Research Article

Preventing Patron Theft in the Archives: Legal Perspectives and Problems

VINCENT A. TOTKA, JR.

Abstract: The theft of archival materials has become a problem of yet-unknown proportions. No one knows how much material has been stolen from archival repositories over the years. There are two types of theft that archives face: *insider theft* and *patron theft*. This paper concentrates on patron theft and describes a survey to determine security awareness among member repositories in the State Historical Society of Wisconsin's Area Research Center (ARC) Network.

About the author: Vincent A. Totka, Jr., is a correctional officer with the State of Wisconsin Department of Corrections. He received an undergraduate degree in history and an MLIS from the University of Wisconsin-Milwaukee.

DESPITE AN INCREASE IN REPORTS of theft, the creation and implementation of adequate security measures appear to be a low priority for many archivists. The topic is seldom discussed at professional meetings and only in passing in graduate archival education programs.

Many archival repositories in the United States have a disaster plan to cope with a flood or fire, but few have a formalized plan to deal with theft. The irony, as one writer has noted, is that theft "may be as devastating as any natural disaster for an institution's collection."[1]

In their haste to serve, archivists seem to have allowed themselves to be seduced by thieves. Charles Merrill Mount was an art historian who "was charged with the interstate transport of manuscripts from the Library of Congress and the National Archives, where he was 'well known' as a 'registered researcher.'"[2] In an examination of the Mount case, investigators found that existing security policies were circumvented as a courtesy to Mount. According to Theresa Galvin, Mount had "developed friendships with some staff and was allowed certain privileges not given other scholars."[3] The most significant was that "he was not subject to routine inspections" by security staff when he left the repository.[4] National Archives professional staff members used their authority over security staff to create an ideal working environment for Mount. They did this because they viewed Mount as being above suspicion. At both the National Archives and the Library of Congress, Mount took advantage

of lax security procedures and stole manuscripts valued at more than $100,000.[5]

Examples in the literature suggest that in an attempt to assist the "serious researcher," archivists routinely make exceptions to the basic policies and procedures which govern the administration of their repositories. As a result, many repositories in this country have put their collections at risk.

In an attempt to determine the security awareness within a fairly homogeneous yet typical group of repositories, eleven institutions in the State Historical Society of Wisconsin's Area Research Center (ARC) Network were surveyed by telephone regarding issues relating to patron theft. The survey was created and conducted by the author for a graduate seminar in archival education.

The ARC Network, established in 1962, consists of thirteen regional archives, each of which is responsible for a specific geographic area within the state. The eleven ARC institutions surveyed are located on campuses of the University of Wisconsin (UW) System. The twelfth ARC is located at UW–Superior, and the thirteenth is at Northland College.[6] The ARC repositories were selected because they hold similar collections and operate within a common set of procedures, rules, and regulations,[7] and also because they are located within one state and are thus governed by the same laws.

The survey questions were based in part

[1]Susan M. Allen, "Theft in Libraries or Archives," *College & Research Libraries* 51 (November 1990): 939.

[2]Lawrence W. Towner, "An End to Innocence," *American Libraries* 19 (March 1988): 210.

[3]Theresa Galvin, "The Boston Case of Charles Merrill Mount: The Archivist's Arch Enemy," *American Archivist* 53 (Summer 1990): 449.

[4]Galvin, "The Boston Case of Charles Merrill Mount," 449.

[5]David Streitfeld, "Library of Congress Ready to Throw the Book at Thieves," *Milwaukee Journal*, 5 April 1992, p. 6(J).

[6]Richard A. Erney and F. Gerald Ham, "Wisconsin's Area Research Centers," *American Libraries* 3 (February 1972): 135–40.

[7]Only 11 of the 13 ARC repositories were surveyed. During the time of the survey, I was unable to make contact with archives personnel at UW–Superior and Northland College. ARC rules for researchers are listed on the reverse side of the State Historical Society of Wisconsin Archives Reading Room rules and registration sheet.

on the ARC Network's own regulations and policies that all patrons are required to read and agree to. Other questions were designed to explore archivists' knowledge of the relevant state statutes.

The objectives of the survey were to determine the following:

- How well personnel at the repositories understood the laws that govern the security of their holdings
- To what degree existing security policies were enforced or followed
- How personnel at the repositories would respond to a suspected theft if one took place in their presence
- Whether the repositories had written policies that governed the actions of staff members when they have probable cause to believe a theft has taken place in their presence
- Whether archivists were familiar with four important state statutes that should influence any security actions or policies in the State of Wisconsin, including:
  (1) 943.61   *Theft of Library Materials*
  (2) 939.49   *Defense of Property and Protection Against Retail Theft*
  (3) 19.35   *Access to Records*
  (4) 942.01   *Defamation*[8]

The complete survey consisted of 47 questions, broken into two sections to allow parallel questioning of institutions with written policies governing patron theft and of those without written policies. The survey's first significant finding was that this distinction was unnecessary; *none* of the repositories had a written security policy.

In general, compliance with the rules of the State Historical Society of Wisconsin (SHSW) was found to be inconsistent. According to SHSW rules, patrons are required to sign in each day they use the archives. Nine respondents (81%) stated that they did require patrons to sign a daily logbook. Two (18%) said they had patrons sign in, but not on a regular basis. Society procedures also require all patrons to present identification and to read and sign the rules sheet annually. Although most of the repositories complied with this requirement,[9] in some cases it appeared that the first thorough reading of the rules sheet had been prompted by participation in the survey.

The archivists were then asked whether they required patrons to present identification before using records. This is an important point because it is the first step in deterring theft. Compliance with such a policy should not be a problem for the "good patron," but it constitutes another obstacle for those with ulterior motives. This potential deterrent was not employed by the majority of ARC archivists. Ten of eleven respondents stated that they did not require patrons to show identification. Among those who did not, one mistakenly stated that it would be a violation of Wisconsin Statute *19.35 Access to Records; Fees*, to require patrons to present identification before being given access to public records. At first glance this appears to have merit. Wisconsin Statute 19.35 does state that "no request [to records] may be refused because the person making the request is unwilling to be identified or to state the purpose of the request." However, further reading reveals that "a requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever the *security reasons* or federal

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[8]The reason that *939.49 Defense of Property and Protection Against Retail Theft* is included is that *943.61 Theft of Library Materials* is derived from *943.50 Retail Theft*. According to Wisconsin case law, at the time of this survey there had not been any appeals filed contesting a guilty finding for violations of *943.61*. Challenges to *943.50* were used as a model for how the appeals courts have handled the issues of *reasonable manner of detention* and *false imprisonment*.

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[9]One repository did not use the SHSW rules sheet.

law or regulations so require."[10] Requiring patrons to present identification before allowing them to use records is clearly legal if it is done for security reasons, such as to prevent theft. Network rules for researchers require that "all containers and personal effects including briefcases, typewriter cases, and purses must be placed in the lockers and wraps put in the closet."[11] This rule is designed to keep documents from being lost, due to mistake or theft, in the personal effects of the patrons. At the practical level, if patrons are not allowed to have personal items at the reading tables, the personal items will not have to be searched when the patron leaves the archives reading room. Only six (54%) of the eleven respondents enforced this rule consistently, three (27%) did not enforce it at all, and two (18%) enforced the separation rule occasionally. These findings may be explained in part by the fact that most of the ARCs do not have adequate storage areas for patrons' personal effects. However, it is interesting to note that two of the three repositories that have lockers do not consistently require patrons to use them. The worst case involved a repository that does not have a separate reading room and allowed the patrons to retrieve research materials.

A related ARC policy requires patrons to have their materials inspected before leaving the repository. Apparently, this practice is distasteful to archivists, because six (54%) of the respondents stated that they do not inspect materials, and five (45%) stated that they do so only occasionally. Enforcement of this rule is especially important for the repositories lacking adequate storage areas for patrons' personal belongings. Ideally, if the separation rule

is not enforced, the personal materials of patrons should be inspected.[12] The legal right to inspect certain materials is acquired when a patron signs the SHSW reading room rules sheet.[13]

Due to staffing patterns at the various ARCs, reading room security was a serious problem. The majority of the repositories had from one to three staff members working in the archives per shift, but generally only one staff member was in the reading room at any given time. It therefore seemed likely that patrons would be left alone with archival materials when staff members had to retrieve other records. Seven respondents (63%) confirmed the existence of this problem when they stated that patrons were left unobserved "sometimes." More troublesome still were the three (27%) that stated that patrons were left unsupervised on a regular basis. Only one person stated that patrons were never left unsupervised.

Another administrative procedure used within the ARC Network requires patrons to complete and sign reference slips when they request archival collections. Archivists were asked whether they used reference slips and, if so, how long the slips were retained. The case of Charles Merrill Mount showed the importance of reference slips in the investigation of archival theft. While attempting to prove that Mount had stolen materials from the National Archives, authorities examined the reference

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[10]*Wisconsin Statutes, 1989–1990,* p. 360. Emphasis added.

[11]State Historical Society of Wisconsin Archives Reading Room Rules and Registration sheet, rule no. 4.

[12]There is a problem with the inspection clause of the reading room rules sheet. Rule 11 assumes that patrons will not be allowed to have personal items such as briefcases, purses, or coats, in the reading room. Rule 11 states that "all notes, photocopies, books, etc. must be presented to the staff for inspection." The "etc." portion of the rule may not provide archivists with the legal right to inspect briefcases, purses, or coats if these items are allowed in the archives reading room.

[13]*Wisconsin Statutes, 1989–1990.,* p. 527. *968.10 Searches and Seizures; When Authorized:* "A search of a person, object or place may be made and things may be seized when the search is made with . . . (2) consent . . . with the authority and within the scope of a right of lawful inspection."

slips for materials Mount had used. Based on the information gleaned from the slips, they were able to determine that Mount had used a number of Whistler letters that he later sold to Goodspeed's Book Shop in Boston, Massachusetts.[14] Because of the Mount case, "reference slips, formerly scheduled for disposal [by the National Archives] after two years, [are] being kept up to twenty-five years."[15]

Surprisingly, four ARC archivists (36%) stated that they never use reference slips, and six (54%) replied that, although they used the slips, they did not require patrons to sign them.[16] Only one repository both used reference slips and required patrons to sign them, as the SHSW procedure specifies. The retention schedule for reference slips varied widely for the repositories that used them.[17]

Perhaps the most serious problem revealed by the survey was a lack of awareness and concern about the importance of theft prevention. Although all respondents felt that their repository should have a written policy outlining procedures to prevent theft and to guide staff members who may be faced with patron theft, no one had taken the time to draft such a policy. When asked how they would respond to a perceived theft, the majority of the respondents stated that they would attempt to talk to the patron about what they thought they had observed. Seven people (63%) stated that they would confront the patron at the tables in the reading room, and three (27%) said that they would do so at the entrance or exit of the repository. One person stated that it would be best to confront the patron after he or she had exited the repository. According to

the law,[18] the patron would not be guilty until he or she had passed the "last station for borrowing material."[19] Since archival materials do not circulate, it seems logical to assume that the exit to the repository would be the last station.[20]

Approaching the patron at the tables in the reading room might present two problems. First, the patron would not be beyond the last station for borrowing materials. Second, there is a greater risk that the resulting conversation would be overheard by a third party. This risk increases the likelihood that the patron will be publicly embarrassed or defamed. According to Wisconsin law, defamation may occur when "Whoever with intent to defame communicates any defamatory material to a third person without the consent of the person defamed."[21] This statute also defines *defamatory material* "as anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society or injury in his business or occupation."[22] Therefore, if a staff member inadvertently accuses a patron of theft in front of witnesses, the staff member may be open to charges of defamation. Confronting the patron at the exit may reduce the chance that witnesses will overhear the conversation, and it may thereby reduce the risk of a defamation lawsuit.

The ARC archivists' instincts were generally very good. All eleven stated that they

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[14]Galvin, "The Boston Case of Charles Merrill Mount," 445–46.

[15]Galvin, "The Boston Case of Charles Merrill Mount," 449.

[16]8% of the respondents stated that they had patrons sign the slips "sometimes."

[17]Range of retention was from three to ten years for repositories that used them.

[18]State Statute *943.61 Theft of Library Material.*

[19]This is the terminology used in *943.61 Theft of Library Material.* The implication for archivists is that patrons with materials beyond the "last station for borrowing materials" are technically in violation of the law.

[20]Unfortunately, the law does not differentiate between a library and an archival repository on this point. If the repository is found within a library, does the removal of material apply to the exit of the archives or the library? It is only through challenges to the law, and the subsequent legal decisions, that a more precise definition will be obtained.

[21]Wisconsin State Statute *942.01 Defamation.*

[22]*Wisconsin Statutes, Selected Excerpts, 1989–1990,* p. 437.

would prefer to speak to the patron in private. Asking the patron to go to a private area to discuss the situation is the appropriate action to take. By doing so, the staff member reduces the risk of engaging in defamation, and a patron who has erroneously placed the materials in with his or her personal effects may be spared embarrassment. Also, if the patron intended to steal a document, the archivist provides him or her with an opportunity to return it gracefully. If the patron claims to have made a mistake and turns the document over to the staff member, the crisis is over. This is an acceptable outcome because the first priority of the archives should be to protect its holdings.

Under Wisconsin law, when a staff member detains a patron for questioning, the patron must be informed of the reason for being detained and be allowed to use the telephone. A staff member who detains a patron in compliance with the law is immune from being charged with false imprisonment, but this immunity clause is not sacrosanct. Legal precedents established in cases of retail theft provide guidelines for conduct by archivists. In a number of cases where suspected shoplifters have been detained by store personnel, the suspects have filed claims of false imprisonment against the store. The cases indicate that the behavior of the employee can influence the determination of whether the detention was "reasonable."[23] Legal interpretation of the statute has clearly shown that an employee who is loud or abusive to someone suspected of theft could lose his or her immunity from being charged with false imprisonment.[24]

When asked if they would question a patron who was detained, ten (90%) of eleven archivists responded yes. The one dissenter said he or she would not question the patron unless another staff member were present. Under the law, a staff member must obtain the consent of the patron before asking questions. If the patron agrees to engage in a discussion, the archivist should restrict the questions to facets of the incident. If the patron refuses to discuss the situation, the staff member's only option is to wait for a law enforcement officer to arrive.[25] Archival staff should remember that most security personnel are not law enforcement officers. Therefore, their legal right to stop, detain, or question patrons is no different from an archivist's.

Respondents also were asked what they felt would be a reasonable manner of detaining a patron suspected of theft. Asking the patron to sit and wait for a law enforcement officer to arrive was considered reasonable by nine respondents (81%). One person felt that it would be reasonable to go one step further and physically block the exit, whereas another said it would be reasonable to do "whatever was necessary" to prevent the patron from leaving the repository.

Respondents were asked their opinion of the legality of using physical force to prevent a patron from leaving the repository. Four archivists (36%) thought that using physical force was legal, six (54%) thought it would be illegal, and one was unsure. Under Wisconsin law, an archivist *can* employ physical force to prevent theft.[26] Even

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[23]In the case of *Hainz* v. *Shopko Stores, Inc.*, the plaintiffs charged that store personnel engaged in an unreasonable manner of detention. In its examination of the case, the court of appeals stated that the reasonableness of detention can hinge on "whether the employee's manner was harsh, loud, or abusive."

[24]"Reasonable manner" of detainment as defined by the court in *Hainz* v. *Shopko Stores, Inc.*

[25]*165.85 Law Enforcement Standards Board (2)(c)*: "Law enforcement officer means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws of ordinances and who is authorized to make arrests for violations of the laws or ordinances he is employed to enforce."

[26]*Wisconsin Statues, 1989–1990*, p. 411. *939.49 Defense of Property and Protection Against Retail Theft*: "A person is privileged to threaten or inten-

so, only two respondents said that they would actually use physical force, and one of those two stated that the decision to use force would depend on the perceived value of the document and on the certainty that the patron actually had the document in his or her possession.

Concerning liability for the actions of staff members, seven (63%) of the eleven respondents believed the institution could be held liable for staff actions. Responding to a similar question, six (54%) thought they personally could be held liable for their actions, while five (45%) said that they could not. The sad truth is that in our litigious society, frivolous lawsuits are filed every day, so no one should assume that an archives or its staff members could not be held liable for the actions of staff. If a patron is defamed or, worse yet, injured in a physical confrontation with a staff member, the question of both criminal and civil liability is raised.[27] A staff member who is found to have used excessive force in subduing and detaining a patron suspected of theft could be charged with battery.[28]

Conclusions

This survey clarifies two points. First, the archivists surveyed were largely una-

ware of the laws that could have an impact on their organization. Second, the available tools, such as security policies and procedures, were not being fully employed.

Archivists need to confront their attitude toward security. Most security measures are being ignored in the name of providing better access to patrons. Some respondents expressed concern that there were already too many rules governing the use of archives. One archivist stated that it is "impossible to service the collection and provide security at the same time," and that [security] "makes it hard to maintain good patron relations." Similar to the manner in which archivists at the National Archives thought that they knew Charles Merrill Mount, some of the ARC archivists expressed the idea that they "knew their patrons well" and said that they "would be able to tell if something was missing from a collection."

No archivist seeks to damage patron relations, but the safety of the collections should come first. Trust should not be substituted for reasonable precautions. Archivists need to become as serious about security as they have become about preservation. What archivist would knowingly allow documents to remain in a room that had leaky water pipes overhead? Allowing access to collections without providing security is equally irresponsible. An archives should be able to safeguard its holdings from all threats, not simply floods and fires. The concern that some patrons would feel annoyed and inconvenienced by a tightening of security is well taken, but it does not justify a lackadaisical approach to enforcing reasonable rules. Since most archives do not serve large numbers of individuals each day, taking a few minutes to discuss security measures with anyone who asked would educate patrons about the need for such measures and would help to overcome any ill feeling. Although most archivists showed common sense in the situational portion of the survey, the archives need to develop a written policy governing theft

tionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property." It also states that "an official or adult employee or agent is privileged to defend the property of the library in the manner specified in this subsection."

[27]Jonathan S. Tryon, "Premises Liability for Librarians," *Library & Archival Security* 10, no. 2 (1990): 20.

[28]*Wisconsin Statutes 1989–1990*, p. 421. *940.19 Battery; Aggravated Battery*. "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor."

prevention, and staff response to theft. A written policy, with clearly defined limits, should promote consistency and provide some legal protection for the repository and its staff.

When formulating a policy, archivists should consult experts in the field of law enforcement. This step will help archivists limit the time they spend creating drafts of policies that may be ineffective or even illegal. Contacting the local police department or university police is the logical first step. All staff members should be encouraged to participate in the creation of the policy because they will be responsible for enforcing it. The repository's legal counsel should examine the policy before it is implemented, because the counsel will be responsible for defending the policy in the event of a lawsuit.

Once a policy has been approved, all staff members should receive a copy and be required to "sign off" on the document. This will ensure that each staff member reads and understands the policy. This procedure should be repeated annually, or each time the policy is modified. This sign-off procedure may provide legal protection to the archives if a staff member acts contrary to the policy and the action results in a lawsuit against the archives. Once the new policies are in place, all staff members should receive training so that they will know what they legally can do to protect themselves and the materials in their care. Such training is essential, and some aspects of the law, particularly those that deal with the use of physical force and detention of suspects, should be reviewed carefully. Although the law states that physical force or threats may be used to detain a suspected thief, it would be best to view such action as a last resort. Archivists receive no training in applying physical force against suspected thieves as part of their graduate work, and physical force applied by an untrained staff member could result in serious injury to the patron or the staff member. If the repository wants its employees to use physical force to stop suspected thieves from leaving the archives, the repository should provide the appropriate training.

A general guide for how staff members should respond to a suspected theft by a patron might be as follows:

- If possible, contact a co-worker before confronting the patron. The co-worker should be informed of what is taking place, so that he or she can provide assistance.
- The staff member should use the patron's name when informing him or her of the reason for the detainment. Using the patron's name conveys to the patron that he or she is not anonymous.
- The staff member should maintain a professional demeanor at all times, speaking to the patron in a calm and controlled manner. A properly trained staff member will know how to respond to the situation, and this confidence in his or her abilities will be projected to the patron.
- The staff member should attempt to move the situation to a private area as soon as possible.
- The staff member should avoid touching the patron except in self-defense.

An archives can provide increased levels of security for its holdings with a small investment of time and money. Law enforcement professionals and insurance investigators have a concept of "soft" versus "hard" security that is applicable to archives. "Soft" security focuses on policies, procedures, and training. "Hard" security focuses on detection devices, electronic monitoring equipment, or physical structure (i.e., thick doors or barred windows). Because of its cost, "hard" security is beyond the means of most repositories. Using the "soft" security idea, repositories should create policies and procedures governing the activities of the patron that promote the impression of tight security.

All patrons coming to the archives should be required to present photographic identification when they sign the logbook. The staff member on duty should watch the sign-in procedure to ensure that the name appearing on the identification matches the one that appears in the logbook.

All containers and personal effects should be kept separate from the tables in the reading room. If the repository possesses lockers for the personal effects of patrons, the lockers should be used at all times.

All archives should require the reading room to be adequately staffed at all times. This will ensure that one staff member can retrieve materials while another maintains security.

All repositories should use reference slips, and patrons should be required to sign them. A retention schedule should be established to ensure that the reference slips are available if they are needed later for investigating a theft. Such procedures are already widely employed, but they must be enforced by *all* staff members and for *all* patrons without exception.

Wisconsin's ARCs are probably typical of other archives across the country. The tools are there, in the form of policies and procedures, but they are not being fully used. With our present state of security awareness, it is not difficult to imagine the following scenario.

A staff member attempts to use physical force to stop a patron suspected of theft from leaving the archives. The patron is injured when attempting to leave. The patron is held until the police arrive, but no documents are found. When asked why he or she attempted to leave the archives, the patron responds, "Because the staff member was rude and abusive, and I did not feel that I should be subjected to such treatment."

This case would most likely end up in court, and the first question the patron's attorney would ask the director of the archives would be, "What is your policy on handling cases of suspected theft?" No archivist wants to respond, "We don't have one."