the great canons of literature; “geniuses themselves were widely dismissed as desiccated relics of the past, part of a mummified category and order of things that was likewise dead and gone.”<sup>91</sup> Because the goal of the deconstructionist is “to assail, undermine and finally pull down everything that had previously appeared to be fixed certainties,”<sup>92</sup> the movement in essence amounts to a “broad-based attack on the modern foundations of democracy.”<sup>93</sup> Pluckrose describes the modern era attacked by the postmodernists as

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88. Galbin, *supra* note 85, at 91. Pluckrose states that, in postmodernism, we see an explicit epistemic relativism (belief in personal or culturally specific truths or facts) and the advocacy of privileging “lived experience” over empirical evidence. We see too the promotion of a version of pluralism which privileges the views of minority groups over the general consensus of scientists or liberal democratic ethics which are presented as authoritarian and dogmatic. See Pluckrose, *supra* note 82.

89. Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142, 146-47 (Stephen Heath trans., 1977).

90. COOPER & MAY, *supra* note 38, at 16.

91. DARRIN M. MCMAHON, *DIVINE FURY: A HISTORY OF GENIUS* 237 (2013).

92. MURRAY, *supra* note 23, at 54.

93. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 4 (1997).

the period of history which saw Renaissance Humanism, the Enlightenment, the Scientific Revolution and the development of liberal values and human rights; the period when Western societies gradually came to value reason and science over faith and superstition as routes to knowledge, and developed a concept of the person as an individual member of the human race deserving of rights and freedoms rather than as part of various collectives subject to rigid hierarchical roles in society.<sup>94</sup>

Radical progressives criticize modern-world concepts such as knowledge, reason, and merit, which they believe are “culturally contingent, and thus suspect”<sup>95</sup> and for them

knowledge is intensely personal. Personal perspective, however, is not individual. Instead, it is based on membership in a group. Like everything else, knowledge is also political in the sense that it is a method of maintaining established hierarchies. Knowledge thus cannot be evaluated apart from the social roles—and, in particular, the race and gender—of those who claim to know.<sup>96</sup>

The postmodernists thus conveniently assert that knowledge, reason and merit cannot be judged by employing traditional standards, and that these concepts should only be tested by their political effect and their ability to further the interests of the fringe group that wants to rapidly change the law, not to understand it.<sup>97</sup>

Not surprisingly, therefore, the core premise of the Barthes-Foucauldian worldview is that all human interactions should be viewed and analyzed from within an unforgiving and perverse prism of power.<sup>98</sup> Foucault suggested that “underlying what counts as objective knowledge is a power relation, one category of people benefiting at the expense of another category of people.”<sup>99</sup> Consequently, the radical deconstructionists “would jettison our inherited culture in its entirety in the name of empowering the downtrodden,” essentially attempting “to overturn the foundations of American legal thought.”<sup>100</sup> While such a planned utopia may sound enticing upon first blush, I will show in Section IV how Orwell dispelled the supposedly altruistic intentions of such power-infused movements and revealed that power *qua* power is, in fact, their lusty purpose.

As applied to the concept of authorship, in particular, deconstructionists do not merely desire to deconstruct the author but to crush and kill him, entirely rejecting any possibility that the author presents society with “some kind of creative, conscious act.”<sup>101</sup> Thanks also to Foucault and his stalwart admirers, academics, and others who insist on deconstructing the notion of

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94. Pluckrose, *supra* note 82.

95. FARBER & SHERRY, *supra* note 93, at 25.

96. *Id.* at 29.

97. *Id.* at 30.

98. MURRAY, *supra* note 23, at 53.

99. FARBER & SHERRY, *supra* note 93, at 24.

100. *Id.* at 16.

101. Doris Estelle Long, *Dissonant Harmonization: Limitations on “Cash N’ Carry” Creativity*, 70 ALB. L. REV. 1163, 1187 (2007).

the author steadfastly deny that it represents individuated creative genius.<sup>102</sup> Particularly relevant to the contemporary digital age in which it has become increasingly difficult for owners of original content to police their copyrighted works on the Internet,<sup>103</sup> Foucault's philosophy becomes an irresistible force with which to justify an outright assault on the traditional meaning of an author and the process of authorship:

The author-function in a technocratic age finds no significance as the definition of authorship and the purpose of authorship increasingly becomes complex through the digital and e-resources. In the same manner, the name of the author and the function of the name as Foucault imagines might not be significant, as the creators do not matter but only the content. The author is distanced from the subject function but accrues on the manner where the personal name becomes a collective rational force behind the outcome of the text.<sup>104</sup>

As I discuss in the next Section, this deconstructionist philosophy of postmodernist literary criticism opened the door for legal scholars whose manifest intent is to annihilate the natural rights premises upon which copyright law works.

### B. The Dead Author and Cancel [©opyright] Culture

In the wake of the highly influential DOA movement in literary circles, and because the notion of author is so central to copyright law,<sup>105</sup> in the 1980s, legal scholars began to speculate whether the literary critique of the author concomitantly threatened the very foundations upon which copyright law stands.<sup>106</sup> They reasoned that “[i]f the legal walls establishing ownership of the text were built on the same intellectual foundations as romantic authorship, and those premises turn out to be sand rather than rock, copyright will sooner or later come tumbling down.”<sup>107</sup> Matt Williams describes the movement as follows:

For more than twenty years, a slow struggle to use postmodern recognitions to draw attention to ambiguities and assumptions regarding creativity has framed academic discourse regarding copyright theory. The process has unmasked the author, empowered the audience, reconsidered

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102. *Id.* at 1188.

103. *Cf.*, Sherisse Pham, *How much has the US lost from China's IP theft?*, CNN BUSINESS.COM, March 23, 2018, <https://money.cnn.com/2018/03/23/technology/china-us-trump-tariffs-ip-theft/index.html> [https://perma.cc/NA4M-33UY] (quoting a US Trade Representative who claimed that “Chinese theft of American IP currently costs between \$225 billion and \$600 billion annually”).

104. Raj, *supra* note 74, at 10.

105. *See, e.g.*, Shyamkrishna Balganes, *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 HOUSTON L. REV. 403, 404 (2016) (“Authorship is the real sine qua non of copyright law. Regardless of whether one's theory of copyright is normative or descriptive, explanatory or justificatory, or consequentialist or deontic, authorship occupies a central place therein”).

106. Bentley, *supra* note 80, at 974.

107. *Id.*

the work, supported generative technological networks, and celebrated the remix.<sup>108</sup>

Jane Ginsburg observes that, whereas scholars used to discuss copyright in terms of authorship, today the discourse has been recharacterized as “a law of users’ rights” that will tolerate exclusive rights for authors “only so far as they enhance the instruction, or perhaps the convenience, of users.”<sup>109</sup> Similarly, Christian Stallberg claims:

Today it is a common occurrence that intellectual works never originate exclusively from the person authorship is attributed to. Instead, every author is integrated into the manifold social and cultural contexts from which he steadily borrows. Thus, creating intellectual works always means the appropriation of preceding ideas. This point has been emphasized by the deconstructivism movement which focuses on deconstructing authorship and disclosing its ideological character.<sup>110</sup>

Similarly, Doris Estelle Long overtly reveals the eventual fate of the copyright author should the radical postmodern agenda prevail:

Since the role of authorial consciousness is diminished under a post-structuralist view of creativity, the need for a putative author’s ability to control the economic exploitation of her work through the property rights of copyright appears similarly diminished. If all creativity, therefore, involves appropriation, then a fortiori appropriation is creative. Following this construct to its logical conclusion, if every appropriation is creative, then nothing is “not creative.” Ultimately, creativity itself becomes a meaningless construct.<sup>111</sup>

When examined closely, four disturbing axioms underlie these scholarly claims, which are today representative of the majority of articles on the copyright author. First, it is a myth that individual authors create *anything* original because they merely borrow, regurgitate, and appropriate from others and the public domain. Second, all works of authorship are, at best, on the same par and, at worst, not even creative at all. Third, any fealty or reverence for the traditional role of the author is misguided and even unjust, racist, and bigoted. Lastly, because the postmodern scholars in their infinite wisdom have conclusively proven the “true” role of the “author-function,” there are no longer natural rights or any other moral or philosophical justifications for exclusive property ownership in creative works of art.

It is clear to me that an appreciable number of copyright instructors and by extension, their students, have radically embraced the postmodern DOA mythos due to its utility in providing a supposed justification for chipping

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108. Matt Williams, *Silence and Postmodern Copyright*, 29 CARDOZO ARTS & ENT. L.J. 47, 47–48 (2011).

109. Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC’Y U.S.A. 1, 2 (1997) [hereinafter *Authors and Users*].

110. Christian G. Stallberg, *Towards A New Paradigm in Justifying Copyright: An Universalistic-Transcendental Approach*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 333, 337 (2008).

111. Long, *supra* note 101, at 1189.

away at the exclusive rights of copyright authors.<sup>112</sup> Ironically, faculty members who attack the foundational tenets of copyright routinely utilize the Copyright Act to secure exclusive ownership of their own books and articles on point.<sup>113</sup> Although they can be called out on their hypocritical, radical inconsistencies, they nonetheless “cannot be dismissed easily because of their substantial influence within the American academy in general and also specifically within the legal academy through the critical legal studies movement.”<sup>114</sup>

If creative works of art are globally accepted as un-authored—and therefore, unoriginal—in the manner suggested by the DOA scholars, it would be much more palatable for courts to pardon blatant acts of appropriation by defendants that have historically been proscribed. This is, indeed, the main goal of the DOA copyright scholars, which will be revealed in the following section by examining and scrutinizing their works within the context of the totalitarian themes created by Orwell in *Nineteen Eighty-Four*, as well as explored in three of his other essays.

### III. A SUMMARY OF GEORGE ORWELL’S *NINETEEN EIGHTY-FOUR*

Written by Orwell on a secluded island in the Hebrides of Scotland while he was dying of tuberculosis, *Nineteen Eighty-Four* is his last word on a myriad of profound theories and topics on which he focused a life of serious thought and writing, the most enduring of which was a macabre vision of life under totalitarian regimes.<sup>115</sup> Although Orwell is most famously known for his darkly dystopian portrayals of totalitarianism, the topics covered in his writings explore his reflections on an array of various societal ills, including power lust, political corruption and betrayal, the abuse of language and its

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112. See HELPRIN, *supra* note 52, at 53-54 (observing that students today have been entirely indoctrinated from as early as primary school by our modern education system, which “promotes collectivism versus what it perceives as destructive, self-promoting individualism.” This intense “communitarianism” is drilled into them throughout their university and graduate studies and is taught “as an imperative to which even the slightest resistance is suspect as immorality”).

113. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (2004); PATRICIA AUFDERHEIDE & PETER JASZI, *HOW TO PUT BALANCE BACK IN COPYRIGHT* (2011); JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* (2006). For a scathing critique of this phenomenon, see HELPRIN, *supra* note 52, at 66-68 (claiming that proponents of Lessig’s Creative Commons movement make a show of their supposed generosity by toting the free sharing of authored works, yet while they write in favor of abolishing copyright, they publish and sell their books under copyright).

114. Fukumoto, *supra* note 78, at 912.

115. See e.g., Samantha Senn, *All Propaganda is Dangerous, but Some are More Dangerous than Others: George Orwell and the Use of Literature as Propaganda*, 8 J. OF STRATEGIC SEC. 149, at 155-56 (2015) (“While it is obvious how such a totalitarian society [portrayed by Orwell] could be considered a criticism of the Soviet Union . . . Orwell intended *Nineteen Eighty-Four* to be a warning against any type of totalitarianism, abroad or at home”).

impact on the range of thought, systematic political hypocrisy amongst intellectuals, and the idea of objective truth.<sup>116</sup>

The “real targets” of Orwell’s writing include intellectual dishonesty, the degradation of human feeling, and the dangers of absolute power of any type.<sup>117</sup> The remainder of this section thoroughly explores these topics within the context of *Nineteen Eighty-Four*, and Section V further analyzes them as applied to the DOA scholarship and the Cancel Culture movement.

### A. The Main Storyline

In *Nineteen Eighty-Four*, Orwell depicts a fictional future dystopian society known as Oceania, in which an all-knowing, all-powerful, and all-controlling government has eviscerated all the societal freedoms that had formerly been embraced by Western democracy. In the novel, Oceania (formerly Europe) is perpetually at war with two other superpowers, Eurasia and Eastasia. In Airstrip One (formerly Great Britain), the oppressive totalitarian ruling party Ingsoc (short for English Socialism, also referred to as the “Party”) has converted all economic and personal resources to state ownership and thoroughly eliminated all guarantees of individual freedom and privacy:

Always the eyes watching you and the voice enveloping you. Asleep or awake, working or eating, indoors or out of doors, in the bath or in bed—no escape. Nothing was your own except the few cubic centimeters inside your skull.<sup>118</sup>

Hannah Arendt claims that the very nature of totalitarian regimes is to demand unlimited power, which “can only be secured if all men, without a single exception, are reliably dominated in every aspect of their life.”<sup>119</sup> The job of the Thought Police, thus, is to keep the citizens of Oceania from expressing or even conceiving any original or independent thought, an act that is punishable by death as “thoughtcrime.”

Constantly monitored by telescreens in every facet of their daily lives, residents of Oceania are forced to succumb to the collectivist political ideologies of “Big Brother”—the largely symbolic yet omnipresent leader of Ingsoc—or else face being caught by the Thought Police and literally “eliminated” by the Party.<sup>120</sup> Akin to the fate of those subject to today’s Cancel Culture movement, for those who do not outwardly align with the majority politics,

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116. Piers H.G. Stephens, *Nature and Human Liberty: The Golden Country in George Orwell’s ‘1984’ and an Alternative Conception of Human Freedom*, 17 *ORG. & ENV’T* 76, 81 (2004).

117. *Id.* at 82.

118. ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1 at 29.

119. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 456 (1975).

120. The Thought Police was a clandestine agency closely resembling the Gestapo; it was responsible for the suppression and punishment of free thinkers like Smith. *See* Diglin, *supra* note 14, at 611.

there was no trial . . . Your name was removed from the registers, every record of everything you had ever done was wiped out, your one-time existence was denied and then forgotten. You were abolished, annihilated: *vaporized* was the usual word.<sup>121</sup>

The novel follows the story of protagonist Winston Smith, who becomes a detractor of the Party. The Thought Police eventually capture Winston and brutally torture him until he not only succumbs to the will of Big Brother, but also is entirely brainwashed to fully accept and “love” Big Brother. Through Winston’s adventures, Orwell thematically comments on various social and political trends in twentieth-century England, the threads of which he believed to run through the fabric of all totalitarian regimes, and the dangers of which he sternly attempted to warn the post-war British intelligentsia of his time.

### B. Orwell’s Objective: A Warning to Intellectuals

Literary critics have observed that Orwell modelled the propaganda state of Oceania on both Nazi Germany and Joseph Stalin’s U.S.S.R.<sup>122</sup> Erika Gottlieb, for example, maintains that Orwell intended the novel “as a parody of the intellectual implications of the totalitarian mentality” and “the perversions of a centralized economy.”<sup>123</sup> Orwell’s themes are, therefore, directly relevant to my central thesis in this article: that the movement to kill the traditional author is one of an array of academic strategies that slowly, and possibly largely subconsciously,<sup>124</sup> will change the trajectory of our culture from one that celebrates the progress of individual achievements to one that cowers in collectivist malaise. It is a misguided and unwise path that will subtly and slowly debilitate our individual talents, achievements, and goals until we are fully reliant (and happy to be so) on the nanny state of government-controlled creativity.

Naming Orwell as a founding father of anti-Communism, Christopher Hitchens describes him as a stout individualist and patriot who knew right from wrong, reposed a faith in popular wisdom, despised government and bureaucracy, and distrusted academics.<sup>125</sup> In keeping with these attributes, particularly with respect to his distrust of Marxist-leaning academics, Orwell wrote two essays largely directed to this sector of British intelligentsia that warned against their continued forays into collectivist ideology, which he

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121. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1 at 21 (emphasis in original).

122. Diglin, *supra* note 14, at 613. *See also* George M. Enteen, *George Orwell and the Theory of Totalitarianism: a 1984 Retrospective*, 36 J. GEN. EDUC. 206, 206 (1984) (“Orwell’s novel has, of course, obvious reference to a historical entity (Stalinist Russia) and we also have the author’s word that Nazi Germany was not entirely removed from his mind”).

123. Erika Gottlieb, *The Function of Goldstein’s Book: Time as Theme and Structure in Dystopian Satire*, 3 UTOPIAN STUD. 12, 12 (1991).

124. COOPER & MAY, *supra* note 38, at xv (“This diminishment of IP rights is made easier, if not generated, at least in some minds, perhaps even in the subconscious of some minds, by sloganeering of the oft-repeated ‘information wants to be free’ variety”).

125. CHRISTOPHER HITCHENS, WHY ORWELL MATTERS 79 (2002).



believed was the springboard to modern totalitarian forms of government. In writing his essays, Orwell conceived the story line that would form the basis of his best-known and influential novel, *Nineteen Eighty-Four*.

In his 1945 essay, “Notes on Nationalism,” Orwell introduces the socio-political motifs upon which he would build and refine a year later when he began authorship of *Nineteen Eighty-Four*.<sup>126</sup> Of critical importance to my thesis in this article, Orwell highlights the dangerous ideologies promulgated by the British intelligentsia of twentieth-century society, whom he perceives as being responsible for a persistent “habit of mind which is now so widespread that it affects our thinking on nearly every subject, but which has not yet been given a name.”<sup>127</sup> It is unfortunate that Orwell defines this phenomenon as “nationalism,” a term that even he admits is far less than precise to capture the sentiments he intends to express in the article.<sup>128</sup>

Perhaps if here were alive today, Orwell would agree that a more accurate contemporary term for the societal malaise he was attempting to expose is “progressivism,” specifically the brand of radicalized progressivism as trumpeted by the academic elite in universities throughout the Western world. As this article unfolds, I make the case that Orwell was trying to process and understand the intellectual penchant towards Marxist-apologist theories that were rapidly snowballing throughout academia and other intellectual circles during the immediate post-World War II timeframe in which he wrote, and which led directly to the formation of the radical postmodernist movement.

With this overarching objective in mind, Orwell categorizes and provides examples of the destructive thought patterns that had been circulating in twentieth-century academic circles, all of which fall under the term “nationalism,” and which relate to the main theme of *Nineteen Eighty-Four*: the undisguised and unapologetic lust for power, merely for the pure sake of power itself.

While only a minority of academics during this period openly identified as Marxist pacifists (this is not the case today)<sup>129</sup> Orwell understood the psychological and often subconscious tendency of all human beings to lust for power.<sup>130</sup> His stated goal in the article is “to isolate and identify the

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126. George Orwell, *Notes on Nationalism*, in GEORGE ORWELL: ESSAYS 865-84 (Peter Davison, ed., 2002) [hereinafter, *Notes*].

127. *Id.* at 865.

128. *Id.* (“As the nearest existing equivalent I have chosen the word ‘nationalism’, but it will be seen in a moment that I am not using it in quite the ordinary sense, if only because the emotion I am speaking about does not always attach itself to what is called a nation—that is, a single race or a geographical area. It can attach itself to a church or a class, or it may work in a merely negative sense, against something or other and without the need for any positive object of loyalty”).

129. Toby Young, *The Neo-Marxist Takeover of our Universities*, THE SPECTATOR, Sep. 18, 2018, <https://www.spectator.co.uk/article/the-neo-marxist-takeover-of-our-universities> [<https://perma.cc/24MA-RUKN>].

130. Jordan Peterson frequently claims that human beings must come to terms with the fact that all humans have mythical monsters lurking within our personalities and so we should “recognize and

tendencies which exist in all our minds and pervert our thinking, without necessarily occurring in a pure state or operating continuously.”<sup>131</sup> Indeed, commentators have observed that a main theme in *Nineteen Eighty-Four* is “the totalitarian danger that lies within ourselves and in all the political systems of our time.”<sup>132</sup> Because this earlier essay was Orwell’s initial outline for *Nineteen Eighty-Four*, I will discuss his theory on nationalism in conjunction with the main themes of the book that pertain to my discussion of authorship and the broader Cancel [©opyright] Culture craze.

According to Orwell, “a nationalist is one who thinks solely, or mainly, in terms of competitive prestige,” or someone who “sees history, especially contemporary history, as the endless rise and decline of great power units.”<sup>133</sup> Orwell posits that the most common form of nationalism practiced among the intellectual elite consists of a loyalty to Communism: those “fellow travelers” who believe their duty is to “justify Russian policy and advance Russian interests at all costs.”<sup>134</sup>

Orwell identifies various categories of nationalists that he believed flourished among the intellectuals of his day, including “a minority of intellectual pacifists whose real though unadmitted motive appears to be hatred of western democracy and admiration of totalitarianism.”<sup>135</sup> In the form in which nationalism is present among the intellectuals, “it is a distorted reflection of the frightful battles actually happening in the external world, and that its worst follies have been made possible by the breakdown of patriotism and religious belief.”<sup>136</sup>

Orwell was frightened by how these tendencies, which were inspired by nationalism and did not self-regulate with any moral compass, led to brute violence against one’s ideological enemies and a desire not to win them over, but to punish them.<sup>137</sup> Kristian Williams observes that

Orwell tried to adapt himself to violence by separating it from hatred and hysteria, by refusing to be poisoned by resentment, by pursuing reconciliation rather than revenge, and by remaining clear-eyed and pragmatic while admitting that there are limits to what one is willing to do, and then refusing to transgress those limits. He understood, as too few of us do, that we cannot pursue an ideal of shared humanity while also treating our enemies as monsters. By doing so, we defeat our own purposes and become monsters ourselves. We must, instead, make our fighting and expression of our ideals. This means, among other things,

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understand that evil twin, that mortal enemy, who is part and parcel of every individual.” See JORDAN B. PETERSON, MAPS OF MEANING: THE ARCHITECTURE OF BELIEF 311 (1999) [hereinafter MAPS].

131. Orwell, *Notes*, *supra* note 126, at 880.

132. MARCELA KNAPP, CULTURAL CONTROVERSIES IN THE WEST GERMAN PUBLIC SPHERE: AESTHETIC FICTION AND THE CREATION OF SOCIAL IDENTITIES 119 (2020) (quoting Golo Mann, Thomas Mann’s son).

133. Orwell, *Notes*, *supra* note 12, at 867.

134. *Id.* at 868.

135. *Id.* at 878.

136. *Id.* at 883.

137. WILLIAMS, *supra* note 17, at 105.

refusing to dehumanize our enemies or to celebrate cruelty, avoiding deliberate atrocities, resolving to greet victory with magnanimity.<sup>138</sup>

Orwell was concerned that once nationalism spreads past a certain point, the overall quality of all political debate and thought would degrade.<sup>139</sup> Eventually, individual people will turn to dogma over respect for the truth, at which point they may fabricate evidence and slander their opponents, and not find these acts to be at all despicable, or even dishonest.<sup>140</sup> Orwell expanded upon these themes in *Nineteen Eighty-Four*, creating the despotic, resentful, war-driven, and hideous world he thought would be the logical end-result of the nationalist tendencies of the twentieth-century intellectuals. Of the countless casualties attendant to the creation of such a dystopia, the metaphorical death of the author is paramount as it relates to a discussion of Cancel [©opyright] Culture.

#### IV. *NINETEEN EIGHTY-FOUR* APPLIED TO THE DEATH OF THE AUTHOR

*Nineteen Eighty-Four* was written decades before Barthes and Foucault unleashed their diabolical assault on the traditional Romantic notion of authorship. Presciently, though, the novel perfectly predicts the rise of postmodernism and its dangerous deconstructionist ideologies that would serve as the foundation of contemporary anti-Enlightenment practices such as radical multiculturalism, identity politics and, of course, Cancel Culture.

Orwell's brilliant literary opus utilizes powerful topical images to describe a cold society that has deteriorated away from reason, freedom, individuality, and human dignity and towards a power hungry, nihilistic dictatorship. I analyze these themes in the following subsections as they frighteningly mirror the various ideological principles and goals of the DOA movement in general, and Cancel [©opyright] Culture in particular.

##### A. The "Memory Hole:" An Abrogation of Facts and History

A major theme of *Nineteen Eighty-Four* is the importance of objectively understanding and keeping accurate records of historical facts and knowledge. As nineteenth-century Spanish-born American author George Santayana famously stated, "Those who cannot remember the past are condemned to repeat it."<sup>141</sup> History in this sense, of course, includes knowledge not only gleaned from books and newspaper and magazine articles, but also from the beauty and truth that has inspired great works of art, literature, and the sciences—in short, the stuff upon which copyright law

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138. *Id.* at 105-06.

139. *Id.* at 127.

140. *Id.* at 129.

141. See DICTIONARY.COM, <https://www.dictionary.com/browse/those-who-cannot-remember-the-past-are-condemned-to-repeat-it> [<https://perma.cc/4Y6D-S45M>] (last visited Apr. 10, 2021).

is focused. In the novel, as is indicative to all totalitarian societies, Orwell portrays a dictatorship form of government that ensures its citizens are only exposed to state-manufactured and altered “facts” and “histories” that fit within the ideological narrative of the Party.

The novel follows the life of protagonist Winston Smith, a detractor of the Party who works in the Records Department at the Ministry of Truth—a foreboding pyramidal structure established by Big Brother, “which concerned itself with news, entertainment, education and the fine arts.”<sup>142</sup> Winston contributes to the mission of erasing the facts of history and retelling them in order to perpetuate the propaganda utilized by the Party and maintain its power over the people.<sup>143</sup> His job is literally to rewrite newspaper and magazine articles that contain inconvenient truths for Big Brother. Inside the Ministry of Truth:

[h]eroes were turned into villains in Soviet biographies and encyclopedias, figures were air-brushed out of photographs and hence out of existence, the memory hole has its equivalent in the shredder.<sup>144</sup>

Once Winston made the necessary edits and “corrections” to the copy, “with a movement which was as nearly as possible unconscious, he crumpled up the original message and any notes that he himself had made, and dropped them into the memory hole to be devoured by the flames” into an “unseen labyrinth” that was reached by a pneumatic tube.<sup>145</sup> It was a continuous process of alteration that

was applied not only to newspapers, but to books, periodicals, pamphlets, posters, leaflets, films, sound-tracks, cartoons, photographs—to every kind of literature or documentation<sup>146</sup> which might conceivably hold any political or ideological significance. Day by day and almost minute by minute the past was brought up to date.<sup>147</sup>

Within this process, the great canonical works of literature “which had become ideologically offensive” are replaced by workers in the Ministry of Truth with “garbled versions” that would become the official “definitive texts” approved by the Party for dissemination to the masses.<sup>148</sup>

It is likely that Orwell modeled the Memory Hole after similar propagandist tactics that Joseph Stalin actually used during his rule of the Russian Communist Party. In 1938, Stalin commissioned and published a “new official history” of the Communist Party, which “consisted in destroying, together with the older books and documents, their authors and readers” and which, according to Arendt, “was the signal that the superpurge

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142. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 6.

143. *Id.* at 9.

144. *Id.* at xxii.

145. *Id.* at 42.

146. In other words, to all types of works of authorship that are protected by copyright law.

147. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 42.

148. *Id.* at 45.

which had decimated a whole generation of Soviet intellectuals had come to an end.”<sup>149</sup>

*i. The Contemporary Academic Assault of the Canon*

Unfortunately, widespread tactics to rewrite literary history are no longer merely the stuff of Orwell’s fiction. For decades, real-world radical progressives have launched a similar assault that has universally “triumphed within the academy” upon the authoritative works of Western literature, because they contend “the canonical designation is always the product of [sexual and racial] bias.”<sup>150</sup>

The movement to add *more* works to the canon created by female and minority authors began with a genuinely sanguine and worthy attempt to establish the widespread inclusivity of marginalized ideas and encourage robust debate, which should be primary goals of any serious academic. Unfortunately, such are not the goals of the bands of radical progressives from all academic disciplines that wound up usurping and poisoning the movement to widen and diversify the existing canon.

Like most radical progressivist ambitions, the intent of the “canon busters,” as termed by Peter Shaw in “The Assault on the Canon,” is not one driven by fairness or democratization in order to make room in the canon for prior-excluded groups, but rather a political movement to delegitimize and outright reject the backbone of Western culture.<sup>151</sup> This is evident in a second-wave movement of the canon assaulters in the late twentieth century: the goal to treat works within the traditional canon from a *new* point of view that was inspired by the French postmodern theorists: “[t]hey should no longer be revered, but rather dealt with skeptically by teachers—they should be ‘deconstructed’.”<sup>152</sup> Dominic Welburn describes the “increasing irreverence toward the Greats” as follows:

In summary, the canon of Western literature, in the new postmodern intellectual landscape of the late twentieth century, was increasingly seen as neither impartial, nor as an indicator of original genius and timeless excellence. Rather, it was a deconstructed contingent of privilege, race, gender and class.<sup>153</sup>

Thus, the notion that the development of the canon, like Western culture itself, was a patriarchal conspiracy to maintain hierarchical power structures,

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149. ARENDT, *supra* note 119, at 341-42.

150. Peter Shaw, *The Assault on the Canon*, 102 SEWANEE REV. 257, 257 (1994).

151. *Id.* See also, HEATHER MAC DONALD, THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE 5 (2018) (arguing that “[m]ulticulturalism, which took over literary studies in the 1980s, destroyed [the] respect for the canon while continuing the deconstructive stance of exposing alleged subtexts and suppressed meanings. What had been an epistemological project became a political one”).

152. *Id.* at 260.

153. DOMINIC WELBURN, CANON CONTROVERSIES IN POLITICAL THOUGHT: TWO THEORIES OF INFLUENCE 42 (2020).

was the next academic wave that dealt “a revolutionary blow against society.”<sup>154</sup>

Writing in 1994, Shaw correctly observed—and Orwell most certainly would have agreed—that “[t]he debate over whether the classics of Western literature deserve their canonical status is a political rather than intellectual phenomenon.”<sup>155</sup> What Shaw had underestimated, though, is where Orwell (writing almost five decades earlier than Shaw) adroitly foreshadows with the memory hole: the current wave of the canon assaulters to actually vaporize, or cancel the traditional canonical works. At the end of “The Assault on the Canon,” Shaw naively maintains that the defense of the canon lingers, despite the “self-delusionary” attempts by academics whom he claims “are distinctly marginal to establishing the canon,” to alter their reading lists “to accommodate political demands.”<sup>156</sup> According to Shaw:

These professors occupy the same position as the editors of the Baseball Encyclopedia who have removed the asterisk from Roger Maris’s home-run record. The fact that this record was achieved in a longer season than Babe Ruth’s total cannot be erased from the collective memory of baseball fans. In the end, as with the canon, the final determination of which home-run total was the greater achievement will not be decided by the authorities. Instead, over time, the issue will be decided by a discussion based on standards appropriate to baseball. So, too, with the canon and its standards. As it happens, these standards are fundamental to human freedom as it is known in the West.<sup>157</sup>

In “Notes on Nationalism,” as discussed above,<sup>158</sup> Orwell took much more seriously the power of the academics to influence politics and, therefore, the real-world effects of their destructive ideologies. A more Orwellian—as such, more frighteningly somber—analysis of why radical postmodern attacks are waged only against the Western canon is offered by Stephen R.C. Hicks:

If one’s deepest goals are political, one always has a major obstacle to deal with—the powerful books written by brilliant minds on the other side of the debate. In literature, there is a huge body of novels, plays, epic poems, and not much of it supports socialism. Much of it presents compelling analyses of the human condition from opposed perspectives . . . Consequently, if you are a Left-wing graduate student or professor, you have two choices. You can take on the opposing traditions, have your students read the great books and the great [legal] decisions, and argue with them in your classes. That is very hard work and also very risky—your students might come to agree with the wrong side. Or you can find a way to dismiss the whole tradition, so that you can teach only books that fit your politics.<sup>159</sup>

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154. Shaw, *supra* note 150, at 260.

155. *Id.* at 257.

156. *Id.* at 270.

157. *Id.*

158. *See infra*, note 126 and accompanying text.

159. HICKS, *supra* note 40, at 190.

Hicks describes deconstruction as the “seductive” solution that allows academics to entirely dismiss and set aside “whole literary and legal traditions as built upon sexist or racist or otherwise exploitive assumptions.”<sup>160</sup>

ii. *The Mainstream Cancellation of Historical and Literary Knowledge*

While the first benign step taken by the postmodernists was to include previously marginalized authors into the canon and their second move was to viscously attack the classical authors and their works, today there is a direction—not only in academia, but within the mainstream—to entirely eviscerate whole swaths of historical and literary knowledge, and this is precisely the warning Orwell issued. For if, as the radicals view it, “a text can mean anything, then it means nothing more than anything else” and therefore, “no texts are then great.”<sup>161</sup> Now that the radical progressive faculty members have instilled this mindset into their students, they have become enlisted as pawns to assist with a real-world postmodern agenda, which delegitimizes any form of enlightened self-introspection that may be inspired by the classics, as well as the historical knowledge that warns us of the cost of doing so.

For example, in 2020 St. John’s University fired adjunct professor Richard Taylor, a retired police officer, for asking his students to consider both the negative *and* positive aspects of early global trade within the Columbian Exchange of the early fifteenth century in his “Emergence of a Global Society” history course.<sup>162</sup> On the day that a student posted an Instagram complaint about this class, which specifically mentioned Taylor’s service in the Marine Corps and the New York Police Department, Taylor was immediately fired without investigation or due process after being told that he violated the “University’s Policy against Bias, Discrimination, and Harassment” by teaching his class.<sup>163</sup> When Taylor asked the Director of Equal Opportunity and Compliance at the university which section(s) of the 2,300 word policy he violated, the latter refused to provide him with the evidence used to support the finding.<sup>164</sup>

In 2020, similar stories about cancel-cultured professors such as Taylor who dare to teach historical facts and prompt intellectual debate over complex subjects such as imperialism are at an all-time high.

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160. *Id.*

161. *Id.* at 199.

162. *Teaching History Not Permitted: St. John’s Bulldozes Academic Freedom, Punishes Professor for Posing Question About ‘Columbian Exchange’*, FIRE, Oct. 8, 2020, <https://www.thefire.org/teaching-history-not-permitted-st-johns-bulldozes-academic-freedom-punishes-professor-for-posing-question-about-columbian-exchange/> [https://perma.cc/7TZ7-GAZ3 ].

163. *Id.*

164. *Id.*

Unquestionably, “the ethereal academic debate over social constructionism, rationalism, and principles of individual liberty have some very concrete consequences in the outside world.”<sup>165</sup> Just as in *Nineteen Eighty-Four*, historical debate in all forms has today been conveniently  *canceled*.

Copyright scholars now also use more covert tactics in order to achieve ultimately the same goal of canceling the Western canon. Beginning with Peter Jaszi and Martha Woodmansee in the 1990s, these scholars have commonly utilized a repeated trope that reconfigures Enlightenment history in order to attack the “Romantic” origins of authorship.<sup>166</sup> The basic premise is that the “persistent notion” of individual authorship that emerged during the post-Enlightenment Romantic period of literature is merely a myth utilized by American copyright law, which “makes it difficult for any new legal synthesis, which would focus on the reality of collective creativity, to emerge.”<sup>167</sup>

Jaszi and Woodmansee viscerally attack the great Romantic authors, particularly William Wordsworth who openly called for copyright protection of the  *individual* works that had begun to flourish during the post Renaissance in England. In a series of co-authored articles, Jaszi and Woodmansee together wove a fantastic story regarding the evolution of authorship utilizing Foucauldian principles, intending to “welcome a legal regime that engages ‘the realities of contemporary polyvocal writing practice— which is increasingly  *collective*, corporate, and collaborative.’”<sup>168</sup>

These few examples show how the Cancel Culture movement has proven Orwell’s fears regarding the possibility of a total erasure of literary and artistic history to be correct, and the copyright scholars who promulgate killing the author are contributing to this eventuality in droves. Conveniently, the “Romantic” author figure whom copyright scholars besmirch is perfectly representative of the white-male canon of Western Enlightenment tradition.

Some academicians have written that the Romantic author is merely the figurative scapegoat that is blamed for the ever-expanding nature of copyright,<sup>169</sup> including me.<sup>170</sup> In “The Prevention of Literature,” Orwell himself prefigured that academic tirades against both individualism and

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165. Steven G. Gey, *Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory*, 83 MINN. L. REV. 1707, 1732 (1999).

166. See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 29-31 (Martha Woodmansee & Peter Jaszi eds., 1994).

167. Reilly, *Tragedy*, *supra* note 26, at 135 (quoting Peter Jaszi).

168. *Id.* at 141-62.

169. See, e.g., Lionel Bently, *R. v. the Author: From Death Penalty to Community Service – 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007*, 32 COLUM. J.L. & ARTS 1, 15 (2008) (“In the early 1990s, scholars arrested, charged, prosecuted and convicted the “romantic author” of the crime of copyright expansion”).

170. Reilly, *Synergy*, *supra* note 27, at 602.



romanticism such as these become “a forensic device, the aim of which is to make the perversion of history seem respectable.”<sup>171</sup> He bemoaned that

Everything in our age conspires to turn the writer, and every other kind of artist as well, into a minor official, working on themes handed down from above and never telling what seems to him the whole of the truth.<sup>172</sup>

After watching the recent Cancel Culture events play out our current world stage, and upon further research, I have come to believe that the DOA movement has a much more insidious agenda akin to that of the Cancel Culture movement: to largely do away with all individual ideas, voices, and opinions not in keeping with radically progressive ideologies. In reality, there is no Ministry of Truth in which a Memory Hole is used to achieve this goal (yet). However, the catastrophic results are the same: the canon war becomes a convenient political tool in which to bury historical truths and/or rewrite them in order to legitimize a particularly evil set of ideological agendas, with censorship of legal, legitimate, competing ideas at its core.

For example, in his article responding to the recent mob craze to “cancel,” deface, and even publicly topple and destroy allegedly offensive statues, Jarrett Stepman finds it absurd that Abraham Lincoln has become a stated target, as some claim he “did not show through policy or rhetoric that black lives ever mattered.”<sup>173</sup> Stepman maintains that “[t]he result of these trends is that we’ve been losing our ability to maintain a clear-eyed view of our own past. America’s sins have been magnified, its triumphs diminished and taken for granted.”<sup>174</sup>

Similarly, the DOA writers accomplish their nefarious goals by deconstructing to the point of vaporizing not only the figure of the author and what it represents in our post-Enlightenment history, but also individual authors and the merits of their entire canons, ideologies, and lives. This breed of “absolutist relativism” which Orwell warned us about has failed our students and our society overall because it “has created a public discourse incapable of dialogue,”<sup>175</sup> which has been the primary enabling catalyst of the Cancel Culture movement.

### B. “Newspeak”: The End of Original Expression

Just as the alteration of our historical and literary canon is necessary in a totalitarian society, it is equally important to create an atmosphere in which the individual is discouraged for fear of retribution from all creative thinking

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171. George Orwell, *The Prevention of Literature*, in GEORGE ORWELL: ESSAYS 934, 931-945 (Peter Davison, ed., 2002) [hereinafter *Prevention*].

172. *Id.* at 932.

173. Jarrett Stepman, *Cancel Culture’s Next Targets: George Washington and Abe Lincoln*, THE NATIONAL INTEREST (March 13, 2021), <https://nationalinterest.org/feature/cancel-cultures-next-targets-george-washington-and-abe-lincoln-180030> [https://perma.cc/9CAY-C94B].

174. *Id.*

175. Katie Kelaidis, *The Return of the Canon Wars*, THE QUILLETTE (April 26, 2018), <https://quillette.com/2018/04/26/return-canon-wars/> [https://perma.cc/ZFL4-68P3].

and forms of original expression. In Oceania, the Party achieves this, in part, by the creation and institution of an entirely new language: “Newspeak.”

In the first scene of *Nineteen Eighty-Four*, we meet Winston as he is compelled to begin writing the story of his present “predicament” into a diary, which he had surreptitiously purchased with the intent of communicating with “the unborn,” hoping that he would inspire a future world that would be vastly different from the abjectly miserable world of the present.<sup>176</sup> Such a brazen act of authorship, if discovered, would surely land him in the fateful hands of the Thought Police, as the truth of his words would threaten the continued existence of the Party. Whereas Winston had been preparing for this brave and defiant moment for weeks, he found himself oddly unable to write:

For some time he sat gazing stupidly at the paper. The telescreen had changed over to strident military music. It was curious that he seemed not merely to have *lost the power of expressing himself*, but even to have forgotten what it was that he had originally intended to say. For weeks he had been making ready for this moment, and it had never crossed his mind that anything would be needed except courage. The actual writing would be easy. All he had to do was to transfer to paper the interminable restless monologue that had been running inside his head, literally for years. At this moment, however, even the monologue had dried up.<sup>177</sup>

Orwell’s description of Winston’s brave foray into the world of self-expressive writing, which was an art that had been nearly forgotten in Oceania, as “the pen was an archaic instrument, seldom used for even signatures,” chillingly portrays the destruction of the individual voice that had once been prized and protected in the formerly Enlightened western world.<sup>178</sup>

In the novel, the creation of Newspeak is the mechanism by which the Party is able to subjugate the citizens of Oceania by a methodological purgation of their ability to use “Oldspeak” (the former English language) in order to think and communicate creatively. Workers in the Research Department of the Ministry of Truth, such as Winston’s friend Syme, are employed to compile the Eleventh Edition of the Newspeak Dictionary, which will be the “definitive edition” or the “shape [Newspeak is] going to have when nobody speaks anything else.”<sup>179</sup>

Syme’s job is to destroy hundreds of words a day and cut the language “down to the bone” so that the Eleventh Edition “won’t contain a single word that will become obsolete before the year 2050.”<sup>180</sup> According to Syme, the stated aim of Newspeak “is to narrow the range of thought,” ever ensuring that with fewer words, the “range of consciousness [is] always a little

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176. ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1, at 9.

177. *Id.* (emphasis added).

178. *Id.*

179. *Id.* at 51-53.

180. *Id.* at 54.

smaller.”<sup>181</sup> One way to ensure the implementation of this goal is akin to the function of the Memory Hole: destroying the entire canon of Western literature and changing it into something contradictory of what it used to be; then not only will the “whole climate of thought” be different, but “there will be no thought, as we understand it now.”<sup>182</sup>

Orwell tacitly juxtaposes Winston’s personal diary in which he struggles to write about his current life in Oceania with another work of authorship rumored to exist known only as “*the book*.” Winston describes *the book* as a “terrible” piece without a title, which contains a compendium of the heresies against the Party concocted by Emmanuel Goldstein, who is the alleged enemy of Big Brother and public scapegoat for Party propaganda.<sup>183</sup>

After Winston eventually manages to obtain a copy of *the book*, the Thought Police capture him before he has a chance to read most of its content. During Winston’s imprisonment later in the novel, his torturer, former friend and confidant O’Brien, informs him that Goldstein did not in fact write *the book*, but is rather a collective work created by O’Brien and other collaborators within the hierarchical Inner Party.<sup>184</sup> Here, Orwell may be suggesting that Goldstein and the whole opposition to Big Brother “may be a figment created by the Party.”<sup>185</sup> Responding to Winston’s obvious look of surprise in learning this information, O’Brien coldly responds, “No book is produced individually, as you know.”<sup>186</sup>

In addition to books, there are no other forms of art afforded with the privilege of individual creation in Oceania. The existence of the State-produced music—described as “dreadful rubbish”—has even a more sinister provenance than that of the collective rewriting of classic literature: it is created by non-human means:

The tune had been haunting London for weeks past. It was one of countless similar songs published for the benefit of the proles by a subsection of the Music Department. The words of these songs were composed without any human intervention whatever on an instrument known as a versificator.<sup>187</sup>

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181. *Id.* at 55.

182. *Id.* at 56.

183. *Id.* at 15. *See also*, Gottlieb, *supra* note 123, at 15 (“Goldstein was a renegade and a backslider who once, long ago (how long ago nobody quite remembered), had been one of the leading figures of the Party, almost on a level with Big Brother himself, and then had engaged in counter-revolutionary activities, had been condemned to death, and had mysteriously escaped and disappeared”).

184. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1 at 274.

185. John O. Lyons, *George Orwell’s Opaque Glass in “1984”*, WIS. STUD. IN CONTEMP. LITERATURE, Autumn, 1961, Vol. 2, No. 3, pp. 39-46, at 43.

186. *Id.*

187. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1 at 144-45.

By manner of print, telescreen, and radio, therefore, Big Brother is able to manipulate public opinion, “enforcing not only complete obedience to the will of the State, but also complete uniformity of opinion on all subjects.”<sup>188</sup>

Not only had the creative intellects of the citizens of Oceania become deadpan and vacuous, but their physical appearances also took on an austere and sullen lack of expression. Constantly monitored by the telescreens for any facial indication that would suggest they were engaging in *thoughtcrime*, the citizens train themselves to become expressionless in order to survive. In the scene when Winston first attempts to write in the diary, he hears a knock at the door, which winds up being his neighbor, but whom he is convinced is the Thought Police, immediately discovering his illegal actions and hunting him down:

Already! He sat still as a mouse, in the futile hope that whoever it was might go away after a single attempt. But no, the knocking was repeated. The worst thing of all would be to delay. His heart was thumping like a drum, but his face, from long habit, was probably expressionless. He got up and moved heavily towards the door.<sup>189</sup>

In their regulation clothing, the citizens are likewise indistinguishable, and “[n]early everyone was ugly, and would still have been ugly even if dressed otherwise than in the uniform blue overalls.”<sup>190</sup> With these morose physical and psychological images, Orwell relays the manner by which a continued dearth of individual creativity and personality, which is evident in a totalitarian system, invariably leads to the commonality of not only manipulated and forced thought, but also regulated physical expression.

This opening salvo in *Nineteen Eighty-Four* immediately sets the tone of one of its main themes that continues throughout the novel: the slow deterioration of individual thought and self-expression, which is a dire eventuality within a totalitarian society. As Winston’s thoughts become more disjointed, he is increasingly frustrated by the inability to express his own story and relay his individual belief system. In this penetrating diary scene, “Orwell establishes the impression that creativity is impossible within the confines of such a despotic system.”<sup>191</sup> Similarly, in his 1946 essay, “Prevention of Literature,” Orwell wrote that

the imagination, like certain wild animals, will not breed in captivity. Any writer or journalist who denies that fact—and nearly all the current praise of the Soviet Union contains or implies such a denial—is, in effect, demanding his own destruction.<sup>192</sup>

The scene is also perfectly illustrative of Orwell’s belief that within a totalitarian system of government, or even within other settings,

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188. *Id.* at 214.

189. *Id.* at 21-22.

190. *Id.* at 63.

191. Malcolm R. Thorp, *The Dynamics of Terror in Orwell’s “1984”*, BYU STUD., Winter 1984, at 13.

192. Orwell, *Prevention*, *supra* note 171, at 945.

a powerful group with a unity of common interest in extending its power can always threaten liberties of life, expression, and thought, whether that group is openly manifested in a one-party state or hidden behind a plurality of supposedly competing political groupings that actually disagree over nothing substantive. This was why he defended individual expression when threatened by parliaments just as much as when threatened by dictators.<sup>193</sup>

Indeed, the important diary scene thematically depicts how one of the goals of Big Brother's manipulation of language accomplished by Newspeak "was the elimination of all subtleties of meaning and hence of thought,"<sup>194</sup> which are prerequisites to the creation of original works of authorship as contemplated by copyright law.

Along with *Nineteen Eighty-Four*, "[s]everal of Orwell's essays explore the conditions that allow or prevent the freedom of expression (and freedom from self-censorship) [that is] essential for good writing to exist."<sup>195</sup> In "The Prevention of Literature," Orwell considers various "insidious factors" attributable to the attachment of intellectuals to Soviet Union style communism, which act to "mitigate against the creation of great, or even honest literature."<sup>196</sup>

There he also states that "the idea of intellectual liberty" is under attack by "its theoretical enemies, the apologists of totalitarianism," which, among other phenomena, are conspiring "to turn the writer, and every other kind of artist as well, into a minor official, working on themes handed down from above and never telling what seems to him the whole of the truth."<sup>197</sup> In this unbelievably prognostic passage, Orwell sagaciously predicts the entire philosophical framework that would underpin the French postmodern era of deconstructionism, which was still decades away from the making. He believed that totalitarianism "can never permit either the truthful recording of facts or the emotional sincerity that literary creation demands."<sup>198</sup> But he also understood that to be corrupted by totalitarianism one does not have to live in a totalitarian country, claiming that "[t]he mere prevalence of certain ideas can spread a kind of poison that makes one subject after another impossible for literary purposes."<sup>199</sup>

Similar to the ultimate purpose of Newspeak, the Cancel Culture movement is today running roughshod over any individual attempt to question or make independent judgement about the ideological policies established by the political majority. A private school in New York has asked its community to replace the use of "mom" and "dad" with "grown-

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193. Stephens, *supra* note 116, at 80-81.

194. ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1, at xxiii.

195. Jeffrey Meyers, *George Orwell and the Art of Writing*, 27 *THE KENYON REV.*, no. 4, 2005, at 106.

196. *Id.*

197. Orwell, *Prevention*, *supra* note 171, at 932.

198. *Id.* at 939.

199. *Id.*

ups,” “folks” or “family,”<sup>200</sup> and the French parliament has voted to banish the words “mother” and “father” from official paperwork in their education system.<sup>201</sup>

Phrases such as “long time no see” (offensive of the way Native Americans speak), “hysterical” (sexist because it is derived from the Greek word for uterus) and “blind spot” (ableist) are not just banned only on college campuses, but have “oozed down from the Ivory Tower.”<sup>202</sup> The upshot is that such censorship results in dire consequence to everyday folks who may innocently use these expressions to their Cancel Culture detriment. Without doubt, it is almost impossible to keep up with the growing list terms considered taboo to the overly sensitive mob.

The Politically Correct or PC movement of yesterday was mainly limited to ugly words with obvious and objectively insulting meanings. Thanks to Cancel Culture, however, the list of non-obvious words and phrases banned as offensive in our politically correct culture continues to rise and now jobs are lost and lives are ruined if anyone dare slip up and use one of them.

Verily, the DOA scholars have all but accomplished their sinister goal of manipulating language and reason in order to denigrate the authorial voices within the genius works of the Western canon. Helprin poignantly observes the obvious problems that will ensue if such a dangerous trend continues:

The rights of authorship, the most effective guarantor of which is copyright, protect fact from casual manipulation; slow the rush to judgment; fix responsibility; encourage conscience in assertion and deliberation; and protect the authority of the individual voice, without which we are little more than nicely yoked oxen,<sup>203</sup>

just like the frightened, drab, and expressionless citizens of Oceania.

### C. The Glass Paperweight: An Annihilation of Beauty and Individual Ownership

One of the most disturbing attributes of a totalitarian regime Orwell depicts masterfully in *Nineteen Eighty-Four* is the deliberate annihilation of all objects of art and beauty....eerily foreshadowing the revengeful actions

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200. Dustin Barnes, *NYC School Defends Inclusive Language Guide Asking Students, Parents to Avoid Phrases Like 'Mom and Dad'*, USA.COM (March 12, 2021, 4:43 PM), <https://www.usatoday.com/story/news/education/2021/03/12/nyc-school-defends-guide-asking-students-avoid-saying-mom-dad/4668994001/> [https://perma.cc/W5HY-3SJ5].

201. Charles Bremmer, *'Mother' and 'Father' to be Banned on Forms as French Schools go Gender-Neutral*, THE TIMES (Feb. 19, 2019, 12:00 AM) <https://www.thetimes.co.uk/article/mother-and-father-to-be-banned-on-forms-as-french-schools-go-gender-neutral-3pzlrcn6d> [https://perma.cc/JCK4-4VGL].

202. Kyle Smith, *PC Police Won't Let Us Use These Words Anymore*, NEW YORK POST (May 26, 2018, 3:27 PM), <https://nypost.com/2018/05/26/pc-police-wont-let-us-use-these-words-anymore/> [https://perma.cc/DT75-XZ7E].

203. HELPRIN, *supra* note 52, at 66.

of non-law-abiding protesters who routinely topple and cancel statues today.<sup>204</sup> According to Hicks, the traditional perception of art

was a vehicle of sensuousness, meaning, and passion. Its goals were beauty and originality. The artist was a skilled master of his craft. Such masters were able to create original representations with human significance and universal appeal. Combining skill and vision, artists were exalted beings capable of creating objects that in turn had an awesome power to exalt the senses, the intellects, and the passions of those who experience them.<sup>205</sup>

Because totalitarian leaders also recognize “the value and absolute weight of art,” the act of destroying it and/or transforming it into propaganda becomes a diabolical mechanism to achieve mass indoctrination.<sup>206</sup> By destabilizing and equalizing art, as well as converting it for propagandist purposes, therefore, they are able to fashion “what could be called a beautiful illusion but a complete lie.”<sup>207</sup>

Another indispensable feature of totalitarianism is the eradication of all forms of property ownership, both real and intellectual. For example, in *The Communist Manifesto*, Marx and Engels admitted that the abolition of private property was “the quintessence of their movement.”<sup>208</sup> In fact, when they came into power, the Bolsheviks liquidated all forms of productive property and converted their citizens into wage-earning employees of the state; therefore, the entire wealth of the country became public possession.<sup>209</sup>

Incorporating these features into the novel, Orwell depicts the forlorn citizens of Oceania as deprived of all forms of both traditional artistic beauty and property, even down to their dingy state-issued clothing. From the beginning of the novel, Orwell portrays the dismal, ugly world of Oceania that smells of the greyed, watered down cabbage soup and sweat of the workers, in which “there seemed to be no colour in anything” except within the ominous posters that depict the “black-moustachio’d face” of Big Brother “gazed down from every commanding corner.”<sup>210</sup>

Within this foreboding setting, Winston manages to purchase various Western-world relics from an antique pawnshop, including the cream-paged diary from the first scene of the novel, as well as a “heavy lump of glass” with a “strange, pink, convoluted object that recalled a rose or a sea

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204. See Samantha Lock, *Portland Rioters Topple Abraham Lincoln and Teddy Roosevelt Statues in ‘Day of Rage’ Against Columbus*, NEWSWEEK (Oct. 12, 2020, 6:27 AM) <https://www.newsweek.com/portland-rioters-topple-abraham-lincoln-teddy-roosevelt-statues-day-rage-against-columbus-1538202> [<https://perma.cc/QZ5Z-NKMM>].

205. HICKS, *supra* note 40, at 249.

206. Anila Mullahi, *The Use of Art and Culture by Politics in a Totalitarian State*, 2 EUR. SCI. J. 120, 122 (2014).

207. *Id.* at 125.

208. Richard Pipes, *Human Nature and the Fall of Communism*, 49 BULL. OF THE AM. ACAD. OF ARTS AND SCI. 38, 39 (Jan. 1996) [hereinafter *Human Nature*].

209. *Id.* at 48.

210. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 4.

anemone.”<sup>211</sup> Winston is immediately struck by the coral-laden object, due to “its apparent uselessness” and uniqueness, and because “the air it seemed to possess of belonging to an age quite different from the present one.”<sup>212</sup> He keeps the hefty object in his pocket as a fetish, which represents to him a small chunk of beauty and history that the Party has failed to corrupt.<sup>213</sup>

Symbolically, the glass paperweight harkens back to the enlightened Western world, in which individuals were able to create, enjoy, and exclusively own works of beautiful art. John Lyons also believes that Orwell’s use of the image of distorting glass comments on “the isolation of modern man” and the “sin of power” represented by corrupt government institutions.<sup>214</sup>

Of course, upon Winston’s capture, a member of the Thought Police finds the paperweight and smashes it into the fireplace,<sup>215</sup> destroying its aesthetic and symbolic beauty as well as infringing Winston’s rights of personal property ownership, which is commonplace in totalitarian systems. Because personal property and IP “share the same conceptual foundations,” attacks on IP “are in large measure attacks on property itself, even though they may not be characterized as such or even recognized as such by those attacking IP.”<sup>216</sup>

According to Russian historian, Richard Pipes, the removal of individual property rights in favor of the concentration of all resources in the hands of the state not only undermines the work ethic of a nation, but also inhibits innovation, eventually leading to “the withering of personality, the prime mover of progress.”<sup>217</sup> This is true, in part, because personal belongings like the paperweight can be philosophically considered as extensions of the self: something of the individual owner’s “life spirit” becomes integrated within them.<sup>218</sup> Deprivation of this personal connection to creativity can only lead to isolation and a halt on the progress of art and knowledge, the primary goal of the Progress Clause.

It is, indeed, remarkable that in his symbolic usage of the glass paperweight, Orwell perfectly predicts the rise of the radical progressives, who with their DOA mentality have become the contemporary enemies of both artistic originality and exclusive copyright rights. In a manner similar to the behavior of Big Brother and other fictional and nonfictional totalitarian leaders, DOA scholars also push for fewer copyright ownership rights while

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211. *Id.* at 98-99.

212. *Id.* at 99.

213. Lyons, *supra* note 185, at 44.

214. *Id.* at 45.

215. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 232.

216. COOPER & MAY, *supra* note 38, at 31.

217. RICHARD PIPES, PROPERTY AND FREEDOM 216 (1999) [hereinafter PROPERTY AND FREEDOM].

218. *Id.* at 79.



they degrade the beauty and inspiration behind genius works of art and literature from within the canon.

Robert Merges keenly observes the overwhelming academic resistance to the old-school recognition of discrete, individual authorship and control of copyright assets, which he describes as “yesterday’s news,” and which the radical progressives hope will “just wither away in the future.”<sup>219</sup> He decries that the post-Enlightenment creation of individual rights that had been afforded to authors in the past

is sharply at odds with prevailing views of creativity today, particularly those of intellectual property scholars. A primary emphasis in recent scholarship is the highly social nature of creative production. The general idea is that the creative person swims in such a rich and stimulating sea of ideas that it is wrong to celebrate the backstroke or crawl of the individual racer.<sup>220</sup>

According to Merges, the theorists who hail what they label with largely undefined notions of collective creativity believe that

most movies, novels, nonfiction books, inventions, and product designs are the result of group creativity that accumulates over many years. From this perspective, IP rights are seen as artificial legal constructs that often assign individual ownership on the basis of incomplete and inadequate understanding of the real essence of the creative enterprise. Individual vision and effort are at best overrated, and at worst, nothing but dishonest conceptual constructs employed to serve the interests of powerful industries.<sup>221</sup>

Lior Zemer scripted a recent DOA article that touts this amorphous group creation concept, definitively claiming that “literature on the construction of authorship rejects the author-as-creator concept and criticizes scholarship that discounts the sociality of the creative act.”<sup>222</sup> This new interpretation of authorship “questions the construction of the self and emphasizes the role of otherness in creative processes.”<sup>223</sup> Pursuant to this regime,

. . . authors are required to acknowledge the contribution of other voices to the emergence and development of their authorial personality while compromising the degree of their subjective beings. They are required to embrace the other as a partner rather than a trespasser. That is, authors are not born authors. They become authors. They are composites.<sup>224</sup>

Both ironically and hypocritically, in 2007 Zemer wrote a book entitled *The Idea of Authorship in Copyright Law*, which he copyrighted pursuant to the 1976 Copyright Act of the United States of America.<sup>225</sup> In chapter one

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219. MERGES, *supra* note 23, at 294.

220. *Id.* at 113-14.

221. *Id.*

222. Lior Zemer, *Multivoiced Authors*, 35 CARDOZO ARTS & ENT. L.J. 383, 396 (2017).

223. *Id.*

224. *Id.*

225. *See generally* LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007).

under the first subheading, “Against Sole Authorship,” Zemer’s first words of the book state:

Every copyrighted entity represents the creative collectivity. It is a joint enterprise of both the individual author and the public. Contemporary conceptions of copyright reject the collective nature of authorial and artistic creations and invoke copyright to signify entitlement of a certain kind, to mark an individual territory and disregard its social nature.<sup>226</sup>

Although I am a member of Zemer’s stated “public,” I have not been “acknowledged” by Zemer, who has chosen to “invoke copyright” and “mark an individual territory.” I imagine that if I were to attempt to sell Zemer’s book under my name, he would not embrace me “as a partner rather than a trespasser,” or else he would have published his book utilizing a copyright-free system such as the Creative Commons.<sup>227</sup>

Doris Estelle Long echoes Zemer’s sentiments by the following observations of the postmodern DOA movement:

Thus, under post-structural analysis, literature is not the result (if it ever was) of an author’s individuated originality. Instead, it is the result of intertextuality—of a collaboration between author and reader that goes beyond the reader merely reading the words selected by another. The centrality of the reader’s role in the creative process, as the interpreter of textual meaning, has the potential to tip the balance between author and the public almost exclusively in favor of the public interest.<sup>228</sup>

Such sentiments are perfectly representative of the legal movement to denigrate and *require* (as stated twice by Zemer) individual authors—who are specifically afforded exclusive rights by the Constitution—to compromise their own being, autonomy, and personality as they accede these rights to “other voices.” Conveniently, the “others” whom the DOA scholars purport to protect with their new interpretations of authorship are never defined. In fact, they cannot ever be defined.

As Pipes reasons, rights can only be afforded to human beings; therefore, the class rights or social rights of the type defended by the DOA scholars “are a phantom.”<sup>229</sup> Regardless of this fact, copyright scholars are determined to make spurious and unsupported claims suggesting the alternative, stating, for instance, that “Romantic notions such as originality still persist in the field even though in many cases corporations and other collective entities are doing the creating.”<sup>230</sup>

Pipes warns against the dangers of this modern habit of thinking in terms of legislating for group, over individual, rights because “just as it can

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226. *Id.* at 1.

227. The Creative Commons is an alternative to the Copyright Act created by copyright professor Lawrence Lessig (who also ironically publishes his own books under the Copyright Act). In its own words, Creative Commons is “a global nonprofit organization that enables sharing and reuse of creativity and knowledge through the provision of free legal tools.” See Peter L. Skolnik, *Navigating Social Media Copyrights*, N.J. LAW., October 2013, at 7.

228. Long, *supra* note 101, at 1189.

229. PIPES, PROPERTY AND FREEDOM, *supra* note 217, at 289.

230. Fukumoto, *supra* note 78, at 903.

be used to identify those who qualify for special benefits, so it can serve to single them out for special punishment.”<sup>231</sup> The tyrannical destruction of Winston’s glass paperweight—and ultimately his own life—represent the evident repercussions of a system of government that undervalues natural individual rights and replaces them with untenable, undefinable, and manifestly unjust collective ownership rights.

#### D. “2+2=5”: The Loss of Objective Knowledge

In “The Prevention of Literature,” Orwell contends that “[f]reedom of the intellect means the freedom to report what one has seen, heard, and felt, and not to be obliged to fabricate imaginary facts and feelings.”<sup>232</sup> In *Nineteen Eighty-Four*, Orwell thematically represents this basic freedom to speak objective facts by the phrase, “two and two are four.”

Throughout the novel, Winston repeats this mathematical truism—now considered a “secret doctrine” in Oceania—as he struggles to maintain his connection to objective reality, and his sanity.<sup>233</sup> The phrase first appears when Winston strives in Part I to write in his diary and he contemplates how difficult it is for anyone today to know what life had *really* been like prior to the Revolution.<sup>234</sup> He takes out a children’s history book, from which he reads largely fabricated, propagandist stories in which the former world of Oceania was depicted as a “miserable place” where children were whipped, starved, and had no place to sleep:

He picked up the children’s history book and looked at the portrait of Big Brother which formed its frontispiece. The hypnotic eyes gazed into his own. It was as though some huge force were pressing down upon you—something that penetrated inside your skull, battering against your brain, frightening you out of your beliefs, persuading you, almost, to deny the evidence of your senses. In the end, the Party would announce that two and two made five, and you would have to believe it . . . And what was terrifying was not that they would kill you for thinking otherwise, but that they might be right. For, after all, how do we know that two and two make four? Or that the force of gravity works? Or that the past is unchangeable?<sup>235</sup>

This scene illustrates just how effective the propagandist mechanisms of the Memory Hole and Newspeak had been in confusing and indoctrinating citizens of Oceania to question objective facts and forget historical events. It also foreshadows the end of the novel when O’Brien finally and successfully breaks Winston’s will by brainwashing him not only to *speak*

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231. PIPES, PROPERTY AND FREEDOM, *supra* note 217, at 289.

232. Orwell, *Prevention*, *supra* note 141, at 934.

233. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 230.

234. *Id.* at 75.

235. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 83-84.

the words “two plus two equals five,” but to actually *believe* them; and not only to *accept* Big Brother, but to actually *love* him.<sup>236</sup>

Orwell—in his typical vatic fashion—also predicts in “The Prevention of Literature” the universal negation of objective reality that would become the prominent feature of radical postmodernist thought. He observes that, “[i]n our age, the idea of intellectual liberty is under attack from . . . its theoretical enemies, the apologists of totalitarianism”<sup>237</sup> and that

[a] totalitarian society which succeeded in perpetuating itself would probably set up a schizophrenic system of thought, in which the laws of common sense held good in everyday life and in certain exact sciences, but could be disregarded by the politician, the historian, and the sociologist. Already there are countless people who would think it scandalous to falsify a scientific textbook, but would see nothing wrong in falsifying an historical fact. It is at the point where literature and politics cross that totalitarianism exerts its greatest pressure on the intellectual.<sup>238</sup>

The “schizophrenic system” Orwell adroitly predicted in his writings would begin to take actual shape in the form of French postmodernism some twenty years later, and snowball across the Western world in the forms of deconstructionism, cultural relativism, and now—Cancel Culture.

With these writings, Orwell desperately attempted to convince his fellow intellectuals of the cultural dangers inherent in reconfiguring facts for political gain and the denial of scientific rationalism and other post-Enlightenment principles. All of these basic tenets, however, became anathema to the radical progressivists, who routinely use tactics such as  $2+2=5$  to deliberately remove the objective meaning of everything, with their goal to “destabilize any sense of solidity and meaning and then to use the ensuing confusion to advance a particular form of radical politics.”<sup>239</sup>

Foucault, for example, openly wrote, “it is meaningless to speak in the name of—or against—Reason, Truth, or Knowledge.”<sup>240</sup> Having deconstructed these terms and particularly claiming that reason “is the ultimate language of madness,” the radicals are able to assert their relativistic ideology that “there is nothing to guide or constrain our thoughts and feelings. So we can do or say whatever we feel like.”<sup>241</sup> Postmodernism, according to Hicks, thus becomes a political, activist strategy against the coalition of reason and power, which seeks not to find the foundation and conditions of truth, but only to exercise power for the purpose of social change.<sup>242</sup>

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236. *Id.* at 303.

237. Orwell, *Prevention*, *supra* note 171, at 931.

238. *Id.* at 936.

239. James Lindsay, *2+2 Never Equals Five*, NEW DISCOURSES (Aug. 3, 2020), <https://newdiscourses.com/2020/08/2-plus-2-never-equals-5/> [https://perma.cc/KCG9-TWWJ].

240. HICKS, *supra* note 40, at 2.

241. *Id.* at 2.

242. *Id.* at 3.

Enter the Cancel Culture movement. In late 2019, Seattle Public Schools released a new draft curriculum aimed at “re-humanising” mathematics.<sup>243</sup> It suggests that Western math is racist because it has been used to “oppress and marginalize people of colour” by posing as the only legitimate expression of mathematical identity and intelligence.<sup>244</sup> The document goes on to ask, “Who gets to say if an answer is right?” and “How important is it to be right?”<sup>245</sup> One reporter actually chose Orwellian terminology to comment cynically on the initiative:

Two plus two may equal four, but if the student says five, you better not correct them, oppressor! Math, in Seattle schools, will become a social justice course. But that’s not all. The U.S. government will be posited as a racist institution that must be destroyed. If this is taught to students, it’s indoctrination at its most destructive.<sup>246</sup>

Orwell would have been dismayed—but not surprised—that we have arrived at a time in which an appreciative number of people are willing to question the certainties of mathematics, science, and engineering—the foundational principles of progress in a civilized society. In such a Foucauldian cloud of confusion, resentment, power struggle, and identity politics, we know that we are another step closer to an Oceania-like totalitarian society which, according to Orwell,

demands, in fact, the continuous alteration of the past, and in the long run probably demands a disbelief in the very existence of objective truth. The friends of totalitarianism . . . usually tend to argue that since absolute truth is not attainable, a big lie is no worse than a little lie. It is pointed out that all historical records are biased and inaccurate, or on the other hand, that modern physics has proven that what seems to us the real world is an illusion, so that to believe in the evidence of one’s senses is simply vulgar philistinism.<sup>247</sup>

James Lindsay summarizes this phenomenon as follows:

[I]n the conceptual operating system underlying Critical Social Justice (i.e., Woke) thought, 2+2 might sometimes equal 4, but we have to understand that accepting this as an objective statement of basic arithmetic contributes to a system of oppression that, in other corners of its existence, oppresses racial, gender, and sexual minorities, women, the overweight, the disabled, and people outside of the “Western context,” which is accused of accepting statements like “2+2=4” in an “uncritical” way (which means without using the favored Critical Theory of the relevant moment). Pause to breathe. The activists behind this really think like this,

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243. Catherine Gewertz, *Seattle Schools Lead Controversial Push to ‘Rehumanize’ Math*, EDUCATIONWEEKLY (Oct. 14, 2019), <https://www.edweek.org/teaching-learning/seattle-schools-lead-controversial-push-to-rehumanize-math/2019/10> [https://perma.cc/678U-ZTL4].

244. *See Id.*

245. *Id.*

246. Jason Rantz, *Seattle Schools document say math is oppressive, US government racist*, 770KTTH (Oct. 2, 2019), <https://mynorthwest.com/1537348/rantz-seattle-schools-document-say-math-is-oppressive-us-government-racist/> [https://perma.cc/S8FS-4ZDR].

247. Orwell, *Prevention*, *supra* note 171, at 936.

and one of the weirder battles of the culture war of the day rages around that fact.<sup>248</sup>

Copyright scholars have run rampant with similar Foucauldian approaches that invariably strive with great aplomb to read white supremacist power tactics into the concept and meaning of authorship. Whereas the early legal DOA scholarship focused mainly on changing the individual nature of creative authorship to one of common, collective ownership—as discussed in Section II.B—a change has recently occurred.

In step with the mentality of Cancel Culture and an even more pernicious post-Trump wave of radical progressivism, copyright writers are now claiming that providing copyright authorship privileges to one group (the white male) automatically and necessarily disenfranchises underprivileged minority voices. For example, citing Foucault, John Tehranian asserts that copyright authorship is

a vehicle through which authority to control narratives and semiotics passes. And the location of authorship and its attendant rights in one individual can result in demeaning and devaluing the authorial contributions of another individual.<sup>249</sup>

By employing the feminist-cinematic metaphor of the “male gaze,”<sup>250</sup> he claims that, in the absence of significant reform, traditional copyright laws

. . . will continue to empower the male gaze, giving legal bite to a system of production and rights-vesting that all too frequently reduces women, indigenous communities, minority racial groups, and the poor to passive objects in creative works, deprived of agency, operating only in the service of, and at the behest of, the traditional male mastermind. In a post-industrial society where rights to intellectual, rather than tangible, property increasingly drive economic wealth and political muscle, we can no longer afford to ignore the profound implications of copyright’s male gaze.<sup>251</sup>

While the usage of the catchy “male gaze” metaphor may resonate with radical feminists and other identity-politics ideologues who will nod in agreement with this and similar statements in Tehranian’s article, it leaves rational folks who have actually practiced copyright law in the trenches scratching their heads, asking for both clarification and resolution of these perceived wrongs. Common to most DOA articles, Tehranian never provides guidance on the “significant reform” that should occur in order to make existing copyright regulations more fair or accessible to the allegedly marginalized groups he broadly references.

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248. Lindsay, *supra* note 239.

249. Tehranian, *supra* note 68, at 385.

250. Film critic Laura Mulvey coined the term “male gaze” in 1975 “to describe the cinematic angle of a heterosexual male on a female character.” It has become a familiar cultural perspective, which some believe to have “significant and pervasive psychological costs for women that they might not even be aware of.” See Tara Well, *Taking Back the Male Gaze: The Secret to Feeling Beautiful and Confident*, PSYCHOLOGY TODAY (Nov. 6, 2017), <https://www.psychologytoday.com/us/blog/the-clarity/201711/taking-back-the-male-gaze> [https://perma.cc/LV5B-WNL3].

251. Tehranian, *supra* note 68, at 393.

Similarly, in advocating for a “New Enlightenment” in copyright law that employs “cultural analysis” and “cultural theory” (both undefined) Madhavi Sunder claims that

under a cultural analysis, law would want to ensure that all individuals—not just the most powerful—would have access to the channels of making cultural meaning. A cultural theory of intellectual property recognizes not only the symbiotic relationship between technology and intellectual property, but also views intellectual property—including its technology policy—within a context of cultural development and social movements, from the rise of identity politics to the elaboration of Knowledge Societies and the rumblings of a New Enlightenment.<sup>252</sup>

Again, Sunder’s article slings together all the popular phrases and feel-good multiculturalist terminology. Yet, it leaves the reader wondering what a regime that views IP “within a context of cultural development and social movements” would look like or, even more importantly, exactly how the current copyright regime fails these charges.

More disturbingly, both authors conveniently fail to communicate the fact that copyright rights are available today to all authors no matter their gender, race, creed, or color and—most importantly—the message or meaning they convey. Unlike obtaining a patent or even a trademark, which requires specialized knowledge and lengthy and expensive registration processes, the Copyright Act of 1976 made federal protection of works of authorship automatic upon fixation.<sup>253</sup> The standard of originality required for copyright protection is also very low, requiring only a “modicum of creativity,”<sup>254</sup> which is never judged by a proscribed or legalized aesthetic style or taste.<sup>255</sup>

Copyright, thus, is decidedly *not* the zero-sum game that Tehranian and Sunder suggest. The truth is far from it. If a million white men secure copyrights for their creations, so can ten, twenty, or forty million women and minorities do the same with respect to their own works as long as they are fixed in a tangible medium of expression, original, and independently created.<sup>256</sup> Cooper and May have observed that when copyrights (as well as patents) are granted

Others remain free to create and invent as they so choose. The liberty of prospective authors and inventors to offer their own creations and

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252. Sunder, *supra* note 48, at 332.

253. Lydia Pallas Loren, *Fixation As Notice in Copyright Law*, 96 B.U. L. REV. 939, 940 (2016) (“today [fixation] is the only remaining required indication of the content of the author’s expressive work to which copyright protection may attach.”).

254. *Feist Publ’ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345-6 (1991).

255. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (holding that that a circus advertisement and other alleged forms of low art could be copyrighted alongside fine art because “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations”).

256. *See* MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 428 (6th ed. 2014) (“A work is copyrightable if original and independently created, even though it is identical to another copyrighted work.”).

inventions as competing alternatives is limited only by their own creative and inventive resources and by the limited rights of original authors and inventors.<sup>257</sup>

At the same time, the profitability and popularity of creative works is determined by marketplace factors in a free economy outside of the realm and legal dictates of copyright law.<sup>258</sup> It is unfortunate, but not uncommon, that neither Tehranian nor Sunder even attempt to explain in their articles exactly whose rights would be demeaned and devalued and how exactly non-white/non-males are deprived from the spoils of creation, or copyright. It is, though, abundantly clear that, employing a postmodern lens, the scholars aim to spark with their words and sentiments an unresolvable and phantasmagoric struggle, covertly exacerbating existing tension and animosity among various groups along lines of gender and race.

Writing along similar lines, Xiyin Tang so regrets the presence of canonical works written by white males (and even white females), that she takes this line of unreasoned scholarship a step further to claim that the reason they have prestigious status “is because they depend on privileging one set of dominant social ideals over another.”<sup>259</sup> Her solution? In order to “hijack” those works and take back power for the marginalized females and minorities, the white male textual sites of domination and oppression must first be emptied out of meaning—excavated, in effect—and then filled, this time with the voice of the oppressed.<sup>260</sup>

Tang further maintains, “[w]ithout the violent appropriation of the oppressor’s work, the shock value of both the new work and the message behind the taking would be lost.”<sup>261</sup> Again, it is unclear what this string of sentences means for the actual practice of copyright law and within the real world, but the disdain for the individual author from this student writer sadly rings loud and clear. And so does her undercurrent that encourages a metaphorical, yet ideologically dangerous, form of violence against the perceived enemies of the allegedly oppressed voices she claims to represent.

When their instructors spew such venom, and irresponsibly condone violence for the “shock value” effect of spreading their Marxist ideologies, it is no wonder that today 64% of college students agree that the rioting, looting, and burning of thousands of businesses across the nation in 2020 (and continuing into 2021) is justified to some degree.<sup>262</sup> With their never-

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257. COOPER & MAY, *supra* note 38, at 56.

258. See, e.g., Elizabeth L. Rosenblatt, *Copyright’s One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 606 (2019) (noting that copyright “is facially neutral when it comes to creators’ identities and the genre of their work. Its incentives and protections are purely economic, and explicitly unconcerned with the identities of creators and the quality or genre of their work.”).

259. Xiyin Tang, *That Old Thing, Copyright . . . : Reconciling the Postmodern Paradox in the New Digital Age*, 39 AIPLA Q.J. 71, 98 (2011).

260. *Id.*

261. *Id.*

262. Brad Palumbo, *65% of College Students Say Rioting and Looting is ‘Justified,’ New Poll Finds*, FOUNDATION FOR ECONOMIC EDUCATION (Oct. 28, 2021), <https://fee.org/articles/65-of-college-students->



ending claims of oppression by hegemonic narratives, the radical progressive academics seek to rewrite facts and subvert truths. Moreover, any reasoning that objectively disproves the truth and correctness of their assertions must “be deconstructed by rhetorical tricks and marginalized by moral and, perhaps, physical force and intimidation.”<sup>263</sup>

#### E. “Doublethink”: The Abuse of Language for Political Gain

One common rhetorical trick used by politicians and academics, and abhorred by Orwell, was their abuse of language to confuse and obfuscate meaning. Orwell was a passionate believer in the responsibility of the writer “to make accessible to the ordinary intelligent reader ideas and analysis however strange or difficult.”<sup>264</sup> He routinely chastised academic writing for reveling in unclear and ambiguous language that is difficult to read and understand, with the hopes that if readers find the writing to be obscure, they will also believe it is necessarily profound.<sup>265</sup>

Based on Orwell’s astute and brave observations in his articles, he demonstrates in *Nineteen Eighty-Four* how Ingsoc abuses language to indoctrinate the citizens of Oceania into a collective mindset that leaves them groping for truth and even questioning their own good judgment. This phenomenon is accomplished in “the labyrinthine world of doublethink,” which Winston describes in the beginning of the novel:

To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which canceled out, knowing them to be contradictory and believing in both of them; to use logic against logic, to repudiate morality while lying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy; to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again: and above all, to apply the same process to the process itself. That was the ultimate subtlety: consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed. Even to understand the word ‘doublethink’ involved the use of doublethink.<sup>266</sup>

Doublethink is achieved by the elimination of the logic that is inherent in the English language, and its replacement with Newspeak, which creates words having two mutually contradictory meanings, such as *blackwhite*.<sup>267</sup> Blackwhite, when applied to an opponent, means “the habit of impudently

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[say-rioting-and-looting-is-justified-new-poll-finds/](https://perma.cc/YZB8-HGJ7) [https://perma.cc/YZB8-HGJ7] (The poll was conducted by McLaughlin & Associate in conjunction with Yale University’s conservative William F. Buckley Program. It surveyed a nationally representative sample of 800 college students on a wide array of issues, from the coronavirus to race in America).

263. Lindsay, *supra* note 239.

264. WILLIAMS, *supra* note 17, at 3.

265. *Id.*

266. ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1, at 37-38.

267. *Id.* at 221.

claiming that black is white, in contradiction of the plain facts,” but when it is applied to a Party member,

it means a loyal willingness to say that black is white when Party discipline demands this. But it means also the ability to *believe* that black is white, and more, to *know* that black is white, and to forget that one has ever believed the contrary. This is a continuous alteration of the past, made possible by the system of thought which really embraces all the rest, and which is known in Newspeak as *doublethink*.<sup>268</sup>

Thematically, doublethink is the literary mechanism Orwell uses in *Nineteen Eighty-Four* to serve as the culmination of all of the most insidious tactics of Big Brother to reduce humanity to a collective, thoughtless mass of pliant and obedient automatons: the Memory Hole, Newspeak, 2+2=5, and Two Minutes Hate (discussed in Section IV.F). For, if a totalitarian regime can successfully alter thought by the widespread use and acceptance of manipulative and essentially meaningless language, it then holds the key to unleashing its unlimited power.

In “Politics and the English Language,” another classic essay Orwell wrote prior to *Nineteen Eighty-Four*, he catalogues what he considered the modern vices of language which produced “a stagnant and stifling mental atmosphere in which *thought* is commonly replaced with the automatic recitation of certain prescribed words or phrases ‘tacked together.’”<sup>269</sup> Here Orwell discusses a theme that runs through much of his body of literature, including *Nineteen Eighty-Four*: the intentional use of vague and subversive language by academics and ruling political parties to hide rather than express the truth in order to gain power and/or enlist followers. Underneath such tactics lie “the half-conscious belief that language is a natural growth and not an instrument which we shape for our own purposes.”<sup>270</sup>

In this essay, Orwell keenly observes how inattentive and sloppy writing has maligned the English language to the point where it has become “ugly and inaccurate,” making it “easier for us to have foolish thoughts.”<sup>271</sup> Claiming that modern English is “full of bad habits which spread by imitation,” Orwell cites five examples of prose written by professors and journalists (and one from a pro-communist pamphlet). After dissecting the passages for their rabid inaccuracies, Orwell observes:

Each of these passages has faults of its own, but, quite apart from avoidable ugliness, two qualities are common to all of them. The first is staleness of imagery; the other is lack of precision. The writer either has a meaning and cannot express it, or he inadvertently says something else, or he is almost indifferent as to whether his words mean anything or not. This mixture of vagueness and sheer incompetence is the most marked

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268. *Id.*

269. HICKS, *supra* note 40, at 167-68 (emphasis in original) (quoting Orwell in “Politics and the English Language”).

270. George Orwell, *Politics and the English Language*, in GEORGE ORWELL: ESSAYS 954, 954-967 (Peter Davison, ed., 2002) [hereinafter, *Politics*].

271. *Id.*

characteristic of modern English prose, and especially of any kind of political writing. As soon as certain topics are raised, the concrete melts into the abstract and no one seems able to think of turns of speech that are not hackneyed: prose consists less and less of words chosen for the sake of their meaning, and more and more of phrases tacked together like the sections of a prefabricated hen-house.<sup>272</sup>

Orwell provides examples of how both thought can corrupt language, and language can corrupt thought, maintaining that “[a] bad usage can spread by tradition and imitation, even among people who should and do know better.”<sup>273</sup> He cites examples of obscure and shoddy prose (and how readily accepted such could be), but he was even more concerned how easily writers have come “to deliberately pass off one thing as another, or to hide bad reasoning in a rhetorical fog.”<sup>274</sup> An intensely practical man, Orwell was also highly critical of academic language that “lacks the necessary specificity to actually tell anyone what they should to in any real-world circumstance.”<sup>275</sup>

i. *How the Radical Postmodernists use Doublethink to Perpetuate the Death of the Author Trope*

The usage of doublethink—and its corollary, doublespeak—is essential not only to the goals of Ingsoc in Orwell’s novel, but also to the eternalization of the largely incoherent writing used by the postmodernist French theorists who heralded the DOA movement. I myself had not read or studied Barthes or Foucault until I recently embarked upon my graduate studies in English Literature. I recall reading the convoluted ideas and indecipherable sentences in both “The Death of the Author” (Barthes) and “What is an Author” (Foucault) over and over again, confusedly feeling like I needed to enroll in a remedial course in theory to untangle what it was I simply could not grasp in the postmodernist writings that are all the rage in academia. Here is a shining example, cited frequently by copyright scholars, from “What is an Author”:

the author is not an indefinite source of significations that fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. When a historically given function is represented in a figure that inserts it, one has an ideological production. The author is therefore the ideological

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272. *Id.* at 956-957.

273. *Id.* at 964.

274. WILLIAMS, *supra* note 17, at 168.

275. *Id.* at 169.

figure by which one marks the manner in which we fear the proliferation of meaning.<sup>276</sup>

Concomitantly, this exact language is reduplicated, yet never fully explained, in countless law review articles discussing the legal ramifications of the putative death of the copyright author.<sup>277</sup> However, even self-proclaimed anarchist Kristian Williams admits, “if a sentence cannot be translated from anarcho-English into plain English, there is a very good chance that it is meaningless.”<sup>278</sup>

On further investigation into my frustrating and perplexing experience with modern French theory, I was relieved to find that a host of contemporary journalists and scholars—many of whom are intentionally *not* studied at university—was beginning to expose postmodernism as “intellectual terrorism masquerading as faux-profundity,” as described by Gad Saad.<sup>279</sup> Examining the same attributes of Marxist-leaning intellectuals as Orwell did in “Politics and the English Language,” Saad explains that the reason why postmodernism thrives in academia is “because of the assumption that if something is nearly impossible to understand, it must be profound.”<sup>280</sup> To buttress his assertion, Saad recounts an actual conversation between Foucault and an American philosopher in which Foucault actually admitted that “[i]n France, you gotta have ten percent incomprehensible, otherwise people won’t think it’s deep—they won’t think you’re a profound thinker.”<sup>281</sup>

I was, and remain, astounded by the fact that countless academics blindly follow such a narcissistic person who would intentionally mangle the English language in order to *seem* profound, and then glibly admit to doing so. In a recent article unpacking the “bewildering theory” of postmodernism, Helen Pluckrose eloquently explains the conundrum as follows:

The irrational and identarian “symptoms” of postmodernism are easily recognizable and much criticized, but the ethos underlying them is not well understood. This is partly because postmodernists rarely explain themselves clearly and partly because of the inherent contradictions and inconsistencies of a way of thought which denies a stable reality or reliable knowledge to exist.<sup>282</sup>

As the mystery of why I seemed unable to grasp either the substantive meaning or purpose of the early DOA writings began to unravel, I dug more

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276. Michel Foucault, *What Is an Author?* in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM*, 141 (Josue V. Harari ed., 1979).

277. See, e.g., David Lange, *At Play in the Field of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, *LAW & CONTEMP. PROBS.* 139, 143 (1992); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward A Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293, 1294 (1996); and Tehranian, *supra* note 68, at 385.

278. WILLIAMS, *supra* note 17, at 175.

279. GAD SAAD, *THE PARASITIC MIND: HOW INFECTIOUS IDEAS ARE KILLING COMMON SENSE* 75 (2020).

280. *Id.*

281. *Id.*

282. Pluckrose, *supra* note 82.

into the personal background of Foucault, who had become the darling prophet of copyright academicians across the country. Sadly, I found that he was a very troubled soul.

Coincidentally, during the writing of this section of my article, I was shocked to read a breaking story that French-American intellectual Guy Sorman told Britain's *The Sunday Times* that he witnessed Foucault—one of the most cited academics in the world—sexually abusing children as young as eight-years-old while he lived in Tunisia during the 1960s.<sup>283</sup> In addition to this claim, Sorman said that

[d]espite Foucault's self-professed Marxist leanings . . . his behavior in real life was indicative of French elitism, noting that Foucault 'believed there were two morals, one for the elite, which was immoral, and one for the people, which should be restrictive.'<sup>284</sup>

Sorman's allegation, while not yet proven, is consistent with the fact that Foucault signed a petition in 1977 along with Barthes and their other radical postmodernist friends, which sought to legalize sexual relations with children aged 13 or above in France.<sup>285</sup> The petition stated, in part, that "children and adolescents have the right to a sexual life."<sup>286</sup> It is not surprising that I had to dig deeply to find the facts surrounding Sorman's claim because none of the mainstream media outlets covered it. What *is* surprising is that contemporary academics nonetheless continue to worship Foucault and his destructive philosophies.

I learned further from Jordan Peterson's<sup>287</sup> body of work—for which I remain wholly thankful for and indebted to—that the French postmodernists I continue to struggle with (now, in so many ways) were indeed "powerfully

283. Kurt Zindulka, *Woke Philosopher Michel Foucault Raped 8-Year-Old Children in Tunisian Cemeteries: Claim*, BREITBART (March, 29, 2021), <https://www.breitbart.com/europe/2021/03/29/woke-hero-philosopher-michel-foucault-raped-children-as-young-as-8-years-old/> [https://perma.cc/JP9Y-3QQR].

284. *Id.*

285. *Guy Sorman Accuses Michel Foucault of Abusing Boys in Tunisia*, DAILY SABA (March 30, 2021), <https://www.dailysabah.com/arts/guy-sorman-accuses-michel-foucault-of-abusing-boys-in-tunisia/news> [https://perma.cc/4GP7-TF6K].

286. Marie Doezema, *France, Where Age of Consent is up for Debate*, THE ATLANTIC (March 10, 2018), <https://www.theatlantic.com/international/archive/2018/03/frances-existential-crisis-over-sexual-harassment-laws/550700/> [https://perma.cc/D8LJ-T5L2].

287. Jordan B. Peterson is a Canadian psychology professor at the University of Toronto and former Harvard professor and clinical psychologist. In the 2010s, he began to receive worldwide attention for his in-class and public criticism of radical postmodernist ideological views and for his supposedly conservative agenda, which espouses inspirational guidelines for living a responsible, goal-oriented, productive life as opposed to living an existence of victimhood. His two books, *12 Rules for Life: An Anecdote to Chaos* and *Beyond Order: 12 More Rules for Life*, have been consistently misunderstood, mischaracterized, and maligned by academia and the mainstream media for allegedly espousing white-male "patriarchal" viewpoints. *See, e.g.*, Nellie Bowles, *Jordan Peterson, Custodian of the Patriarchy*, THE NEW YORK TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/style/jordan-peterson-12-rules-for-life.html> [https://perma.cc/9RXD-TU6Y]; and Kelefa Sanneh, *Jordan Peterson's Gospel of Masculinity*, THE NEW YORKER (Feb. 26, 2018), <https://www.newyorker.com/magazine/2018/03/05/jordan-petersons-gospel-of-masculinity> [https://perma.cc/6NQN-FRFS].

influenced by Marx.”<sup>288</sup> Peterson observes how Foucault and the other radicals linguistically and intentionally disguised their continuing loyalty to a new brand of Marxist ideology that essentially replaces “economics” with “power” as the primary motivating force behind all human behavior.<sup>289</sup> In the writings of Stephen R.C. Hicks, I uncovered even more about Foucault’s state of mind as expressed in one of his own essays in which he

speaks almost longingly about the coming erasure of mankind: Man is ‘an invention of recent date’ that will soon ‘be erased, like a face drawn in sand at the edge of the sea.’<sup>290</sup>

It then occurred to me why I had been so unable to put my finger on what I similarly was never able to understand about the DOA theories that were popping up like bad pennies in scholarship analyzing copyright authorship. I realized my colleagues had fully been taken in by, and aligned themselves with, these Marxist-leaning faux-Foucauldian theories. Over and over again in their scholarship they boldly and confidently re-cited Foucault (and each other) as if the dour claim of the dead author had been fully vetted, verified, accepted, and even had become sacrosanct.

ii. *The Effect of Postmodernist Doublethink on Copyright*

Due to the vast proliferation of the DOA scholarship, Foucault’s overt collectivist theories have been surreptitiously inserted into the scholarly conversation about copyright authorship by way of persistence rather than objective or rational proof, as described by Helprin:

Taken for fact, misconception builds upon previous misconception until what emerges is the result of a high-speed game of telephone among thousands (or tens or hundreds of thousands) of people, in which responsibility to the truth is considered met if one has read something somewhere that say something close to what one will now further distort.<sup>291</sup>

Indeed, within my extensive DOA research, I observed that over the last few decades it has become an accepted truth in the academy that Foucault and his band of French theorists have “proven” that the author is dead.

Recently, Fukumoto took the DOA conversation to a new level, theorizing that “[c]opyright law’s reliance on the author conception becomes increasingly problematic if one considers the artistic and intellectual trends that view the ‘author’ as a social construct.”<sup>292</sup> He boldly maintains that “[t]he historical claim that the author ideology was the product of a particular epoch leads to the general philosophical point that authors as originators do

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288. JORDAN B. PETERSON, BEYOND ORDER: 12 MORE RULES FOR LIFE 173 (2021) [hereinafter BEYOND ORDER].

289. *Id.*

290. HICKS, *supra* note 40, at 195.

291. HELPRIN, *supra* note 52, at 41.

292. Fukumoto, *supra* note 78, at 910.

not exist now and indeed *never existed*.”<sup>293</sup> He attempts to justify his cavalier dismissal of thousands of years of human creativity and originality by arguing that

The post-structuralist attack on the author is part of a more sweeping criticism of the concepts of a subject, an individual, a consciousness, a method, and a meaning. Each of these concepts is a philosophical fiction that has its uses, but that post-structuralists see as having no existence prior to its social construction. Each post-structuralist has a different way of dealing with or discarding these now-discredited concepts.<sup>294</sup>

The most disheartening section of this article, though, is the following observation of Derrida’s motive in deconstructing the author, which Fukumoto enthusiastically embraces:

Derrida’s work . . . provides the most thorough and sweeping philosophical justification for undermining the concept of the author, individual, or consciousness. He tries to show that the tradition of Western thought since Plato depends upon such concepts as truth, presence, substance, subject, “consciousness, God, man, and so forth.” “Deconstruction” is the name of the project to undermine these concepts. Deconstruction does not mean destroying the structure of Western thought. That may indeed be the eventual goal, but it cannot be achieved all at once. Instead, deconstruction seeks to weaken the structure by employing the tools of Western thinking against itself . . .<sup>295</sup>

Fukumoto essentially praises Derrida for his attacks on authorial originality “through his sweeping denial that human consciousness, as a non-linguistic, non-material entity, produces language.”<sup>296</sup> Now that students of the DOA scholars such as Fukumoto routinely accept and regurgitate such ridiculous notions that the canon of great Western literature was not created by the minds of individual, original, and in many cases genius authors, but from some other vague, undescribed phantom scribe, the ground for doing away with copyright altogether has certainly been well laid.

Still, the question that has haunted me during the past couple decades during which I have studied copyright and the DOA syndrome is similar to the one that perplexes Winston throughout *Nineteen Eighty-Four* when pondering the motives behind the soulless and evil policies of Big Brother: *Why?*

I understand the need for copyright balance and equity, and even substantial reform to better accommodate the complexities inherent in our digitally driven creative culture. But *why* are DOA scholars—from Foucault to Fukumoto—so insistent on negating, maligning, and finally killing the figure who makes the progress of creativity, art, and beauty possible in the first place? That is the question to be explored in the last and most poignant

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293. *Id.* at 904 (emphasis added).

294. *Id.* at 912-13.

295. *Id.* at 914-15.

296. *Id.* at 916.

and terrifying of Orwell's themes in *Nineteen Eighty-Four*: "Two Minutes Hate."

#### F. "Two Minutes Hate": Power and the Destruction of Progress

Throughout the novel, the Party subjects Winston and his fellow workers in the Records Department of the Ministry of Truth to a daily ritual called Two Minutes Hate, a propagandist tactic used by Big Brother to keep the citizens committed to publicly extolling Ingsoc and reviling Goldstein, the scapegoat who is dubbed The Enemy of the People.<sup>297</sup> Goldstein's face appears on the telescreen for two minutes to remind the citizens of Oceania that

[h]e was the primal traitor, the earliest defiler of the Party's purity. All subsequent crimes against the Party, all treacheries, acts of sabotage, heresies, deviations, sprang directly out of his teaching.<sup>298</sup>

The distinguishing characteristic of Orwell's Two Minutes Hate—a daily intake of visceral denial of all things anti-Ingsoc—is that it slowly builds the citizens of Oceania up into a "frenzy," which makes it impossible for them to avoid joining in the chaos:

A hideous ecstasy of fear and vindictiveness, a desire to kill, to torture, to smash faces in with a sledgehammer, seemed to flow through the whole group of people like an electric current, turning one even against one's will into a grimacing, screaming lunatic. And yet the rage one felt was an abstract, undirected emotion which could be switched from one object to another like the flame of a blowlamp.<sup>299</sup>

Toward the end of the two minutes, the citizens work themselves into a slow, deep chanting of "B-B!. . .B-B!"<sup>300</sup> Winston describes this ritual as "an act of self-hypnosis, a deliberate drowning of consciousness by means of rhythmic noise that is "curiously savage."<sup>301</sup>

Orwell's inspiration for Two Minutes Hate was undoubtedly influenced by the actual propagandist practices that had occurred during the twentieth century during which Orwell wrote. Unlike Western democracies, which are generally antipathetic to the whole idea of propaganda, film propaganda was an important and visible weapon used in the totalitarian governments of

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297. ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1, at 13.

298. *Id.* at 14.

299. *Id.* at 16.

300. *Id.* at 18 (the initials of Big Brother).

301. *Id.* at 18-19.



Soviet Russia and Nazi Germany for political indoctrination and social control.<sup>302</sup> Moreover, it remains so in the Communist Party of China.<sup>303</sup>

Indeed, totalitarian governments recognize that propaganda played an important role in their revolutionary struggles.<sup>304</sup> Thus—similar to the Ministry of Truth in *Nineteen Eighty-Four*—they established centralized state apparatuses for the dissemination of political propaganda: the People’s Commissariat for Enlightenment in Soviet Russia and the Ministry for Propaganda and Popular Enlightenment in Nazi Germany.<sup>305</sup>

Orwell introduces Two Minutes Hate early in the novel as the literary mechanism by which he later reveals the Party’s true motives for obliterating its democratic society and creating such a hellish and bleak society as Oceania in its stead. As Winston wonders whether he is a lunatic as he contemplates the reasons behind his strong desire to chronicle the dire story of his existence in Oceania in his diary, he describes his confusion regarding the motives of Big Brother:

What most affected him with the sense of nightmare was that he had never clearly understood *why* the huge imposture was undertaken. The immediate advantages of falsifying the past were obvious, but the ultimate motive was mysterious. He took up his pen again and wrote: *I understand HOW: I do not understand WHY.*<sup>306</sup>

When Winston finally has a chance to begin reading *the book* midway through *Nineteen Eighty-Four*, he is about to peruse the section that reveals the ultimate purpose of Ingsoc:

Here we reach the central secret. As we have seen, the mystique of the Party . . . depends upon *doublethink*. But deeper than this lies the original motive, the never-questioned instinct that first led to the seizure of power and brought *doublethink*, the Thought Police, continuous warfare and all the other necessary paraphernalia into existence afterwards. This motive really consists . . .<sup>307</sup>

Maddeningly for the reader (or at least, this reader), Winston is interrupted from his reading before the central secret is revealed to either him or Orwell’s readers.

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302. James Chapman, *Review Article: The Power of Propaganda*, 35 J. OF CONTEMP. HIST. 679, 680 (2000). (Reviewed Work(s): Britain’s Secret Propaganda War 1948-1977 by Paul Lashmar and James Oliver: Foward Soviet! History and Non-Fiction Film in the USSR by Graham Roberts: European Culture in the Great War: The Arts, Entertainment, and Propaganda, 1914-1918 by Aviel Roshwald and Richard Sites: Film Propaganda: Soviet Russia and Nazi Germany by Richard Taylor).

303. Emma Sun, *Propaganda Films to Dominate Chinese Theaters in Anniversary Year*, VARIETY (June 16, 2019, 5:25 PM), <https://variety.com/2019/film/asia/propaganda-films-dominate-chinese-theaters-in-anniversary-year-1203245115/> [https://perma.cc/AR45-75Y5]; Clarissa Sebag Montefiore, *How China Distorts its Minorities Through Propaganda*, BBC (Dec. 15, 2013), <https://www.bbc.com/culture/article/20131215-how-china-portrays-its-minorities> [https://perma.cc/5KLP-A5RB].

304. Chapman, *supra* note 302, at 680.

305. *Id.*

306. ORWELL, NINETEEN EIGHTY-FOUR, *supra* note 1, at 83 (emphasis in original).

307. *Id.* at 226.

Orwell finally unveils Ingsoc's agenda at the end of the novel, just as O'Brien is about to break Winston's spirit and convert him into the Brotherhood. Aware that Winston has been reading a copy of *the book*, O'Brien compels him to state why it is that Ingsoc clings to power. Savagely beaten down both physically and spiritually, Winston contemplates his response to O'Brien's inquiry:

He knew in advance what O'Brien would say. That the Party did not seek power for its own ends, but only for the good of the majority. That it sought power because men in the mass were frail cowardly creatures who could not endure liberty or face the truth and must be ruled over and systematically deceived by others who were stronger than themselves.<sup>308</sup>

The surprising and shocking reveal of the novel follows with O'Brien's reply:

Now I will tell you the answer to my question. It is this. The Party seeks power entirely for its own sake. We are not interested in the good of others; we are interested solely in power. Not wealth or luxury or long life or happiness; only power, pure power.<sup>309</sup>

O'Brien continues by informing Winston that once Ingsoc fully institutes all its power-hungry stratagems, all characteristics of life previously known to Western democracy would end: there would be no wives and no friends; children will be taken from their mothers at birth; the sex instinct will be eradicated; there will exist no loyalty, no love, and no laughter.<sup>310</sup>

But most importantly for the purposes of copyright law, in Ingsoc, "[t]here will be no art, no literature, no science."<sup>311</sup> Indeed, the entire post-Enlightenment, natural-rights inspired conception of Progress that our constitutional Framers and other Western democracies set in motion will be turned entirely on its head, as O'Brien informs Winston:

Progress in our world will be progress towards more pain. The old civilisations claimed that they were founded on love or justice. Ours is founded upon hatred. In our world there will be no emotions except fear, rage, triumph and self-abasement. Everything else we shall destroy—everything.<sup>312</sup>

With the Memory Hole and Newspeak, the Party had already begun to bring the achievements of great thinkers in line with the philosophies of Ingsoc:

Various writers, such as Shakespeare, Milton, Swift, Byron, Dickens and some others were therefore in process of translation: when the task had been completed, their *original writings*, with all else that survived of the literature of the past, would be destroyed. These translations were a slow and difficult business, and it was not expected that they would be finished before the first or second decade of the twenty-first century.<sup>313</sup>

In other words, right now!

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308. *Id.* at 274-75.

309. *Id.* at 275.

310. *Id.* at 280.

311. *Id.* at 279.

312. *Id.*

313. *Id.* at 325 (emphasis added).

And right now in the real world, thanks to Cancel Culture even George Orwell himself may find himself on the chopping block (he would not be surprised) as the radical progressives invent more and new ways every day to suppress viewpoints not in keeping with their collectivist and often Marxist agendas.<sup>314</sup> The most important recent development along these lines for the Cancel Culture warriors is the charge of “cultural appropriation,” in which writers and artists from majority or “power-holding” cultures are forbidden to engage with topics, themes, styles, or attitudes of cultural groups to which they do not belong, particularly those of minority or oppressed cultures.<sup>315</sup>

For example, in Oregon, a group of radical progressives recently created a social media listing of restaurants that should be canceled because their owners are white, yet they are serving Asian, Latin, African, and Indian cuisine.<sup>316</sup> The unnamed and anonymous group claims that the white-owned restaurants “hamper the ability for POC [people of color] to run successful businesses of their own (cooking their own cuisines) by either consuming market share with their attempt at authenticity or by modifying foods to market to white palates.”<sup>317</sup>

*The Portland Mercury* published an article about two white women who established a burrito truck business after visiting Mexico, falling in love with the authentic food, and attempting to reverse engineer the recipes they encountered there.<sup>318</sup> Hostile commentators “trashed the pair,” claiming it was “the latest example of white folks profiting off the labor of people of color,” and slamming their actions as “intellectual property theft.”<sup>319</sup>

Sadly, the culture bullies managed to prevail as the successful business went under.<sup>320</sup> Orwell’s brand of exhibiting power only for the sake of power is now present and reaping consequences in the real world. Doubtless, Foucault and his band of postmodern theorists would have approved of such a hate-inspired move—pitting one cultural group against another in the name of power—but copyright professors surely understand that the IP theft allegations for reverse engineering common recipes mentioned in the article are preposterous and meritless, right?

Wrong. Copyright scholars today are also in the habit of admonishing similar acts of cultural appropriation, defined in legal terms as the “taking from a culture that is not one’s own, intellectual property, cultural

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314. See Stewart, *supra* note 20.

315. *Id.*

316. Robby Soave, *White-Owned Restaurants Shamed for Serving Ethnic Food: It’s Cultural Appropriation*, REASON (May 23, 2017, 4:05 PM), <https://reason.com/2017/05/23/someone-created-a-list-of-ethnic-restaur/> [https://perma.cc/F9TA-2SFW].

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

expressions and artifacts, history and ways of knowledge.”<sup>321</sup> Another explanation of cultural appropriation is “the act of taking some product from a ‘source community’ culture and repurposing it in a different culture.”<sup>322</sup>

More recent law review articles openly frame cultural appropriation within a Foucauldean power lens. The authors of these articles suggest that the earlier definitions of the term “miss the component of dominance,” and should incorporate the sentiment that “the culture that is appropriating something is usually in a position of higher power in contrast with the culture whose idea is being appropriated.”<sup>323</sup>

Let me be abundantly clear. It is, of course, rational and meritorious to advocate for the protection of IP products created by people from Indigenous cultures. However, it is not admirable to do so at the expense of Western cultures that have a developed body of copyright laws, which have worked for centuries to protect original works.

It is true that aspects of Indigenous cultural property protections (or lack thereof) theoretically conflict with the legal requirements of Western copyright laws, such as originality and fixation.<sup>324</sup> It is also rational to observe that *real* appropriation of cultural artifacts occurs to the detriment of Indigenous societies. In fact, those working in international IP organizations such as the World Intellectual Property Organization continue to take important steps to increase awareness of the gaps in IP protection for many Indigenous societies.<sup>325</sup> Similarly, many serious scholars like my friend and colleague Dalindyebo Shabalala continue to advance workable solutions to bridge the gap between Westernized notions of original, fixed, exclusive individual copyright ownership with those of Indigenous practices that are more group oriented, non-commercial, and non-fixed.<sup>326</sup>

Unfortunately, though, other scholars use this platform not to offer practical, all-inclusive, and globally equitable solutions, but instead to clandestinely pit Western cultures against Indigenous cultures in a no-win, identity-politics-driven war for power. It is also not helpful, for example, when scholars write articles that tally and highlight the racial and cultural differences between defendants in infringement cases, which only serve to exacerbate racial tension and detract from the myriad of complex legal issues

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321. Olga Bryana Gonzalez, *Cultural Appropriation: The Native American Artist Struggle for Intellectual Property Protection in Canada, Mexico, and the United States*, 42 T. JEFFERSON L. REV. 1, 21 (2019).

322. *Id.* at 20.

323. *Id.*

324. Stuart Schüssel, *Copyright Protection's Challenges and Alaska Natives' Cultural Property*, 29 ALASKA L. REV. 313, 314, 325 (2012).

325. Indigenous Peoples and Intellectual Property, at 317.

326. *See, generally*, Dalindyebo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1128 (2017).

that drive the results in these difficult and often novel cases of first impression.<sup>327</sup>

The scholarly persistence upon Foucauldian notions of power and resentment pervade this issue, and inexorably lead to the common result that people from both cultures lose out, as “the doctrine of group identity inevitably ends with everyone identified as a class enemy, an oppressor: with everyone uncleanly [sic] contaminated by bourgeois privilege.”<sup>328</sup> Like Orwell, Jordan Peterson warns of the lure toward such ideologies:

Beware of intellectuals who make a monotheism out of their theories of motivation. Beware, in more technical terms, of blanket univariate (single variable) causes for diverse, complex problems . . . The attraction of doing so is, however, obvious: simplicity, ease, and the illusion of mastery (which can have exceptionally useful psychological and social consequences) . . . and let us not forget, the frequent discovery of a villain, or set of villains, upon which the hidden motivations for the ideology can be vented.<sup>329</sup>

Observing that diversity is so highly regarded today on campuses, Charles Russo maintains that as important as diversity is, faculty members also have the duty to “help teach students to move beyond such personal characteristics as race, ethnicity, gender and sexual orientation to embrace intellectual diversity instead demonizing ‘the other.’”<sup>330</sup>

Radical progressive scholars, on the other hand, contradictorily believe that, although Western authors should have extremely narrowed (if not nonexistent) rights of exclusion, the creative content of Indigenous peoples should be afforded expansive and even special protection. For example, copyright scholars routinely reprimand Western authors for attempts to privatize common elements in the public domain, such as unfixed vocalizations, simple chord formations and lyrics, yet they advocate for “stronger intellectual property protections for Native American tribes and individuals” for similar content because “their culture, languages, and creations are inextricably intertwined with their cultural survival.”<sup>331</sup>

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327. See e.g., Rosenblatt, *supra* note 258, at 631-32 (comparing the races and music styles of digital sampling defendants—N.W.A. on the one hand and Madonna on the other—in cases that form a circuit split on *de minimis* copyright infringement and maintaining this shows how hip-hop musicians have “borne the stigma of copyright devaluation” thus “feed[ing] a narrative under which dominant culture’s appropriation of minority and indigenous cultures is portrayed as groundbreaking, edifying, or archivally valuable, and minority artists’ appropriation of dominant culture is portrayed as lazy or uncreative”). See also, HELEN PLUCKROSE & JAMES LINDSAY, CYNICAL THEORIES: HOW ACTIVIST SCHOLARSHIP MADE EVERYTHING ABOUT RACE, GENDER, AND IDENTITY-AND WHY THIS HARMS EVERYBODY 224 (2020) (providing a similar example of how feminist and activist scholars have tediously measured the number of words spoken by women as compared to men in films, and arguing that such “uncharitable” approaches are “both highly interpretive and unfalsifiable”).

328. ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO 1918-56 (Thomas P. Whitney & Harry Willets trans., Edward E. Ericson, Jr. abridged., Jordan B. Peterson, foreward) xviii (1985).

329. PETERSON, BEYOND ORDER, *supra* note 288, at 174.

330. Charles J. Russo, “Trigger Warnings, Safe Spaces, and Free Speech: Lessons from the United States,” *International Journal of Law & Education*, Vol. 22, pp. 4-17 (2019).

331. Gonzalez, *supra* note 321, at 9.

Conveniently, neither side of the equation wins in these scenarios. The Oregonian women are publicly shamed into shutting down their burrito truck by journalists; the citizens of the city lose an opportunity to enjoy authentic Mexican food and perhaps learn a little about a country they have never visited, which invariably harms the Mexican culture at the end of the day. It is unbelievable—truly remarkable, in fact—that Orwell predicted the very type of events and sentiments that today motivate the Cancel Culture and Cancel [©opyright] Culture warriors, which he claimed would be “tolerated and even defended by people who considered themselves enlightened and progressive.”<sup>332</sup>

Fortunately, other contemporary authors are brave enough to expose the hidden Marxist motivations of our Cancel Culture society. Journalist Robby Soave poignantly cuts through the veneer of the hateful culture warriors in Oregon when he claims that

One understands the desire for respect and a fair chance to represent one’s own culture, but cultural practices are not zero-sum entities. They cannot be stolen or exhausted. The real goal of cultural appropriation charges seems to be to induce a permanent cultural cringe, to create a version of cultural crimestop, the Party-induced state of mind in [Orwell’s] 1984.<sup>333</sup>

In his forward to the officially abridged version of Aleksandr Solzhenitsyn’s *The Gulag Archipelago*,<sup>334</sup> Jordan Peterson similarly shows that, if one studies the totalitarian regimes of the twentieth century, it is apparent that their goal was to “remake man and woman,” with the “longing to restructure the human spirit in the very image of the Communist preconceptions.”<sup>335</sup> Peterson keenly notes that the Soviets

tortured, thieved, imprisoned, lied and betrayed, all the while masking their great evil with virtue. It was Solzhenitsyn and *The Gulag Archipelago* that tore off the mask, and exposed the feral cowardice, envy, deceit, resentment, and hatred for the individual and for existence itself that pulsed beneath.<sup>336</sup>

Peterson further points out how, like Big Brother and the Inner Party rulers of Oceania,

[t]he radicals who conflate the activities of the west with the oppression of the downtrodden therefore do nothing to aid those whom they purport to prize and plenty to harm them. The claims they make to act under the

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332. ORWELL, *supra* note 1, at 213.

333. Stewart, *supra* note 20.

334. Solzhenitsyn was a Russian novelist and historian who was awarded the Nobel Prize for Literature in 1970 for exposing the world to the personal terrors he and millions of other Russians endured in Joseph Stalin’s work camps. After fighting for his country in World War II, in 1945 he was arrested for writing a letter in which he criticized Stalin and spent eight years in prisons and labor camps, after which he spent three more years in enforced exile. *The Gulag Archipelago* is his attempt to compile a literary-historical record of the vast system of prisons and labor camps that came into being shortly after the Bolsheviks seized power in Russia (1917) and that underwent an enormous expansion during the rule of Stalin (1924–53). See “Aleksandr Isayevich Solzhenitsyn,” ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/biography/Aleksandr-Solzhenitsyn>. (last visited on Mar. 7, 2021).

335. PETERSON, GULAG, *supra* note 328, at xix.

336. *Id.*

inspiration of pure compassion must therefore come to be regarded with the deepest suspicion—not least by those who dare to make such claims themselves.<sup>337</sup>

Acknowledging the important role power plays in a totalitarian society, Kohn writes:

Whereas tyranny, pitting the ruler and his subjects against each other, is ultimately powerless, totalitarianism generates immense power. It is a new sort of power, not only exceeding but different in kind from outward coercive force. In the name of ideological necessity, totalitarian terror dominates human beings from within, thereby mocking the appearance and also the disappearance, the lives and the deaths of distinct and potentially free men and women. It mocks the world that only a plurality of free individuals can continuously renew and share with one another, and it mocks the earth as the natural home of such beings.<sup>338</sup>

The most important contribution Orwell made in *Nineteen Eighty-Four* was to expose the world through the remarkable literary journey of Winston Smith to the true motivations behind the totalitarian regimes that came to power and were, thankfully, defeated in the twentieth century. Like Solzhenitsyn, “Orwell risked his ideological commitments and his reputation to tell us all what was truly occurring in the Soviet Union in the name of egalitarianism and brotherhood.”<sup>339</sup>

#### V. CONCLUSION: “ANCESTRAL MEMORY” AND THE RECONSTRUCTION OF THE PROGRESS CLAUSE AND THE ROMANTIC AUTHOR

At various points throughout *Nineteen Eighty-Four*, Winston waxes nostalgically when triggered to recall the few thoughts he can remember from the peaceful childhood he experienced in the formerly free country of England, referring to this phenomenon as “ancestral memory.” In his ancestral memory, for example, he fondly recalls the feeling of relaxing alone by a fire with his feet up in a place that he independently owned and decorated:

utterly alone, utterly secure, with nobody watching you, no voice pursuing you, no sound except the singing of the kettle and the friendly ticking of the clock.<sup>340</sup>

Today, we would also do well to recall our own ancestral memory, particularly those individualistic, natural rights-based ideals that have shaped our Constitution and our *free* republican form of government.

As befits writing during the long-awaited and hope-inspired arrival of 2021, I conclude by following the sage advice Orwell provided in “Notes on

337. *Id.* at xxii.

338. Jerome Kohn, *Arendt's Concept and Description of Totalitarianism*, 69 *SOCIAL RESEARCH* 621, 632 (2002). Published by: The Johns Hopkins University Press Stable URL: <https://www.jstor.org/stable/40971564>.

339. PETERSON, *GULAG*, *supra* note 328, at xix.

340. ORWELL, *NINETEEN EIGHTY-FOUR*, *supra* note 1, at 100.

Nationalism.” I deliver another warning that if twenty-first century intellectuals in all disciplines fail to heed the premonitory words of our best—and, yes, most genius—authors of the nineteenth and twentieth centuries, then we are destined to witness a rapid unraveling of all the comforts—both physical and intellectual—that are afforded by a civilized, democratic society.

Certainly, while inequalities do, indeed, exist within the democracies of the free Western world, they are “[t]he only systems that have produced some modicum of wealth,” and which “emphasize above all the essential dignity, divinity and ultimate responsibility of the individual.”<sup>341</sup> Contrarily, the radical Marxist ideologies upon which the DOA and all forms of Cancel Culture rely upon when implemented during the twentieth century have led to twenty-five million dead in the Soviet Union, sixty million dead in Mao’s China, two million in Cambodia’s Killing Fields, not to mention the horrors that have occurred in Cuba and Venezuela.<sup>342</sup> On Marxism, Peterson highlights the fact that

[n]o political experiment has ever been tried so widely, with so many disparate people, in so many different countries (with such different histories) and failed so absolutely and so catastrophically. Is it mere ignorance (albeit of the most inexcusable kind) that allows today’s Marxists to flaunt their continued allegiance—to present it as compassion and care? Or is it, instead, envy of the successful, in near-infinite proportions? Or something akin to hatred of mankind itself?<sup>343</sup>

Without the Progress Clause of our constitution and its celebration and provocation of the genius that lies within all of us who dare to create works of authorship, our non-fictional fate lies with that of Winston and his physically and mentally deprived comrades in Oceania.

Thanks to his brave authorship of *Nineteen Eighty-Four*, George Orwell reminds us—among all of the lessons within the novel—of the unequivocal fact that great literature is, indeed, important for our moral guidance, our sanity, our future, and most importantly, the soul and spirit of our culture. Unlike the radical DOA advocates and Cancel [©opyright] Culture advocates would have us think, the great literature we love and that inspires us is written by individual authors, not by undefined group think, polyvocal creativity, the author-function, or any of the other resentment-motivated, collectivist regimes they have devised to vilify and replace the author.

Michael Brandon Lopez most eloquently explains the continuing importance of individual authorship—as I am confident that our constitutional Founders, as well as Orwell, would well agree—as follows:

Literary writers perform an important societal function, however. They are a source of national pride and a symbol of influence around the world. And the process by which poets and writers arrive at their literary creations

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341. PETERSON, *GULAG*, *supra* note 328, at xxii.

342. *Id.* at xx.

343. *Id.*



is an arduous task, requiring the author to go into himself and recover from the depths of his psyche the mappings of a novel, poem, or play that examines, mirrors, and questions the contours of society. Indeed, as Coleridge declared, “I see, not feel, how beautiful they are . . . I may not hope from outward forms to win, the Passion & the Life, whose Fountains are within.” The author stands as an individual in relation to the entire community, and through the creative process is able to distill and unfold the spectrum of society, its errors, failings, pathos, and possibilities. One can hardly think of England without recognizing the names of Shakespeare, and Chaucer, or of France without thinking of Voltaire or Sartre. Even in the United States, most individuals are apt to know the legendary figure of Ernest Hemingway as big-game hunter, or his work *The Old Man and the Sea*, or Mark Twain’s *Huckleberry Finn*. And the enduring importance of J.D. Salinger’s *The Catcher in the Rye* cannot be overstated. The significance authors have to expose readers in a particular community to each other is one of the foundational roles an author serves—they help to explain and create fictions that we can then adapt into our own lives, and ultimately make into our own stories. In short, literature helps us to see one another, despite the inescapability of our own prison-houses of perspective.<sup>344</sup>

The beauty of the United States Constitution and our democratic-republican form of government, and what absolutely can never be accomplished within any form of Marxism, socialism, or totalitarianism, is that there is room for more—and *truly* inclusive and diverse—authorship to sit with, inspire, and even critique our great canonical works. As for the canonical and genius *Nineteen Eighty-Four*, hurry and read (or re-read) it . . . before it’s canceled.

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344. Lopez, *supra* note 62, at 178–79.