

PLAYING FAIR WITH THE RIGHT TO PRIVACY

BY MARYBETH GAUDETTE

ABSTRACT: Archivists and personal papers and manuscripts librarians have been unable to reach consensus over the years on how best to balance the needs of researchers with the privacy rights of individuals whose letters, photos, writings, and journals have come to be held in archives or personal papers collections without their consent. This article reviews the spectrum of opinion both past and present on this issue and takes the archival profession to task for its continuing failure to adopt a firm and unambiguous position on access rights. It concludes by offering a solution that, if implemented, would provide consistent access guidelines applicable to all nongovernment-controlled collections and, more importantly, would secure the long overdue right to privacy for those unwitting contributors who are unable to defend that right for themselves.

Although there are laws addressing the copying and distribution, fair or otherwise, of unpublished works in a private archival or personal papers collection, there are no statutes governing the question of access to such works for viewing or display. In light of the absence of such laws, this paper surveys the range of opinions on the ethics of allowing access to items such as correspondence, writings, photographs, sketches, etc., that have found their way into such collections, were created by persons other than the donor and, at the time of accession, were the property of the donor. Moreover, this paper focuses on the issues of access and display only as they relate to private collections. It does not attempt to discuss the same issues as they relate to public archives. For the purposes of this paper, the term “blind-donors” will be used to refer to individuals whose creations are contained within a collection without their consent regardless of their knowledge of that fact.¹

The matter of an individual’s right to privacy has been a hot-button topic for so long in our national collective discourse that many people assume the right to privacy has been a cornerstone of our democratic way of life since the founding of the republic. In truth, it was an idea whose time had not yet come when the Bill of Rights was written. However, with the advent of yellow journalism in the last quarter of the nineteenth century, the idea that the government should step in and address the issue of privacy began to take root. At that time, victims of yellow journalism’s revelations about their private lives had no recourse but to turn to the courts to seek relief from those who, by their rapacious plundering of whatever sources they could get their hands on, including

personal papers, were wreaking havoc on their good names. Then, in 1890, an article in the *Harvard Law Review* triggered the rallying of American public opinion in favor of legislation to outlaw the unauthorized publication and exposure of personal information. In their article, "The Right to Privacy," the authors, Samuel Warren and future United States Supreme Court Justice Louis Brandeis, not only recited the growing case law but put forth a passionate argument defending the sanctity of private expression.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed."²

Brandeis and Warren did not rely on an interpretation of property rights as the basis for their stance but rather they argued the inalienable right of a creator to have control over when, where, and to whom his work was made public. "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."³

Although Brandeis and Warren's arguments as to the unauthorized publishing of a person's expressions as an invasion of privacy were eventually settled by federal copyright enactments, the issue of allowing access for the purpose of view or display has not been settled by law and has, therefore, been left open to interpretation. As a result of the lack of legal guidelines and except as donor-imposed restrictions in deeds of gift may control, archivists and personal papers curators have no legal imperative to prohibit the right of access to unpublished materials for the purpose of viewing, nor are they enjoined from displaying them. Yet, if one agrees with Brandeis and Warren's stated premise, "In every such case the individual is entitled to decide whether that which is his shall be given to the public,"⁴ it should then be arguable that "given to the public" would also include a prohibition against an unpublished item in a personal papers or archival collection being available for viewing, whether by a researcher in a reading room or by the general public at an exhibition, without its creator's permission.

Moreover, with the findings of the court in *Pollard v. Photographic Co.*, 40 Ch. Div 345, there is established case law dating to 1888 that addresses the issue of the unauthorized displaying of an artifact, and Warren and Brandeis cited this case to bolster their definition of what constitutes the scope of privileged expression. In *Pollard*, the court had ordered the defendant to cease the unauthorized displaying of a photograph of a female customer on the grounds that such a display was a breach of confidence.⁵ In effect, the right to control the displaying of a particular instant of documentation of her face, which the customer had sought to have taken for her own private purposes, was awarded to her by the court. In stating their analysis of the findings of the court in *Pollard v. Photographic Co.*, Brandeis and Warren wrote:

The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented.⁶

Given that intense discussions about privacy rights have often been center stage in the 112 years since the publication of “The Right to Privacy,” and given the feelings of ill will and the embarrassing publicity that have erupted when prominent blind-donors discover that what they had assumed had remained private, if not long destroyed, was actually available for viewing without restriction, it is both amazing and disappointing that private papers curators and archivists have for so long declined to take a definite profession-wide stance on the issue of allowing access to the writings, correspondence, and other creations of blind-donors.

The closest the profession has come to speaking as an integrated body is through the means of perfunctory nods to the importance of privacy in various codes of ethics. But codes of ethics carry no weight in law and, as Joan Hoff-Wilson pointed out in 1983, such codes are themselves indicative of an underlying problem in that they may “be more symptomatic of the existence of unethical professional practices than they are effective means for correcting them.”⁷ Hoff-Wilson was also skeptical of such codes having influence on any meaningful compliance: “Instead of representing the highest standards, codes may at best represent the lowest common denominator of professional agreement. Unless these stated standards are exceeded by individual members, adoption of codes will contribute little to the improvement of professional conduct.”⁸

In addition to being aimed at the lowest common denominator, codes of ethics are frustratingly vague when it comes to providing direction on how to ensure privacy. The *Code of Ethics for Archivists with Commentary* of the Society of American Archivists is a case in point: “Archivists respect the privacy of individuals who created, or are the subjects of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials.”⁹

While the privacy guidelines promoted by the International Council on Archives (ICA) in its *Code of Ethics* are only a slight improvement over those of the SAA, at least the ICA broadens the scope of concern by acknowledging that the “use” of materials could

cause distress: "They [archivists] must respect the privacy of individuals who created or are the subjects of records, especially those who had no voice in the use or disposition of the materials."¹⁰

There is more of the same from the Association of Canadian Archivists: "Archivists make every attempt possible to respect the privacy of the individuals who created or are the subjects of records, especially those who had no voice in the disposition of the records."¹¹

The Confidentiality and Privacy Section of the Code of Ethics of the Australian Society of Archivists offers this bland mandate on how to address privacy issues: "Archivists shall protect personal information gained under privilege and contained in records in their custody."¹² What procedures and guidelines, one may ask, does the verb "protect" encompass, and for how long are any protections in place? And although the same section of the Australian code requires that individuals give their permission before information would be divulged that would identify them "as subjects of case files,"¹³ there is no corresponding requirement that extends such privacy protection to persons whose names appear in private collections through no will of their own.

The *Code of Conduct* of the grand dame of British archival associations, the Society of Archivists, does not even attempt to address the privacy concerns of blind-donors in the instructions to its adherents: "Members must perform their function in respect of the creation, maintenance and disposal of current and semi-current records, the selection, acceptance or acquisition of records for archival custody, the safeguarding, preservation and conservation of records in their care and the arrangement, description, publication and making available for use of those records in accordance with generally accepted archival principles and practices, offering impartial advice to all and employing available resources to provide a balanced range of services."¹⁴ The British archivist or curator is left to sink or swim depending on his understanding of what constitutes "accepted archival principles and practices."

Moreover, although three of these codes use the phrase "respect the privacy," those same codes are silent as to what exactly is meant by that phrase. If there is no definition of "respect" and no definition of "privacy," how is an archivist or curator to know when she has breached the code? Opinions can differ from person to person, gender to gender, culture to culture, and generation to generation as to what practices constitute manifestations of respect, let alone what concerns deserve shelter under an umbrella of privacy.

Historians, understandably, want to have access to everything in order to be able to verify that the information they present has been thoroughly researched and is accurate as far as available sources allow. But the question of at what point historical researchers' needs should be allowed to supersede the rights of blind-donors is one that has had archivists and manuscript curators chasing their own tails for decades. Some curators and archivists, such as Heather MacNeil, favor limits determined by mandatory periods; some are in the camp of Mark Greene and favor virtually total access to those matters not otherwise closed in accordance with deeds of gift or other donor agreements; and some favor determinations based on the perceived degree of sensitivity of the materials.

An early proponent of this third standard of access was Waldo Gifford Leland, who offered the following point of view in his 1909 address to the first Conference of Archivists held to coincide with a meeting of the American Historical Society: "While a chronological dead line is convenient, especially for the archivist ... it may be questioned if it is not better to decide each case upon its own merits."¹⁵ When five years later at the 1914 Conference of Historical Societies the historians present "emphasized free access and the public's right of ownership of historical documents,"¹⁶ archivists in attendance countered that it was "the duty of the repository to protect the confidences expressed in the documents. There was, many of the archivists felt, some right of property in the documents that did not belong to the public."¹⁷

At the beginning of the last quarter of the twentieth century, archivists and curators were still in a quandary about what to do concerning the tension between privacy rights and access. In his introductory remarks to the 1975 Rockefeller Archive Center Conference, *The Scholar's Right to Know Versus the Individual's Right to Privacy*, Joseph W. Ernst, then Director of the Rockefeller Archives, reminded the conferees of Irving Howe's impassioned comments issued upon Richard Ellman's publication of *The Selected Letters of James Joyce*: "A line ought to be drawn between what the world has a right to know and what is really none of its business. And even the dead ought to have some rights."¹⁸

Addressing the same conference, Robert Rosenthal, Curator, Special Collections, Joseph Regenstein Library, University of Chicago, offered, "The scholar's access to the record is not a right, but is determined by his needs and the needs of a democratic society."¹⁹ At the same time, Rosenthal acknowledged the burden placed on archivists due to the lack of legislated guidelines:

The keeper of the historical record has been placed squarely in the middle of a growing, ambiguous situation. The traditional passivity of the archivist no longer affords him protection. The archivist, in fact, has become a central element in the conflict. He has had to become simultaneously an advocate and a protector of both sides of a complex and sensitive issue, while foregoing the sheltered and far more placid role of dutiful purveyor of the record.²⁰

Rosenthal also did not trust the ability of statutory publication prohibitions to deter any harm that may arise from unrestricted access. "The act of giving access does not contain the right of dissemination, a matter complicated by literary rights, which are separate from the physical property rights. But access certainly implies dissemination, and once access is given, it can be assumed that dissemination will take place in one form or another. Indeed, it is almost impossible to control, the literary rights notwithstanding."²¹

John E. Lockwood, lawyer and past chairman of the Board of Trustees, New York Public Library, told the same conferees that he found particularly troublesome references to third parties made either by the donor or his correspondent:

In most cases, the author of the comment would not have made it if he had had any idea that it would one day become public.

In these cases, multiple interests are involved. The communications are undoubtedly extremely helpful to the person to whom they are addressed and, in the absence of assurance of confidentiality, they probably would not be made or, if made, they would be made orally. Suppression of these expressions would hamper the decision-making process. On the other hand, it is just such communications which the writer or scholar (or the scandalmonger) would be most anxious to see, and the record would be incomplete without them.²²

As an alternative to his one suggestion that materials be by or referencing third parties be kept “under lock and key for an appropriate time,”²³ Lockwood offered this solution:

Material to be deposited in an archive should not be contemporary. In this way the archival institution will not have to cope with the most controversial or sensitive issues. ... As applied to individuals, this means that, in most cases, an individual’s records would not be deposited during his lifetime ... waiting until the death of the person whose papers are involved will certainly reduce a great deal of the need for this kind of restriction.²⁴

In the case of the donor, Lockwood suggested that “a reasonable time would be one that does not exceed what we lawyers call the rule against perpetuities. ... This means that the donor-testator could have the material closed for the lives of his then-living descendants. ... Sensitive material affecting outsiders or innocent bystanders might well be tagged with the requirement for consent of the individual concerned during his life.”²⁵

Lockwood’s concerns for “innocent bystanders” were voiced over 25 years ago, but due to the lack of legislation and inertia on the part of archivists and curators to work toward an agreement to specific profession-wide access standards, such concerns are still gnawing at the minds of archivists and curators at the dawn of the twenty-first century. While she acknowledges in her 2000 article “At Odds?: Archives and Privacy” that J. D. Salinger’s insistence that “letters were meant for a certain pair of eyes, and those eyes alone”²⁶ is an argument that has no validity in law, Jill Cariffe Cirasella sympathizes with Salinger’s highly publicized distress upon discovering the status of his letters. She feels that, although it is not illegal, it is, nevertheless, unnecessary and unethical that, despite Salinger’s outraged protests, “many pairs of eyes” now are free to examine his letters.²⁷

However, Cirasella rejects the suggestion that tags, such as suggested by Lockwood, be put in files to indicate that material has been withdrawn for reasons of protection of the privacy of the subject or author because she fears they could “bait researchers and encourage security breaches.”²⁸

Privacy issues are international in scope, and the fact that the privacy of blind-donors has not been adequately protected has been recognized in other parts of the globe. As Helen Yoxell of Australia wrote in 1984, “People disclosing information in letters are normally expecting an audience of one. The manuscript librarian or archivist has a obligation to protect the privacy of those correspondents who have not consented in a

way to have their letters enshrined in a public institution and who, indeed, probably do not even know they are there."²⁹ And while she accepts that an argument can be made for social-research access to public records, she doubts that "where personal papers are concerned, that the justification of research alone would ever over-ride the legitimate need for individual privacy."³⁰ Yoxell also bemoaned "the time needed to physically work through each collection" in the hunt for sensitive material, which "hardly ever appears as a solid block, but is spread throughout otherwise innocuous material."³¹

But even if one agrees with Lockwood, Cirasella, Yoxell, and others that steps are to be taken to protect from view the sensitive material of blind-donors, there still remains the issue of how to define "sensitive." Paul J. Sillitoe suggests, "It might be said that the only judge of sensitivity is the sensitive individual."³² But having said that, Sillitoe then goes on to make a case for further burdening an archivist or curator with the responsibility of distinguishing between personal information that is sensitive and personal information that is confidential:

Here we must make a clear distinction between the concepts of sensitivity and confidentiality. Applying the public records' open government criteria to our present purposes, we may define "sensitive personal information" as that which would induce "substantial distress" in a "reasonable person", if made publicly available.

Confidential information, on the other hand, may be defined as: "Information which has been obtained on an explicit or implied basis of confidentiality, from the individual to whom it pertains, or from a third party."

Such confidential information may or may not be sensitive, and there will obviously be considerable overlap in practice between the two concepts. Information which is confidential may, however, require significantly different access management from that which is sensitive.³³

The mind boggles in an effort to imagine how archivists and curators would be able to discern confidential information from sensitive information when they cannot even agree in the first place on what is sensitive.

Differing in their opinions from the views of Rosenthal and Lockwood on the need to protect privacy rights are those archivists and curators who profess their concerns for privacy issues from the perspective that archives and personal papers can serve as a forum for those to whom history has previously denied a voice. For instance, in telling of her experiences at the Lesbian Herstory Archives, Judith Schwarz wrote of how she and staff members "continually had to wrestle with the issues of confidentiality, censorship, and access for researchers"³⁴ and how they "struggled mightily over the issue of individual policy versus collective memory."³⁵

To illustrate her point, Schwarz told the story of a woman who was distressed to learn that two of her letters had come to be transferred to the Herstory Archives. The woman insisted that the letters, which she had written in the 1960s to the Philadelphia chapter of the lesbian advocacy group Bilitis, be destroyed. But in 1984, her letters had been forwarded, along with 20 years worth of other papers, by the librarian of the Philadel-

phia chapter to the Herstory Archives. The woman's demands for the destruction of the letters were countered by a protracted campaign of pleas from the Herstory Archives staff to reconsider her request on the grounds that "shouldn't she continue to feel comfortable about her participation in the Daughters of Bilitis, and about being a part of women's, lesbian, and civil rights history?"³⁶

Whether some might find it disquieting and perhaps in itself an invasion of privacy that the members of the Herstory staff took it upon themselves to inject their personal opinions of the overriding importance of the lesbian movement into a discussion with the woman about her views on her right to privacy is one issue, but the broader issue is why Schwarz, as the archivist, and the woman, as the blind-donor, should have had reason to discuss the issue in the first place.

And while the premise for Schwarz's article is that "by constructing policies that protect privacy, archivists can encourage donors to save and give revealing materials,"³⁷ Schwarz never addresses the point that what triggered the woman's outrage in the first place was the time-honored, accepted archival-personal papers repository standard practice of not notifying blind-donors of the fact that materials created by them are being transferred to an archives or manuscripts library. However, if there were a law requiring that such notice be given and that blind-donors would be given a choice to agree to accept the statutory restrictions or to agree to an earlier release date that would not, of course, be earlier than any corresponding date set in the deed of gift, not only would such a law be fair to blind-donors and respectful of their rights to privacy, but it would do away with the kinds of hassle-filled situations in which the Herstory Archives became embroiled.

It would be interesting to know in what way Canadian archivist Tim Cook reconciles compliance with the mandate of the ACA's *Code of Ethics* to "make every attempt possible to respect the privacy of individuals"³⁸ with his commitment to "collective memory" imperatives. He finds that obtaining donors' consent, which he quotes Heather MacNeil as insisting "is necessary if we are to keep that sacred bond between archivists and donors,"³⁹ is neither a reachable nor necessarily a desirable goal and asks, "Is our society so worried about privacy infringement that we are willing to sacrifice our culture in the process?"⁴⁰ Cook does allow that "citizens must be guaranteed that their personal lives are not an open book" but pleads with archivists to speak out against any privacy demand that would interfere with the preservation of cultural heritage.⁴¹

While MacNeil herself acknowledges the value to society of the eventual release of information, she fears that blind kowtowing to the demands of sociohistorical research could undermine the public's trust in the integrity of the very social institutions that have been set up to preserve society.⁴² She does not accept the argument that even with a goal of righting society's inequities historians should be allowed carte blanche access to the record in order to "scrutinize the private lives of citizens who are powerless to object," for she sees such scrutiny as an abuse that itself is a further exploitation of such citizens' powerless state.⁴³ MacNeil believes that both historical and privacy needs can be satisfied by releasing private information according to mandated periods and has challenged "the archival community, through its professional organizations, to develop guidelines for closed periods attuned to the diverse kinds of personal information in

archival custody; and for archivists to lobby for statutory and regulatory amendments, where these are required, to implement those guidelines.”⁴⁴

MacNeil’s passionate pro-privacy arguments have focused on the issue of accessing personal information in government archives. Yet, an assumption could be made that there is no less a desire on her part that the right to privacy should trump the researcher’s need to know when it comes to accessing blind-donor information in personal papers and manuscripts collections, especially given that such revelations are far less likely to satisfy a compelling public interest that will result in a timely, if any, improvement of society than they are to benefit the researcher with some form of financial or professional gain. But though her recommendation as to developing guidelines according to the “diverse kinds of personal information” may be workable for records transferred from a government agency in which the information contained in the records was originally collected and organized according to content, it is not a practicable solution for private collections in which “diverse kinds of personal information” are more often than not scattered haphazardly throughout letters, diaries, journals, albums, etc. For such collections, MacNeil’s solution would require that archivists spend endless hours analyzing every paragraph of every composition penned by every blind-donor in order to determine what is suitable for access and what is not.

Because of the lack of laws or clearly delineated profession-wide strictures called for by MacNeil, archivists and curators can find themselves struggling to divorce their own sense of values from the problem at hand. On more than one occasion, Sara Hodson caught herself on the verge of injecting her “own sense of propriety” into a decision to restrict.⁴⁵ She also reports that she decided against contacting a third party whose letters she was concerned about because she did not want to “invite trouble” by calling the party’s attention to the existence of the letters in the collection.⁴⁶ Basing her decision on the grounds of avoiding trouble may have been practically expedient, but it was not a decision that spoke to the ethics of the situation.

Hodson is not opposed to donor-based restrictions on all or part of a collection and finds restrictions stretching anywhere from 10 to 50 years “entirely reasonable” and “straightforward to administer.”⁴⁷ But absent such donor-requested guidelines, she, like so many other archivists and curators, believes in making “delicate judgments on a case-by-case basis”⁴⁸ that end up enmeshing her in controversies toward which, ideally, she should remain neutral. But Hodson’s belief that by virtue of her position she should make such judgment calls is not surprising given that in Alice Robbin’s 1981–1982 survey of policies and practices vis-à-vis privacy and access in state archives, 68 percent of the archivists queried responded that it is the archivist who should “be responsible for decisions about access” because, as many of them explained, “the archivist was the expert and understood the value of the records.”⁴⁹

But understanding the value of records does not mean that archivists or curators should presume that they have the requisite wisdom or moral authority to make judgments regarding another person’s right to privacy. As one of Robbin’s survey respondents expressed it, “I strongly feel that it is a greater civic virtue to respect personal or confidential information about people than that [the information] be available without restriction.”⁵⁰

And perhaps she could not see the forest for the trees, but Hodson clearly missed the point when she stated that “excessive zeal in maintaining privacy” was the villain behind Stephen Joyce’s decision to destroy family letters of author James Joyce.⁵¹ Based on his explanation of why he did it, it was clearly excessive zeal and a frankly cavalier attitude toward the rights of privacy on the part of researchers that triggered the destruction. Had Stephen Joyce been able to place his trust in a system that would guarantee the restriction of family letters until such time as their revelations would be of no import to family members, perhaps the letters would not have been destroyed but would have survived to become a rich treasure trove for fortunate researchers of future generations.

Mark Greene argues that, with the donor agreement, archivists already have the solution to privacy issues at hand. In his 1993 article, “Moderation in Everything, Access in Nothing?: Opinions about Access Restrictions on Private Papers,” Greene asks, “But are not the donors almost always in the best position to judge the sensitivity of their papers—sensitivity to the donors and to their friends and colleagues?”⁵² In assuming that the reader agrees with him, Greene promotes a clearly written donor agreement as the mechanism through which archivists can be safeguarded legally from charges of contributing to invasions of privacy. But while one might safely agree with Greene that donors are in the best position to judge the sensitivity of their self-authored papers, it does not automatically follow that they would always possess insight into the sensitive nature of materials penned by others, especially when those others do not constitute “their friends or colleagues” but fall into the vulnerable categories of enemies and strangers. But even should Greene’s “donor-as-best-judge” supposition be true in all cases, it cannot be used as a basis from which to argue that a given donor cares about respecting the privacy of all or any of his correspondents, or that the donor is completely aware of all of the materials that constitute the donation, as those archivists who have had the experience of processing personal papers of contemporary individuals may know only too well. And while for some archivists the donor agreement may satisfy their legal fears as to their part in providing access to blind-donor materials, there are other archivists for whom a donor agreement would fall far short of absolving them of the regret of being agents in the delivery of information that could cause emotional pain to those blind-donors to whom it never would have occurred that their confidential utterances would be subject to public scrutiny.

So what is an archivist or personal papers curator to do? As distasteful to many curators and archivists as it might be, the simplest and most sensible solution would be to apply specific time restrictions either to the whole collection or to those portions that can be easily discerned as containing blind-donor materials. Ideally, the restrictions should be set out in law but, should that not occur, professional associations should adopt clearly delineated rules on access and display and require that their member institutions and professionals comply with same.

The most logical method for setting access dates would be to align them with any date limits that are already set by statute and that apply to duplication and publishing of unpublished materials for other than fair use. In the United States, that would mean blind-donor letters and other creations not released for access by their creators would become available for review and display pursuant to the restrictions in Title 17 of the *United States Code*, Sections 302 and 303, as amended: life of the author plus 70 years.⁵³

It is understandable that archivists and curators who decry censorship in all its forms and accept the researcher's argument that it is necessary to exhaust all resources to arrive at the fullest understanding of a subject will balk at the suggestions herein to promote statutory or association-enforced rules for access and viewing of unpublished creations. Yet, it is doubtful that the same body of professionals would condone for the sake of scholarly needs a researcher planting a microphone or wiretap to eavesdrop on a communication between people in a private dwelling or over the telephone. Why, then, should these same professionals favor a researcher with the right to, in essence, eavesdrop by allowing him to ferret through papers that served as a mode of communication between people who, for whatever reason, had not communicated in person or telephonically?

A profession-wide commitment or a statute ordering a prescribed no-access period would not preclude the opening of part or all of a collection should the archive or manuscript library be able to obtain releases from blind-donors or their legal agents, providing the active donor agrees. The release form should clearly state the legal status of both the blind-donors' rights as to the copyrights to their creations and the donor's right to transfer the current manifestations of the creations to an archive or manuscripts library.

Conclusion

Archivists and curators should neither be forced nor willing to take on the responsibility of adjudicating between the needs of researchers and individuals' privacy rights as to making blind-donor materials available for research and/or display. Creators should be allowed to have the comfort of law to know that their privacy rights are respected and protected, and researchers should be able to know that they are being treated fairly when being denied access to unpublished materials. The possibility that two different archivists or curators could reach different decisions on the accessibility of a given item is in itself sufficient reason case-by-case decisions should not be tolerated. Therefore, archivists and manuscripts curators would do themselves and their patrons and donors a service by lobbying for laws governing access to unpublished works. At the very least, they should aggressively lobby their professional associations into adopting clearly delineated procedures that truly respect the right to privacy demanded on behalf of the "inviolable personality" by Warren and Brandeis⁵⁴ over one hundred years ago.

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NOTES

1. "Blind-donors" seems a fitting term as it is highly likely that most such donors are in the dark as to the presence of their creations within a collection.
2. Samuel D. Warren and Louis D. Brandeis, "The Right of Privacy," *Harvard Law Review*, IV (December 1890): 198–199. *Hein Online*.
3. Warren, 205.
4. Warren, 199.
5. Warren, 208.
6. Warren, 214–215.
7. Joan Hoff-Wilson, "Access to Restricted Collections: The Responsibility of Professional Historical Organizations," *American Archivist* 46 (fall 1983): 442.
8. Hoff-Wilson, 442.
9. Society of American Archivists, "VII, Privacy and Restricted Information," *Code of Ethics for Archivists with Commentary*, 1992, <http://www.archivists.org/governance/handbook/app_ethics.asp> (29 April 2003).
10. International Council on Archives, "Section 7," *Code of Ethics*, September 1996, <http://www.ica.org/biblio/spa/code_ethics_eng.html> (29 April 2003).
11. Association of Canadian Archivists, "Application of Principles, C. Availability and Use, C2" *Code of Ethics* (n.d.), <<http://archivists.ca/about/ethics.aspx>> (4 October 2004).
12. Australian Society of Archivists, Inc., "3. Professional Responsibility and the Records, 3.7.5, Confidentiality and Privacy" *Code of Ethics*, June 1993, <<http://www.archivists.org.au/about/ethics.html>> (29 April 2003).
13. Australian Society of Archivists, Inc.
14. Society of Archivists, "6," *Code of Conduct*, October 1994, <<http://www.archives.org.uk/thesociety/codeofconduct.asp>> (29 April 2003).
15. Waldo Gifford Leland, "American Archival Problems," *Annual Report of the American Historical Association for the Year 1909*, Government Printing Office (1911): 347, quoted in Raymond H. Geselbracht, "The Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives," *American Archivist* 49 (1986): 147.
16. Geselbracht, 146.
17. Geselbracht, 146.
18. Irving Howe, "Portrait of the Artist as a Special Kind of Hero," *The New York Times*, 23 November 1975, p. 277, as quoted in Joseph W. Ernst, "Introductory Remarks," in *The Scholar's Right to Know Versus the Individual's Right to Privacy: Proceedings of the First Rockefeller Archive Center Conference* (December 1975): 2. In his 1975 *New York Times* review of the publication of *The Selected Letters of James Joyce* (New York, The Viking Press, 1975), Howe took editor Richard Ellmann to task for including in the collection the sexually explicit letters Joyce had written to his wife Nora in 1909 and in which Joyce had admitted using language that was "ugly, obscene, and bestial." In the review, Howe stated that he was "not so much criticizing Mr. Ellmann for giving us these letters as regretting the fact that he has. I regret it not because the letters diminish Joyce but because their

- appearance in print seems still another instance of that relentless undermining of privacy which is one of the most disturbing features of American culture." In every other respect, Howe's review commends Ellmann for putting together "a splendid collection." (Irving Howe, "Portrait of the Artist as a Special Kind of Hero," *The New York Times*, 23 November 1977, p. 277: *ProQuest Historical Newspapers, New York Times 1857–Current file*).
19. Robert Rosenthal, "Who Will be Responsible for Private Papers of Private People," in *The Scholar's Right to Know Versus the Individual's Right to Privacy: Proceedings of the First Rockefeller Archive Center Conference* (December 1975): 3.
 20. Rosenthal, 3.
 21. Rosenthal, 4.
 22. John E. Lockwood, "Private Papers and the Doctrine of Delayed Retribution," in *The Scholar's Right to Know Versus the Individual's Right to Privacy: Proceedings of the First Rockefeller Archive Center Conference* (December 1975): 15.
 23. Lockwood, 15.
 24. Lockwood, 16–17.
 25. Lockwood, 18.
 26. David Margolick, "Whose words are they anyway?" *The New York Times*, 1 November 1987, Sec. 7, *Academic Lexis-Nexis* <<http://web.lexis-nexis.com/universe/>> (29 April 2003).
 27. Jill Cariffe Cirasella, "At Odds?: Archives and Privacy," *Current Studies in Librarianship* 24 (2000): 90.
 28. Cirasella, 89.
 29. Helen Yoxell, "Privacy and Personal Papers," *Archives and Manuscripts* 12 (May 1984): 40.
 30. Yoxell, 40.
 31. Yoxell, 43–44.
 32. Paul J. Sillitoe, "Privacy in a Public Place: managing public access to personal information controlled by archives services," *Journal of the Society of Archivists* 19 (April 1988): 9.
 33. Sillitoe, 9.
 34. Judith Schwarz, "The Archivist's Balancing Act: Helping Researchers While Protecting Individual Privacy," *The Journal of American History* 79 (June 1992): 180 *JSTOR* (April 15, 2003).
 35. Schwarz, 188.
 36. Schwarz, 188.
 37. Schwarz, 180.
 38. Association of Canadian Archivists, "Application of Principles, C. Availability and Use, C2" *Code of Ethics* (n.d.), <<http://archivists.ca/about/ethics.aspx>> (4 October 2004).
 39. Heather MacNeil, "Defining the Limits of Freedom of Inquiry: The Ethics of Disclosing Information held in Government Archives," *Archivaria* 32 (1991) as found in Tim Cook, "Archives and Privacy in a Wired World: The Impact of the *Personal Information Act* (Bill C-6) on Archives," *Archivaria* 53 (2002): 110.
 40. Cook, 113.
 41. Cook, 113.
 42. Heather MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Metuchen, NJ: Society of American Archivists and The Scarecrow Press, 1991): 171–172.
 43. MacNeil, 175–176.
 44. MacNeil, 118.
 45. Sara S. Hodson, "Private Lives: Confidentiality in Manuscripts Collections," *Rare Books and Manuscripts Librarianship* 6 (1991): 110.
 46. Hodson, 110.
 47. Hodson, 109.
 48. Hodson, 110.
 49. Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," *American Archivist* 49 (1986): 170.
 50. Robbin, 172.
 51. Hodson, 113–114.
 52. Mark A. Greene, "Moderation in Everything, Access in Nothing?: Opinions about Access Restrictions on Private Papers," *Archival Issues* 18 (1993): 36.

53. This article has concentrated on the issue of researcher access, rather than on the related issue of archives staff access. Admittedly, there are problems with having to wait to process all or parts of a collection until after a specified period has passed. Among them is that the longer one waits to process a collection, the more difficult it might be to identify a name within it. But just as a researcher's needs should not be allowed to interfere with privacy rights, neither should those of the archival staff. If there is no way of getting around restricted materials being viewed by staff members, at the very least it behooves institutions to mandate that their employees sign a statement affirming their agreement not to divulge or discuss the contents of unreleased items in a collection beyond what is necessary to receive directions and training for processing of same.
54. Warren, 205.