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Legally Speaking — Tarisoff, Patron Confidentiality, and Duty to Society: An Ethical Quandary

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What do you do if a patron appears to be suicidal? What if a patron requests a book on how to build a bomb? Should librarians give out the information and keep the request confidential, or should we disclose the information to the appropriate people? Of all the ethical dilemmas in the field of librarianship, the balance between confidentiality and societal interest is the most difficult to decide. This article will take a look at the issue and make suggestions based on ethical principles used in other professions.

The ALA Code of Ethics proclaims: “We protect each library user’s right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.” We have a duty to the intellectual freedom of our patrons. Indeed, there are laws in most states forbidding disclosure of patron information; and the Family Educational Privacy Rights Act applies to academic institutions receiving Federal funds.

As most readers know, I am a very strong advocate of library privacy rights. There are many reasons why it is in the interest of the individual and of society to protect information about the materials that patrons may read. I am also very concerned about the U.S.A. Patriot Act, some provisions of which I believe may be unconstitutional. As Richard Rubin has stated, “[O]ne could argue there are many acts of speech that should be protected regardless of whether harm arises. After all, a cardinal reason why free speech is protected is that it can produce substantive results that some would consider harmful while others would consider the same results salutary. Similarly, what if harm arises from truthful speech? Shouldn’t such speech be protected regardless of harm? The point is that if people are to speak freely, speech must generally be protected regardless of its consequences; otherwise a chilling effect on speech would result.”

Along with the importance of preserving free speech, there is also a duty to the greater society. And in some cases there is a responsibility to the patron as well. There are two competing ethical principles involved in the situation of the potentially harmful patron. One is intellectual freedom, but the other is a duty to society. For example, Robert Hauptman poses the question: “Must one simply respond as a librarian who is there to serve, and does one have a higher duty ‘to society in general’….to make a professional judgment and refuse to help the patron, [sic] if detrimental effects are suspected?”

What are the circumstances under which librarians should disclose information about patron requests? Some would argue that “National Security” is one. However, in the face of vague concepts such as “National Security,” I would not disclose information without a search warrant. (Most privacy laws contain exceptions for validly issued search warrants.) I’m not going to discuss this issue at all. Instead, the issue I will be discussing involves a patron who poses an immediate and identifiable risk to themselves or others.

The Ethical Background

There is a paradox in current librarianship regarding the censorship of controversial materials. On the one hand, librarians tend to depoliticize or neutralize their role in the process of information provision, considering themselves just as “custodians of information” rather than “judges of what is and what is not acceptable...” On the other hand, however, librarians strongly politicize and moralize the issue of censorship. We seem to treat the Library Bill of Rights as unquestionable or unchallengeable.

As professionals, it is very important that we have an ethical code of conduct and that we follow this code to the greatest extent possible. Our ethical decisions affect people’s lives. We have a specialized duty to our patrons and our profession to follow ethical guidelines. In fact, the very definition of a profession involves ethical guidelines. According to the New York Court of Appeals:

A profession is not [just] a business. It is distinguished by [1] the requirements of extensive formal training and learning, [2] admission to practice by qualifying licensing, [3] code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, [4] a system for discipline of its members for a violation of the code of ethics, [5] duties to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined and honorable occupation.

It is because of these considerations that we have the Library Bill of Rights and the ALA Code of Ethics. These ethical guidelines are not merely nice things to have. They are a large part of what differentiates information workers as professionals rather than as technicians. Yet the rules don’t cover every situation. “Insisting that one’s obligation is merely to follow the rules leads one to see one’s ethical life as a life of avoiding the blame of having broken any rules. But in our ethical lives we need to attend not only to the rules, the principles of our professional or personal lives; we also need to be attentive to what effects following those rules may have on those with whom we live. Our sole goal ought not to be to morally blameless; we would also like to contribute to making better the lives of those around us and who share our communities.”

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Although library privacy should be adhered to, most state library privacy statutes contain exceptions for criminal activity occurring in the library. For example, in order to prosecute a patron for accessing illegal child pornography in the library, there would have to be a disclosure of what site the patron went to. It is not the place of the librarian to decide whether the site was legal or illegal; that is the place of investigators, prosecutors, and ultimately the judge and jury. However, if a patron were charged with a crime in regard to illegal child pornography sites accessed in the library, the library worker who witnessed the act would certainly be called upon to testify.

The Suicidal Patron

Richard Rubin has effectively framed the moral quandary of the suicidal patron. Rubin presents a case study in a popular library school textbook, dealing with this important issue.1 Rubin’s scenario involves a teenage patron who is known to have “problems.” She comes up to the reference desk crying and asks for the book Final Exit,2 which is a manual on how to commit suicide. You know that the book is on a cart waiting to be reshelved. What do you do?3

This type of situation is one in which the reference interviewing process becomes crucial. If we do the right type of reference interview, it should become apparent why the person is requesting information. She could be a student with a problem, or the request could be academically related. There is also a limit on what we can do. We don’t want to go too far and practice medicine or psychology without a license; not only is this not the place of the information professional, but it may also be illegal under state laws.

We can ask the student what kind of information she is looking for; to see if there is anything else she may need. If the patron is working on an academic project, she will probably want to find other articles, books, statistics, etc. She might also want to find materials on prevention of suicide. In the course of the reference interview, it would probably become clear eventually whether she was looking solely for a book on committing suicide.

Suppose, however, that the patron states that she is going to commit suicide. I don’t have any hard and fast answers, but I do have some suggestions. First of all, the answers to these questions depend on what type of library we are talking about. By law, school libraries have a different standard to adhere to. “Unlike public libraries, school libraries do assume some in loco parentis responsibilities, or duties to act on behalf of children ‘in the place of a parent.’”4 [Emphasis added] According to Words and Phrases, “a person assuming the parental character or discharging parental duties” is in loco parentis.5 Basically, a K-12 school is responsible for the students while under school care.

In a school setting, there is a special duty to report this type of behavior to the guidance counselor or school principal. Educators have a legal duty to report students who may have been abused, appear suicidal, or in any way appear to be at risk. Indeed, in the aftermath of the school shootings in Columbine and West Paducah, there has been a lot of discussion about reporting potentially violent behavior. Therefore, in a school setting, potentially harmful or violent behavior should always be reported.

The Immediate Threat of Physical Violence

Suppose, however, that you are not in a school setting and don’t have the special duty that comes with being in loco parentis. What should you do? I would suggest that you would have another type of duty.

What I’m going to say is not something that comes from our professional associations, but rather from my background in law. What I would recommend is that we adopt the standard...
that psychologists and psychiatrists use. What a patient says to a counselor is confidential, but if the person is a danger to himself or others, the counselor has a duty to report this situation. For example, the Louisiana State Board of Examiners of Psychologists states that:

A. When a patient has communicated an immediate threat of physical violence against a clearly identified victim or victims, coupled with the apparent intent and ability to carry out that threat, a psychologist or psychiatrist treating such a patient and exercising reasonable professional judgment, shall not be liable for a breach of confidentiality for warning of such threat or taking precautions to provide protection from the patient’s violent behavior.

B. A psychologist’s or psychiatrist’s duty to warn or to take reasonable precautions to provide protection from violent behavior arises only under the circumstance specified in Subsection A of this Section. This duty shall be discharged by the psychologist or psychiatrist if he makes a reasonable effort to communicate the immediate threat to the potential victim or victims and to notify law enforcement authorities in the vicinity of the patient’s or potential victim’s residence.

C. No liability or cause of action shall arise against any psychologist or psychiatrist based on an invasion of privacy or breach of confidentiality for any confidence disclosed to a third party in an effort to discharge the duty arising under Subsection A of this Section.

The premier case on this topic was Tarasoff v. Regents of the University of California. In the Tarasoff case, a patient named Prosenjit Poddar told his psychologist that he was planning to kill Tatiana Tarasoff, a woman with whom the patient had become obsessed. The psychologist asked the campus police to go to Poddar’s dorm room, but because of confidentiality he did not tell them why. The police left because Poddar appeared to be rational. After Poddar killed Tatiana Tarasoff, the family sued, saying that the psychiatrist had a duty to warn Tarasoff that she was in danger. In deciding the Tarasoff case, the California Supreme Court stated that:

"If a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case... the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise. In sum, the therapist owes a legal duty not only to his patient, but also to his patient's would-be victim...." [Citations omitted]

The standard that is generally used in such cases involves the immediate and identifiable danger of harm to oneself or others. This principle has become law in many different jurisdictions. For example, in 1999 the Supreme Court of Canada adopted similar reasoning, stating that:

"The foregoing review makes it clear that even the fundamentally important right to confidentiality is not absolute in doctor-patient relationships... When the risk and the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs. In rare circumstances, these public interests may be so compelling that the privilege must be displaced... Danger to public safety can, in appropriate circumstances, provide the requisite justification.

In a library setting, the question involves the potential for the person committing harm against himself or others. Many professions have had to struggle with this question, and most of them have come to the same conclusion: if the person appears likely to commit immediate and identifiable harm to himself or others, the professional has a duty to report the situation to the appropriate authorities. I would argue that this is how librarians should handle the situation as well, whether we are talking about a suicidal patron or a patron building a bomb.

Courts and professional bodies in the United States, Canada, United Kingdom, Australia, and other common-law countries generally consider three factors in deciding whether disclosure is justified:

1. Is there a clear risk to an identifiable person or group of persons?
2. Is there a risk of serious bodily harm or death?
3. Is the danger imminent?

In the context of a relationship between a doctor or a counselor, if the professional has "to take some affirmative action outside the regular course of treatment to protect third persons [such] affirmative actions are for the benefit of third parties, not the patient, and involve such steps as notifying a potential victim or calling the police...." [Citations omitted]

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Please understand that I am not advocating that librarians should undertake a therapeutic relationship with patrons. Librarians should not make determinations about the sanity of an individual or undertake counseling sessions. Care should always be taken to avoid practicing psychology or medicine without a license. Nor am I talking about vague situations where a patron asks for books about bombs, Marxism (as in the McCarthy cases of the 1950s), or any other subject. I am talking about the limited situation where there is a clear risk to an identifiable person or group of persons, there is a risk of serious bodily harm or death, and the danger is imminent. This is a very specific situation, one that most librarians will never have to face. Nonetheless, it is an important issue that needs to be discussed.

The test that I am advocating (a clear and imminent risk of serious bodily harm or death to an identifiable person or group of persons) is not taken from anything in the library profession. My suggestion is based on the way other professionals, such as doctors, lawyers, clergy, and counselors, handle this type of situation.

Now let us return to Richard Rubin’s case study of the patron asking for Final Exit. If we change the scenario a bit, we may come up with a different answer. If we have the student come up calmly and rationally, without any evidence of crying or depression, and ask for the book, we should use our reference interview to ascertain what type of research she is working on. This may just be a school project, and if so we should give her the book. But if she says that she is going to commit suicide, we shouldn’t give her the book; instead, we should refer her to the suicide prevention hotline. In fact, if you are at all in doubt, you may want to make an anonymous call to the suicide prevention hotline.

This answer doesn’t come from the guidelines of the ALA, AASL, or any other professional association for librarians. The writers of these guidelines might disagree with my feelings that library confidentiality should not extend to those who pose a clear, identifiable, and imminent danger to themselves or others. (Just to be clear, this is my analysis, not the ALA’s.) The opinions expressed in this article are mine alone, and do not represent the views of my employer or of the publisher or editors of this journal.

Conclusion

The disclosure of confidential patron information should be done with great care and trepidation. Disclosure should only be made if the reference interview reveals the three principles outlined above: 1) there is a clear risk to an identifiable person or group of persons; 2) there is a risk of serious bodily harm or death; and 3) the danger is imminent. If these three principles prevail, I believe that the librarian must disclose information in order to protect the potential victims.

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The hard-working Jenny Buzzbee (EBSCO) is back at work after six weeks of maternity leave. She recently sent us some fabulous pics of the new addition.

And just as we go to press, we got the following information! Accucoms BV has just been launched with a mission to provide specialist sales and marketing services for publishers of all sizes. The new company, based in The Netherlands, will provide in-bound and out-bound telemarketing as well as field sales operations, to publisher clients across the globe. Pinar Erzin, Managing Director of Accucoms, and until recently General Manager of Extenza Marketing Solutions, reveals that the company was launched due to unprecedented demand from publishers. As well as service quality, Erzin explains that transparency of pricing will be a key differentiator of the new company. Accucoms is backed by a strong list of strategic investors including John Cox of John Cox Associates Limited, Duncan Spence who is well known from his previous investments at Carfax Publishing and CatchWord Limited, and Chris Beckett and Simon Inger from Scholarly Information Strategies Limited. Publishers are invited to contact Pinar Erzin at <info@accucoms.com>. The company address is: Accucoms B.V., Gietervrij 86 A, 2211 ZD Noordwijk, The Netherlands. Website is forthcoming http://www.accucoms.com.