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NOT SO PUBLIC: ACCESS TO COLLECTIONS

Nowadays, an archive is likely to include the “private” papers—letters, diaries, unpublished manuscripts, etc.—of “public” figures. For this reason, they are not always so public.

~ JAMES E. B. BRESLIN

IN 1951, KURT EISSLER, a psychoanalyst who as head of the Freud Archives controlled many of Freud’s papers, deposited the collection at the Library of Congress (LC) under an arrangement that sealed various materials until 2020, 2038, 2053, 2057, and, in the case of one item, 2113. Although LC staff members have worked commendably to open as much of the collection as possible to the public (about 90 percent is now said to be accessible), the question remains why and how such outlandish restrictions exist. After all, Freud died in 1939, and none of the ordinary concerns for privacy, physician confidentiality, or government secrecy could possibly justify the length of the embargoes in question. Unfortunately, the answer is simple.

Both Eissler and Freud’s daughter Anna, who owned many of her father’s papers, were eager to protect the great man’s reputation from (as they viewed it) unfair criticism. When asked whether it was not unjust to withhold documents from scholars for more than a century, Eissler replied, “Injustice! I think it is a far greater injustice that [a critic] may publish whatever he wants about Freud, and that Freud cannot defend himself and

prove he is being maligned.”¹ The reason restrictions can be imposed is that in our legal system the Freud Archives owned the papers in exactly the same way one owns a pair of shoes or a dishcloth and thus could do whatever it wanted with them. As James Joyce’s grandson Stephen said, after having destroyed the letters of Joyce’s daughter Lucy, “What are people going to do to stop me?”²

Such incidents of concealment and destruction, eminently familiar to archivists and curators, raise a question that has often been asked rhetorically, but rarely addressed seriously, and that has been almost totally ignored by the legal community: Can someone really own Freud’s (or any notable person’s) reputation? Put that way, the answer of course is no. No one can own reputation any more than one can own the history of the twentieth century. At another and very practical level, however, the answer is not nearly so unequivocal. Insofar as important data are uniquely contained in a particular physical artifact or document that has never been made public, the owner effectively does own a reputation or a fragment of history. Depending on the availability of other sources, and the importance of the matter involved, the consequences flowing from proprietary power may be large or small, bad or good. Many instances, such as the one involving the Freud Archives, are familiar: Warren Harding’s widow systematically burning his Teapot Dome papers; Max Brod disobeying Kafka’s instruction to destroy his manuscripts; the cabal of Dead Sea scholars withholding the scroll texts from everyone outside a favored circle of students and associates for more than 40 years.

One of the anomalies of our legal system is that we have so singular and indiscriminate a theory of property. With only the rarest exceptions (you cannot own another person anymore; in most places you cannot own and market your sexual services), an individual can own anything and thereby

1. Janet Malcolm, *In the Freud Archives* (New York: Knopf, 1984), 117.

2. *The New York Times*, Aug. 15, 1988, C11.

control every element of property in that thing, including not only the right to buy and sell, bequeath, etc., but also to destroy or hide it away. This entirety of entitlements in things one owns is what lawyers describe metaphorically as the full “bundle of sticks” in property, that is, every one of the potential powers that can inhere in ownership. No distinction has been made between the right we all have to take a garish gift from Aunt Sally and hide it away in the attic, never to be seen again, and the identical right that Bill Gates got when he bought the Leonardo Da Vinci notebook known as the Codex Hammer.

Happily, Gates announced that he would make his purchase publicly available, but many precious artifacts, most commonly paintings, go into private collections not to be seen again for decades, sometimes for centuries. However, exercise of the no-access “stick” within the bundle of property rights is by no means limited to art. Sometimes objects of scientific importance have been hidden away. Perhaps the most notorious instance involved Eugène Dubois who, in 1892, discovered the first fossil remains of a human ancestor, *Homo erectus*, known at the time as Java man. Although its importance is now accepted, the find was controversial at the time and Dubois reacted by locking his fossils away in a vault for nearly twenty-five years so that those who doubted his work could not see them. A never-published manuscript of Einstein’s, with edits in his own hand, in which he elaborated on his special theory of relativity, was sold at auction to an anonymous buyer who kept it behind closed doors for many years until it was put up for sale again in 1996. Though it is said to have laid the groundwork for Einstein’s general theory of relativity, it had never been available to scholars or the public. Such behavior is commonplace among collectors.

What makes the theory of unqualified ownership anomalous is that it is at odds with another very prominent and well-accepted legal principle, which is that no one can own ideas or knowledge. For example, no one can patent the idea of the wheel, the theory of relativity, or the concept of the detective novel. It is possible to get a patent for a particular invention employing

the concept of the wheel or to copyright the text of a particular detective story, but even these rights are constitutionally granted only “for limited times.” Such limits in copyright and patent law express a fundamental public policy in favor of an intellectual public domain and the notion that limits should apply to the permissible domain of private ownership. The implications of that policy for unique objects such as Leonardo’s notebook, Freud’s papers, or the Dead Sea Scrolls have never even been explored, let alone implemented. Yet, the fact is that ideas and knowledge—artistic, historical, and scientific—are physically bound up in such objects. Such artifacts are both material objects and unique repositories of particular and precious knowledge, artistic techniques, historical matter, and ideas. The result is that conventional ownership of the objects effectively grants exclusive ownership of the ideas or knowledge they contain. So long as the owner prevents copies from being made, and at the same time denies access, whatever is uniquely contained within the object has been privatized.

Of course, no one can compel an individual who has a great idea or who makes a fundamental scientific discovery to share it with the public. Such matters can be taken to the grave with their creator. In practice, if not in theory, the same is true for a work of art or a manuscript. No one can effectively prevent an artist or writer from obliterating a canvas or dumping a manuscript in the trash before anyone sees it. And that is as it should be. There is a world of difference between the creator and the mere owner. What Leonardo ought to be able to do with his notebooks and what Armand Hammer or Bill Gates (respectively, contemporary notebook owners) ought to be able to do with such an object are distinctly different considerations.

As a preliminary matter, one might distinguish three situations: (1) the creator of a work; (2) the owner of an ordinary object; and (3) the owner of an extraordinary object (commonly called “cultural property”). As to the first, creators should be allowed to treat their compositions as they wish, not because they are proprietors but, rather, because creative people ought to be allowed to be known for the work with which they wish to associate

themselves and that they think is worthy of them. One may dispute this view, but, right or wrong, it is not a question of property but, instead, of personality or identity. Conversely, owners of ordinary objects should be able to dispose of them however they wish simply because no one else has any particular interest in them. Who cares what their neighbor does with a pair of old shoes or even an unwanted pair of new shoes? Although we may properly deplore waste or extravagance, contemporary society quite uniformly values the protection of autonomy and privacy against the risks of intrusive neighbors or a moralistically coercive state. Full “bundle of sticks” property rights in this respect are generally justified by a broadly accepted public policy.

That leaves the third category, consisting of things where the owner is not the creator, which the creator had no interest in destroying or concealing (often exactly the opposite is the case, especially with works of art or architecture), and in which the public has a very great interest. The classic case would be a great work of art or a never-published letter by a great writer or historic figure held in a private collection. Although there are many good and sufficient reasons to permit and even encourage private collectors, to welcome private enjoyment of such objects, and even to sustain markets in which owners benefit economically, it is very difficult to understand why a mere owner, whether because of wealth, connoisseurship, or even dumb luck in finding something, should have the right to deprive the public of knowledge of its content for an indefinite time or, worse, to destroy it. One need not go as far as Whistler, who believed that a painter never really lost ownership of his works, or even agree with Ruskin, who believed that we owe a debt to the departed geniuses and artisans who made the wonderful medieval churches. Rather, one need only acknowledge that it is far from obvious that an owner, simply because he or she is wealthy, well born, or eccentric, should be able to obliterate posterity’s opportunity to know the achievement of a great artist or writer whose unpublished work has come into his or her possession. Interestingly,

although the law appears to have tolerated such ownership powers, there seems to be no legal literature that fundamentally engages the question one way or the other with regard to cultural property. It is a sort of unfilled niche in legal theory.

To be sure, there are many variant ownership situations and they present a variety of potentially perplexing problems. For example, what of the writer who dies with unpublished manuscripts sitting in her study that she may not have wanted the world to see or the writer, as in the famous case of Kafka and Brod, who has asked an executor to destroy his papers? What should happen in the case of the writer's child or grandchild? Does the inheritor stand in the stead of the creator or of the mere collector/owner? If documents exist that might prove embarrassing, do the original owners' privacy interests last indefinitely, beyond the lives of those who might have been embarrassed? Is there a family privacy interest that passes from generation to generation, held even by remote descendants? Is there a private–public distinction? For example, should public officials who generate historically valuable (but privately owned) papers or those who inherit them bear a greater obligation than a famous writer or scientist or his or her heirs?

Each of these variant situations deserves detailed attention, but some general principles can be suggested. First, privacy concerns and family feeling can endure almost indefinitely. Recent reports about the fracas surrounding news of Thomas Jefferson's offspring or the vigorous and successful efforts of Warren Harding's descendants to prevent publication of his love letters to Carrie Phillips (which are embargoed until 2014, 91 years after Harding's death) should make that clear. On the other side stand the interests of scholarship and history, which are compelling interests in a society that values freedom of inquiry and an unflinching search for truth. If privacy and related concerns are respected for a decent time (the joint lives of those concerned within a given generation, for example), the most painful hurts are almost certainly avoided and the interests of historical veracity are ultimately served, though admittedly at some cost to remoter heirs and admirers.

Two factors strongly support a policy of ultimate openness, as against both the right of destruction and the right of long-term denial of access. The first factor is the extraordinary capacity of society to see things differently at different times. Not many years ago, homosexuality was considered deeply shameful, even ruinous if publicly exposed. Today, we see sexuality in a very different light, though certainly it is still a highly controversial subject. Indeed, for that very reason, to have retained knowledge about the reality of sexual behavior by both ordinary and important figures in earlier times can be crucial to serious study of the subject today. The Minnesota Historical Society is reported to have sequestered (uncataloged) one of a series of boxes containing the papers of a former Episcopal bishop of Minnesota containing love letters between his wife and the sister of President Grover Cleveland. Such secrets fed the common view that only “freaks” were homosexuals and certainly not respectable and prominent ladies. Fortunately, the letters were not destroyed and eventually were outed by a scholar of gay history.

A similar point may be made about gender issues. It has been reported that Charles Dickens’s daughter Kate planned to burn her mother’s letters, believing they reflected poorly on her. Ultimately, she was persuaded by George Bernard Shaw to save the letters and donate them to the British Museum. Shaw saw, as few then would have, that “the sentimental sympathy of the nineteenth century with the man of genius tied to a common-place wife had been rudely upset by a writer named Ibsen.”³ A second, and perhaps even more telling, point is that those who happen to own papers—usually children, executors, or collectors—are rarely likely to be well-suited to evaluate their ultimate literary, historical, or scientific value, or indeed to have much objectivity.

If these distinctions seem plausible and if it appears important to avoid future problems of the sort presented by the Freud papers embargo or the Dead Sea Scrolls cartel, a series of questions then arises: How would a more

3. Phyllis Rose, *Parallel Lives: Five Victorian Marriages* (New York: Knopf, 1984), 191.

qualified sort of right be characterized? What material would be covered? How would such a plan be implemented? Each of these fundamental questions can be addressed only briefly here.

- As to the nature of the appropriate restriction for owners, the two essential elements are: (1) do not destroy material that is likely to have historical, artistic, or scientific value (with an exception for the artist or writer who considers the material unworthy of his or her talents); and as to material not destroyed in the artist's lifetime, presume that the artist meant for it to be retained, no matter what he or she may have said to an executor; and (2) do not restrict access beyond the reasonable bounds of privacy, privilege, or official secrecy, which roughly could be measured by the lives of those directly affected or about two generations (40 or so years).
- As to coverage, rather different approaches are appropriate for different sorts of artifacts. There is extensive experience in identifying some categories of what sometimes is called cultural property, patrimonial property, or national heritage. Historic preservation laws, common throughout the world, classify buildings of historic or architectural significance. In some countries (though rarely in this country), artworks of special importance are classified for purposes of restricting exportation or allowing deferral of inheritance taxes in exchange for owner-provided accessibility. Many countries also define objects of importance for purposes of regulating archeological excavations or (as we do) for determining repatriation to indigenous peoples. Although these classifications can be controversial, they generally seem to function satisfactorily. As to collections of papers, to which I shall return shortly, a working rule of thumb might be that any collection that a public (that is, tax-exempt) institution is interested enough to take and administer should presumptively be subject to the applicable rules.
- As to implementation, three basic models might be followed and, depending on the circumstances, one or another or some combination of

them might be appropriate. The first is simply public prohibitory regulation. The most familiar examples are laws that disallow the destruction or modification of a listed historic structure without a permit and the so-called *droit moral* laws, which vest in living artists a right to protection of their reputations by prohibiting those who own the artists' works from mutilating and, in some laws, destroying them. (These laws are perhaps the most prominent setting in which law denies to an owner of cultural property the full "bundle of sticks.") A second technique is incentive, for example, granting a tax benefit to owners who allow periodic public exhibition of important objects in their collections. Lastly, and to be discussed more specifically below, institutions such as museums and libraries can seek to limit the conditions or restrictions owners can put on donated or loaned collections, such as access restrictions or embargoes.

Every species of cultural property presents its own particular issues. Those involving manuscripts and collections of papers are of particular interest, partly because they have received even less attention than works of art. Problems relating to the public's interest in access arise in several different ways. Perhaps the most common is the offer of a collection on condition that it be embargoed for a substantial period of time. Another occurs if an institution, usually a university library, acquires and holds material for the exclusive use of a particular scholar. This situation can arise in several different forms. For example, the scholar may have been instrumental in obtaining the material from an author or a family. He or she may be an authorized biographer designated by the biographee or his or her executors to have exclusive use, at least until the biography is completed. Or an institution may simply be implementing a practice within a scholarly community giving to a particular individual *editio princeps* or a first right of publication of certain materials for an indefinite period. This practice has been common in fields such as archeology and papyrology (and was essentially the practice followed with the Dead Sea Scrolls by the Jordanian, and later the Israeli, governments).

Some practices are particularly suspect and certainly should be repudiated by both archival institutions and scholarly organizations. For example, whatever might be said in support of limiting access for a time to an owner (such as a former president who wants to write his memoirs) or even to an authorized biographer, there is nothing to be said for postpublication embargoes. They insulate a writer from honest and informed criticism. Even exclusivity arrangements prior to publication, although they may have some justification, undermine the principle of a level playing field and often work to advantage those already on top to the detriment of younger, less well-known researchers. Another troublesome version of selective openness arises from the common practice (sometimes insisted on by donors) of screening researchers to determine whether they are “serious” or are scholars rather than “mere” journalists. To demand such judgments of those who administer collections seems at odds with the simple and fundamental notion that work should speak for itself in the intellectual marketplace. Awareness that the person doing the filtering sometimes is a competing biographer, a protective relative, a curator with research interests of his or her own, or a power-aggrandizing administrator should be enough to suggest the unseemliness of such distinctions.

Among many instances that might be cited, the following contemporary example illustrates the perils of selective access. The papers of former U.S. Supreme Court Justice William Brennan are in the Library of Congress, primarily administered through Stephen Wermiel, Brennan’s authorized biographer. Wermiel himself described an incident where a writer for a lesbian publication wanted to do an article about the Supreme Court’s handling of sexual privacy cases. Even though he considered the project legitimate and appropriate, Wermiel turned down the request because it came from someone without academic affiliation. This was consistent with the no-journalists policy he had adopted because, he indicated, tell-all books such as Woodward and Armstrong’s book *The Brethren*⁴ had generated an interest in gossip “that is

4. Bob Woodward and Scott Armstrong, *The Brethren*, (New York: Simon and Schuster, 1979).

not that insightful or helpful.” Such practices, which doubtless are commonplace, suggest the desirability of a simple rule: material is either closed (for a reasonable period, to everyone) or it is open to all adults, with whatever qualifications are necessary to protect fragile materials.

Although libraries and museums are fundamentally committed to openness and strongly discourage restrictive access, the conventional view is that institutions essentially are at the mercy of donors and sellers. A library that refuses to accede to a donor’s demands risks several responses, none of them attractive. At worst, the desired material may be destroyed. Alternatively, it may be kept with the donor, who then can manage it however he or she likes. Or it may go to another institution that accepts the material on the donor’s terms so that nothing has been gained in terms of public access.

Perhaps it is best to begin with some practical considerations. There is virtually no way to stop owners who are determined to destroy material still in their possession. They are beyond practical regulatory reach simply because no one knows what they are doing and because one rarely knows the content of such collections. Similar considerations make it impractical to exercise the eminent domain power and take public possession of private collections, even if it were otherwise desirable and politic to do so (which it is not). Of course, there are exceptions to this general rule, the Nixon papers being the best-known recent example. Although presidential papers were the private property of a departing president until the 1970s (since then changed by federal law), Congress can use the eminent domain power and obtain a collection by compulsory purchase, as it did with the Nixon material to prevent destruction and concealment. Perhaps some few cases will arise where materials are well known, the risk of loss is imminent, and the public nature of the situation makes a regulatory rule or compulsory purchase seem appropriate, but these will be exceptional and rare.

At the other extreme of the spectrum, it would be desirable if more owners of papers with literary or historical importance adopted a posture that is com-

mon among serious art collectors, who commonly consider themselves temporary custodians of objects that are really the heritage of the community at large and of posterity. One model is that of Pierpont Morgan. Morgan, a lordly connoisseur who collected for his own pleasure, left his artworks to his son through a will saying that “it has been my desire and intention to make some suitable disposition . . . which would render [the works] permanently available for the instruction and pleasure of the American people.”⁵ Perhaps the earliest collector to characterize himself in stewardship terms, interestingly, was a famous bibliophile, Richard de Bury, chancellor to Edward III in the fourteenth century. He wrote in his little book, *Philobiblon*, that “we have collected so great store of books for the common benefit of scholars and not only for our own pleasure.”⁶ A parallel sentiment is heard regularly from prominent collectors today. Douglas Cramer, a successful television producer and major collector, was quoted recently as saying, “I don’t approve of people who collect and don’t lend, or of people who don’t make their art as visible and accessible as possible.”⁷ No doubt, it seems somewhat more natural to think of oneself as the trustee of a public trust when one possesses a great work of genius passed down through centuries (a Raphael or a precious Book of Hours). Yet, the heirs and executors who have items such as the Freud papers, or their literary or political counterparts, ought surely to be able to appreciate that they have been granted a role in a historical process that surpasses the bounds of pure family feeling or personal sensitivities. The question is how to help move them more commonly in that direction.

Insofar as some additional incentive is desirable, there are some practical ways to encourage owners to provide timely access to donated manuscript collections. One easily administered device would condition recognition of a tax deduction for donors upon acquiescence in a set of specified minimum conditions of public access and maximum limits on embargoes. Several

5. Last Will and Testament, 1913 (Morgan Library Archives).

6. *The Philobiblon of Richard de Bury*, ed. and trans. Ernest C. Thomas (London: Kegan Paul, Trench, 1888).

7. *The Washington Post*, July 9, 1989, G1.

countries use similar provisions to promote accessibility of important artworks in private hands. For example, England defers inheritance tax on objects that qualify as worthy of national heritage status on the condition that the owners grant reasonable public access upon request. A Web site lists all the items, which include paintings, sculpture, books, manuscripts, and furniture, and a contact to arrange access. Germany and Austria are said to provide relief from wealth taxes to collectors who loan desired works of art for a period of public viewing in public museums. Many variants of such techniques are possible. Estate taxes could be reduced or deferred for the value of collections donated to public institutions consistent with specified provisions for public access. Or, a lower tax rate could be applied to sales of collections that meet such public access conditions. Of course, such measures require legislation.

In addition, there is a potentially powerful step that libraries and museums could take on their own. If common criteria were developed that set out standards for openness, and if all major archival institutions committed unwaveringly to implement such standards so that they resulted in a uniform policy; owners would be unable to play one institution against another. Illustratively, such criteria might identify maximum time limits for sequestration of various sorts of materials, taking into account matters such as privacy and privilege; provision against exclusive use to favored individuals; and time limits on implementation of exclusivity with regard to first-publication rights in materials to a researcher. To be sure, the efficacy of such a common approach would depend on how much influence institutions collectively have over donors and sellers of manuscript collections. Although owners could always retain material and administer it as they wish, archivists and curators probably underestimate their collective leverage (or perhaps underestimate the relative importance of public benefit resulting from common cause to promote access versus individual institutional gains attendant on competitive prowess).

Identifying, organizing, cataloging, storing, and administering collections is a considerable and expensive task that very few owners or estates can accomplish themselves. A library's services also facilitate the work of biographers and scholars, which is often of major interest to heirs and executors. For those reasons, securing a collection in an institution, particularly a prestigious one, is frequently a necessary route to the public attention that owners want, even though they may simultaneously harbor inappropriate desires for access restrictions. In addition, owners who want to obtain tax benefits from disposal of their collection must turn it over to a library or museum. Retention is not an option for them.

These considerations suggest that if institutions commonly adopt and rigorously implement a set of reasonable, identical basic rules for access, they would be well positioned to deter donors from imposing inappropriate restrictions. No doubt some things will be lost to destruction or private sequestration if extreme donor desires are not met, and no one can say with confidence just how great the risk is, though, as suggested here, it is likely less than sometimes has been thought. Whatever the ultimate decision about whether to take the risk of loss, surely the time is ripe for major institutions to move beyond common *statements* of policy and consider the desirability and importance of common *enforcement*.