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Defending Research Confidentiality "To the Extent the Law Allows:" Lessons From the Boston College Subpoenas

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Abstract Although in the US there have been dozens of subpoenas seeking information gathered by academic researchers under a pledge of confidentiality, few cases have garnered as much attention as the two sets of subpoenas issued to Boston College seeking interviews conducted with IRA operatives who participated in The Belfast Project, an oral history of The Troubles in Northern Ireland. For the researchers and participants, confidentiality was understood to be unlimited, while Boston College has asserted that it pledged confidentiality only "to the extent American law allows." This *a priori* limitation to confidentiality is invoked by many researchers and universities in the United States, Canada and Great Britain, but there has been little discussion of what the phrase means and what ethical obligations accompany it. An examination of the researchers' and Boston College's behaviour in relation to the subpoenas provides the basis for that discussion. We conclude that Boston College has provided an example that will be cited for years to come of how *not* to protect research participants to the extent American law allows.

Keywords Research confidentiality · Boston College · Belfast Project · Legal cases · Limited confidentiality · Ethics-first

Although in the United States there have been dozens of subpoenas seeking information gathered by academic researchers under a pledge of confidentiality (e.g., Cecil and Wetherington 1996; Lowman and Palys 2001), few cases have garnered as much attention as the two sets of subpoenas issued to Boston College in 2011 by the US Attorney General acting on a request from the United Kingdom under the UK-US Mutual Legal Assistance Treaty (MLAT) regarding criminal matters. The subpoenas sought interviews from Boston College's "Belfast Project," an oral history with former republican and loyalist paramilitaries

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who had first-hand knowledge about bombings, kidnapping and murders committed during The Troubles[1] in Northern Ireland. Many aspects of the case contribute to its notoriety, particularly the conflict that developed between Boston College, which coordinated the project and is the legal guardian of the archive housed in its Burns Library, and the researchers over the degree of confidentiality that was promised to research participants. The conflict exemplifies the two approaches that have developed over the past 40 years to the threat of court-ordered disclosure of confidential research information.

On the one hand the researchers—Mr. Ed Moloney, the Project Director, Dr. Anthony McIntyre, who interviewed republicans, and Mr. Wilson McArthur, who interviewed loyalists—advocate an ethics-first approach (Lowman and Palys 2007). According to this doctrine, the researcher's primary commitment is to protect the welfare of research participants. In the absence of a more compelling ethical motive, this commitment means that they would maintain confidentiality even if it means defying a court order to disclose confidential research information and being jailed for contempt of court.[2] On the other hand are researchers and university administrators who advocate a Law of the Land approach (Brewer 2012; Clayman 1997; Comarow 1993), which holds that academic institutions and researchers must always obey the law, including a court order to violate research confidentiality. Consequently, in the interest of obtaining informed consent, they must declare this limitation to confidentiality to research participants at the outset.

The researchers have made it clear at every point that the pledge of confidentiality they made was not limited in any way and have stated they will do whatever it takes to protect research participants, including defying any disclosure order and refusing to participate in any attempt to prosecute the participants. It is less clear what Boston College pledged, because its account has changed over time and in different sources.[3]

The major emphasis of Boston College's spokesperson Mr. Jack Dunn since Judge William Young of the District Court of Massachusetts initially ordered that two sets of interviews be turned over to the UK has been on a section in the College's agreement with Moloney that stated:

> Each interviewee is to be given a contract guaranteeing to the extent American law allows the conditions of the interview and the conditions of its deposit at the Bums Library, including terms of an embargo period if this becomes necessary, as outlined herein. An appropriate user model, such as Colombia University's Oral History Research Office Guidelines statement, should be adopted.[4]

[1] The Troubles constituted the most recent period of armed conflict over the sovereignty of Northern Ireland dating back 300 years. The conflict involved mostly Catholic republicans seeking to unite Ireland under independent rule in armed conflict with mostly Protestant loyalists, who support Northern Ireland's continued membership in the U.K. The *Good Friday Agreement* of 1998 led to formal ceasefires by the main republican and loyalist paramilitary organizations involved (http://www.dfa.ie/uploads/documents/Anglo-Irish/good%20friday%20agreement.pdf).

[2] The literature reveals two instances in which researchers actually went to jail—Samuel Popkin, a Harvard University political scientist, in 1972, and Rik Scarce, a Washington State University graduate student in sociology, in 1994 (see Popkin 2001; Scarce 1994).

[3] See *Boston College confidentiality—Public references to agreement* at http://bostoncollegesubpoena.wordpress.com/2012/01/02/boston-college-confidentiality-public-references-to-agreement/ and http://bostoncollegesubpoena.wordpress.com/2012/02/26/boston-college-confidentiality-public-references-to-agreement-2/

[4] *In RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price.* (hereafter *In RE: Request from the UK re Dolours Price*). M.B.D. No. 11-MC-91078. Moloney Agreement. Attachment to affidavit of Robert K. O'Neill. Document 5-6. Online at http://bostoncollegesubpoena.wordpress.com/exhibits/respondent-moloney-agreement/

Dunn has asserted the phrase "guaranteeing to the extent American law allows" referred to the length to which Boston College was prepared to go to defend confidentiality in the event of a subpoena. However, Boston College did not articulate this claim in its initial Motion to Quash the first subpoenas, and the College's "Agreement for Donation" (hereafter the Donor Agreement) did not inform participants about this alleged limitation. Moloney believed the two sentences in his contract referred not to participant confidentiality but to Boston College's desire to ensure unambiguous copyright and clarify conditions of access to the archive (Moloney and McIntyre 2012). If that was not the case, then presumably the College would have ensured that its agreement with interviewees included this vital proviso on which the study hinged. Interviewees would not have consented to be interviewed had they known that the Belfast Project archive was not truly confidential, nor would the researchers have conducted the interviews in the first place.

When Boston College received the first set of subpoenas, it brought a motion to the District Court to have them struck down. But the College decided not to appeal a subsequent order to release one particular interview, and handed dozens more to the court. Its actions thus raise questions about what it would mean for Boston College to defend research-participant confidentiality "to the extent that American law allows."

An examination of the College's behaviour in this important case is useful for that reason alone, but has broader applicability as Boston College is not the only institution to limit its pledge of confidentiality to research participants to the extent that law permits. For example, after a student at Simon Fraser University became the first Canadian researcher ever to be subpoenaed and asked to divulge confidential information to a court, the university's Vice President for Research attempted to introduce a policy that would have required any researcher who anticipated hearing about illegal behaviour to pledge that confidentiality would be maintained unless disclosure was "required by law" (Clayman 1997; Lowman and Palys 2000). The university eventually withdrew that policy after recognizing its imposition to be a violation of academic freedom. SFU now allows researchers to choose whether they will adhere to their ethical commitment to confidentiality or their obligation to disclose in response to a legal order. However, at least one other Canadian university still requires researchers to limit confidentiality by law (Bernhard and Young 2009; Palys and Lowman 2010; Social Sciences and Humanities Working Committee on Research Ethics 2004) notwithstanding the Tri-Council Policy Statement's respect for the ethics-first position (Canadian Institutes of Health Research et al. 2010),[5] as one would expect of an "ethics" policy. Some researchers and universities in the United States (Adler and Adler 2002) and Great Britain (Brewer 2012) adopt and sometimes impose a Law-of-the-Land doctrine. Indeed, in Great Britain it is unclear whether universities even permit researchers the academic freedom to make an ethical pledge that is not limited by law (Lowman and Palys in submission).

But what exactly do such phrases mean? When a university or researcher includes such a warning about the possibility of disclosure in order to secure informed consent, is their ethical duty over? Or are there other ethical obligations incurred by universities or researchers who limit their commitment to confidentiality this way? There has been little discussion of these issues despite the phrase's widespread use and its profound ramifications. Scrutiny of Boston College's behaviour in relation to the Belfast Project provides the vehicle for that discussion.

[5] The policy holds that "Researchers shall maintain their promise of confidentiality to participants within the extent permitted by ethical principles and/or law" (p. 58).

Origins of the Belfast Project

The 1998 *Good Friday Agreement* began a process that attempted to end the Troubles in Northern Ireland. As part of the peace process attention turned to reconciliation and the lessons learned from the protracted period of violent sectarian conflict. The idea for the Belfast Project originated when Boston College Librarian Robert O'Neill approached historian Paul Bew while he was a visiting professor at Boston College in 1999 and 2000 about the possibility of creating some sort of historical record of the Troubles. When Bew returned to Belfast he contacted Moloney, an Irish journalist who has written extensively about the conflict, who proposed an oral history, in part because of his appreciation of a project conducted after the Anglo-Irish War of 1919–21:

> "[The Irish oral history project] was a very, very valuable historical archive and it was conducted and paid for by the government," Moloney said in an interview. "I had always been an admirer of this. I had thought, 'Wouldn't it be great to do something like this in Northern Ireland and the Troubles?' for a very simple reason, and that is that history books and accounts of history are normally written by the leaders—by the people who are the generals and politicians, who emerge at the end of the day at the top of the heap. Very rarely do they reflect the views or the experiences and life stories of people who are at the ground level in these conflicts" (Cote 2012a).

It was clear to all those involved that if such an oral history were to be undertaken, several conditions had to be met for it to succeed. Confidentiality of the archive would be essential: interviewees would be sharing information about criminal activity, much of which would never have been prosecuted, and the interviewees and one of the interviewers had, after all, been members of an organization that meted out the death penalty to people who were alleged to be informers.

Boston College hired Moloney as Project Director. As a journalist, his commitment to protecting sources had been tested when he was served with a court order in 1999 under the *UK Prevention of Terrorism Act* that sought his interview notes with a member of a Protestant paramilitary group who had been charged with the murder of Belfast lawyer Pat Finucane. Moloney refused to turn over his notes and sought to have the order quashed. In a briefing note written before his hearing, he stated:

> The issues are very simple. If I give up these notes I may as well quit as journalist. The betrayal of trust involved would mean that nobody could trust me from thereon not to pass on information to the police given to me in confidence. …. If this attempt to force me to cross the divide between reporting and evidence gathering for the police is successful then no journalist is safe (Moloney 1999).

Moloney won the case. National Union of Journalists General Secretary John Foster affirmed the decision "was a blow to attempts by the authorities to undermine the independence and integrity of the media by commandeering material to trawl for evidence" (Gopsill 1999).

Anthony McIntyre was hired to conduct the republican interviews. McIntyre had been a Provisional IRA volunteer and spent 18 years in Northern Irish prisons including the Maze, after which he attended Queen's University in Belfast where he earned a doctorate. Clearly he understood what he was getting himself into, a man who IRA members could trust. Wilson McArthur, who was familiar with the loyalist Ulster Volunteer Force (UVF) and also had completed a degree at Queen's, was hired to perform the loyalist interviews.

Meanwhile, Boston College was finding funds to get the project going. Although some funding was eventually obtained from an Irish-American entrepreneur/philanthropist, the

College provided the lion's share. Boston College appeared to be the ideal site for such a project as it was already widely recognized for its special relationship with Ireland and its neutrality with respect to the armed conflict. Thomas Hachey, a historian who became executive director of Boston College's Center for Irish Programs, and Burns Librarian Robert O'Neill saw in the Belfast Project an opportunity to further enhance and solidify the College's reputation. As the two would later write in their preface to *Voices From the Grave*, the first publication to be generated from the Belfast Project archive:

> It is the Burns Library, however, arguably the crown jewel of the Boston College Centre for Irish Programmes, that provides the ideal repository for this unique archive. The extensive holdings of the Burns have long attracted researchers from all over the globe, including many of the most distinguished chair-holders throughout Britain and Ireland. (Hachey and O'Neill 2010: 2–3)

Boston College clearly viewed the Belfast Project as a significant acquisition. Indeed, the archive is stored in the aptly named "Treasure Room" in Burns Library.

Due Diligence, Institutional Conflict of Interest and Ethics Review

Although the pride evident in Hachey and O'Neill's description is understandable, it also reveals an institutional conflict of interest in Boston College's involvement in the Belfast Project. Boston College had much to gain by acquiring such an important archive. And yet, there were ethical issues to be addressed, the most obvious of which was how to ensure that the confidentiality of participants could be safeguarded. As sponsor and coordinator of the project with a priceless archive to gain, and especially given the significant harms that could befall participants, not to mention the peace process in Northern Ireland, independent ethics oversight should have been the institutional order of the day.

When we contacted the Chair of the Boston College Institutional Review Board (IRB) to inquire whether the Belfast Project had undergone ethics review, the Chair sent a "Statement from Boston College" by College spokesperson Jack Dunn, which stated in part, "The interviews took place beginning in 2000, several years before the established federal guidelines that guide all current research activity were established."[6] In a subsequent email, Dunn explained that the project did not require review because it was not "research" as defined by "the federal definition of research," which is "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalized knowledge." Dunn's email added:

> In the case of the Belfast Projects, there was no systematic study; there was no hypothesis; and standard research methods were not used. The interviews were largely conversations, recorded in an attempt to get a better understanding of The Troubles for the sake of posterity.[7]

There are three problems with this explanation. First is Dunn's claim that the Belfast Project interviews did not constitute "systematic study" and were simply "conversations … for the sake of posterity" that did not seek "to contribute to generalized knowledge." To

[6] Email from Vincent Lynch, PhD, Chair, Boston College IRB, to Palys dated 12 January 2012, including "Statement from Boston College" signed by Jack Dunn, University Spokesperson.

[7] Email from Jack Dunn, University spokesperson, Boston College, to Palys dated 20 January 2012. Dunn made the same claim to journalist David Cote (2012b).

dismiss the interviews as mere "conversations" is to denigrate oral history, even though the College went to considerable trouble to ensure that the project met professional standards. Further, Boston College's motion to quash the first set of subpoenas contradicted Dunn's subsequent claim that the study did not seek generalizable knowledge:

> The purposes of the Belfast Project were to gather and preserve for posterity recollections that would help historians and other academicians illuminate the intricacies of the Northern Ireland conflict in studies and books, *and that would advance knowledge of the nature of societal violence in general*, through a better understanding of the mindset of those who played a significant part in the events in Northern Ireland (emphasis added).[8]

Second, the explanation is not consistent with the Boston College ethics policy when the Belfast Project began. Using the "Wayback Machine" at web.archive.org, we secured a copy of Boston College's ethics policy at the time the Belfast Project was being formulated. The Wayback archive we accessed for Boston College was for 11 February 2001. The date on the ethics policy in effect at that time was 30 December 1996. The document reveals that an institutional ethics review board was in place operating under the aegis of the Common Rule (45 CFR 46). The policy stated that:

> It is the policy of Boston College that, except for those categories specifically exempted by 45 CFR 46 and certain course-related, classroom research projects involving human subjects, all research will be reviewed and approved by the BCIRB, established in accordance with DHHS guidelines. The collection of data and involvement of human subjects in research covered by this policy will not be permitted until the Department/School Human Subject Committee and/or BCIRB has reviewed and approved the research protocol and informed consent has been obtained in accordance with and to the extent required by 45 CFR 46.116.[9]

Oral history was not among the exempted forms of research.[10]

Third, even if review by the Boston College IRB was not required, submitting the project for review nonetheless would be advisable for several reasons. To begin with, there was the institutional conflict of interest noted above. With Boston College both the initiator and primary funder of the project, it would be advisable to have an independent ethics review of the proposal given the degree of risk to research participants:

> The reason those interviewed for the Belfast Project insisted on confidentiality was not simply their interest in not incriminating themselves or their colleagues. In the case of former IRA members such as Dolours Price, of equal or greater importance was the danger of retaliation from other IRA members. The IRA imposes a code of silence akin to the concept of "omerta" in the Mafia. … Because those who were perceived as having violated that code were subject, under IRA rules, to punishment by death,

[8] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 5. Motion of Trustees of Boston College to Quash Subpoenas, p.5. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-to-quash/

[9] Boston College (30 December 1996). *Policies and Procedures for Use of Human Subjects in Research*. Online at http://web.archive.org/web/20010211141503/http://www.bc.edu/bc_org/avp/gsas/ora/HumSubjPol.pdf, p.1.

[10] In 2003 the Office of Human Research Protections accepted representations that many, though not all, oral history projects did not meet the conventional definition of "research" and thus should not require ethics review. Even today, however, it is questionable whether the Belfast Project would be exempt. At the very least it would have to be submitted to the IRB to determine its status.

> interviewers and interviewees who had been associated with the IRA were naturally unwilling to participate in the Belfast Project without assurance that the interviews would be kept locked away until the interviewees' deaths.[11]

Ethics review might have helped ensure that the Donor Agreement presented to participants reflected Boston College's true intentions. Although the Boston College spokesperson claims that the College's intention was always to limit protection of the archive to the extent American law allows, the Donor Agreement that participants were required to sign made no mention of this limitation. Instead, it stipulated unequivocally that:

> Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided prior written approval for their use following consultation with the Burns Librarian, Boston College. Due to the sensitivity of content, the ultimate power of release shall rest with me. After my death the Burns Library of Boston College may exercise such power exclusively.[12]

If it was Boston College's intention to pledge confidentiality only to the extent American law allows, then its Donor Agreement misinformed participants in a fundamental way.[13]

Another example of where an IRB's advice might have been useful was in relation to the length of the embargo period. The Donor Agreement specified that no transcript or tape would be released prior to the death of a participant. An IRB might have voiced concerns about this timing. Unlike the earlier oral history of the Ango-Irish War that was conducted a full two decades after the conflict, the Belfast Project began only 3 years after the *Good Friday Agreement* was signed, with the peace process on-going and wounds from the conflict still fresh. Although the focus of the Donor Agreement was primarily on the participants, the privacy of all the persons named by participants also was at stake. Released transcripts might have negative repercussions for other living individuals, regardless of whether they were interviewees or not. An IRB might have asked Boston College to at least consider whether the embargo period should have been extended until all those interviewed and referred to in the archive were dead, or simply for some period of time—e.g., 30 years—after which time that certainly would be the case. However, an IRB also might have understood why the shorter embargo period was desirable given the lessons that may be learned from the experience of the Troubles, thereby making the need for a formal legal opinion on the legal status of the Belfast Project archive that much greater.

[11] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 5. Motion of Trustees of Boston College to Quash Subpoenas, p.5. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-to-quash/

[12] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Agreement for Donation. Attachment to Moloney affidavit, p.9. Online at http://bostoncollegesubpoena.wordpress.com/exhibits/affidavit-of-ed-moloney/

[13] Both forms were the responsibility of Boston College. An alternative interpretation is that the two are consistent: the Donor Agreement did exactly and only what the agreement with Moloney said it would do, i.e., contractually outline "the conditions of the interview" (i.e., that it would be taped and transcribed) and "the conditions of its deposit at the Burns Library" (i.e., copyright held by interviewee until death; copyright goes to Boston College thereafter) "to the extent American law" (as opposed to Irish law) allows. This explanation is more consistent with university spokesperson Jack Dunn's statement in a TV interview right after the receipt of the first Boston College subpoenas was made public, that "There was information that was clearly granted on the condition of confidentiality…" (Rooney 2011) and would mean that Boston College had no contingency plan in place in the event of a subpoena. This interpretation also is consistent with Moloney and McIntyre's assertion that Boston College went into the project believing the risk of subpoena was zero and thus kept reassuring the researchers that their pledges of confidentiality were rock solid (Moloney and McIntyre 2012).

Engaging Legal Protections

Seeking to protect research participants to the extent American law allows presumes some knowledge of what the law is and what legal protections are available to meet the standard to which Boston College alleges it should be held.[14] Given the potential impact of disclosure on the participants—which, according to Boston College's court submissions, included the possibility of death—it would seem foolhardy, even negligent, for the College not to seek legal advice at the Belfast Project design stage. The lawyer representing Boston College in its motion to quash the first subpoenas was involved in a successful defence of research participants in *Cusumano* v. *Microsoft* (1998), one of the most important recent U.S. cases involving a challenge to research confidentiality. His advice could have been helpful as the project was being designed, not just after the subpoenas were delivered.

When it comes to statutory protections for US researchers, an example of the sort of research shield law that Boston College appears not to have considered is the system of confidentiality certification administered by the National Institutes of Health (NIH). Section 301(d) of the *Public Health Service Act* (42 USC 241(d)) authorizes the US Secretary of Health and Human Services (DHHS)[15] to issue confidentiality certificates to researchers involved in any health research where confidentiality is deemed to be essential for producing valid and reliable information, regardless of whether DHHS funds it. Confidentiality certificates "allow the investigator and others who have access to research records to refuse to disclose identifying information on research participants in any civil, criminal, administrative, legislative, or other proceeding, whether at the federal, state, or local level." By protecting research participant identities from compelled disclosure, confidentiality certificates "help achieve the research objectives and promote participation in studies by helping assure confidentiality and privacy to participants."[16] Confidentiality certificate legislation has been challenged only once (*People* v. *Newman* 1973). The decision described confidentiality certificate protection as "absolute"[17] and dismissed the challenge. The US Supreme Court declined to hear an appeal.

Numerous other Federal and state laws also protect government-funded research, to the point that there is now an "armamentarium" of protections (Fanning 2007). For example, in the case of research on crime, 42 *USC* 3789g provides that information collected using Office of Justice Programs (OJP) funding is not admissible as evidence "in any action, suit, or other judicial, legislative, or administrative proceedings." OJP-funded research is subject to 28 CFR Part 22 (22.23), which requires all funding applicants to certify that they will not divulge confidential research information pertaining to any identifiable private person. Once approved, confidentiality is guaranteed. These protections are referred to as "privacy certificates."

A confidentiality certificate provides rock solid statute-based protection for those who are eligible to apply for one. Although the Belfast Project may not have been eligible for one, with so much at stake, it would have been prudent to at least attempt to acquire that

[14] We asked the university spokesperson whether a formal legal opinion was sought prior to engaging the project, and if so, whether we might obtain a copy. (Email dated 25 January 2012 from Palys to Jack Dunn, University Spokesperson, Boston College). The query was repeated in follow-up emails on 17 February and 25 May. No response was received.

[15] The individual agencies comprising DHHS are all authorized to issue confidentiality certificates as long as they generally fall within the mission of the National Institutes of Health.

[16] http://grants2.nih.gov/grants/policy/coc/background.htm

[17] *People* v. *Newman* (1973) at paragraphs 12, 15, 20, 43.

protection.[18] However, the acquisition of a confidentiality certificate would require the researcher to have an IRB-reviewed proposal for a project in which confidentiality is essential, yet another reason why it would have been advisable for Boston College to require that the Belfast Project interview protocol be submitted for ethics review. Perhaps that is one reason why the contemporary Boston College IRB posts information about confidentiality certificates on its web site:

> A. Maintaining Privacy and Confidentiality
>
> Confidentiality of the identity of research participants and of information from research participants is an important part of any research activity. Breach of confidentiality and invasion of privacy may pose the greatest risks of harm associated with the research. Wherever possible, research data should be retained without any identifiers. When this is not possible Principal Investigators must take steps to protect the confidentiality of the research participants and the data.
> Principal Investigators who collect sensitive information from research participants who may be identifiable as study participants may apply for a federal Certificate of Confidentiality (http://grants2.nih.gov/grants/policy/coc/). The Certificates are available to all Principal Investigators, whether or not their research is funded by the federal government, and regardless of the kind of sensitive information being collected. The Certificate is intended to protect identifiable research data from disclosure through subpoena, warrant, or court order.[19]

Even if the Belfast Project did not prove eligible for confidentiality certification, there was still the common law. At the time the Project was being formulated, there was already a well-developed literature describing the issues that researchers working on sensitive topics needed to address in order to maximize their chances of securing research-participant confidentiality using principles established in common law. In this instance the researchers were well positioned to assert privilege using common law because of the unequivocal confidentiality pledge they made. However, the inconsistency of Boston College's Belfast Project contracts compromised its ability to use a common law defence of confidentiality in this instance.

Several commentators (Palys and Lowman 2000; Traynor 1996) have argued that, in the absence of statute-based protections, researchers doing research on sensitive topics where disclosure would be harmful to participants should design their research to anticipate the requirements of the courts for recognizing a qualified evidentiary privilege. In Canada this is most effectively done by anticipating the requirements of the Wigmore test (Wigmore 1905), which the Supreme Court of Canada has recognized as the appropriate mechanism to adjudicate claims of privilege case by case (Palys and Lowman 2000). Although the Wigmore test per se is rarely invoked in the US, it is nonetheless applicable (Traynor

[18] We asked the Boston College spokesperson whether Boston inquired about either of these protections, but did not receive a reply. (Email from Palys to Jack Dunn, University Spokesperson, Boston College, dated 20 January 2012. Follow-up emails asking the same question were sent 25 January, 17 February and 25 May.) When asked the same question Project Director Moloney replied that he never heard anything at the time from any Boston College representative about these certificates.

[19] The information is on p.30 of Boston College's "Standard Operating Procedures for Researchers" (dated 2010) available at http://www.bc.edu/content/dam/files/research_sites/oric/human/pdf/BC_IRB_PI_Procedures.pdf. We asked the IRB Chair in an email—from Palys to Vincent Lynch, IRB Chair, dated 13 January 2012—whether the information would have been available to researchers in 2000 when the Belfast Project was being formulated but did not receive a reply.

1996) and seems to reflect the decision-making logic that US trial and appeal courts employ (Palys and Lowman 2002). For example, notwithstanding the clarity of the Donation Agreement that participants in the Belfast Project signed, the agreement failed to include explicit reference to "confidentiality," which allowed the Court of Appeal to question whether there was indeed a mutual expectation of confidentiality, as the Wigmore test requires: "This clause does not contain the term 'confidentiality' and provides only that access will be restricted."[20]

As far as we can ascertain, Boston College fell short of exercising the kind of legal due diligence that the Belfast Project warranted. To protect confidentiality to the extent law allows requires knowing it in the first place. A legal opinion might even have identified the 1994 MLAT between Great Britain and Northern Ireland and the Government of the US as a potential threat to the integrity of the archive.

Avoiding a Legal Achilles Heel

Seeking to protect research participants to the extent American law allows obliges limited confidentiality researchers to ensure that any limitations they invoke do not surrender participant rights by creating a "waiver of privilege," as happened in *Atlantic Sugar, Ltd.* v. *The United States of America* (1980). Corporate respondents to an International Trade Commission questionnaire were informed that the information they provided would not be disclosed "except as required by law." When Atlantic Sugar subpoenaed the survey records of other companies thinking it might help its own case, one of the companies that completed the survey objected, asserting that it had been promised confidentiality. The court rejected the claim, noting that respondents had been warned that confidentiality was promised "except as required by law."[21] The US Customs Court's "requirement" of the information was exactly the circumstance that participants had been warned might occur:

> When various persons responded to the questionnaires (from which the information subject to disclosure was evidently extracted) they were informed that the information would not be disclosed "except as required by law." The requirement of disclosure for judicial review is such a requirement, even though it may not have been exactly foreseen at that time.

This case affirms that anyone who pledges confidentiality only to the extent American law allows must ensure they do not shoot themselves in the legal foot and imperil participants' right to claim privilege in the process. It appears Boston College may have done exactly that, as both Judge Young in his initial decision and the First District Court of Appeals pointed to the clause in the Moloney agreement as an indication of Boston College's acceptance of legal limits to confidentiality: "The agreement, in this clause, expressly acknowledged that its protections could be limited by American law."[22]

[20] *In RE: Request from the UK re Dolours Price*. United States Court of Appeals for the First Circuit, No. 11-2511. *US* v *Moloney, McIntyre*. dated 6 July 2012, p.8. Online at http://bostoncollegesubpoena.wordpress.com/2012/07/06/first-circuit-court-of-appeals-ruling/

[21] The loss of privilege in this case is all the more provocative because it goes against the grain of many other US court decisions that protect confidentiality.

[22] *In RE: Request from the UK re Dolours Price*. United States Court of Appeals for the First Circuit, No. 11-2511. *US* v *Moloney, McIntyre.* dated 6 July 2012, p.7.

Walking One's Talk

When subpoenas are delivered and a claim of privilege made, the courts will subject to detailed scrutiny everything that those associated with the project have done in order to assess whether they walked their talk and behaved as if confidentiality truly mattered. All the documentation we have seen in relation to the Belfast Project[23] suggests that both the researchers and the Boston College Donor Agreement lived up to that standard. There must be a mutual understanding of confidentiality, for example, and the documents available suggest that the participants and interviewers discussed these issues. The interviewers made clear and the interviewees understood that confidentiality was both integral to the project and guaranteed.[24]

The behaviour of the researchers in gathering and transmitting the data to Boston College affirmed this view. For example, interviewer Anthony McIntyre's affidavit supporting the College's challenge to the first set of subpoenas stated that:

> Interviewees did not want to have anything in writing in their possession which might associate them with the project. They did not keep copies of the interview tapes, transcripts, or donation forms.[25]

Project Director Ed Moloney's affidavit added:

> It is important to note that in all my communications with Anthony McIntyre while the project was ongoing we took great care to ensure the greatest security. When emailing each other, for instance, all messages from me to him and vice-versa were encrypted. This was an indication of how seriously we regarded the confidentiality and safety of the interviewees.[26]

Privilege can be denied when those responsible for maintaining confidentiality are less than very careful about who they talk to about a project and who has access to research information. If persons who do not have a bona fide reason to be made privy to research information are given access, a court may deem confidentiality to have been waived. For example, when a grand jury subpoenaed sociologist Rik Scarce and ordered him to divulge information he had gathered about a particular member of an animal rights group who was

[23] The database on which this article is based began to be compiled as soon as we first heard about the case in the summer of 2011. We joined Twitter @BC Subpoena News (see https://twitter.com/#!/BCSubpoenaNews) in order to ensure that we heard about every new document that was posted on the archive at http://bostoncollegesubpoena.wordpress.com/, an extraordinarily useful site. Also we conducted occasional Google searches to try and identify any media or scholarly commentary that the bostoncollegesubpoena site might have missed. At the time of writing well over 600 unique legal documents, blog entries, news articles, audio files, video files and images comprise the collection.

[24] An anonymous reviewer wondered whether the guarantees by the researchers and those found in the Donor Agreement were misplaced given what s/he thought is every citizen's legal obligation to report past crime to the police if they become aware of it. In fact, there is no such generalized legal obligation in most Western jurisdictions (e.g., Teitelbaum 1983). Some reporting requirements are to be found in mandatory reporting laws, such as the requirement in many provinces and states to report when children have been abused and are in need of protection. These laws are designed to identify situations where a crime is on-going in order to prevent it recurring. If there was a general legal obligation to report past crimes to the police, specific mandatory reporting laws would be redundant.

[25] *In RE: Request from the UK re Dolours Price*). M.B.D. No. 11-MC-91078. Document 5-4. Affidavit of Anthony McIntyre, pp.2–3. Online at http://bostoncollegesubpoena.wordpress.com/exhibits/affidavit-of-anthony-mcintyre/

[26] *In RE: Request from the UK re Dolours Price*). M.B.D. No. 11-MC-91078. Document 5-5. Affidavit of Ed Moloney, p.11. http://bostoncollegesubpoena.wordpress.com/exhibits/affidavit-of-ed-moloney/

the prime suspect in an act of serious vandalism at a university animal care facility, the prosecutor shone a spotlight on a conversation over breakfast involving Scarce, his wife and the research participant. The intimation was that, if conversations with research participants could be held in front of members of the researcher's family who were not members of the research team, then how confidential could the conversation have been (Scarce 1994; *In re Grand Jury Proceedings. James Richard Scarce* 1993)?

In that regard, the behaviour of the researchers and the guardians of the archive at Boston College's Burns Library were consistent with an unlimited pledge of confidentiality. For example, in his affidavit in response to the subpoenas, Professor Thomas Hachey explained:

> Apart from the two interviewers, who saw only the transcripts of the individuals whom they themselves interviewed, the only other people who ever saw any of the material were Robert O'Neill, Ed Moloney, myself, and two academic specialists who were given some of the transcripts to review, but only with coded numbers (not names) attached to them, for the purpose of confirming for us what we believed to be the value of this unique collection.[27]

This attention to security extended to the physical environment as well. As Burns Librarian Robert O'Neill noted:

> The audiotapes of interviews, the transcripts of those interviews, and floppy disks of transcripts in Microsoft Word and text formats, including the interviews of Dolours Price, were stored in the Treasure Room of the Burns Library at Boston College. The Treasure Room is a secure area, monitored by cameras, with access by a combination of key entry and a code entered onto a security pad. Access is limited to select Burns staff, and the key to the Treasure Room must be signed out by staff. The Treasure Room has a state-of-the-art HVAC system and a Halon fire suppressant system.[28]

It thus appears the researchers were scrupulous in ensuring their behaviour was consistent with the duty of confidentiality they undertook. The guardians of the archive at Boston College managed the archive in accordance with that duty as well, at least until the subpoenas arrived. In the case of the College, however, the District Court's order to disclose a confidential interview brought about a sea change in attitudes.

Opening Pandora's Box

One event that would have significant repercussions for the Belfast Project as a whole was the publication in 2010 of the first book based on the archive—*Voices From the Grave: Two Men's War in Ireland* (Moloney 2010)—and release of an award-winning documentary of the same name later that year.[29] The two men referred to in the subtitle were Brendan Hughes, a Provisional IRA operative, and David Ervine, a member of the UVF, whose transcripts and tapes were liberated from the archive embargo following their deaths in accordance with the terms of the Donor Agreement. Project Director and journalist Ed

[27] *In RE: Request from the UK re Dolours Price*). M.B.D. No. 11-MC-91078. Document 5-2. Affidavit of Thomas Hachey, p.3. Online at http://bostoncollegesubpoena.wordpress.com/exhibits/affidavit-of-thomas-e-hachey/

[28] *In RE: Request from the UK re Dolours Price*). M.B.D. No. 11-MC-91078. Document 5-6. Affidavit of Robert K. O'Neill, p.4. Online at http://bostoncollegesubpoena.wordpress.com/exhibits/affidavit-of-robert-k-oneill/

[29] The film won the award for "Best Documentary" at the 8th Annual Irish Film and Television Awards ceremony held in Dublin's Convention Centre on 12 February 2011. The film can be seen on Youtube.

Moloney became the book's author, while Boston College historian Thomas Hachey and Burns Librarian Robert O'Neill shared in the royalties as General Editors and authors of the preface.

If the original intention was to keep the very existence of the Project secret, the secret ended with publication of the book.[30] Both the film and book revealed the kind of detailed and potentially incriminating information the archive contained, with names named and specific events discussed. Among those named was Sinn Féin[31] leader Gerry Adams, who has never admitted membership in the IRA, but who Hughes asserted in *Voices From the Grave* had played a central role in certain "disappearances," including the abduction and murder of Jean McConville, an alleged informer.

Further attention was drawn to the Belfast Project when a *Sunday Life* article (Barnes 2010) suggested that convicted IRA bomber Dolours Price also had alleged that Adams was implicated in McConville's murder. The *Sunday Life* story ostensibly was based on an interview Price gave to *The Irish News*. Although the *News* decided not to publish the story because Price was under treatment for post traumatic stress disorder at the time, the *Sunday Life* article reported that she had "made taped confessions of her role in the abduction to academics at Boston University [sic]." The *Sunday Life* article did not actually quote Price, however, so it is not known what she is alleged to have said. One thing is clear: Ciaran Barnes, the author of the article, never heard the interviews stored in a vault at Boston College.

One person who took notice of these developments was former Royal Ulster Constabulary (RUC) and Police Service of Northern Ireland (PSNI) Detective Chief Superintendent Norman Baxter.

> Baxter's particular animus against Gerry Adams came through in a column in the Belfast Newsletter on March 30 2010, in which he urged the PSNI to launch a new investigation into the Sinn Fein leader's alleged role in the 1972 abduction and killing of Jean McConville, the mother of ten whose "disappeared" body was finally located on a beach in Co. Louth in 2003. He appears to have been the first figure of any note—certainly the first with a media presence and extensive police connections—to call publicly for action to subpoena video tapes held by Boston College, Massachusetts, in which two ex-IRA members claim that Adams, as a senior IRA commander in Belfast, had ordered the killing of Mrs. McConville and others of the "disappeared".
>
> Baxter's intervention came within 24 h of the publication on March 29 of "Voices From The Grave." (McCann 2012)

Regardless of how one might judge the motivations that led to the Belfast Project subpoenas, for some interested parties the investigation of McConville's murder is more important than research confidentiality. It turned out that there is a legal mechanism to advance just such a claim in the form of the *Treaty between the US and UK on Mutual Assistance in Criminal Matters*. The UK government requested the US to acquire the interviews of Brendan Hughes and Dolours Price, at which point the US Attorney General issued a set of subpoenas ordering their production.

[30] However, in a recent affidavit, Moloney (2012b) states that by the time the book was being published, the existence of the archive was well known. For example, he recounts phone calls from a journalist asking him about details of Brendan Hughes's interviews in early 2010 prior to the book's publication.

[31] Sinn Féin originated as the political wing of the IRA, and became the second largest party in Northern Ireland's government.

The First Set of Subpoenas

The first set of subpoenas arrived at Boston College in May, 2011. Served on the John J. Burns Library, Professor Thomas Hachey, and Burns Librarian Robert O'Neill, they commanded production of:

1. The original tape recordings of any and all interviews of Brendan Hughes and Dolours Price.
2. Any and all written documents, including but not limited to any and all transcripts, relating to any and all tape recordings of any and all interviews of Brendan Hughes and Dolours Price.
3. Any and all written notes created in connection with any and all interviews of Brendan Hughes and Dolours Price.
4. Any and all computer records created in connection with any and all interviews of Brendan Hughes and Dolours Price.[32]

The interviews with Brendan Hughes were handed over immediately because he was at that point deceased. According to the terms of the donor agreement he had signed, his interviews could be released. Dolours Price was/is still alive, however, in which case Boston College was obliged to maintain confidentiality of her interviews at least "to the extent American law allows."

Some commentators on subpoenas of research information have suggested that it is important to go public and enlist help as soon as possible after receipt of a subpoena. For example, reflecting on his own experience of being subpoenaed, Rik Scarce (1994) noted:

> Now, though, I realize that getting the word out to friends and colleagues was the most important thing that I could have done. It would have provided me with the support that I needed most in those early months but that emerged only later. …
> Silence served no one, other than those who sought to wear down my resistance, and I effectively curbed the emergence of my own support network for as long as possible. (140)

In contrast, Boston College's initial response was apparently to try and keep the subpoenas secret. Project Director Moloney was aghast when he discovered inadvertently that Boston College had not informed him when the first subpoenas were served. Moloney immediately contacted the media. Later he reflected:

> I very seriously doubt—if I had not picked up the phone and called *The New York Times*, if I had not received that phone call from a contact within the college telling me about the subpoenas—I wonder … would Boston College have fought those subpoenas if I hadn't found out about them? (quoted in Cote 2012a)

Publicity allows the building of alliances, lets prospective interveners know there is a role for them to play, and creates an opportunity for academic institutions to educate the public about the value of social research. Marshalling support shows those who seek confidential research information that their quest will not be easy; they will face resistance at every step. Displays of resistance may lead the third party to withdraw the subpoena and look for other

[32] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 5. Motion of Trustees of Boston College to Quash Subpoenas, pp.2–3. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-to-quash/

sources of the information they seek. At the very least, making clear they have a huge mountain to climb may make the third party more likely to compromise.

The central thrust of the US government's legal argument was that the MLAT that triggered the subpoenas bound it, and thereby the courts and Boston College, to immediately supply the information requested without any review of the merits of the request.[33] Against this view, Boston College argued[34] that the court had a role to play in balancing the research participants' right to privacy against the UK government's need for information that might help the original initiator of the subpoenas—now known to be the PSNI—in a criminal investigation. But instead of maintaining control over Dolours Price's interviews, the College offered to and eventually did hand them over to the judge for him to determine their fate *in camera*.[35] The researchers and independent observers such as Harvey Silverglate, a civil liberties and criminal defense attorney who sits on the Legal Committee of the Massachusetts ACLU, sharply criticized this surrender of confidential material. After pointing out how it was only through consistent resistance that journalists have won some recognition of privilege in the courts, Silverglate and Schwartz (2012) lamented how Boston College decided not to "fight tooth and nail, but rather to turn the documents over to the Court and allow the judge to scrutinize them."

Interlude

The subpoenas delivered to Boston College in May 2011 sought two interviews—those of Brendan Hughes and Dolours Price. But it was quite possible that whoever initiated the subpoenas might just be testing the waters and would seek more material. The researchers started considering ways to ensure that the remainder of the archive was secured while the battle was waged over the Price interview. Timing was important because, if further materials were subpoenaed, removing them would entail contempt of court and/or obstruction of justice. However, as long as they were not under subpoena, the interviews could be moved to another location, possibly even to another country, thereby making the legal process involved in their recovery that much more difficult.

Moloney contacted Hachey by email suggesting that,

> … the entire IRA archive be despatched, as quickly as possible back to Anthony McIntyre in Ireland and that an agreement be drawn up between BC and McIntyre stating that ownership of the archive is transferred to him for a set period, 1, 2 or 3 years perhaps. The understanding is that the archive would be returned to BC once the danger is agreed to have disappeared. If not the agreement can be renewed for another period until everyone is happy that the archive is not in danger. BC can be

[33] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 7. Government's Opposition to Motion to Quash and Motion for an Order to Compel, p.20. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/government-opposition/

[34] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 10. Memorandum of Trustees of Boston College in reply to Government's Opposition to Motion to Quash Subpoenas and in Opposition to Government's Motion to Compel. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/reply/

[35] The offer was made in I*n RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 5. Motion of Trustees of Boston College to Quash Subpoenas, p.16, filed 7 June 2011. The interviews were handed over within days after Judge Young took them up on their offer in his decision, which was given on 16 December 2011, despite his anticipation that the College would likely seek to stay his order while they appealed. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-to-quash/

content that ultimately the archive will be returned. All that we are not sure about is the timescale.

Moloney went on to explain how a move of this sort would put more obstacles in the path of anyone trying to use legal means to acquire parts of the archive, and reaffirmed McIntyre's willingness to go the distance in protecting participant confidentiality:

> [McIntyre] resides south of the border and any British effort to get the material will encounter very different political and legal obstacles than exist in the US. He is also quite determined not to give up any material and would happily go to jail than do so. [36]

Moloney emailed O'Neill to keep him apprised of the plan, noting that he had spoken with the Boston College attorney, who agreed there was a possibility another subpoena "fishing expedition" might well come their way. Moloney encouraged O'Neill to speak with the attorney and draw up the necessary paperwork as soon as possible.

Hachey immediately scuttled the plan, stating that BC attorneys had told him,

> … under no circumstances would BC allow the documents to be sent to an alternative site (be it in the US or Ireland) as they felt that that did violate the understanding that we had with participants re: the safe deposit of their recollections in the "Boston College Archive."[37]

This response ensured that the archive remained at Boston College, but it did so by endangering the research participants. Its actions further added to the appearance that Boston College was acting on its institutional conflict of interest in order to retain a valuable archive even if doing so put research participants at risk.

The Second Set of Subpoenas

A second set of subpoenas did indeed arrive 2 months after that interchange, in August, 2011. Served on the Trustees of Boston College and the Burns Library, Professor Thomas Hachey, and Burns Librarian Robert O'Neill, they sought:

1. Original audio and video recordings of "any and all interviews containing information about the abduction and death of Mrs. Jean McConville."
2. Written transcripts, summaries, and indices of such interviews.
3. Records that describe the arrangement and circumstances of the recordings and the chain of custody of the recordings.[38]

This second set of subpoenas exemplifies the "fishing expedition" in which the third party seeking information has no idea what the records contain but hopes to find something useful. If they had been addressed solely under American law in the usual manner, it is hard to believe they would not have been dismissed out of hand. As Traynor (1996) put it in his seminal article on the "excessive subpoena:"

[36] Email from Ed Moloney to Tom Hachey dated 31 May 2011. The email appears in Bray (2012a). The original was written mostly in lower case and has been edited here for capitalization.
[37] Email from Thomas Hachey to Ed Moloney dated 2 June 2011. The email appears in Bray (2012a).
[38] *In RE: Request from the UK re Dolours Price*. M.B.D. No.: 11-MC-91078. Motion of Trustees of Boston College to Quash New Subpoena, p.2. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-to-quash-new-subpoena/

> Researchers unfamiliar with court procedures and subpoenas may be jolted when served with a subpoena. They may fear intrusion upon their work, the vitiation of the assurances of confidentiality they extended, or a public array of their records and computer databases in a courtroom. Subpoenas are often phrased in extraordinarily broad and demanding terms that might further alarm researchers who are unaware that sweeping subpoenas are common and mean "just about as much as the asking price for a rug in an Oriental bazaar." Such broad subpoenas are inconsistent with Rule 45 of the Federal Rules of Civil Procedure. The court accordingly has discretion to quash the overbroad subpoena and require the requesting party to start anew instead of modifying the subpoena.

The second subpoenas revealed what the first set of subpoenas had left unstated: that the material of interest to the UK government concerned the 1972 abduction and murder of Jean McConville. Because of this shift in emphasis Boston College argued that both sets of subpoenas cast too broad a net—they sought entire interviews—and should be narrowed to disclosure of material directly related to the McConville abduction and murder.[39] Boston College further argued that the second set of subpoenas posed an "unreasonable burden" because of the volume of material that would have to be searched in order to ascertain which interviews were responsive to the subpoenas.

In reply, the US government attorney argued that the UK's request was not limited to the McConville case; there were other secret filings that justified the broader scope of the subpoenas.[40] The government also ridiculed Boston College's assertion that "a chaired historian and the director of a distinguished college library" were incapable of determining which interviews referred to the McConville case, a task it suggested "would be fairly straightforward for a first year paralegal."

Meanwhile, the researchers were becoming more disenchanted with the way Boston College was proceeding, and by late August 2011 had secured their own legal representation and filed a motion to intervene. Moloney and McIntyre's motion asserted their interests in the case were not being addressed. In particular, they spoke to the political motivation of the subpoenas, and their belief that the US Attorney General had failed to live up to his responsibility to consult with British authorities in order to ensure their request was consistent with the purpose for which the MLAT had been established.[41]

The District Court's Decision

Judge Young's decision was released on 16 December 2011. He rejected the government's argument that the subpoenaed materials should be surrendered without a review of their legal merit. On the basis of his ensuing review, Young concluded that Boston College's motion to

[39] *In RE: Request from the UK re Dolours Price*. M.B.D. No.: 11-MC-91078. Document 12. Motion of Trustees of Boston College to Quash New Subpoenas, p.2. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-to-quash-new-subpoena/

[40] *In RE: Request from the UK re Dolours Price*. M.B.D. No.: 11-MC-91078-JLT. Document 14. Government's Opposition to Motion to Quash New Subpoenas and Motion to Compel, pp.2–3. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/government-opposition-to-second-motion-to-quash/

[41] *In RE: Request from the UK re Dolours Price*. M.B.D. No.: 11-MC-91078 (JLT). ECF Motion for Leave to Intervene. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-for-leave-to-intervene/

quash the subpoenas should be denied. He ordered that Boston College "…produce copies of all materials responsive to the commissioner's subpoenae to this Court for *in camera* review by noon on December 21, 2011, thus allowing time for Boston College to request a stay from the Court of Appeals. Absent a stay, this Court promptly will review the materials *in camera* and enter such further orders as justice may require."[42] Young denied Moloney and McIntyre's motion to intervene.

Boston College then made two decisions, both of which fell short of its promise to protect confidentiality to the extent American law allows. First, the College did not take up Judge Young's invitation to request a stay from the Court of Appeals, but prepared to deliver the materials as ordered. Second, instead of producing only the material that was responsive to the subpoenas—i.e., material pertaining to McConville's abduction and murder—it handed over the entire republican archive so that the Judge could decide *in camera* which material he thought was relevant.

To justify this action, Hachey and O'Neill continued to argue that it would have been too onerous for them to search through the interviews to ascertain which were responsive to the second set of subpoenas, thereby clearly violating the Donor Agreement, even if confidentiality was "limited by law." They would go on to scapegoat the researchers for refusing to participate in the identification of which interviews contained information relevant to the McConville abduction and murder, writing in the *The Irish Times* that:

> No one knows more about the contents of the interviews of former IRA members than the interviewer himself, Anthony Mclntyre, who declined the court's request to disclose which of the interviews were potentially responsive, thereby requiring Boston College to provide all the IRA interviews to the court for its review. (Hachey and O'Neill 2012)

It is not clear why Hachey and O'Neill would have thought that McIntyre would become complicit in an action with which he thoroughly disagreed and that would violate the promise of confidentiality he made to interviewees; he was against disclosing any material to the court and was prepared to engage in civil disobedience to prevent it. Nor is it evident why, having decided that they would surrender tapes to the court, Hachey and O'Neill were not capable of determining for themselves which interviews included information about the McConville abduction and murder. O'Neill's affidavit stated that the interview transcripts were stored in electronic form in Microsoft Word and text formats.[43] Using the "find" facility in Microsoft Word they easily could have searched for the name "McConville." A qualitative data analysis program such as NVivo could search the entire archive in seconds and return a report of all occurrences of the name "McConville," along with their context.

Even more surprising was the College's failure to appeal the court's decision not to quash the first subpoenas notwithstanding the judge's invitation to do so. The Hughes interview presented no problem because he had died, in which case according to the Donor Agreement his interview could be released. But why did the College not appeal the order to disclose Price's interview?

The reason Hachey, O'Neill and Dunn gave was the interview that Price gave *The Irish News*, which presumably formed the basis for Barnes's (2012) article in *Sunday Life* that alleged she talked about Gerry Adams's involvement in the McConville murder and

[42] *In RE: Request from the UK re Dolours Price*. Memorandum and Order, dated 16 December 2011, District Judge William Young, p.21. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/young-ruling/

[43] *In RE: Request from the UK re Dolours Price*. M.B.D. No. 11-MC-91078. Document 5-6. Affidavit of Robert K. O'Neill, p.3. Online at http://bostoncollegesubpoena.wordpress.com/exhibits/affidavit-of-robert-k-oneill/

mentioned interviews she gave to "Boston University" [sic]. Hachey and O'Neill (2012) argued that the subpoena was "in no small part a direct result of this disclosure." In one of its court submissions Boston College went even further to state that it did not appeal the order to disclose the Price interview because:

> Boston College was aware that Dolours Price herself had already disclosed her involvement in the Belfast Project and provided much of the information about her role in the IRA and the disappearances of individuals, including Jean McConville, in public interviews, which indicated that she was not seeking to protect the confidentiality of her Belfast Project interviews.[44]

Did either of them ask Price whether she waived confidentiality? Apparently they did not. The article Hachey and O'Neill referred to was written by a journalist who had not interviewed Price, did not provide any direct quote of what she might have said with regards to the Belfast Project, and either was referring to another university or reported the name of the college incorrectly. As blogger Chris Bray (2012c) pointed out, now Boston College's representatives were claiming that human subjects can waive research confidentiality "indirectly and informally" rather than "directly and explicitly notifying researchers and archivists that they no longer wish to have research materials protected from disclosure." This clearly violated the Donor Agreement and surrendered a point the government should have been challenged to demonstrate. It accepted Barnes's claims without question to justify not appealing the order to disclose her interviews. Boston College's decision to disclose them is that much more surprising given that the PSNI had an opportunity to interview and/or arrest her when she visited Northern Ireland, but did not (Bray 2012b).

Subsequently, Moloney has asserted in an affidavit filed in a Belfast Court[45] on behalf of Anthony McIntyre's application for a judicial review of the PSNI request under the mutual assistance treaty that Barnes's claims regarding Price in her Belfast Project interviews are a combination of lies, innuendo and blind speculation. Again confirming that he will never break the Donor Agreement and talk about what Price did say, Moloney felt ethically justified in reporting what she did not say:

> …in her interviews with BC researcher, Anthony McIntyre, Dolours Price did not once mention the name 'Jean McConville'. The subject of that unfortunate woman's disappearance was never mentioned, not even once. Nor so were the allegations that Dolours Price was involved in any other disappearance carried out by the IRA in Belfast, nor that she received orders to disappear people from Gerry Adams or from any other IRA figure. None of this subject matter was disclosed in her taped interviews with Anthony McIntyre. (Moloney 2012b)

Even more disconcerting is that Hachey and O'Neill had seen the interviews and thus presumably would have known that McConville was not mentioned. Instead of appealing the order to hand over Price's interview, Boston College rolled over:

[44] *In RE: Request from the UK re Dolours Price*. No. 12-1236. Brief of Appellant Trustees of Boston College, p.7. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/brief-of-appellant-trustees-of-boston-college/

[45] *In the matter of an application by Anthony McIntyre for judicial review and in the matter of a decision of the Police Service of Northern Ireland to request the United States Government to seek on its behalf confidential material held by Boston College, Massachusetts, USA, pursuant to the treaty between the United States and the United Kingdom on mutual assistance in criminal matters*. First affidavit of Ed Moloney. 12 September 2012. Online at http://bostoncollegesubpoena.wordpress.com/2012/09/17/boston-college-subpoenas-caused-by-journalists-lies-and-psni-failings/

> Boston College Spokesperson Jack Dunn has told RTÉ that the College fought the court order in so far as it could. …
> The Boston College spokesperson said it tried to protect the archive and had "fought the fight and the fight was lost."[46]

Throwing in the towel after one round in the ring is hardly protecting confidentiality to the extent American law allows. The revelation that, in her Boston College interview, Price did not mention the murder that is the subject of the subpoena suggests that there is no sound legal basis for the British authorities to request that the U.S. issue Boston College the subpoenas in the first place—in which case Boston College's rolling over on the Price subpoena is that much more egregious.

Plan B

In contrast to Boston College, the researchers moved quickly to appeal the negative decision regarding their motion to intervene, and to activate a protective order that would "stay production of materials responsive to the Commissioner's subpoenae at issue, pending the outcome of their appeal."[47] When their appeal to the First District Court of Appeal for intervenor status failed, they applied for review of the negative decision to the US Supreme Court, thereby continuing the stay order and keeping all the interviews in the United States and out of the hands of the PSNI. McIntyre also initiated a separate legal action in Belfast,

> … seeking a judicial review of the PSNI action alleging that the UK authorities are in breach of the European Convention on Human Rights and the British Human Rights Act of 1998. The Judicial Review asks that the British Home Office's request of assistance from the United States be quashed, the subpoenas be declared unlawful, a discontinuation of the PSNI's application for the material, and for an injunction stopping any material from Boston College being received by the PSNI.[48]

His initial request for an injunction was successful (Cote 2012c)—thereby ensuring, at least for the moment, that even if decisions in the US were to see the interviews transmitted to the British Government, they would not get into the hands of the PSNI. That action continues as we write.

The researchers recognized that, while the Belfast Project's political aspects and the potential adverse impact of disclosure on the Northern Ireland peace process added an extra dimension of concern, it also meant the interests of the research participants were aligned with people who had an interest in protecting the still-fragile peace. Accordingly, the researchers and Carrie Twomey, McIntyre's US-born wife, in conjunction with 3 Irish-American organizations—the Massachusetts Ancient Order of Hiberians, the Brehon Law Society, and the Irish American Unity Conference—have enlisted broad political support. As of the time of writing, 11 Congressional representatives and 8 Senators—including John Kerry, Chair of the US Foreign Relations Committee—have written to Secretary of State Hillary Clinton expressing their concern for the impact of the subpoenas and potential

[46] RTÉ News/Ireland. (8 January 2012). Belfast Project interviewer fears for his life. Online at http://www.rte.ie/news/2012/0108/belfastproject.html

[47] *In RE: Request from the UK re Dolours Price*). M.B.D. No. 11-MC-91078 (WGY). Motion for Stay or Injunction Pending Appeal to the Court of Appeals from the Order of the District Court for the District of Massachusetts, p.1. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-for-stay/

[48] Press release online at http://tomasoflatharta.com/2012/07/05/second-front-opened-in-legal-fight-to-save-boston-college-archives/

disclosure of Belfast Project interviews on peace in Northern Ireland, and encouraging the Secretary to meet with her UK counterpart to urge that the subpoenas be withdrawn.

The group also has engaged media in Ireland and the United States—including television, newspapers, radio, the blogosphere, Twitter and Facebook—to keep observers informed and to generate support. The American Sociological Association[49] (ASA) and the American Civil Liberties Union (ACLU)[50] have written in support of the researchers, with the ACLU securing intervener status in Moloney and McIntyre's appeal. As Silverglate and Schwartz (2012) explained:

> [O]ver the course of the last year, Boston College has shown immense institutional cowardice and abrogated its responsibility as a protector of academic freedom. The highly regarded Jesuit liberal arts college has been so betrayed by its administration, and in turn has so betrayed its most fundamental mission, that it has been left to the ACLU of Massachusetts to step-up in a battle for which those cowering behind the ivy walls have all but thrown in the towel before ever truly engaging in the fight.

It is clear that many mistakes were made in setting up the Belfast Project. The researchers have acknowledged that they would have done some things differently had they known at the time the project was being formulated what they know now. In contrast, Boston College has dug in, seemingly incapable of self-reflection. Once the researchers were confronted with the subpoenas they have pursued every avenue open to them to protect their research participants. Unlike the College, they have challenged every ruling they can, and show every indication they will continue to do so until the archive is safe or all legal avenues are exhausted. If a qualified research participant privilege is ever to be recognized in common law, it will have to be fought for exactly as Moloney and McIntyre are doing, trying their utmost to be both ethical *and* legal. Because this case epitomizes the need for a research-participant privilege to be recognized so that research on sensitive topics can even occur, it could well go to the Supreme Court and change the legal landscape for subsequent research participants who are willing to divulge their fragility, weakness, violence, and transgressions so that others can learn from their experiences.

The case is not over despite Boston College's willingness over various issues to throw in the towel. Moloney, McIntyre, Twomey, and the various politicians, bloggers and news media who support them have brought new life to a case that is likely to become the paradigmatic example of the issues created by the threat of court-ordered disclosure to research confidentiality. Perhaps one of the measures of their success is that Boston College, which could say no more than that they had fought the fight and the fight was lost, decided in May 2012 to appeal aspects of Judge Young's decision with respect to the second set of subpoenas. The First Circuit Court of Appeal heard their arguments on 7 September 2012.[51] No decision had been made as of the time of writing.

[49] http://www.asanet.org/press/ASA_Opposes_Subpoena_of_Belfast_Project_Data.cfm

[50] http://bostoncollegesubpoena.wordpress.com/court-documents/amicus-curiae-brief-of-aclu-in-support-of-appellants-moloney-mcintyre/

[51] For Boston College's written submissions, see *In RE: Request from the UK re Dolours Price*. No. 12-1236, dated 3 May 2012. Brief of appellant trustees of Boston College. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/brief-of-appellant-trustees-of-boston-college/ and *In RE: Request from the UK re Dolours Price*. No. 12-1236, dated 6 August 2012. Reply brief of appellant trustees of Boston College. Online at http://bostoncollegesubpoena.wordpress.com/court-documents/motion-for-stay/ . For an audio and transcript of oral arguments, see http://bostoncollegesubpoena.wordpress.com/2012/09/09/audio-transcript-of-oral-arguments-first-circuit-court-of-appeals-September-7-2012/

Discussion and Conclusions

While the law and ethics of research confidentiality rarely conflict in practice, occasions do sometimes arise when lawful challenges to research confidentiality occur. If academic institutions are to honor their responsibility to maintain confidentiality at least to the full extent permitted by law it is incumbent upon them to be aware of the relevant law and to be prepared to exhaust all legal avenues to defend research confidentiality. If these lawful attempts to defend research confidentiality fail, and the researcher is ordered to disclose confidential research information, then they would either have to comply (the Law of the Land position) or defy the order in order to maintain their ethical commitment to research-participant confidentiality (the ethics-first approach).

Boston College's post-subpoena stance exemplifies the Law of the Land approach to research confidentiality, with its official spokesperson asserting that the College always meant to pledge research confidentiality only to the extent American law allows. Although the College's Donor Agreement failed to inform research participants of this crucial proviso, our purpose in this paper has been to evaluate the degree to which Boston College lived up to the standard it claims to uphold. A review of Boston College's various decisions suggests that it has fallen far short in many respects.

Instead of requiring that the Belfast Project be submitted for ethics review and get expert advice about protecting research confidences, the College claims that the Common Rule did not apply to the Belfast Project. While defending research participants and research confidentiality to the extent American law allows presupposes knowing what the law is, the College apparently did not solicit a formal legal opinion about how best to protect the Belfast Project archive from third party legal challenges. Ethical and legal due diligence would have involved scanning the legal and ethical horizons for potential vehicles through which a challenge to research confidentiality might be mounted as well as ways to maximize the protection of research participants in law. Such an opinion could have alerted Boston College to: (a) the existence of highly successful statute-based protections such as confidentiality certificates for which the project might have been eligible; (b) common law protections that could be invoked, e.g., through anticipation of the Wigmore criteria; (c) legal traps to avoid that could undermine any claim for privilege; (d) the threat of the MLAT; and (e) the principles underlying the ethics-first approach, which the Belfast Project researchers were prepared to follow even if the institution was not.

Once the subpoenas arrived, protecting research participants to the extent American law allows would have involved resisting the subpoenas using every legal opening possible, making the challenger substantiate each of its claims, and appealing every order to disclose to the highest level of court that would hear the case. In the event disclosure was ordered, it would involve doing one's best to ensure that any order was obeyed to the letter—using as conservative an interpretation of the disclosure order as possible—to keep the disclosure to an absolute minimum. Instead of maintaining control over the archive and relinquishing that control only when no other option was available, Boston College suggested that the judge inspect all the republican interviews *in camera,* and even the loyalist interviews too.[52] When ordered to surrender additional materials in response to the second set of subpoenas, Boston College gave the court far more than was requested. When the District Court ordered Boston

[52] College officials ended up examining the loyalist interviews, which made little sense given that it should be obvious that they would be unlikely to know anything about McConville's abduction and murder. But more importantly, if Boston College had the ability to search through the loyalist interviews, their arguments about why they handed over republican interviews to the court seem even less compelling.

College to disclose Price's interview, Boston College did not appeal the decision, instead blaming Price, a troubled woman being treated for post traumatic stress disorder, on the basis of unsubstantiated allegations from a secondary source. The College also did not support Moloney and McIntyre in their appeal of Judge Young's ruling that denied them status as interveners. Instead of clarifying that the College would appeal every ruling to the highest level possible, Boston College's official spokesperson claimed that Boston College had "fought the fight and the fight was lost."[53]

In view of the record, Boston College has provided an example that will be cited for years to come of how not to protect research participants to the extent American law allows. Instead, it has allowed its Law of the Land doctrine to devolve into a form of *caveat emptor* (Palys and Lowman 2006; SSHWC 2005). This liability management approach holds that it is ethically acceptable to disclose information to legal or other authorities as long as the participants are warned about the possibility—except in the case of the Belfast Project, Boston College did not even warn participants about this alleged limit. *Caveat emptor* falls far short of the ethical standards expected of researchers in numerous ways:

1. It emphasizes informed consent at the expense of other ethical principles, most notably confidentiality—and does not achieve informed consent in any event.
2. The primary ethical duty of researchers is to protect research participants from harm; *caveat emptor* facilitates harm.
3. It downloads responsibility for the management of information to research participants, who are often the most vulnerable and least likely to know how legal and ethical principles interact; investigators cannot abdicate their ethical responsibilities.
4. It allows the researcher and university to avoid or show only token legal resistance to a subpoena and then give up with a shrug and say, "Sorry, but we told you that might happen," instead of resisting to the full extent that law allows.
5. *Caveat emptor* warnings of the possibility of disclosure run the risk of being treated as waivers of privilege; it is unethical for investigators to require or cause participants to waive their rights as a condition of participation.
6. Acquiring information that will benefit the researcher (through publications, enhanced reputation), the university (through the collection of overhead and/or enhanced reputation) and society (which benefits from the knowledge gained) while failing to protect research participants to at least the full extent that law allows is exploitative.

Both the researcher and the institution have a duty to protect research participants from harm. Participation in research on sensitive topics makes participants vulnerable while placing researchers in the ethical and legal driver's seats; it requires research participants being able to trust researchers—and universities—to live up to their pledges. Boston College neither lived up to the pledge it made research participants in its Donor Agreement nor to its revised pledge after the fact to maintain confidentiality to the extent American law allows.

As is so often the case with advocates of Law of the Land limitations to research confidentiality, Boston College's perspective reflects the attitude that law is merely constraining, something to be reacted to rather than something that is enabling, dynamic, and that academics can influence. In the absence of statute-based protections for research participants, a privilege for research confidentiality is something that the academy has to fight for, with researchers and the institutions they work for leading the charge. As Blomley

[53] RTÉ News/Ireland. (8 January 2012). Belfast Project interviewer fears for his life. Online at http://www.rte.ie/news/2012/0108/belfastproject.html

and Davis (1998) enjoined in a review of the actions of another university that folded its tent when a subpoena arrived:

> Challenges to academic freedom can come both from within and without the university. A university can guarantee to protect academic freedom against actions inside the institution that are within its legal and moral jurisdiction. It can, of course, give no such guarantee about threats to academic freedom that come from outside the university. But a university has the obligation to try to protect this freedom from such external threats and challenges. If universities do not take on this obligation to protect such a basic institutional right, who will?

There are many other lessons to be learned from the Belfast Project. One is to ensure that the university administration, the researcher(s) and research participants all are in agreement about the guarantee of confidentiality being made and that any consent statements or contracts encapsulating it are clear and consistent. Much of the conflict between Boston College and the researchers after the subpoenas arrived concerned what guarantee of confidentiality had been made. In the minds of the research participants and the researchers it was unlimited. Every statement that Boston College personnel made prior to the arrival of the first set of subpoenas affirmed this interpretation. Indeed, the College gave the impression it was proud of having made this guarantee because without it there would be no Belfast Project archive.[54] It was not until Boston College decided to hand over republican interviews that it began claiming that its confidentiality guarantee was limited by law, a revisionist history of the Belfast Project that pulled a single awkwardly worded clause from Moloney's contract to justify the College's capitulation.

Unfortunately, one of the other lessons learned from the Boston College subpoenas is to be suspicious of universities. Researchers usually retain control of data they gather, but in this case Boston College paid for the Belfast Project archive and became its custodian. In a recent speech at an Irish symposium on the challenge of recording memories from the Troubles, Moloney (2012a) voiced his regrets about the Belfast Project protocol:

> It wasn't just the choice of BC that was wrong but a wider mistake, and this is the lesson for others who follow in our footsteps. The mistake that we made, that I made, was to surrender control of the product, to let a second party take possession of the tapes and transcripts. Once we did that we put ourselves at the mercy of people who did not share our concern for the wellbeing of the interviewees and, when it came to the bit, were troubled only about their selfish, corporate interests.
>
> The project that we undertook was and is important and I hope others try to replicate it but my advice would be to maintain control of the product even if that makes funding more difficult.

Moloney and McIntyre now find themselves watching the institution in which they placed their trust handing over documents *en masse*. Instead of battling only the subpoenas, the researchers are also battling Boston College, the institution that funded the research to the tune of hundreds of thousands of dollars in order to add a significant jewel to its crown, but seemed unprepared to live up to the responsibilities that go along with it.

Although Boston College's spokesperson blamed the researchers and participants for the problems the subpoenas have caused, it is the researchers who have walked their talk and

[54] See *Boston College confidentiality—Public references to agreement* at http://bostoncollegesubpoena.wordpress.com/2012/01/02/boston-college-confidentiality-public-references-to-agreement/ and http://bostoncollegesubpoena.wordpress.com/2012/02/26/boston-college-confidentiality-public-references-to-agreement-2/

lived up to their unlimited promise of confidentiality, including their relentless pursuit of every legal avenue available to protect research participants. How ironic that their ethical commitment will end up being the one that ensures that research participants are protected to the extent American law allows while the institution that claims to uphold that standard came up short in several significant ways.

The Boston College case is a reminder of the responsibility to research participants that academic institutions take on, and the moral bankruptcy of *caveat emptor* approaches that shirk their ethical duty to protect research participants to at least the full extent the law allows.[55] We can only hope that Boston College's more recent decision to appeal aspects of the decision regarding the second set of subpoenas represents a change of approach that will see it live up to its pledge to protect research confidentiality to the extent American law allows. While a rapprochement with the researchers is unlikely at this juncture, if Boston College were to match the researchers' ethical leadership, it could well be the case that, in the short term, sees courts of appeal extend earlier decisions that have recognized a qualified research-participant privilege in common law[56] and, over the longer term, shows legislators the need for expanding the statutory authority that currently exists for confidentiality certificates to a broader range of research for which an iron-clad pledge of confidentiality is essential for the acquisition of valid data that speaks to some of the most important and controversial social policy issues of the day.

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[55] Presumably such behaviour is no longer possible in Canada with the publication of TCPS2 (CIHR et al. 2010), which states, "Researchers shall safeguard information entrusted to them and not misuse or wrongfully disclose it. Institutions shall support their researchers in maintaining promises of confidentiality." (Article 5.1)

[56] Many cases could be cited. Examples include *Richards of Rockford Inc.* v. *Pacific Gas and Electric* 1976; Dow Chemical v. Allen 1982; *Deitchman* v. *E.R. Squibb & Sons, Inc.* 1984; *In re Grand Jury Subpoena Dtd January 4* 1984; *Snyder* v. *American Motors Corp.* 1987; *Cusumano* v. *Microsoft* 1998. See Cecil and Wetherington (1996) and Lowman and Palys (2001) for further examples.

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