IN SEARCH OF THE COMMON GOOD: THE ETHICS OF DISCLOSING PERSONAL INFORMATION HELD IN PUBLIC ARCHIVES

By

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M.A., Simon Fraser University, 1985

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARCHIVAL STUDIES

in

THE FACULTY OF ARTS

Administered by

School of Library, Archival and Information Studies

and

Department of History

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THE UNIVERSITY OF BRITISH COLUMBIA

AUGUST 1987

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Date 9 October 1987

ABSTRACT

The right to privacy is the right of individuals to determine, within reasonable limits, the extent to which they are known to others. Over the last twenty years the enormous increase in the amount of personal information on citizens maintained in government record-keeping systems has led to increasing public concern for information privacy. Computer technology has contributed to the collection, preservation and use of massive bodies of highly detailed personal information documenting individual characteristics as well as a broad range of social transactions. Automated record-keeping systems permit the linking of personal information from a wide variety of government data banks, a capability which, civil libertarians fear, is vulnerable to abuse.

The social contract underlying relations between citizens and the state requires that individuals surrender some measure of privacy in return for physical and social protection. But how far does that contract extend? Does the social contract which, implicitly, governs the collection of personal information in the interests of administering various social benefits, also entitle archivists, as the official keepers of government records, to permit subsequent uses of that information once its administrative usefulness has been exhausted?

Social researchers, including social historians, take an affirmative position, arguing that the closure of records

containing personal information is a violation of the principle of freedom of enquiry or the scholar's right to pursue and to communicate knowledge in the interest of a greater societal good. The question is, does freedom of enquiry possess the same moral value as the right to privacy? In situations where the two values conflict, where does the archivist's moral duty lie? The thesis will address these questions by examining the ethical justifications for and against research uses of personal information and the social role the archivist plays in mediating the competing moral claims for privacy and access. The thesis concludes that, in a democratic society, the right to privacy supersedes the scholar's freedom of enquiry. In situations where the two values conflict, archivists, as the public trustees of the record, must act on behalf of that public to ensure that the right to privacy is not violated.

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I

PRIVACY AND HISTORICAL RESEARCH: MAPPING THE MORAL TERRITORY

His mind of man, a secret makes
I meet him with a start
He carries a circumference
In which I have no part.

Emily Dickinson

In 1890, Samuel Warren and Louis Brandeis published "The Right to Privacy" in the Harvard Law Review. In it, they argued the case for the recognition of a general right to privacy based on the principle of "inviolate personality."[1] The right to privacy was intended to protect individuals against unjustifiable exposure of their private affairs without their consent, an exposure which, Warren and Brandeis believed, "subjected [an individual] to mental pain and distress, far greater than could be inflicted by mere bodily agony."[2] The legal system that has evolved from that recognition, however, has tended to focus on property rights, relating to such issues as theft, trespass, copyright and squatters' rights. With the exception of defamation laws, injury to personality has largely escaped comprehensive legal definition.

If a comprehensive definition of privacy escapes us, it is still possible to identify the underlying notions of privacy.

Defence against intrusion--into one's home or personal life--is one such notion; another is defence against surveillance. A third notion, and the one most pertinent to this discussion, is privacy of information. In The Politics of Privacy, James Rule argues that, in the last twenty years, concerns over privacy have mainly to do with invasion of privacy by those at the centers of power: "that is, they result from the demands for personal information by powerful but more or less distant social entities,"[3] governments, for example.

In a 1978 report on privacy, the Australian Law Reform Commission defined the concept of information privacy as:

> ....the need for proper respect for the autonomy of the individual. To deny the individual the ability to control, to an appropriate extent, his relationships with others in the community is to compromise his autonomy. In the context of personal information, the individual's claim to privacy is therefore a claim to control, to an appropriate extent, the way that others in the community perceive him. The way that personal information about individuals is collected, used and disclosed is a matter for privacy concern.[4]

One manifestation of the threat to information privacy is the benign surveillance power afforded by the maintenance of personal records by government institutions and agencies. Record-keeping has been, for centuries, a tool of public administration, and its primary purpose has always been to provide a mechanism for the social and political control of individual behaviour. The rise of the modern welfare state in the 1930s brought with it an enormous increase in the amount of personal information available

in public record-keeping systems. As society became increasingly urban and anonymous, and as computer technologies began to take hold, record keeping systems expanded in their capacity to store personal information.

Perhaps the most fundamental aspect of the computer revolution involves changes in the form and nature of the information recorded. Information that was once recorded in conventional written or printed form is increasingly recorded in machine-readable form. Computer technology has contributed to the collection, preservation and use of massive bodies of highly detailed information such as that describing individual characteristics, recording human transactions, or documenting the elements of social, economic and political processes.

The technological capability to store an enormous amount of information about individual members of society in computerized data banks could, potentially, make communications about private things less confidential. Once information is stored in a data bank, control over access is immediately attenuated. Moreover, argues Jean Tener in "Accessibility and Archives:"

> Technical sophistication enables 'the centralized processing and storage of large bodies of data' from which 'highly detailed analysis would reveal relationships and permit the drawing of inferences about people not possible before the computer.[5]

Technological developments such as this pose a potentially serious threat to the right to privacy.

The right to privacy is generally considered a prima facie rather than an absolute right; the subject of current debates on the issue of privacy is the extent of the right to privacy, that is, the extent to which people are, or should be, entitled to choose that state in some part of their lives when there are others who claim to be entitled to prevent them from exercising that choice. The right of individuals to control access to information about themselves cannot be considered an inalienable right because, the argument goes, in some cases it may not be in the public interest that they should control it. Proponents of this position maintain that the public interest requires that the community should know as much as possible about every individual so as to be able to conduct its affairs more efficiently for the benefit of all, including the individual.

Throughout history some measure of privacy has been traded for physical and social protection under the terms of the social contract underlying relations between citizens and government. This social contract is the philosophical basis of the state, and is defined by J.W. Gough as "a theory of political obligation, to explain the nature and limits of the duty of allegiance owed by subjects to the state, and of the right on the part of the state or its government to control the lives of its citizens."[6] Based on the fact that "every civilized community, perhaps any real community requires, in order that it may exist at all, a mutual recognition of rights on the part of its members, which is a

tacit contract,"[7] social contract theory specifies the privileges and responsibilities foregone by citizens and placed in trust with the governing agency and the benefits citizens receive in return, for example, good government, protection from external threat, and a guarantee of selected individual rights, rights that can only be relinquished with the consent of the individual.

In the interest of the social contract, citizens are obliged to surrender a certain amount of their privacy. The government's right to collect and store information about citizens is not, however, an unlimited one. This right does not, for example, permit the government to disseminate personal information to third parties for unspecified purposes. The disclosure of personal information to third parties is contrary to the basic principle that individuals should be able to determine for themselves when, how and to what extent information about them is communicated to others. Individuals have little control over whether or not their privacy is invaded by the government since they are often denied benefits and services if personal information is not provided. For the government then, to disseminate or permit others access to that information for use in unspecified ways is a serious threat to individual privacy. Even if nothing intrinsically private or improperly derogatory is stored in a data bank, there remains some concern that the combination of vast quantities of ostensibly innocuous information on citizens currently held in data banks, and the

technological capacity that exists for data bank linking will result in a less spontaneous and, ultimately, less free society.

Over the past decade, in response to public concerns over administrative abuses of personal information, most western countries have developed data protection laws which attempt to define, legislatively, categories of private life as they relate to record-keeping practices. In Obstacles to the Access, Use and Transfer of Information in Archives, Michel Duchein outlines the main categories of information protected by most privacy legislation. These include: civil status and filiation; health; wealth and income; penal and criminal proceedings; professional activity; political, philosophical and religious opinions; basic statistical documents; police documents; and information obtained on promise of secrecy.[8] In Canada, data protection is enshrined in the joint Access to Information Act and the Privacy Act.[9] The Canadian Privacy Act incorporates the categories of personal information outlined above, and has added, "any identifying number, symbol or other particular to an individual."[10]

The principle underlying data protection legislation is that the personal information individuals must disclose to the government in connection with any of our transactions with the government should be held to a trust relationship and should create a duty of non-disclosure. The collection of personal information about private individuals by the government is, theoretically, prohibited where individuals do not have the right

of access to that information, lack opportunity to rebut data that might be prejudicial and have no opportunity to exercise control over its dissemination.

The development of data protection legislation is a matter of some concern within the research community because of the constraints such legislation could, potentially, place on research. Herbert Kelman argues that asking researchers, particularly social researchers to leave certain regions of privacy untouched would hamper research severely:

> a blanket prohibition of research that might conceivably touch on such areas [ones that would violate private space]--which would include, among others, the topics of sex, personal health, death, religion, ethnicity, politics, money, and parent-child relations--would destroy or trivialize social research.[11]

Historians such as Reg Whittaker defend research uses of personal information on the grounds that the researcher's intention is not to expose a particular individual to public scrutiny but to reveal the application of government policy in a particular time period. Whittaker argues that there is not enough acknowledgement of the scholarly research process in the government's handling of research requests for personal information.[12]

In making their claim for access to records containing personal information, historians invoke the principle of scientific or academic freedom, that is, the scholar's freedom

(some would say right) to pursue and to communicate knowledge. To the extent that privacy restrictions would make some studies impossible to perform, they argue, those restrictions infringe on the scholar's right to illuminate unknown regions of human understanding. It is important, however, to distinguish from the outset between the principle of academic freedom and the principle of the right to know as legislatively defined in freedom of information laws.

Freedom of information represents a constitutional recognition of the public's "right to know." Based on the principle that "a democracy works best when the people have all the information that the security of the nation permits,"[13] freedom of information means that the citizen who pays the taxes which finance the gathering of government information has the right to scrutinize that information. The right to know is linked, historically, with the emergence of the principle of individual natural rights--Voltaire claimed, on behalf of natural freedom, the right of criticism and, therefore, of knowledge--and with the re-birth of the concept of democracy, according to which sovereignty derives from the people, and the people, consequently, have the right to control the action of the leaders they have chosen to govern them under the terms of the social contract.[14] The acceptance of the people's right to rule, first articulated by Enlightenment thinkers and enshrined in both the French Declaration of the Rights of Man and of the Citizen (1789)

and the American Bill of Rights (1791), implied the state's obligation to make available the records of its own activities in the interest of keeping government visible and responsible. In Democracy in America, Alexis de Tocqueville defended the principle of the right to know on the grounds that, "when the right of every citizen to a share in the government of society is acknowledged, everyone must be presumed to to be able to choose between the various opinions of his contemporaries and to appreciate the different facts from which inferences may be drawn."[15]

Historically and philosophically then, the right to know is justified in terms of the requirements of citizenship and political action: "vindicating the 'people's right to know,' does not require that all specialized, private, and relatively inaccessible information be 'made public.' It demands, rather, that the public have access to those facts necessary for public judgement about public things ..."[16] Freedom of enquiry in the pursuit of knowledge is a value in its own right. It is not, however, identical with the public right to know as we have come to understand that term.

The social contract implies an obligation on the part of citizens to surrender some degree of privacy in the interests of the common good. But how much ought we to surrender? Does the social contract, under which we give the government permission to know us in various private ways, also entitle archivists, as the

official keepers of government records, to permit subsequent uses of that information for the purposes of research once its administrative usefulness, that is, its original intention, has been exhausted? In its formal definition of an archivist, the Society of American Archivists maintains that archivists "share a unifying belief in the value of historical records."[17] A crucial part of the archival mandate, it is widely argued, is to promote access to records to the fullest extent. The Association of Canadian Archivists has warned that large-scale closures of personal records

> would cause a serious deterioration of publications on the development of Canadian society. For example, the production of scholarly works currently being written on the settlement of the West, the depression, World War II, immigration and ethnic communities, which rely heavily on correspondence from and concerning individuals would be seriously curtailed and the ability to increase our knowledge in understanding our Canadian culture would be seriously impaired.[18]

The ethical dilemma posed by researchers' claims for access to records containing personal information arises out of the conflict between the competing values of autonomy and social enquiry, values which, Edward Shils believes, are both rooted in the individualist premises of modern liberal society:

> The respect for privacy rests on the appreciation of human dignity, with its high evaluation of individual self-determination, free from the bonds of prejudice, passion and superstition. In this, the respect for human dignity and individuality shares an historical comradeship with the freedom of scientific inquiry, which is equally precious to modern liberalism. The

> tension between these values, so essential to each other in so many profoundly important ways, is one ofthe antinomies of modern liberalism.[19]

The question is, does freedom of scientific inquiry possess the same moral value as the right to privacy? In situations where the two values conflict, where does the archivist's moral duty lie? What criteria should be applied in determining "reasonable" access? These questions will be examined in the next four chapters with reference to the evolution of the concept and right of privacy; trends in socio-historical research that threaten the right to privacy; the ethical justifications for and against research uses of personal information; and, finally, the role of the archivist in mediating the competing moral claims for privacy and access.

CHAPTER I

ENDNOTES

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II

THE EVOLUTION OF PRIVACY AS CONCEPT AND RIGHT

> Each person, withdrawn into himself, behaves as though he is a stranger to the destiny of all the others. His children and his good friends constitute for him the whole of the human species. As for his transactions with fellow citizens, he may mix among them, but he sees them not; he touches them, but does not feel them; he exists only in himself and for himself alone. And if on these terms there remains in his mind a sense of family, there no longer remains a sense of society.
>
> Alexis de Tocqueville

When de Tocqueville wrote Democracy in America in 1835 his deepest reservations concerning the American political system were directed at the centralizing and conformist tendencies of government bureaucracy and the attenuating effect such tendencies could have on the emotional and personal foundations of citizenship, individual rights and, ultimately, their effect on the public's ability to defend its political rights. He predicted that American democracy would inevitably be constrained by what he called "the tyranny of the majority," the desire to level things down to a common standard. Out of majoritarian oppression would emerge a power that, de Tocqueville warned:

> ...does not destroy, but prevents existence ...does not tyrannize but ...compresses, enervates, extinguishes and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals of which the government is the shepherd.[1]

Tocqueville's nightmare vision of a totally conformist society in which no public exists in any meaningful sense comes disturbingly close to the situation we find ourselves in as we near the end of the twentieth century. The roots of the nightmare can be traced to the deterioration of what used to be known as the public sphere and the absorption of the traditional private sphere into what we call today mass society.

In classical Greek thought, the division between public and private--between activities related to a common world and those related to the maintenance of life--stood as a self-evident and axiomatic assumption.[2] The public sphere was the realm of common political activity which directed itself toward the public welfare; the private sphere was synonymous with the household or family realm and it revolved around the fundamental maintenance of life--food, clothing and shelter. Today the distinction between the private and the public, once considered essential, no longer corresponds to the relationship between the individual and the state.

Michel Foucault has traced the beginnings of the change to a conceptual shift in political thinking that occurred during the Renaissance. It was around this time, according to Foucault, that the household and its method of organization came under the scrutiny of political theorists and treatise writers who found in it both a useful metaphor and an adaptable model for a new form of political power: the state. New links between the state--

which formed itself around the great territorial monarchies that arose in Europe from the fragments of feudal estates--and the individual--whose spiritual welfare became a political issue in the Reformation and Counter-Reformation--gave rise to a new type of political reflection.[3]

Around the middle of the sixteenth century, a series of treatises on the "art of government" began to appear. Such treatises introduced, for the first time, detailed analyses on the most efficient means of introducing government, meaning economy and order, from the state at the top down through all aspects of social life. The treatises referred directly to the "governing of a household, souls, children, a province, a convent, a religious order, or a family," and political reflection extended to embrace virtually every aspect of human activity, "from the smallest stirrings of the soul to the largest military manoeuvers of the army."[4] Each activity was scrutinized in order to determine the most economical method by which it could be carried out. "The art of government," Foucault argues,

> [was] concerned with how to introduce economy that is the correct manner of managing individuals, goods and wealth within the family, ...how to introduce this meticulous attention of the father towards his family, into the management of the state.[5]

Within this new paradigm of political thinking, a complex relationship of men and things was given priority, a relationship in which:

> the things which the government [was] to be concerned about are men, but men in their relations, their links, their imbrication with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, ...men in their relation to other kinds of things which are customs, habits, ways of doing and thinking, etc.; lastly, men in their relation to that other kind of things which are accidents and misfortunes such as famine, epidemics, death, etc.[6]

These academic treatises on the art of government can be linked to the rise and growth of centralized state administrative apparatuses from the middle of the sixteenth century on. By the seventeenth century, this new political rationality had given birth to "statistics", the science of the state, which measured "'the different elements, dimensions and factors of the state's power.'"[7]

As the life process of the population itself became a central concern of the state, a new regime of power--what Foucault has termed "bio-power"--was instituted. Bio-power "brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of the transformation of human life."[8] In the middle to late eighteenth century, bio-power fused around two distinct poles: the human species and the human body. According to Foucault, "for the first time in history, scientific categories (species, population, fertility, and so forth), rather than juridical ones, became the object of systematic, sustained political attention and intervention." At the same time, the human body began to be

approached "as an object to be manipulated and controlled."[9]

Around this objectification of the body emerged a new "disciplinary technology," a set of procedures that were directed toward the molding of "a docile body that may be subjected, used, transformed and improved."[10] Adopted in a variety of institutional settings--workshops, schools, prisons and hospitals for example--this disciplinary technology used drills, physical training, the standardizing of actions over time and the control of physical space to accomplish its ends.

The "Panopticon," conceived by Jeremy Bentham in 1791 as the model for a "scientific" prison is a significant manifestation of disciplinary technology as theory and praxis. In Discipline and Punish: The Birth of the Prison, Foucault describes the principle on which the Panopticon was based:

> ...at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. ...Each individual, in his place, is securely confined to a cell from which he is seen from the front by the supervisor; but the side walls prevent him from coming into contact with his companions. He is seen, but he does not see; he is the object of information, never a subject in communication.[11]

The Panopticon is a useful metaphor for the behaviourist sensibility that permeated the Age of Reason. Its essential point, expressed architecturally, was to effect a radical separation between the observer and the observed and to render the latter permanently visible through its schema of generalized surveillance. The gradual extension of the mechanisms of discipline embodied in panopticism--where the powerless are exposed and power lies in the relentless invisible gaze which studies them--is only the most visible aspect of various more profound processes that spread throughout the social body in the seventeenth and eighteenth centuries, processes that altered forever the relationship between the private and the public.

Hannah Arendt has argued that the emergence of society--the elevation of the concerns, activities and organizational devices of the household to the public sphere--occurred at the expense of the private sphere to which such activities had hitherto belonged. From the middle of the sixteenth century on, the traditional family unit declined as it gradually became absorbed into corresponding social groups.[12] And as society grew and began to assume the contours of a gigantic household, a super-human family[13] whose everyday affairs were administered by the state, it began, increasingly, to expect from the members of this new "family" a certain kind of behaviour. It embodied that expectation in a wide range of codes and conventions that sought to "normalize" its members, to make them behave. "Whether the

framework happens to be actual rank in the half-feudal society of the eighteenth century, [or] title in the class society of the nineteenth," such codes and conventions "always equate the individual with his rank within the social framework. What matters is [the] equation with social status."[14]

This same expectation of conformity to clear-cut codes of behaviour is apparent in the evolution of the modern science of economics whose birth coincided with the rise of society. Armed with its foremost technical tool, statistics, economics became the perfect embodiment of the philosophical principles of the Age of Reason. According to Arendt, "economics ...could achieve a scientific character only when men had become social beings and unanimously followed certain patterns of behaviour, so that those who did not keep the rules could be considered to be asocial or abnormal."[15]

The rise of society and the entrenchment of state power that accompanied it changed irrevocably the relationship between the individual and the state and, in the process, blurred forever the old borderlines between public and private. In ancient feeling, the privative trait of privacy was emphasized, it meant literally a state of being deprived of something. Aristotle insisted that a man who lived only a private life could not be considered fully human. But around the time of the Enlightenment, the traditional function of the private--the physical maintenance of family life, was transformed. Privacy became synonymous with what we call

today, the "sphere of intimacy." Its decisive function, according to the first articulate explorer of intimacy, Jean-Jacques Rousseau, was to shelter the interior regions of human consiousness, which until then had needed no special protection, from the oppressive intrusion of society, "the modern individual and his endless conflicts, his inability either to be at home in society or to live outside it altogether, his ever-changing moods and the radical subjectivism of his emotional life was born in this rebellion of the heart."[16] The rebellion against society was directed primarily against the levelling demands of the state, and against society's demand that its members behave as one enormous family possessing only one opinion and one interest; a form of domination characterized by Arendt as, "the rule by Nobody,"[17] in which government is replaced by pure administration.

If the thrust of society in earlier centuries was directed at devouring the old realms of the public and private, the tendency of mass society in this century has been to devour the more recently established sphere of intimacy. Aided by the enormous growth of technology, the same society which created the modern demand for privacy has also created the means to make its elimination a fairly simple matter.

Some historians have argued that we experience greater privacy than did previous generations.[18] The weakening of community bonds and moral norms, the anonymity of urban life, and

the increased cultural emphasis on individual aspiration and achievement are cited frequently as factors that have enhanced individual privacy significantly.[19] But, as Arthur Schaefer argues, the social impact of these factors has not been so profound as that caused by such countervailing historical trends as the higher population density of urban environments; business factors, such as the widespread use of credit with the resultant need for credit ratings; and, perhaps most significantly, the technological breakthroughs in computerization and monitoring, which permit extensive government and business surveillance of private affairs and communication.

Today, information about all major personal characteristics--vital statistics, social and geographic mobility, wealth, income, education, political affiliations--can be easily stored, organized and disseminated in machine-readable form. One result of this, according to Arthur Schaefer, has been that otherwise harmless (because scattered) data can be transformed into potentially harmful dossiers:

> Advanced technology has made extensive surveillance relatively easy and inexpensive. At the same time, the increasingly bureaucratic organization of social institutions (a feature shared by governments and multi-national corporations) has made extensive surveillance and monitoring of individuals seem inevitable and desirable, at least to those whose power and other interests are enhanced by the result.[20]

A 1972 Report of the Department of Communications/Department of Justice, Privacy and Computers, concluded that "more personal

information is being collected than most Canadians probably suspect, and is made available to a larger number of users than is probably supposed."[21]

The administrative context in which documentation is collected, stored and disseminated by large social organizations, particularly governments, is at the heart of debates concerning potentially invasive uses of personal information. Such debates take as their starting point a number of factual premises concerning the process of information collection, including: that information is supplied by individuals about themselves or others to government agencies for a specific purpose, for example, to obtain a pension or to seek employment; that record-keeping systems are often arranged, maintained and made accessible according to personal identifiers (usually a Social Insurance Number); that references and cross-references can be made to identifiable people in other records maintained by agencies; that personal information gathered is usually organized and stored in a form which can be used subsequently by others; that the use of certain categories of information for secondary purposes is considered socially acceptable, for example, in dealing with violations of the law; and, finally, that the information that can be derived from a body of data containing personal information is not necessarily exhausted at the time of its original use.[22]

Today, various data banks can be linked that will allow bank

records, credit card files, tax payment information and much more to be assembled into one large electronic dossier. "Computer matching" involves a particular type of record linkage or matching of personal data. It has been defined as "the comparison of different lists or files to determine whether identical, similar, or conflicting information appears in them. Comparisons can be made by matching names, social security numbers, addresses, or other personal identifiers."[23] Computer matching has been used to detect unreported income, unreported assets, duplicate benefits, incorrect personal identification numbers, overpayments, ineligible recipients, inappropriate entitlements to benefits, and service providers billing twice for the same activity. A special survey by the Treasury Board Secretariat in 1984-85 revealed that a considerable amount of computer matching is carried out by government institutions.[24] 53 separate computer matching programs were discovered in some of the larger departments and agencies; and the practice is almost certainly more widespread than the 53 programs documented by the Treasury Board since only 12 departments were included in the survey.

Computer matching programs are regularly defended on the grounds on their effectiveness and efficiency. At present, the Canadian Privacy Act[25] does not deal with computer matching in explicit terms although it does establish in section 7(a) the basic principle that personal information should only be used for

the purpose for which it was collected, or for a use consistent with that purpose. Since computer matching involves the comparison of personal information collected for different purposes, the practice clearly contravenes this provision of the Act. Federal Privacy Commissioner John Grace has argued that only an unacceptably broad interpretation of the words "consistent use" could be used to justify computer matching as it is currently understood:

> ...computer-matching turns the traditional presumption of innocence into a presumption of guilt ...In matching, even where there is no indication of wrong-doing, individuals are subject to high technology search and seizure. Once the principle of matching is accepted, a social force of unyielding and pervasive magnitude is put in place.[26]

Whether the intention that feeds the practice is innocent or malign, the fact that information collected for one purpose can be used for another--can be used, in fact, to compile dossiers on private citizens--is a serious problem because the protection of personal information is one of the few defences the individual has against government abuse.

In Canada, much of the concern over computer matching, or dossier building has focused on the increasing and multiple uses of the Social Insurance Number. The Social Insurance Number (SIN) is the most common personal identifier in use in Canada. It was developed in the early 1960s in response to the need for numerical identification of individuals as a means of facilitating the efficient use of mainframe computers; that

technological imperative continues to drive its use. SINs were introduced for purposes of federal unemployment insurance and pension plans in 1964, but no controls were placed on additional uses of this new numbering system. In 1981, in response to burgeoning uses of the SIN, the first Privacy Commissioner Inger Hansen recommended the creation of a new criminal offence "against the privacy of another" in order to regulate its use[27] but her recommendation fell on deaf ears. In 1985-86, the Privacy Commissioner heard from more than 100 individuals complaining about some organizations' use of social insurance numbers or seeking clarification about the requirement to provide a SIN.[28]

Today, almost every transaction between citizens and social organizations--they could be governmental, educational or business--requires the inclusion of the SIN as an essential and formal element in that transaction. In the Report of the Standing Committee on Justice and Solicitor General reviewing the Access to Information Act and the Privacy Act, the Committee members cite a number of agencies who abuse the SIN, including: certain police departments who require a SIN from persons calling their emergency number; some funeral homes who require the deceased's number to obtain a burial permit from municipal authorities; insurance companies who regularly ask policy holders to divulge their SINs when making policy claims; and credit bureaus, who use the SIN as a primary means of linking pieces of

information about a specific person.[29]

Grace maintains that, "uncontrolled and general use of the SIN establishes a de facto national identifier with all its ominous and de-humanizing implications."[30] The practice makes it much easier to compile a wide range of information about citizens from disparate sources. Circumstantial evidence could, potentially, be put together on individuals, traces could be kept of their reading or educational interests, on virtually every aspect of their lives. If we consider the broad range of government programs and the broad range of activity in the private sector affecting individual citizens, it becomes clear that the documentary world concerning us is very extensive. The gathering of data by large organizations is a source of uneasiness because it constitutes a form of surveillance, a kind of technological voyeurism against which, unless it is checked, we, as citizens, are, largely, defenceless. Moreover, there is a concern that large information gathering organizations, governments for example, will use the information in ways that were not intended, or consented to, at the time of collection.

Sociologist James Rule suggests that much of the organizational interest in the private lives of individuals is generated by the desire to control deviant behaviour, through credit systems that attempt to minimize the number of poor credit risks; and by "the [need]...to document and define ...fine-grained bureaucratic obligations."[31] The enormous quantity of

personal documentation required for medical insurance or welfare benefits, for example, serves mainly to establish eligibility for those services. Moreover, Rule points out:

> People ...protest what they consider "unfair surveillance"--often in the same breath with which they demand more vigorous surveillance for purposes which they support. Nearly all people can point to some form of surveillance with which they are unhappy, either because they disapprove of the ends at which it is directed, or because it is inefficient in the pursuit of these ends. But most people remain quick to demand surveillance, whenever it seems to promise effective pursuit of ends which they deem desirable. Public and private bureaucracies are usually only too willing to accommodate these demands.[32]

Clearly, public demand for effective protection against tax evaders, dangerous drivers, or welfare frauds is at least partly responsible for the growth of surveillance. Social uncertainties make systematic monitoring and control possible; and so long as the efficiency criterion remains in effect to justify surveillance, the pressures against personal privacy will, inevitably, increase. There is no natural limit to the growth of surveillance and no area of an individual's life too private to attract bureaucratic surveillance. People disclose all manner of deeply sensitive information to medical personnel as one of the costs of modern medical care; they may reveal equally sensitive information to insurance companies when filing a claim.[33] The result is that as correlations are established between particular kinds of data, offering new possibilities for various kinds of social control, the demands for more personal data inevitably

follow.[34]

All of these developments--social, economic and technological--have generated well-founded fears about the ability of individuals and groups to protect themselves effectively against unwarranted intrusions into their private affairs. Such intrusions have not gone unchallenged and over the last twenty years cracks in the cultural hegemony have begun to appear. Since the late 1960s, what the philosopher Theodor Adorno once referred to as the "administered world" has become a battleground for social struggle. Against the pervasive sense of personal isolation and passivity, of social structures that were aloof, enigmatic and unwieldy, the characteristic demand of the various political and student movents that took shape during the sixties was for greater participation and control in all phases of collective life. Animated by the same consciousness that drove the freedom of information movement, citizens began to speak also not only of their need for privacy but of their legitimate right to it. Today, most western countries have adopted some form of data protection legislation in acknowledgement of the principle of the right to privacy. But, while the principle of a "right to privacy," is relatively easy to defend, the issue of privacy protection remains a problem because the concept itself resists coherent legislative definition. What constitutes an unwarranted invasion of privacy? How do we define private affairs?

The obstacles to defining privacy, as summarized in the the Younger Committee Report[35], are two-fold: first, many of the things we feel the need to preserve from the prying eyes of others are feelings, beliefs, or matters of conduct that are essentially irrational; and second, the scope of privacy is determined largely by the standards and mores of a given society and these standards are subject to constant change. The Younger Committee Report concluded that "the concept of privacy cannot be satisfactorily defined," citing, in support, the equally pessimistic conclusions reached by an earlier British Justice Committee on Privacy which were:

> .... that no purpose would be served by our making yet another attempt at developing an intellectually rigorous analysis ...At any given time, there will be certain things which almost everyone will agree ought to be part of the "private" area which people should be allowed to preserve from the intrusion of others, subject only to the overriding interest of the community as a whole where this plainly outweighs the private right. Surrounding this area there will always be a "grey area" on which opinions will differ, and the extent of this grey area, as also that of the central one, is bound to vary from time to time.[36]

Clearly, the range of privacy concerns is remarkably wide and diverse, a fact that has led some critics to assume a morally skeptical position with respect to its value.[37] Privacy debates revolve around two issues concerning the reducibility of privacy to other interests or rights, commonly termed the "coherence" and "distinctiveness" issues. First, is there something fundamental, integrated and unique about the concerns commonly grouped under

the heading "privacy issues" or are those concerns only randomly associated? Second, is there something morally distinctive about privacy or can privacy claims be defended by the same moral principles on which we base our defence of other values?

The most concise definition of privacy is "the right to be let alone,"[38] according to which privacy is synonymous with "negative liberty". The equation has some validity since the standard cases of "invasion of privacy" commonly take the form of coercive intrusions upon the individual and relate to such issues as theft, trespass, copyright and defamation of character. Such a definition is flawed, however, inasmuch as it lacks the distinctiveness necessary for the phrase to be useful in more than a conclusory sense. "The right to be let alone" covers almost any conceivable complaint a citizen could make and a great many examples of not letting people alone cannot readily be described as invasions of privacy. In some instances the negative liberty attaching to this definition may even conflict with the right to privacy.[39]

The definition is, at the same time, too narrow since it is possible to violate a person's privacy without any coercion or interference with freedom of action. Surveillance of various kinds can take place without our knowledge--wiretapping or computer-matching are just two examples; and in each case we suffer a loss of privacy, notwithstanding the fact that we are not coerced and our freedom of action, thought, and expression

has not been interfered with.

A related theory of privacy, first articulated by Samuel Warren and Louis Brandeis in 1890 stresses the relationship between respect for privacy and respect for individual dignity generally. Privacy itself is not defined; rather it is connected with other values, including the right to be let alone and the respect due an individual's "inviolate individual personality."[40] According to this theory privacy is connected in a specific and profound way with the recognition of human moral character; "inviolate personality" embraces individual integrity and dignity, personal uniqueness, and personal autonomy.

Edward Bloustein has suggested that the coherence of privacy lies in the fact that all invasions of privacy are violations of human dignity.[41] There are, however, violations of human dignity and personality that have nothing to do with privacy: having to stand in line at a foodbank, for example, is a serious affront to human dignity but it has nothing to do with privacy.

The right to make personal decisions without interference by the state constitutes yet another variation on the theme of privacy as the right to be let alone.[42] In such cases, the concept of privacy is extended to protect the individual's liberty of actions and autonomy from state regulation of certain intimate aspects of their life. The first problem with this concept of privacy is that the typical privacy claim is not a claim for non-interference by the state, but, rather, a claim for

state interference in the form of legal protection against other individuals.[43] Secondly, it excludes all claims that have nothing to do with highly personal decisions, such as an individual's unwillingness to be "on file" in a central data bank. Thirdly, to define privacy as non-interference with private actions is to restrict the context in which we can speak about important issues relating to state interference with individual action, issues that may be more effectively addressed under the umbrella concept of "liberty of action."[44]

The most popular approach to defining privacy currently is one which takes "information control" rather than non-interference as its essential characteristic. Alan Westin's definition of privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"[45] is the most frequently cited in this regard and its influence on the study of privacy has been enormous.[46] Other proponents of the control type definition include Richard Parker, who defines privacy as control over who senses us;[47] Charles Fried, who defines it as "the control we have over information about ourselves;"[48] and Arthur Miller, who identifies privacy as "the individual's ability to control the circulation of information relating to him."[49] The advantage of the control type definition of privacy is that it identifies clearly the interest involved when people resist surveillance or monitoring of their affairs,

that interest being the desire of individuals and groups to disclose what they are doing on their own terms and to whom they choose.[50]

There are, nevertheless, serious limitations to this concept of privacy. According to one sense of the definition, the "weak sense" definition of control, a voluntary disclosure does not involve loss of privacy because such a disclosure would be considered an exercise of control, rather than a loss of it.[51] Control over the decision to disclose information, rather than control over the amount of information others actually have is emphasized in this definition. The other, "strong sense" definition of control sees voluntary disclosure as a loss of control because the person who discloses loses the power to prevent others from further disseminating the information.

The weak sense definition of control is not sufficient as a description of privacy because individuals can have control over whether to disclose personal information and yet not control the information and access others have to them through other means. The strong sense definition of control, on the other hand, claims too much because it may indicate a loss of privacy when there is only a threat of such loss. Moreover, to equate privacy with the right of individuals to control the flow of information about themselves does not establish whether they are in fact known by others (through other means). A more serious concern with control definitions of privacy is that control situates the

essence of privacy in the ability to choose it and see that the choice is respected; the power of choice is emphasized rather than the way in which such power should be exercised, thereby preempting questions concerning when and why losses of privacy are undesirable. There are losses of privacy that have nothing to do with losses of control and the reasons we value privacy may have nothing to do with whether an individual has in fact chosen it. If privacy is defined as a form of control it prohibits us from criticizing how that control--to choose privacy or not to choose it--is exercised.[52]

Ruth Garvin has suggested that, rather than attempt to define privacy itself, it may be more useful to define the loss of privacy.[53] A loss of privacy, Garvin argues, occurs as others obtain information about us, pay attention to us, or gain access to us. Our concerns regarding loss of privacy translate into the most useful definition of it, that is, "the extent to which we are known to others; the extent to which we are the subject of others' attention; and the extent to which others have physical access to us."[54] Garvin's neutral concept of privacy enables us to identify losses of privacy distinctly and coherently because it suggests a complex of three independent and irreducible elements: secrecy, anonymity, and solitude. Although each element can function independently within its own self-contained area of privacy concern, the concept coheres because all three elements are part of the same notion of accessibility.[55]

The concern for secrecy, or the amount of information known about an individual, relates to information gathering practices, covering situations ignored by traditional interpretations of "invasion of privacy": intrusion, trespass and falsification. The concern for anonymity, or the attention paid to an individual, refers to losses of privacy that result when we become the subject of others' attention, either by direct or indirect observation. The third element in Garvin's privacy concept, concern for solitude, relates to physical access; the concern embodied here is not that more information has been obtained, nor that more attention has been drawn to us but that our "spatial aloneness" has been encroached on.[56]

The neutral concept of privacy, as expressed in the three elements of information gathering, attention, and physical access, covers such typical invasions of privacy as the collection, storage, and computerization of information; the dissemination of information about individuals; intruding or entering private places, eavesdropping, wiretapping, reading of letters, required testing of individuals and forced disclosure of information. Though the contexts differ widely, the reasons for which we claim privacy in each of these situations are similar; those reasons are connected to the positive functions privacy has in our lives: the promotion of liberty, autonomy, human relations, and the maintenance of a free society. Privacy appears to be a cultural value in all known human communities

although the forms it assumes vary widely.[57] In establishing their case for the recognition of a general right to privacy, Warren and Brandeis argued that "the intensity and complexity of life ...have rendered necessary some retreat from the world ...so that solitude and privacy have become more essential to the individual."[58]

The need to protect privacy is rooted in our notion of the individual and the requirements of selfhood and, in our concept of a democratic society; if we want a society that will not hinder the individual attainment of the above mentioned goals, society has to be liberal and pluralistic. Arthur Schaefer traces the case for assigning a high value to privacy to the utilitarian principles first espoused by John Stuart Mill in On Liberty:

> As Mill points out, there is a close correlation between the availability of a protected zone of privacy and the individual's ability freely to develop his individuality and creativity. In a society which is frequently intolerant of or hostile to non-conformity, freedom from constant surveillance is an important pre-condition for the development of independent and critically-minded individuals. Diversity and non-conformity will, in turn, promote the vitality and progress of society and contribute thereby to long-run utility.[59]

The important psychological utility of privacy as a "protected zone" has been explored by a number of social scientists, all of whom agree that privacy is a deeply experienced need and that the consequences of denying this need are profound. Erving Goffman's analysis of such "total

institutions" as prisons and mental institutions confirms the importance of privacy for the development and preservation of personal identity by illuminating the effects of its negation:

> ...beginning with admission a kind of contaminative exposure occurs. On the outside, the individual can hold objects of self-feeling--such as his body, his immediate actions, his thoughts and some of his possessions--clear of contact with alien and contaminating things. But in total institutions these territories of self are violated; the boundary that the individual places between his being and the environment is invaded and the embodiments of self profaned.[60]

A number of philosophical arguments concerning the value of privacy contend that privacy, by limiting access to an individual, creates the necessary context for other activities that we consider essential. Jeffrey Reiman, for example, believes that privacy enables the development of individuality by allowing individuals to distinguish between their own thoughts and feelings, and those of others.[61] In related arguments, Charles Fried and James Rachels argue[62] that privacy provides the necessary context for the development of trust, love and friendship because, "if we cannot control who has access to us, sometimes including and sometimes excluding people, then we cannot control the patterns of behaviour we need to adopt ...or the kinds of relations with other people that we will have."[63] Privacy is a necessary precondition for the creation and maintenance of different kinds of social relationships, because, "we act differently if we believe we are being observed. If we

can never be sure whether or not we are being watched and listened to, all our actions will be altered and our very character will change."[64]

Privacy serves many diverse values, including freedom from censure and ridicule and the promotion of mental health, autonomy, and human growth. Privacy also permits the relaxation and intimacy essential to many kinds of human relationships. In promoting these values, privacy functions in specific ways. First, it insulates us from the distracting and inhibiting effects of social life. The need to be free from distractions and to have the opportunity to concentrate in solitude is present and pressing in a wide range of human activities, among them learning, writing and most other forms of creativity.

In addition to providing that necessary freedom and opportunity, privacy protects us against ridicule and censure in the early stages of groping and experimentation.[65] In the absence of privacy we would be less likely to take risks since any failures would be public ones and fields of enquiry would shrink to the predictable and the known. In The Intruders, Edward Long decries the decline in spontaneity within society that has already resulted from the erosion of privacy: "because of this diligent accumulation of facts about each of us, it is difficult to speak or act today without wondering if the words or actions will reappear 'on the record'."[66] Sidney Jourard[67] has linked privacy with mental health by arguing that the pressures

to conform to society's expectations can lead to mental illness for some individuals. By providing a shelter to secret thoughts or acts of disobedience, privacy eases the strain of public obedience.

Second, privacy promotes liberty of action by shielding an individual's conduct from others' knowledge of that conduct. In so doing, privacy functions as a safeguard against interference, pressures to conform and other forms of hostile reaction. This promotion of liberty of action links privacy to a variety of related individual goals, foremost among them, autonomy and meaningful human relations. Moral autonomy is "the reflective and critical acceptance of social norms, with obedience based on an independent moral evaluation of their worth."[68] Even in societies that pride themselves on their openness and tolerance, individuals or groups who behave in a manner that deviates from certain norms are subject to hostile treatment. For this reason privacy is needed to enable an individual, or a group, to deliberate and establish their opinions without interference or coercion from a potentially hostile public. Privacy also functions to promote liberty in ways that allow us to form and maintain different kinds of human attachments; it enables us to edit and present our different selves to the world. This function is crucial because we project our identity through these various selves and it is through such images of self that human relations are created and maintained.[69]

Privacy is derived from liberty in that we tend to allow privacy to the extent that the liberty it promotes is considered desirable. As the above analysis suggests, learning, practising and creating require privacy, as do certain forms of relaxation and intimacy. The liberty promoted by privacy is required, too, in contexts in which we believe we should have few or no norms; for example, contexts in which freedom of expression and racial tolerance are involved. Because the existence of freedom of expression or anti-discrimination laws does not guarantee that individuals or groups will not be subject to prejudice or pressures to conform, respect for privacy is a way of enforcing tolerance of others. The fact is, that although laws can be deliberately and consciously changed, morality cannot. The right to privacy is accepted as a necessary compromise between the ideals of social harmony and the limits of human nature.[70]

Privacy is also required in contexts in which there is no clear consensus as to the desirability of certain norms.[71] Homosexual relations between consenting adults is still illegal in some American states; the fact that the law is rarely, if ever, enforced is an indication that the privacy of such relationships is permitted to protect the participants from legal sanctions.[72] Privacy is also allowed to promote the liberty of individuals to withhold information about their past in the interest of rehabilitation or to protect themselves against discrimination of various kinds. Privacy functions in both these

case to ease tensions between personal preferences and social norms by suspending the enforcement of certain morally questionable standards.

Clearly, privacy is necessary to enable individuals to maintain their mental health and autonomy and to develop meaningful human relations. In promoting such goals, privacy also promotes a more pluralistic and tolerant society. And, to the extent that privacy is important for autonomy, it is important for democracy because the justification for majority rule and the right to vote rests on the assumption that citizens should participate in political decisions by forming judgements and establishing choices. If citizens are to exercise their political liberty to the fullest extent, they must have the right to keep private their votes, their political discussions, and their associations. The same democratic principle holds true for groups. If they are to protect their organizational life, ideological protest movements, unions and a variety of other groups and movements all require what Arthur Schaefer calls "a kind of nutritive privacy" with respect to their internal affairs, "...unless individuals and groups have wide scope to formulate and test their ideas without intrusive surveillance by governments, the police or the general public, an essential precondition for an effective democratic society will be destroyed."[73]

A certain sphere of privacy has had legal protection from

the earliest times. Anglo-Saxon law and German tribal law protected the privacy that attached to every freeman's dwelling, and offered compensation for damage to property, insulting word, and the mere act of intrusion. Additional protections in the form of restrictions on the power of government officials to search, detain or enter, strict norms of confidence, and prohibition of eavesdropping emerged later.[74] The tradition of legal protection, however, is inadequate when it comes to addressing the modern concern with losses of privacy. According to Garvin, the legal protection of privacy is inadequate, "not because the level of privacy it once secured is no longer sufficient, but because that level can no longer be secured."[75]

Advances in the technology of surveillance, recording, storage, and retrieval of information have made it either impossible or extremely costly for individuals to protect the same level of privacy that was once enjoyed. The increase in the number of people whose profession it is to observe and report on people's activities, the intensified activity in search of publishable information and the changes in the equipment that enables such enterprises make it more likely that events and information will be recorded and published in some form. A 1986 consultant's Report to the Organization for Economic Co-operation and Development's (OECD) Committee for Information, Computer and Communications Policy identified significant problems for data protection in the development of the following forms of new

technology: expert systems used on personal information data bases; optical character recognition methods of computerizing manual records; distributed data processing and ad hoc data communication; two-way electronic services; and electronic mail. Other emerging threats to individual privacy are transborder data flows and vastly increased numbers of microcomputers maintaining undeclared collections of personal information.[76]

Theoretically, the protection of privacy is enshrined in Canadian Law in the form of the Privacy Act. The main goal of the Act, articulated in section 2, is to "protect the privacy of individuals with respect to personal information about themselves held by a government institution ...". The Privacy Act is, in fact, a data-protection statute in the sense that it deals with the threats posed to individual privacy by the collection, use, storage, and dissemination of personal data. At the core of the legislation, incorporated in sections 4 to 9, is the standard code of "fair information practices." Under section 4 of the Act, the heads of government institutions are required to have procedures in place to ensure that personal information which is collected "relates directly to an operating program or activity of the institution." Government institutions are required to collect personal data directly from the individuals concerned, wherever possible, and to inform them of the purposes of data collection. Such information must be kept as accurate, up-to-date, and complete as possible. Subject to various conditions,

information may only be used for the purpose for which it was collected or for a consistent use. Personal information may not be disclosed without the consent of the individual. The last principle is qualified somewhat by section 8(2), which describes thirteen purposes for which personal information may be disclosed to third parties.

In March 1987 the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act published a comprehensive report on the provisions and operations of the federal access and privacy acts. The Committee found the Privacy Act wanting in several respects. The Act's oversight of computer matching programs, the problems with the "consistent use" provision in the Act and the misuses of the Social Insurance Number have already been discussed. A further limitation inheres in the concept of exempt banks. Section 18 of the Act authorizes the Governor in Council to establish personal data banks to which individuals cannot obtain access under any circumstances. This section stipulates that the information banks in question "contain files all of which consist predominantly of personal information" concerning international affairs, national defence, and law enforcement and investigation as described in sections 21 and 22 of the Privacy Act. Individuals who apply for access to an exempt bank are neither given denial nor confirmation of the existence of information about them.[77] The Canadian Police Information Centre, one of the

most sensitive data bases maintained by the government, does not fall within the mandate of the Act. It is operated by the Royal Canadian Mounted Police as a centralized automated index to local police records, at the expense of the federal government on behalf of police forces across Canada.

The Act does not mention the need to maintain adequate security for personal information. In November 1986, an employee of Revenue Canada, Taxation removed 2,000 microfiche records from a locked reading room in the Toronto District Taxation Office. These records contained the name, address, Social Insurance Number, an employment code, last tax filing year, and name of spouse of 16 million individual taxpayers.[78] The records were quickly recovered but the incident demonstrated a significant problem with current security procedures and intensified the concerns of the general public.

As it stands currently, the Privacy Act does not provide for civil remedies for wrongful collection, use, and disclosure of personal information; nor do Canadians have an established right to sue the federal government for invasion of their privacy since the tort of invasion of privacy does not exist at the federal level.[79] There is, moreover, no explicit right to privacy under the Canadian Charter of Rights and Freedoms; the inclusion was proposed but defeated by a vote of fourteen to ten. The absence of a common-law and/or Charter based right to personal privacy in Canada is a significant impediment to the protection of

individual rights. The Standing Committee noted that, although Canada played a significant role in drafting the 1984 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, and committed itself "to encourage private sector corporations to develop and implement voluntary privacy protection codes ...no visible effort has been made to discharge this obligation."[80]

Perhaps the most glaring omission in the Canadian Privacy Act, and one that is endemic in privacy legislation generally, is the absence of a definition of privacy. Section 3 of the Act includes a definition of the meaning of "personal information" and a lengthy list of what constitutes personal information for purposes of the legislation; but nowhere does it define the term "privacy."

The foregoing makes clear that the legal protection of privacy does not always reflect, adequately, the importance of privacy. In some instances, limits of the law in protecting privacy are necessary and stem from the law's commitment to interests that sometimes require losses of privacy, such as freedom of expression and the needs of law enforcement. There are, however, subtler obstacles to the protection of privacy that need to be critically examined.

To begin with, our privacy can be invaded without our being aware of it, since it is difficult to know, for example, if others are reading our dossier. This absence of awareness is a

serious problem in a legal system that relies primarily on complaints initiated by victims. As Ruth Garvin points out, "the problem may be aggravated by the fact that a major invader of privacy is the government, whose interest in exposing its own misconduct is always uncertain."[81] There are cases in which victims learn that their privacy has been invaded because the information that has been acquired about them is used in a public trial; the case of Daniel Ellsberg is a notable example.[82] In most situations, however, there is no need to use the information publicly, and victims will not be able to complain about the invasions of privacy simply out of ignorance that such an invasion has occurred. The absence of complaints is, therefore, no indication that invasions of privacy do not exist or do not have undesirable consequences. In fact, Ruth Garvin argues, "because deterrence depends at least partly on the probability of detection, these problems of awareness may encourage such invasions."[83]

Even in those cases where invasion of privacy can be proved, for example, invasion of privacy through publication, legal proceedings are lengthy, costly and, more importantly, involve additional losses of privacy. Privacy is important in those areas in which we want a refuge from pressures to conform, where we seek freedom from the inhibiting effects of social life. Invasions of privacy are hurtful because they expose us; they may cause us to lose self-respect, trust, and, in the end, our

capacity to have meaningful relations with others. The law, as one of the most public mechanisms society has developed, is completely out of place in most of the contexts in which privacy is deemed valuable: "for the genuine victim of a loss of privacy, damages and even injunctions are remedies of despair."[84]

Garvin believes that what currently protects privacy is not the difficulty of invading it, but the lack of motive and interest of others to do so.[85] The protection our relative anonymity allows us is quickly lost, however, the moment someone does become interested, since information about us can be obtained from a host of data banks. And, if our privacy is invaded, it can be invaded today in more serious and more permanent ways than ever before. We have an obligation to protect privacy rights if we want a society that is committed to promoting the goals of a democratic society.

We have a particular obligation to alert those whose occupations involve systematic breaches of others' privacy, among them, journalists, social scientists and, more recently, historians--to the fact that, although some invasions of privacy are inevitable, a cavalier attitude toward such losses "may corrupt the invader as well as harm the victim."[86] In recent years, the research community has been forced to re-examine some of its research practices in the face of growing public concern over potential invasions of individual privacy. The nature of research methodologies generally and socio-historical research

specifically, and the reasons these have become a matter of concern in privacy debates will be explored in the next chapter.

CHAPTER II

ENDNOTES

1. Alexis de Tocqueville, Democracy in America, 2 vols. (New York: Vintage, 1945) 1: 337.

2. Hannah Arendt, The Human Condition (Chicago: University of Chicago Press, 1958) 24.

3. Michel Foucault, "On Governmentality," quoted in The Foucault Reader, ed. Paul Rabinow (New York: Pantheon Books, 1984) 14-15.

4. Foucault, "On Governmentality" 15.

5. Foucault, "On Governmentality" 15.

6. Foucault, "On Governmentality" 16.

7. Foucault, "On Governmentality" 16.

8. Foucault, "On Governmentality" 17.

9. Foucault, "On Governmentality" 17.

10. Michel Foucault, Discipline and Punish: The Birth of the Prison (New York: Vintage Books, 1979) 198.

11. Foucault, Discipline and Punish 200.

12. Arendt, The Human Condition 38-40.

13. According to Arendt, "the scientific thought that corresponds to this development is ...'national economy' or 'social economy' or Volkswirtschaft, all of which indicate a kind of 'collective housekeeping'; the collective of families economically organized into the facsimile of one super-human family is what we call 'society,' and its political form of

organization is called 'nation.' Arendt, The Human Condition 28-29.

14. Arendt 41.

15. Arendt 42.

16. In Arendt 39. According to Arendt, the authenticity of Rousseau's discovery is apparent in the flowering of poetry and music, as well as the rise of the novel, from the middle of the eighteenth century on. In Home: A Short History of an Idea, Witold Rybczynski provides further verification of the historical transformation of privacy into a protected realm of intimacy when he describes the concept of privacy as one of the great architectural discoveries of the bourgeois age. See Rybczynski, Home: A Short History of An Idea (New York: Viking Penguin, 1986) 26-28, 77, 107-108, 221-222.

17. Arendt warns that, "this nobody, this assumed one interest of society as a whole ...does not cease to rule for having lost its personality. As we know from the most social form of government, that is, from bureaucracy ...the rule by nobody is not necessarily no-rule, it may indeed, under certain circumstances, even turn out to be one of its cruellest and most tyrannical versions." The Human Condition 40.

18. See, for example, David H. Flaherty, Privacy in Colonial New England (Charlottesville: University of Virginia Press, 1972).

19. See Arthur Schaefer, "Privacy: A Philosophical Overview," Aspects of Privacy Law: Essays in Honour of John M. Sharp, ed. Dale Gibson (Toronto: Butterworths, 1980) 2; and Ferdinand Schoeman, "Privacy: Philosophical Dimensions of the Literature," Philosophical Dimensions of Privacy, ed. Ferdinand Schoeman (Cambridge: Cambridge University Press, 1984) 1-2.

20. Arthur Schaefer 2.

21. Quoted in Schaefer 3-4.

22. See G. Finlay, "Protection of Privacy and the Government Archives Organisation," paper presented at the XXIIIrd International Conference of the Round Table on Archives, Austin, Texas, 24-28 Oct. 1985.

23. Oversight of Computer Matching to Detect Fraud and Mismanagement in Government Programs, Hearings before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, 97th

Congress, 2nd Session, 15-16 December 1982 (Washington D.C.: Government Printing Office, 1983) 1-2.

24. Treasury Board Canada, Report on Data Matching, May 3, 1985, Report presented in Hearings before the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act.

25. S.C. 1980-83, c. 111, Schedule II.

26. Annual Report Privacy Commissioner 1985-86 (Ottawa: Supply and Services, 1986) 7.

27. Report of the Privacy Commissioner on the Use of the Social Insurance Numbers in Canada (Ottawa: Department of Justice, 1981).

28. Annual Report Privacy Commissioner 1985-86 8.

29. Open and Shut: Enhancing the Right to Know and the Right to Privacy, Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act (Ottawa: the Queen's Printer, 1987) 45.

30. Annual Report Privacy Commissioner 1985-86 8-9.

31. James Rule, The Politics of Privacy (New York: New American Library, 1980) 133.

32. Rule 135-136.

33. Rule 136.

34. Rule 136.

35. Report of the Committee on Privacy, under the Chairmanship of the Rt. Hon. Kenneth Younger (London: Her Majesty's Stationery Office, 1972).

36. British Section of the International Commission of Jurists, "Privacy and the Law," referred to in Report of the Committee on Privacy 17-18.

37. Some philosophers assume a morally skeptical position with respect to the value of privacy on the grounds that it cannot meet the criteria of distinctiveness and coherence. These "reductionist" critics maintain that "the right to privacy" is a catch-all phrase disguising a cluster of independent rights, lacking a common foundation. Judith Jarvis Thomson, for example,

argues that privacy is entirely derivative in its importance and justification. It fails to constitute a significant moral category in its own right because what needs to be said about privacy can be best expressed without reference to privacy at all, using notions such as property rights, and the rights an individual has over his or her own person. See Judith Jarvis Thomson, "The Right to Privacy," Philosophy and Public Affairs 4 .4 (Summer 1975): 295-314. In a similar vein, critics such as William Prosser and Frederick Davis argue that our interest in privacy, as articulated in tort law, can be reduced to interests of "reputation, emotional tranquility, and proprietary gain, none of which suggest a distinctive interest in privacy." See William L. Prosser, "Privacy [a legal analysis]," Philosophical Dimensions of Privacy, ed. Ferdinand Schoeman (Cambridge: Cambridge University Press, 1984): 104-155; and Frederick Davis, "What do we mean by "right to privacy?" South Dakota Law Review 4 (1959): 1-24.

38. The phrase is often attributed, incorrectly, to Samuel Warren and Louis Brandeis whose article, "The Right to Privacy," in the Harvard Law Review (1890) is considered the seminal article on privacy. In fact, Warren and Brandeis never equated the right to privacy with the right to be let alone; the article implied that the right to privacy is "a special case of the latter." The notion of a right "to be let alone" was first advanced in Thomas M. Cooley, "The right to be let alone," Torts 29 (2nd ed. 1888).

39. H.J. McCloskey argues that it may be necessary, in order to protect an individual's right to privacy, to interfere with the liberty of others to spy upon that person, or to publish information about that person. See "Privacy and the Right to Privacy," Philosophy 55 (1980): 17-38.

40. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review 4 .5 (1890) 193-220, reprinted in Philosophical Dimensions of Privacy 75-103.

41. Edward J. Bloustein refutes the reductionist position taken by William Prosser (see note 36) by arguing that the values at stake in privacy incursions "are fundamental human values of a sort more exalted and more coherent than those proposed by Prosser". Moreover, Bloustein maintains that there is something distinctive about privacy, "in the sense that we cannot eliminate mention of it in discussing certain cases without loss of moral vision." See "Privacy as an aspect of human dignity: an answer to Dean Prosser," Philosophical Dimensions of Privacy 156-202.

Stanley Benn argues that there are reasonable grounds for objecting to privacy even when the information acquired is not

misused. Even when no extrinsic harm comes to the person as a result of losing his or her privacy, that person has a prima facie right not to be spied upon or watched without their knowledge or consent because, Benn maintains, "humans are self-conscious beings and to monitor their conduct without authorization is to show a less than proper respect for their privacy." See "Privacy, freedom and respect for persons," Nomos XIII: Privacy, ed. J.R. Pennock and J.W. Chapman (New York: Atherton Press, 1971) 1-26.

42. This interpretation of the right to privacy has been applied in at least two U.S. Supreme Court decisions which have determined that, for the purposes of American law, the right to privacy includes the right of a married couple to use contraceptives (Griswold vs. Connecticut (1965) 85 S. Ct. 1678); and the right of a woman to have an abortion prior to the seventh month of pregnancy, with the approval of a doctor (Roe vs. Wade (1973) 410 U. S. 113 (U.S.S.C.)).

43. Ruth Garvin, "Privacy and the Limits of the Law," Yale Law Journal 89 .3 (January 1980): 438.

44. Garvin 439.

45. Alan Westin, Privacy and Freedom (New York: Atheneum, 1967) 7.

46. The Standing Committee on Justice and Solicitor General which recently completed its review of the Canadian Access and Privacy Act has recommended that this definition be incorporated into the Privacy Act. See Open and Shut 57 (rec. 5.24).

47. Richard Parker, "A Definition of Privacy," Rutgers Law Review 27 (1974): 275-296.

48. Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice (Cambridge: Harvard University Press, 1970) 140.

49. Arthur Miller, The Assault on Privacy (Ann Arbor: University of Michigan Press, 1971) 25.

50. Schaefer, "Privacy: A Philosophical Overview" 9.

51. Edward Shils defines privacy in a way that reinforces this notion: "privacy exists where the persons whose actions engender or become the objects of information retain possession of that information, and any flow outward of that information from the persons to whom it refers (and who share it where more than one person is involved) occurs on the initiative of its

possessors." See "Privacy: Its Constitution and Vicissitudes," Law and Contemporary Problems 31 (Spring 1966): 282.

52. For a more detailed analysis of the "weak" and "strong" sense definitions of control, see Garvin, "Privacy and the Limits of the Law" 426-428.

53. Garvin, "Privacy and the limits of the Law" 421-471.

54. Garvin 423.

55. Garvin 434.

56. Garvin 433.

57. See, for example, Alan Westin, "The origins of modern claims to privacy," Philosophical Dimensions of Privacy 56-74; John M. Roberts and Thomas Gregor, "Privacy: A Cultural View" Privacy, Nomos XIII 199-225; and Barrington Moore Jr., Privacy: Studies in Social and Cultural History (Armonk, New York: M.E. Sharpe, 1984).

58. Warren and Brandeis, "The Right to Privacy," Philosophical Dimensions 77.

59. Schaefer, "Privacy: A Philosophical Overview" 15.

60. Erving Goffman, Asylums: Essays on the Social Situation of Mental Patients and Other Inmates (New York: Doubleday, 1968) 23.

61. Jeffrey Reiman, "Privacy, Intimacy, and Personhood," Philosophy and Public Affairs 26 .6 (1977): 31-36.

62. See Charles Fried, "Privacy," Yale Law Journal 77 (1968): 484-485; Fried, Anatomy of Values 138; and James Rachels, "Why Privacy is Important," Philosophy and Public Affairs 4 .4 (Summer 1975): 323-333.

63. Rachels 331.

64. Hubert Humphrey, foreword, The Intruders: The Invasion of Privacy by Government and Industry, by Edward V. Long (New York, Washington, London: Frederick A. Praeger, 1967) viii.

65. Garvin 448.

66. Edward V. Long, The Intruders 55.

67. Sidney Jourard, "Some Psychological Aspects of Privacy," Law and Contemporary Problems 31 (Spring 1966): 307-318, esp. 307, 309-311.

68. Garvin 449.

69. A number of privacy critics object to this justification of privacy, among them, Richard Wasserstrom and Richard Posner. Wasserstrom and Posner argue that we either act authentically or inauthentically as we present ourselves in a various contexts. If we do not reveal all of what we are to those who have reason to interact with us, we are being partially deceptive; therefore, our wish to present different versions of ourself in different contexts cannot be supported ethically or legally. Wasserstrom and Posner take the position that those who defend privacy fail to give sufficient weight to the socially and individually demoralizing aspects of a society in which respect for privacy is institutionalized. Wasserstrom, for example, suggests that "not revealing information about oneself may be morally equivalent to deception and thus improper." See Richard Wasserstrom, "Privacy: Some Arguments and Assumptions," Philosophical Law: Authority, Equality, Adjudication, Privacy, ed. Richard Bronough (Westport: Greenwood Press, 1978) 148-166; and Richard A. Posner, "An Economic Theory of Privacy," Philosophical Dimensions of Privacy 333-345.

However, as Ferdinand Schoeman makes clear, "the notion of the self as an integrated substratum that explains the consistency of human activities in divers [sic] contexts has come under attach from several theoretical quarters." Schoeman cites the psychologist Walter Mischel who has argued that one of the primary reasons we have for positing the self--the supposed consistency in behaviour regardless of context--is not well founded in practice; and the social analyst Erving Goffman, who maintains that there is no "core person" underlying the various "context-dependent personalities" we occupy in life. See "Privacy: Philosophical Dimensions," Philosophical Dimensions of Privacy 26-31.

Ruth Garvin puts the matter simply: "we always give only partial descriptions of ourselves and no one expects anything else. The question is not whether we should edit, but how and by whom the editing should be done." "Privacy and the Limits of the Law" 454.

70. Garvin 452.

71. Garvin provides an insightful analysis of the problems inherent in this defence of privacy. Garvin wonders whether privacy should be allowed to function in a way that perpetuates

the very problems it helps to ease: "when privacy lets people act privately in ways that would have unpleasant consequences if done in public, this may obscure the urgency of the need to question the public regulation itself. If people can keep their independent judgements known only to a group of like-minded individuals, there is no need to deal with the problem of regulating hostile reactions by others." In the end, although she acknowledges that privacy might, in such situations, reduce our incentive to deal with our problems, she defends its use on the grounds that we are limited in our capacity to change positive morality and, therefore, to affect social pressures to conform:

> When this is the case, the absence of privacy may mean total destruction of the lives of individuals condemned by norms with only questionable benefit to society. If the chance to achieve change in a particular case is small, it seems heartless and naive to argue against the use of privacy. Although legal and social changes are unlikely until individuals are willing to put themselves on the line, this course of action should not be forced on anyone ...if an individual prefers to present a public conformity rather than unconventional autonomy, that is his choice. The least society can do in such cases is respect such a choice.
> See "Privacy and the Limits of the Law" 452-454.

72. Garvin 452.

73. Schaefer, "Privacy: A Philosophical Overview" 14.

74. Garvin 464.

75. Garvin 465.

76. In his annual report, the Privacy Commissioner expressed his concern that, "the personal computer's ability to develop its own records systems and share information without leaving an audit trail raises new and far-reaching threats to privacy protection ...Anyone with a personal computer on a desk is the master of a machine with the storage capacity of many filing cabinets, with the potential for linking up with other similar computers and, even, access to centralized record systems." See Annual Report Privacy Commissioner 1985-86 7.

77. Until 1986 there were 20 exempt data banks. The exempt status on 15 of those banks has since been revoked. The remaining five exempt banks are: (1) National Defence. Military

Police Investigation Case Files; (2) National Defence. Communications, Security Establishment, Security and Intelligence Investigation Files; (3) Privy Council Office. Security and Intelligence Information Files; (4) Revenue Canada. Tax Evasion Cases; (5) Royal Canadian Mounted Police. Criminal Intelligence Operational Records. See Annual Report Privacy Commissioner 1986-87 24-25.

The Standing Committee on Justice and the Solicitor General has recommended that "the concept of exempt banks be removed from the Privacy Act by repealing sections 18 and 36, since there is no compelling need to retain such a concept in light of the other strong exemptions on disclosure that exist in the legislation. See Open and Shut 46-49 (rec. 5.11).

78. Open and Shut 59.

79. The Standing Committee cites several examples of the kinds of problems that arise under the Privacy Act that currently lack a legal remedy. In one example, "files from Employment and Immigration Canada were found in an alley behind its local office in Winnipeg; they contained personal data on individuals participating in various programs. The Privacy Commissioner 'concluded that the EIC office was negligent in handling the out-of-date files by not properly supervising or instructing the cleaner about the disposal.' If individuals had suffered damages as a result of such negligence, they should have had a statutory cause of action." Further disturbing examples of census forms, tax forms and government personnel files going astray through government carelessness, are cited by the Privacy Commissioner in his Annual Report 1986-87 8-19.

The Standing Committee has recommended that monetary damages be provided to data subjects for "identifiable harm" resulting from government breaches of privacy rights. See Open and Shut 50 (recs. 5.13 and 5.14).

80. Open and Shut 73.

81. Garvin 457.

82. The break-in of Ellsberg's psychiatrist's office was revealed during the Watergate hearings. See New York Times 28 April 1973: 1.

83. Garvin 458.

84. Garvin 458.

85. Garvin 469.

86. Garvin 470.

III

HISTORY FROM THE BOTTOM UP
TRENDS IN HISTORICAL RESEARCH SINCE WORLD WAR II

Les documents, il faut les solliciter.

Marc Bloch

The reasons for the comparative prominence of the issues of privacy and confidentiality in debates about social research generally and, increasingly, about contemporary socio-historical research specifically, are related to the sources and methods of such research. Increasingly, social researchers are drawn to studies of human behaviour and history that intrude into those areas generally defined under the heading "private life."

The inquiry into new, hitherto undocumented areas of human experience and social interaction has had a profound influence on public archives; during the 1970s the numbers of academic users of archives increased dramatically.[1] Much of the new social research focuses on the "non-elites" of society, creating enormous demands on archival resources in terms of the variety and quantity of source material required by researchers. It has also raised some troubling ethical dilemmas with respect to individual privacy. More and more researchers are demanding access to records containing personal information of varying degrees of sensitivity; and questions arise about the conditions,

if any, under which access to all or some of these records is morally justifiable. Before examining the moral justifications for and against access, however, we need to explore the shifting environment in which historical research has been carried out since the end of the Second World War and the impact that shifting environment has had on archives.

In a statistical study of 11 countries, carried out for the 9th International Congress on Archives in 1980, Michael Roper attempted to trace the epistemological evolution of history in relation to archives[2], by identifying the main characteristics of current historical research that have impinged directly on the demand for access to archives. In the United Kingdom, the numbers of those engaged in academic history more than doubled between 1961 and 1976.[3] As the number of academic researchers has increased, so too has the diversity of research interests. According to Roper, "the three well established branches of historical enquiry--political (or constitutional) history, legal history, and ecclesiastical history have been joined by military history (no longer the restricted preserve of retired generals and admirals), international history, and economic history, from which social history has developed more recently as a separate branch."[4] The shift in interest to new branches of history has been accompanied by an enormous growth in the study of contemporary history, dealing with the twentieth century and particularly the decades after World War I.[5]

Economic and social history have spawned numerous sub-disciplines, among them, business history, labour history, women's history, each with distinct interests, methodologies and journals. In Canada, the Social Sciences and Humanities Research Council specifically encourages mission-oriented research in areas of interest to social historians--population aging, the family and the socialization of children, and women in the labour force.[6]

In addition, Roper points out, scholars from other academic disciplines have immersed themselves in the historical aspects of their subjects and have become historical geographers, historians of education, historians of science, technology and medicine, historians of ideas, and historians of the arts, and so on. Others are using historical sources to enrich the study of their particular disciplines:

> ...archaeologists ... and especially marine and industrial archaelogists, are using historical sources to assist them both in identifying sites of potential interest and in the interpretation and restoration of their discoveries, while linguists are turning ...to historical sources ... to understand more of the development of language and dialect. Rather different again are the "applied historical studies" of the social and political scientists, which have been defined as "explorations of the past undertaken with the explicit purpose of advancing social scientific enquiries" and in which historical data are used to test hypotheses of general application.[7]

The "cross-fertilization" that has occurred between history and other disciplines has led to historians adopting research techniques and approaches developed by other disciplines,

particularly economics and social science; and adapting them for historical purposes. Among the techniques adopted by historians are the techniques of psychoanalysis, which have been used to write psycho-histories of individuals or groups, and the interviewing techniques of the social sciences, which, aided by the development of the portable tape recorder, have led to the development of oral history.

According to a recent survey by the Organization of American Historians, the fastest growing field of historical research is the "new" social history.[8] Perhaps the most significant impetus to the development of the new social history has come from the quantitative research methods and statistical sampling techniques of economists and social scientists, involving the analysis of huge quantities of economic, social and political data from the recent past. In the mid-1960s political scientists developed quantitative methods for analyzing and recording numerous variables such as opinion polls and voting behaviour. At its simplest level, quantitative research is the counting and comparing of that which can be counted and compared.[9] Implicit in this definition is the measurement of phenomena--directly or indirectly observable--to which numbers are assigned according to specified rules. The data base of numeric documentation thus created can be subjected to computerized statistical analysis.

Sociologists, as well as historians, soon began to use economic, political science, and other techniques for "recording,

storing and tabulating quantitative data about individuals, institutions, events and goods to test earlier hypotheses and develop new insights."[10] Gradually, the practice of quantitative history aligned itself with the inter-disciplinary social science history. As characterized by Charles Dollar, the social science historian uses numeric documentation (usually machine readable) to investigate a particular historical problem or question. That historical question is then "treated as part of a social system encompassing legal, social, economic, and social psychological relationships, to name only a few. A social systems approach permits both macro and micro level analysis, and the additional sophistication of possible perspectives from a variety of disciplines."[11] Social science historians formalize their investigations into a statement of assumptions and a set of procedures to follow in testing one or more hypotheses.

When the first studies of geographic and social mobility based on manuscript census returns, city directories and parish registers appeared in the late sixties and early seventies, they were proclaimed as representatives of the "new social history." Reviewers suggested that quantitative analysis "would lend a healthy depth and precision to more traditionally based enquiries into the lives of the labouring and 'unlettered' during the nineteenth century."[12]

The so-called "new" social history owes much to the "total history" concept of the French Annales school with its balanced

emphasis on social structure, cultural values and physical environment.[13] The Annales movement was launched in 1929 with the founding of the journal Annales d'histoire economique et sociale, by Marc Bloch and Lucien Febvre. Rejecting the dominant pattern of nineteenth century historical writing associated with the German "scientific" school, which centered on the study of elites governing the nation-states, Annales scholars insisted on a "broadened and deepened history," one which went below politics to the fundamental causes of stability and change.[14] By rejecting traditional history, Annales scholars rejected, too, the "narrow documentary base" on which that history was built.[15]

The Annales methodology favoured structural analyses of the economic and material conditions of past societies. As Tom Nesmith has observed, "the ambition to master a wider range of sources led followers of Bloch and Febvre to rationalize their research methods using technology and quantitative procedures."[16] Annales scholars collected and analyzed large quantities of data from a wide range of sources--architectural remains, land records, birth, marriage and death registers, tax records, wills, account books, marriage settlements to name only a few--spanning generations and even centuries. From this greatly expanded documentary base, Annales historians assembled the "parahistoric languages" of demography, technology, money, towns, that had traditionally been kept separate from each other and

consigned to the margins of history.[17] From these parahistoric languages there emerged a broad picture of society "from the bottom up", a picture that emphasized the living conditions and collective mentality of the majority.

The Annales approach has exercised a profound influence on the "new" history since the end of the Second World War. Demography, which deals with the life conditions of communities of people as revealed in statistics of births, deaths and diseases, has become a central frame of reference for social history. Under the influence of the demographic view of society, history, as the record of growth, conflict and destruction, and the powerful actions of certain men, has given way to history as the record of the expression of demographically significant preferences, and the processes of choice and preference.

According to David Gagan, social history treats society as a "constantly changing archive of public and private experience awaiting both empirical investigation and theoretical speculation aimed at describing the historical meaning of social reality."[18] The focus of its concern is the constituent elements of society: class, gender, family, local or regional communities, and occupational, ethnic, and age groups. Over the last fifteen years, social history has examined the sources and consequences of social discontinuity in a wide variety of social groups, among them, women, children, adolescents and the elderly; voluntary

associations; political factions; professional and vocational groups; crowds and movements; social classes; and local populations.[19]

The new social history provides a stratigraphic[20] perspective on society, a perspective built largely from quantified data upon a base of demographic information. Census enumerations and parish registers have, for the most part, provided the backbone of demographic studies; but, as Andre LaRose's annual bibliography of historical demography makes clear, a variety of other evidence is also available, largely in the form of routinely generated administrative records: assessment rolls, land records, military records, marriage contracts, school records, hospital records, criminal records, bank records, ships' nominal rolls, and the records of benevolent associations.[21] The general ambition of historical demography has been to link evidence from a variety of sources in order to describe and explain demographic behaviour.

One approach involves local microstudies of a city, county, or township and the use of quantitative methods to assist in the control and analysis of the information. In Canada, the most ambitious work in this area of socio-historical research is being undertaken at the Universite de Montreal, where scholars in the Programme de Recherche en Demographie Historique have been attempting to reconstruct the entire population of Quebec from 1608 to 1850. Relying primarily on parish registers and nominal

census data, the project aims at producing, eventually, a demographic biography of every individual "qui ont mis le pied sur la territoire quebecois" up to the mid-19th century.[22] A similar project is underway at the Universite de Quebec at Chicoutimi. Since 1972, a team of demographers has been engaged in building a comprehensive data bank of the population of the Saguenay-Lake St. John area from 1838 up to 1931.[23]

More recently social historians have discovered the family "as the lowest common denominator of demographic and social structural analysis, in effect, a laboratory for the study of the processes of social discontinuity in larger populations."[24] This demographic and social structural approach to family history aims at exposing the realities of individual experience at various stages in the life cycle. By tracing individuals through, for example, parish registers, census returns, birth, death and marriage registers, assessment and other property records, researchers can "reconstitute" the family process in specific communities.[25] The perspective promoted by this record linking technique is a longitudinal one. Historians active in the field have generated a complex picture of the effects of social change on the structure, function and culture of family life, of the adaptive strategies employed, historically, by families to promote continuity in the face of change, of the cycle of family life and of life-styles within the family. The central concern of these studies is, in David Gagan's estimation "the larger

framework of local, regional and national economics which determined the nature of economic opportunity in the past and, therefore, the sources and timing of social discontinuity which is revealed, at the microcosmic level of family life, as a process of adaptation to quantum shifts in the material bases of life."[26]

Another dimension of family-centered social history is revealed in the recent re-visioning of women's history. The "new" women's history attempts to document the hitherto hidden areas of life in which women have, traditionally, been active, and to explore the public institutions that have assumed family functions, among them, prisons, hospitals, schools, and public and private welfare organizations. Carroll Smith Rosenberg observes that social historians and historians of women especially, focus their concern on "private places: the household, the family, the bed, the nursery, and kinship systems."[27] Demographic sources are essential to such studies, as Eva Moseley makes clear:

> Census and other statistical data can help delineate the lives of such women: the proportion of females to males and the female mortality rate for various age groups; the numbers who married, divorced, were widowed or deserted, and at what ages; the number of children per mother and their mortality; how many women were employed, in what kinds of jobs, for how much pay--and so forth. Company personnel records, reform school, prison, court, hospital, and morgue records, when they exist and are available, will all yield useful information.[28]

Susan Laskin, Beth Light and Alison Prentice have made extensive

use also of the manuscript census in their study of the history of teaching as a "woman's" occupation in the nineteenth century. The census returns allowed them to examine such variables as religious affiliation and ethnicity, the household and marital status, and the age as well as gender of individual teachers over time. The returns also permitted them to study the teachers in their familial groupings and residential settings.[29]

In an attempt to "illuminat[e] the texture of life among the 'submerged' four-tenths"[30] of society, social historians are turning also to case files generated by public and philanthropic social welfare institutions as a valuable source of documentation. Such case files contain highly detailed information on persons, groups, and institutions, rarely recorded elsewhere, and are considered particularly useful in reconstructing life histories and identifying and explaining social processes; an approach to social history known as prosopography or collective biography, which stresses interest group dynamics.[31] Joy Parr's study of the orphaned, deserted and dependent children who emigrated to Canada in the late nineteenth and early twentieth century, Labouring Children: British Immigrant Apprentices to Canada, 1869-1924 is a good example of the prosopographic approach. Drawing on information gleaned largely from case files, particularly those preserved on former wards of Dr. Barnardo's Homes, the British agency that dominated the juvenile immigration programme in the late nineteenth and

early twentieth century, Parr has constructed a highly detailed picture of the material conditions of life among the children who were the object of one of the most significant reform movements of that period.

Historians and archivists alike view the case files of public and private welfare agencies as a valuable source of information for documenting a stratum of society which traditionally has been poorly represented in written sources. According to R. Joseph Anderson:

> The historical value of these records results from the fact that the case method, as employed in contemporary public welfare systems, has remained essentially investigatory since its origin among the late nineteenth-century charity organization societies. The societies' "friendly visitors" sought to diagnose and treat poverty as a character defect rather than as a social problem, and this approach led to the creation of individualized profiles of recipients, which documented their habits, attitudes, and lifestyles as well as their economic needs ...and, until the early 1970s, they continued to combine normative judgements and objective information.[32]

Public and private welfare case files contain a wide range of quantitative and anecdotal information on the personal adjustment, family dynamics and social functioning of welfare clients; moreover, since "public welfare agencies frequently serve as referral sources and focal contacts for other service organizations ...[the] records often contain information from schools, clinics, rehabilitation programs, private charities, and other community agencies.[33]

The social historian's quest for new sources and for large

amounts of relatively recent quantifiable data has been facilitated by the vastly expanded documentary base of late twentieth century society. Direct and indirect government involvement in the daily lives of non-elites has expanded greatly in this half-century with the growth of regulatory and social welfare programs. One result of this is that the major source of documentation of non-elite groups probably exists in governmental data bases and case files. More than 80 per cent of government records consist of case files of various kinds; over the last decade, most of these files have been computerized for more efficient operations.[34]

Government data files are generally composed of one or more of three broad types of information: demographic information, such as age, sex, marital status, and place of residence; socio-economic information, such as occupation, education, and income; and attitudes and opinions.[35] These data files can be linked, one with another, creating a wealth of material for social and historical research.

As increasing emphasis is placed upon quantitative, statistical analyses of detailed source materials, documenting individual characteristics and activities, social and governmental processes, and economic transactions, social researchers are playing a more active role as consumers of official data gathering systems.[36] There is a steadily growing demand on the detailed machine-readable records now being created

in rapidly expanding volume. At the same time, the more contemporary oriented research of social scientists in other disciplines also places increased value on the machine-readable records created by governmental organizations.

The growth in demographic studies has led, particularly, to an increased demand for quantifiable micro-level data in machine-readable form since the informational value of machine readable records is proportional to their level of aggregation. According to Charles Dollar:

> summary information at the county level is more valuable than summary information at the state level. But this county level information is less valuable than information on individual persons, places or things because summarized data cannot be disaggregated. In contrast, one can always summarize or aggregate the individual information to the desired summary level. Consequently, individual data or unaggregated micro-level information has the greatest potential for statistical manipulation.[37]

Quantitative research also requires that the potential for linking, comparing, or adding the file to another file exists. Usually, records arranged at the lowest unit have considerable linkage potential. Common attributes such as geographic location, occupation, age, and sex permit the linkage of a file with groups possessing similar attributes. Personal identifiers such as name and social security number permit even more sophisticated data linkage.

But, while detailed records created by governmental organizations have undoubted research value and will increasingly

come into the jurisdiction of archivists, many of those records also present major threats to the privacy of countless individuals. Tax records and records of public assistance payments contain detailed intimate and sensitive information that jeopardizes individual privacy and confidentiality. Legal requirements governing the management of and access to such records at present are both unclear and confused; information bearing upon techniques for providing security for collections of sensitive machine-readable records is not now widely available; and procedures for providing legitimate access to elements of information contained in such records without compromising individual privacy and confidentiality are not well-developed or understood.

The fundamental ethical issues with respect to research uses of personal information are tied closely to social expectations about the personal information supplied to government and, specifically, the nature of the contract struck between the government and an individual at the time of the original information collection. Clearly, the public considers privacy a right which the government is, theoretically, obliged to protect. The carrying out of that obligation is, however, compromised by a number of administrative obstacles.

In the information gathering process, references to privacy and confidentiality are generally vague. The implication is that any personal information supplied to government will be made

available only to a limited number of people on a "need to know" basis. Once information exists in record form, however, particularly in machine-readable form, any control mechanisms that may be placed on disclosure are immediately attenuated, given the enormous potential of linking data, particularly demographic and socio-economic data, through personal identifiers.

In certain transactions between the government and an individual, there is an expectation that certain kinds of information will be strictly safeguarded, but how this is to be done is often not formally prescribed, creating problems at a later date in dealing with the information so gathered. Frequently, no formal provision is made for the ultimate removal of embargoes placed on use. Individuals who provide sensitive information on the promise of confidentiality, for example, are not informed that the promise expires after a certain period of time--ten, twenty, or fifty years, as the case may be.

The issue of confidentiality constitutes a particular species of the larger issue of privacy. Whereas privacy is the social expectation that individuals have a right to determine, to a reasonable degree, the extent to which they are known to others, are the subject of others' attention and other's physical access to them, confidentiality refers to the specific "status accorded to data or information indicating that it is sensitive for some reason, [and] therefore needs to be protected against

theft or improper use and must be disseminated only to individuals or organizations authorized ...to have it."[1] Personal case files are, perhaps, the most prevalent type of confidential documentation. According to Virginia Stewart:

> the case record may include age, sex, religious preference, medical history, legal and financial status, marriage, family and social relationships, and residence and employment patterns, all of which may be supplemented by test results, investigations, diagnoses, and notations of courses of therapy or intervention.[2]

An American survey undertaken in 1973 found that case record series occurred in a wide range of collections, including records of public and private welfare agencies; clinics, hospitals and public health agencies; juvenile homes and residential and special schools; adoption agencies; and labour union grievance and compensation boards.[3] Peter Gillis has identified similar collections of personal, investigatory and report case files created by the numerous departments and agencies of the Canadian government, including immigration case files, criminal investigation case files, Unemployment Insurance benefit case files, deportation case files and "special" case files.[4] Whatever the impetus behind their creation, it is clear that "the concept of privacy is a vital part of the administrative context in which such information is solicited ...Individuals, corporations, organizations, and groups are discussed and expose themselves in these files in a very intimate and usually frank manner."[5]

And yet, in both Canada and the United States, confidentiality provisions with respect to public welfare records vary widely from one jurisdiction to the next.[43] Legislative mandates on access and privacy exist at the federal level in Canada and the United States through freedom of information and privacy laws. Authority on access to records is not, however, clearly mandated in legislation at the state or provincial level. In the United States, a broad privacy law is lacking in two-thirds of the states; in Canada, nine provinces out of ten have yet to pass privacy legislation.[44] In addition, statutes governing a certain category of records, for example, mental health records, may address the administrative needs of agencies but fail to clarify the conditions of use for records transferred to public archives.[45]

In her 1982 survey of state archival policy governing personal privacy and access to Health and Social Services records for social research, Alice Robbin found that Health and Social Service records "revealed varying degrees of inconsistency, ambiguity, and conflict in the fifty state codes."[46] In Canada, at the provincial level, provisions for confidentiality are in similar disarray. In some jurisdictions, Ontario's Ministry of Community and Social Services for example, no overall written policy covers privacy or confidentiality of records, with the exception of the oath of secrecy administered by the province to all new employees. Personnel training emphasizes neither privacy

nor confidentiality and includes no education about client information rights.[47]

The ambiguity that surrounds public policy on confidentiality provisions is exacerbated by a lack of awareness, on the part of archivists, that such ambiguity exists. Alice Robbin found that, in the United States, almost three-quarters (72%) of the archivists surveyed, "said there were no conflicting state laws, including court or administrative orders, on disseminating or limiting access to H&SS records administered by the archives."[48] In Canada, at the federal level, although "case file series ...are offered up for disposal under the records management program with great regularity, there is in the end no agreement on how such material will be made available to the public as an archival source."[49]

The ethical conundrum provoked by researcher demands for access to case records is articulated succinctly by historian Joy Parr:

> An agency which opens case records to researchers places in the public domain information about individuals who never chose to enter public life. Boards of directors necessarily undertake this decision without the consent of the parties directly concerned: their former clients, families of clients or members of adoptive and foster households. They surrender information provided in confidence or under duress, an action which challenges directly the ethics of the helping professions.[50]

In certain areas of government, such as social services, corrections, and law enforcement, there are strong reservations

about allowing individuals access to their own records because of the sensitive nature of the information contained in the file. The current bias in record-keeping practice within these agencies is in favour of non-disclosure. Should researchers have access to records that contain sensitive information concerning a client's character, morality, physical and mental condition-- information that may be subjective, biased, or incorrect-- when the clients themselves were never permitted access to that information? For a government agency to disseminate or permit others access to such information for use in unspecified ways is a serious breach of privacy ethics, regardless of whether the intended use is for administrative or research purposes.

Clearly, when individual citizens supply personal information to the government, whether it is of a routine or sensitive nature, they are not thinking of its implications for posterity. The ethics of socio-historical research as it relates to the preservation of personal information for a wide variety of research uses, is not widely discussed in the public arena, primarily because the public is unaware, for the most part, that such information is transferred to an archives and made available for research. It is difficult for citizens to make any coherent assessment as to whether research uses of personal information constitute an unwarranted invasion of privacy since they have no way of knowing the size of the data base from which such information can, potentially be drawn, or the variety of sources

contained in it. Micro-level data subjects the interaction between an individual and a government agency to the maximum degree of exposure possible in records. The potential for data linking can turn disparate pieces of apparently innocuous information about an information into a comprehensive biography, making Arthur Miller's "womb to tomb dossier" a reality.

Ethical dilemmas notwithstanding, most historians believe that, while the preservation of records containing personal information presents serious problems to archivists with respect to privacy and confidentiality, the preservation of such records is a professional challenge that should be accepted when possible. From the historical researcher's vantage point the individual's right to privacy "must be balanced by the collective need to understand society and society's needs."[51] To a significant degree, archivists concur with that rationale. When it drafted its Model Archives Law in 1972, The International Council of Archives recognized the conflict of values between access and privacy but it concluded that "the principle of free access ...should no longer have to be sacrificed every time it clashes ...with the privacy of individuals."[52] Peter Gillis has argued that in debates concerning the legitimacy of access to case files, "the position must never be abandoned that this type of file has a rich potential for research purposes":

> While such documentation is of a private and confidential nature at the time of its creation and for a considerable period thereafter, it becomes, at some point in time, an important research aid for social scientists, historians, and genealogists. The danger is always there that such information will be released too soon and render great damage to those individuals or organizations mentioned on the file, but public records archivists must be in the forefront of those who advocate that this is a legitimate risk which must be faced ...[53]

But is such a position ethically valid? The moral justifications for and against access to individually identifiable records for social research will be the subject of the next chapter.

CHAPTER III

ENDNOTES

1. The Public Archives of Canada documented a 71 percent growth in the number of academic users between 1971 and 1976; The Archives generales du Royaume and Archives de l'Etat of Belgium documented a 39 percent increase over the same period. In Spain, the growth, in the period 1957-75 was 757 percent; in the United Kingdom, between 1962-78, the growth documented was 558 percent. At the U.S. National Archives, non-genealogist researchers represented 43 percent of all research conducted in 1976. See Michael Roper, "The Academic Use of Archives," International Council on Archives, volume XXIX: Proceedings of the International Congress on Archives London, 15-19 September, 1980 (Munchen, New York, London, Paris: K.G. Saur, 1982) 42-43, table 3.

2. Geoffrey Barraclough has compiled a detailed survey as part of the study conducted for Unesco on the social sciences entitled Main trends of research in the social and human sciences, part 2: anthropological and historical sciences, aethetics and the science of art, legal science, philosophy (Paris: Unesco, 1978); cited in Michel Duchein, Obstacles to the Access, Use and Transfer of Information from Archives: A Ramp study (Paris: Unesco, 1983) 8.

3. Roper, "The Academic Use of Archives" 27.

4. Roper, "The Academic Use of Archives," 27. According to Roper's survey, in 1977 the Public Archives of Canada reported 31.8 percent of academic use of its archives was related to social history, and 12.9 percent was related to economic history, compared to 26.0 percent for political history and 1.8 percent for religious history. At the Public Record Office, 21.8 percent of documents consulted in 1977-78 related to economic and social history as compared with 13.8 percent in 1962-64.

5. In 1971, the entries in Historical Abstracts dealing with pre-1914 history numbered 3303 as compared to 3103 entries dealing with post-1914 history; in 1976, there were 4100 entries dealing with pre-1914 history and 4994 entries dealing with post-1914 history. See Roper, "Academic Use" 40, table 1.

6. David Gagan and H.E. Turner, "Social History in Canada: A Report on the 'State of the Art'," Archivaria 14 (Summer 1982): 28.

7. Roper 28. For a more detailed discussion of the expansion of clientele of archives, see Ivan Borsa, "The Expanding Archival Clientele in the Post-World War II Period," International Council on Archives, volume XXVI: Proceedings of the 8th International Congress on Archives Washington, 27 September - 1 October 1976 (Munchen, New York, London, Paris: K.G. Saur, 1979) 119-126.

8. Dale C. Mayer, "The New Social History: Implications for Archivists," American Archivist 48 .4 (Fall 1985): 388.

9. Charles M. Dollar, "Quantitative History and Archives," International Council on Archives, volume XXIX: Proceedings of the International Congress on Archives London 15-19 September, 1980 (Munchen, New York, London, Paris: K.G. Saur, 1982) 46.

10. Meyer Fishbein, Guidelines for Administering Machine-Readable Archives, prepared for the Committee on Automation, International Council on Archives, Washington, D.C., November 1980 5-6.

11. Dollar, "Quantitative History and Archives" 47.

12. G.J. Parr, "Case Records as Sources for Social History," Archivaria 4 (Summer 1977) 122.

13. For a detailed analysis of the Annales school and its influence, see Traian Stoianovich, French Historical Method: The Annales Paradadigm (Cornell University Press: Ithaca and London, 1976).

14. Marc Bloch, quoted by Tom Nesmith in "Le Roy Ladurie's 'Total History' and Archives," Archivaria 12 (Summer 1981): 128.

15. Nesmith, "Le Roy Ladurie's 'Total History' and Archives," 128.

16. Nesmith 128.

17. Fernand Braudel, The Structures of Everyday Life: The Limits of the Possible. Civilization and Capitalism, 15th-18th Century Volume 1, trans. Sian Reynolds (New York: Harper and Row, 1981) 27.

18. Gagan and Turner, "Social History in Canada" 27.

19. Gagan and Turner 27.

20. Le Roy Ladurie, quoted by Tom Nesmith in "Le Roy Ladurie's 'Total History' and Archives" 129.

21. Listed in Chad Gaffield, "Theory and Method in Canadian Historical Demography," Archivaria 14 (Summer 1982): 129.

22. Gagan and Turner 36.

23. Gagan and Turner 36.

24. Gagan and Turner 30.

25. Gaffield, "Theory and Method" 125.

26. Gagan and Turner 32.

27. Carroll Smith-Rosenberg, "The New Woman and the New History," Feminist Studies 3 .1-2 (1976): 185.

28. Eva S. Moseley, "Sources for the 'New Women's History'," American Archivist 43 .2 (Spring 1980): 182

29. Susan Laskin, Beth Light and Alison Prentice, "Studying the History of Occupation: Quantitative Sources on Canadian Teachers in the Nineteenth Century," Archivaria 14 (Summer 1982): 77.

30. G.J. Parr, "Case Records" 122.

31. Gagan and Turner 27-28.

32. R. Joseph Anderson, "Public Welfare Case Records: A Study of Archival Practices, American Archivist 43 .2 (Spring 1980): 165.

33. Anderson 169.

34. Meyer H. Fishbein, "The 'Traditional' Archivist and the Appraisal of Machine-Readable Records," Archivists and Machine-Readable Records: Proceedings of the Conference on Archival Management of Machine-Readable Records, February 7-10, 1979, Ann Arbor, Michigan, ed. Carolyn L. Geda, Erik W. Austin, Francis X. Blouin, Jr. (Chicago: Society of American Archivists, 1980) 60.

35. Harold Naugler, The Archival Appraisal of Machine-Readable records: a RAMP study with guidelines (Paris: UNESCO, 1984) 84.

36. G. Martinotti, "Data Processing, Government, and the Public: Reflections on the Italian case," International Social Science Journal 30 .1 (1978): 149.

37. Charles M. Dollar, "Machine-Readable Records of the Federal Government and the National ARchives," Archivists and Machine-Readable Records: Proceedings of the Conference on Archival Management of Machine-Readable Records, February 7-10, 1979, Ann Arbor, Michigan (Chicago: Society of American Archivists, 1980) 83.

38. Introduction, Computers and Privacy in the Next Decade, ed. Lance J. Hoffman (New York: Academic Press, 1980) 11.

39. Virginia Stewart, "Problems of Confidentiality in the Administration of Personal Case Records," American Archivist 37 (1974): 387.

40. Stewart 391.

41. Peter Gillis, "The Case File: Problems of Acquisition and Access from the Federal Perspective," Archivaria 6 (Summer 1978): 32-39.

42. Gillis 38.

43. The literature on legislation governing confidentiality in public welfare case files in the United States has grown since the publication of Virginia Stewart's ground-breaking article, "Problems of Confidentiality in the Administration of Personal Case Records," American Archivist 37 (1974): 387-97. Since that time, the issue has been addressed in a number of articles, including R. Joseph Anderson, "Public Welfare Case Records: A Study of Archival Practices," American Archivist 43 .2 (Spring 1980): 169-79; Ronald M. Baumann, "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law," American Archivist 49 .4 (Fall 1986): 349-70; David Klassen, "The Provenance of Social Work Case Records: Implications for Archival Appraisal and Access," Provenance 1 .1 (Spring 1983): 5-39; Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," American Archivist 49 .2 (Spring 1986): 163-75.

In Canada, the literature on public welfare case files is not as well-developed. The two articles that have become standard reading on the subject are: G.J. Parr, "Case Records as Sources for Social History," Archivaria 4 (Summer 1979): 122-36; and Peter Gillis, "The Case File: Problems of Acquisition and Access from the Federal Perspective," Archivaria 6 (Summer 1978): 32-39.

44. Quebec is the only province with comprehensive privacy legislation. In Manitoba and Ontario privacy legislation currently exists in bill form.

45. Ronald Baumann, "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law," American Archivist 49 .4 (Fall 1986): 355.

46. Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," American Archivist 49 .2 (Spring 1986): 167.

47. A related issue is accountability for records which has not yet been resolved in the development of social service privacy policy in Ontario. Directors of some individual agencies contractually funded by the Ministry insist that the agency owns the records and therefore has sole responsibility for privacy and confidentiality of its records despite the difficulty of establishing legal ownership of information. Municipalities also claim record ownership rights over General Welfare Assistance records. The responsibility for third party reports, such as medical or psychological assessments contained in social service record systems is also open to question. See Chapter 8 of Michael Brown, Brenda Billingsley and Rebecca Shamai, Privacy and Personal Data Protection: A Report on Personal Record-Keeping by the Ministries and Agencies of the Ontario Government, prepared for the Commission on Freedom of Information and Individual Privacy, March 1980.

48. Robbin, "State Archives" 167.

49. Gillis 35.

50. Parr, "Case Records" 135.

51. Allan Bogue, "Data Dilemmas: Quantitative History and the Social Science History Association," Social Science History 3 .3-4 (October 1979): 212.

52. Quoted in Jean Tener, "Accessibility and Archives," Archivaria 6 (Summer 1978): 18.

53. Gillis 38.

IV

PRIVACY DILEMMAS IN HISTORICAL RESEARCH

> The toil, nay the most exciting toil of historians is to make dumb things speak.
>
> Lucien Febvre

Early in 1986, 15,000 Swedes who were born in 1953 discovered that every aspect of their lives had been under the microscope since the day they were born as a result of a secret sociological study. Newspapers disclosed[1] that researchers at Stockholm University had been amassing computerized files on all 15,000 people born in Stockholm in 1953 as part of a project called "Metropolit".

There are approximately 100,000 computer registers containing data about individuals in Sweden. More than 600 were set up by the government and cover everything from education, health, social problems and absences from work, to taxes, rents and military service. Using information supplied by virtually all public bodies, including confidential data from police and health authorities, the researchers put together encyclopaedic files which included the subjects' school record, sexual problems, performance at work, family ties, income and crimes. The purpose of the research, according to a member of the Metropolit project was, apparently, "to see how things are for people in life." Carl-Gunnar Janson, a Sociology professor at

Stockholm University and the leader of the Metropolit project, defended the research on the grounds that "it would be grotesque if those interviewed were able to rob me of material which I have been working with for more than 20 years. The idea that they can own the information about themselves is fantastic."

That same week, the Swedish Data Inspection Board, whose job is to protect Swedes against abuse of data held about them in government computers reported that scientists at the Karolinska Institute had assembled a file on women who had legal abortions between 1966 and 1974. The institute used the file in a study of the links between abortion and cancer. None of the women were told their names were on the institute's computers. These incidents are particularly worthy of note since they took place in the country whose data protection laws are considered the most stringent in the world.

When Emile Durkheim published The Elementary Forms of Religious Life he looked forward to the time when science would take over the subjects that religion and philosophy had traditionally sought to explain--nature, humankind and society. Science, he proclaimed, would "set aside the veil with which mythological imagination had covered [these subjects] for them to appear as they really are."[2] The illusion that social transparency is achievable has driven the social sciences ever since. Many social benefits have derived from the pursuit of that illusion; but there have also been costs. The steady

erosion of individual privacy is by no means the least of those costs.

In 1977, representatives from the research communities of five countries met in Bellagio to discuss ways of improving access to census data and similar government archives. The participants reached a consensus on a number of key issues, among them: that there are valid and socially significant fields of research for which access to microdata is indispensable; that there are legitimate research uses which require the utilization of identifiable data within the framework of concern for confidentiality; and that some research and statistical activities require the linking of individual data for research and statistical purposes.[3]

A key concept enshrined in the Bellagio Principles is that of "functional separation." It was first articulated in 1976 by the American Privacy Protection Study Commission, which recommended that to protect the individual from

> inadvertent exposure to an administrative action as a consequence of supplying information for a research or a statistical purpose, and to protect the continued availability of research and statistical results which are important for the common welfare, there must be a clear functional separation between research and statistical uses and all other uses ...The principle must be established that individually identifiable information collected for research or statistical purposes may enter into administrative and policy decision making only in aggregate or anonymous form.[4]

The principle of functional separation attempts to establish a

crucial distinction between information collected for administrative purposes: for example, to make decisions on judgements about a particular identifiable individual; and information collected for research purposes, in which the individual's identity is incidental and the function of the information is not tied to decisions about the individual.

Researchers frequently invoke this principle in defence of access to personal information. The reason for collecting information, the argument goes, is not that researchers wish to know who the individual is, in the ordinary sense of "to know." Nor are they ordinarily interested in disclosing the information they collect about an individual; they merely want a simple, dependable way of matching a piece of information collected on one occasion with a piece of information collected about the same individual on a different occasion. Any dependable matching method would be equally acceptable in principle to the researcher: a unique alias, or an arbitrary serial number.

While the principle is an important one, it flounders on two false assumptions. The principle assumes that researchers will be capable of protecting the confidentiality of their research files against administrative abuses when this is not the case. A number of recent court cases involving the subpoena of social scientists' research notes has demonstrated just how fragile promises of confidentiality can be.[5] Social researchers do not enjoy the same broad testimonial privilege of lawyers and

physicians. Threats to confidentiality from courts and other governmental bodies that can issue subpoenas for information about individuals from the records of studies designed for other purposes has become a matter of growing concern within the research community.

The second false assumption implicit in the principle of functional separation is the assessment of risk to record subjects. Researchers assume that public concern over invasions of privacy is based on a fear of the potentially harmful consequences of disclosure. If individuals are assured that the information they disclose will not be used against them, researchers reason, their privacy concerns will be alleviated. This consequentialist perspective is limited because it diminishes the moral significance of the invasive action itself and the cumulative effect of such invasions, not only on individuals, who may never know that their privacy has been invaded, but on the society as a whole. If there is a general feeling within society that the right to privacy is not respected, or that promises of confidentiality will not be honoured, interpersonal trust will, inevitably, break down.

The range of social research is enormous, and its methodologies diverse. For the purposes of this enquiry, social research refers to any deliberate attempt to gather data on individuals and groups through such systematic means as indirect observation and secondary analysis. The focus here is on

unobtrusive data collection methods through the gathering of information about people from governmental archives. The question this kind of social research raises is whether the purposes for which researchers pursue their studies lend special legitimacy to sometimes questionable methodology. Should ordinary moral restraints be overridden for the sake of "academic" or "scientific" inquiry?

The rationale for research serves partly to answer, partly to deflect that question. Though fewer now believe in the possibility of attaining "true knowledge" than in Durkheim's time, most will argue that research may at least push back the boundaries of ignorance and felt chaos.[6] Traditional arguments in support of research--invoking the pursuit of knowledge, the freedom of inquiry, and the benefits of research--have been extended by some to justify studies that are invasive of individual privacy. John Robertson observes that some social scientists,

> question the very legitimacy of any government regulation of social research. In their view scientists have a right to plan and conduct research as they see fit, subject only to judgements of their peers based on canons of scientific validity. This right, they assert, is inherent in the role of scientist and in doctrines of academic freedom and is protected by the free speech clause of the First Amendment.[7]

Freedom of academic or scientific inquiry is a value expressed both in its own right and in opposition to control or regulation of scientific enterprise on the grounds that, "a society which

limits the academics' area of inquiry and expression is hurting itself by reducing its potential for knowledge."[8] Sociologist Norman Denzen takes the position that no research method can be defined in an a priori fashion as unethical.[9]

The tradition of the autonomy of the researcher is supported by theories concerning the process of scientific discovery, and the conditions that are required to foster it. In The Structure of Scientific Revolutions, Thomas Kuhn introduced the notion that science advances by means of "paradigm shifts", in which the beliefs, values and techniques shared by the members of a given scientific community are challenged by the discovery (or cumulative discoveries) of anomolies within the established framework of theory. According to Kuhn, the "failure of existing rules is the prelude to a search for new ones."[10] Old paradigms are not, however, easily surrendered. Paradigm shifts can only occur in a nutritive environment that allows for repeated trial and error, permits scientists the freedom to pursue hunches and undefined lines of inquiry without formalizing the hypotheses guiding their research and encourages scientists to consider alternatives to established ideas.[11]

The concern that constraints placed on research will hobble opportunities to produce new scientific ideas and stifle scientific innovation is the basis on which scientists have argued for the freedom of scientific inquiry, expressed as "the freedom to pursue and develop any issue that seems of

intellectual significance, relying solely on the evaluation of other scientists to determine which new ideas will be accepted as useful after they have been fully developed and compared with data from research."[12] To the extent that restrictions on research methodology would make some studies impossible to perform, scientists have argued that those restrictions would infringe on the scientist's right to illuminate still mysterious regions of human understanding.

The traditional arguments in favour of researcher autonomy--invoking the pursuit of knowledge and freedom of scientific inquiry--take for granted the researcher's right to pursue and communicate knowledge, a right that is taken to outweigh moral considerations. Over the past twenty years, that assumption has lost considerable ground, largely as a result of the increasingly invasive practices of social research. The principle behind unrestricted freedom of scientific inquiry is based on the value that knowledge is better than ignorance, and that a scientific end justifies any means. Critics of "unrestrained" research argue that scientific freedom is not an absolute right, but rather an institutional norm which must be weighed against other norms to find the balance most conducive to promoting social welfare.[13] Social responsibility in research is a necessary corrective to unrestricted freedom of inquiry. In 1975, the American Association for the Advancement of Science's Committee on Scientific Freedom and Responsibility suggested that freedom

and responsibility are inseparable and they recommended that the scientific community recognize the principle that freedom is an acquired and not an inalienable right.[14]

In addition to the value of scientific freedom, another ethical argument commonly invoked in justifying social research is the utilitarian appeal to the beneficial consequences that derive from research. According to this argument, the professional obligation to advance human understanding is taken to include a positive moral duty to provide social benefits. The principle of beneficience is used to ascertain classes of actions that are morally permissible to achieve beneficial ends. Ethical dilemmas are resolved by balancing the risk of harm to subjects against the potential benefits of research.

The risk-benefit model is inadequate on a number of counts. The first problem concerns the issue of whether it is appropriate to justify social research in terms of the social benefits it promises to produce. The risk-benefit model is drawn from biomedical research in which specific improvements in health care delivery or cost reductions can be cited as important social benefits. It is not really possible to invoke comparable benefits in performing risk-benefit assessments in the social sciences, since considerable social research aims primarily at the acquisition of knowledge, and only secondarily, if at all, at the beneficial applications which may result from that knowledge.

The definition of "social benefits" is also problematic.

The same utilitarian calculations that justify epidemiological research, for example, might seem to justify other, less acceptable, invasions of privacy. Highly objectionable police investigative activities, for example, could be justified in terms of the fundamental social benefit of national security. Moreover, to permit any invasions of privacy on risk-benefit grounds might contribute to a callous attitude toward invasions of citizen privacy generally. To regard such invasions as justifiable could pave the way for routinely condoning unjustifiable privacy violations. Even if research results entail significant social benefits, the countervailing negative consequences of the methods employed may outweigh those benefits and so render the study morally unjustifiable.

A number of philosophers, among them Alasdair MacIntyre, take the ethical position that "a project whose benefits clearly outweighed its risks might nevertheless be morally impermissible if the risks are unjustly borne by economically disadvantaged members of society."[15] The principle of distributive justice is invoked as a protection against "group risk", the risk that the interests of collectivities might suffer some future setback as a result of research study. In Ethics in Social Research, Robert Bower and Priscilla de Gasparis argue that, "the standard use in quantitative social research (even that which is not focused on particular groups) of group characteristics--age, sex, race, marital status, income, and so on--as explanatory variables is

apt to lead to the presentation of research results in ways that are ideally suited to the identification of intergroup differences and the drawing of comparisons that may seem invidious with respect to one group or favorable for another."[16] Minority group members and people at lower socio-economic levels in society (the favourite subjects of social analysis, including social history) are particularly vulnerable to this kind of social injury.

Another difficulty posed by risk-benefit analysis is that of finding a common standard in terms of which to compare harmful and beneficial consequences. Risk-benefit analyses are useful guides to anticipated conduct only if they are performed in advance of the research project under consideration. The uncertainty of risks and benefits is implicit in Kuhn's description of the nature of scientific discovery, according to which the risks of social research are often not only incalculable, but often emerge accidentally in the course of the work and are identified after the fact as "unanticipated consequences." Social researchers, such as Joan Cassell argue that the advance assessment of risks and benefits requires predictions that cannot reliably be made in the unstable environment of social research.[17] One can identify and describe, at least in speculative terms, the benefits that may result from research, just as one may identify many of the risks that record subjects may experience. But such risks and benefits currently

resist quantitative analysis. The judgements about risks that can be made ahead of time tend to be either based upon untested assumptions about record subjects' feelings on the matter or based upon the researcher's own sense of right and wrong.

The assessment of risks and benefits is inevitable in ethical evaluation of of research procedures. In most social research however the assessment of both harms and benefits is limited by a lack of knowledge on which to base judgements. The notion of harm implies an evaluative framework for assessing damages to individuals and to social groups and entails fundamental assumptions about the nature of persons and society, about the individual and collective conditions constituting well-being, or its absence, about what is most and least valued by persons, groups, professions, and governments, and about the specific impact of social research on these constituencies.[18] However much may be assumed about what harms and what benefits the subjects and potential subjects would themselves see as important to them, very little is actually known about such matters, because most of the factors that must be considered are intangible and subjective. The question, Tom Beauchamp suggests, is, "should the term [harm] be restricted to physical consequences that are damaging and irreversible, or should it also embrace impermanent and less dramatic psychological effects? Legal effects? Economic effects?"[19]

Clearly, we have a moral obligation to avoid actions that

reduce others' well-being or that inhibit their freedom to fulfill their potentialities. That obligation is enshrined in various principles, for example, the principle of autonomy. To demonstrate empirically that the violation of a principle has negative consequences for human fulfillment is, however, enormously difficult sometimes because the predicted consequences are often due to the cumulative effect of violations of the principle. In calculating the effects of breaking a promise of confidentiality, for example, we need to take into account not only the harm caused to the individual whose confidence has been violated, but the larger effect of the broken promise in undermining interpersonal trust in society. The accumulation of promise-breaking may damage an individual's self-esteem; but it may also lower the level of trust and undermine the integrity of the rule of promise-keeping which is essential to harmonious and effective social interaction.[20] Donald Warwick argues that, in defending their research claims, social researchers:

> typically do not consider the cumulative harms of their research on the larger society though they will often cite the cumulative beneficial effects of increased knowledge. Those who take a different view of human nature, of the persistence of ruptured trust ...will come to other conclusions.[21]

Because the consequences of such violations are difficult to prove or disprove empirically, Herbert Kelman has suggested that a more effective approach to the moral evaluation of research is a rights-based analysis, an analysis based on a description of

the action, rather than on the prediction of its consequences.[22] The criterion for moral evaluation should be "consistency with human dignity," a principle deriving from Kant's categorical imperative to, "act so that in your own person as well as ...every other you are treating mankind ...as an end, never merely as a means."[23] The imperative obtains even in the absence of violations.

While respect for human dignity is rooted in principles demanding fulfillment of human potentialities, it can be treated as though it were an end in itself in moral decision making because the principle holds whether or not its acceptance or violation has demonstrable consequences for self-fulfillment. Kelman distinguishes two components--identity and community--which serve as conditions of dignity:

> identity refers to our capacity to take autonomous action, to distinguish ourselves from others, to live our lives on the basis of our own goals and values; community refers to our inclusion in an interconnected network of individuals who care for each other and protect each other's interests.[24]

Identity is here equated with individual freedom and community with individual justice.

In Kelman's view, rights to self-fulfillment and dignity are

> socially accepted and enforced protective devices, which assure people access to certain benefits, defense against certain harms, and continued ability to safeguard their interests, pursue their goals and express and develop themselves. The value of rights is that they reduce the dependence of an individual's (or

> group's) well-being on others'calculations in particular circumstances of what is best for that individual (or group) and for society at large. They represent, in principle, non-contingent entitlements to certain resources and opportunities.[25]

Rights are not, however, absolute and judgements have to be made about competing rights. In weighing competing rights, one of the considerations is the relative cost of violating one as compared to the other, including the relative social cost entailed by the reduced integrity of whichever right is violated. The crucial point in a rights-based analysis is that, although the origin of such rights is ultimately rooted in harm-benefit considerations, these rights become "functionally autonomous ...That is, the right has moral force regardless of whether, in any given case, it can be <u>demonstrated</u> that its violation would cause harm."[26] Maintaining the integrity of rights is itself an important consideration in ethical decision making because of the long-term systematic consequences of their violation. We take or avoid certain actions, defined by general moral principles, not only to avoid causing harm, but to conform to, and maintain the integrity of, a right. For that reason, Kelman argues, "it is enough to say that the right is being violated; there is no need to prove that its violation causes measurable harm."[27]

Invasions of privacy and confidentiality can be viewed, in their own right, as harms of a special type; or they can be viewed as conditions that subject people to the possibility of harm. In research involving secondary uses of government data,

invasions of privacy occur to the extent that record subjects are unable to control the amount of information about themselves they will disclose and the subsequent uses to which that information will be put. Violations of confidentiality constitute a sub-class of invasion of privacy and they occur specifically when information about a record subject is disseminated to audiences for whom it was not intended, breaking a promise that was made to that individual, either explicitly or implicitly, at the time the information was collected.

Invasion of privacy cannot be described as a harm in the obvious sense of a lasting injury or measurable damage to the research subjects. It can however be subsumed under the category of harms that Alasdair MacIntyre designates "moral wrongs", acts that subject people to the experience of being morally wronged, whether or not their interests are damaged in specifiable ways.[28] In terms of Kelman's analysis, invasion of privacy, by violating people's autonomy, is inconsistent with respect for their dignity and therefore a presumptive, or prima facie cause of harm.

When we speak of the invasion of privacy as a moral wrong, we are postulating a correlative right--the right to privacy--that is being violated. In this sense too it can be viewed as a harm in its own right. Privacy provides people with some protection against harmful or unpleasant experiences, against threats to the integrity and autonomy of the self, against embarrassment or lowered self-esteem. Invasions of privacy not

only subject individuals to the possibility of harm; they increase the likelihood of harm because they deprive the individual of protection against it.[29]

The socio-historical analysis of government data containing personal information brings to the foreground a number of specific concerns about invasion of privacy. The distinguishing feature of this kind of research is that the data consist of information obtained from or about individuals on an earlier occassion and for a different purpose. The first concern is whether we can assume tacit consent, on the part of the individual who originally supplied the data, to subsequent uses of that data. The failure to obtain consent for a clearly different use of the data than the one originally agreed to presents an ethical problem at the level of interpersonal relationships. Researchers working with data collected by others do not have a direct relationship with the record subjects, but in accepting personal data, they have an obligation to honour the original contract under which the information was collected; failure to do so shows a lack of respect for the private rights of record subjects.[30]

At the level of wider social values, the major issue raised by research based on secondary analysis of government data containing personal information is the reduction of private space. The practice of opening individually identifiable records to research, thereby widening the availability of personal

information, may weaken the boundaries that society tries to sustain between private and public domains because it supports and reinforces the sense people already have that personal data revealed in a restricted context will, sooner or later, become publicly known. Moreover, research that reduces the level of privacy in society may cause diffuse harm independent of its effect on individual record subjects or the groups from which they are drawn, by creating an atmosphere of surveillance that is deleterious to the maintenance of public trust in society. Taken together with the proliferation of data banks and other records maintained on individuals, social science research may reinforce the tendency of people to live "for the record." The principles of privacy and confidentiality are designed to protect record subjects against the possibility of harm caused by unforseeable as well as foreseeable future circumstances. As Kelman has argued earlier:

> If they [privacy and confidentiality] were made conditional on calculation of the magnitude of harm anticipated [by disclosure] they would lose much of their protective value ....It is presumed that any violation [of the right to privacy] is damaging--if not in the short run, then in the long run; if not to the particular individual involved, then to the larger society (by weakening an important protective mechanism).[31]

Rights are our most demanding moral rules. According to Terry Pinkard, "the citizen who bears a right does not hold a privilege and is not subject to the charity or professional etiquette of another."[32] Pinkard argues that the justification

for social science research must be judged within a framework of moral reasoning that focuses on principles that are shared between people and to which we can imagine people contractually agreeing. The idea of hypothetical agreement between consenting parties rests on the principle of respect for persons.[33]

The collection of personal information by governments presents a critical dilemma with respect to conflicting rights--individual rights versus the rights of government. It qualifies as a moral dilemma, however, only because we accept, albeit in varying degrees, that the government possesses certain rights that may, in particular cases, legitimately override the rights of individuals. The social contract that exists between a government and its citizens gives the government the right to collect certain types of potentially embarrassing information such as the information gathered in the census or that required by internal revenue agencies.

No general contractual agreement exists between the research community and the public at large; in the absence of such a contract, social researchers have no moral right to their investigations corresponding to the rights of government. Researchers can argue that their studies will yield substantial social benefits and should be supported. But they cannot validly argue that research studies should be supported even in the face of their violating individual rights to privacy. In Taking Rights Seriously, Ronald Dworkin observes that

> The dominant idea of utilitarianism is the idea of a collective goal of the community as a whole ... Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.[34]

According to this argument, rights "trump" utility, and, therefore, they trump the needs and interests of social researchers.[35]

Restrictions are pervasive in our society but there are cogent ethical reasons for them. In the same way that restrictions on the admissibility of evidence hamper police work or limitations on the use of confidential information hamper banks, the application of strong ethical standards for social research will, undoubtedly, hamper, and, perhaps, render impossible clearly valuable research. Such a consequence is unfortunate; but, it is not on that account unjust.[36] It is worth remembering here that the principle on which Nazi medical "research" was defended at the Nuremberg trials--that the welfare of the community overrides the welfare of the individual--was rejected.[37]

Although harm-benefit assessments will probably always remain part of the process of ethical review of research, a number of commentators have argued that it is better to put more emphasis on informed consent procedures which stress the decision-making rights of the subject, than on harm-benefit

calculations which place more responsibility on the researcher. The justification for social research is not an issue if the informed consent of record subjects is obtained because consent satisfies the moral requirements of respect for persons. Unfortunately, the definition of consent is also riddled with ethical ambiguities. Any probe into an individual's personal behaviour or history can be justified by researchers if the subject's consent has been obtained. But what constitutes "informed" or "implied" consent? Was the consent freely given? How was it given? Were record subjects aware of all the potential uses of the information when they gave consent?

The notion of implied consent is based on the assumption that the context in which data is originally collected can indicate a person's implicit or informal consent to the disclosure of personal information. It can be argued that individuals are, or should be, aware of the possibility that personal information they provide to hospitals, schools, or agencies may be used for subsequent statistical analyses, since such analyses are routinely performed and often reported in the press. Such an awareness is sometimes taken to imply consent to subsequent uses of personal data supplied to government agencies. However, certain services, especially government services, require that individuals provide what is often extremely personal information about themselves. Since they must disclose that information in order to receive benefits, for example, medical

coverage, welfare, unemployment insurance, there is some question as to whether such disclosure can be taken as "implied consent" to any use of that information; certainly it has not been given freely which is what consent implies.

Researchers object to the imposition of consent requirements because of the burden they place on research activities. Paul Davidson Reynolds argues:

> in many cases it is either impossible or impracticable to obtain the informed consent of participants who provide information for archival records. The ...participants may have moved to an unknown location, or the number of participants may be so great as to preclude contact with all of them.[38]

Respect for the rights of records subjects which is typically demonstrated by seeking informed consent, Reynolds suggests, can instead be demonstrated through measures taken to protect subject anonymity. In the social science research literature, a substantial body of literature has developed detailing various techniques for protecting subject anonymity; for example, through the manipulation of data files to prevent identification of record subjects; through the destruction or separation of identifiers from the raw data; through random sampling procedures; through ethical review boards that ensure that confidentiality safeguards are incorporated into research projects; and through data aggregation.[39]

While there is no clear consensus within the social science research community regarding the appropriate means for protecting

subject privacy, there is a clearly articulated will, enshrined in ethical codes and guidelines, as well as procedural safeguards, to demonstrate a commitment toward maintaining the confidentiality of personal information used in research. The Bellagio Conference reinforced the need for professional codes of ethics in the following Principle:

> Professional or national organizations should have codes of ethics for their disciplines concerning the utilization of individual data for research and statistical purposes. Such ethical codes should furnish mutually agreeable standards of behaviour governing relations between providers and users of governmental data.[40]

Since the late 1960s, funding bodies for social research have, increasingly, demanded that researchers undertake formal procedures to protect the confidentiality of research subjects. In response, social science associations have become involved in developing codes of ethics for social research that incorporate specific obligations with respect to the rights of research subjects.

In 1977, the Canada Council's Consultative Group on Ethics published a set of principles and guidelines for research in the humanities and social sciences. Among its discoveries, the group included the following observation:

> It is well known that psychological experimentation, sociological survey, educational testing and anthropological investigation all involve ethical issues, but it is less well recognized that the ...linguist, demographer, political scientist ...historian, biographer and archaeologist also gather data through direct and indirect contact with people ...[41]

The Consultative Group criticized the failure of existing ethical codes to address the subject of secondary uses of data. Concluding that it is not the discipline that determines the presence or absence of ethical considerations, "but whether or not the methodology employed results in the research having a direct impact on people" the Consultative Group proposed principles and guidelines that were "intended to provide direction on ethical issues involved in the documentary research pursued by historians and biographers."[42]

Despite this prodding, the need for a specific commitment to ethical principles that demonstrate a concern for individual rights has remained largely, unexplored as a substantive issue in the historical research community. The major historical associations in the United States and Canada have not yet adopted formal codes of ethics.[43] The historical profession has tended to defend research access to records containing personal information on the traditional grounds of freedom of inquiry; privacy is viewed generally as a non-absolute right that must be balanced with the scholar's "right to know."[44] Canadian historian Robert Craig Brown, for example, argues that:

> At bottom, the manic pursuit in government agencies and university administration for codes, guides, regulations and bureaucratic impediments is a disavowal of trust in the integrity of the researcher and his or her research.
>
> ....What is needed, Professor [Robert] Graham concluded in 1971, "is a reaffirmation of the principle that as far as the world of scholarship is concerned, the public interest is served by protecting to the greatest possible extent the freedom of the scholar,

> provided that it is coupled with a sober sense of responsibility."[45]

This point of view, predicated on an aristocratic ideal of scholarly research in the pursuit of knowledge, persists as the moral justification behind historians' demands for greater access to government records containing personal information. The moral justification for research on the grounds of society's collective need to understand itself betrays, occasionally, a dangerously cavalier attitude toward individual rights to privacy. Allan Bogue, former president of the Social Science History Association in the United States, for example, "see[s] no great threat in full disclosure of an individual's transactions with government."[46] Arguing that data under extreme confidentiality restrictions may be as useless as data destroyed, Bogue urges archivists not to abet or contribute to what he terms the "hysteria over privacy." Instead:

> we must prevent restrictions in mindless ways or the result will be the destruction of data of historical consequence or restricted access for ridiculously long periods of time. The position that we should close records to protect individuals is much less in the interests of the historical researcher and the public than is the principle that there should be appropriate penalties for the misuse of information derived from personal records...[47]

Such a solution, which focuses on the measurable consequences of a particular invasion of privacy, rather than the diffuse harm caused by invasive acts generally, is not only a remedy of despair; it is a denial of the full moral significance of privacy

invasion.

David Flaherty maintains that the reason historians as a group, unlike social scientists, "have not confronted certain basic ethical issues of data use"[48] is rooted in the traditional orientation of historians toward past generations. Since historians are, increasingly, writing about living persons, entering into client relationships, such as those of oral historians, engaging in research similar to that of some social scientists and facing similarly sensitive issues concerning the use of personal information, the absence of a clearly stated commitment to the principles of privacy and confidentiality in the pursuit of research is a glaring omission that is untenable given the escalating public concern over invasions of privacy.

Higher standards for historical research need to be set out of concern for the integrity of research itself, as much as for the individuals whose lives it touches. Principles and guidelines are needed to ensure that violations of privacy are minimized and, wherever possible, eliminated. As keepers of the record, archivists are obligated to assume some responsibility for mediating the competing claims for research access on the one hand, and individual privacy on the other. The question that remains is how archivists are to achieve an equitable balance between privacy and research access. What measures can archivists take that will responsibly enhance, rather than destroy public trust?

CHAPTER IV

ENDNOTES

1. Calgary Herald 13 February 1986: A22; Globe and Mail 11 February 1986: A21; Winnipeg Free Press 11 February 1986: 16.

2. Emile Durkheim, The Elementary Forms of the Religious Life, trans. Joseph Ward Swain (London: George Allen & Unwin, 1915) 429.

3. The eighteen Bellagio Principles are outlined in David H. Flaherty, "The Bellagio Conference on Privacy, Confidentiality and the use of Governmental Microdata," Secondary Analysis: New Directions for Program Evaluation, ed. Robert F. Boruch (San Francisco: Jossey-Bass Inc., 1978) 19-30.

4. Personal Privacy in an Information Society: Report of the Privacy Protection Study Commission (Washington, D.C.: Government Printing Office, 1977) 573.

5. Prosecutors, grand juries, legislative bodies, civil litigants, and administrative agencies all can use their subpoena powers to compel disclosure of confidential research information. The threat of a subpoena has been used for harassment and intimidation by law enforcement officials seeking sensitive research information. For example, a 1973 survey of drug treatment centers found that almost one-third of the centers responding to the survey reported at least one instance of difficulty in protecting the confidentiality of their records. The most frequently cited difficulty concerned requests for information from the police; almost 10 percent of the centers had actually been threatened with a subpoena. Robert F. Boruch and Joe S. Cecil have identified numerous examples where the confidentiality of research notes has been threatened by subpoena. See Boruch and Cecil, Assuring the Confidentiality of Social Research Data (Pennsylvania: University of Pennsylvania Press, 1979).

6. Sissela Bok, Secrets: On the Ethics of Concealment and Revelation (New York: Vintage Books, 1983) 235.

7. John A. Robertson, "The Social Scientist's Right to Research and the IRB System," Ethical Issues in Social Science Research, ed. Tom L. Beauchamp, Ruth R. Faden, R. Jay Wallace, Jr., LeRoy Walters (Baltimore and London: Johns Hopkins University Press, 1982) 356.

8. W. Spinrad, quoted in Robert T. Bower and Priscilla de Gasparis, Ethics in Social Research: Protecting the Interests of Human Subjects (New York: Praeger Publishers, 1978) 46.

9. See "On the Ethics of Disguised Observation: an exchange between Norman Denzen and Kai Erikson," Social Research Ethics, ed. Martin Bulmer (New York: Holmes and Meier, 1982) 143.

10. Thomas S. Kuhn, The Structure of Scientific Revolutions 2nd ed. (Chicago: University of Chicago Press, 1970) 68.

11. See Paul Davidson Reynolds, Ethical Dilemmas and Social Science Research (San Fransisco: Jossey Bass, Inc., 1979) 228-229.

12. Reynolds 230.

13. See, for example, N. Peterson, "Forbidden Knowledge," The Social Contexts of Research, ed. S.Z. Nagi and R.G. Corwin (New York: John Wiley, 1972) 289-322.

14. Quoted in J. Edsall, "Scientific Freedom and Responsibility," Science 188 (1975): 687-93.

15. Alasdair MacIntyre, "Risk, Harm, and Benefit Assessments as Instruments of Moral Evaluation," Ethical Issues in Social Science Research, ed. Tom L. Beauchamp et al 181.

16. Bower and de Gasparis, Ethics in Social Research 29.

17. Joan Cassell, "Does Risk-Benefit Analysis Apply to Moral Evaluation of Social Research," Ethical Issues in Social Science Research 144-162.

18. Donald P. Warwick, "Types of Harm in Social Research," Ethical Issues in Social Science Research 103.

19. Tom Beauchamp, introduction, Ethical Issues in Social Science Research 24.

20. Herbert C. Kelman, "Ethical Issues in Different Social Science Methods," Ethical Issues in Social Science Research 42.

21. Warwick, "Types of Harm" 103.

22. Kelman 42.

23. Immanuel Kant, The Fundamental Principles of the Metaphysics of Ethics, trans. O. Manthey-Zorn (New York: Appleton-Century-Crofts, 1938) 47.

24. Kelman 43.

25. Kelman 45.

26. Kelman 89.

27. Kelman 46.

28. MacIntyre, "Risk, Harm, and Benefit Assessments" 177.

29. Kelman 48.

30. Kelman 82.

31. Kelman 89.

32. Terry Pinkard, "Invasions of Privacy in Social Science Research," Ethical Issues in Social Science Research 267.

33. Pinkard 270.

34. Ronald Dworkin, Taking Rights Seriously (Cambridge, Massachusetts: Harvard University Press, 1978) xi.

35. John A. Robertson and E.L. Patullo argue that there may be constitutional grounds under the first amendment to perform research but as Terry Pinkard makes clear, there are no moral or legal grounds whatever that would support a right to perform research sufficient to override individual rights to privacy. See Robertson, "The Social Scientist's Right to Research and the IRB System," Ethical Issues in Social Science Research 356-372; and E.L. Patullo, "Modesty is the Best Policy: the Federal Role in Social Research," Ethical Issues in Social Science Research 373-390.

36. Pinkard 272.

37. The precise phrase was, "the welfare of the species overrides the welfare of the particular man." Quoted in Bower and de Gasparis, Ethics in Social Research 4.

38. Reynolds, Ethical Dilemmas 216.

39. See, for example, Richard I. Hofferbert, "Confidentiality, Privacy and Social Data Archives: Special Problems for Policy Analysis,"Archivists and Machine-Readable Records, pp. 224-227; Robert F. Boruch and Joe S. Cecil, Solutions to Ethical and Legal Problems in Social Research (New York: Academic Press, 1983); Boruch and Cecil, Assuring the Confidentiality of Social Research Data (Pennsylvania: University of Pennsylvania Press, 1979); David H. Flaherty, Privacy and Government Data Banks: An International Perspective (London: Mansell, 1979).

40. Flaherty, "The Bellagio Conference" 26.

41. Canada Council, Consultative Group on Ethics, Ethics (Ottawa: The Canada Council, 1977) 5.

42. Canada Council, Ethics 5.

43. According to Joan Hoff-Wilson, "Neither the Organization of American Historians, nor the American Historical Association has adopted any ethical guidelines beyond endorsing the 1966 Statement on Professional Ethics approved by the council of the American Association of University Professors. The questions of research and access are not specifically addressed in the AAUP statement." "Access to Restricted Collections: the Responsibility of Professional Historical Organizations," American Archivist 46 .4 (Fall 1983): 442.

44. See, for example, Allan Bogue, "Data Dilemmas: Quantitative History and the Social Science History Association," Social Science History 3 .3-4 (October 1979): 212.

45. Robert Craig Brown, "Government and Historian: A Perspective on Bill C-43," Archivaria 13 (Winter 1981-82): 123.

46. Allan G. Bogue, "Historical Research and State Archival Data," Archivists and Machine-Readable Records 26.

47. Bogue, "Data Dilemmas" 213-14.

48. David H. Flaherty, "Privacy and Confidentiality: The Responsibility of Historians," Reviews in American History 8 (September 1980): 419.

V

NEGOTIATING FOR THE PUBLIC GOOD: ARCHIVISTS AND SOCIAL RESPONSIBILITY

> Archives are not drawn up in the interest of or for the information of Posterity.
>
> Sir Hilary Jenkinson

In "Privacy Legislation: Implications for Archives," Judith Rowe suggests that archivists are "uniquely qualified to play the role of 'honest broker' between today's citizens and tomorrow's researchers."[1] A 1982 survey of fifty state archives, conducted by Alice Robbin, of the public policy issues of privacy, and access to restricted records for social research, indicates, however, that the reality is otherwise.[2] The results of her survey bore out an earlier assertion, made by Margaret Hedstrom in the pages of Midwestern Archivist, that the clear lack of standards and mechanisms for reconciling competing interests of privacy and access within government bureaucracies made archivists reluctant to "become involved in determining [how to regulate] personal information because they viewed their role as ambiguous."[3] Reluctant or not, archivists are assuming the role of mediators of the flow of information between agencies, users, and, increasingly, technology. According to Alice Robbin, "it is

therefore critical that guidelines be established for the types of information the [archives] will accept, for the responsibilities of the archivist in protecting this information, for administrative procedures to protect and control the flow, access, and description of these data, and for technical procedures to ensure nondisclosure of confidential information."[4] In this chapter, we will examine the ways in which archivists have attempted to negotiate claims for privacy and research access within the new information environment.

Within the international archival community, there have been continuing efforts to standardize access regulations that balance the competing claims for access and individual privacy. A common restriction which allows for the retention and eventual disclosure of individually identifiable records is the closure of files for a specified time period. At the beginning of the nineteenth century, a considerable number of countries accepted the principle that public documents might be made available on the expiry of a set time-limit, which would vary according to the categories of document. The passage of time principle "assumes that the reasons for or appropriateness of denying access diminish over time."[5] Archivists cite this principle when arguing that time restrictions must be placed on any exemptions which apply to the release of records and it is recognized in the Privacy Act's provision that personal records cease to be private twenty years after the record subject's death.

The system of closed periods was born in an era when the notion of documentary accountability was, perhaps, clearer than it is now. In the nineteenth century, the state had not yet assumed significant regulatory and social service functions. The concept of a public document was more clear-cut because the power of the state to administer the lives of ordinary citizens was not nearly so great as it is now and the amount of sensitive personal information that could, legally and technically, be collected about individual citizens was fairly limited.

The system of closed periods also grew out of an historiographical framework very different from the present one. The scholarly approach to historical records was filtered through the lens of nineteenth century "scientific" history which tended to project an elitist vision of the causes underlying political and social change. The sources of documentation on the past to which historians turned were those documenting the events of national politics, warfare and diplomacy and the careers of great statesmen. The principle that such records should eventually be open for research was less problematic because these were public records documenting activities for which the state was clearly accountable to history and, perhaps, because the need to protect the confidentiality of certain records was based more on considerations of national security than on the issue of personal privacy; a consideration for which the passage of time provided an acceptable antidote.

Today, the emphasis of history has shifted dramatically and the concept of a "public" document is no longer so clear-cut. Changing perceptions regarding the role government should play in the lives of private citizens, coupled with improvements in the technical means to collect, store and manipulate data has resulted in some erosion of the system of closed periods both as a principle and technique for negotiating access to personal information. The principle is undermined by the speculative nature of its basic assumption, that is, that the sensitivity of any information will diminish with the passage of time. But how long is long enough? The sensitivity of certain government records may be reduced in the eyes of the creating agency after a certain period of time because the repercussions disclosure will have on the agency have been sufficiently minimized with the passage of time. On the other hand, individuals whose most painful or private life experience is documented in certain records--mental health files or criminal case files for example--might argue that, for them, the sensitivity of such records does not diminish significantly over time.

While it is assumed generally that the right to privacy ends with death, the legitimacy of that assumption has been challenged by some philosophers who argue that people's notions of themselves can extend beyond their physical limits. This "extension of self" is a complex phenomenon--is information about an individual's family, information about that individual?

Stanley Benn argues that, in cases involving disclosures about parents, children or siblings, the "extension of self" may be based on a feeling of responsibility for or identification with the other person.[6]

The extension of self argument is accepted implicitly in most old laws governing access to archives which include provisions to protect "family honour"; many of these provisions continue to exist, particularly in archive legislation in Latin America. According to Michel Duchein, "in many countries, the law expressly states that the notion of protecting private life includes not only living persons but also the memory of the dead and their families"[7]:

> The negative consequences of revealing an illegitimate birth, for example, may affect the descendants of a family several generations later. Likewise, the disclosure of an impropriety committed in the past can be seriously damaging to the perpetrator's descendants and family even long after his death.[8]

The principle is invoked in France through the withholding of information about hereditary diseases for 150 years.

The notion of "family honour" clearly is open to abuse and could be used in an arbitrary manner as a pretext for refusing access to certain documents regardless of their dates. Nevertheless, the demonstrated plausibility of this interpretation of the right to privacy in certain cases--claims of invasion of privacy have been made on such grounds, for example, in cases where the "victim" never chose to enter public life--[9] undermines the efficacy of the passage of time principle.

If it is to effectively protect the privacy of both individuals and their families, it must impose a prohibitively long period of closure; at the same time, there is the danger that the principle could be wielded in such a way that it prevents legitimate access to records.

The issue of how long is long enough plagues, not only the principle of closed periods, but its practical application as well. Although the international archival community, through the International Congress on Archives and national professional associations, has confirmed the principle of specified time restrictions, its position as to what constitutes an acceptable period of closure remains vague. At a recent I.C.A. roundtable on access to information and privacy, delegates agreed "that a well proportioned balance between the right to privacy on the one hand, and the right to information on the other, will lead to the release of all restricted material at the conclusion of whatever period of closure may be necessary."[10] When the Council of the Society of American Archivists announced its own code for access in 1973, it too confirmed the principle of specified time restrictions but it failed to make any recommendations concerning the desirable duration of restricted access.[11]

Access guidelines that have attempted to establish more specific time limits have not met with much success. At the 1968 Madrid Congress, the International Council on Archives urged a closed period of no longer than thirty years for both private and

public records. In 1972, under the auspices of UNESCO, the I.C.A. published a draft law on production and right of access, the intention of which was to bring archival legislation "into line with the political, legal and technical exigencies of modern development."[12] Under the UNESCO/I.C.A. draft law, transfer to an archives would be synonymous with free access. The general time limit prescribed was twenty-five years; records containing information that might violate either personal privacy or state secrets would be closed for fifty years "after the conclusion of the matter to which they refer."

The authors of the draft law acknowledged that such a liberal access policy would be in conflict with privacy values. Nevertheless, they defended it on the grounds that "the principle of free access ...should no longer have to be sacrificed every time it clashes ...with the privacy of individuals."[13] Given their controversial nature, the I.C.A. recommendations have not been generally accepted by the archival community.[14] In actual institutional practice, the duration of closed periods varies greatly. Kathy Roe Coker, who reviewed archival policy at the state level with respect to access to confidential records, discovered that periods of closed access ranged in length from twenty-five years to the death of the record subject.[15]

Closed periods have eroded partly because, with the passage of freedom of information legislation, the imaginative distance separating "current" from "historical" records has been eclipsed

inasmuch as the Act comes into effect at the moment the documents are created; and partly because of the increasing interest shown by researchers in contemporary history and the ensuing pressure to reduce closed periods on access for those categories of records, including those containing personal information, which are exempt from access under freedom of information laws. The breakdown of the 100 year rule which traditionally defined the historians' time frame for enquiry has resulted in a greated demand for relatively recent documents. Historians maintain that closed periods of 30 years or more do not facilitate a critique of current government practice; it permits that criticism only in retrospect. Lengthy time restrictions are, therefore, considered unacceptable to historians since they would severely restrict the research done on contemporary social issues.[16]

Whether in the case of documents classified on the grounds of protection of privacy, or documents which have not reached the time-limit for free access, laws and regulations almost invariably make provision for special permission. If such a possibility did not exist, so the argument goes, whole classes of archival documents would remain definitively inaccessible for historical research. The I.C.A. has endorsed the principle of special clearance procedures on the grounds that they are essential for documents closed for extended periods of time.[17] The principle is manifested through a variety of access procedures, including screening, discretionary disclosure and

contractual agreements.

The screening of researchers on the basis of research credentials or the nature and value of the proposed research project is one method of restricting access to, as well as the use of, sensitive personal records. In the United States, several state archives have set as a condition of access to confidential government case files "the demonstration of legitimate purpose by the researcher," which the archivist ascertains through initial screening interviews and consultations with the source agency.[18]

Screening procedures imply that there is a legitimate distinction between serious and non-serious research and that the archivist has a right to make judgements as to who can use the information under the archives' control as well as how that information can be used. Helen Yoxall defines the ethical issue thus: "although ...archivists may privately make ...judgements about researchers' characters and motives, can they act in this discriminatory manner, particularly if the repository is a publicly-funded one?"[19] The application of an intellectual means test for access to records containing personal information is an elitist policy that is incompatible with the democratic spirit of archival principles that have been developed since 1945. The I.C.A. draft law on production and right of access encourages access without distinction made between users[20] and the Society of American Archivists' 1973 statement on access recommended that

a repository "should not grant privileged or exclusive use of materials to any person or persons." [21]

Jean Tener has argued forcefully that access should be regarded

> as something which cannot be divided into open categories for "scholars" and closed categories for "sensational writers," or available to those with a "genuine" interest and unavailable to those who lack an appropriate "appreciation." Access should be indivisible.[22]

That the traditional notion of "legitimate" historical research as the exclusive domain of the scholar is losing ground is evident in a recent court decision in the Netherlands in relation to a refusal to grant access to archives to a journalist. The judge decided in favour of the journalist, concluding that, "the dividing line between scientific research and non-scientific research cannot be determined solely by the nature of the publication for which the result of this research is intended. It is therefore preferable to rule that, for serious historical research, a departure may in principle be made from legislation currently in force regarding the secrecy of archives."[23]

In some government jurisdictions, competing claims for access and privacy are mediated by way of legislated access. The Public Archives of Canada employs the principle of discretionary disclosure established in section 8 of the Privacy Act which is a provision permitting controlled access to government information that has been transferred to the Public Archives of Canada for archival or historical purposes. Subsection 8(3) permits the

discretionary disclosure of personal information by the Public Archives; it states that:

> Subject to any act of Parliament, personal information under the control of the Public Archives that has been transferred to the Public Archives by a government institution for archival or historical purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.[24]

The conditions for disclosure of archival or historical personal information for research or statistical purposes are set out in Section 6 of the Privacy Regulations. Disclosure is permissible if the information is of such a nature that disclosure would not constitute an unwarranted invasion of the privacy of the individual to whom the information pertains; or, one hundred and ten years have elapsed following the birth of the individual to whom the information pertains; or, in cases where the information was obtained through the taking of a census or survey, ninety-two years have elapsed following the taking of the census or survey containing the information.[25]

Discretion to differentiate between those types of personal information which would constitute an unwarranted invasion of privacy is given to the Dominion Archivist. Unwarranted invasion of privacy is described as "a situation in which the disclosure of personal information would clearly result in harm or injury to the individual to whom it pertains"[26] (emphasis mine). Injury is interpreted in the Regulations as any harm or embarrassment which will have direct negative effects on an individual's career,

reputation, financial position, health or well-being.[27]

Four interrelated factors are taken into account in the invasion of privacy test and include: the expectations of the individual; the sensitivity of the information relative to its contents and currency (the passage of time principle); the probability of injury; and the context of the file.[28]

Each of these criteria for testing invasion of privacy is problematic for ethical reasons that have been discussed in the last chapter. First, it is difficult to determine the expectations of individuals with respect to the confidential nature of the information they have provided to a government agency since provisions for confidentiality are notoriously vague in many government agencies. In applying the invasion of privacy test here, the archivist is instructed by the guidelines to ask the following question: "Was the information compiled or obtained under guarantees which preclude some or all types of disclosures ...or ...can the information be considered to have been unsolicited or given freely or voluntarily with little expectation of being maintained in total confidence?"[29] It is quite possible for an individual to have a reasonable expectation of confidentiality with respect to the contents of a case file and yet no formal guarantees may exist for its protection.

The second criterion, sensitivity of the information, may be difficult to establish since computer matching techniques have blurred, to some extent, the distinctions between highly

sensitive personal information and fairly innocuous information. The third criterion, that the personal information must be assessed in relation to the entire file "to determine that disclosure of the information does not form part of a crucial segment of a larger picture that could reasonably be expected to be injurious to the individual,"[30] only takes into account the contents of a file on an individual; it does not (and cannot) address the total context of information known about an individual in various government data bases in assessing whether the disclosure of personal information will be injurious to the individual.

Finally, all of these criteria hinge on the evaluation of measurable injury. It has been established that a purely consequentialist analysis is a faulty yardstick with which to measure harm. Because the injury must be measurable, vis a vis career, reputation or financial position, it does not take into account the diffuse harm, not only to the individual, but to the society as a whole, which results from the accumulation of invasions of privacy. The principle of the right to privacy obtains even in the absence of "measurable" harm.

The Privacy Regulations also permit disclosure to personal information for research purposes under paragraph 8(2)(j) of the Privacy Act. Under this clause, personal information under the control of a government institution may be disclosed for research purposes if the head of the government institution is satisfied

that the research cannot reasonably be accomplished unless the information is provided in individually identifiable form; and if the researcher provides a written statement that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates. This clause may be invoked by a researcher who wants access to extensive series of records that contain personal information and that are systematically organized or retrieved by the name of an individual or by an identifying number, symbol or other particular assigned to an individual. Examples of records that fall into this category are case files such as Unemployment Insurance Commission benefit claims files, civil service personnel records and pilots' files.[31] The approach to access here is a contractual one. According to the Public Archives' Guidelines for Disclosure of Personal Information, the purpose of this clause

> is to provide an avenue for research and statistical analysis involving personal information, especially in medicine and the social sciences, while making researchers formally accountable for the protection of individual privacy when they are allowed access to such information.[32]

Contractual agreements between researchers and government archives are commonly used to enforce standards of confidentiality for classes of records containing sensitive personal information. In 1974, Virginia Stewart articulated the need for archival repositories to develop policy "covering

acquisition, custody, and access to case records" from a theoretical and legal perspective;[33] and she described the policy on access that the Manuscript Section of the University of Illinois Library had developed in order to deal with confidential public welfare case files. The policy incorporates the following conditions for access:

> Any person wishing to use case records must make application, identifying himself and stating his research purpose. In this application he will agree to maintain the confidentiality of the subjects and all persons mentioned in case records. The application will be reviewed by the Manuscript Librarian ...who will inform the applicant of the restrictions applicable to the collection requested.
> All research notes are subject to review by the Manuscript Librarian for compliance with the applicable restrictions.
> A copy of any publication resulting from the research shall be provided by the user to the Manuscript Section.[34]

The researcher also agrees to "hold harmless and indemnify" the archives against any loss or damage arising out of use of the records.

The contractual letter of agreement between the archives and the researcher adopted by Michigan State Archives in 1978 obliges researchers to accept conditions on access that are variations on the theme developed by Stewart. The letter of agreement was developed to permit research use of mental health records acquired from a state hospital for the criminally insane. Under the conditions of the agreement, researchers must keep confidential any identifiable personal information about the

record subject; allow prepared writings based on their research to be reviewed by the state archives before dissemination; to pay damages of one thousand dollars for violating provisions of the agreement; and to indemnify and hold harmless the state and its agencies for any costs or damages which may accrue from the use of the records.[35] Most respositories make access to certain sensitive materials subject to one or more of the conditions on use just described.[36]

Defenders of contractual agreements argue that contracted access is an effective way of sensitizing the research community to the need to protect personal privacy. A significant drawback to this technique is that it requires archivists to intercede in the research process in a manner many might find repellent. The vetting of publications and the scrutiny of research notes is a practice rightly abhorred by many archivists because, they argue, it sets up the archivist as the final arbiter of what studies may be published: "too much discretionary power presents the danger that the archivist will become policeman and censor."[37] The position taken by Helen Yoxall, that "if the data is too sensitive to allow the researcher to use it in the way he/she sees fit, then it is really too sensitive to be seen in the first place"[38] is one that deserves serious consideration.

Aside from the ethical dilemma posed by reviewing research notes and vetting publications, there is some concern that the deterrence built into contracted access, by way of financial

penalties, may not be a sufficiently strong guarantee that privacy rights will be protected by the researcher. The issue is not so much whether researchers can be trusted to uphold their contract; it is more a question of whether researchers will, in every case, be able to uphold their contract, in the event that their research notes are subpoenaed. Under most circumstances research records may be obtained for evidence by subpoena, given adequate legal justification, whether or not the researcher has promised to maintain the confidentiality of those records. The issue of legal protection of research records is complex, but the balance between values of confidentiality and public access to information seems heavily weighted toward the latter in disputes involving criminal actions.[39] The fact that the archives is indemnified and, therefore cannot be held accountable as a general publisher[40] offers small consolation to the individual whose privacy is violated or to the archives whose reputation will certainly suffer in the event a breach of confidentiality does occur.

The question that remains is whether such a system of paternalistic checks and balances addresses the real issue behind the protection of privacy--the right of the individual to a reasonable degree of secrecy and anonymity. We have already established that the administrative context in which certain kinds of records are created destroys any illusion that the individual concerned consented "freely" to the original

disclosure of the information let alone its subsequent dissemination. Clearly a system of access based on closed periods, privileged access or researchers' guarantees of anonymity cannot dispel the ethical ambiguities with respect to personal privacy that surround a great many government records when they come into the custody of the archives. Restricting access to so-called "serious researchers" or placing conditions on use begs the question of whether those records should be seen at all.

Rather than attempt to control the post-disclosure use of personal information, archivists working in social science data archives[41] and machine-readable divisions of government archives have concluded that it may be more appropriate to simply reduce direct research access to such information. Given the power of computers to manipulate data elements in individually identifiable records, they reason, the only ethical and practical way to resolve the privacy dilemma is to treat all personal information contained in records as confidential and to release files only when individuals cannot be identified.[42]

In this approach, the repository maintains two data files--one containing the raw data and the other containing the data in a public use or disclosure free format. Personal information is processed so that the specific individuals to whom it relates cannot be identified and thus the information can be released for general research use. For traditional paper records, it is

possible to remove or block out identifiers contained in textual case files[43]. With machine-readable records, there are, primarily, two approaches which can be taken with respect to data anonymization. The first is by completely removing various pieces of information from the file, that is, deleting variables. The second approach is by aggregating the information contained in one or more variables in such a way as to eliminate the identifying characteristics by submerging them in successively broader categories of information. Various data can be suppressed and classifications can be collapsed to limit the detail of small samples and prevent the disclosure of individual identities by way of cross classification.

Harold Naugler suggests that, "where possible, aggregation should be the desired means to anonymize a data file", because:

> Removing information from a file always represents an absolute information loss. Whatever amount of knowledge about the study group was contained in a deleted variable is completely unavailable to the researcher, and since the information collected for inclusion in a data file generally has a specific, and important purpose, its elimination affects the usefulness of the other data. Similarly, aggregation represents information loss but usually not as completely as does deletion. The effect of aggregation is to reduce the degree of specificity of the data. As a variable is successively aggregated, fewer research questions can be addressed and fewer problems can be analysed.[44]

A substantial body of literature has been developed by government census bureaus and social science data archives which describes a variety of methods for anonymizing data and for ensuring that

users of aggregated data cannot identify record subjects.[45]

Anonymization procedures are time consuming and expensive. Moreover, many types of research, especially many types of historical research, require the use of individually identifiable records.[46] From the researcher's point of view, anonymizing or aggregating data involves "the suppression and ultimate loss" of raw or micro-level data that scholars want "preserved in usable and accessible form"[47] for longitudinal research, which tracks an individual or group of individuals over time, and correlational research, which establishes relationships between characteristics of an individual, usually by linking information held in separate records systems.[48]

Social science historian Allan Bogue objects to the aggregation of micro-level data on the grounds that, "once the basic individual unit of data is gone and we are forced to depend upon an agency aggregative summary, or one done by an earlier scholar, we can never again recapture the individual characteristics for certain."[49] Similarly, in a 1978 brief to the federal government, the Canadian Association of University Teachers (CAUT) indicated that both the CAUT and the Canadian Historical Association share the view that:

> Certain kinds of research necessitate access to micro-data at an identifiable individual level, although the final result of a researcher's work might be of an anonymous or statistical nature. The publication of aggregated information from census and other surveys is not sufficient as it cannot take into consideration all of the concerns of scholars.[50]

Undoubtedly, procedures designed to protect confidentiality will result in some reduction in the quantity and quality of the data available for general use; it will not, however, destroy the net value of the data. As Richard Hoffebert maintains:

> The price paid now in caution, procedural development, and perhaps data imprecision is low compared to the costs to research targets that might flow from breaches of confidentiality. And the strictures which might be placed by poorly informed and insensitive legislative or bureaucratic authorities, in the event of real or contrived scandal, are far worse in their potential incarnations than those which might be rationally placed by ourselves upon our own research activities.[51]

Although historians likely will continue to urge archivists to preserve all the records that will be needed by social history,[52] and to lobby government agencies on their behalf for more liberal access to records containing personal information, total access to all records is an impossible expectation and a significant change in this state of affairs seems unlikely in the near future since requirements of personal privacy and confidentiality will continue to prevail in greater or lesser degree. Even if the situation were to change, the question remains whether archivists have a duty, as some historians (and many archivists) seem to suggest, to encourage government agencies to loosen privacy restrictions for the benefit of the research community.

In his "Moral Defence of Archives," Sir Hilary Jenkinson warned archivists to guard against "haste in dealing with Archives due to anxiety to make them available for use."[53] Such haste, in Jenkinson's estimation, constituted a form of moral

negligence; a point S.N. Prasad makes clear in "The Liberalisation of Access and Use":

> the ultimate allegiance of the archivist ...is neither to the existing administration, nor to the scholars of today. His allegiance is to the records and to documentation, which he holds in sacred trust for the generations to come ...Preservation of records must take priority over utilisation. Undue pressure from researchers might endanger documentation itself in various ways.[54]

When the Society of American Archivists drafted its Definition of an Archivist in 1984, it reiterated Jenkinson's 1922 definition of the archivist as "a kind of Public Trustee."[55] The S.A.A. definition stated, "the archivist is the trustee of the present and the past for future generations ...a steadfast keeper of the records held in trust."[56]

The archivist, Jenkinson maintained, back in 1922, should "provide to the best of his ability for the needs of historians and other research workers." But this he considered a secondary duty, subject to the discharge of the archivist's primary duty, that is, "to take all possible precautions for the safeguarding of his Archives and for their essential qualities;"[57] and he warned that, "the position of primary and secondary duties must not be reversed."[58]

Margaret Cross Norton, one of the most articulate and comprehensive explorers of the ideas underlying archives, has argued convincingly that the first principle in the care of public records is, that under a democratic form of government,

the people are sovereign:

> ...that is, the records of the government belong to the people and the official who creates, files, and services the records is merely acting as custodian for the people ...officials do not own the records which they create, but merely act as custodians of the records on behalf of the people.[59]

As custodians of the record, our archival responsibilities follow, not only from our obligations to the research community, but, more importantly, from our obligations to the public at large. That we have forgotten, to some extent, this larger sense of obligation, is in part a consequence of what Hugh Taylor has called the "historical shunt" of archives.[60] Taylor argues that, in their original function, governmental archives were records of business transactions made and preserved because such records might later be required as evidence in lawsuits involving those transactions. In England during the Middle Ages the keepers of the record remained at the heart of the administration; and the legal value of the material ensured its own survival long after the administration of national affairs had passed into other hands.[61] The French Revolution altered profoundly the perception of records as the evidences of the offices of origin:

> At one stroke, the creation of the Archives Nationale sundered the ancient records from their roots [in their offices of origin], placed them in common archives, and in, effect labelled them "historical." The modern archivist was born and the historical archives emerged essentially as a repository of raw material for the historian who, using von Ranke's model as a prototype, would mine their rich veins of documentary evidence...[62]

The legitimacy of this "historical shunt" of archives is being re-examined in the face of access and privacy debates which focus on current access and not on long term preservation and access. These debates have underlined the need for archivists to re-assert their traditional role as public trustees. Ruth Simmons believes, "the time is over for ad hoc decisions on access, both for the protection of the repository and for the protection of privacy rights of individuals archivists are ethically and legally bound to uphold."[63]

One issue within the constellation of privacy debates to which archivists will need to pay close attention is the issue of ethical destruction. In a number of western countries, a discussion about the desirability of destroying sensitive personal information--information relating primarily to criminal offences--for the protection of individual integrity has been in progress for the last few years.[64] The issue of ethical destruction has emerged in response to the justifiable fear that computerized personal data registers might encroach upon the integrity of the individual. To some extent, ethical destruction is already being carried out. In Sweden, for example, the register of serious criminals is, for humanitarian reasons, regularly purged of all information relating to criminals who have died, passed their eightieth birthday, or remained unconvicted during the last 10 years (the Swedish Bureau of Statistics still keeps magnetic tapes of the contents of the

register for the most recent years).[65]

The response of the research and archival community to ethical destruction has been, not surprisingly, one of anger. In 1983, that anger focused on the Canadian Young Offenders Act which had just been passed by the government. What researchers and archivists object to was section 45 of the Act, a provision authorizing the destruction of Young Offender files two to five years after all dispositions made in respect of the young person have been completed, or upon that person's receiving a pardon. Under 45 (1):

> all records kept pursuant to sections 40 to 43 [i.e., case files, criminal history] and records taken pursuant to section 44 [i.e., fingerprints, photograph] that relate to the young person in respect of the alleged offence and all copies, prints or negatives of such records shall be destroyed.

Section 45 stipulated that any refusal or failure to destroy these records constituted an offence; the stipulation applied retroactively to the records maintained under the Juvenile Delinquents Act which had preceded the Young Offenders Act. The Act asserted, in its declaration of principles, that:

> in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families.

The historical community denounced Section 45, describing the measure as "wanton destruction" and "an act of bureaucratic vandalism."[66] While historians acknowledged the principle

underlying the destruction it was quickly set aside on the grounds that such records possessed significant research value and that only "serious researchers" would be allowed access.[67] Given that the legal viability of confidentiality is, at the moment, uncertain, the possession of "serious researcher" credentials is questionable currency for negotiating access. Moreover, as already discussed, the practice of allowing certain researchers to see confidential records is an elitist and undemocratic practice whose legitimacy should be questioned rather than assumed both by archivists and historians.

More importantly, the argument misses the point. The practice of maintaining certain kinds of derogatory information about individuals ignores a fundamental premise of Judaeo-Christian culture, that is, that we possess a capacity for self-redemption. On that premise, certain kinds of derogatory information such as a criminal record should be allowed to disappear from view after a certain period of time. In "Privacy: Some Arguments and Assumptions," Richard Wasserstrom states the case thus:

> A society that is concerned to encourage persons to believe in the possibility of genuine individual redemption and this is concerned not to make the process of redemption unduly onerous or interminable might, therefore, actively discourage the development of institutions that impose permanent marks of disapprobation upon any of the individuals in the society. One of the things ...wrong with Hester Prynne's "A" was that it was an unremovable stain impressed upon her body. The storage of information about convictions in a data bank is simply a more contemporary method of affixing the indelible brand.[68]

In a letter expressing its "deep concern" over the records disposition section of the Young Offenders Act, the Association of Canadian Archivists argued against the destruction of the files on the grounds that "maintaining a record of juveniles before the courts is vital to our historical understanding of the relationship between juveniles and Canadian society."[69] While the argument, and the principle underlying it, is a compelling one, the value of historical documentation represents only one of a number of values on which moral decision-making ultimately rests. To justify the preservation of such records, it must be demonstrated that the liberty promoted by historical research is of greater value to the community as a whole than that promoted by the right to privacy governing the files' destruction.

The philosopher Hans Jonas has argued that only activities that are strictly necessary for the continued existence of society can justifiably extract a sacrifice in terms of human autonomy such as the right to privacy. If we cast that conclusion in terms of the social contract underlying political and social relations, it is clear that such a contract does not entail a commitment to the continual improvement of the human lot over and above the basic preservation of social order. Participation in projects aimed at essentially meliorative goals is, therefore, not something that should be expected of citizens as a matter of course; it should be, rather, a fully voluntary matter for individuals to decide for themselves.[70]

A related issue, and one that constitutes an increasingly prevalent threat to personal privacy in a free society, is that of personal information gathered by government agencies that has been obtained through implied, actual or believed threat of retaliation. Over the last twenty years legal debates and press campaigns have questioned the legality of certain police investigations and certain records maintained by the police. A 1981 parliamentary inquiry in Canada on the files of the Royal Canadian Mounted Police, discovered that the R.C.M.P. had maintained information prohibited by law on the private life of citizens; these files were ordered destroyed. The issue surfaced the same year in France with regard to police records and the "files on Jews" that had been set up during the Nazi occupation by the Vichy government. Citing these incidents, Michel Duchein, acknowledges that "archivists have never looked fondly upon the destruction of documents of any kind." Nevertheless, he argues, "when the question arises of safeguarding individuals against any risk of persecution or illegal practices, it is obviously more desirable to destroy documents than to endanger human lives."[71]

In situations involving ethical destruction, the moral defence of public archives and, consequently, any decision archivists take or ratify with respect to records destruction must rest, not solely on the grounds of research value, which has always been a changeable creature, but on the pursuit of two fundamental principles. The first principle is that archivists

preserve records relating to the origin and administration of public policy; the second principle is that archivists preserve records that protect people's rights. If we wish to argue the case against ethical destruction, the grounds for such an argument should derive from those principles. If a case for preservation cannot be made on these grounds, then the humanitarian reasons underlying the destruction should prevail.

Archivists do have an obligation to guard against the destruction of records containing personal information merely for reasons of administrative convenience. The obligation to ensure that records destruction is in the public interest and not simply in the interest of administrative efficiency also emerges, Norton suggests, from our democratic system of government, "that is, the theory that government records once created may not legally be destroyed without authorization from the representatives of the people in general assembly--by that body which authorized the creation of the records by direction or by implication.[72]

"Integral to the notion of proper archival management of records," Ruth Simmons argues, "...especially those which require decision-making, is the necessity to demonstrate a pattern of practice which shows care and concern."[73] If we are to fulfill our obligations to the records and to the public who owns those records, we will need to play a more active role in the establishment of policies governing the collection, maintenance and dissemination of personal information held in government

agencies. We need to know how personal information is collected and for what purpose; and we need to increase our understanding of the environment in which such records are created.

Once the information is collected, four basic questions need to be addressed. First, what details are available about the existence of records containing personal information: what kind of information should be collected about the existence of records and by whom? To whom should such information be made available, for example, to government agencies, the public, and for what purpose? Secondly, which records are to be kept and for how long? Who will decide and how are decisions to be documented, made known and accounted for? Thirdly, when, if ever, can an embargo on access other than by the provider of the information and by the original agency be lifted and for what purpose? If it is lifted, should it be lifted in favour of other agencies or parties for management purposes? In favour of the general public? Finally, where are the records to be kept? In what circumstances are they to be held by a custodial organization? What safeguards exist for protecting personal information? How are they assessed and by whom?

A further way to demonstrate our care and concern for the integrity of records containing personal information is to establish a set of ethical standards on which to base access decisions. A set of ethical standards has been proposed by Alice Robbin, enshrining the archivists' commitment to a number of

traditional principles including: a responsibility to protect the public trust with which personal information has been given; the maintenance of a high standard of professional competence with respect to non-disclosure of confidential information; sensitivity to the social codes and moral expectations of the public community which they serve; safeguarding the confidentiality of individually identifiable information; establishing and publicizing conditions for protecting confidential records; and establishing appropriate security measures to prevent access to data processing and storage devices that maintain personal information.[74]

Historians such as David Flaherty and Joan Hoff-Wilson have also alerted the historical community to the need to "set [its] own house in order so as to avoid, in particular, intervention by federal governments and the courts."[75] Flaherty points out that:

> Other disciplines have to worry about practitioners who are unethical, careless or insensitive to privacy and confidentiality ...It can be argued that the historical profession ...runs major risks to its integrity and reputation from the occurrence of even one significant well publicized breach of confidentiality, whether in using information on individuals in the hands of government or in private depositories.[76]

Detailed and explicit codes to protect the confidentiality of personal data should be established, Flaherty argues, by professional associations; further, "such codes should be brought to the attention of appropriate custodians of personal information. Agencies might be justified in making the existence

of an ethical code a prerequisite for access to sensitive personal information in their custody."[77]

As cases are argued, decisions appealed, and practices implemented, a jurisprudence of access to records containing personal information will gradually evolve. One method of ensuring that checks and balances respecting access and privacy are established during this process may be through the creation of ethics committees, similar to public documents committees, but on which the interests of all the relevant communities would be represented--the public, researchers, archivists, the civil service. The function of such committees would be to expose governmental information-gathering practices to the clear light of public scrutiny. Such committees could play an active role in the scheduling and disposition of records containing personal information and ensure that access is being negotiated for the public good and not only for the good of the research community.

In a paper presented to the Society of American Archivists in 1982, Gerald Grob observed that:

> ...the tendency of most scholars has been to make their claim for access take precedence over all other rights, a position that is both irresponsible and dangerous. A system that rests solely on good intentions is, in effect, no system; there are few individuals who would admit to harboring anything but the best of intentions. Consequently it is imperative that [historians] recognize that the interests of different groups, each with different concerns, must be taken into account.[78]

Appeals of the sort put forward by historian Robert Craig Brown, that in conflicts between the principle of respect for privacy

and the needs of researchers we should "trust in the integrity of the researcher",[79] no longer carry the moral force they once did. What is required instead is a variety of mechanisms that eliminate the need for conventional appeals to faith in the researcher's integrity.

As "a steadfast keeper of the records held in trust," archivists are charged with the responsibility of protecting the integrity of the records for the benefit of the public who owns them. Implicit in this responsibility is the obligation to respect and protect the integrity of the various social contracts between citizens and government to which the records bear witness, an obligation that entails protecting the privacy of record subjects. The Society of American Archivists has enshrined this obligation in its code of ethics for archivists which maintains that "archivists respect the privacy of individuals who created or are the subject of records and papers, especially those who had no voice in the disposition of materials."

One of the guidelines recommended by the Canada Council Consultative Group on Ethics in respect of privacy is, "that since concepts of privacy vary from culture to culture, the question of invasion of privacy be looked at from the point of view of those being studied rather than that of the researcher."[80] Given that informed consent is an unrealistic expectation when dealing with vast quantities of archival

records, it is necessary that archivists "act independently on behalf of individuals and apply restrictions to protect their privacy."[81] Virginia Stewart has argued:

> the archivist has the immediate responsibility for maintaining rigorous standards in the protection of personal privacy on behalf of persons who may be unable to assert their rights--because they are legally incompetent to do so (children, institutionalized persons) or because they are unaware that records involving them have been transferred to an archives.[82]

In any social enquiry, privacy as a matter of principle is degraded. Whatever decision we take in determining access to records containing personal information should be based on a thoughtful consideration of the purposes for which records were created and on a clear understanding of the expectations of the individual who supplied the information. The administrative context of collection should assert some decisive power over subsequent uses of that information.

In 1927 officials of Dr. Barnardo's Homes, the juvenile immigration agency, refused to allow an investigator from the Canadian Council of Child Welfare to examine case files on the grounds that the records were not, strictly speaking, theirs to supply:

> They are the records of the children rather than the records of the Homes, and they are certainly not records intended for the public. The view taken by Dr. Barnardo's has always been that these usually humble members of society are entitled to demand that the history of their childhood should be as much shielded from public curiosity as the history of more fortunate children who have been brought up in the privacy of their parents' homes.[83]

The documentation of the history of what we euphemistically call the "non-elites" in society frequently requires that historians scrutinize the private lives of citizens who are powerless to object. And while their intentions may be of the purest kind--to expose inequities and so, symbolically redress them--by the very nature of their endeavour they exploit further the powerlessness of those who become the subject of their enquiry, by perpetuating an essential abuse of the right of all individuals--regardless of economic or social status--to privacy.

Privacy invasion is damaging both to the climate of a free society and to the integrity of the profession that permits it and, for that reason, the archival bias in issues concerning personal privacy should be in favour of the record subject rather than the researcher. That the position taken here will impose limitations on historical enquiry is unfortunate. But any ethical stance imposes limits on one's freedom of movement; that does not mean that the stance is an unreasonable one. It is true that we possess a collective need to understand ourselves and our society; but we also need to feel confident that the social contract between citizens and government, embodied in government records, is respected. In the interest of numerous collective goods, citizens give the government permission to know them in a variety of private ways, a permission grounded in public trust. We do not advance the integrity of the archival profession by adopting a paternalistic attitude toward documentary material

that encroaches on the lives of private citizens, an attitude too often based on poorly defended notions concerning the "public good." Any decision concerning access to records containing personal information must be guided, not only by the obligation to enhance research but, also, by the obligations that fall to us as moral beings.

CHAPTER V

ENDNOTES

1. Judith Rowe, "Privacy Legislation: Implications for Archives," Archivists and Machine-Readable Records: Proceedings of the Conference on Archival Management of Machine-Readable Records, February 7-10, 1979, Ann Arbor Michigan (Chicago: Society of American Archivists, 1980) 194.

2. For the survey results, see Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," American Archivist 49 .2 (Spring 1986): 163-75.

3. Margaret L. Hedstrom, "Computers, Privacy, and Research Access to Confidential Information," Midwestern Archivist 6 .1 (1981): 6.

4. Alice Robbin, "Ethical Standards and Data Archives," Secondary Data Analysis: New Directions for Program Evaluation, ed. Robert Boruch (San Fransisco: Jossey-Bass, 1978) 8.

5. Brown, "Government and Historian" 121.

6. Stanley Benn, "Privacy, Freedom, and Respect for Persons," Nomos XIII 12-13.

7. Michel Duchein, Obstacles to Access 22.

8. Duchein 21.

9. See, for example, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (parent alleged that his right to privacy was invaded by identification of daughter as victim of rape-murder); Corliss v. E.W. Walker Co., 57 F. 434 (C.C.D. Mass. 1893), injunction dissolved, 64 F. 280 (C.C.D. Mass. 1894) (plaintiffs alleged publication of biography and picture of dead husband and father constituted injury to their feelings). Both cases are cited in Garvin, "Privacy and the Limits of the Law" 431. See also Flaherty, "Privacy and Confidentiality" 421-22.

10. "International Council of Archives at P.A.C.," A.C.A. Bulletin 10 .2 (November 1985).

11. Tener 19.

12. Quoted in Jean Tener, "Accessibility and Archives," Archivaria 6 (Summer 1978): 18.

13. Quoted in Tener 19.

14. See Tener 19.

15. Kathy Roe Coker, "Confidentiality of Records and Access: A Survey of State Archival Institutions," Records Management Quarterly 16 (July 1982): 26.

16. Reg Whittaker, "Access to Information: The Historian's Perspective," paper presented at the Toronto Area Archivists Group Access to Information Forum, 15 November 1986.

17. "International Council of Archives at PAC," A.C.A. Bulletin 10 .2 (November 1985).

18. Anderson, "Public Welfare Case Records" 174.

19. Helen Yoxall, "Privacy and Personal Papers," Archives and Manuscripts 12 (May 1984): 42

20. Tener 18.

21. Sue E. Holbert, Archives and Manuscripts: Reference and Access (Chicago: Society of American Archivists, 1977) 9.

22. Tener 26.

23. Cited in Duchein, Obstacles to the Access, Use and Transfer of Information from Archives: A RAMP study with guidelines (Paris: Unesco, 1983) 30.

24. Cited in Guidelines for the disclosure of personal information for historical research at the Public Archives of Canada (Ottawa: Public Archives of Canada, 1983) 3.

25. Guidelines for Disclosure 3-4.

26. Guidelines for Disclosure 4.

27. Guidelines for Disclosure 6.

28. Guidelines for Disclosure 5-6.

29. Guidelines for Disclosure 5.

30. Guidelines for Disclosure 6.

31. Guidelines for Disclosure 7.

32. Guidelines for Disclosure 7.

33. Stewart, "Problems of Confidentiality" 396.

34. Stewart 396.

35. Ronald M. Baumann, "The Administration of Access to Confidential Records in State Archives: Common Practice and the Need for a Model Law," American Archivist 49 .4 (Fall 1986): 363.

36. See Baumann, "Administration of Access" 349-70 for detailed case studies of state archives that have adopted contractual agreements of various kinds as a way of mediating claims for access and privacy.

37. Tener 26.

38. Yoxall, "Privacy and Personal Papers" 42.

39. Henry W. Riecken, "Solutions to Ethical and Legal Problems in Social Research: An Overview," Solutions to Ethical and Legal Problems in Social Research, ed. Robert Boruch and Joe S. Cecil (New York: Academic Press, 1983) 8.

40. According to Virginia Stewart, in the absence of a written statement by researchers that they will "hold harmless and indemnify" the archives, "a repository furnishing material to a researcher may incur liability as "general publisher" to lawsuits arising from published research." See "Problems of Confidentiality" 390n.

41. Social science data archives receive data from a variety of sources with the specific objective of organizing these data into machine-readable form for purposes of subsequent re-dissemination and utilization in a variety of research settings. See Joseph Steinberg, "Social Research Use of Archival Records: Procedural Solutions to Privacy Problems," Solutions to Ethical and Legal Problems in Social Research 249-262.

42. See, for example, Charles M. Dollar, "Machine-Readable Records of the Federal Government and the National Archives," Archivists and Machine-Readable Records: Proceedings of the Conference on Archival Management of Machine-Readable Records, February 7-10, 1979, Ann Arbor, Michigan (Chicago: Society of American Archivists, 1980) 85; and Harold Naugler, "The Machine-Readable Archives Program of the Public Archives of Canada," Archivists and Machine-Readable Records: Proceedings of the Conference on Archival Management of Machine-Readable Records, February 7-10, 1979, Ann Arbor, Michigan (Chicago: Society of

American Archivists, 1980) 76.

43. The Public Archives of Canada and the University of Saskatchewan have developed a procedure in which sensitive information is removed from microfilmed legal records by covering certain frames on the film with light sensitive tape prior to producing duplicate copies of the records. See James M. Whalen, "The Application of Solicitor-Client Privilege to Government Records," Archivaria 18 (Summer 1984): 148.

44. Harold Naugler, The Archival Appraisal of machine-readable records: A RAMP Study with guidelines (UNESCO: Paris, 1984) 86.

45. See, for example, Solutions to Ethical and Legal Problems in Social Research, ed. Boruch and Cecil; Assuring the Confidentiality of Social Research Data, ed. Boruch and Cecil; David H. Flaherty, Privacy and Government Data Banks; Paul T. Zeisset, "Census Bureau Confidentiality Practices and Their Implications for Archivists," in Archivists and Machine-Readable Records.

46. The assertion that there are legitimate research uses which require the use of individually identifiable data is enshrined in the Bellagio Principles.

47. In Tener 29.

48. For a more detailed description of longitudinal and correlational research, see Assuring the Confidentiality of Social Research Data 30, 47.

49. Bogue, "Historical Research and State Archival Data," Archivists and Machine-Readable Records 26.

50. Canadian Association of University Teachers, Freedom of Information: A Brief submitted to the Government of Canada by the Canadian Association of University Teachers (Ottawa: Canadian Association of University Teachers, 1978) 3.

51. Richard I. Hoffebert, "Confidentiality, Privacy and Social Data Archives: Special Problems for Policy Analysis," Archivists and Machine-Readable Records 228.

52. See, for example, Bruce Bowden and Roger Hall, "The Impact of Death: An Historical and Archival Reconnaisance into Victorian Ontario," Archivaria 14 (Summer 1982): 104.

53. Sir Hilary Jenkinson, A Manual of Archive Administration (Oxford: Clarendon Press, 1922) 66.

54. S.N. Prasad, "The Liberalisation of Access and Use," International Council on Archives volume XXVI. Proceedings of the 8th International Congress on Archives Washington, 27 September-1 October 1976 (Munchen, New York, London, Paris: K.G. Saur, 1979) 143.

55. Jenkinson 39.

56. "Archivist: A Definition," S.A.A. Newsletter (January 1984).

57. Jenkinson 15.

58. Jenkinson 15.

59. Margaret Cross Norton, Norton on Archives, ed. Thornton Mitchell (Carbondale and Edwardsville: Southern Illinois University Press, 1975) 26, 32.

60. Hugh Taylor, "Information Ecology and the Archives of the 1980s," Archivaria 18 (Summer 1984): 25-37.

61. Taylor 26.

62. Taylor 26.

63. Ruth Simmon, "The Public's Right to Know and the Individual's Right to be Private," Provenance 1 .1 (Spring 1983): 3.

64. Ake Kromnow, "The Appraisal of Contemporary Records," International Council on Archives, volume XXVI 52.

65. See Jan Sundin and Ian Winchester, "Towards Intelligent Databases: Or the Database as Historical Archivist," Archivaria 14 (Summer 1982): 140.

66. See Frank Jones, "Destroying these records is shameful," Toronto Star 7 October 1985: A15.

67. William Ormsby, Archivist of Ontario, cited in Frank Jones, "Destroying these files is shameful," Toronto Star 7 October 1985: A15.

68. Richard Wasserstrom, "Privacy: Some Arguments and Assumptions," Philosophical Law: Authority, Equality, Adjudication, Privacy, ed. Richard Bronaugh (Westport, Conneticut: Greenwood Press, 1978) 160.

69. Association of Canadian Archivists, letter to Hon. Mark McGuigan, Minister of Justice and the Attorney General of Canada, 13 March 1984.

70. See Hans Jonas, "Philosophical Reflections on Experimenting with Human Subjects," Contemporary Issues in Bioethics, ed. Tom L. Beauchamp and Leroy Walters (Belmont, California: Wadsworth, 1982) 524-532.

71. Duchein 22.

72. Norton 32.

73. Simmons 3.

74. Robbin, "Ethical Standards" 15-17.

75. See Flaherty, "Privacy and Confidentiality" 419-429; Hoff-Wilson, "Access to Restricted Collections" 441-447 .

76. Flaherty 421.

77. Flaherty 427.

78. Gerald N. Grob, "Archivists and Historians: Problems of Appraisal," paper delivered at the Annual Meeting of the Society of American Archivists, Boston, 20 October 1982.

79. Brown, "Government and Historian" 123.

80. Canada Council, Ethics 17.

81. Yoxall, "Privacy and Personal Papers" 40-41.

82. Stewart, "Problems of Confidentiality" 398.

83. Parr, "Case Records" 135.

CONCLUSION

> I can imagine rather easily the day when two men will have no more secrets from one another because they will keep secrets from no one, since the subjective life, just as much as the objective life, will be totally offered, given.
>
> Jean-Paul Sartre

A number of social critics allege, with some justification, that we suffer from too much privacy, that it has become an unhealthy obsession of modern liberal society, an indicator of social pathology rather than social health wherein we "seek more and more privacy, and feel more and more alienated when we get it."[1] The excessive stress which liberal ideology places on privacy and the consequent turning away from the public aspects of life, such critics argue, has damaged the tissues of social connection and withered public spiritedness.

The societal ideal invoked, implicity, in such criticism, is one of universal transparency. Meister Eckhart "call[ed] him a good man who reveals himself to others and in so doing is of use to them."[2] Similarly, Sartre held that "transparency must substitute itself at all times for secrecy."[3] He was realistic enough, however, to surmise that such transparency would be achievable only when material want had been eradicated and human relations were no longer fraught with antagonisms. In the world as it presently exists, privacy possesses a paradoxical ability both to facilitate the development of social relationships and to

diminish human interaction depending on the way it is incorporated with other social values and embedded in social institutions.[4] Individuals must be in some intermediate state--a balance between privacy and interaction--in order to maintain human relations, develop their capacities and sensibilities, create and, ultimately, to survive.

Part of the price we pay for community membership is the sacrifice of some degree of privacy, when this is required either to fulfil ourselves as social beings or to further the public interest. The problem then becomes one of balancing the individual's claim to privacy against the community's claim to regulate conduct for general good, against the claim of other individuals to exercise their legitimate rights and against the individual's own need for participation in wider communities.[5] Freedom of enquiry in the pursuit of knowledge is a crucial freedom in modern liberal society but it is not a right that possesses a moral stature equivalent to that of privacy. The distinction between a freedom and a right is, Christian Bay maintains, essential:

> "Right" refers to a protected freedom. "Human right" refers to a kind of freedom that can be, and therefore, must be, made available to and protected for all the people in a given society. A freedom that cannot be extended to all is an example of a "social privilege"...[and] in a free society a privilege must yield whenever it demonstrably becomes an obstacle to a fuller protection and expansion of human rights.[6]

If we are justified in imposing a set of constraints on research in the interest of privacy, however, it is important

that we always remain vigilant against corruptions of that principle. A legitimate concern of the research community has been the potential for the misguided use or direct abuse of the principles underlying privacy. Researchers such as Robert Boruch and Joe Cecil argue that, at times, the shield of privacy is held up to protect abuses that are in no way personal, "in the best of these instances, the appeal to principle is pious but irrelevant--that is, there is no real threat to individual privacy or to confidentiality of records. At worst, the appeal is corruptive, dedicated not to preserving individual privacy but to assuring secrecy that runs counter to the public interest."[7] Claims of privacy are often invoked for practices of large scale collective secrecy in the interests of "national security." But, as the philosopher Sissela Bok makes clear, while "claims for privacy are often made for such practices, and the metaphors of personal space are stretched to apply to them ...the use of the language of privacy, with its metaphors of personal space, spheres, sanctuaries and boundaries, to personalize collective enterprises should not go unchallenged. Such usage ...can ...distort our understanding of the role of these enterprises."[8]

Our acceptance of limitations on the pursuit of knowledge, in the interest of a greater common good, is what distinguishes us, finally, as moral beings. The second highest stage of moral development, the psychologist Lawrence Kohlberg has argued, is typified by an embrace of "democratic contract," involving

collective discussion and agreement, as the basis of individual moral action.[9] The commitment to a common humanity, implicit in the notion of a democratic contract, and the self-containing sense of responsibility that grows out of it, are the forces that will guide us through the ethical dilemmas posed by competing claims for access and privacy. Our success in negotiating those troubled waters will depend on the breadth and depth of our commitment to those forces.

CONCLUSION

ENDNOTES

1. Philip Slater, The Pursuit of Loneliness (Boston: Beacon Press, 1970) 7.

2. Cited in Bok, Secrets 17.

3. Cited in Bok 17.

4. Schaefer, "Privacy: A Philosophical Overview" 19.

5. Schaefer 19.

6. Christian Bay, "Access to Political Knowledge as a Human Right," Government Secrecy in Democracies, ed. Itzhak Galnoor (New York: New York University Press, 1977) 23.

7. Boruch and Cecil, Assuring Confidentiality 81. See also Howard Zinn, "Secrecy, Archives, and the Public Interest," Boston University Journal 19 (1971): 37-44.

8. Bok 13-14.

9. The highest stage in Kohlberg's schema is stage 6 in which the basis of moral action is found in individual principles of conscience. According to Kohlberg, "as far as we can ascertain all our stage 6 persons must have been killed in the 60s like Martin Luther King. Stage 6 remains as a theoretical postulate but not an operational entity. See Lawrence Kohlberg, The Meaning and Measurement of Moral Development: Volume XIII, 1979 Heinz Werner Lecture Series (Worcester, Massachusetts: Clark University Press, 1981) 34.

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