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Confidentiality of Library Records: A Survey of Problems, Policies, and Laws

Bruce M. Kennedy

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In recent years, many states have passed laws protecting the confidentiality of library records. Mr. Kennedy discusses the development of this movement and its relationship to court decisions on the right to privacy.

For centuries librarians have been asked to reveal who reads what.¹ Libraries have been asked for reading histories of specific users, circulation histories of particular books, and research histories of controversial topics. Biographers have pored over the library records of Presidents John Adams and Abraham Lincoln. Ministers have sought to learn who borrows sex education materials. Police have asked who borrows books on photoengraving, bomb making, and the occult.

Since 1970, the library profession has sought to shield these records from scrutiny to safeguard the privacy of library users. Conflict, legislation, and litigation have resulted. This article surveys the problems, policies, and laws concerning the confidentiality of library records.

I. The Problem: Access versus Privacy

Libraries generate many client records. These include registration records, circulation files, reference logs, and computer search worksheets. Such records are created for innocent but important purposes—to enhance service, account for the use of library resources, and control the circulation of a collection. Quite unintentionally, these records may reflect the reading and research interests of individual library users.

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1. As early as the eleventh century, librarians in Benedictine monasteries were expected to disclose circulation information. Under the Rule of St. Benedict, monks were assigned sacred texts to study. At an annual Lent ceremony, the librarian read aloud the circulation records for each monk. If the monk had not studied the book entrusted to him, he was to confess his fault and pray for forgiveness. See J. CLARK, *THE CARE OF BOOKS* 57-58 (1975).

Disclosing library records raises complex privacy issues. A meticulous dissection of these issues would expend more ink and energy than is appropriate for this survey. Instead a skeletal analysis is offered, sufficient to frame the privacy problems that law and policy seek to remedy.

Privacy, like other legal values, is not an absolute right; it must be balanced against competing legal interests. The interests of the library record seeker must be weighed against the privacy interests of the library user.²

The status of the record seeker is a threshold issue. The requestor may be a government official or a private citizen. Different legal and policy considerations figure in each scenario. A government request for library records pits privacy against the government's authority to investigate. A citizen request pits privacy against the citizen's legal right to inspect public documents under an open records law.

A. Government Access to Library Records

Governmental authority to access library files rests on concerns of law enforcement, public safety, and national security. To this trinity of legitimate state interests can be added a fourth, darker, purpose. To some unknown and probably unknowable extent, government agents have used library records to spy on lawful research activity.³

Law enforcement officers have used library records in three contexts: to complete a case against a known suspect in a crime,⁴ to target an

2. While the interests of the record seeker and the library user are the primary concerns to be balanced, the library itself may have its own interests, which are entitled to some weight.

Some record requests are burdensome. Even if a library is sympathetic to a record request—perhaps a request from a biographer—the library may not be able to afford the staff time to cull through voluminous files to find a few relevant records.

Similarly, the library and its patron may have differing interests. The clearest case is where a patron sues a library for alleged wrongful disclosure of library records. To defend itself, the library might contend that the disclosure was permitted by law or that the disclosure caused no actual injury.

Generally, libraries have been viewed as stakeholders in records disputes. One legal scholar has suggested that librarians have their own constitutional rights concerning free access to library materials. See O'Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUM. RTS. 295, 300 (1975) [hereinafter O'Neil I]. This, however, is a novel thought. The conventional analysis presumes that the constitutional rights of the library patron are the primary interests in conflict with the rights of record seekers. In this article, I explore this basic conflict, and leave for further study whether librarians have any legal rights that limit the disclosure of library records.

3. Apparently, in the 1960s federal agents attempted to use library records to monitor lawful research activities of certain Vietnam War protesters. See *infra* pp. 741-42.

4. To investigate the shooting of President Reagan by John Hinckley, federal investigators analyzed records reflecting Hinckley's use of a Colorado public library. The library records indicated that Hinckley borrowed *The Fan*. That Hinckley was obsessed by this novel was used by witnesses who testified at his trial on the issue of his sanity. See 106 LIBR. J. 1366 (1981); L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 78 (1984).

individual as a suspect,⁵ and to monitor persons who may commit future crimes.⁶ In these contexts, records have been used for two purposes. The first is to prove some fact about the state of mind of the library user. For example, police have used library records to make inferences about a user's mental state, knowledge, opinions, or beliefs. The second purpose is to prove some external fact about a library user. For example, records could be used to prove that a suspect was in the library on a certain date.

The legitimacy of these police requests hinges, in large part, on the context of the investigation and the reliability of the library records as evidence. The most troubling record requests come out of government "fishing expeditions," which monitor people who may (or may not) commit future crimes. Equally dangerous are requests that allow police to speculate about the thoughts of a user from the content of a library book. These requests endanger civil liberties.

Much less troubling are narrowly tailored requests that are made to investigate completed crimes; particularly if library records are used only to prove some external fact about a patron.⁷ For example, using a library registration record to obtain a handwriting exemplar of a patron is no more intrusive than obtaining the same information from a driver's licence.

Inseparable from law enforcement is the public safety justification for government access to library files. Most criminal investigations seek to both bring an offender to justice for a completed crime and prevent personal or property injury attending future crimes. Intuitively, public safety is the strongest justification for the disclosure of library records.

5. A death threat against President Reagan was scrawled in a library book belonging to an upstate New York library. After obtaining a subpoena, federal agents were allowed to see the circulation record, which indicated that only one person had borrowed the book. On the strength of this evidence, that person was arrested. See 24 NEWSL. ON INTELL. FREEDOM 25 (1975); 33 NEWSL. ON INTELL. FREEDOM 5 (1984).

6. In the 1960s libraries revealed to the FBI who was charging out books on photoengraving in an effort to identify potential counterfeiters. 95 LIBR. J. 2593 (1970). In 1970 United States Treasury agents asked libraries to reveal the names of borrowers of books on drug mixing and bomb making. *Id.*

7. One attorney has posed this intriguing hypothetical situation as an example of a reasonable police request for library records:

[A] bomb goes off in a crowded street in the middle of rush hour, killing and injuring hundreds. Fingerprints are found on bomb fragments. The police go to the local library and find a book diagramming how to build a bomb identical to the one which exploded. Police dust the book and find fresh fingerprints matching the fingerprints on the bomb fragment. They seek the circulation record of that book for the past few months.

Pavvner, *Coping with the Conflict*, 29 NEWSL. ON INTELL. FREEDOM 115, 117 (1980). This narrowly framed request is made to advance a bonafide criminal investigation. The bomb, the suspect, and the book have all been tied together before any request is made for the circulation record. Police can use the record to link together physical evidence without speculating on the mental state of the patron. Under these circumstance, disclosing the library records is in the public interest.

One who would harm another cannot legitimately claim any privacy right as a cloak to complete the offense.

Finally, national security may justify government access to library records. Nations have the fundamental right to act to preserve their existence. Translated into terms of American jurisprudence, this means that the United States government has the right to investigate and quash any attempt to overthrow it by unconstitutional means. This is the essence of national security.

National security, however, applies only when national existence is at risk. It does not authorize domestic surveillance of constitutionally protected political activity. Monitoring the research done by members of The Order—a neo-Nazi organization that has formally declared war against the United States—may be a legitimate exercise of national security power. Similar surveillance of a nonviolent activist, like the Reverend Martin Luther King, Jr., is clearly beyond the pale of national security.

Between these clear cases is a vast gray area of controversial investigations. Another layer of controversy is added when librarians are asked to become proxy investigators. The furor over the FBI Library Awareness Program⁸ dramatically illustrates the tangled skeins of privacy, national security, and the professional ethics of a librarian. Unquestionably, a librarian operates under a strong ethical duty to preserve patron privacy. Yet, as a citizen, the librarian has some duty to report espionage. This dilemma deserves in-depth study, which is not possible here.

One modest point is clear. The preservation of public safety and public freedom underscore a need for controlled government access to library records. One cannot categorically approve or condemn all government requests for library records.

B. Citizen Access to Library Records

Citizen access to library files stems from statutes that are popularly known as “freedom of information” acts or more accurately as “open

8. After a Soviet agent successfully recruited a college student in a library, the FBI became concerned that libraries may be enlistment points for spies and collection points for sensitive technological data. As a countermeasure, the agency visited key research libraries to make librarians aware of this national security concern. The agency has also requested librarians to report spy recruitment activity and to monitor the reading and photocopy habits of the patrons who may be foreign agents.

Librarians have not cooperated with these investigations for a number of reasons. Some are skeptical that this information is vital to American national security. Others feel that it is not the place of libraries to conduct national security surveillance. These beliefs are reinforced by misgivings that cooperation with the FBI may violate the constitutional and statutory privacy rights of library users. For a general description of the Library Awareness Program, see Robins, *Spying in the Stacks: The FBI's Invasion of the Stacks*, *NATION*, Apr. 9, 1988, at 481; Shields, *Academic Libraries Must Oppose Federal Surveillance of Their Users*, *Chron. Higher Educ.*, Mar. 28, 1988, at 48A.

records laws.” These state and federal statutes create a public right to inspect most documents kept by government agencies.

Most libraries are characterized as governmental agencies because they are established, funded, or regulated by a federal, state, or local government. So characterized, the files kept by libraries are public documents that may be inspected under an open records law unless they are exempted from disclosure.

The rationale behind open records laws is that the people are entitled to know about the actions of their government. This right to know is vital to maintain public confidence in the government, to maximize the accountability of government officials, and to enable citizens to make informed political choices. In short, the purpose behind these open records statutes is to allow citizens to review and, if necessary, change official government policy.

Ironically, public access to library files is not consistent with the underlying purpose of these laws. This is true for two reasons. First, patron records document only an individual's use of a library, rather than any library policy. Second, although the open records law postulates that citizens will access government papers for a public purpose, many citizen requests for library files are based on purely personal motives that serve no public interest.

The first point is reflected in these observations made by the General Counsel of the American Library Association:

Library circulation records do *not* contain information regarding the affairs of government but contain information only about the reading habits and propensities of individual citizens. Moreover, library circulation records clearly do not reflect the official acts of public officials and employees.

It is no secret that libraries keep circulation records in order to keep track of works in their collection. . . . The only acts revealed in such records are the acts of private citizens in borrowing books; the only “official act” they reflect is the fact that the library permitted the book to be borrowed⁹

This logic applies with equal force to other types of library records. Reference logs and similar records tell more about patron activity than about official library policy.

The second point is substantiated by the many baldly personal record requests received by librarians. A sales representative sought access to

9. Statement of William D. Hill of Kirkland & Ellis to John Hill, Attorney General of Texas (May 6, 1975), *quoted in* Million & Fisher, *Library Records: A Review of Confidentiality Laws and Policies*, 11 J. ACADEMIC LIBRARIANSHIP 346, 347 (1986).

circulation files to develop a potential customer list for her products.¹⁰ A parent wanted to know if his child had charged out library materials under his surname or that of his former wife. A husband wanted to know if his wife had borrowed books about divorce.¹¹ These requests advance private, not public, interests.

An odd pair of groups do routinely seek library files for public impact: journalists and censors. Investigative journalists see library files as source material for stories about public figures. With atypical irony, one reporter wanted to know about the library use habits of local legislators who had recently voted down a library budget proposal.¹² The nomination of Judge Robert Bork to the Supreme Court suggests another use for library records. Journalists and political opponents of a nominee may search library records to uncover embarrassing information about the nominee's cultural tastes.¹³

Would-be censors make the most pernicious demands for library records. Groups such as the Moral Majority often want to know who uses the library materials they seek to ban.¹⁴ This gambit allows the censor to pursue a two-front campaign: a conventional censorship campaign against the library and an invidious campaign of intimidation against the audience of the targeted title. These campaigns of harassment and censorship are a perversion of the democratic ideals that underpin the open records law.

In short, citizens have few legitimate uses for library records. Library service records do not reflect official library policy, nor are most citizens interested in library policy. Apart from personal gain, some citizen requests are contrary to the public interest. Nevertheless, most states have crafted

10. See 96 LIBR. J. 432 (1971); 20 NEWSL. ON INTELL. FREEDOM 48 (1971).

11. See Wash. Post, July 20, 1980, § V.a., at 9, col. 1.

12. Another journalist sought circulation records from an art library to determine what kind of paintings had been borrowed by local government officials. See 24 NEWSL. ON INTELL. FREEDOM 85 (1975).

13. Journalists and political opponents of Judge Bork examined video rental records that identified movies the judge had rented and presumably viewed. This investigatory tactic was widely condemned as an invasion of privacy. Two bills were introduced into Congress to shield records kept by video stores and libraries. See H.R. 4947, 100th Cong., 2d Sess. (1988); S. 2361, 100th Cong., 2d Sess. (1988). S. 2361 was enacted but not before the bill was amended to delete explicit references to libraries. See 134 Cong. Rec. S16,312 (daily ed. Oct. 14, 1988). Accordingly, Congress has dealt with the minor problem of privacy of video rental but has ignored the larger problem concerning library records.

14. As part of a censorship campaign against a sex education film, *Achieving Sexual Maturity*, the Moral Majority initiated a law suit against the Washington State Library to compel the library to reveal the names of public school employees who had borrowed the film. Moral Majority of Washington State v. Washington State Library, No. 81-2 00191 0 (Washington Super. Ct. for Thurston County). After much furor, the suit was dismissed and the censorship campaign apparently dissipated. See 30 NEWSL. ON INTELL. FREEDOM 40, 51 (1981).

their open records statutes broadly so that library records are open to inspection by the general public.¹⁵

C. Privacy Interests of Library Users

If library records are disclosed, what interests are violated and what injuries are sustained? Occasionally, disclosure is harmless. No privacy right is intruded upon if the library user is an historical figure. Carl Sandburg sifted through Library of Congress records to ascertain the borrowings of Abraham Lincoln to no one's harm.

In rare instances, an invasion of privacy occurs but is purposefully ignored. For example, many would agree that parents should have access to the library records of their minor children. This is part and parcel of the parental authority. Moreover, to interpose a privacy interest between parent and child would interfere with a private relationship to which law and society accord great respect. This, however, is an unusual situation. It is difficult to imagine a similar relationship between adults. For example, the current notion of marriage does not give one spouse any right to pry into the reading habits of the other.

Apart from these unusual circumstances, most requests for circulation records do infringe on the privacy of the library user. The precise injuries that flow from this infringement depend upon the facts of each case. However, two conceptions of privacy can be articulated.

The first conception views privacy as an intrinsic right. This is a positivist view that privacy is the fundamental right "to be left alone," to recall the apt phrase of Justice Brandeis.¹⁶ So envisioned, privacy is a dignitary right based on societal regard for individual autonomy.

Some object to cloaking patron records with this privacy right because most library transactions occur in public view. The argument is that since the records are generated in plain view, the patron cannot have any reasonable expectation of privacy. Though it is superficially appealing, this argument fails to consider that library users may entertain subtler expectations of privacy.

15. Not all states have construed their open records laws to apply to library services records. The Kentucky open records statute requires a court order to disclose public records when disclosure would result in a clearly unwarranted invasion of personal privacy. See KY. REV. STAT. ANN. § 61.878(1)(a) (1985). In 1981 the Attorney General of Kentucky opined that library records need not be subject to public inspection because of this general privacy exemption. See Op. Att'y Gen. Ky. 81-159 (1981). More typical are the views of the attorneys general of Iowa and Mississippi, who have opined that absent any special privacy provision, library records are discoverable under an open records law. See Op. Att'y Gen. Iowa 363 (1979); Op. Att'y Gen. Miss. (May 10, 1985) (available on WESTLAW, MS-AG Database).

16. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

One such expectation is that library service transactions will be witnessed by only two classes of people: library employees and library users. Library users may reasonably expect that transactions will not be vicariously viewed by persons outside the library community.

Another possible privacy expectation centers on the distinction between single library transactions and the entire history of a user's transactions. Even if a user expects no privacy concerning an isolated library transaction, the user may reasonably expect that the records reflecting the entire compilation of transactions will be confidential.

Finally, a user may believe that privacy attaches to records only after they are integrated into the library's files. In other words, a user may not believe that any zone of privacy exists on the public side of a circulation or reference desk, but may reasonably believe that privacy begins on the nonpublic side of library service points.

Whatever the exact expectation, it seems clear that the mere fact that the library transactions are public does not mean that users can have no reasonable expectation of privacy over their library records.

A second conception of privacy casts it as a prophylactic right that secures and safeguards other, traditional legal rights. So viewed, the right of privacy is a buffer against intrusions that could mature into serious personal, reputational, or proprietary injuries.

The most immediate injury flowing from free access to library records is that the library user may be subject to harassment, intimidation, or persecution. If reading tastes become a matter of public knowledge, readers may be targets of community prejudice and bigotry. A person who reads a few books about Marx may be branded a Communist. Another who enjoys racy novels may be ostracized from a church. One who researches AIDS may be rumored to have the disease. Various emotional and reputational injuries are foreseeable.

In the case of government requests, a person's reading tastes may spark enough suspicion to kindle an investigation. The fruits of an investigation might be stored in computer databases, which may be shared between federal and state agencies and, in some cases, private organizations. Dormant for years, the information could emerge to taint applications for employment, for financial credit, for admission to the bar, for naturalization, or for other government benefits.

Even worse, a government investigation might lead to a formal criminal prosecution. The charge may be as amorphous as conspiracy or syndicalism. In extreme cases, the government could appear to be prosecuting "thought crimes."¹⁷

17. See generally Comment, *Evidentiary Use of a Criminal Defendant's Reading Habits and Political Conversations*: United States v. Giese, 93 HARV. L. REV. 419 (1979).

The central irony is that books are not reliable indicators of their readers' thoughts. That a person borrowed a library book does not mean that the person read it. That a borrower read it does not mean that the person understood—let alone agreed with—the author's ideas. Indeed, a reader's persecution may be based on a tragedy of errors.

Collectively, these risks may dissuade readers from using libraries to do controversial research. Such a "chilling effect" on library use would eviscerate publicly supported libraries as havens for intellectual freedom. It would also devalue the immense investment made by communities to develop rich and diverse library collections.

Beyond the injuries sustained by the target of a record search, the privacy rights of others may be indirectly infringed. Locating records regarding an individual may require sifting through the records of many library users. Unless this sifting is done by library staff, information about other patrons may be inadvertently disclosed. Though this harm may be difficult to measure, it should be factored into the privacy analysis.

Articulating and balancing precise claims of access and privacy is only possible in the context of a specific case. Nevertheless, some generalizations are in order.

Many requests for library records do not serve any bonafide public interest. Against these claims, privacy should be the superior value. In a few cases, however, a request for library records is supported by a strong public interest. When library records will materially assist in the solution of a serious crime or save someone from personal injury, privacy should compromise to public safety. This tension between access and privacy drives a quest for reasonable policies and laws to safeguard both library users and the general public.

II. The Response of the Library Profession

Libraries and library associations have slowly mustered resistance to demands to disclose patron records. The roots of this resistance go back to the Vietnam War protest era.

In 1970 the Reverend Philip Berrigan and six other Vietnam War protesters were placed on trial for conspiracy and kidnapping. To build a case against the "Harrisburg Seven,"¹⁸ the FBI monitored the defendants'

18. The seven defendants were primarily accused of conspiracy to kidnap Henry Kissinger, to blow up generators in heating tunnels in Washington D.C., and to vandalize draft board offices. After a two-month trial, the jury was unable to reach a verdict and a mistrial was declared on the principal charges. The Rev. Berrigan and one other person were convicted of smuggling contraband to and from Lewisburg Penitentiary but these charges were subsequently dismissed. For more information on the trial, see N. ZAROULIS & G. SULLIVAN, *WHO SPOKE UP? AMERICAN PROTEST AGAINST THE WAR IN VIETNAM, 1963-1975*, at 378-79 (1984).

use of a college library. Federal agents engaged in electronic surveillance, attempted to search library circulation records, and sought to enlist librarians as informants.¹⁹

In 1971 the membership and Executive Board of the American Library Association responded by approving a Resolution on Governmental Intimidation.²⁰ Drafted as five articles, the resolution condemned, in no uncertain terms, the techniques of investigation and intimidation used at Harrisburg. The first three articles condemned spying in libraries, the use of grand jury proceedings to intimidate protesters, and the use of the federal Conspiracy Act of 1968 to quash lawful political activism. Article four asserted that the "confidentiality of the professional relationships of librarians to the people they serve" must be respected in a like manner as the confidential relationships of medical doctors, lawyers, or priests.²¹ A final article resolved that librarians should not become government informants by "voluntarily revealing circulation records or identifying patrons and their reading habits."²²

The Harrisburg Resolution was flawed only by its specificity. It addressed a specific investigation under specific federal laws. In 1973 ALA adopted a more general Resolution on Governmental Intimidation, which broadly denounced the use of political power to silence lawful political expression. This general resolution rescinded only the first three articles of the Harrisburg Resolution. Left intact were the final two articles, which stand as an early expression of concern for the confidentiality of library records.²³

While academic libraries dueled with the FBI, public libraries were confronted by federal agents from the Treasury Department. In 1970, Treasury agents approached public libraries in Atlanta, Cleveland, Milwaukee and elsewhere and asked to see circulation records for books on bomb making.

The sequence of events at Milwaukee was typical. The agents requested the records and were rebuffed by librarians. Undaunted, the agents returned with an opinion from the office of the Milwaukee City Attorney, which advised that the circulation records were public records and therefore could not be withheld from the agents. Reluctantly, the library opened its files.²⁴

19. FBI surveillance in libraries is described in AMERICAN LIBRARY ASSOCIATION, OFFICE FOR INTELLECTUAL FREEDOM, INTELLECTUAL FREEDOM MANUAL 108-10 (3d ed. 1989) [hereinafter INTELLECTUAL FREEDOM MANUAL].

20. For the text of the ALA Resolution on Governmental Intimidation, see *id.* at 108-09.

21. *Id.* at 109.

22. *Id.*

23. *Id.* at 110. The ALA Council amended the policy July 1, 1981. *Id.* at 112.

24. 1 AM. LIBR. 751 (1970).

The ALA Executive Board reacted by issuing an advisory statement condemning the investigations as “an unconscionable and unconstitutional invasion of . . . privacy.”²⁵ Library leaders protested to members of the Senate Subcommittee on Constitutional Rights. Concerned librarians held sit-ins at the Washington office of the Internal Revenue Service. This activism prompted negotiations between the ALA and the IRS.

A joint communique, issued by the ALA and the IRS, stated that both groups would work to develop guidelines on government access to circulation records. The communiqué suggested that both groups would attempt “to identify areas of reconciliation that would give the Government access to specific library records in justifiable circumstances but would unequivocally proscribe ‘fishing expeditions’ in contradistinction to the investigation of a particular person or persons suspected of a criminal violation.”²⁶ The promised guidelines never appeared.

The IRS position in this imbroglio was put forth in a letter from Secretary of the Treasury David Kennedy to Senator Sam Ervin, Chair of the Senate Subcommittee on Constitutional Rights. The Secretary wrote:

[The visits had been conducted to] determine the advisability of the use of library records as an investigative technique to assist in quelling bombings. The survey . . . has terminated and will not be repeated. [However] . . . it is our judgment that checking such records in certain limited circumstances is an appropriate investigative technique.²⁷

The ALA position on the matter was formalized in 1971 with the adoption of a Policy on Confidentiality of Library Records. The current version of this policy reads:

The American Library Association strongly recommends that the responsible officers of each library, cooperative system, and consortium in the United States:

- 1) Formally adopt a policy which specifically recognizes its circulation records and other records identifying the names of library users with specific materials to be confidential.
- 2) Advise all librarians and library employees that such records shall not be made available to any agency of state, federal, or local government except pursuant to such process, order, or subpoena as may be authorized under the authority of, and pursuant to, federal, state, or local law relating to civil, criminal, or administrative discovery procedures or legislative investigatory power.
- 3) Resist the issuance or enforcement of any such process, order, or

25. *Memo to Members*, 1 AM. LIBR. 658 (1970).

26. *Memo to Members*, 1 AM. LIBR. 771 (1970).

27. Letter from David Kennedy to Senator Sam Ervin, Jr. (July 29, 1970) (copy in ALA files and partially reprinted in INTELLECTUAL FREEDOM MANUAL, *supra* note 19, at 103).

subpoena until such time as a proper showing of good cause has been made in a court of competent jurisdiction.²⁸

The policy aims to limit the independence of police discovery by requiring that some order be obtained from a judicial, legislative, or administrative body. So designed, the policy does not advocate absolute privacy over library records. Instead, a disclosure of records is permitted for good cause as determined by a nonpolice entity.

The policy is silent on the matter of citizen access to library records. This is understandable since the policy grew out of conflicts with government investigators. Nevertheless, the spirit of the policy seems to deny citizen access to library records. If government access to library records should be limited, *a fortiori*, citizen access should be even more limited. In the wake of this policy, professional ethics statements that echoed the need for confidentiality evolved. An ALA Statement on Professional Ethics, adopted in 1975, admonished librarians to "protect the essential confidential relationship which exists between a library user and a library."²⁹ In 1980 a new Code of Ethics directed librarians to "protect each user's right to privacy with respect to information sought or received, and materials consulted, borrowed, or acquired."³⁰

These ALA directives could not be achieved without some catalyst. That catalyst was and remains the ALA Intellectual Freedom Committee (IFC). The IFC has played a dual role as reporter and policy maker. By reporting controversies involving library records in its *Newsletter on Intellectual Freedom*, the IFC has kept this privacy problem in the consciousness of the library profession. In its more proactive role as policymaker, the IFC has drafted and pressed for adoption of the ALA statements on governmental intimidation and confidentiality of library records. Still vigilant and active, the IFC has recently published a set of procedures for implementing the Policy on Confidentiality of Library Records.³¹

28. ALA Policy Manual § 52.4, in AMERICAN LIBRARY ASSOCIATION, ALA HANDBOOK OF ORGANIZATION 1988/89, at 37 (1988) [hereinafter ALA HANDBOOK]. Point three of this policy has been construed to mean that:

upon receipt of such process, order, or subpoena, the library's officers will consult with their legal counsel to determine if such process, order, or subpoena is in proper form and if there is a showing of good cause for its issuance; if the process, order, or subpoena is not in proper form or if good cause has not been shown, they will insist that such defects be cured.

Id. at 106. The policy was amended in 1986 to reach library cooperative systems and consortia. See 35 NEWSL. ON INTELL. FREEDOM 166 (1986).

29. *Statement on Professional Ethics, 1975, reprinted in 10 AM. LIBR. 666 (1979).*

30. ALA Policy Manual § 54.16(3), Code of Ethics, in ALA HANDBOOK, *supra* note 28, at 241. For the revision of the Code of Ethics, see 12 AM. LIBR. 335, 404-05 (1981).

31. *Suggested Procedures for Implementing "Policy on Confidentiality of Library Records,"* 37 NEWSL. ON INTELL. FREEDOM 69 (1988).

The ALA policies have inspired a proliferation of confidentiality policies by library associations and libraries. Some of the many organizations that have adopted confidentiality statements include the Special Libraries Association,³² the American Association of Law Libraries,³³ the New York Library Association,³⁴ the Atlanta Public Library,³⁵ the Milwaukee Public Library,³⁶ and the Cornell University Library.³⁷

As shields, these policies have met with mixed success. The policy of the Washington State Library Commission was credited with deterring the Moral Majority from learning who borrowed the sex education film *Achieving Sexual Maturity*.³⁸ However, the policy of the Jefferson County Public Library did not prevent the disclosure of the library records of John Hinckley to the FBI and *Newsweek*.³⁹

Though these policies are not law, they have prompted legislation. They have galvanized librarians to lobby for privacy legislation. For example, library associations in Arizona and Indiana had a hand in reviewing proposals for library privacy laws.⁴⁰

Library privacy legislation has not eliminated the need for strong confidentiality policies. Minimally, a policy can ensure that the library staff complies with the applicable privacy legislation. Also, a policy will have special protective force in certain states that have enacted weak library privacy legislation. In these states, the privacy laws give libraries discretion to shield or disclose records.⁴¹ An unequivocal library policy can buttress these weak privacy laws by serving as an internal safeguard against imprudent disclosures. Finally, a detailed policy can reach a myriad of ethical concerns about client confidentiality that are not answered by a

32. See *SPECIALIST*, Aug. 1988, at 1.

33. In 1980 the AALL adopted the 1975 ALA Code of Ethics, which contained a patron confidentiality provision. See *American Association of Law Libraries Code of Ethics*, 11 *AALL NEWSL.* (1980) (unpaginated material between pp. 130-31). In 1988, the AALL passed a resolution in opposition to the FBI Library Awareness Program that declared that "the protection of the confidentiality of library records [should be] maintained by public and private institutions." See 20 *AALL NEWSL.* 6 (1988).

34. The New York Library Association policy is reprinted at *N.Y.L.A. BULL.*, June 1988, at 4.

35. The Atlanta Public Library policy is reprinted at 1 *AM. LIBR.* 729 (1970).

36. The Milwaukee Public Library policy is reprinted at 95 *WIS. LIBR. BULL.* 413 (1970).

37. See Cornell University Library, *Library Users Policies and Regulations II.A.2*.

38. See 12 *AM. LIBR.* 177 (1981).

39. See 106 *LIBR. J.* 2162 (1981).

40. See *SCHOOL LIBR. J.*, Aug. 1985, at 10; Swan, *Public Records & Library Privacy*, 108 *LIBR. J.* 1645, 1646-47 (1983).

41. See *infra* p. 756.

statute.⁴² For these reasons, policy statements remain important resources to solve library confidentiality problems.

III. Constitutional Uncertainty

The ALA⁴³ and legal commentators⁴⁴ have opined that disclosing patron records violates the constitutional rights of library users. Two constitutional theories are advanced. One is that disclosure violates the first amendment rights of library users by abridging their freedom of speech. The other argument is that disclosure violates a constitutionally protected privacy interest of patrons.

Before analyzing these claims, it is important to recall why the Constitution is involved at all. Constitutional liberties are a bulwark against oppressive "state action," but they afford no defense against private intrusions. Given this concept of state action, it is easy to see why government requests for library records raise constitutional questions. Harder to visualize are instances where a private citizen asks for circulation records. However, even these circumstances raise constitutional issues because the library itself is a branch of the state, and any compliance with a private request should be sufficient state action to pose a constitutional question.

The first amendment argument for the confidentiality of library records can be outlined in five premises. First, the first amendment protects against state action that indirectly abridges speech by exerting a "chilling effect" on speech. Second, protected speech includes both the right to speak and the right to receive speech. Third, the right to receive speech includes using a library to receive ideas and information. Fourth, state action that has a chilling effect on using a library violates the first amendment. Finally, because the disclosure of library records would have a chilling effect on using a library to obtain controversial materials, the first amendment requires that library records remain confidential.

The United States Supreme Court has not adopted this reasoning. Indeed, only the first premise of the argument has been generally accepted. That the Constitution protects against government actions that "chill" speech is settled first amendment jurisprudence.⁴⁵

42. For a convincing argument that librarians need a detailed code of ethics concerning confidentiality, see Stover, *Confidentiality and Privacy in Reference Service*, 27 RQ 240 (1987).

43. See *infra* nn. 25-26 & accompanying text.

44. See Comment, *Surveillance of Individual Reading Habits: Constitutional Limitations on Disclosure of Library Borrower Lists*, 30 AM. U.L. REV. 275 (1981) [hereinafter Comment on Surveillance]; Comment, *Brown v. Johnston: The Unexamined Issue of Privacy in Public Library Circulation Records in Iowa*, 69 IOWA L. REV. 535 (1984) [hereinafter Comment on Brown].

45. See, e.g., *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 463-66 (1958).

The stumbling block is the second premise. One might presume that the right of free speech implies the right to receive speech, but no such principle has been authoritatively established by the Supreme Court. Indeed the "right to receive speech," or, as it has been more descriptively termed, the "right to receive ideas and information" has been the subject of much debate.⁴⁶

In a variety of cases, the Supreme Court has suggested the existence of a right to receive ideas and information. The right to receive mail from Communist countries was upheld in *Lamont v. Postmaster General*.⁴⁷ The right to hear a foreign speaker was acknowledged in *Kleindienst v. Mandel*.⁴⁸ The right of the general public to receive balanced broadcasting was mentioned in *Red Lion Broadcast Co. v. FCC*.⁴⁹ The right to receive consumer information in advertisements was declared to be constitutionally significant in the *Virginia State Board of Pharmacy* decision.⁵⁰

In these cases, several Justices have expressed their conviction that the first amendment embraces a right to receive information. Justice Brennan, concurring in *Lamont*, articulated his vision of this right:

[T]he Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.⁵¹

Similar reasoning was expressed by Justice Marshall in his dissenting opinion in *Kleindienst*:

The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." . . . The First Amendment means that Government has no power to thwart the

46. One aspect of the "right to receive ideas" is particularly relevant to librarians. This is the "right to read." Several excellent articles meticulously build a case for a constitutional right to read. See Comment on Surveillance, *supra* note 44, at 282-85; O'Neil I, *supra* note 2, at 300-06; O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CINN. L. REV. 209, 216-41 (1973) [hereinafter O'Neil II].

47. 381 U.S. 301 (1965).

48. 408 U.S. 753 (1972).

49. 395 U.S. 367 (1969).

50. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

51. 381 U.S. at 308 (citations omitted).

process of free discussion, to "abridge" the freedoms necessary to make the process work.⁵²

Though these statements seem to be strong pronouncements of law, three caveats are in order. First, the statements are dicta rather than actual holdings of the Court. Second, the statements reflect the views of a few Justices and are not indicative of a majority of the Court. Third, at least one eminent scholar, Professor Robert O'Neil, has reluctantly concluded that these complex cases may be conservatively interpreted to fall short of declaring a general constitutional right to receive information.⁵³

These equivocal cases are the backdrop for the last and most relevant first amendment case: *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.⁵⁴ As the first library censorship case to reach the Supreme Court, *Pico* invited the Court to consider whether, and to what extent, there is a constitutional right to receive ideas via a library.

In *Pico* a school board decided to remove ten offensive books from two secondary school libraries. These books were not assigned textbooks but were extracurricular reading. Students responded with an action in federal court, based on a claim that the removal of the books violated their rights under the first amendment.

To probe the nature of the students' first amendment rights, the Court explored the underlying right to receive ideas. On this issue, the Court divided into three camps.

One camp, composed of Justices Brennan, Marshall, and Stevens, sought to expand and generalize the suggestions in the prior caselaw that the first amendment embraces a right to receive ideas. Writing for this plurality, Justice Brennan stated that:

[The right to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.⁵⁵

Diametrically opposed to this view was the camp of Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor. Speaking primarily through the Chief Justice, this camp denied any constitutional right to receive ideas.

52. 408 U.S. at 775-76 (citation omitted).

53. See O'Neil II, *supra* note 46, at 216-33; O'Neil I, *supra* note 2, at 300-04.

54. 457 U.S. 853 (1982).

55. *Id.* at 867.

The Chief Justice disputed the reasoning of Justice Brennan that the right to receive ideas is a natural corollary of the speech and press rights of senders and recipients. From the perspective of the sender, the relevant precedent suggested only that the government may not unreasonably restrain speech⁵⁶ or compel speech.⁵⁷ Nothing, opined the Chief Justice, suggested that the state must affirmatively assist the speaker in reaching a recipient,⁵⁸ nor does the “right to receive information and ideas”⁵⁹ carry with it “the concomitant right to have those ideas affirmatively provided at a particular place by the government.”⁶⁰

Alone in the third camp was Justice Blackmun. He did not subscribe to the notion that the government has an affirmative obligation to provide information or ideas to students.⁶¹ However, he did acknowledge a narrower right of access to ideas. He contended that the first amendment protects against “certain forms of state discrimination *between* ideas.”⁶² Specifically, he read the Court’s precedent as directing that “the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.”⁶³

Justice Blackmun’s reasoning is similar to, but subtly different from, that of the Brennan plurality. Both camps would frame similar standards as to when the state infringes upon the right to receive ideas.⁶⁴ Brennan would find a constitutional violation if the school board removed the books with the *intent* of suppressing ideas. Blackmun would find a first amendment violation if the Board removed books for the *purpose* of suppressing access to ideas.⁶⁵ The difference between these two camps comes in the nature of the underlying right that yields their similar standards.

As Justice Blackmun explained, “[M]y view presents the obverse of the plurality’s analysis: while the plurality focuses on the failure to provide information, I find crucial the State’s decision to single out an idea for disapproval and then deny access to it.”⁶⁶

56. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (permitting students to wear armbands as a form of protected speech).

57. See *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (holding that a school board may not compel students to take part in a flag salute ceremony).

58. *Pico*, 457 U.S. at 887 (Burger, C.J., dissenting).

59. *Id.* at 888 (Burger, C.J., dissenting) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

60. *Id.*

61. *Id.* at 878.

62. *Id.* at 878-79.

63. *Id.* at 879.

64. *Id.* at 871.

65. *Id.* at 879-80.

66. *Id.* at 879 n.2.

As *Pico* dramatically reveals, the Supreme Court is deeply divided as to whether the first amendment confers any right to receive information or ideas via a library. Until such a right is established, any first amendment claim that library records should be confidential is, at best, speculative.

The other constitutional basis for the confidentiality of library records is privacy. In *Griswold v. Connecticut* the Supreme Court found that the first, third, fourth, fifth, and ninth amendments cast "penumbras" that form the basis of a constitutional right of privacy.⁶⁷ The essence of this right is that the Constitution forbids state intrusion in certain highly personal associations and decisions. Classic examples of constitutionally protected private matters include the right of a physician to counsel married couples about contraception⁶⁸ and the qualified right of a woman to have an abortion.⁶⁹

To libraries, the most relevant privacy decision from the Court is *Stanley v. Georgia*.⁷⁰ In *Stanley*, federal and state agents obtained a warrant to search for evidence of bookmaking activity. The search revealed no bookmaking materials, but in a bedroom police discovered three reels of film. Using the defendant's projector, police viewed the films and concluded they were obscene. The defendant was charged with unlawful possession of pornography.

The issue before the Court was whether "the mere private possession of obscene matter"⁷¹ can constitutionally be made a crime. In defense of its law, Georgia urged that "[i]f the State can protect the body of a citizen, may it not . . . protect his mind?"⁷² The Court rejected this paternalistic argument, reasoning that the first amendment created a zone of privacy, which constitutionally protected the right to read even obscene materials in one's own home. As Justice Marshall explained:

[The defendant] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. . . . [W]e think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. . . . If the First Amendment means anything, it means that a State has no business telling a man, sitting

67. 381 U.S. 479, 484 (1965).

68. See *id.* at 479 (extending constitutional protection to the confidential association between a physician and a married couple seeking medical advice and a prescription of contraceptives).

69. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

70. 394 U.S. 557 (1969).

71. *Id.* at 557.

72. *Id.* at 560.

alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.⁷³

Whether the logic of *Stanley* can be exported from a private library to a public library is the critical question. *Stanley* may say more about the constitutional privacy of homes than it does about libraries.

Some suggest that any concept of "privacy" is unreasonable in a public library. As one attorney commented, a library circulation desk is as public as a bus terminal.⁷⁴ Yet, as noted earlier, that library records are publicly created does not mean that the records are not worthy of privacy. For several reasons, patrons may have very legitimate expectations of privacy concerning their library records.⁷⁵

These constitutional issues await rigorous judicial consideration. This is true even though one court has already addressed the constitutional privacy interests in library records. That court, the Iowa Supreme Court, superficially analyzed the issues in *Brown v. Johnston*.⁷⁶

Brown involved a police investigation of a series of bizarre cattle mutilations. The county prosecutor theorized that the mutilations were part of an occult ritual and asked the Des Moines Public Library to reveal the names of people who had borrowed sixteen books on witchcraft. After the library refused, the prosecutor obtained from the clerk of the district court a subpoena *duces tecum* ordering the library to produce the records. The library and a patron commenced an action to enjoin enforcement of the subpoena, but the district court denied relief. On appeal to the Iowa Supreme Court, two questions were presented. First, did the Iowa library privacy statute⁷⁷ apply against police? Second, if the privacy statute did not apply, did library users have any constitutional privacy that precluded police access to the records? The court ruled that library users had neither statutory nor constitutional privacy rights against the police. The statutory half of *Brown* is analyzed in the next section.⁷⁸ The constitutional half of the case is considered here.

The court's cursory constitutional analysis focused on when the Constitution confers a privilege against the forced disclosure of information to the state. It began with the observation that while

73. *Id.* at 565.

74. Lovenheim, *The Freedom of Information Act: Defining, Using, and Protecting It*, 29 NEWSL. ON INTELL. FREEDOM 91, 110 (1980).

75. *See infra* pp. 739-41.

76. 328 N.W.2d 510 (Iowa 1983), *cert. denied*, 463 U.S. 1208 (1983).

77. IOWA CODE § 22.7(13) (1979).

78. *See infra* pp. 756-58.

constitutional privileges against forced disclosures have been recognized, such privileges are not absolute.⁷⁹ Each claim of privilege must be balanced against “a societal need for the information and the availability of it from other sources.”⁸⁰

The court then analyzed two United States Supreme Court decisions which were characterized as “closely analogous”:⁸¹ *Branzburg v. Hayes*⁸² and *United States v. Nixon*.⁸³ In *Branzburg* a reporter attempted to withhold the names of his news sources from a prosecutor. The Court held that the reporter’s first amendment claim of privilege is outweighed by the public interest in well founded grand jury indictments.⁸⁴ In *Nixon* the President attempted to withhold executive papers and other materials from counsel involved in the Watergate conspiracy trials. The Court ruled that the President’s claim of executive privilege was outweighed by public interest in a fair trial of the Watergate defendants.⁸⁵ In both cases, the Court ordered the disclosure of records to prosecutors.

Finding *Branzburg* and *Nixon* controlling, the *Brown* court held that “[t]he State’s interest in well-founded criminal charges and the fair administration of criminal justice must be held to override the claim of privilege here.”⁸⁶ So ruling, the court rejected the constitutional privacy claim.

Brown has been criticized for its shallow constitutional analysis. At least one commentator, Carolyn Hinz, believes that the right of privacy concerning library records remains unexplored because of the court’s shoddy legal reasoning.⁸⁷

Hinz carefully dissected *Brown* and criticized the decision on two levels. First, Hinz contends that the *Brown* court used an amorphous analytical framework to consider the constitutional claim. Usually, when a novel constitutional claim is offered up for judicial review, a court will first probe the nature of the claimed right to determine if it is of constitutional stature. If it is, the court then must determine if the challenged action by the state actually truncates the constitutional right. If it does, the court then must articulate a legal standard to balance the competing constitutional and state interests. After the standard is articulated, the

79. 328 N.W.2d 510, 512 (1983).

80. *Id.*

81. *Id.*

82. 408 U.S. 665 (1972).

83. 418 U.S. 683 (1974).

84. 408 U.S. at 690-91.

85. 418 U.S. at 713.

86. 328 N.W.2d at 513.

87. See generally Comment on *Brown*, *supra* note 44.

court must actually apply the standard to determine if that constitutional right is abridged.

The *Brown* court did not employ this traditional method of constitutional decision making. The court did not probe into the nature of the privacy interests of the library user, nor did it articulate any legal standard by which the competing interests should be weighed. As Hinz notes, several cases from the United States Supreme Court have used a "strict scrutiny" standard to test the validity of state action that threatens a free speech interest. The *Brown* court failed to use this usual standard and made no attempt to explain why that standard was inapplicable.⁸⁸

As her second line of attack, Hinz convincingly argues that the *Brown* court misread the *Nixon* and *Branzburg* decisions. *Nixon* is distinguishable on two grounds. First, the privacy right claimed by President Nixon was not based on any of the Bill of Rights but rested on the principle of separation of powers. Second, the presidential materials were disclosed to assist the criminal prosecution *and* to release potential defense evidence to the Watergate defendants. In other words, the constitutional rights of the defendants were an important consideration that justified the forced disclosure of the executive papers. This countervailing constitutional interest is nonexistent in *Brown*.⁸⁹

Hinz contends that *Branzburg* is also distinguishable. There the Supreme Court carefully examined the nature of the reporter's claim against the forced disclosure of the names of news sources. The Court noted that reporters were not attempting to protect the privacy of their sources; instead, they were claiming confidentiality as a professional privilege of journalists. Only after reaching this conclusion did the Court deny journalists a privilege against testifying in court. *Brown* is factually different because the library was concerned about user privacy rights rather than any professional confidentiality right for librarians.⁹⁰ Hinz's careful dissection of *Brown* compels the conclusion that the case has not settled the constitutional law concerning the privacy of library records.

The constitutional uncertainty that appears in the caselaw is mirrored in several advisory opinions issued by state attorneys general. The attorneys general of Nevada, Tennessee, and Texas have opined that the United States Constitution protects the confidentiality of library records.⁹¹ The

88. *Id.* at 538-41.

89. *Id.* at 541-42.

90. *Id.* at 542-44.

91. See Op. Att'y Gen. Nev. 80-6 (1980); Op. Att'y Gen. Tenn. 87-04 (1987); Att'y Gen. Tex. Open Records Decision No. 100 (July 10, 1975), reprinted in 24 NEWSL. ON INTELL. FREEDOM 152 (1975).

attorneys general for two other states, Iowa and Mississippi, have taken the opposite view.⁹² The Alaska Attorney General has taken the unusual position that library records may be confidential under the Alaska Constitution, which grants a right of privacy.⁹³

In the final analysis, the constitutional arguments for the confidentiality of library records remain mere theories. They await acceptance or rejection in an authoritative judicial decision. This constitutional uncertainty has prompted most states to seek legislative solutions to the problem.

IV. Statutory Protection

Over forty states and the District of Columbia have wrestled with the problem of privacy of library records.⁹⁴ Legislatures in these jurisdictions have crafted statutes that strike a balance between privacy and access. Generally, the statutes create a routine privacy right surrounding library records that may be suspended for good cause as determined by a court or some similarly neutral arbiter. Beyond this broad purpose, these laws are amazingly diverse. Literally, no three of them are alike.

A single privacy statute can be thoroughly analyzed by using this framework of five elements:

- 1) *Statutory design.* How does the privacy law interrelate with the applicable state open records law? Are they integrated or independent from each other?
- 2) *Scope of the privacy right.* Specifically what kind of libraries are covered? What records are confidential? What information is confidential?
- 3) *Exceptions to the privacy right.* When or to whom may library records be disclosed?
- 4) *Disclosure procedure.* What, if any, procedure does the statute provide for the disclosure of library records?
- 5) *Sanctions.* What penalties or liabilities may be imposed on a librarian who violates the law by wrongfully disclosing records?

92. The Iowa Attorney General has twice declared that the Constitution does not mandate confidentiality for library records. See Op. Att'y Gen. Iowa No. 71-8-22 (1971); Op. Att'y Gen. Iowa No. 78-8-25 (1979) (available on LEXIS, States Library, IAAG File, and WESTLAW, IA-AG Database). See also Op. Att'y Gen. Miss. (May 10, 1985) (available on WESTLAW, MS-AG Database).

93. See 2 Informal Op. Att'y Gen. Alaska 67, 68 (1984).

94. See Appendix, *infra* p. 803, for a list of state laws that protect the confidentiality of library records.

This framework can also be applied to draw general comparisons among these laws. Such a comparison is worthwhile to appreciate the rich experimentation done by state legislatures on the issue.

A. *Statutory Design*

The basic purpose of these privacy laws is to limit the reach of state open records laws with respect to library records. Accordingly, the first element to analyze is how these privacy laws interact with open records laws.

A drafter constructing a library privacy provision has two design options. One option is simply to amend the open records law to exempt library records from mandatory disclosure. If this is done, the privacy law is "integrated" into the open records law. The other option is to enact the privacy law as a separate statute,⁹⁵ which creates an "independent" limitation to the open records law. With a few exceptions, library privacy laws can be categorized as either independent or integrated statutes.⁹⁶

An independent statute is easier to understand. The scope of the privacy right is spelled out in the four corners of a single, short statute. An integrated law is more complex because it is part and parcel of a larger open records law.⁹⁷ Analyzing the exact scope of an integrated law may pose formidable questions of statutory construction. Other aspects of

95. Most open records statutes expressly allow for the contingency that other statutes may independently create privacy rights that limit access to public records. Many open records laws have a general provision that denies access to records if public inspection would be contrary to another state or federal law. *See, e.g.*, MD. ANN. CODE STATE GOV'T § 10-615(2) (1984).

96. A few states have embraced both options by enacting an independent library privacy statute and amending their open records law to exempt library records from public disclosure. *See, e.g.*, ALA. CODE § 41-8-9 (Supp. 1988) (an independent provision); ALA. CODE § 36-12-40 (Supp. 1988) (an integrated provision).

97. One who drafts an integrated law has two further choices. A library privacy provision may be inserted either in a definitions clause or an exemption clause.

Often an open record law has a clause that defines the term "public records." The definition of this term can be amended to expressly exclude library circulation records. The open records laws of Delaware, Massachusetts, and Rhode Island define public records to exclude library circulation records that identify specific borrowers. *See* DEL. CODE ANN. tit. 29 § 10002(d)(12) (1983); MASS. GEN. L. ch. 4, § 7, 26(k) (1987); R.I. GEN. LAWS § 38-2-2(d)(21) (1984).

Similarly, an open records law may have a clause that exempts certain documents from public disclosure. This exemption clause can be amended to list library records as a protected class of documents. For example, the Oregon open records law has a public access clause limited by a second clause that exempts library circulation records from disclosure. *See* OR. REV. STAT. §§ 192.420, 192.500(1)(j) (1985).

It makes no difference whether an integrated privacy provision is buried in a definition clause or an exemption clause. Much more important is whether a law is crafted as an independent or integrated statute.

research, such as analyzing the legislative history or judicial interpretation of a statute, may be more difficult for an integrated law.

This design choice is more than a matter of theoretical interest. Subtle problems associated with integrated statutes are illustrated by the experiences of the Connecticut legislature and the Iowa Supreme Court. A clause in the Connecticut open records law permits nondisclosure of personnel, medical, or similar files if disclosure would constitute an invasion of privacy. In 1981, a bill was introduced into the Connecticut legislature which would have amended this clause to include library records.

While this bill was under scrutiny, legislators noticed that the clause secures only a "permissive" privacy right—that is, the statute permits a record custodian to decide when a record request would invade the privacy of another. By adding library records to this clause, the legislature would have created only a permissive library privacy right. Instead, the legislature opted for a stronger library privacy provision that was wholly independent from the open records law, and thus evinced its intent to prohibit the disclosure of library records rather than make nondisclosure permissive in the judgment of the library.⁹⁸

As the Connecticut experience teaches, the basic design of an open records law may weaken the scope of an integrated library privacy provision. Similarly, the judicial construction of an open records law may create a window of vulnerability in an integrated provision. This vulnerability was dramatically demonstrated in litigation before the Iowa Supreme Court.

In 1980, the Iowa legislature enacted one of the first library privacy laws. That law, which was integrated into the state open records statute, read:

The following public records shall be kept confidential, unless 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 records, would reveal the identity of the library patron checking out or requesting an item from the library.⁹⁹

Whether this law applied to police requests for library records was put before the Iowa Supreme Court in *Brown v. Johnston*.

Considered earlier for its constitutional analysis,¹⁰⁰ *Brown* involved a prosecutor's request for circulation records of borrowers of books on the

98. See Op. Att'y Gen. Conn. (Dec. 15, 1981) (available on LEXIS, States Library, CTAG File; citation: 1981 Conn. AG LEXIS 114, and WESTLAW, CT-AG Database).

99. 1980 Iowa Acts ch. 1024, § 1 (repealed 1980).

100. See *infra* pp. 751-54 and accompanying notes.

occult. When the library refused, the prosecutor obtained a subpoena *duces tecum*, which ordered disclosure of the records. The library and a patron sued to enjoin enforcement of the subpoena claiming that the Iowa library privacy statute forbid disclosure. Notwithstanding the statute, the trial court ordered that the records be released.

On appeal, the Iowa Supreme Court held that the library privacy statute did not limit police access to library records. Primarily,¹⁰¹ the court relied on its prior decision in *Iowa Civil Rights Commission v. City of Des Moines*.¹⁰² In that case, an administrative agency conducting a civil rights investigation against the City of Des Moines sought to subpoena personnel records that were exempt from public disclosure under the Iowa open records law. The court held that the exemption clause did not apply to an administrative investigation. The court reasoned that the legislature intended the open records law to open government affairs to public scrutiny. Consequently, any exemptions to the law were carefully tailored to circumstances where disclosure would not serve the public interest.¹⁰³ Since the administrative investigations were clearly in the public interest, the exemption clause in the open records law was never intended to limit the subpoena power of administrative agencies.¹⁰⁴

The *Brown* court followed the *Iowa Civil Rights Commission* case to ensure consistency. The court feared that an indefensible distinction would be drawn if it held that the exemption clause blocked a prosecutorial subpoena but not an administrative subpoena.¹⁰⁵ That these two cases involved different kinds of records and perhaps different kinds of privacy interests was not considered by the court. Yet, this is not surprising since both cases arose under the same section of the open records law.

101. In addition to its primary reason discussed above, the *Brown* court offered a secondary reason why the privacy statute did not bar the prosecutor from obtaining the library records. The court reasoned that the terms of the privacy statute had been met when the prosecutor obtained a subpoena *duces tecum* from the clerk of the trial court.

The Iowa statute allows library records to be disclosed pursuant to a "court order." The court noted that under the Iowa Rules of Criminal Procedure, a prosecutor must obtain "approval" from the district court before a subpoena *duces tecum* can issue. Thus, in effect, the prosecutor had obtained a court order in compliance with the privacy statute, even though the subpoena was issued by a clerk rather than a judge. 328 N.W.2d at 512.

The court made no effort to determine if the approval process prescribed by the court rules was actually observed. Nor did the court consider if this summary approval was the type of judicial scrutiny the legislature intended in order to prevent a wrongful disclosure of records. These unexamined questions mitigate the force of the court's conclusion that the terms of the privacy statute were in fact satisfied.

102. 313 N.W.2d 491 (Iowa 1981).

103. *Id.* at 495.

104. *Id.*

105. 328 N.W.2d at 511-12.

Shortly after *Brown*, the Iowa Supreme Court decided *Head v. Colloton*,¹⁰⁶ which defined the relationship of the open records law to government investigations. The *Colloton* court explained that the open records law speaks only to the citizen's right to inspect public records. It has no bearing on government access to public records. Since the Iowa open records law itself does not apply to the government, any privacy provisions integrated into that law do not apply either.¹⁰⁷

In the wake of *Brown*, the Iowa Legislature amended the library privacy law so the provision would govern police investigations. As amended, the statute reads:

The following public records shall be kept confidential, unless 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 or information from the library. *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.*¹⁰⁸

Perhaps the important lesson of *Brown* is that some integrated library privacy statutes may afford no protection against police investigations. Several jurisdictions have judicially construed their open records statutes to function as citizen access laws. So construed, these laws simply do not address government access to public documents. Thus, the library privacy provisions that are integrated into such laws afford no protection against government requests for library records.

Of course, as the Iowa experience indicates, an integrated provision can be amended to apply expressly to both private and police requests for library records. Nevertheless, an independent provision is a simpler solution. Free from the legislative history and judicial construction of an open records law, an independent provision may provide the sounder foundation for a strong library privacy right.

B. Scope of the Privacy Right

The second element to analyze is the scope of the privacy rights created by these statutes. This can be measured by three dimensions: 1) what

106. 331 N.W.2d 870 (Iowa 1983).

107. *Id.* at 873-74.

108. IOWA CODE ANN. § 22.7(13) (West Supp. 1989) (emphasis added to indicate amendment).

libraries are covered by these laws?; 2) what records are confidential?; and 3) what information is confidential?

Superficially, it appears that these laws protect libraries. In fact, the class of persons protected by these statutes are library users and not libraries.¹⁰⁹ To shield library users, these laws generally aim to create a zone of privacy within certain libraries. The exact boundaries of this privacy zone vary from jurisdiction to jurisdiction, depending upon the language of each statute.

The kinds of libraries expressly covered by these statutes vary tremendously. Approximately ten laws are couched in broad terms by cloaking the records of "libraries" without defining that word.¹¹⁰ More provisions narrowly focus on public libraries including libraries that are established,¹¹¹ operated,¹¹² or funded¹¹³ by state or local governmental bodies. School district libraries,¹¹⁴ academic libraries,¹¹⁵ and state libraries¹¹⁶ are expressly included in a few statutes. Two types of libraries generally are not mentioned in these statutes: archives and special or private libraries.

In the case of archives, this is probably an unintended omission. No evidence suggests that any legislature has intended to shield library records but not archival records. Probably legislatures see no distinction between libraries and archives on this issue. If this is true, then to give full effect to the legislative intent of these laws, they should extend to publicly supported archives.

109. If libraries are not "protected" by these privacy laws, another possible view is that libraries are "regulated" by these laws. However, this view is not entirely accurate. In fact, some jurisdictions have enacted library privacy laws that impose less regulation on libraries.

Before passage of library privacy statutes, libraries were "regulated" by open records laws. Most jurisdictions have adopted privacy laws that forbid libraries from disclosing circulation records except under a court order or other statutory requirements. Under these laws, a library still is regulated as to when its records can be disclosed. A few jurisdictions have enacted privacy laws that merely permit libraries to refuse record requests. Under these laws, libraries are less regulated.

110. See, e.g., CAL. GOV'T CODE § 6254(j) (West Supp. 1989) (applying to "library circulation records").

111. See, e.g., N.C. GEN. STAT. § 125-18(1) (1986) (applying to any library "established by the State; a county, city, township, village, school district, or other local unit of government").

112. See, e.g., MINN. STAT. ANN. § 13.04(1) (West 1988) (applying to any "library operated by any state agency, political subdivision or statewide system").

113. See, e.g., N.D. CENT. CODE § 40-38-12 (Supp. 1989) (applying to any "library receiving public funds").

114. See, e.g., ALASKA STAT. § 09.25.140(a) (Supp. 1988) (applying to "libraries . . . of public schools"); S.C. CODE ANN. § 60-4-10 (Law. Co-op. Supp. 1988) (applying to "school . . . libraries . . . supported in whole or in part by public funds").

115. See, e.g., N.Y. CIV. PRAC. L. & R. 4509 (McKinney 1988) (applying *inter alia* to "college and university libraries").

116. See, e.g., ME. REV. STAT. ANN. tit. 27 § 121 (1988) (applying expressly to the Maine State Library).

Private or special libraries generally are not included in these laws, probably because their records are private property and are not subject to disclosure under open records laws. Problems may arise, however, when a private library has a sufficient nexus to the state so that its files can be characterized as public records. The statutes of several states extend to special libraries that receive government funds¹¹⁷ or that are open to the public.¹¹⁸ New Jersey may have the broadest statute, which cloaks any "library maintained by any . . . governmental agency, school, college, or industrial, commercial or other special group, association or agency, whether public or private."¹¹⁹

Once the relevant class of libraries is ascertained, the next step is to identify the relevant class of library records. The statutes seem to reflect three approaches.

The first approach defines the class of relevant records from the perspective of the library. These statutes shield enumerated types of library records, such as "circulation records"¹²⁰ or "registration records."¹²¹ Several states have adopted near uniform definitions for these terms.¹²²

A second and more common approach identifies the relevant class of records in terms of patron activity. Many statutes cloak records that reflect library materials "requested,"¹²³ "obtained,"¹²⁴ or "used"¹²⁵ by a patron. Similarly, a few laws expressly extend to service transactions by shielding records that indicate any service "requested"¹²⁶ or "used"¹²⁷ by a patron. These provisions are clearly broad enough to cover such service records as reference logs and interlibrary loan records. Arkansas has an extremely broad statute that protects information or documents generated in circulation transactions, computer database searches, interlibrary loans, reference queries, patent searches, and photocopy requests, as well as requests to use reserve and audiovisual materials.¹²⁸

117. See, e.g., OKLA. STAT. ANN. tit. 65 § 1-105(A) (West Supp. 1989) (applying to "[a]ny library which is in whole or in part supported by public funds including . . . special libraries").

118. See, e.g., MICH. COMP. LAWS § 397.602(a) (1988) (applying to "any private library open to the public").

119. See N.J. REV. STAT. ANN. § 18A:73-43.1(a) (West Supp. 1988).

120. See, e.g., OR. REV. STAT. § 192.500 (1)(j) (1985).

121. See, e.g., WYO. STAT. § 16-4-203(d)(ix) (Supp. 1989) (shielding both circulation and registration records).

122. See ALA. CODE § 41-8-9 (Supp. 1988); FLA. STAT. ANN. § 257.261 (West Supp. 1988); ILL. ANN. STAT. ch. 81, 1201 § 1(c) (Smith-Hurd 1987).

123. See, e.g., ARIZ. REV. STAT. ANN. § 41-1354(A) (1985).

124. See, e.g., MICH. COMP. LAWS § 397.602(b) (1988).

125. See, e.g., MONT. CODE ANN. § 22-1-1102(2) (1987).

126. See, e.g., COL. REV. STAT. § 24-90-119(1) (1988).

127. See, e.g., NEB. REV. STAT. § 84-712.05(10) (1987).

128. See 1989 ARK. ACTS 903 § 1(b).

The third and perhaps broadest approach defines the relevant class of records in terms of their information content. In other words, the focus is any record that reveals the patron's identity or research interest. The laws of Minnesota and North Dakota reach library records that capture the subject of a patron's research.¹²⁹ The Indiana law applies to "library records that can be used to identify any library patron."¹³⁰

Most statutes do not stipulate the format of the library records that are declared confidential. The usual assumption is that patron records are private, regardless of their format. However, at least five statutes expressly declare that records in all information storage media are private.¹³¹

The final dimension of the privacy right is the kind of information made confidential by these statutes. A few of the laws specifically stipulate that names and addresses of patrons are declared confidential. The overwhelming majority of provisions generally protect any information that identifies a patron and links that patron to a library transaction.

Though these privacy rights are extensive, some library records and materials are clearly outside the ambit of these laws. For example, actual library materials—books and other documents—may be sequestered by police as evidence without complying with these statutes. Nonpersonal circulation records can be disclosed without violating these provisions. For example, the Michigan law states that the term "library records" does not encompass "nonidentifying information that may be retained for the purpose of studying or evaluating the circulation of library materials."¹³²

C. Exceptions to the Privacy Right

Virtually every law permits some access to library records.¹³³ The most common exception to these privacy rights is a proviso that library records may be released pursuant to a court order¹³⁴ or subpoena.¹³⁵ The intended effect of this exception is to "judicialize" the disclosure of library records.

129. See MINN. STAT. § 13.40(2) (1988); N.D. CENT. CODE § 40-38-12 (Supp. 1989).

130. See IND. CODE ANN. § 5-14-3-4(b)(16)(A) (Burns 1987 & Supp. 1989).

131. These are the laws of Michigan, Missouri, Montana, New Jersey, and North Carolina. See MICH. COMP. LAWS § 397.602(b) (1988); MO. REV. STAT. § 182.815(3) (1986); MONT. CODE ANN. § 22-1-1102(2) (1987); N.J. REV. STAT. ANN. § 18A:73-43.1(b) (West Supp. 1988); N.C. GEN. STAT. § 125-18(2) (1988).

132. MICH. COMP. LAWS ANN. § 397.602(b) (1988).

133. Only the Connecticut provision, CONN. GEN. STAT. § 11-25(b) (1986), lacks an express exception to the privacy right. It remains to be seen if a Connecticut court will imply any exception to effectuate the usual purpose of these laws, which is to provide routine privacy but allow disclosure in exigent circumstances.

134. See, e.g., ALASKA STAT. § 09.25.140(a) (Supp. 1988).

135. See, e.g., GA. CODE ANN. § 24-9-46(a)(3) (Supp. 1989).

In theory, such a proviso removes a records dispute from the local political milieu and places it in the hands of an independent judicial decision maker, who may be more attuned to the legal protection of privacy. Another consequence is that police may be required to appear before a judicial officer and explain why the records ought to be disclosed.

In practice, the legal standard for granting a court order or subpoena may not be onerous. For example, in *Brown v. Johnston*, a prosecutor was able to obtain a subpoena with only nominal judicial scrutiny. Court approval was granted without any showing that the records were relevant to the criminal investigation and without any judicial balancing of the privacy interest at risk.¹³⁶ After *Brown*, the Iowa Legislature amended the state law to heighten judicial scrutiny.¹³⁷ *Brown* also prompted other state legislatures to enact provisions that require particular judicial findings before library records can be released.¹³⁸

While the court order exception limits libraries from disclosing records, a second exception may grant libraries more discretion to release records. Several statutes provide that libraries need not disclose circulation records under the state open records law.¹³⁹ So framed, these laws create a permissive privacy right. The library may withhold records from public scrutiny, but it is not forbidden from releasing them.

These provisions represent a minimalist solution to the problems of library privacy. They exempt records from mandatory public disclosure, but they go no further toward building a privacy right around these records. As noted earlier,¹⁴⁰ libraries in these jurisdictions should adopt strong confidentiality policies to block an improvident disclosure of records.

136. See *supra* note 101.

137. See *supra* text accompanying note 108.

138. See MO. REV. STAT. § 182.817(2) (1986) (court must find that the disclosure of the records is "necessary to protect the public safety or to prosecute a crime"); MONT. CODE ANN. § 22-1-1103(b) (1987) (court must find that "the merits of public disclosure clearly exceed the demand for individual privacy"); NEV. REV. STAT. § 239.013 (1986) (disclosure must be necessary to "protect the public safety or to prosecute a crime"); 24 PA. CONS. STAT. ANN. § 4428 (Purdon Supp. 1989) (disclosure only "by a court order in a criminal proceeding"); S.C. CODE ANN. § 60-4-10 (Law, Co-op. Supp. 1988) (disclosure allowed when "necessary to protect public safety, to prosecute a crime, or upon showing of good cause before the presiding Judge in a civil matter").

139. By several linguistic formulas, many statutes only declare that library records need not be disclosed under an open records law. Most of these weak laws have been integrated into open records laws. See, e.g., IND. CODE § 5-14-3-4(b)(16) (West 1989) (library records are confidential "at the discretion of a public agency"); KAN. STAT. ANN. § 45-221(a)(23) (Supp. 1988) (public agency "shall not be required to disclose" library patron and circulation records); NEB. REV. STAT. § 84-712.05(10) (1987) (library records "may be withheld from the public"). At least one independent law creates only a permissive privacy interest in library records. See MO. REV. STAT. § 182.815-.817 (1986) ("no library shall be required to release a library record").

140. See *supra* pp. 745-46.

A third exception found in several laws recognizes the private relationship between parent and minor child. A number of states allow the library records of a minor child to be disclosed to the child's parent, custodian, or legal guardian.¹⁴¹

A fourth exception permits the disclosure of records when necessary for the proper operation of the library. Logically, these laws should not bar the free use of library records by library employees or officials, since no "disclosure" occurs until the records reach a third party.

However, a number of third parties routinely supervise or assist library operations. Accordingly, some statutes allow records to be released to supervise or administer the library,¹⁴² to enforce fines,¹⁴³ and to collect overdue books.¹⁴⁴ Similarly, the District of Columbia law expressly allows for the disclosure of library records to the legal counsel representing the library in a civil action.¹⁴⁵

Common sense has inspired a fifth exception that permits the disclosure of records when a patron consents. Sixteen jurisdictions expressly permit the release of records upon patron consent.¹⁴⁶ Georgia also permits a parent or guardian to consent to the disclosure of the records of their minor child.¹⁴⁷ Most of these provisions require that consent be expressed in writing.

A patron consent exception should be implied in all library privacy statutes. These laws are intended to protect the privacy of a library patron and thereby promote intellectual freedom. Consistent with this libertarian spirit, a patron should have the capacity to waive his or her library privacy rights.

D. Disclosure Procedures

After dissecting the substance of these laws—the basic privacy right and its exceptions—the next element to consider is procedure. Procedural rights are important safeguards for preserving the confidentiality of library

141. See ALA. CODE § 41-8-9 - 41-8-10 (Supp. 1989) (disclosure to parent of minor child); ALASKA STAT. § 09.25.140 (Supp. 1988) (disclosure to parent or guardian); LA. REV. STAT. ANN. § 44.13 (West Supp. 1989) (disclosure to parent or custodian of minor child); N.M. STAT. ANN. § 18-9-5 (Supp. 1989) (disclosure to legal guardian of unemancipated minors); WYO. STAT. § 16-4-203(d)(ix) (Supp. 1989) (disclosure to custodial parent or guardian of minor child).

142. See, e.g., N.J. REV. STAT. ANN. § 18A:73-43.2(a) (1988).

143. See MONT. CODE ANN. § 22-1-1103(3) (1987).

144. See, e.g., LA. REV. STAT. ANN. § 44.13(C) (West Supp. 1989).

145. See D.C. CODE ANN. § 37-106.2(b)(3) (1986).

146. These jurisdictions are Arizona, Colorado, the District of Columbia, Georgia, Louisiana, Maine, Michigan, Missouri, Montana, New Jersey, New York, North Carolina, Oklahoma, South Carolina, South Dakota, and Wisconsin.

147. See GA. CODE ANN. § 24-9-46(a)(2) (Supp. 1989).

records. Key procedural questions include: is a hearing required before records are disclosed?; may a library be represented by counsel and appear in court to oppose a disclosure request?; and who has the burden of explaining why the library records should or should not be disclosed—the requestor or the patron? Given the importance of these issues, it is essential to consider what disclosure procedures are prescribed by these statutes.

As noted earlier, most provisions permit library records to be released pursuant to a court order or subpoena. Unfortunately, most laws do not specify any particular judicial procedure for the issuance of these orders. If no special procedure is specified, the general court rules and statutes governing civil and criminal procedure will dictate how these orders will issue.

A few laws do contain some procedural safeguards to minimize the risk of improvident disclosure. Several statutes suggest the order must be issued by a judge rather than by a clerk of court.¹⁴⁸ The Michigan law provides that the library must be given notice and an opportunity to be heard before a court considering a request for records. Moreover, a Michigan library may be represented by counsel at the hearing.¹⁴⁹

The District of Columbia statute establishes an elaborate disclosure procedure. On receipt of a subpoena, a library must promptly notify a patron that his or her library records have been subpoenaed. Within ten days from the mailing of this notice, the patron may make a motion to the court to request that the records not be released. Curiously, the patron must explain, in his or her motion, why the records should remain confidential. The patron also has the right to be represented by counsel in the action.¹⁵⁰

The District of Columbia statute also establishes a procedure that allows government authorities to expedite their access to library records in exigent circumstances. The usual notice to a patron can be waived by a court if authorities demonstrate that notice might endanger a person, cause flight from prosecution or tampering with evidence, or otherwise jeopardize an investigation.¹⁵¹

As the District of Columbia law suggests, library record requests pose special procedural problems. In particular, the procedural rights of the library should be defined within the privacy statute. Library privacy laws that do not address this point should be amended rather than leave procedure to the vagaries of the general court rules.

148. *See, e.g.*, S.C. CODE ANN § 60-4-10 (Law. Co-op. Supp. 1988).

149. MICH. COMP. LAWS § 397.603(2) & (3) (1988).

150. D.C. CODE ANN. § 37-106.2(b)(4) (1986).

151. *Id.* § 37-106.2(b)(6).

E. Sanctions for Wrongful Disclosure

While the library profession has lobbied for these privacy laws, they may expose librarians to civil or criminal liability for wrongful disclosure of records. Only a few statutes expressly address the matter of liability.

Three state laws expressly allow a library patron to bring a civil action for a wrongful disclosure of records.¹⁵² The Michigan statute is typical; it allows an action against both the offending library employees and the library.¹⁵³ The District of Columbia law is unusual in that it permits suits only against "individuals"; presumably, the library itself is immune from suit.¹⁵⁴ Both statutes allow a patron to recover actual damages or statutory damages of \$250.00, whichever is greater, as well as reasonable attorneys' fees and costs.¹⁵⁵

Though most laws are silent on the issue of civil liability, libraries should not construe this silence as an immunity from suit. In jurisdictions that recognize the tort of invasion of privacy, a civil claim may be possible unless the library is protected by sovereign immunity or some similar defense.

Georgia has an unusual "safe harbor" clause in its law. A library employee who discloses records when authorized by the statute is not liable for any injury caused by the disclosure.¹⁵⁶

The statutes of five jurisdictions criminalize the unauthorized disclosure of library records.¹⁵⁷ All treat the offense as a misdemeanor punishable by a fine. For example, the Colorado and the District of Columbia laws punish violators by a fine which is not to exceed \$300.00.¹⁵⁸ A few states go further and provide for jail terms for wrongful disclosure. The South Carolina statute may be the most punitive. It provides that a third-time offender may be fined up to \$2000.00 or imprisoned for up to 90 days.¹⁵⁹

152. These are the laws of the District of Columbia, Michigan, and Montana. See D.C. CODE ANN. § 37-106.2(d) (1986); MICH. COMP. LAWS § 397.604 (Supp. 1988); MONT. CODE ANN. § 22-1-1111 (1987).

153. See MICH. COMP. LAWS § 397.604 (1988).

154. See D.C. CODE ANN. § 37-106.2(d) (1986).

155. See *id.*; MICH. COMP. LAWS § 397.604 (1988).

156. See GA. CODE ANN. § 24-9-46(b) (Supp. 1989).

157. These jurisdictions are Arizona, District of Columbia, Colorado, Florida, and South Carolina.

158. See COL. REV. STAT. § 24-90-119(3) (1988); D.C. CODE ANN. § 37-106.2(d) (1986).

159. See S.C. CODE ANN. § 60-4-30 (Law. Co-op. Supp. 1988). This law punishes first offenders with a fine up to \$500.00 or imprisonment for up to 30 days, and second offenders with a fine up to \$1000.00 or imprisonment for up to 60 days.

F. Remaining Issues

While these laws go far to define a new privacy right regarding library records, some areas of ambiguity remain. Two major legal issues await resolution.

The first is whether these state statutes limit access to library records by agents of the federal government. Thus far, when federal agents have been confronted by these privacy laws, the agents have either abandoned their requests or complied with the law by obtaining a court order authorizing the disclosure of the relevant records. This compliance has been begrudging and may reflect an agency decision that it is more expeditious to obtain a court order than to initiate litigation to test the validity of these laws. Nevertheless, an agency may someday contend that these laws do not limit federal investigations because the state statutes are "preempted" by federal law. This preemption claim is an important and complex issue that deserves a much deeper study than is possible in this survey.

The second major legal issue concerns interstate library operations such as interlibrary loan, reference, and photocopy transactions. For example, an interlibrary loan request through OCLC or RLIN often contains the patron's name along with the requested title. This poses a choice of law question. Does the state law of the borrower or the lender govern the confidentiality of the records of the transaction? This too warrants careful study.

A final issue is a practical matter. Libraries are in a powerful position to protect patron privacy by using responsible information management practices. The Church Report condemned the federal intelligence community for collecting too much data and holding it for too long.¹⁶⁰ Some libraries can be similarly condemned. Library registration, circulation, and service forms should ask only for personal information that is essential to serve the patron and preserve the collection. More importantly, after a transaction is completed, records should be promptly destroyed.¹⁶¹ Libraries should become information storage centers *for* their patrons, and not *about* their patrons.

V. Conclusion

American law is continuously evolving a network of constitutional and statutory principles in defense of intellectual freedom. The first amendment

160. See SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess., bk. 2, at 7 (1976).

161. By legislation, Arkansas has required libraries to adopt prudent management practices concerning their patron files. The state statute directs libraries to use "an automated or Gaylord type circulation system that does not identify a patron with circulated materials after materials are returned." See 1989 ARK. ACTS 903 § 2(i).

protects freedom of expression. Whether it will ever establish a coequal freedom to receive ideas remains to be seen. Federal and state open records laws promote intellectual freedom by granting citizens the right to receive government papers. Similarly, the library privacy laws that limit open records laws do so in the name of intellectual freedom. These privacy provisions ensure that libraries will remain safe havens for unorthodox research, which is often the engine of progress.

