

JONATHAN PRATTER  
Foreign and International Law Librarian  
Tarleton Law Library  
University of Texas at Austin

## Library Privacy in Context

The English word *private* comes from the Latin *privatus* meaning “withdrawn from public life, deprived of office, peculiar to oneself, or private,” and which is itself the past participle of *privare*, meaning “to bereave or to deprive.”<sup>1</sup> The Greek word *idiotes* means both “private person” and “ignorant, ill-informed person” and is derived from *idios* meaning both “private” and “peculiar” and which gives us the English *idiot* and *idiosyncrasy*.<sup>2</sup>

Hannah Arendt has suggested that a large part of what we consider the private and intimate realm was held by the classical Greeks to be the sphere of mere necessity and material dependence.<sup>3</sup> A citizen of classical Athens had to leave the family and household and enter the public realm—the *polis*—in order to achieve freedom and the realization of his human potential.<sup>4</sup> Arendt’s view has been criticized recently, but even her critic concedes that life as a member of the *polis* was primary. “One’s existence, one’s values, one’s fulfillment as a member of the human species was dependent on being a member of the *polis*.”<sup>5</sup>

All of this suggests that the classical civilizations had an idea of privacy that is foreign to ours today. They devoted a lot of attention to the question of what constitutes the good life. Yet they assigned a modest role to privacy as a part of life. Certainly consideration of the ancients does not require us to throw over our own understanding of privacy. It should bring us to give some thought to it as a value in modern life.

### The Value of Privacy

It has been difficult even to settle on a definition of privacy. There have been enough variations to fuel a continuing debate about whether

privacy is an integrated, coherent concept, or is instead an aggregation of distinct interests.<sup>6</sup> One attempt at a unitary definition is that privacy is the right to be let alone, but this is too vague and general to be of much help.<sup>7</sup> For Alan Westin, a leading commentator, privacy is the claim to control when and to what extent information about a person will be communicated to others.<sup>8</sup> A definition offered by Ruth Gavison is more comprehensive. Privacy is the limitation of access to a person, and this has three aspects: the limitation of information about a person, the limitation of the attention directed at a person, and the limitation of physical access to a person.<sup>9</sup> These aspects represent interests we have in seclusion or solitude, in freedom from observation or scrutiny, and in withholding information about ourselves.

What is the value of privacy? I lean toward thinking of privacy as an instrumental value. That approach lets us see how privacy is the means by which we attain other valued ends. There are several of these: creativity, reflection, psychological well-being, and individual autonomy. Privacy has been called the essential context for the development of relations founded on trust, love, or friendship.<sup>10</sup> There is wide agreement that privacy is indispensable in our modern world to the dignity of persons, to respect for persons, and to our fulfillment as persons.

But the matter is more complicated than that. Take the relation between privacy and liberty. It is widely agreed that a basic function of privacy is to insulate the individual from public scrutiny, to place a buffer between personal preference and prevailing social norms. But is it better to insulate ourselves from compliance with public norms? Shouldn't we instead challenge them openly and force them to change? Stanley Benn,<sup>11</sup> in an early article, captures this tension:

It is not only the authorities we fear. We are all under strong pressure from our friends and neighbors to live up to the roles in which they cast us. If we disappoint them we risk disapproval, and what may be worse their ridicule. For many of us, we are free to be ourselves only within that area from which observers can legitimately be excluded. We need a sanctuary or retreat in which we can drop the mask, desist for a while from projecting on the world the image we want to be accepted as ourselves, an image that may reflect the values of our peers rather than the realities of our natures. To remain sane, we need a closed environment, open only to those we trust, with whom we have an unspoken understanding that whatever is revealed goes no further.

Put in this way, however, the case for privacy begins to look like a claim to the conditions of life necessary only for second-grade men in a second-grade society. For the man who is truly independent—the autonomous man—is the one who has the strength of mind to resist the pressure to believe with the rest, and has the courage to act on his convictions....Socrates did not ask to be allowed to teach philosophy in private....Of course, there are not many like Socrates in any society....Not

many of us perhaps have gone so far along the road to moral maturity that we can bear unrelenting exposure to criticism without flinching.

Benn's view may strike the reader as rigorous, even naïve. It needs to be qualified by Gavison's perspective<sup>12</sup> on the same problem.

There are important limits on our capacity to change positive morality, and thus to affect social pressures to conform. This may even cause an inability to change institutional norms....If an individual prefers to present a public conformity rather than an unconventional autonomy, that is his choice....Ideally, it would be preferable if we could all disregard prejudices and irrelevancies. It is clear, however, that we cannot. Given this fact, it may be best to let one's ignorance mitigate one's prejudice.

### The Principles of Fair Information Practices

Concern about the collection of large amounts of personal information by both public and private organizations emerged as a major issue during the 1960s and early 1970s. The response of some institutions, including libraries, has been substantial enough that by 1982 Arthur Miller, one of the first to sound an alarm in his *Assault on Privacy*,<sup>13</sup> was prepared to say that a "Privacy Revolution" had taken place.<sup>14</sup> An early and influential discussion of the problem was *Records, Computers and the Rights of Citizens*.<sup>15</sup> This was a report issued in 1973 by an advisory committee to the Secretary of the U.S. Department of Health, Education and Welfare. It was the first report to develop the idea of fair information practices. These principles have had a substantial impact on the formulation of public policy regarding large-scale personal data gathering.

The principles of fair information practices can be stated briefly:<sup>16</sup>

1. There must be no personal-data recordkeeping systems whose existence is secret.
2. There must be a way to find out what information about a person is in a record and how it is used.
3. There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
4. There must be a way for an individual to correct or amend a record of personal information about him.
5. Any organization creating, using, or disseminating records of personal data must assure the reliability of the data for its intended use and must take reasonable precautions to prevent its misuse.

*Reliability* here means the combination of accuracy, completeness, timeliness, and pertinence. Timeliness requires that information which has become "stale" be purged from a record of personal information.

The first two principles have to do with simple disclosure. The fourth principle and much of the fifth are grounded on a requirement of fairness or due process. The critics of organizational gathering of personal data have often expressed the concern that decisions are made about people's lives without any assurance of the accuracy or completeness of the supporting information. The result is an increased risk that decisions will be wrong because of an inaccurate, distorted, or superficial record. This has more to do with fairness in decision-making than with privacy. In any case, the concern is legitimate.

The third principle imposes a restriction on the movement and use of personal data. It speaks to a public expectation that information shall be used only by the organization to which the disclosure was made. Strict application of this principle would prevent the commingling of information in a single database, as well as the passing of one database against another in order to identify correspondences.

The principle of pertinence demands that only information which is relevant will be considered. It recognizes that unfairly prejudicial information, information which should have no bearing on decision-making, must be kept out of personal data records. The timeliness principle acknowledges that with the passage of time and changes in circumstances personal information becomes "stale." It requires that only relatively recent information be retained in data files.

Experience has taught us that substantive restrictions on the collection of information by organizations are necessary. But not everyone agrees. Richard Posner, an economist who has written provocative articles on privacy, insists that we should credit users of information with the ability to be rational discounters of its relevance and importance. He sternly disapproves of legislative intervention that imposes restrictions on the consideration of discreditable personal data.<sup>17</sup> For example, he objects strenuously to provisions of the "Fair Credit Reporting Act" which prevent reporting of bankruptcies more than ten years old or of criminal convictions more than seven years old.<sup>18</sup>

### **Legal Aspects of Library Privacy**

At the same time that general privacy concerns began to emerge, the issue of privacy in library circulation records came rapidly into view. During the spring and summer of 1970 agents of the U.S. Bureau of Alcohol, Tobacco and Firearms attempted to examine the circulation records of public libraries in several cities. The American Library Association responded quickly to the threat that rummaging through library circulation records was on the point of becoming a standard "investigative technique" of some law enforcement agencies. The "ALA Policy on Confi-

dentiality of Library Records" was approved in January of 1971 and with minor revisions continues in effect today.<sup>19</sup>

Section 1 of the policy recommends that each library "formally adopt a policy which specifically recognizes its circulation records and other records identifying the names of library users to be confidential in nature." Section 2 expands on the general statement by recommending that patron records not be disclosed to any government agency "except pursuant to such process, order, or subpoena as may be authorized under the authority of, and pursuant to, federal, state, or local law...." Section 3 recommends that libraries "resist the issuance or enforcement of any such process, order, or subpoena until such time as proper showing of good cause has been made in a court of competent jurisdiction." The ALA policy is commendable for its clarity, except on one account. Neither Section 3 nor any of the accompanying materials gives any guidance on what is involved in resisting the enforcement of a subpoena.

The first difficulty is that a subpoena is issued *ex parte*, that is, at the request of those seeking the witness' attendance and without the participation of anyone else. An attorney or prosecutor, in connection with pending litigation or a criminal investigation, need only send a request for a subpoena to the clerk of the court. The subpoena will be issued as a matter of course. So, contrary to Section 3 of the ALA policy, it is usually impossible beforehand to resist the issuance of a subpoena.

A second difficulty is that it may not be up to the party seeking to enforce the subpoena to show that there is good cause for it. On the contrary, the library officers may have to take formal legal action of their own. They may have to file a motion challenging the subpoena and requesting a hearing before a judge of the court that issued it.<sup>20</sup> The usual name for this procedure is a motion to quash the subpoena.

The most significant recent legal development for privacy in libraries is the enactment of library confidentiality statutes. At last count twenty-three states had passed laws requiring that patron records be kept confidential.<sup>21</sup> These statutes are remarkable for their variety (or lack of uniformity), though they can be classed into two main groups. One group is composed of exceptions to a general open records statute, the other, of independent library privacy acts.<sup>22</sup>

With one exception the prohibition of disclosure is absolute in the sense that there is no provision for the exercise of discretion by the custodian of the records, the librarian. The exception is the Iowa statute<sup>23</sup> which reads in part:

The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information....13. The records of a library which, by themselves or when examined with other public

records, would reveal the identity of the library patron checking out or requesting an item from the library.

The first part of the statute dispenses with an absolute duty and leaves room for an independent decision by the librarian. Notice that the strength of the statute as a ground for the refusal to disclose records remains intact.

Some statutes actually impose civil or criminal liability for the improper disclosure of information about a library patron.<sup>24</sup> That is unnecessary. An ethical obligation can be enforced without having to be transformed into a legal duty. Complaint, criticism, and reprimand can all be brought to bear to enforce ethical standards.

May civil liability be imposed under a library confidentiality statute that says nothing about it? It is possible. A common-law rule permits it. The *Second Restatement of Torts*<sup>25</sup> puts the rule this way:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

I am not aware that a lawsuit for breach of confidence has been brought against a librarian. Now that the possibility exists, my concern is that librarians did not adequately consider beforehand the implications of enacting library confidentiality statutes. The statutes' purpose was to find an adequate means of protecting library patrons. Librarians' altruism may have obscured the prudential implications of imposing a legal duty. Ultimately, a judgment of the wisdom of shouldering this duty will depend on librarians' view of its importance for maintaining ethical standards and of the potential for harm to our patrons that might flow from a breach.

A case arising under the Iowa library confidentiality statute was decided by the Iowa Supreme Court in 1983.<sup>26</sup> The court denied claims that a sweeping subpoena to the Des Moines Public Library violated the first-amendment rights of patrons and was unreasonable and oppressive. A recent casenote in the *Iowa Law Review* discusses the case (*Brown v. Johnston*) in detail.<sup>27</sup> The author points out that the court's first-amendment analysis was inadequate. The article presents a good argument in favor of a constitutional right of privacy in public library circulation records.

If the first amendment is to ensure an informed citizenry by guaranteeing a right to receive information and ideas; a right to privacy in library circulation records should be extended to public library patrons. Compelled disclosure of library records, like forced disclosure of organizational membership, would discourage individuals from seeking or

receiving unpopular or controversial ideas contained in certain books because other people might learn of their inquiries and take retaliatory economic or social steps to discourage the library patrons' further inquiry.<sup>28</sup>

The Iowa legislature responded quickly to the *Brown* decision. It passed an amendment to the confidentiality statute.

The records shall be released to a criminal justice agency only pursuant to an investigation of a particular person or organization suspected of committing a known crime. The records shall be released only upon a judicial determination that a rational connection exists between the requested release of information and a legitimate end and that the need for the information is cogent and compelling.<sup>29</sup>

This addition plus the provision for the exercise of discretion make the Iowa statute nearly ideal.

### **Suggestions for Assuring Library Privacy**

Here are some suggestions and considerations for implementing a confidentiality assurance program in the library. The library's confidentiality policy should be included in the personnel manual and discussed with staff members. Circulation procedures should be reviewed to locate points where accidental disclosures might occur. Do overdue and reserve notices go out on postcards or in envelopes? If notices are given over the telephone, it may be necessary to have the patron return the call if someone else answers.

How much information should be requested at the time of registration? Librarians should be pleased that libraries have come to be viewed as informal institutions. Nevertheless, users have to tolerate some degree of control.

Do any of the library's services use interest profiles? If so, how detailed are they? Is access to them restricted?

What happens to circulation information after materials have been returned and fines paid? Is it purged from an online system? Are any hardcopy records maintained? It is impossible to subpoena records that do not exist.

What is the policy for releasing records as part of an investigation or prosecution for library theft? There may be a technical conflict here with a confidentiality statute.

Many libraries are public places. It would be impossible to achieve the privacy of a doctor's office in a public library nor should it be tried. Patrons do not require or expect that a public library prevent all possibility of disclosure. They do expect that library personnel will take precautions to prevent unnecessary or intrusive disclosures.

### Implications of the Computer

It is fair to say that the advent of the computer played a significant role in precipitating our present concern with the security of personal information. Of course, the collection of information about people began well before the arrival of the computer; the federal income tax was instituted in 1913, social security in 1936. But it is the added potential of computerized data banks and advanced telecommunications which continue to fuel the debate.

Few people would deny that the growth of advanced information technology presents the risk of harm to privacy. But it is equally difficult to ignore the benefits that clearly have been derived from this technology. These observations can only begin the inquiry. They pose the question of whether society will be able to integrate the new technology without jeopardizing important privacy values.

I think the major risks come under the rubric of abuse or misuse. Problems such as unauthorized surveillance, intentional breaches of computer security, or the use of personal information for purposes beyond those for which it was disclosed ought to be regarded as abuses to be prevented and deterred, not as inevitable consequences. The rigorous application of the principles of fair information practices would go a long way toward preventing such abuses.

There is another question to confront. Is it possible that too much ostensibly innocuous information about the individual could be collected, even for purely benign purposes? Would people then "think more carefully before they did things that become part of the record?"<sup>30</sup> Would life become "less spontaneous and more measured?"<sup>31</sup> The United States could no doubt reach such a point, though it is to be hoped that the working of a democratic society would stop well short of it. These are difficult issues and it has been my intention here merely to raise them rather than to offer solutions. Whatever the answers society determines, librarians and other information specialists are well-placed to contribute to the debate.

### REFERENCES

1. *Oxford English Dictionary*, s.v. "private."
2. *Ibid.*, s.v. "idiot."
3. Arendt, Hannah. *The Human Condition*. Chicago: University of Chicago Press, 1958, p. 30.
4. *Ibid.*, pp. 31-37.
5. Saxonhouse, Arlene W. "Classical Greek Conceptions of Public and Private." In *Public and Private in Social Life*, edited by S.I. Benn and G.F. Gaus, p. 364. London: Croon, Helm, 1983.
6. Schoeman, Ferdinand. "Privacy: Philosophical Dimensions of the Literature." In *Philosophical Dimensions of Privacy: An Anthology*, edited by Ferdinand Schoeman, pp. 2-6. Cambridge: Cambridge University Press, 1984.

7. Thomson, Judith Jarvis. "The Right to Privacy." In *Philosophical Dimensions of Privacy*, p. 272.
8. Westin, Alan F. *Privacy and Freedom*. New York: Association of the Bar of the City of New York, 1970, p. 7.
9. Gavison, Ruth. "Privacy and the Limits of Law." *Yale Law Journal* 89(Jan. 1980):428-33.
10. Fried, Charles. "Privacy: A Moral Analysis." In *Philosophical Dimensions of Privacy*, pp. 203-19.
11. Benn, Stanley I. "Privacy, Freedom and Respect for Persons." In *Privacy* (Nomos Series No. 13), edited by J. Roland Pennock and John W. Chapman, pp. 24-25. New York: Atherton Press, 1971.
12. Gavison, "Privacy and the Limits of Law," pp. 453-54.
13. Miller, Arthur R. *The Assault on Privacy: Computers, Data Banks, and Dossiers*. Ann Arbor: University of Michigan Press, 1971.
14. ————. "Computers and Privacy." In *Ethics and the Management of Computer Technology*, edited by W. Michael Hoffman and Jennifer Mills Moore, p. 93. Cambridge, Mass.: Oelgeschlager, Gunn & Hain, 1982.
15. Department of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems. *Records, Computers and the Rights of Citizens*. Washington, D.C.: USGPO, 1973.
16. *Ibid.*, pp. xx-xxi.
17. Posner, Richard A. "An Economic Theory of Privacy." In *Philosophical Dimensions of Privacy*, p. 344. Also see: ————. *The Economics of Justice*. Cambridge: Harvard University Press, 1981, pp. 231-309.
18. 15 U.S.C. §1681c (1982).
19. American Library Association, Office for Intellectual Freedom. *Intellectual Freedom Manual*, 2d ed. Chicago: ALA, 1983, pp. 98-104.
20. 97 C.J.S. "Witnesses," §25j (1957). See also: *Carmody-Wait 2nd Cyclopedia of New York Practice* §54:40.
21. "Confidentiality Update." *Newsletter on Intellectual Freedom* 33(May 1984):91.
22. Swan, John C. "Public Records and Library Privacy." *Library Journal* 108(1 Sept. 1983):1645-50. (This is an excellent discussion of library privacy in general and privacy legislation in particular.)
23. *Iowa Code Ann.* §68A.7 (West 1983).
24. *Colo. Rev. Stat. Ann.* §24-90-119 (1983); and *Mich. Comp. Laws Ann.* §397.604 (West 1983).
25. *Restatement of Torts, 2d.* §874A (1979).
26. *Brown v. Johnston*. 328 N.W. 2d 510 (Iowa 1983).
27. Hinz, Carolyn M. "Brown v. Johnston: The Unexamined Issue of Privacy in Public Library Circulation Records in Iowa." *Iowa Law Review* 69(March 1984):535-50.
28. *Ibid.*, p. 547.
29. *Iowa Code Ann.* §22.7 (West 1985).
30. Wasserstrom, Richard A. "Privacy: Some Arguments and Assumptions." In *Philosophical Dimensions of Privacy*, p. 328.
31. *Ibid.*