

The Ethics and Law of Confidentiality in Criminal Justice Research: A Comparison of Canada and the U.S.¹

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Abstract . The Academy of Criminal Justice Sciences *Code of Ethics* and the American Society of Criminology *Draft Code of Ethics* raise the possibility of a conflict arising between research ethics and the law relating to evidentiary and testimonial privilege. However, they say nothing about the form that legal threats to research confidentiality may take in Canada and the United States, the two countries where these *Codes* apply, nor do they describe the strategies that researchers can employ to protect confidential research information in court. The purpose of this article is to address these matters. The paper begins with a brief description of the role that confidentiality plays in protecting research participants and maintaining the validity and reliability of criminal justice research. It then describes the legal context in which the researcher's ethical obligations unfold and the strategies researchers can employ to protect confidential research information when third parties use legal force to try to obtain it. The paper argues that the ethical responsibilities of researchers studying criminal justice issues are best fulfilled and their research participants best protected when researchers use their understanding of law to design research so as to anticipate the evidentiary requirements of the courts. It concludes with a discussion of the respective advantages and disadvantages of statutory as compared to common law protections for research confidentiality.

Confidential information provided by research participants must be treated as such by criminologists, even when this information enjoys no legal protection or privilege and legal force is applied.

(American Society of Criminology *Draft Code of Ethics* paragraph 30;
Academy of Criminal Justice Sciences *Code of Ethics*, paragraph 19.)²

With this sentence, taken from the 1989 American Sociological Association's (ASA) *Code of Ethics*, the American Society of Criminology (ASC) draft *Code of Ethics* and Academy of Criminal Justice Sciences (ACJS) *Code of Ethics* raise the possibility of a conflict arising between research ethics and the law relating to evidentiary and testimonial privilege. Both affirm that the criminologist's primary obligation is to ethics. However, none of these codes say anything about the form that legal threats to research confidentiality may take. And while all enjoin

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² The ACJS *Code* sets out to be more advisory rather than regulatory in tone (see its Preamble), and changes the word "must" to "should."

researchers in one way or another to “anticipate possible threats to confidentiality” (e.g., ACJS *Code of Ethics*, paragraph 18), none describe the legal protections and privileges that researchers can employ to protect confidential research information in court.

While confidentiality is essential to many different types of research, nowhere is it more important than in research where subjects are asked to divulge information about criminal activity and criminal justice processes, especially when this concerns criminal activity and/or rights violations that have not been detected. The primary role of research ethics is to ensure that subjects are not harmed by their participation in research. When subjects divulge information about crime or criminal justice processes, it is our ethical responsibility to ensure that the information cannot be used against them. Without a guarantee of confidentiality and confidence in our willingness and ability to maintain it, neither offenders nor those who prosecute, process and incarcerate them -- police, prison guards, prosecutors and judges -- are likely to reveal sensitive information about the nature of their activity and the operation of the criminal justice system.

The purpose of the current paper is to address these issues as they pertain to criminal justice research in Canada and the United States. The paper begins with a brief description of the role that confidentiality plays in protecting research participants. It then describes the legal context in which a researcher's ethical obligations unfold and how researchers most effectively can protect confidential research information when third parties use legal force to try to obtain it. Because the ASC and ACJS ethics codes apply in both Canada and the United States, we describe the history of conflicts between ethics and law in both countries. The comparison itself is instructive because of the very different experiences of researchers in the two countries.

Confidentiality in Criminal Justice Research

The need for confidentiality arises in relationships where one party is vulnerable because of the trust reposed in the other and includes relationships where one party provides information to another *because* of the latter's commitment to confidentiality. For this reason, a confidential relationship is a fiduciary relationship *par excellence*.

The researcher-participant relationship is unique among relationships in which confidentiality may be considered integral to the functioning of the relationship. If research participants face a risk because of their participation in our research, it is usually because we have walked into their lives and exposed them to it. Generally, research participation is voluntary, and conducted without undue coercion or promise of reward. While some research participants are paid for their time, such as students in psychology experiments or criminal offenders, the payment is usually nominal. Although participants may derive satisfaction at someone lending them an ear and perhaps even hope to change the world by revealing private information to a researcher, research participants are generally motivated by their desire to help create knowledge for the greater good.

The primary purpose of research ethics is to ensure research participants are not harmed by their involvement in research. With respect to risks produced by third party intrusion, our commitment to confidentiality and anonymity provide the key foundations for this protection. When research can be conducted in a way that maintains research participant anonymity, the threat of violating confidentiality because of some unwanted third party intrusion is minimal. Clearly, whenever data can be gathered anonymously, they should be.

However, in many types of research, anonymity is not an option. Researchers who want to link particular individuals across different databases or track certain participants over time must have a means of identifying research participants. When working with large databases, a variety of techniques can be used to sever identifying information and destroy it, or store it separately, preferably in another country.

Unless they are involved in longitudinal studies or tracking individuals across databases, quantitative researchers generally do not experience the problem of recording incriminating

information, and they rarely carry it in their heads. But the more qualitative and inductive the research becomes, the more difficult it is to use technical devices to protect research participants. Ethnographers and other researchers working with a limited number of key informants or on case histories, where participants are chosen on the basis of their reputation or institutional affiliation and position, can delete identifying information from interview transcripts and field notes, but they cannot delete it from their memories.

Of course, confidentiality is not essential across the entire spectrum of research. With relatively innocuous topics confidentiality may be of little concern to participants. Also some research participants prefer to be named, as is their right. However, when research participants divulge personal information that could harm their reputation, self-esteem and/or well being, and especially when secrecy is cherished in the social world under study, the researcher-participant relationship is predicated on trust. Trust cannot be built on a promise of confidentiality that, depending on whether law enforcement authorities or interested third parties want the information, may or may not be kept.

Potential Conflicts Between Research Ethics and Law

There are at least four areas of potential conflict between the law and the ethical requirement of confidentiality:

1. When researchers learn about certain crimes and are statutorily obliged to report them (i.e., mandatory reporting laws that do not exempt researchers; these vary by jurisdiction, but may include, for example, elder abuse, child abuse, and/or spousal assault).
2. When researchers learn about potential future crime and may be held liable for harm to third parties they could have prevented.
3. When non-governmental third parties subpoena researchers to testify about issues arising in high stakes litigation.
4. When prosecutors, grand juries, congressional committees and various public bodies subpoena researchers to testify about crimes and/or other offences research participants may have revealed to the researcher. Coroners also can subpoena researchers who they think might have information relevant to an inquest.

In general, the first two are situations where the researcher's violation of confidentiality would be a matter of their own initiative, independent of compulsion. In contrast, subpoenas create the threat of compelled revelation after the fact. Depending on the kind of research they are conducting, criminologists could find themselves confronting dilemmas in any of these four areas. However, historically, in the U.S. at least, it is the third and fourth categories — both involving the possibility of subpoena and orders for disclosure — that have represented the greatest threat to researchers and their participants.

Subpoenas and Court Orders for Disclosure: A Brief History

The general duty that all citizens have to testify when called upon — and the contempt of court they can be charged with if they do not — constitutes the principle threat to research confidentiality. In the U.S. since the 1960s, dozens of researchers have received subpoenas and been asked — and occasionally ordered — to violate research confidences (e.g., see Bond, 1978; Carroll & Knerr, 1975; Cecil & Wetherington, 1996). In Canada, we know of only one such instance (see below).

Challenges to Research Confidentiality in the United States

In the United States, the principal threats to research confidentiality have come from Congressional committees, grand juries and from private interests using the discovery process in civil litigation. Since 1970, an extensive secondary literature has developed to describe these problems.

One of the first recorded instances of third party attempts to obtain confidential research information involved the FBI's threat to subpoena some of the sex research records of the Kinsey Institute at Indiana University. The FBI withdrew when members of the Institute made it clear that, regardless of the legal consequences, they would not release confidential research information (Carroll & Knerr, 1973).

Conflicts between research ethics and law proliferated during Richard Nixon's Presidential Administration when politicians, law enforcement officials, prosecutors and grand juries began trying to co-opt research for law enforcement purposes. For example:

- In 1971 a local county prosecutor subpoenaed a researcher studying a federally sponsored income maintenance program in New Jersey. The prosecutor was interested in determining if any participants had illegally collected welfare while receiving income maintenance. The researcher refused to reveal the names of his participants on the grounds that he had guaranteed them anonymity (Bond, 1978).
- In 1972, Samuel Popkin, a Harvard political scientist, spent eight days in jail for refusing to reveal to a grand jury the identities of the persons he interviewed regarding the Pentagon papers, a secret war study (Carroll & Knerr, 1973; O'Neil, 1996).
- In 1973, as part of its investigation into criminal liability arising from the Attica prison riot, the New York State Attorney's Office subpoenaed the records of the State Governor's Commission on the riot. In this instance, the court ruled that, because of the threat to research that a violation of confidentiality would cause, it was in the public interest that the subpoena be quashed (Nejelski & Finsterbusch, 1973).

By the mid-1970s, Carroll and Knerr (1975) were able to identify some two dozen instances of Congressional Committees, law enforcement agencies, prosecutors and grand juries harassing researchers for information to aid the investigation and prosecution of research participants. These developments had profound implications for criminology because of the potential they had to compromise research where anonymity was not possible.

Since that time, although the number of such cases has declined, two of the most important occurred:

- Mario Brajuha was conducting participant observation research on "the sociology of the American restaurant" when the restaurant where he was working and observing burned down under suspicious circumstances. A grand jury subpoenaed Brajuha to testify and produce his field notes to help their investigation. Brajuha refused. In the end, Brajuha was able to anonymize his field notes before submitting them, thereby protecting the identities of his participants (*In re Grand Jury Subpoena Dtd*, 1984; Brajuha & Hallowell, 1986).
- University of Washington graduate student Richard Scarce was engaged in research with animal rights activists when an animal care facility at the university was vandalized. When the grand jury investigating the case subpoenaed Scarce, he refused to reveal information that would violate the confidentiality of individual participants. His claim of privilege was denied both at trial and on appeal. Scarce maintained confidentiality nonetheless, and spent 159 days in jail until the judge deemed that his incarceration was no longer "coercive" but

"punitive," at which time he was released (*In re Grand Jury Proceedings. James Richard Scarce*, 1993; Scarce, 1994, 1999).

The threat from Congressional Committees, grand juries and prosecutors appears to have declined over the past twenty years. But from the mid-1970s onwards, another broad threat posed by large corporations embroiled in high stakes litigation came to the fore. Corporations became interested in research findings either to discredit them or enlist them in support of the corporation's case. The following summary of cases³ on compelled disclosure gives a sense of the wide range of research affected:

- Marc Roberts, a Harvard public health professor, interviewed employees of Pacific Gas and Electric Company (PG&E) in a study of utility company decision-making regarding environmental issues. Subsequently, a company sued PG&E for breach of contract. Roberts's interview notes were subpoenaed because the plaintiff believed they might have a bearing on the case. Roberts refused, arguing that compelled disclosure of confidential information would stifle research into public policy, the very subject in which the public interest is greatest (see *Richards of Rockford Inc. v. Pacific Gas and Electric*, 1976).
- In 1982, two Dow Chemical Company herbicides were the subject of cancellation hearings before the Environmental Protection Agency. When independent research conducted at the University of Wisconsin was cited at the hearings, Dow subpoenaed the researchers asking them to produce complete documentation of the research. The researchers refused, arguing the subpoena was excessive and amounted to harassment (*Dow Chemical v. Allen*, 1982).
- Arthur Herbst, Chair of Obstetrics and Gynecology at the University of Chicago, had compiled a registry of over 500 women with vaginal and cervical adenocarcinoma dating back to 1940, and had published several articles based on data in the registry. In 1984, plaintiffs brought an action against several drug companies alleging a drug they manufactured caused cervical cancer. Dr. Herbst's research was cited in support of the claim. One of the companies subpoenaed Herbst, ordering that he produce every record in the registry. Herbst refused, stating that information in the registry was confidential, and that his and similar research would be impossible to conduct in future if that confidence were to be violated (*Deitchman v. E.R. Squibb & Sons, Inc.*, 1984).
- On two occasions, American Tobacco Company subpoenaed Irving Selikoff of the Mount Sinai School of Medicine, in order to challenge his research regarding links between smoking and cancer (see *In re American Tobacco Co.*, 1989a, 1989b). In another case, Dr. Paul Fischer of the University of Georgia Medical School had surveyed three- and six-year old children to determine whether they were able to identify R.J.Reynolds Tobacco Company's "Joe Camel" character. They were. As part of a suit against them in California, RJR subpoenaed Fischer, initially demanding all documentation in relation to his study, including the names of all the children who had taken part (*R.J. Reynolds Tobacco Co., v. Fischer*, 1993; Fischer, 1996). Both Selikoff and Fischer resisted the subpoenas.
- In 1992, the Exxon Shipping Co. was sued for liability arising from the Exxon Valdez oil tanker disaster. Upon hearing of research being conducted by University of Alabama sociologist, J. Steven Picou, regarding community stress in Alaskan coastal villages

³ For further discussion of many of these cases, see the compendium of articles in the special edition of *Law and Contemporary Problems* (Volume 59, No. 3) entitled, "Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law."

following the disaster, the shipping company subpoenaed Picou's field notes. Picou challenged the subpoena (Picou, 1996).

- Professors Michael Cusumano and David Yoffie of Harvard and MIT had interviewed 40 Netscape employees regarding their "browser war" with Microsoft. Not long after the interviews were conducted, Microsoft became embroiled in defending itself against anti-trust violations. With respect to the browser wars, Microsoft argued that the stunning increase in market share it enjoyed at Netscape's expense was not because of the predatory business practices of which Microsoft stood accused, but due to poor business decisions by their rivals at Netscape. Microsoft subpoenaed the two researchers and asked for all interview tapes, transcripts, data files, correspondence and field notes pertaining to the browser wars. The researchers refused, claiming these materials were privileged (see *In re: Cusumano and Yoffie*, 1998).

We will review the outcomes of these cases as we delve more deeply into the implications of U.S. jurisprudence for protecting confidential research information. Although none of the civil cases is explicitly "criminological," one can easily imagine situations where researchers studying corporate or white-collar crime might find themselves in the crossfire between corporate litigants and/or government agencies. Also, U.S. criminologists must remain mindful of the threat posed by grand juries investigating specific cases.

Challenges to Research Confidentiality in Canada

In Canada, the situation is very different. There are no grand juries and, to our knowledge, prosecutors have not pressured researchers to yield the identity of research participants who have disclosed information about their own criminal activity. And we have not yet found an example of a corporation involved in high stakes litigation dragging a Canadian researcher into court. Indeed, we can find just one instance where the threat of compelled disclosure has arisen.⁴ The case involved a coroner's court and Simon Fraser University (SFU) criminology graduate student Russel Ogden, whose MA thesis included interviews with people who had witnessed or assisted in the suicides and euthanasia of persons with AIDS.

When he submitted his ethics application to the SFU Research Ethics Review Committee, Ogden made it clear that he proposed to provide "absolute confidentiality" to his participants. How else could research with persons potentially facing first degree murder charges be conducted? The university ethics committee approved the proposal.

After a local newspaper published an article on the research, the Vancouver Coroner subpoenaed Ogden and a journalist to attend an inquest into the death of an "unknown female" who may have been one of Ogden's subject's. Ogden appeared, but refused to reveal the identity of any of his participants, whereupon the Coroner threatened to take action against him for contempt of court.

Ogden's lawyers argued that his research met the Wigmore criteria, a common law test Canadian courts use to adjudicate claims of privilege, which we describe later in the paper. In the end, the Coroner acknowledged the public interest privilege that made Ogden's research possible, and released him "from any stain or suggestion of contempt" (*Inquest of Unknown Female*, 20 October 1994; oral reasons for judgement of the Honourable L. W. Campbell, 91-240-0838, Burnaby, B.C., p.10).

⁴ In 1998 we published an article in the Canadian Association of University Teachers *Bulletin* (Lowman & Palys, 1998a), the Association's monthly national newspaper, requesting information about any cases members might know. None were forthcoming.

The Simon Fraser University Research Ethics Controversy

Although Ogden won the day in Coroner's court, the experience set in motion a prolonged controversy at SFU over the University's treatment of Ogden, and subsequent changes to the University's research ethics policy. It took an internal inquiry and the caustic comments of a judge to resolve the controversy over the administration's treatment of Ogden (Lowman and Palys, 2000). In 1998, the University President apologized to Ogden for the university's failure to appear on his behalf in court, paid his legal fees and lost wages, and undertook to represent other researchers should they ever find themselves in the same predicament. The controversy over changes to the ethics policy proved more difficult to resolve.

The controversy about the ethics policy revolved around a "limited confidentiality consent statement" university administrators and the ethics committee imposed to ensure there would not be a repeat of the problems they perceived to be caused by Ogden's guarantee of absolute confidentiality (Lowman & Palys, 1998b). A new "screening" question was added to the ethics review application form asking: "Does information to be obtained from subjects include information on activities that are or may be in violation of criminal or civil law?" Applicants who answered in the affirmative — mostly criminologists — were required to tell participants:

Any information that is obtained during this study will be kept confidential to the full extent permitted by law... It is possible as a result of legal action the researcher may be required to divulge information obtained in the course of this research to a court or other legal body.

Framed this way, the statement had a severe impact on certain kinds of criminological research. What prospective participant would talk to a researcher about their offences if they thought the researcher would hand the information to a court so that they could be prosecuted?

When pressed about the ethics of this approach, the VP-Research gave three justifications for use of the limited confidentiality consent statement (Clayman, 1997; testimony in *Russel Ogden v. SFU*):

1. Because researcher-participant privilege is not recognized in Canadian statutory law, there is no point in challenging a subpoena.
2. Researchers are "not above the law of the land" and the University cannot condone law breaking because it must respect the Rule of Law. Consequently, the university cannot approve an unlimited guarantee of confidentiality because it implies that a researcher would deliberately break the law by refusing to comply with a court order to disclose confidential research information.
3. Therefore, in the interest of informed consent, it is necessary to warn prospective participants of the legal limits to confidentiality.

We refer to this doctrine as the "Law of the Land" or *caveat emptor* approach to research ethics. It put criminologists and researchers from several other disciplines in a catch-22, because the SFU research ethics policy also says, "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their own disciplines." No North American ethics code we know of absolutely subordinates research ethics to the law of confidentiality, including the disciplinary codes that apply to our own research, criminology and sociology.

Consequently, several SFU criminologists refused to use of the limited confidentiality consent statement on the grounds that:

1. It abrogates the researcher's ethical responsibility to do everything legally possible to protect research participants from harm. As we demonstrate below, academic

researchers *can* use a case-by-case analysis in common law to assert privilege, as Ogden did.

2. Far from satisfying the requirements of informed consent, the limited confidentiality consent statement provides information only about the *legal* limit of confidentiality. It says nothing about the researcher's *ethical* stand, because it assumes that law establishes the ethical limit.
3. While researchers are not above the law of the land, many social science ethics codes recognize that the researcher's primary professional obligation in the last instant is to ethics, not law. Consequently, in those rare circumstances where law and ethics conflict, researchers must oppose compelled disclosure if it creates an ethical conflict.

As the ensuing discussion demonstrates, this "ethics-first" position is based on the disciplinary norms and standards of various disciplinary ethics codes and the *Tri-Council Policy Statement*, the new national ethics code created by Canada's three federal research-funding agencies (the Medical Research Council,⁵ the Natural Sciences and Engineering Research Council and the Social Sciences and Humanities Research Council.1998). While the ethics-first position holds that, in the last instant, law must be subordinated to ethics, the researcher's goal nevertheless should be to avoid ever having to violate a court order to disclose confidential information. The ethical and legal strategy we present next is designed to do just that and, in the process, maximize the legal protections available for research participants.

Research Confidentiality: The Criminological Tradition

Reflecting on the obvious threat that U.S. courts and grand juries posed to research participants and the integrity of research, Marvin Wolfgang wrote a series of articles (1976, 1981, 1982) outlining the appropriate ethical response. Wolfgang summarized the criminologist's ethical responsibility to maintain confidentiality this way:

[The researcher] is a neutral, disinterested recipient of data collected only for scientific research purposes. The purpose for obtaining the information is to aid the scholarly enterprise and to provide guidance for a rational social policy. Data obtained that could have direct untoward consequences to subjects are not the possession of the state but of science. ... the social scientist is not a representative of any branch of government with an obligation to execute certain police or judicial duties. (1981, p.351)

In a subsequent section entitled, "What should a research center do if the police, prosecutor or court requests the files?" Wolfgang states:

Our position is clear: we would not honor the request. We would make every effort, short of using aggressive force, to prevent the files from being examined or taken from the Center's premises. We would, if necessary, enter into litigation to protect the confidentiality of the records (pp. 352-353).

He adds that, even if a researcher were to be charged as an accessory or with contempt, "we would still maintain a posture of unwillingness to reveal names" (p.353).

In fact, in the U.S. the general researchers' response to third party threats to confidentiality, be they agents of the state or private litigants, has been precisely the approach Wolfgang outlined: resistance, resistance, resistance. They have been aided in this task by their

⁵ Now called the Canadian Institutes of Health Research.

respective disciplinary associations, who have contributed by filing *amicus curiae* briefs in court,⁶ and developed codes of ethics that make it clear that researchers have an ethical obligation to maintain confidentiality unless the research participant wishes to waive that right. If its *Draft Code* is accepted, ASC will have institutionalized that approach in criminology, as ACJS already has.

And in other Disciplines...

Although many researchers do not share Wolfgang's view of researchers as "neutral" and "disinterested," several disciplinary ethics codes explicitly recognize that, in some rare situations, the ethical course of action might mean refusal to comply with court-ordered, or some other kind of compelled disclosure. For example, the American Political Science Association code (section 6.2) says that:

[S]cholars also have a professional duty not to divulge the identity of confidential sources of information or data developed in the course of research, whether to governmental or non-governmental officials or bodies, even though in the present state of American law they run the risk of suffering an applicable penalty.

Another example comes from the 2000 Canadian Psychological Association's *Code*, which requires psychologists to:

IV.17 Familiarize themselves with the laws and regulations of the societies in which they work ... and abide by them. If those laws seriously conflict with the ethical principles contained herein, psychologists would do whatever they could to uphold the ethical principles. If upholding the ethical principles could result in serious personal consequences (e.g., jail or physical harm), decision for final action would be considered a matter of personal conscience.

Similarly, the 1997 American Sociological Association code (section 11) says that, "Confidential research information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege." The ASA code is worth examining in more detail, as both the ASC and ACJS codes are based on it.

The American Sociological Association Code of Ethics

Section 11 of the 1997 *Code of Ethics Code* states unequivocally that, "Sociologists have an obligation to ensure that confidential information is protected... even if there is no legal protection or privilege to do so." However, the clause "and legal force is applied" which appeared in the 1989 code at the end of that sentence and which is reproduced in the ACJS *Code* and ASC *Draft Code*, was omitted from the 1997 version.

The statement in the 1989 *Code* about maintaining confidentiality even when "legal force is applied" was valuable precisely because it represented unambiguous evidence that confidentiality is crucial to the research enterprise and worth fighting for. Also, it clearly recognized a researcher's freedom to pledge unlimited confidentiality to research participants. Thus, a potential problem with the 1997 ASA *Code* was that it could be interpreted as equivocating on whether confidentiality is an integral part of the researcher-participant relationship. Along with statements affirming the importance of confidentiality to research are others alluding to legal constraints on the degree of confidentiality that can be offered. Was ASA merely acknowledging their existence or accepting them as limits?

⁶ In the Brajuha case, for example, a joint brief was filed by the American Sociological, Anthropological, and Political Science Associations.

When these potential difficulties were drawn to the attention of the ASA Committee on Professional Ethics (COPE) (Lowman & Palys, 1999) ASA published a clarification:

One's ability to pledge confidentiality to research participants is a cornerstone of research involving human subjects. Further, a researcher's obligation to maintain the confidentiality of information lies at the heart of the ethical principles of science and research. Thus, the changes in the ASA *Code of Ethics* regarding the limitations to confidentiality were crafted with the utmost care and reflection. By clarifying the principle, the goal was to strengthen, not to erode it.

The changes in the *Code* were not intended to undermine a researcher's commitment to confidentiality or to subjugate research ethics to law. ... Although the phrase "even when ... legal force is applied" has been eliminated in the 1997 *Code*, this was not to imply that sociologists should divulge confidential information when pressure from the courts or legal sanction is brought to bear. (Iutovich, Hoppe, Kennedy, and Levine, 1999, p.5)

Clearly the ASA *Code* does not subordinate ethics to law.

The Canadian Tri-Council Policy Statement

The *Tri-Council Policy Statement* (MRC et. al. 1998), Canada's new national research ethics code, should spell the demise of the "law of the land" doctrine of research ethics, not just at Simon Fraser University, but across Canada. The *Policy Statement* (p. i.5) makes confidentiality one of its core principles and clearly recognizes that:

Legal and ethical approaches may lead to different conclusions. The law tends to compel obedience to behavioural norms. Ethics aim to promote high standards of behaviour through an awareness of values, which may develop with practice and which may have to accommodate choice and liability to err (p. i.8).

However, the code also notes that researchers are, "honour-bound to protect confidentiality ... to the extent possible within the law" and should "indicate to research subjects the extent of confidentiality that can be promised, and hence should be aware of the relevant law." (p. 3.2)

Lest anyone interpret these statements as implying that law does set the limit to confidentiality, we sent a formal query to the three granting councils asking them if the code intended to subordinate research ethics to the law of confidentiality. The reply, written by NSERC on behalf of all three councils,⁷ unequivocally states that:

If there is a conflict, the researcher must decide on the most acceptable course of action. The principle of maintaining the confidentiality of research information is an important element of the TCPS. The onus is on the researcher to know the legal context of the research before starting his/her research activities, and to anticipate his/her options in the unlikely event of a court-ordered disclosure.

In other words, the *Policy Statement* does not subordinate ethics to law; the researcher — not the university or the REB — must decide on the appropriate course of action should they be confronted with a court order to disclose confidential research information. This approach is consistent with the ASA Code.

And like the *Policy Statement*, the ASA Code also requires that researchers inform themselves about the law relevant to their research. This is not just because of considerations of

⁷ The three councils are Natural Science and Engineering Research Council (NSERC), the Social Science and Humanities Research Council (SSHRC) and the Canadian Institutes of Health Research (CIHR).

informed consent. Just as importantly, researchers need to know the law in order to be able to employ law in the service of ethics. In this respect, this current paper moves beyond talking about the appropriate *reaction* to third party intrusion by also encouraging researchers to consider how they might fare even better than they have by proactively *anticipating* the evidentiary requirements of the courts. This way, they can maximize the protection of research participants that is "possible within law" and promote the development of "good law" by supplying the courts with "good facts" on which to base it. This requires some understanding of the law of privilege.

Research Confidentiality and the Law of Privilege

Generally speaking, the courts' access to all relevant information pertinent to a case is considered to be fundamental to their search for truth. Accordingly, citizens are obliged to testify about their knowledge of facts relevant to all court proceedings, both civil and criminal. However, in some instances, evidentiary "privilege" is granted in the interest of public policy and the good order of society. When information is privileged a witness may not be compelled to testify or disclose relevant documents. In some cases, privileges are defined in statute; in others, privileges are recognized in common law.

Statutory Exemptions From the Obligation to Testify

In both Canada and the U.S. there is perhaps no better example of statutory privilege for researchers and their participants than that extended by the state to its own research, and, most notably, to researchers responsible for the census.

The Canadian Statistics Act

The one place in Canada where researcher-participant privilege has been codified in law is in the *Statistics Act*. This *Act* gives Statistics Canada researchers protection to ensure that the information they collect cannot be used by any other branch of government, or in any civil or criminal court "in such a manner that it is possible from the disclosure to relate the particulars obtained from any individual return to any identifiable individual person, business or organization" (Section 17(b)). Section 18 provides the statutory protection that enables them to live up to that ethical obligation without fear of punishment:

Information is privileged

18. (1) Except for the purposes of a prosecution under this *Act*, any return made to Statistics Canada pursuant to this *Act* and any copy of the return in the possession of the respondent is privileged and shall not be used as evidence in any proceedings whatever.

(2) No person sworn under section 6 shall by an order of any court, tribunal or other body be required in any proceedings whatever to give oral testimony or to produce any return, document or record with respect to any information obtained in the course of administering this *Act*.

There appear to be four main reasons for this provision of privilege:

1. Information to be gathered through social research is essential to informing government so that it is best able to fulfil its mandate;
2. Confidentiality is essential to the gathering of accurate information;
3. When the first *Statistics Act* was proclaimed in 1917, the primary mandate of Statistics Canada (then the Dominion Bureau of Statistics) was to undertake the census. Because of the mandatory participation requirement — Canadians are liable for fine and/or

imprisonment if they do not participate in the census — Parliament traded mandatory reporting for guaranteed confidentiality; and

4. Because Statistics Canada is itself a part of government (i.e., the state), research subjects must be assured that any information they provide will not be used against them later by other parts of government.

Although the privilege embedded in the *Statistics Act* originated in part with the mandatory participation requirement of the census, Statistics Canada now engages in many other types of surveys that do not require participation, but are still governed by the same oath and privilege.

Beyond the *Statistics Act*, there is no other statutory privilege for researchers. This at least in part reflects the fact that, until recently, there has been no need to defend confidential research information from court intrusion.

Statutory Privilege for Research Participants in U.S. Law: The U.S. Census Bureau

Since 1880 in the U.S., tough laws and courts at every level have upheld census confidentiality. As one pamphlet on the Year 2000 Census put it, "No other government agency has access to individual or family census information — not the IRS, not Immigration, not welfare or law enforcement agencies — no one except census bureau employees" (U.S. Census Bureau 1999). The *United States Code* provides this guarantee by ensuring that census information "shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding" (Title 13, Chapter 7, Subchapter 1, §9). Census Bureau employees take an oath that they will live up to that guarantee, and face up to five years in federal prison and up to a five thousand dollar fine if they break it (*U.S. Code*, Title 13, Chapter 7, Subchapter 1, §214).

The challenges to research confidentiality that arose in the 1960s and 70s led U.S. federal legislators to create some statutory protections for other research as well. The *Code of Federal Regulations* and *United States Code* currently provide protections for certain kinds of research. However, "confidentiality certificates" represented the first research shield beyond the protections for the Census Bureau.

Confidentiality Certificates

Certificates of confidentiality were created in 1970 to enable research projects on drug use among returning Vietnam War veterans during the period when grand juries, Congressional Committees and the like were posing threats to research confidentiality. In this political climate, the Drug Enforcement Administration realized that it would not be possible to conduct valid and reliable research on drug use and abuse. Granted by the Secretary of what was then known as the Department of Health, Education and Welfare (HEW),⁸ the first certificates protected research participants by bestowing immunity to drug researchers from compelled production of confidential research information.

When HEW was divided into the separate Departments of Education, and Health & Human Services (DHHS), the authority to protect individually identifiable research data went to the separate departments. The National Centre for Education Statistics is statutorily mandated to "protect persons in the collection, reporting and publication of data" under 20 U.S.C. §9007. Data collected under its authority "shall be immune from legal process, and shall not, without the permission of the individual concerned, be admitted as evidence or used for any purpose in any

⁸ *Comprehensive Drug Abuse Prevention and Control Act* of 1970, Pub. L. No. 91-513, § 3(a)

action, suit, or other judicial or administrative proceeding." This protection only applies to individually identifiable information.

At DHHS, a 1974 amendment expanded confidentiality certificate coverage to mental health in general, including research on the use and effect of alcohol and other psychoactive drugs,⁹ and, in 1988, were expanded even more broadly. Currently, §301(d) of the *Public Health Service Act* (42 U.S.C. §241(d)) empowers the Secretary of the DHHS to protect the identities of persons participating in research from compelled disclosure:

Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings to identify such individuals (§301(d))

The Secretary¹⁰ can award the protection to a category of sensitive health research, as was done in the 1970s in the case of research regarding methadone maintenance programs, or can grant a confidentiality certificate on a case-by-case basis. An important element of confidentiality certificates is that they can be granted to anyone studying "health," whether funded by DHHS or not, where confidentiality is essential to undertaking the research, e.g., research that examines "health" issues in relation to sexual preferences and practices, drug (ab)use or criminal behaviour; medical records or genetic information; or any other phenomenon or source where the information being gathered is sensitive and its revelation could be damaging to the participant financially or socially.¹¹

Notwithstanding their limit to "health" research, confidentiality certificates provide powerful protections. As far as we have been able to ascertain, they have been challenged only once (*People v. Newman* 1973)¹² and upheld; the decision in that case referred to the statutory provisions as offering "absolute confidentiality" (see at 11, 12, 13, 15, 16, 17, 18, 20, 44).

Privacy Certification

A similar confidentiality statute protects research funded by the National Institute of Justice (NIJ) and other Bureaus and Program Offices within the Office of Justice Programs (OJP):

Research or statistical information identifiable to a private person shall be immune from legal process, and shall only be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceeding with the written consent of the individual to whom the data pertains. *Code of Federal Regulations* (Revised July 1, 1997) Title 28, Volume 1, Section 22.28.

All research supported by NIJ or other OJP agency is subject to the regulations laid out in 28 *CFR* Part 22. These regulations require that anyone applying for OJP funding must submit a "privacy certificate" which describes the measures they will take to comply with the confidentiality regulations.

⁹ Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Amendments of 1974, Pub. L. No. 93-282, §122(b).

¹⁰ Although legal authority lies with the Secretary of DHHS, the administration of individual confidentiality certificates has been delegated to the National Institutes of Health (NIH).

¹¹ See documentation at the National Institutes of Health (NIH) web site, particularly at <<http://grants.nih.gov/grants/oprr/humansubjects/guidance/certconpriv.htm>> and <<http://grants.nih.gov/grants/oprr/humansubjects/guidance/cert-con.htm>>.

¹² The challenge was limited to a "technical" issue; the argument was that the Secretary's statutory authority for granting the confidentiality certificate in question had been superseded by subsequent legislation. A trial and appeal court disagreed with that argument; the Supreme Court refused to even hear the case.

Once approved, the researcher's privacy certificate enjoys statutory protection. To the best of our knowledge, they never have been challenged in court.

State Law

In the U.S., Rule 501 of the *Federal Rules of Evidence* notes that state law supplies the rules of decision in civil actions and proceedings. Accordingly, many states have created statutory privileges. Some states have enacted specific research shield laws. For example, New Hampshire protects data "obtained for the purposes of medical or scientific research by the Commissioner [of Health and Human Services] or by any person, organization or agency authorized by the Commissioner to obtain such data" (N.H. Rev. Stat. Ann. §126-A:11, 1996). Fanning (1999) notes that Minnesota (Minn. Stat. Ann. §144.053, 1983) and Michigan (Mich.Comp.Laws §333.2631-2632, 1992) have similar laws. Also, a research shield law is currently before the Georgia legislature. U.S. researchers should check local state laws so that they can provide accurate descriptions of the confidentiality protections they are able to offer participants.

Thirty-one states have enacted journalistic privilege, some of which could include researchers under their broad definition of "journalist" (McLaughlin 1999). Only Delaware has legislation that explicitly includes a reference to scholars in its definition of "journalist." Because of the similarity of journalism and social science and the door this opens to First Amendment protection, McLaughlin suggests this is an important body of law for scholars asserting privilege. Researchers also should be aware of both federal and state level freedom of information and protection of privacy legislation for any bearing these might have on their research.

Evidentiary Privilege in Common Law in Canada and the United States

In the U.S., it appears that because the writers of the *Federal Rules of Evidence* could not agree on how to codify the common law of privilege (Cotchett and Elkind 1993), privilege has been left to the principles of common law as interpreted by the courts "on the basis of reason and experience," except as otherwise required by Congress, the Supreme Court and state laws (*Federal Rules of Evidence* 501). Thus, researchers who are not protected by confidentiality and privacy certification or by state journalist or researcher shield laws must use common law to assert privilege. Similarly, in Canada, all researchers who are not employees of Statistics Canada must turn to the common law to assert privilege. Consequently, both Canadian and U.S. researchers would do well to anticipate the criteria that claims of privilege in common law must satisfy in order to maximize their chances of securing it.

Anticipating Evidentiary Concerns: The Wigmore Test

In the U.S. John Henry Wigmore, a Northwestern University Dean of Law and at the time the foremost authority on procedure and evidence distilled case law on privilege into a comprehensive test that is still used by American courts today (Lempert and Saltzburg 1982; Palys and Lowman, in press). However, although U.S. commentators on research-participant privilege mention the Wigmore test (e.g., Nelson and Hedrick 1983; Traynor 1996) U.S. researchers confronted with a subpoena have not resorted to the Wigmore criteria as a framework for presenting evidence in defense of privilege. In Canada, the Supreme Court also has recognized the Wigmore test as the appropriate measure for adjudicating claims of privilege (see Sopinka, Lederman and Bryant 1992). In the one Canadian case where a court sought confidential research information, the researcher (Russel Ogden) successfully utilized the Wigmore test to assert privilege.

According to Wigmore, to be privileged, communications must satisfy four criteria:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and

- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. (1905, p.3185; italics in original).

Canadian legal commentary indicates that there should be clear evidence on each criterion in order for a communication to be privileged (Daisley 1994; Marshall 1992; *R. v. Gruenke* 1991). Similarly, U.S. authors advise that researchers should assume courts know little about research and that researchers must be prepared to present evidence that is specific to the case (e.g., Crabb 1996; Traynor 1996; Wiggins and McKenna 1996).

The first criterion requires that the subjects in the relationship must share the expectation that their communications are “confidential.” Accordingly, researchers should clearly inform research participants that their interactions are confidential, and record these undertakings and participants’ understanding of them in anonymized interview transcripts or field notes.

The second criterion requires that confidentiality is so important to the continued existence of the relationship that it would cease to exist or be seriously compromised without it. In Wigmore’s (1905) words, the object of granting privilege is “to protect the perfect working of a special relation, wherever confidence is a necessary feature of that perfect working” (p.3211).

Confidentiality is clearly a necessary feature of research where participants provide information that, if they were to be identified, could seriously harm them. What criminal offender, for example, would ever disclose information about their own criminal activity knowing that, if pressured, the researcher would reveal the identity of the informant to a prosecutor or a grand jury in order to prosecute them? However, because the need for strict confidentiality is not universal, researchers should be prepared to demonstrate that the provision of confidentiality was essential to the research at hand. Most simply, this could be done by asking participants if they would participate if the researcher did *not* guarantee confidentiality, and recording their response in anonymized interview transcripts or field notes.

The third criterion asks whether “the community” believes the researcher-participant relationship should be sedulously fostered. Researchers should be prepared to present evidence showing the importance of research to various communities, including, for example: (1) the research community; (2) the community of persons being researched; (3) the community interested in the research for the purpose of informing social policy; and (4) the broader citizenry.

The fourth criterion of the Wigmore test calls for a balancing of two competing social considerations:

- (1) The importance attached to the relationship for which privilege is sought and the adverse impact on that relationship if confidentiality were to be violated.
- (2) The importance attached to the state’s obligation to ensure fair criminal trials and civil litigation, and the impact that the non-disclosure of evidence would have on the particular criminal or civil proceeding in which the privilege is claimed.

Some observers have concluded that, when it comes to balancing interests in research confidentiality with the interests at trial, U.S. courts have been inconsistent (e.g., Levine and Kennedy 1999; O’Neil 1996). However, when discussing what, in the U.S. literature, has been referred to variously as “a *scholar’s* privilege,” “*academic* privilege” and “a *researcher’s* privilege,” we should be careful to distinguish two sets of interests that sometimes conflict — those of *researchers* and those of *research participants*. When these interests are distinguished, an important pattern emerges in U.S. jurisprudence: while U.S. courts have varied in the extent to which they have granted privilege to *researchers*, they have carefully protected the identity of *research participants* and information that could be linked to them, especially in civil litigation. Because this is potentially a key distinction in the way that researchers present their case, it is worth considering in some detail.

The Rights and Interests of Researchers

Researchers have personal and collective interests beyond their ethical obligation to protect research participants. They have a broad interest in protecting academic freedom in order to maintain independence from both corporations and the state. Also, they have an interest in protecting unpublished data in order to maintain priority of and timeliness of publication and would rather not deplete resources responding to expansive and time-consuming subpoenas.

Courts have been sensitive to these concerns -- when researchers have both articulated and presented evidence to document them -- because the judiciary appears to attach a high social value to the role of research in advancing public knowledge. Several court decisions include strong statements about the social value of research and the need to protect academic freedom. For example, the court of appeals characterized Dow Chemical's subpoena (*Dow Chemical v. Allen*, 1982) as a threat of "substantial intrusion into the exercise of university research ... capable of chilling the exercise of academic freedom," which would "inevitably tend to check the ardor and fearlessness of scholars." The court quashed the subpoena. Similarly, in its decision to quash Microsoft's subpoena of Cusumano and Yoffie, the court stated that:

[A]llowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents' future research efforts but also those of other similarly situated scholars. This loss of theoretical insight into the business world is of concern in and of itself. Even more important, compelling the disclosure of such research materials would infrigate the free flow of information to the public, thus denigrating a fundamental First Amendment value. (*In re: Cusumano and Yoffie*, 1998: 9)

Given that Microsoft's market capitalization dropped by tens of billion dollars when Judge Jackson issued his initial opinion, the court's protection of Cusumano and Yoffie's research participants stands as powerful testimony to the value it placed on research.

In other instances, it is hardly surprising that courts have ordered researchers to produce information that does not identify research participants. Researchers should be accountable for the information they disseminate. If their findings are relevant to the adjudication of a case and are not available elsewhere, then the party disadvantaged by that information has as much right to challenge the researcher's methodology and interpretive validity as the opposing party has to introduce it.

Generally speaking, the courts have balanced these obligations of researchers with a concern for safeguarding academic freedom. In particular, courts have been especially likely to protect researchers when a subpoena appears to be part of a strategy of harassment, when the researcher is independent, when the party issuing the subpoena has not clearly demonstrated its relevance, and when other sources of information are available to speak to the issue at hand (e.g., see Crabb, 1996; Wiggins and McKenna, 1996).

At the same time, the information that researchers are asked to disclose would not exist in the first place were it not for the researcher's pledge of confidentiality. Consequently, while researchers have a duty to inform courts about the knowledge they produce, they also are obliged not to harm research participants in the process, and the courts have consistently respected that obligation.

The Rights and Interests of Research Participants

When U.S. courts have compelled researchers to disclose information, they typically order *partial* disclosure, where the part being protected is research participant identity. For example, in *Deitchman v. Squibb* (1984) Dr. Herbst was ordered to testify and produce documentation from his confidential data registry. But the court also ordered that the names of the women in the registry be redacted (see Crabb 1996: 10-12). Similarly, in *In re American Tobacco Company* (1989a; 1989b), Dr. Selikoff was ordered to testify and produce data tapes for the courts, but with participant names redacted (Wiggins and McKenna 1996: 70). In the Exxon Valdez case, the

court directed Dr. Picou to show his field notes to a sociologist hired by Exxon, but warned the Exxon sociologist that he would be held in contempt of court if he violated the confidentiality of Picou's respondents (Picou, 1996).

The biggest challenge to research confidentiality will come when a criminal defendant's right to a fair trial is pitted against research-participant privilege. The only case we have found that came close to doing so involved Richard Leo's (1995) observation of police interrogation practices. A public defender subpoenaed Leo as a percipient witness during a felony court criminal trial, seeking his field notes and testimony regarding one of the interrogations he observed. After attempting to get the subpoena quashed, Leo complied with the Judge's order to testify. Leo (1995) has publicly stated that he will "always regret that decision" and that, for the sake of the integrity of the research enterprise, he should have refused to testify.

We suggest that Leo's concern was misplaced and emerged largely because of failing to distinguish the locus of privilege. If "researcher privilege" were at issue, then Leo's regret would be understandable to the extent that he allowed a court order to thwart what would be seen as his professional obligation. However, as is the case with attorney-client privilege, where the privilege is that of the *client* and *not* the lawyer, researcher-participant privilege should be seen to lie not primarily with the researcher, but with the research *participant*. The ACJS *Code of Ethics* recognizes this important distinction by asserting that, "Subjects of research are entitled to rights of personal confidentiality unless they are waived" (p. 14). It turns out that Leo's was a false ethical dilemma. He reports that his police officer participants actually *wanted* him to testify because they believed, as did he, that his eye witness testimony would corroborate their view of the interrogation. Understanding that the privilege was *theirs* and not his would have led Leo to ask them whether they wanted to waive privilege; presumably in this case the answer would have been "yes" and the ethical dilemma would have been resolved.

Because Leo chose to testify, the question of privilege in that case was not the subject of a legal decision, leaving open the question of what the courts would do if research participant privilege conflicted with a defendant's right to a fair trial. No doubt the resolution would depend on the particular interests at stake in the case, if indeed the matter ever arose in court. If a researcher were to discern convincing evidence during the course of research that an individual was being falsely accused, s/he would likely have to wrestle with the ethical issues involved well before any court issued a subpoena, if at all.

There are only three cases where courts have ordered researchers to divulge participant names or information that could be linked to them: two grand jury cases (Popkin and Scarce) and *Atlantic Sugar v. United States* (1980). One noteworthy point about each of these cases is that, for a variety of reasons, the researchers in question would have had a hard time satisfying the first Wigmore criterion. For example, neither Popkin nor Scarce was able to demonstrate that their communications with particular individuals were confidential, a problem that may well have been alleviated had their research protocols anticipated the evidentiary requirements of the Wigmore test (see Palys and Lowman, forthcoming 2001). The *Atlantic Sugar* case raises an entirely different issue, which relates to the problems created by *a priori* limitations of confidentiality, which we consider next.

Should Confidentiality Ever Be Limited?

The essence of the ASA *Code* on which the ASC and ACJS *Codes* are based is that researchers should know the law that is relevant to their research, only make promises they are willing to maintain, and be forthright with research participants about what they are promising. Consequently, ASA obliges researchers to discuss confidentiality and any factors that "may limit or alter guarantees of confidentiality" [ASA *Code of Ethics* 1997, section 11.02(a)] that are made to research participants. One such factor is the unanticipated discovery of serious prospective harm. A higher ethic might cause a researcher to violate a guarantee of confidentiality to prevent loss of life or serious bodily harm. But is this possibility a reason to limit confidentiality *a priori*? We suggest that there is a defensible ethical position that the answer is "no," although there may

well be a reason to *violate* a guarantee of confidentiality, depending on the research and the pledge that is made.

Is there a General Duty to Report Crime?

One concern that deserves attention in any consideration of the law regarding confidentiality is the proposition that researchers who learn about civil or criminal offences are *required* to disclose such information to the authorities. Historically, a citizen who failed to report a felony was responsible for "misprision of felony" in common law. Indeed, in the *United States Code*, misprision of felony is still an offence:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both. (Title 18, §4)

Had the courts construed misprision of felony broadly, the chilling effect on ethnographic and other kinds of field research would have been so great that many of the sociological classics of the twentieth century could not have been written. But in U.S. jurisprudence the phrase "conceals and does ... not make known" has been construed quite narrowly. As Teitelbaum (1983: 21) explains, "The essence of the crime lies in the commission of acts that impede, rather than in omission to aid, the administration of justice." In other words, silence alone does not constitute misprision of felony. Of course, as Teitelbaum warns, because some states also have misprision statutes, researchers in the U.S. also should familiarize themselves with relevant state law and jurisprudence.

Mandatory Reporting Laws

Although there is no general duty to report crime, there are some offence-specific mandatory reporting laws. They vary across state jurisdictions, sometimes including and sometimes exempting researchers, and include reporting of child and elder abuse. In some jurisdictions reporting of venereal disease also is mandatory.

Mandatory reporting laws create a difficult dilemma for researchers. On the one hand, we all have an ethical responsibility to protect each other from the harms that are the subject of mandatory reporting laws.¹³ However, persons conducting research with the intention of reporting offences they can anticipate hearing about would appear to be self-consciously building a law-enforcement role into their research. They might consider seeking a reporting exemption from state authorities. If they do not secure an exemption and if they can anticipate learning of activities that are the subject of mandatory reporting laws but feel that the value underlying the mandatory reporting law outweighs the value of the research, then they should not conduct the research. If they feel the value of the research outweighs the value underlying the mandatory reporting law and the research is not protected by a research shield law they should make an unlimited guarantee of confidentiality and stick to it. If they do not anticipate discovering activities falling under the ambit of mandatory reporting laws, they may treat such discovery as an instance of unanticipated "heinous discovery."

Heinous Discovery: An Ethical Conundrum

The one potential *ethical* qualifier to a researcher's commitment to maintaining research confidences involves the possibility that a researcher might encounter circumstances where they discover completely *unanticipated* information about serious prospective harm to a third party or the research participant themselves, such as intended suicide. Levine and Kennedy (1999) make

¹³ Indeed, Comarow (1993) has argued that researchers should automatically report crimes they discover and limit confidentiality accordingly.

reference to this situation in a discussion of the 1997 ASA *Code of Ethics*, which was revised, in part, to address that eventuality:

Unlike the 1989 edition, the 1997 *Code* is explicit about one circumstance when information *may* be disclosed despite prior guarantees of confidentiality. Both editions of the *Code* emphasize that underlying a pledge of confidentiality is the ethical standard of preserving privacy and protecting subjects and others from harm. Only the 1997 edition, however, addresses what a sociologist might do in the face of unforeseeable harm. As stated in section 11.02(b), sociologists "may confront unanticipated circumstances where they become aware of information that is clearly health- or life-threatening to research participants ... or others. In these cases, sociologists balance the importance of guarantees of confidentiality with other principles in this *Code of Ethics*, standards of conduct, and applicable law." The 11.02(b) exception for clear harm is the only potential qualifier to guarantees of confidentiality. (p.973)

The essence of the ASA *Code's* provisions regarding confidentiality and informed consent is that researchers should only make promises they are willing to maintain. As a logical extension of this principle, ASA now obliges researchers to discuss the prospect of serendipitous discovery of serious prospective harm: "[R]esearchers may not promise absolute confidentiality ... if they are unwilling to maintain confidentiality in these situations" (Iutovich *et al.* 1999: 5). NIJ and NIH use a similar strategy.¹⁴

While the ethics associated with confidentiality and informed consent is clear with regard to eventualities the researcher can reasonably anticipate, the ethics for dealing with the prospect of *un*anticipated serious prospective harm is more complicated because of the ethical conundrum involved. In describing this conundrum, we use the term "heinous discovery" to refer to situations where a research participant indicates that they intend to seriously harm or kill a third party or themselves (Palys and Lowman, 2000). Heinous discovery includes, but is not limited to, situations coming under the umbrella of what the Supreme Court of Canada has called "the public safety exception" to class privilege.

A recent example of the public safety exception is the Canadian case of *Smith v. Jones* (1999), which saw an exception to lawyer-client privilege. Defendant Jones was charged with sexually assaulting a prostitute. Intending to plead guilty, Jones's lawyer sent him to psychiatrist Smith for a pre-sentencing assessment in the hope the assessment would have a favorable impact on sentencing. In the privacy of Smith's office and with the understanding that the interaction was protected by solicitor-client privilege,¹⁵ Jones revealed to Smith that the assault for which he was charged was actually just a "trial run" for his plan to serially kill Vancouver prostitutes in a particular area. The plan was already sufficiently specific and mobilized that psychiatrist Smith believed if Jones was released, the women he referred to were in real danger of being kidnapped, assaulted, tortured, and murdered.

When the psychiatrist petitioned the court to divulge this information, Jones's lawyer argued that disclosure would violate solicitor-client privilege. The Supreme Court of Canada decided that because the prospective danger was (a) serious, (b) imminent, and (c) with a clearly identified target, preventing a serious and specific threat to prostitutes should take precedence over the interests served by the privilege.

¹⁴ The NIH documentation on confidentiality certificates allows for breaches of confidentiality to prevent serious prospective harm to third parties revealed in the course of their research. Like ASA, NIH also requires that researchers make these decisions at the outset, and warn prospective participants of *any* possible limitation on confidentiality the researcher might consider appropriate. The NIJ privacy certificate authorization requires a warning if the researcher intends to make "voluntary disclosure" regarding "future crimes."

¹⁵ Although Smith was not a solicitor, the fact Jones's lawyer referred Jones to him as part of the preparation of defense meant that Smith also was bound by the obligation of lawyer-client privilege.

If this kind of revelation occurred in a research setting with an undetected offender, the researcher would be faced with an *ethical* rather than a *legal* choice as to whether to violate confidentiality given that a court would probably never learn of the situation. But having recognized heinous discovery as a reason one might *violate* a pledge of confidentiality does it make sense to *limit* it in an informed consent statement, as ASA, NIH and NIJ require? Consider the outcome had psychiatrist Smith told Jones, "This conversation is completely confidential, unless you tell me that you're going to kill prostitutes when you're released, in which case I'll have to report it." With confidentiality limited this way, Jones surely never would have revealed his plans to Smith, would have been released after serving a sentence for assault, and may well have become a serial killer. Ironically, the *a priori* limitation of confidentiality would produce its own apparently unethical resolution: the death of the victim or, in Jones's case, many victims. Iutovich *et al* (1999) describe a similar dilemma:

[I]f a researcher discovers child abuse while gathering ethnographic data about family life, what should the researcher do? The underlying intent of the ethical principles applied to research with human subjects is to protect the subjects from harm or risk. In this situation, the researcher faces a choice. Report the child abuse with a potential breach of confidentiality promised to the parent or maintain the confidentiality of the information and risk future harm to the child. (p.5)

In this unenviable situation, the challenge is to come up with an ethical resolution that causes the least harm among all those involved, including the prospective recipient of harm and the participant, to whom one still has ethical obligations. But is the possibility of encountering an ethical dilemma in a situation where it cannot be anticipated a reason to limit confidentiality at the outset in order to avoid having to confront it?

It does not make sense to limit confidentiality to account for unanticipated heinous discovery, because if the discovery is *not* foreseeable, it likely lies outside the purview of the research. It also places the researcher in the position of having to formulaically announce this limitation in every research project since, by definition, unanticipated heinous discovery can only occur when we cannot anticipate it. Should Little League Baseball coaches be warned that their interviews on coach-parent relations are completely confidential unless they announce plans to dynamite the next annual general meeting? Should women being interviewed about their health be warned that confidentiality is guaranteed unless they indicate an intention to assassinate particular members of the medical profession?

That said, it bears noting that some researchers can anticipate learning about serious prospective harm because such harms are the very focus of the research, e.g., a study of persons who have committed murders for which other persons have been convicted, or an ethnography of undetected and active contract killers. In these situations, it would be unethical to conduct the research knowing full well that one is likely to obtain information one intends to pass on to the authorities. In these instances, there is a good argument to be made that researchers should either give an unqualified guarantee of confidentiality that they intend to honor or not do the research.

Problems With *A Priori* Limitations to Confidentiality in Consent Statements

The *Atlantic Sugar* case is particularly noteworthy because it alerts researchers to the problems that can be created when they warn participants that research findings are confidential with the exception of disclosure "required by law." This was precisely the approach taken by the researchers who conducted a questionnaire for the International Trade Commission. In that case, the trial judge stated that because the court now required the information, precisely the eventuality for which confidentiality had been limited, the information should be disclosed (Traynor 1996). By warning research participants that the information they provide might be shared with a court, the participant's expectation of confidentiality as is required by the first Wigmore criterion is diminished, thereby undermining the ability to assert privilege.

More importantly, the researcher's obligations to the participant do not end with warnings about the threat of court-ordered disclosure. One cannot do research with persons disclosing criminal and civil offences or other sensitive information on the basis of a promise that may or may not be kept. Having alerted the participant to the problem, researchers also must disclose their intentions should there be such an order. In the interest of informed consent the researcher should declare whether, in the event of a court ordering disclosure, they will divulge the information or not.

The Way Forward

The primary disadvantage of case-by-case adjudication of privilege is that one never knows for certain how the courts will treat the claim. Researchers must make their decisions ahead of time, on the basis of their best judgement about what will happen when they engage the field, mindful of the potentially devastating impact that *a priori* limitations of confidentiality would have on their research and their ability to protect research participants. When they use a case-by-case analysis, courts effectively make up the law after the fact. Levine and Kennedy (1999) suggest that this uncertainty already has had a chilling effect on research:

We assume that some important research is either not conducted or not conducted well because the existence of a privilege is not assured. For these reasons, it is important that social scientists have effective legal guidelines regarding a research privilege and the protection of confidential information from data disclosure. (p.969)

The US Supreme Court has shown awareness of this problem in their recent recognition of a class privilege for the psychiatrist-client relation in *Jaffee v Redmond* (1996). In that case, which the Supreme Court agreed to hear in order to resolve inconsistencies that had developed among the US Courts of Appeal in adjudicating cases involving psychiatrist-patient privilege, the majority wrote:

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U. S., at 393.

Whether the Supreme Court would follow the same principle with respect to the researcher-participant relation still awaits the appropriate case; the challenge to researchers is to design their research in such a way that they can provide the evidence that will lead to that favorable adjudication (*cf.* Palys and Lowman, in press).

In the interim, most researchers would agree that maximizing protections for research participants requires the development of a more certain statutory protection. In Canada, there is no such protection for any other than researchers at Statistics Canada. To ascertain what kind of statutory protection should be put in place, it is useful to look at the U.S. experience.

In the U.S., there have been many calls for creation of a broadly defined evidentiary privilege for researchers (see e.g. Bond 1978; Friedson 1976; Leo 1995; Madden and Lessin 1983; McLaughlin 1999; Nejelski and Finsterbusch 1973; Nejelski and Peyser 1976; Nelson and Hedrick 1978; O'Neil 1996; Scarce 1994) and several attempts to bring it about. For example, the 1979 *Privacy of Research Records* bill incorporated many recommendations of the Privacy Protection Study Commission (1977), including a research shield law, but the bill was not enacted

into law (Alexander 1983). The *Thomas Jefferson Researcher's Privilege Act* proposed to the U.S. Senate in 1999 suffered a similar fate.

It appears that legislators have been reluctant to create a blanket statutory privilege, in part because of the difficulty of defining "research" and "researchers," and also presumably because of the very broad protection this would create. Development of a generic statutory privilege faces other obstacles, as well. One problem with blanket protection is that confidentiality is probably not a prerequisite for research on largely innocuous topics. Given that the courts have taken a conservative stance when recognizing privilege, why would federal legislators be any different? For this reason drafters of proposed shield laws should distinguish researcher and participant interests.

Some proposed shield laws are more about protecting *researchers* than they are about protecting research *participants*. Indeed, in the case of the most recently proposed research shield law, the *Thomas Jefferson Researcher's Privilege Act 1999 (RPA)*, protection of research participants appears to be almost a by-product of the proprietary interests of researchers. The *RPA* would have added Rule 502 to the *Federal Rules of Evidence*:

Rule 502. Privilege for research information. A person engaged in the study or research of academic, commercial, scientific, or technical issues may claim the privilege to refuse to disclose data, records, or information, including actual research documents, concerning that study or research. Such person may refuse to disclose unpublished lecture notes, unpublished research notes, data, processes, results, or other confidential information from research which is in any progress, unpublished or not yet verified, and any other information related to research, the disclosure of which could affect the conduct or outcome of the research, the likelihood of similar research in the future, the ability to obtain patents or copyrights from the research, or any other proprietary rights any entity may have in the research or the results of the research.

The *RPA* would amend the Freedom of Information provisions in the *U.S. Code* (Title 5 Section 552(b)(4)) and the *Federal Rules of Civil Procedure* (Rule 45(c)(3)) with similar wording.

It is troubling that neither Senator Daniel Moynihan's remarks in introducing the *Act* (1999) nor the proposed *Act* itself were couched in the language of *research-participant* rights. Instead, they emphasized *researchers'* proprietary rights, including their exclusive right to unpublished research information. The assumption seemed to be that, by protecting researchers' rights, one simultaneously protects research participant rights. But a conflict of interest occurs here.

Our review of U.S. jurisprudence reveals that generally U.S. courts have protected research participant identities. In other words, "reason and experience" in the form of common law already have provided the foundation for *research-participant* privilege. But it does not provide the basis for a *researcher* privilege. In common law, privilege is recognized to protect socially valued *relationships*. As conceptualized in the *RPA*, researcher privilege has as much, if not more to do with the proprietary interests of researchers and commodification of knowledge than it has to do with protecting a socially valued relationship. Also, the common law is clear about where privilege lies. It is with the client, not the solicitor, and the patient, not the doctor. Similarly, any privilege accorded the researcher-participant relationship is the privilege of the participant, not the researcher.

Consequently, proposing legislation that privileges the researcher rather than the participant plays a dangerous game. The proposed *RPA* provided sweeping protections for researchers. But is such protection warranted? Does privileging unpublished research material reduce the accountability of researchers in a way that undermines their traditional social role? Would a sweeping shield law facilitate suppression of undesired research results? How would the protection of the proprietary interests of researchers proposed in the *RPA* impact on the

university's mandate to publicly disseminate knowledge? Will federal legislators be prepared to create such sweeping protection?

When the legislation did not pass both research participants and researchers lost out. But what if research participants lost because researchers asked too much for themselves? And therein lies the conflict of interest in the *RPA*. The ethical obligations of researchers are to their research participants; therefore *research participants* are the ones shield laws should be designed to protect.

Extending the Protection of Confidentiality and Privacy Certificates

The problem with having to assert privilege on a case-by case basis is that researchers have to undertake research and research participants have to agree to participate without clear legal protection. Levine and Kennedy (1999) suggest that an alternative way to deal with this problem is to extend the type of research eligible for protection under 42 U.S.C. §3789 (OJP funded research) and 42 U.S.C. § 241(d) (certified health research under the *Public Health Service Act*). For criminological researchers, the regulations governing privacy certificates might be extended to include all criminological research rather than just that funded by NIH/OJP, in the same manner that the eligibility criteria for confidentiality certificates were extended to include all health research, and not just research funded by DHHS.

The advantage of the case-by-case component of the procedure for granting both confidentiality certificates under the *Public Health Service Act* and privacy certificates under 28 *CFR* Part 22 is that neither treats research as if it is all of a piece. This procedure already anticipates the balancing process the courts engage in when adjudicating privilege under common law. Seen in this light, a confidentiality or privacy certificate constitutes the best evidence that the only reason the research was possible in the first place and the information available at all was because of the guarantee of confidentiality that enabled it to be produced. Because both privileges are built squarely around the research participant, not the researcher, counter-claims of third parties would be that much more difficult to sustain given that the information they seek would not have existed unless the research was conducted with an unqualified guarantee of confidentiality.

One obvious disadvantage of an expanded certification process would be the bureaucracy needed to sustain it. There would be a further problem if control of this bureaucracy were to be left in the hands of the state, as this would leave the academic freedom to do certain kinds of research in the state's control. Of course, confidentiality certificates are themselves open to constitutional challenges, but in this respect they are no different from any other statute designed to privilege researcher-participant communications.

Using the Wigmore test

In the absence of a broadly defined research shield law or extension of the protection offered by confidentiality certificates or state shield laws, researchers will have to turn to the common law to protect research participants. Because U.S. courts generally have protected research-participant identities or information that could be linked to individuals, there is a good argument to be made that research participants in the United States already enjoy a class privilege in all but name. In the event that the courts do not agree with this characterization of jurisprudence, the Wigmore test provides an appropriate mechanism for anticipating the evidence needed to successfully assert privilege on a case-by-case basis.

There are at least three different ways Canadian and U.S. researchers may find a consideration of the Wigmore criteria helpful.¹⁶ The first is as a *decision-making heuristic*. When law and ethics conflict, the researcher "in the trenches" is the one who must decide and be accountable for that decision. The Wigmore test helps researchers perform a sort of ethical "due

¹⁶ Thanks to Robert McLaughlin for drawing these distinctions to our attention.

diligence," and hence balance in their own minds the prospective value of their research with the rights of participants and others in whatever situations they can reasonably anticipate.

The second use of the Wigmore test is as a *design heuristic*. In evaluating claims of privilege, whether using the Wigmore criteria explicitly or not, U.S. courts have followed a distinctly Wigmorean logic. Consequently, the test has implications for the way that researchers design their research to anticipate the evidentiary requirements of the courts (Palys and Lowman 2001, forthcoming).

The third is that researchers may find it useful if they end up in court to invoke the Wigmore criteria to assert privilege. In addition to providing a *bona fide* legal argument, a researcher's *a priori* consideration of the Wigmore criteria is itself evidence that the confidentiality provided was part of a well-considered and necessary research plan, not a justification concocted *post hoc* without sufficient evidence to sustain it. Doing so does not detract from or preclude arguments based on First Amendment or other constitutional rights, but subsumes and strengthens those arguments by providing a legally meaningful framework of privilege in which their claim can be examined.

Conclusion

Most contemporary disciplinary ethics codes recognize that law may conflict with the researcher's ethical obligation to protect confidential research information, particularly the identity of research participants, and call on researchers to anticipate these problems by becoming familiar with the laws of evidentiary privilege that apply to their conduct as researchers. The purpose of the current paper has been to facilitate this understanding by providing a general introduction to the U.S. and Canadian law relating to research-participant privilege and contrasting the experience of researchers in the two countries. The paper identifies the various statutes and common law tests applicable to research-participant privilege, and considers the advantages and disadvantages of research participant shield laws as opposed to the case-by-case analysis that occurs when researchers use common law to assert evidentiary privilege.

We suggest that in the U.S. researchers should apply for confidentiality or privacy certification whenever their research is eligible for it, and campaign for expansion of the areas of research eligible for such protection. In lieu of this protection, they should familiarize themselves with state laws and design their research so as to maximize their chances of satisfying the evidentiary criteria laid out in the Wigmore test.

In Canada, because there is no statutory protection for researchers other than the provisions of the *Statistics Act* which apply only to Statistics Canada employees, researchers should encourage the legislature to introduce confidentiality certification. Until such legislation is in place, they should design their research with the Wigmore test in mind, as it is the only device they have for protecting confidential research information in court.

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