Sociological Methodology (2002) Vol.32, pp.1-17

ANTICIPATING LAW: RESEARCH METHODS, ETHICS AND THE LAW OF PRIVILEGE

Ted Palys
John Lowman

Our ethical obligation to protect the research confidentiality of individual participants is challenged when third parties use subpoenas in the context of criminal proceedings and civil litigation in an effort to order the production of confidential information. This paper discusses strategies researchers may employ in order to maximize their legal ability to maintain confidentiality in spite of those challenges. Use of existing statutory protections is the first choice, but these are available for only a subset of research related to health and criminal justice issues. In situations where statutory protections are not available, the Wigmore criteria may act as a guide for the design of research that maximizes researchers' ability to protect research participants by advancing a case-by-case claim for researcher-participant privilege. We discuss the legal basis for this conclusion and outline procedures that may be used to further strengthen confidentiality protections.

1. THE ETHICAL OBLIGATION TO PROTECT RESEARCH PARTICIPANTS

Survey research, field studies, and other contemporary social science research techniques involve construction of detailed, accurate records of

information about characteristics and behavior of specific, identified persons who serve as research participants. If divulged, some of these records can be used to harm research participants or others who are named in the records. Widely accepted ethical principles (e.g., such as those issued by the American Anthropological Association; American Political Science Association; American Society of Criminology; American Sociological Association) require researchers to conceal research information attributable to a particular individual from those who would use it for nonresearch purposes. In addition, the confidentiality of research records has been claimed as a pillar of the researcher's academic freedom, and that too has motivated academic researchers to restrict the access of others to research records (e.g., Wolfgang 1981).

Academic freedom and ethical principles of research scientists notwithstanding, third parties occasionally seek confidential research records concerning research participants. Historically, these threats have come from two major sources: (1) congressional committees, grand juries, prosecutors, and other law enforcement authorities who subpoenaed researchers in an effort to force them to divulge confidential research information to help prosecute research participants and/or others for offenses disclosed during the course of research; and (2) corporate litigants, including energy, tobacco, pharmaceutical, and computer giants who subpoenaed researchers either to discredit them or to enlist them in their litigious cause (Lowman and Palys forthcoming).

When social researchers have refused to divulge information about research participants to courts and governmental entities, subpoena powers backed by the threat of criminal penalties for noncompliance have been used to try to motivate researchers to reveal research records (Bond 1978; Carroll and Knerr 1975; Cecil and Wetherington 1996; Lowman and Palys forthcoming; Scarce 1994). Social science tradition in the face of such threats is to staunchly resist, both to protect research participants and to preserve academic freedom (Wolfgang, 1981). In two celebrated cases – those of political scientist Samuel Popkin (Caroll and Knerr 1973) and sociologist Richard Scarce (Scarce 1994) – this involved being incarcerated on charges of contempt of court.

Researchers can pre-empt the possibility of legal challenge and the prospective consequences of refusal to obey a subpoena or other court order to divulge confidential research records by removing identifiers or destroying the records *before* governments or courts express interest in

them.[1] Where this is not possible, researchers should design and conduct their research in ways that protect those records from disclosure to governments or courts by (1) establishing them as privileged (where that status is made possible by state or federal legislation); or (2) laying the foundation for that privilege to be recognized on a case-by-case basis in common law. This paper considers both strategies.

2. SHIELD LAWS

Because it bears many similarities to journalism, some types of social science research may enjoy confidentiality protection under the provisions of the First Amendment of the U.S. Constitution (McLaughlin 1999). Thirty-one states have enacted journalistic privilege laws, some of which could include researchers under their broad definition of "journalist." Delaware law explicitly includes scholars in its definition of “journalist” (McLaughlin 1999). But social science and journalism have obvious dissimilarities too, and this protection is absent or uncertain in many situations.

Some states have research shield laws. For example, New Hampshire protects data "obtained for the purposes of medical or scientific research by the commissioner [of Health and Human Services] or by any person, organization or agency authorized by the Commissioner to obtain such data" (*N.H. Rev. Stat. Ann.* §126-A:11). Minnesota (*Minn. Stat. Ann.* §144.053) and Michigan (*Mich. Comp. Laws* §333.2631 and -2632) have similar laws regarding health research (Fanning 1999).

Apparently in response to recognition that certain types of federally mandated research would not yield valid data unless research participants could be guaranteed confidentiality with respect to personal/identifying information, the U.S. Congress has enacted a series of research data confidentiality shield laws, beginning with legislation protecting the confidentiality of data supplied to the U.S. Bureau of the Census.

Later, to enable researchers to obtain information about drug abuse among soldiers returning from Vietnam, the Comprehensive Drug Abuse

[1] This is particularly appropriate when the destruction of records at the end of the study, or their anonymization at the earliest opportunity, is part of the researcher’s pledge and consistent with the research participant’s understanding at the time the record was created. We emphasize “before” because once that interest is expressed, the researcher likely would be considered in contempt of court for destroying evidence.

Prevention and Control Act of 1970 authorized the Secretary of Health Education and Welfare to issue to drug researchers “confidentiality certificates” that ensured immunity from compelled production of confidential research information (Madden and Lessin 1983).[2] Legislation in 1974 expanded confidentiality certificate coverage to mental health research in general, including studies of alcohol and other psychoactive drugs.[3] Currently, Section 301(d) of the *Public Health Service Act* (42 U.S.C. §241(d)) authorizes the U.S. Secretary of Health and Human Services to issue confidentiality certificates to researchers involved in any “health” research, whether funded by DHHS or not, where confidentiality is deemed essential for producing valid and reliable information**.** Authority to issue the certificates has been delegated to the individual agencies comprising DHHS. Receipt of a certificate protects the researcher from being compelled to produce confidential information in any court or other proceeding.[4]

In crime research, 42 *U.S.C.* §3789g provides that information collected using funds of the Office of Justice Programs (OJP) are immune from legal process and inadmissible as evidence "in any action, suit, or other judicial, legislative, or administrative proceedings." In addition, OJP-funded research is subject to 28 CFR Part 22 (§22.23), which requires all funding applicants to submit written certification that they not divulge confidential information pertaining to any identifiable private person. Once approved, confidentiality is guaranteed.

State shield laws can provide useful protection in certain circumstances, but the general utility of such laws is made uncertain by the combination of interstate differences in these laws (including their total absence in some states), and the common practice of researchers to use data that include research participants from several different states. The legal validity of federal research confidentiality certificate legislation has been challenged only once, and without success (*People of the State of New York* v. *Robert Newman* 1973; Nelson and Hedrick 1983). The decision referred to the confidentiality that the certificates provided as “absolute” (e.g., *People* v. *Newman* 1973 at par. 12, 15, 20, 43); the Supreme Court refused to hear an appeal.

[2] *Comprehensive Drug Abuse Prevention and Control Act* of 1970, Pub. L. No. 91-513, § 3(a)

[3] Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Amendments of 1974, Pub. L. No. 93-282, §122(b).

[4] For application instructions, see <http://www.nimh.nih.gov/research/confidentapp.cfm> and/or NIMH’s “frequently asked questions” page at <http://www.nimh.nih.gov/research/confidentfaq.cfm>.

3. ASSERTING RESEARCH-PARTICIPANT PRIVILEGE IN COMMON LAW

In the absence of shield law protection, researchers must rely on tests of "reason and experience" in common law to protect confidential research information from government and court-ordered disclosure. As Rule 501 of the *Federal Rules of Evidence* explains:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Similarly, in cases where no statutory privilege applies, state courts apply the same tests of reason and experience to adjudicate privilege claims.

We now describe how the common law of privilege operates. The discussion focuses on the "Wigmore test" -- four criteria that both federal and state courts use to adjudicate claims of privilege. We suggest that by designing their research to anticipate the evidentiary requirements of the Wigmore test, researchers can present the strongest possible evidence to sustain a claim of research-participant privilege. In the process, researchers not eligible for the guaranteed protection of confidentiality and privacy certificates can provide research participants with the fullest common law protection possible within the law as it stands today. State courts may differ in their application of the Wigmore test. Reliance on a particular state's peculiarities in this regard seems likely to have the same problems, discussed above, as reliance on a particular state's research and journalism shield laws. Our focus is thus on federal cases.

3.1. The Wigmore Criteria

When it was formulated at the start of the last century, the Wigmore test codified common law concerning claims of "a privilege against disclosure of communications between persons standing in a given relation" (Wigmore

1905: 3185). Privilege can exist on a class basis or it can be claimed on a case-by-case basis. A class-based privilege, such as attorney-client privilege, involves an assumption of privilege that places the onus of proof on any person who seeks to obtain confidential information to demonstrate why the privilege should be set aside. When the courts have not yet recognized a class privilege, privilege may still be claimed on a case-by-case basis, but here the onus of proof is on the person asserting the privilege. Research-participant privilege falls into the latter category; various courts have granted privilege to research participants when it has been claimed in particular cases (see Lowman and Palys forthcoming), but the U.S. Supreme Court has yet to hear a research-based case of privilege and make any pronouncement on the matter.

The Supreme Court of Canada has made it clear that anyone wanting to assert a case-by-case claim for privilege must do so using the Wigmore test (see *Inquest of Unknown Female* 1994; Jackson and MacCrimmon 1999; Lowman and Palys 2000; Palys and Lowman 2000; Sopinka, Lederman, and Bryant 1992). The test is also an accepted part of U.S. jurisprudence, having been used in 13 cases before the U.S. Supreme Court since 1900 and the U.S. Courts of Appeals since 1930,[5] and was used as a key basis for the federal rules of evidence regarding evidentiary privilege (see *In re Grand Jury Investigation* 1990 at par. 49). However, we know of no U.S. case in which the Wigmore criteria have been invoked to assert a claim for research-participant privilege. Indeed, in the literature describing these cases, the test is mentioned only in passing (e.g., Lempert and Saltzburg 1982; Nelson and Hedrick 1978; Traynor 1996). In contrast, in Canada, where only one researcher (Russel Ogden) has received a subpoena and been asked to divulge the identities of research participants, he successfully employed the Wigmore test to assert privilege. We will draw on his experience together with the experiences of several U.S. researchers in the process of describing the test's evidentiary requirements.

To qualify for case-by-case privilege, the Wigmore criteria require the following: "(1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between

[5] *American Civil Liberties Union of Mississippi* v *Finch* 1981; *Caesar* v *Mountanos* 1976; *Falsone* v *US* 1953**;** *Fraser* v *US* 1944; *Garner* v *Wolfinbarger* 1970; *In re Doe* 1983; *In re Grand Jury* 1997; *In re Grand Jury Investigation* 1990; *In re Grand Jury Proceedings Storer Communications* 1987; *In re Hampers* 1981; *Mullen* v *US* 1958; *Radiant Burners* v *American Gas* 1963; *Sandberg* v *Virginia Bankshares* 1992.

the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation" (Wigmore 1905: 3185; italics in original). A successful claim of privilege by the Wigmore test necessitates evidence that speaks to all four requirements (e.g., Crabb 1996; Daisley 1994; Jackson and MacCrimmon 1999; O'Neil 1996; *R.* v *Gruenke* 1991; Traynor 1996; Wiggins and McKenna 1996).

To illustrate the depth of this responsibility, it is useful to recall the experiences of Mario Brajuha, a State University of New York graduate student writing a thesis on the sociology of the American restaurant while working as a waiter in the restaurant in which he was conducting his research. The restaurant burned, and the grand jury investigating the suspected arson subpoenaed Brajuha to testify and sought his field notes, for which he claimed privilege. At trial**,** the judge granted the privilege, noting that, "Affording social scientists protected freedom is essential if we are to understand how our own and other societies operate" (quoted in O'Neil 1996: 41). However, while the U.S. Court of Appeals (Second Circuit) later accepted that a "scholar's privilege" *might* exist, they reversed the earlier court's decision on the grounds that the evidence presented was not sufficient to allow a decision on the claim in this case (Brajuha and Hallowell 1986; O'Neil 1996):

> Surely the application of a scholar's privilege, if it exists, requires a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality. Brajuha has provided none of the above. (*In re Grand Jury Subpoena Dated January 4* 1984: 14).

We suggest that designing one's research in anticipation of meeting the requirements for privilege that are embodied in the Wigmore criteria will help the researcher address the court's concerns and thereby maximize the protection they can offer research participants through

the common law. We now review the criteria and their implications for research design.

3.2. Designing Research to Assert Research-Participant Privilege

Establishing a Shared Understanding of Confidence. Wigmore (1905: 3233) wrote, "The moment confidence ceases, privilege ceases." In practical terms, this means that researchers should ensure there is a clear "expectation of confidentiality" that is shared by researcher and participant, and that the research record includes evidence that speaks to that understanding.

It is because of having poor evidence with respect to this criterion that subpoenaed researchers such as Mario Brajuha and Richard Scarce (see Brajuha and Hallowell 1986; Scarce 1994) faced an uphill legal battle right from the start.[6] In their cases, part of the problem was that they had not even clearly established that their interactions were part of a researcher-participant relationship; neither had completed a prospectus that had been subjected to ethics review. Consequently**,** there was no record of the pledge they had made to participants, or any affirmation that they were engaged in an activity that was university approved and being executed in accordance with the canons of their discipline. Nor had either of the two kept records of their and participants' understanding regarding confidentiality in field notes. Brajuha, for example, could say only that he had guaranteed confidentiality to some but not all participants, and could not recall to whom he had guaranteed confidentiality, and to whom he had not (Brajuha and Hallowell 1986; O'Neil 1996).

In contrast, when the Vancouver Coroner subpoenaed Russel Ogden (see *Inquest of Unknown Female* 1994; Lowman and Palys 2000) and asked him to identify two of his research participants who may have witnessed a death, Ogden spoke directly to the first criterion. Evidence presented to the court showed that he had completed and revised several proposals in collaboration with his supervisory committee; that he had undergone research ethics review; and that he could produce copies of the pledge of confidentiality he had made to prospective participants. Taken together,

[6] Brajuha and Scarce both were unsuccessful in claiming privilege; indeed Scarce was incarcerated for 159 days. Our intention is not to chastise these two former students, who showed incredible strength and principle in situations where they clearly had received poor advice and were abandoned by their universities, but to learn from their experience.

this evidence made it abundantly obvious to the coroner reviewing his case that Ogden was indeed engaged in “research;” that officials at the university, both in criminology and on the University Research Ethics Review Committee, had read and approved his plan; that it reflected the highest ethical standards of his discipline; and that both he and his participants shared the understanding that their interactions were completely confidential. It is interesting that although there had never been a case in Canada where a legal authority had subpoenaed a researcher and asked him or her to reveal confidential information, Ogden and his supervisor correctly anticipated that if anyone were to challenge the confidentiality of their information it would be the coroner. Part of Ogden’s pledge was that he would refuse to divulge any identifying information even if threatened with contempt of court.

A matter of no small importance with respect to criterion one is that Ogden’s pledge to participants was unequivocal; anything less could undermine the researcher’s ability to meet the first Wigmore criterion because it runs the risk of being treated as a “waiver of privilege” by the courts. As this suggests, one implication of Wigmore is that the stronger the guarantee, the more clearly one “passes” this first part of the test. Conversely, protections for research participants can be substantially weakened by researchers’ discussions with potential participants of the potential threat of court-ordered disclosure of confidential information - unless it is to reaffirm that they will continue to maintain confidentiality in the face of such legal force - and of any limits they would impose on confidentiality. For example, in *Atlantic Sugar* v *United States* (1980), corporate respondents to an International Trade Commission questionnaire were told that the information they provided would not be disclosed "except as required by law." A U.S. Customs Court later used this exception to justify its order of disclosure of research information from researchers.

Establishing that the Confidence is Essential. Because common law assertions of researcher-participant privilege are decided on a case-by-case basis, general claims about the importance of confidentiality to research are helpful but not sufficient. Researchers also should be prepared to demonstrate that confidentiality was crucial to their ability to do the research *in the case in question* (Daisley 1994; Jackson and MacCrimmon 1999; Palys and Lowman 2000; Traynor 1996). Traynor (1996) suggests that evidence of the necessity of confidentiality should be created at the outset by addressing the issue in research proposals, in

part to show that the pledge of confidentiality was part of a considered plan and neither capricious nor rote. For example, Ogden's research proposal explicitly discussed why he believed that it would be impossible to gather reliable and valid data and to meet the ethical standards of his discipline unless he was prepared to offer "absolute" confidentiality to those participants who wanted it.

Claims that confidentiality was “essential” can be weakened by researcher behavior that courts view as inconsistent with such claims. For example, Scarce’s claims that confidentiality was essential to gather valid data concerning law violations by animal rights activists apparently were weakened by his non-research relationship with a particular participant, and by the presence of his wife at a key meeting where the court believed a confession may have been made, when the wife had not been shown in evidence to be conducting the research (*In re Grand Jury Proceedings: James Richard Scarce* 1993; O’Neil 1996; Scarce 1994 1999).

Conversely, claims that confidentiality was essential can be strengthened by asking participants directly – and recording their answers – as to whether they would participate in the research if confidentiality were not guaranteed. Ogden specifically asked his two groups of research participants how important the provision of confidentiality was to their participation. Most members of the first group -- persons with AIDS who merely reported their attitudes regarding assisted suicide and euthanasia -- indicated that anonymity was *not* vital to their participation. However, members of the second group -- persons who answered questions about actual deaths they had attended and participated in -- were unanimous in stating they would divulge information to Ogden *only* if he were committed to maintaining their anonymity. The two individuals who had attracted the coroner's attention were members of the second group, and the coroner found this evidence persuasive in showing that the information he sought would never have existed in the first place had it not been for the strength of Ogden’s guarantee, and that he was now obliged ethically to live by that pledge (*Inquest of Unknown Female* 1994).

In some cases it is possible that evidence comparable to Ogden’s can be developed *after* a subpoena is served. For example, after being served with a subpoena for confidential research information including reports of sexual practices, researchers at the Center for Disease Control (CDC) contacted research participants and asked if they would object to disclosure of that information to the Proctor and Gamble Corporation (*Farnsworth* v *Proctor and Gamble* 1985). The participants objected, and

this was reported to the court, which agreed that the participants should not be identified.

Establishing that the Community Values the Relationship. Criterion three asks whether the relationship under scrutiny is so socially valued that "the community" believes it warrants vigorous protection. There are many communities that can be considered here, including, for example, the research community itself; the community of which participants in the research at hand are members; the social policy communities who seek independent research information for policy formulation and implementation processes; and the broader citizenry, who benefit from the knowledge created through research. Although much of this information would come from expert testimony when and if the researcher is subpoenaed, there is evidence that can be gathered and material that should be retained as one goes through the process of preparing for and executing the research.

For example, with respect to the research community, any research that has satisfied peer review, secured funding, and/or undergone ethics review, is clearly valued by the research community. Added to these sources of evidence is the extant jurisprudence on research-participant privilege, where an abundance of evidence from the courts themselves attests to the value to society of academic research (e.g., see *Dow Chemical* v *Allen* 1982; *In re: Michael A. Cusumano and David B. Yoffie* 1998; *Richards of Rockford* v *Pacific Gas and Electric Co*. 1976).

A Balancing of Interests. Well-designed social science research on sensitive topics that anticipates the evidentiary requirements of the Wigmore test should satisfy the first three criteria comfortably. In the case of the fourth criterion, the court balances the social values upheld in the researcher-participant relationship and the negative impacts to that relationship that would result from a violation of confidentiality against the costs that would be incurred by withholding relevant evidence in the case at hand. At one level, there is little the researcher can prepare for here, since one never knows for sure when a subpoena will arise, and hence what the other half of the equation will be. At the same time, it is instructive to consider the implications of this criterion for the way we go about research.

In general, US courts have not ordered disclosure unless there is a compelling need for the information, the testimony or documents are directly relevant to the case at hand, and no alternative source of information exists. Even then, the court still must determine that its interest in the information outweighs the damage to research that would be done by disclosure. The challenge to the court is always to fashion a resolution that respects both sets of interests. In this regard, there are two distinguishable sets of interests that have fared very differently in court – the interests of researchers, and that of research participants.

We mention this distinction because we believe a misnomer characterizes much of the writing about privilege in the US, where one often sees reference to “a researcher’s privilege,” “academic privilege,” or “a scholar’s privilege” (e.g., Levine and Kennedy 1999; O’Neil 1996). Stated briefly, we do not believe that one exists, nor that one necessarily should exist, over and above the protection that the research enterprise should have from interests that would engage in harassment and intimidation via litigation and thereby chill academic freedom or “punish” particular researchers or agencies for their independence. University research is a largely publicly funded enterprise whose canons extol the virtues of openness, accountability, and freedom of inquiry. As long as freedom of inquiry and the ability to do research are not affected, academics are obliged to disseminate the fruits of their labour and respond to critique. Decision-making in US courts is consistent with that view (Lowman and Palys forthcoming).

With respect to research participant rights, however, we see a very different story, and suggest that the pattern of US jurisprudence has made research-participant privilege a *de facto* reality. At times courts seem to go out of their way to protect participants (e.g., *In re Grand Jury Subpoena Dated January 4* 1984), apparently understanding that when volunteer participants can no longer trust their interests will be protected, the research enterprise is done.

Whether researcher-participant privilege, or any privilege, should be subject to the balancing considerations reflected in criterion four, is itself a matter of some debate. In *Jaffee* v *Redmond* (1996), the US Supreme Court showed it was cognizant of the dilemma when it discussed the US Court of Appeals’s argument that psychotherapist-patient privilege should be qualified:

> We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality con-

> tingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn,* if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Researchers face exactly this dilemma. One of the basic principles of natural justice is that law should be known in advance. The problem with case-by-case analysis is that what we know in advance is that the law will be made after the fact while researchers must make their decisions ahead of time. However, after a five-year search of the literature describing the subpoenaing of researchers, we have yet to find a case where, in the absence of a research-participant waiver of privilege, violating a research confidence would have been the ethical thing to do. Whatever circumstances arise, using the Wigmore criteria as a guide to research design allows the researcher to anticipate the evidentiary concerns of the courts in a way that maximizes protection of research participants by creating the best case for recognition of a researcher-participant privilege.

4. CONCLUSION

The American Sociological Association ethics code asserts that researchers have an ethical obligation to be *aware* of relevant law, to make an *ethical* decision about the degree of confidentiality they are prepared to promise and then to abide by that pledge (Levine and Kennedy 1999). Understanding the law of privilege does not confine our ethical sensibilities, but is a prerequisite to using law in the service of ethics. This understanding will minimize the likelihood of law and ethics coming into conflict, and may even positively affect the future development of law.

To the extent that some statutory protections already exist, researchers should use them whenever they can. But the protections afforded by

federal and state laws are limited. When statutory protections are not available, researchers must turn to the common law to assert privilege. An examination of U.S. jurisprudence suggests that the courts generally have respected *research-participant privilege.* When confidentiality is essential to the research, many U.S. courts have recognized that releasing the names of respondents would have a profoundly chilling effect on research participation, thereby jeopardizing research and the social benefits that flow from it (Lowman and Palys forthcoming). U.S. jurisprudence on research-participant privilege clearly recognizes that, without people willing to participate, there is no research enterprise (e.g., see Picou 1996).

We have argued that knowledge of the common law of privilege allows researchers to proactively design research in a way that maximizes legal protections for research participants. The primary advantage of a claim of privilege according to common law is that all researchers can assert it using criteria that can be anticipated. In this regard, we have suggested that the Wigmore test provides a useful framework for researchers to anticipate the evidentiary requirements of the courts.

The more that researchers use the Wigmore criteria as a guide to anticipate the evidentiary requirements of the courts, the more likely the courts will be to respond with positive decisions that may culminate in the formal recognition of research-participant privilege. Indeed, the next researcher to be subpoenaed might consider arguing that such a privilege has already been established in U.S. jurisprudence in all but name.

REFERENCES

Bond, K. 1978. “Confidentiality and the Protection of Human Subjects in Social Science Research: A Report on Recent Developments.” *American Sociologist* 13: 144-152.

Brajuha, M., and L. Hallowell. 1986. "Legal Intrusion and the Politics of Field Work: The Impact of the Brajuha Case." *Urban Life* 14: 454-78.

Caroll, J. and C. Knerr. 1973. "Confidentiality of Social Science Research Sources and Data: The Popkin Case." *Political Science Quarterly* 6: 268-80.

------. 1975. "A Report of the APSA Confidentiality in Social Science Research Data Project." *Political Science Quarterly* 8: 258-61.

Cecil, J., and G. T. Wetherington (eds.) 1996. *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law.* Special Edition of *Law and Contemporary Problems* 59(3).

Crabb, B. B. 1996. "Judicially Compelled Disclosure of Researchers' Data: A Judge's View." *Law and Contemporary Problems* 59(3): 9-34.

Daisley, B. 1994. "Clear Evidence Needed to Invoke Wigmore Rules." *Lawyer's Weekly*. 9 December: 28.

Fanning, J. 1999. "Privacy and Research: Public Policy Issues." Unpublished paper. Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human Services.

Jackson, M., and M. MacCrimmon. 1999. “Research Confidentiality and Academic Privilege: A Legal Opinion.” Submission prepared for the Simon Fraser University Ethics Policy Review Task Force. Available at <http://www.sfu.ca/~palys/JackMacOpinion.pdf>.

Lempert, R.O., and S. A. Saltzburg. 1982. *A Modern Approach to Evidence: Text, Problems, Transcripts and Cases*. (2nd ed.) St. Paul, Minnesota: West Publishing Co.

Levine, F., and J. M. Kennedy. 1999. "Promoting a Scholar's Privilege: Accelerating the Pace." *Law and Social Inquiry* 24: 967-76.

Lowman, J., and T. S. Palys. 2000. "Ethics and Institutional Conflict of Interest: The Research Confidentiality Controversy at Simon Fraser University." *Sociological Practice: A Journal of Clinical and Applied Sociology*, *2*(4), 245-55.

------. Forthcoming. "The Ethics and Law of Confidentiality in Criminological Research." *International Journal of Criminal Justice*.

Madden, T. J. and H. S. Lessin. 1983. "Statutory Approaches to Ensuring the Privacy and Confidentiality of Social Science Research Information: The Law Enforcement Assistance Administration Experience." Pp.263-72 in *Solutions to Ethical and Legal Problems in Social Research*, edited by R. F. Boruch & J. S. Cecil. New York: Academic Press.

McLaughlin, R. H. 1999. "From the Field to the Courthouse: Should Social Science Research be Privileged?" *Law and Social Inquiry* 24: 927-66.

Nelson, R. L., and T. E. Hedrick. 1978. "The Statutory Protection of Confidential Research Data: Synthesis and Evaluation." Pp.213-38 in *Solutions to Ethical and Legal Problems in Social Research*, edited by R. F. Boruch & J. S. Cecil. New York: Academic Press.

O'Neil, R.M. 1996. "A Researcher's Privilege: Does any Hope Remain?" *Law and Contemporary Problems* 59(3): 35-50.

Palys, T. S., and J. Lowman. 2000. Ethical and Legal Strategies for Protecting Confidential Research Information. *Canadian Journal of Law and Society*, *15*(1), 39-80.

Picou, J.S. 1996. "Compelled Disclosure of Scholarly Research: Some Comments on "High Stakes" Litigation." *Law and Contemporary Problems* 59(3): 149-57.

Scarce, R. 1994. "(No) Trial (But) Tribulations: When Courts and Ethnography Conflict." *Journal of Contemporary Ethnography* 23: 123-49.

------. 1999. "Good Faith, Bad Ethics: When Scholars Go the Distance and Scholarly Associations Do Not." *Law and Social Inquiry* 24: 977-86.

Sopinka, J., S. N. Lederman, and A. W. Bryant. 1992. *The Law of Evidence in Canada*. Toronto: Butterworths.

Traynor, M. 1996. "Countering the Excessive Subpoena for Scholarly Research." *Law and Contemporary Problems* 59(3): 119-48.

Wiggins, E. C., and J. A. McKenna. 1996. "Researchers' Reactions to Compelled Disclosure of Scientific Information." *Law and Contemporary Problems* 59(3): 67-94.

Wigmore, J. H. 1905. *A Treatise on the System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States, England, and Canada*. Boston: Little, Brown and Company.

Wolfgang, M. 1981. Criminology: Confidentiality in Criminological Research and Other Ethical Issues. *Journal of Criminal Law and Criminology*, 72, 345-61.

Cases Cited

American Civil Liberties Union of Mississippi v *Finch* (1981). 638 F.2d 1336 (5th Cir.).

Atlantic Sugar, Ltd v *United States* (1980). 85 Cust. Ct. 128.

Caesar v *Mountanos* (1976). 542 F.2d 1064 (9th Cir.).

Dow Chemical v *Allen* (1982). 672 F.2d 1262 (7th Cir.).

Falsone v *United States* (1953). 205 F.2d 734 (5th Cir.).

Farnsworth v *Proctor and Gamble Company* (1985). 758 F.2d 1545, 1546-47 (11th Cir.).

Fraser v *United States* (1944). 145 F.2d 139 (6th Cir.).

Garner v *Wolfinbarger* (1970). 430 F.2d 1093 (5th Cir.).

Inquest of Unknown Female (19944). Oral Reasons for Judgement, the Honourable L.W. Campbell, Vancouver Coroner. Case file 91-240-0838.

In re Doe (1983). 711 F.2d 1187 (2nd Cir.).

In re Grand Jury (1997). 103 F.3d 1140 (3d Cir.)

In re Grand Jury Investigation (1990). 918 F.2d 374 (3rd Cir.).

In re Grand Jury Proceedings: James Richard Scarce (1993). 5 F.3d 397 (9th Cir.).

In re Grand Jury Proceedings Storer Communications (1987). 810 F.2d 580 (6th Cir.).

In re Grand Jury Subpoena Dated January 4 (1984). 750 F.2d 223. (2nd Cir.).

In re Hampers (1981). 651 F.2d 19 (1st Cir.)

In re: Michael A. Cusumano and David B. Yoffie (1998). CA1-QL 567 (1st Cir.).

Jaffee v Redmond (1996). *518 U.S. 1, 95-266.*

M.(A.) v *Ryan* (1997). 1 S.C.R. 157.

Mullen v *United States* (1958) CADC-QL 156 No. 14663 (DC Cir.).

People of the State of New York v *Robert Newman* (1973). 32 N.Y.2d 379, 298 N.E.2d 651, 345 N.Y.S.2d 502 *cert. denied*, 414 U.S. 1163.

R. v *Gruenke* (1991). 3 S.C.R. 263.

Radiant Burners v *American Gas* (1963). 320 F.2d 314 (7th Cir.).

Richards of Rockford, Inc. v Pacific Gas and Electric Company (1976). 71 F.R.D. 388 (N.D. Cal.).

Sandberg v *Virginia Bankshares* (1992).. 979 F.2d 332 (4th Cir.).

Upjohn Co. v *United States* (1981). 449 U.S. 383.