# Protecting RESEARCH CONFIDENTIALITY

## What happens when law and ethics collide

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CHAPTER XX

# Implementing Wigmore Part I: Prerequisites for Consideration[1, 2]

The Supreme Court of Canada has made it clear that anyone wanting to assert a claim for privilege must do so using the Wigmore test. Although there is nothing stopping researchers in the US from invoking the Wigmore test,[3] we have not found a US research case that explicitly did so.[4] Nevertheless, when evaluating claims for a researcher-participant privilege, US courts use Wigmore's logic to evaluate privilege claims. On those occasions when assertions of researcher-participant privilege have failed, the cases clearly did not meet the Wigmore criteria in one or more respects.

What exactly does preparing for Wigmore involve? What can researchers and REBs do to ensure that, when that next case occurs, the researcher is armed with "good facts" to make the best case possible for the court's recognition of a researcher-participant privilege? In this chapter, we consider the first three criteria. We do so by drawing on Ogden's successful application of the Wigmore test to assert researcher-participant privilege, the Supreme Court of Canada's decision making on privilege claims in other contexts, and the outcomes of cases involving research confidentiality in US courts. Our analysis brings together material we compiled for three peer-reviewed articles[5] as well as formal legal opinions by Paul Jones,[6] Michael Jackson and Marilyn MacCrimmon,[7] and Deborah Lovett.[8] We approached the task as researchers who wanted to understand law well enough to fulfill our ethical commitments to participants and make every possible effort to fulfill legal requirements that do not transgress our ethical boundaries.

## Criterion One: "The Moment Confidence Ceases, Privilege Ceases"

The first criterion asserts that the people involved in the relationship for which they assert privilege must share the understanding that they uttered the communication in question in confidence. For Wigmore, "The moment confidence ceases, privilege ceases."[9]

The Supreme Court of Canada has set a high standard for "an expectation of confidentiality," as expressed in its adjudication of a claim for priest-penitent privilege. In *R. v. Gruenke*,[10] the court concluded that the mere fact Ms. Gruenke communicated her premeditation in a murder to a counsellor and pastor — persons with whom one might normally expect to have confidential communications — was not sufficient in itself to satisfy the first criterion of the Wigmore test. The Court wanted clear evidence that the communication in question — a confession, but not one that she made in a confessional — had a shared unambiguous expectation of confidentiality. Reflecting on the Supreme Court's ruling, lawyer Mary Marshall advised:

> *[I]f you are speaking with a priest or doctor and you want your statements to remain confidential even in the event of court proceedings, you should begin your discussion with the statement "This must remain absolutely confidential."*[11]

This opinion suggested that the SFU limited-confidentiality consent statement warning that "it is possible that . . . the researcher may be required to divulge information obtained in this research to a court or other legal body" could kill the possibility of a successful Wigmore defence.[12]

But while *R. v. Gruenke* was the leading authority at the time the SFU ethics committee was crafting its limited-confidentiality consent statement in 1995, CAUT legal advisor Paul Jones[13] highlighted a more recent (1997) case, *M.(A.) v. Ryan*, which further clarified the requirements of the first Wigmore criterion.

The case involved "M," a seventeen-year-old girl. Dr. Ryan, a psychiatrist, had indecently assaulted M. After the assault, M went to a second psychiatrist, Dr. Kathleen Parfitt, for treatment. Parfitt explicitly discussed the possibility that a court might, at some point, order disclosure of her therapy records. M made it clear that confidentiality was very important to her, and

that she did not want the records revealed at any point to anyone, including a court. Parfitt stated that she would do "everything possible" to ensure no information was disclosed. The girl subsequently sued Ryan for damages, at which time he subpoenaed Parfitt's records, but not her personal notes. At issue was whether Ryan's right to secure records potentially relevant to testing the plaintiff's case against him outweighed her expectation that communications with her psychiatrist would be kept in confidence.

A British Columbia trial court decided against M and Parfitt on the grounds that their discussions about the possibility of a court order to disclose implied recognition that confidentiality was limited, i.e., that their claim for privilege failed on criterion one. However, the B.C. Court of Appeal decided, and the Supreme Court agreed, that mere consideration of the possibility of court-ordered disclosure in itself did not undermine the expectation of confidentiality. Writing for the majority of the Supreme Court, Justice McLachlin stated:

> *The communications were made in confidence. The appellant stipulated that they should remain confidential and Dr. Parfitt agreed that she would do everything possible to keep them confidential. The possibility that a court might order them disclosed at some future date over their objections does not change the fact that the communications were made in confidence . . . If the apprehended possibility of disclosure negated privilege, privilege seldom if ever would be found.*[14]

According to this decision, a warning about the possibility of court-ordered disclosure in itself would not scuttle a legal defence employing the Wigmore test. The phrase "over their objections" provides crucial information about what it would mean to defend research confidentiality to the extent that law permits. To achieve this, it is crucial to avoid wording that a court could construe as a waiver of privilege.

## Avoiding Waivers of Privilege

Notwithstanding the Supreme Court's recognition that two parties can discuss prospective limitations to confidentiality without necessarily foregoing

an "expectation of confidentiality," researchers should carefully word the way they inform research participants of such possibilities. The Supreme Court refers to the concept of a waiver of privilege in several rulings. For example, in *M.(A.) v. Ryan*, the B.C. Court of Appeal disagreed with the trial court's reasons for rejecting privilege, but substituted its own: that M did not assert the claim immediately. The Supreme Court disagreed: "The appellant's alleged failure to assert privilege in the records before the Master does not deprive her of the right to claim it. If the appellant had privilege in the documents, it could be lost only by waiver, and the appellant's conduct does not support a finding of waiver."[15]

Part of maximizing the legal protection of research confidentiality thus involves ensuring that a court could not construe any aspect of one's informed-consent statement as a waiver of privilege. This is consistent with the TCPS, which states, "the consent of the participants shall not be conditional upon, or include any statement to the effect that, by consenting, subjects waive any legal rights."[16] Just as solicitor-client privilege lies not with the solicitor but with the client,[17] so researchers are the guardians of privilege, not its holder. Research participants can waive their privilege, but the researcher cannot make waiver a pre-condition of participation in the research. Seeking such a waiver would protect the researcher and the university from liability, but only by exposing research participants to greater risk. As Traynor observed:

> *Researchers frequently qualify their assurances by adding a proviso that confidential data will not be disclosed except as required by law. Such a proviso may alert the source to the possibility of compelled disclosure and may strengthen the researchers' defense against a claim of liability premised in contract, promissory estoppel, or tort in the event of such a disclosure. On the other hand, such a proviso could lead the party subpoenaing the data to contend that the possibility of compelled production was anticipated and that enforcement of a subpoena, therefore, is not inconsistent with the qualified assurance given.*[18]

This cautionary note is vital because the TCPS's admonition that researchers should warn research participants about "the extent of the confidentiality that can be promised"[19] could create a booby trap. Researchers created such a trap in research that became the subject of *Atlantic Sugar v. United States*. Corporate respondents to an International Trade Commission questionnaire were informed that the information they provided would not be disclosed "except as required by law." When Atlantic Sugar subpoenaed the survey records of other companies thinking it might help its own case, one of the companies that had completed the survey objected because the researchers had promised it confidentiality. The court rejected the claim, arguing that the US Customs Court's "requirement" of the information that researchers warned participants might occur was now occurring:

> *When various persons responded to the questionnaires (from which the information subject to disclosure was evidently extracted) they were informed that the information would not be disclosed "except as required by law." The requirement of disclosure for judicial review is such a requirement, even though it may not have been exactly foreseen at that time.*[20]

A similar situation arose in the case of the two sets of subpoenas issued for interviews comprising Boston College's Belfast Project, the oral history with paramilitaries from both sides of the Troubles in Northern Ireland. One of the issues debated in that case is just what pledges of confidentiality researchers made to the Republican and Loyalist paramilitaries who gave interviews.[21] From the outset, the researchers adopted an ethics-first approach, promising unlimited confidentiality. Subsequently, they did their utmost to deliver on that promise by battling the subpoenas using every legal strategy possible. In contrast, relying on a clause in its contract with the project director, Boston College argued that its intention from the start was to pledge confidentiality only "to the extent American law allows." In turn, the attorney general who issued the subpoenas seized on that phrase as evidence that Boston College recognized there were limits to confidentiality, in which case Boston College should hand over the interviews in question.

The trial court and First Circuit Court of Appeals both accepted the attorney general's interpretation of that phrase. Both courts identified elements of the evidentiary record that, in their eyes, undermined the claim for privilege. The trial judge drew attention to an email Boston College librarian Robert O'Neill sent to the researchers indicating that he was unsure whether the College could successfully defend the interviews against a subpoena. The judge decided this email indicated those involved in the Belfast Project understood there were limits in the extent to which they could protect the interviews.[22] For its part, the First Circuit Court of Appeals pointed to Boston College's Agreement of Donation with interviewees, which stated:

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

Although assertive in its claim that no transcript would see the light of day until the death of the participant — with no limitations noted — the justices observed that the word "confidentiality" never explicitly appeared in the agreement "and provides only that access will be restricted."[23]

The Atlantic Sugar and Boston College cases show researchers may create more problems than they solve when they or their institutions limit their pledges of confidentiality. Clearly, they should seek legal advice to ensure their consent statement wording does not undermine research participants' rights if they find themselves in court claiming researcher-participant privilege.

The Boston College case also provides a significant lesson about the importance of documenting research protocols. Everyone involved with the Belfast Project understood confidentiality was essential if the participants were going to share their histories frankly. Boston College representatives repeatedly and independently told the researchers that the provisions for confidentiality of the archive were rock-solid. However, they never put those assurances in writing. The only written evidence regarding who said

what was librarian O'Neill's email expressing caution about whether the archive could withstand the threat of subpoena, which served only to undermine the motion to quash the subpoenas that did materialize.

### Documenting the Confidentiality Pledge and Its Importance to the Research

Problems arose in another US case because the pledge of confidentiality employed was not clear. The case involved Mario Brajuha, who was then a graduate student at New York University at Stony Brook. Brajuha had worked as a waiter in the New York area for more than a decade when he decided to make "The Sociology of the American Restaurant" his dissertation topic, at which point he began a more systematic approach to gathering data.[24] Although his research focused on one particular restaurant, his experience and connections gave him access to owners and employees in many other restaurants as well.

All went well until a fire levelled the restaurant that was the focus of his research. The police suspected arson. In the course of their investigation, they discovered that Brajuha had made field notes recording his observations. Investigators wondered whether these notes could shed light on the suspected arson. Shortly thereafter Brajuha received a grand-jury subpoena. Although he challenged the subpoena, his assertion of privilege was problematic because of the lack of documentation regarding his confidentiality pledge. Although sympathetic to his situation, and ultimately permitting Brajuha to redact identifying information before sharing his field notes with the justices in chambers, the appeals court was critical of the lack of documentation regarding which participants were pledged confidentiality:

> *It is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship.[25] Brajuha's factual proffer in support of his claim of privilege hardly rises to the level of conclusory assertions. His attorney's affidavit states only that Mr. Brajuha is a doctoral candidate at SUNY, writing a dissertation entitled "The Sociology of the American Restaurant," and that, in the course of his employment as a "participant observer" at various Long Island restaurants, he*

> *has gathered information "from a variety of sources, many of whom were promised confidentiality."*[26]

Brajuha's experience suggests that researchers must carefully document whatever pledge of confidentiality they make and to whom, without, of course, creating records that would violate the confidence.

## Walk Your Talk

It is clear from judicial decisions based on the Wigmore criteria in Canada and assertions of privilege in the United States that courts expect those who claim confidentiality is essential to their work to behave in a manner consistent with that claim. Precautions should include procedures commensurate with the sensitivity of the confidential material. For example, principal investigators might discuss the importance of maintaining confidentiality with research assistants and train them in appropriate procedures to protect information. No one but authorized members of the research team should have access to confidential materials. Researchers should anonymize transcripts at the earliest opportunity and destroy tapes once transcripts have been prepared and verified. Researchers should keep identifiable material in a locked cabinet or in encrypted electronic files. This is good advice even if a subpoena never arrives.

A positive example of walking one's talk was Dr. Parfitt's interaction with patient M. As Jones[27] explained, while Ryan argued the discussion between Parfitt and the patient regarding the possibility of a court-ordered disclosure meant the court should allow disclosure of M's therapy records, the court viewed Parfitt's conduct outside that discussion as consistently affirming the importance of confidentiality to their communications. The victim-complainant explicitly stated that she did not want her communications with Parfitt disclosed to a court or anyone else. At one point, Parfitt stopped taking her usual notes; if there were no notes, a court could not seize them. There was thus clear evidence that both Parfitt and M understood the importance of confidentiality to their communications regardless of the apprehended threat of court-ordered disclosure, and acted in a manner that maximized confidentiality. Parfitt never stopped asserting privilege on behalf of her client, demonstrating her resolve by taking the case to the

Supreme Court despite negative outcomes at both the trial and appeal court levels; i.e., she defended confidentiality "to the full extent the law allows."

The most important lesson from this case is that the actions of M and Parfitt were consistent with their expectations. Although they entertained the possibility of court-ordered disclosure, their acknowledgement of that possibility in itself did not constitute a waiver of privilege. Indeed, as Supreme Court Justice McLachlin put it, "Far from waiving privilege, the appellant has asserted it throughout the proceedings."[28]

A contrasting example comes from the case of Ric Scarce and his research on animal-rights activists. While Scarce was never a suspect in the vandalism of an animal care facility that police were investigating, the prime suspect was a friend who had been house- and cat-sitting for Scarce while he was on holiday with his family. That friend was also a participant in Scarce's research. The vandalism occurred while the family was away. The morning after they returned home, Scarce and his family shared breakfast with the suspect. According to Scarce, they "discussed the raid like any other group might have discussed the same story around the breakfast table."[29] The prosecutor used that description to argue that it was the only time Scarce and his confidant could have talked about the vandalism, and that confidential conversations do not happen when others — members of his family in this case — are present. Scarce tried to assure the court that he held in private any research-related conversations he had with the friend/suspect — after his child and wife left for the day — but the damage was done.

Qualitative researchers should be particularly attentive to this problem. The importance of building rapport as a foundation for valid data sometimes blurs boundaries. Researchers should be careful to separate their researcher role from any other interactions that involve the participant, perhaps by recording dates of research-related discussions in field notes.

## Summary of Evidentiary Requirements for Criterion One

1. In order to satisfy the evidentiary requirements for Wigmore criterion one, researchers need to make it clear to research participants that their interactions are strictly confidential, and create evidence of the pledge that will satisfy a court. In particular, the proposal should declare unambiguously the

researcher's intention to do "everything possible" to maintain confidentiality. This is the phrasing that the Supreme Court of Canada accepted as clearly indicating both the confidentiality of the communications and the intention of Dr. Parfitt in *M.(A.) v. Ryan*.

2. Researchers should record[30] their pledge of confidentiality and the participant's agreement to its conditions. The proposal submitted to the Research Ethics Board should describe the promise, as should any information sheet handed to prospective participants.[31] The participant's recognition and acceptance of the promise should be included on each interview transcript or recorded in field notes.
3. Researchers' actions should be consistent with their pledge of confidentiality. Judges scrutinize every detail of how allegedly confidential information is treated; they will expect those who claim privilege to have acted in a manner fully consistent with their pledge. In the research context, a court might ask, "Did the researcher avoid creating a paper trail? Were data stored in a secure location? Did the researcher anonymize data at the earliest opportunity? Did only authorized research personnel access the data? Did the training of research assistants include specific mention of the importance of confidentiality to the research?"

If confidentiality is important, then the courts will expect researchers to have walked their talk.

## Criterion 2: Confidentiality Must Be Essential

According to Wigmore 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."[32] The second criterion states: "This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties."[33] The second criterion thus requires evidence that confidentiality is "essential to" the relationship for which privilege is claimed.

## Codes of Ethics All Assert Confidentiality as a Core Principle

Every code of research ethics we have ever seen identifies confidentiality as a core principle of research ethics. The *Tri-Council Policy Statement* that the Government of Canada implemented through its granting agencies in 1998 expressed the same view:

> *Information that is disclosed in the context of a professional or research relationship must be held confidential. Thus, when a research subject confides personal information to a researcher, the researcher has a duty not to share the information with others without the subject's free and informed consent. Breaches of confidentiality may cause harm: to the trust relationship between the researcher and the research subject; to other individuals or groups; and/or to the reputation of the research community.*

There is abundant evidence of the fundamental importance of confidentiality to research.

## Confidentiality Provides Access to Unique Information

Does the provision of confidentiality really make a difference to research with human subjects? Authors of textbooks in research methodology and research ethics think so. For example, in *Ethics in Social Research*, Bower and de Gasparis explained:

> *The guarantee of anonymity to subjects has long been taken for granted as an indispensable condition in social research; it is the commonly held assumption in the profession, just as it is in medicine, law, and journalism, that people will tell a truer tale and act with less inhibition if they believe that what they say or do will be held in the strictest confidence. This scientific rationale, combined with the ethical principle that one respects the privacy of research subjects, has created uniform agreement among social scientists that confidentiality should be preserved by every possible means to protect the interests of both social science and the subjects of its research.*[34]

The assumption that forced disclosure of confidential research information will have an adverse effect on subsequent project viability is pervasive. The more clearly anonymous or confidential the data, the greater their perceived validity, particularly when the information could have serious negative repercussions for the research participant. A clear example is criminological research on law enforcement and law breaking, especially when it concerns undetected or unreported law violations. How many offenders would talk openly about undetected offences if they thought the researcher might divulge that information to a court or anyone else? How could an ethical researcher solicit sensitive information from a volunteer participant knowing that he or she would turn it over to a court, especially if the court were to use it against that volunteer? The same concern applies to research on many other sensitive topics where release of the information would create negative consequences for the participant, such as stigmatization, financial loss, embarrassment, loss of reputation, loss of employment, etc.

The threat of court-ordered disclosure undermines the viability of certain kinds of research. The Boston College subpoenas offer a recent concrete example. Many observers have speculated on the impact the subpoenas would have on the viability of other oral history projects. Jon Tonge — a professor of politics at the University of Liverpool and vice-president of the Political Studies Association of the UK — reported that he had put on hold his planned interviews with IRA dissidents. Prospective interviewees were no longer interested in participating.[35] *The Guardian* noted that researchers stopped a parallel project — this one dealing with police officers, soldiers, and spies who fought the IRA — when prospective participants pulled out.[35] A former IRA operative stated he has now begun to "refuse interviews with academics because of the actions of the Boston researchers."[36] The remains of the Belfast Project itself are crumbling; many of the interviewees whose interviews were not lost in the court case have asked for the return of their tapes and transcripts. Boston College has acceded to those requests.[37]

Third parties who see the opportunity to access information of interest in a confidential data archive trade a short-term gain for the longer-term damage it will do to research. The Boston College subpoenas sought information relating to the 1972 murder of Jean McConville, who the IRA suspected was an informer. While it is not clear that the sought-after interviews

have any real value to a murder investigation that lay dormant for decades, the attempt to obtain material from the Belfast Project archive has closed the door for other researchers. While the McConville family may achieve some closure by finding out what happened to their mother, dozens if not hundreds of others will pay the price, because they now may never find out what happened to their loved ones.

## Statute-Based Protections in the US and Canada Substantiate the Importance of Confidentiality to Research

In Canada, only the participants of research conducted by Statistics Canada enjoy statute-based protection for their research confidences. In the United States, statute-based protections for research participants are more broadly available. For example, certificates of confidentiality are available for health research in which sensitive, identifiable data are gathered. The National Institutes of Health administers the confidentiality certification system, although a researcher does not have to be engaged in NIH-sponsored research in order to be eligible for a certificate. As the NIH information kiosk explains:

> *Certificates of Confidentiality are issued by the National Institutes of Health (NIH) to protect identifiable research information from forced disclosure. They allow the investigator and others who have access to research records to refuse to disclose identifying information on research participants in any civil, criminal, administrative, legislative, or other proceeding, whether at the federal, state, or local level. Certificates of Confidentiality may be granted for studies collecting information that, if disclosed, could have adverse consequences for subjects or damage their financial standing, employability, insurability, or reputation. By protecting researchers and institutions from being compelled to disclose information that would identify research subjects, Certificates of Confidentiality help achieve the research objectives and promote participation in studies by assuring confidentiality and privacy to participants.*[38]

The mere fact that the US has developed confidentiality certificates and a veritable "armamentarium" of other research shield laws at the federal and state levels[39] is unequivocal evidence that the US government is aware that valid data on sensitive topics cannot be gathered without participants having confidence that the information they voluntarily provide will not then be disclosed to their detriment. NIH's confidentiality certificate information kiosk identifies numerous sensitive research areas as eligible for certification, including:

- research on HIV, AIDS, and other STIs;
- studies that collect information on sexual attitudes, preferences, or practices;
- studies on the use of alcohol, drugs, or other addictive products;
- studies that collect information on illegal conduct;
- studies that gather information that if released could be damaging to a participant's financial standing, employability, or reputation within the community;
- research involving information that might lead to social stigmatization or discrimination if it were disclosed;
- research on participants' psychological wellbeing or mental health;
- genetic studies, including those that collect and store biological samples for future use; and
- research on behavioural interventions and epidemiological studies.[40]

"Privacy certificates" offer another form of protection for criminological research funded through the US National Institute of Justice.[41]

One problem with these research shield laws concerns the locus of authority to issue them: In the US, the government reserves that power. Leaving that power to government opens the door to abuse by allowing the state to favour projects that support its policies and actions, potentially leaving those who might be critical of government without protection. For example, while the British government did not stand in the way of the Police Service of Northern Ireland obtaining the Belfast Project interviews

of IRA operatives who fought against the British, it has quashed inquiries into criminal acts — including murder — in which British forces and Northern Ireland Loyalists are alleged to have been involved.[42]

## The Onus Is on the Researcher

As well as documenting the importance of confidentiality to research in general, the onus will be on researchers to prove confidentiality was essential to the "perfect working" of the researcher-participant relationship in their specific research. The US Court of Appeals clarified this consideration when Brajuha claimed a "scholar's privilege"[43] for his field research notes:

> *Surely the application of a scholar's privilege, if it exists, requires a threshold . . . consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality. Brajuha has provided none of the above.*
>
> *. . . Brajuha has made no showing whatsoever that assurances of confidentiality are necessary to the study he is undertaking. Astonishingly, he has not even stated explicitly that confidentiality was necessary to his particular study.*[44]

In a health research case, another US court was more flexible in this regard. Richard Farnsworth led a class-action suit against the Procter & Gamble Company (P&G) arguing that one of its tampon brands caused Toxic Shock Syndrome in the women who used it.[45] The suit based its allegation on a Center for Disease Control (CDC) study that included information about medical histories, sexual practices, contraceptive methods, pregnancy histories, menstrual activity, tampon usage, and douching habits of its research participants. The CDC had complied with P&G's initial requests for information about the research, but sought a protective order when P&G subpoenaed participants' names in order to contact them as part of its plan to establish that the study was biased. While acknowledging

that CDC gave no explicit guarantee of confidentiality, it argued that disclosure of participants' names would undermine CDC's ability to do similar research in future. The court agreed, stating:

> *[T]he Center's purpose is the protection of the public's health. Central to this purpose is the ability to conduct probing scientific and social research supported by a population willing to submit to in-depth questioning. Undisputed testimony in the record indicates that disclosure of the names and addresses of these research participants could seriously damage this voluntary reporting. Even without an express guarantee of confidentiality there is still an expectation, not unjustified, that when highly personal and potentially embarrassing information is given for the sake of medical research, it will remain private.*

The court allowed the CDC to contact each of the women who participated in order to ask who would waive their right to privacy; out of approximately three hundred women contacted, thirty-two waived privilege.

Brajuha's experience suggests researchers should explicitly address confidentiality in their research proposals and while gathering data. As Traynor advised:

> *Researchers should determine at the outset whether they can obtain the necessary data free from any guarantee of confidentiality. If not, they should document the reasons requiring confidentiality. In many cases, confidentiality may be essential to protect data sources from an invasion of privacy, from embarrassment or distress, or from criminal prosecution, tax audits, or other government investigations, as well as from litigation by others.*
>
> *. . . The researcher who prepares a written memorandum at the inception of the research setting forth the reasons for confidentiality will be well-prepared to persuade a court that the project could not have proceeded without the assurance of confidentiality.*[46]

Ogden's research protocol exemplified the way researchers should be aware of the relevant law. His careful preparation of his confidentiality protocol laid the grounds for his successful assertion of researcher-participant privilege.

Evidence demonstrating the importance of confidentiality to Ogden's research came from three sources. First, at the proposal stage, Ogden explained to the SFU ethics committee why an unqualified guarantee of confidentiality was essential. This evidence established that the provision of confidentiality was part of a considered research plan, not a *post hoc* justification. Second, Ogden asked participants directly whether confidentiality was essential for their participation; all those who had first-hand knowledge of an assisted suicide said "yes." Third, the expert testimony of a criminologist established the importance of confidentiality to criminological research, and the expert testimony of a health nurse explained why preserving confidentiality was particularly crucial to AIDS patients.

On considering Ogden's evidence at criterion two, Jackson and MacCrimmon concluded:

> *This evidence was not just compelling as that of a compassionate health care worker who has dedicated his life to working with those on the outer margins of our society, but was compelling also in its relevance to establishing why confidentiality was essential to the relationship of researcher and subject in the study of euthanasia and AIDS. Thus, in Russel Ogden's case, there was a trilogy of evidence from a distinguished criminologist who has himself conducted empirical research, an expert experienced in working in both a caring and research relationship with AIDS patients, and the evidence of the researcher himself as to why, for to these particular research subjects, he needed to give assurances of confidentiality as a prerequisite to carrying out the research project.*[47]

Ogden's preparation exemplified the way researchers should design their research protocols to satisfy the second criterion of the Wigmore test.

### Summary of Evidentiary Requirements for Criterion Two

Researchers will need to supplement expert testimony regarding the general importance of confidentiality to research with evidence that the provision of confidentiality was necessary for that particular project. An independent scholar with experience in the particular area under scrutiny might provide such testimony. Researchers should ask participants at the time they volunteer how important the maintenance of confidentiality is to their participation, and record their responses in the interview transcript and/or field notes.

### Criterion Three: The Relationship Must Be Valued by the Community[48]

Having demonstrated a mutual expectation of confidentiality was essential to the perfect working of the relationship, the third criterion asks whether the relationship in question is one that the community values and believes should be sedulously fostered, i.e., carefully safeguarded because of the social benefits it brings. Does the community value research? A variety of communities may be relevant here, including the research community, communities of interest in relation to the research project, and the community at large.

### The Research Community

It is clear the research community believes its relation with research participants is worth fostering and safeguarding. All research-ethics codes recognize the integral importance of confidentiality to the researcher-participant relationship.

The nature of the relationship between researcher and participant varies to some extent by research tradition. For example, experimental psychologists typically have a limited relationship that entails a single programmed interaction that may be relatively brief, often under an hour. It often involves the participant reading or listening to a set of instructions, and then being exposed to certain stimuli and/or responding to a structured questionnaire about the experience. Courts are unlikely to pose any challenge to research confidentiality in such research because participants typically remain anonymous. It is not necessary for researchers to identify them, and they do not record names unless identifiers are required for longitudinal studies or to link to other databases.

Qualitative research traditions place the researcher in a different relation to the participant than in more experimental and/or quantitative paradigms. Confidentiality is valued because it allows one to understand people in a manner that is not threatening to them, and is the basic expression of trust that allows researchers access into people's lives. John Lofland, then chair of the American Sociological Association's Committee on Professional Ethics, stated it this way:

> *Ethically, social scientists have desired not to harm people who have been kind enough to make them privy to their lives. At the level of sheer civility, indeed, it is rankly ungracious to expose to public view personally identified and inconvenient facts on people who have trusted one enough to provide such facts! Strategically, fieldwork itself would become for all practical purposes impossible if fieldworkers routinely aired their raw data — their field notes — without protecting the people studied. Quite simply, no one would trust them.*

In general, when it comes to sensitive topics, the less experimental and quantitative the research, the more important confidentiality is likely to be.

## The Broader Community

With respect to the broader community, there is abundant evidence of the value placed on social science research and the researcher-participant relationship. Journalists frequently ask university researchers to explain their research results and comment on law, policy, and social trends. Governments engage researchers to evaluate government programs and policies and contribute to governmental committees, inquiries, and commissions. Researchers regularly act as expert witnesses to inform courts about evidence requiring specialized knowledge.

The hundreds of millions of dollars that granting agencies spend annually on research is another indicator of its importance. If we believe formulating policies, procedures, treatments, and law is better when based on evidence rather than stereotypes and uninformed opinion, damage

to the researcher-participant relationship damages society itself. The researcher's role involves critically analyzing all aspects of society, and asking why social arrangements, such as law, are the way they are. It is only by fostering the researcher-participant relationship that researchers can provide the knowledge that courts and governments require for society's long-term benefit. We should not require research participants to pay the price for those benefits. As the three councils affirm, "Part of our core moral objection would concern using another human solely as a means toward even legitimate ends."[49]

### Other Communities

Particular communities of interest may have a special concern about a specific case in which a witness asserts privilege, especially when a controversial topic is involved and there is a dearth of first-hand knowledge. In Ogden's case, the nurse who had spent a decade working with persons with HIV/AIDS provided evidence about the deleterious effect if Ogden had disclosed the names of his research participants. Legislators and policy makers comprise other potential communities of interest; for example, a Senate committee that was examining assisted suicide and euthanasia legislation invited Ogden to discuss the results of his research. In other cases, interveners who are not members of the researched group may also have an interest. For example, in the US, the American Civil Liberties Union has intervened in research confidentiality cases in order to support academic freedom and freedom of speech.

### Summary of Evidentiary Requirements for Criterion Three

For criterion three, researchers will generally need expert witnesses to provide evidence regarding the specific research in question. In addition, one would hope that university administrators — such as vice-presidents of research and chairs of ethics committees — would be willing to provide general evidence about the need to protect research participants, academic freedom, and the research enterprise. Officers of disciplinary associations could provide similar evidence.[50]

This is where chapter 20 is supposed to end.

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## Criterion 4: The Scales of Justice

Because they speak to the eligibility of a communication for privilege, if the researcher and REB have done their respective jobs, research on sensitive topics should comfortably pass the first three Wigmore criteria. They should be relatively easy to meet because they focus only on the researcher-participant relationship, and evaluate whether the prerequisites are in place for the court to consider the broader question of privilege. Criterion four places the relation on the scales of justice where the court weighs two competing considerations:

1. The adverse impact on the researcher-participant relationship if confidentiality were to be violated; with
2. The deleterious impact that non-disclosure would have on the particular legal proceeding in which the privilege is at issue.

And there lies the rub. Although researchers can speculate about who might be interested in the identity of their sources and would have the resources to press the issue in court — for example, Ogden's proposal correctly identified the coroner as a potential threat — they can never know for sure what competing interest will be at issue until a concrete challenge confronts them. However, in the interests of informed consent, they have to tell prospective participants ahead of time what they are prepared to guarantee.

In order for researchers to make an informed decision about what kind of guarantee to make, a review of the interests that third parties have pitted against research confidentiality is in order.

## Weighing Competing Interests

In the US, the research most likely to arouse the interest of a third party is that relating to corporations or business.[1] Typically, two adversaries involved in high-stakes litigation hear about research that might be relevant to the dispute. When one litigant cites the research, the other subpoenas the researcher in order to challenge his or her methodology and findings. In such instances, third parties can affect both researcher and research-participant interests. Distinguishing these two sets of interests helps to understand the jurisprudence relating to them:

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CHAPTER XXI

# Implementing Wigmore Part II: When the Rubber Hits the Road

1. Situations where the personal interests of the *researcher* are at stake, such as having to reveal information before it is published, or having to spend large amounts of time responding to a subpoena; and
2. Situations where the personal interests of *research participants* are at stake, such as the participant's rights to privacy, which depends on the researcher taking legal action to maintain confidentiality.

Although in most instances these interests coincide, they sometimes conflict.

## The Researcher in US Common Law

Receipt of a subpoena or an order to disclose information has the potential of disrupting the normal flow of research and publication. A researcher may receive a subpoena prior to research being ready for publication, leaving that researcher vulnerable to potentially career-damaging critique.[2] Such was the case in *Dow Chemical v. Allen*. Relying in part on preliminary research by two faculty members at the University of Wisconsin, the US Environmental Protection Agency ordered emergency suspension of two herbicides that Dow manufactured, and scheduled hearings that might

result in their prohibition. Dow wanted to challenge the research and subpoenaed the two researchers, asking them ". . . to disclose all of the notes, reports, working papers, and raw data relevant to ongoing, incomplete animal toxicity studies so that it may evaluate that information with a view toward possible use at the cancellation hearings."[3]

The researchers, the university and, in an *amicus curiae* brief, the State of Wisconsin argued that the subpoena was overly burdensome and premature, given that some of the studies for which data were sought were still in progress. They argued that interruption of the research at that point would force the researchers to release data and conclusions that had not yet been subject to peer review, thereby exposing them to potential career damage if data still to be gathered did not support their conclusions. The court agreed, arguing that research deserves protection:

> *Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. Nearly a quarter-century ago, Chief Justice Earl Warren wrote:*
>
> *"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."*
>
> *To be sure, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us not merely to the teachers concerned."*[4]

Although the court affirmed academic freedom is not absolute, any intrusion should not be undertaken lightly:

> *Case law considering the standard to be applied where the issue is academic freedom of the university to be free of*

> *governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse. But what precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited . . . Applying a balancing test, which gave predominant weight to the grave harm resulting from governmental intrusion into the intellectual life of a university, Justice Frankfurter wrote:*
>
> *"[Academic] inquiries . . . must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."*[5]

The court concluded that academic freedom superseded Dow's interests and quashed the subpoena.

The sheer volume of information sought and its impact on research has played a more central role in other cases. For example, when R. J. Reynolds Tobacco subpoenaed Dr. Irving Selikoff at the Mount Sinai School of Medicine to acquire information regarding ongoing research plus documentation for three published studies that addressed the link between smoking and lung cancer among persons also exposed to asbestos,[6] Reynolds requested,

> *. . . all documents related to the studies that describe, constitute, comment upon, criticize, review, or concern the research design, methodology, sampling protocol, and/or conduct of any of the studies; copies of questionnaires, answers to questionnaires, interview forms, responses to interviews, death certificates, autopsy reports, and other causes of death . . . and data sheets, computer tapes and/or copies of computer discs containing all coded data . . . in as "raw" a form as possible.*[7]

Similarly, when faced with six separate lawsuits regarding an intrauterine device (IUD) known as the Copper Seven, the manufacturer subpoenaed Dr. Malcolm Potts, president of a non-profit institute that had done research on the effects of various IUDs. In its subpoena, the manufacturer demanded Potts produce seventy-seven different categories of documents that covered all studies the institute had conducted regarding IUDs. Potts estimated the documentation would total 300,000 pages and take his complete staff several weeks of full-time work to compile and copy.[8]

The courts quashed both subpoenas — in R. J. Reynolds case, because it placed an "unreasonable burden" on the medical hospital,[9] and in Potts's case, because "the burden of producing the information outweighed the plaintiffs' need for it."[10]

A different fate awaited Professor Richard Snyder, a professor of civil engineering at the University of Michigan and internationally recognized expert on highway safety. Snyder published a study entitled "On Road Crash Experience of Utility Vehicles." Victims of several serious crashes while driving the Jeep CJ-5 sued the manufacturer claiming that its propensity to roll over made it inherently unsafe. Jeep Corporation thought that Snyder's research might help its defence and subpoenaed "any and all research data, memoranda, drafts, correspondence, lab notes, reports, calculations, moving pictures, photographs, slides, statements and the like pertaining to the on-road crash experience of utility vehicles." Snyder received over eighty subpoenas and spent a good portion of his retirement fending them off.[11]

US courts have been particularly protective when researchers are not party to the litigation, as their independence contributes to the credibility of their evidence. One example is the case of Arthur Herbst, which Judge Barbara Crabb held to be "paradigmatic."[12] In that case, women who contracted vaginal adenocarcinoma were suing E. R. Squibb and Sons, Inc., for damages. The women cited research by Dr. Herbst of the University of Chicago who compiled a database of all cases of vaginal adenocarcinoma contracted since 1940. The research showed a link between a mother's use of Squibb's drug diethylstilbestrol (DES) during pregnancy and subsequent vaginal adenocarcinoma among their daughters. Squibb subpoenaed Herbst for all data in the registry. The courts agreed that Herbst should supply documentation sufficient to assess the validity of his research and its

conclusions, but ordered that he not disclose the identity of the women in the database. As Judge Crabb explained:

> *Deitchman was a high stakes case in terms of money. It was also a high stakes case in another respect: the risk of serious harm to a significant research study. Not only did the district court and the court of appeals agree that Herbst's concern for the confidentiality of the registry was well-founded, even Squibb appeared to concede that the loss of confidentiality would affect the registry adversely and that "all society would be poorer . . . [because] a unique and vital resource for learning about the incidence, causes[,] and treatment of adenocarcinoma would be lost."*[13]

The *Squibb* case exemplifies the way US courts craft orders that minimize their impact on research. Even when they order researchers to testify, US courts have generally ensured protection of research participants. US courts weigh the balance in the researcher's favour when:

1. the subpoena is overly broad and/or gives the appearance of being a "fishing expedition" or harassment;
2. the person/organization issuing the subpoena has not demonstrated the relevance of the requested information to the litigation;
3. the researcher is an independent third party with no interest in the dispute; and
4. the issue on which the information is sought can be addressed through alternative evidence or is of marginal use.[14]

Although US courts generally have respected academic freedom, researchers should not assume that a court will understand the deleterious effects of a subpoena or court order, and should not over-generalize its prospective impacts. The more concretely one can articulate prospective effects with direct reference to the research at hand, the more likely the court will take those effects into account.[15] As Judge Crabb explained:

> *Researchers cannot assume that the judge will know anything about the milieu in which researchers work, about their resources or lack thereof, about what disruption of a particular study might mean, or about alternative sources of the same information. Researchers must educate the judge about these matters if they want them taken into consideration."*[16]

In sum, although these decisions show that academics can be compelled to testify, they also show that the Courts have protected researchers from litigants with deep pockets who engage in fishing expeditions, or attempt to harass, bully, or intimidate them. Courts protect research because of its potential social value. Indeed, the courts would sometimes thwart their own search for truth if their decisions were to cause the end of the empirical evidence that, with increasing frequency, plays an important role in litigation. In the long term, protection of research confidentiality is a general prerequisite to the correct disposal of litigation.

## The Research Participant in US Common Law

The US literature reveals that attempts to discover the identities of research participants are relatively rare. Although subpoenas have ranged from minor and specific to voluminous and comprehensive, very few ask for participant identities.[17] This may be because the US courts have protected research confidentiality even in cases where researchers did not explicitly guarantee confidentiality.[18]

In cases where a researcher sought an exemption from testifying by asserting "academic privilege" or "researcher privilege," but ended up being required to testify and/or disclose records, the courts protected research confidentiality nonetheless. In *Deitchman v. Squibb*,[19] for example, the case went through several levels of appeal. An appeal court referred the case back to a lower court with the instruction that the subpoena should stand, but that Herbst should be allowed to redact all identifying information about the participants so that confidentiality would be maintained.[20]

The same was true in the case of Dr. Irving Selikoff, who various tobacco companies subpoenaed many times to aid their defence against class-action suits related to their products. Selikoff was required to attend court and

produce documents despite the considerable administrative burden this placed on him, but in every case, the courts allowed him to redact information identifying research participants.

Exxon subpoenaed Dr. Stephen Picou, who was engaged in research with Alaskan Indigenous communities when the Exxon Valdez oil spill occurred, in the hope of finding information to undermine the claims that members of those communities were making regarding the effects of the spill. The court required that Picou testify and provide copies of his notes but, to Exxon's chagrin, permitted him to redact any identifying information from the copies.

Another case in point is the Farnsworth versus Procter & Gamble (P&G) suit involving Toxic Shock Syndrome. Centres for Disease Control researchers testified and provided aggregate information that gave P&G the opportunity to dispute their findings, but the court ensured participants would have to consent to the release of their names.

The court took a similar approach with Mario Brajuha's research on "The Sociology of the American Restaurant." Although it criticized Brajuha for failing to record his pledges of confidentiality and with whom he made them, the court nonetheless allowed him to anonymize his field notes before submitting them to the prosecutor who sought them.

In another case, Harvard public health professor Marc Roberts had conducted interviews with employees of Pacific Gas and Electric (PG&E) regarding how public utility companies make decisions about environmental issues. Later, a construction company sued PG&E for breach of contract. The construction company subpoenaed Roberts in the hope that his interview transcripts would throw light on the corporate decision-making that led to the alleged breach. Roberts claimed that the transcripts were privileged. Although the court refrained from determining whether a general "researcher's privilege" exists, it quashed the subpoena, noting that, ". . . the societal interest in protecting the confidential relationships between academic researchers and their sources outweighed the interests of this litigant and the public in obtaining the research data."[21]

The case that best demonstrates the weight that US courts attach to the researcher-participant relationship is that which pitted Microsoft, then the world's wealthiest company, against researchers from Harvard and MIT,

two of the world's most prestigious universities. The US government had charged Microsoft with violating anti-trust legislation. Prosecutors pointed to the changing fate of the company in the browser wars — where an 80/20 market split that favoured Netscape's Navigator browser relatively quickly turned into a 20/80 split that favoured Microsoft's Internet Explorer — as an example of Microsoft's predatory practices.

When Microsoft lawyers discovered that Professors Cusumano and Yoffie had interviewed forty Netscape employees and written a book on the browser wars, they subpoenaed the professors and all their original raw data in the hope that it would support their argument that the exchange of market share resulted from Netscape's poor management decisions and not Microsoft's predatory practices. Cusumano and Yoffie claimed the records were privileged. Although Microsoft had shown that billions of dollars were at stake, the US Court of Appeals quashed the Microsoft subpoena. Under the heading "Calibrating the Scales," the court carried out the balancing exercise that Wigmore criterion four requires, without referring explicitly to the test. After acknowledging Microsoft's need for the information and its relevance to its case, the justices evaluated the weight of the researchers' countervailing claims:

> *The opposite pan of the scale is brim-full. Scholars studying management practices depend upon the voluntary revelations of industry insiders to develop the factual infrastructure upon which theoretical conclusions and practical predictions may rest. These insiders often lack enthusiasm for divulging their management styles and business strategies to academics, who may in turn reveal that information to the public. Yet, path-breaking work in management science requires gathering data from those companies and individuals operating in the most highly competitive fields of industry, and it is in these cutting-edge areas that the respondents concentrate their efforts. Their time-tested interview protocol, including the execution of a nondisclosure agreement with the corporate entity being studied and the furnishing of personal assurances of confidentiality to the persons being interviewed, gives chary*

> *corporate executives a sense of security that greatly facilitates the achievement of agreements to cooperate. Thus . . . the interviews are "carefully bargained-for" communications which deserve significant protection . . .*
>
> *Considering these facts, it seems reasonable to conclude — as the respondents' affidavits assert — that allowing 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 infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value.*[22]

The central message of these US decisions is that academics are not special, but research participants are. The trust participants place in researchers to ensure they come to no harm fuels the research that benefits society as a whole. Academic researchers are subject to subpoenas like any other witnesses. There is no academic privilege. However, one can infer US courts have consistently recognized researcher-participant privilege because of the social value of research, the voluntary nature of most research participation, and the need for an unyielding ethical commitment to confidentiality to secure it.

In their formal legal opinion, Jackson and MacCrimmon confirmed that, when US courts do order disclosure of research information, they generally issue partial disclosure orders that rarely involve disclosure of the identities of research participants. Their general conclusion is that only very rarely will ethics and law conflict. Given the relatively small number of cases in which third parties have sought confidential research information in the country they referred to as "the most litigious nation on earth,"[23] the ethics and law of research confidentiality are, for the most part, in harmony. With the exception of grand jury proceedings, attempts to use legal processes to force researchers to disclose names of research participants had at that point been unsuccessful in every case but one — *Atlantic Sugar* — where the court order for disclosure was justified by the researchers' limitation of confidentiality.

Having shown that courts generally protect research participants' identities, Jackson and MacCrimmon then identified the scenario where a claim of researcher-participant privilege most likely would fail. They suggested that, if a court weighed researcher-participant privilege against the right of an accused to receive a fair trial, the accused likely would win. They based their conclusion on an analysis of two cases — one Canadian and one American.

The US case involved University of California at Berkeley graduate student Richard Leo.[24] Although Leo's experience did not involve a formal court order to disclose confidential research information, it is worth examining because it is the only known case where a court weighed an assertion of academic privilege against the right of an accused to a fair trial.

Leo's research for his doctoral dissertation involved direct observation of police interrogations. Achieving access was no small feat. It took three months of negotiation to secure ethics approval, but before that, it took two years of negotiations before the Laconia[25] Police Department (LPD) granted Leo access, plus several more months gaining the trust of the officers conducting interrogations. The main worry of the detectives was that an exposé of police interrogation practices by a hostile observer could have negative repercussions for individual officers and the police department as a whole.

Both the LPD and the University of California at Berkeley's ethics committee made confidentiality the primary condition of Leo's access to the interrogation room. Leo's thesis and other publications would use pseudonyms to refer to individual police officers and the department as a whole.[26] Leo saw protection of confidentiality as a core ethical obligation:

> *The protection of research sources from the compulsion of courts (or any legal authorities, for that matter) is especially important in research settings such as this one where the betrayal of promises of confidentiality will likely provide already suspicious research subjects with good reasons to deny future researchers entry. More generally, one of our most fundamental obligations as field researchers is to protect our subjects from invasions of privacy, humiliation, unwarranted exposure, internal and external sanctions or any other personal, social legal or*

> *professional liability to which they may be subjected because we have created a data base of their activities.*[27]

After the research was complete, an accused person alleged that his interrogators had violated his Miranda rights. He subpoenaed Leo, asking him to produce the field notes he took during the interrogation and to appear in court to testify. The particular case came as a surprise, because it was not a contentious interrogation:

> *[M]ore than six months after I had left the field I was called to testify in court as a percipient witness . . . During his brief interrogation, the suspect in this case had provided detectives with a full confession to his role in the armed robbery of a local food chain store and the physical assault on one of its employees . . . his interrogation lasted less than thirty minutes. During pre-trial proceedings, however, the suspect maintained he confessed only because the detectives had first threatened him with other prosecutions if he did not confess, and then prevented him from invoking his Miranda rights. Both detectives denied these allegations.*[28]

Leo and his attorney believed Leo's testimony supported the police account of events, although in court they continued to argue that

> *the subpoena should be quashed because the public interest in my research — research that is uniquely predicated on maintaining the assurances of confidentiality that I provided to my subjects — should outweigh any due process right the criminal defendant may possess to the discovery of my research notes or to the compulsion of my testimony.*[29]

The judge did not agree. In Leo's words:

> *[T]he defendant's due process rights clearly outweighed any public interest in my research . . . Since the defendant and two*

> *LPD detectives had given diametrically opposed accounts of what occurred during the interrogation in question, the judge concluded that my testimony was essential for resolving a dispute that was necessary to provide the accused with a fair trial.*[30]

Ultimately, Leo decided to testify, explaining:

> *At this point I privately consulted with my attorney. The university would support whatever decision I chose, he assured me. However, since turning over my notes would not harm my research subjects but instead help the prosecutor — the detectives had not threatened the suspect or prevented him from invoking his Miranda rights — there was little reason for me to risk jail . . . Under threat of incarceration, under the mistaken impression that my research notes would do no harm to the interests of my research subjects, and believing that my failure to testify could damage the future interests of all academic field researchers, I decided to comply with the judge's order to testify at the preliminary hearing.*[31]

Leo's case is, indeed, worth scrutinizing in detail. There are several problems with his logic for testifying. First, the decision to disclose confidential research information is not solely a matter of personal choice; the university should have insisted that he defend research confidentiality at least to the full extent permitted by law. Although Leo felt testifying would help his participants, the decision about whether to testify was not his to make. If there was a privilege, it was not an "academic's" privilege. Researcher-participant privilege lay with the police officers who participated in his research under Leo's confidentiality pledge. Leo should have asked the officers in question whether they would prefer to waive confidentiality; only if they did so should he have agreed to testify.

As it turned out, the hearing did not produce the anticipated ruling favouring the interrogators. Although Leo's notes and testimony established that the interrogators did not threaten the accused, they led the trial judge to conclude police had violated the accused's *Miranda* rights for other

reasons. Accordingly, the judge did not admit the confession into evidence.

The court convicted the accused of armed robbery, but dismissed the other charges. Leo initially felt that a failure to testify might irreparably harm the research relationship with police, but then concluded that his decision to testify had done just that:

> *I will always regret having chosen to turn over my research notes and testify, even though I was under threat of incarceration and even if my research subjects considered my actions morally appropriate. Not only had I betrayed my research subjects, but I had also probably spoiled the field for future police researchers in Laconia, perhaps elsewhere as well. As a result of my decision to testify, it is likely that my study will not only be the first but also the last participant observation study of American police interrogation practices for some time to come . . . the social science community has a vested interest in preventing such a mistake from happening again.*[32]

Jackson and MacCrimmon placed great significance on the judge's indication that he would order disclosure nonetheless:

> *Professor Leo's analysis . . . provides an opportunity to look at one of the strongest cases that could be mounted for academic privilege. His study into police interrogation practices was one in which there was a strong empirical foundation for his claim that without guarantees of confidentiality . . . police officers would never have shared their trade secrets regarding interrogation techniques. His research related directly to the administration of justice and therefore was directly related to the interests that the most protected form of privilege — that of solicitor-client — is designed to protect. He could make a strong and compelling case that if researchers like him were required to disclose their research and testify in criminal prosecutions, whether for the prosecution or the defence, the ability to carry on this kind of research would be greatly undermined and this*

> *avenue of knowledge would therefore be foreclosed to law and policy makers. Yet, even in the face of this argument, it is our opinion that Canadian courts, like the American judge in the Leo case itself, would favour the interests of an accused person to have access to the testimony of an independent witness whose evidence is directly relevant to the accused's person's ability to have a fair trial, including access to evidence necessary to either establish his innocence or to invoke the protection of rules that go to the integrity of the administration of justice and the control of unlawful police activities.*[33]

We have a different interpretation of the significance of Leo's case. The US government already recognizes the need for special protections for research of the type Leo conducted in the form of privacy certificates administered by the National Institute of Justice (NIJ) — but only for research that it funds.[34] Researchers funded by the NIJ must state explicitly how they will meet the terms of 28CFR22.22,[35] which requires that identifiable information gathered under NIJ only be used for research and statistical purposes and cannot be disclosed without the research participant's permission.[36]

Should participants for a university research project enjoy fewer rights simply because the researcher, whose project was clearly within the NIJ mandate, did not receive his funding through NIJ? This creates the situation where a government can facilitate confidentiality for the criminal justice research it funds, but force others to limit confidentiality or undertake the research with an unlimited pledge and face the possibility of imprisonment for contempt in order to protect participants. Although it might not be its intention, research shield legislation is a convenient tool for a criminal justice system that would prefer to cover its tracks while exposing its critics to prosecution.

Jackson and MacCrimmon's analysis did not distinguish academic privilege and the rights and interests of research participants. In most cases, these two categories are synonymous — asserting researcher-participant privilege is the way researchers will protect research participants. However, research-ethics codes do not safeguard academic privilege as such. The academic does not hold the privilege; it belongs to the research participant. Researcher-participant privilege and academic privilege are distinct.

Leo's decision to testify perhaps best served his research subjects' interests because the police interrogators apparently believed that his observational record supported their account of the interrogation. According to this line of reasoning, Leo's decision to testify would not cause the interrogators any negative consequences, and would enhance their interests by enhancing the likelihood of a conviction.

Why, then, did Leo not ask the interrogators if they would waive privilege? As Traynor advised researchers faced with a subpoena:

> *Researchers should promptly notify confidential sources whenever their data is subpoenaed. Giving timely notice to them may help the researcher and facilitate a solution. The sources may waive confidentiality, thereby eliminating the problem. They may support the researcher in pursuing remedies that would limit the scope of the subpoena. Notice also amplifies the court's awareness of the researcher's concern for the privacy of confidential sources.*[37]

It is not clear from Leo's article whether he did ask the interrogators to waive privilege. Apparently, he did not, even though he seems to have been aware of this possibility.[38]

## Canadian Jurisprudence on Privilege

However helpful it is to peruse US cases regarding researcher-participant privilege, they do not bind Canadian courts. In the absence of any Canadian jurisprudence on researcher-participant privilege beyond the Ogden case and prior to the decision in *Parent & Bruckert* v *The Queen & Magnotta*, a consideration of how the Supreme Court had adjudicated other privilege claims — such as the claims of therapist-client privilege in *R. v. O'Connor*,[39] *A.(L.L.) v. B.(A.)*,[40] *M.(A.) v. Ryan*,[41] and *R. v. Mills*[42] — helps to anticipate the conceptual legal filters through which a claim of researcher-participant privilege would have to pass.

The adjudication of privilege involves a balancing of the rights of all persons involved in a particular court proceeding. As Madame Justice McLachlin stated in *M.(A.) v. Ryan*:

> *While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation.*[43]

In this regard, Canadian and US courts employ a similar balancing of competing interests. They usually achieve the balancing by ordering "partial disclosure," which is done in the context of the facts of each case and the rights in conflict. Partial disclosure involves keeping the door partly open — admitting evidence needed to assess a researcher's methodology and conclusions — and partly closed to protect research participants. US courts have almost always closed the door on the identity of individual research participants.

Jackson and MacCrimmon suggested that when courts balance competing interests, the most difficult challenge to researcher-participant privilege will arise when pitted against an accused person's right to a fair trial. Given the absence of Canadian jurisprudence on such a conflict, one can only speculate about what the courts would do if asked to weigh the researcher-participant's right to confidentiality against the right of an accused to a fair trial; much would depend on the facts of the particular case. The case they found most informative for this sort of claim is *R. v. O'Connor*.

## R. v. O'Connor

Several Aboriginal women sought therapy as part of the process of healing from a series of sexual assaults they suffered at the hands of Bishop O'Connor in a residential school. When O'Connor was charged, he sought to have records of the women's therapy sessions entered as evidence. The Crown objected, stating that giving access to the therapy records violated the women's privacy and equality rights. After much agonizing, the court decided by a margin of four to three that O'Connor's right to make full answer and defence took priority over the

women's privacy and equality rights. Jackson and MacCrimmon treated the case as a clear-cut victory for the right to a fair trial over privacy rights. However, some of the circumstances of the O'Connor case suggest that, should these rights clash again, the result could be different. Jackson and MacCrimmon did not appear to give much significance to the fact that the information the Crown sought to protect on behalf of the women was no longer truly confidential at the time the court was asked to agree that it should be considered privileged. The women had already shared their therapeutic records with the Crown to facilitate O'Connor's prosecution. They were patient-litigants.

This status as patient-litigant distinguishes *R. v. O'Connor* from, for example, *M.(A.)* v. *Ryan*. In the latter case, M was merely seeking therapy and her records had nothing to do with the case against Ryan; the court recognized patient-client privilege in that instance. However, in *R. v. O'Connor*, where the records themselves were the source of the charges, the court ruled that O'Connor had a right to see them as part of his defence. The patient-litigants had a clear appearance of conflict of interest: They wanted the records disclosed to some parties, but not to others, leading Justices Lamer and Sopinka to comment:

> *Fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence.*[44]

The *R. v. O'Connor* ruling thus did not turn on the issue of privilege. The majority held that considerations of privilege were irrelevant when the complainants themselves had already waived the confidentiality of their records — they failed to satisfy Wigmore criterion one. Nonetheless, Justices Lamer and Sopinka did comment on the competing interests at stake:

> *[I]t must be recognized that any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. As this Court held in Stinchcombe (at p. 340), a trial judge may*

> *require disclosure "in spite of the law of privilege" where the recognition of the asserted privilege unduly limits the right of the accused to make full answer and defence.*[45]

The "may" in the preceding passage reveals the court's acknowledgement that just as privilege is not absolute, the accused's right to full answer and defence is not absolute either. As Madame Justice McLachlin commented in her minority decision:

> *The Charter guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. What the law demands is not perfect justice, but fundamentally fair justice.*[46]

Jackson and MacCrimmon drew a somewhat different picture by taking another passage from Madame Justice McLachlin, this one from *M.(A.) v. Ryan*:

> *. . . [T]he court considering an application for privilege must balance one alternative against the other. The exercise is essentially one of good sense and good judgement. This said, it is important to establish the outer limits of acceptability. I for one cannot accept the proposition that occasional injustice should be accepted as the price of privilege. It is true that the traditional categories of privilege, cast as they are in all-or-nothing terms, necessarily run the risk of occasional injustice. But that does not mean that the courts, in invoking new privileges, should lightly condone its extension.*[47]

This passage suggests the right to full answer and defence will supersede a claim of privilege if it compromises a defence. However, McLachlin's comments in *R. v. O'Connor* suggest that balancing a defendant's right to a fair

trial and the privacy interests of research participants must also be evaluated case by case. Indeed, Justice L'Heureux-Dubé implied as much in her *R. v. O'Connor* minority opinion:

> *As important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than trample them. Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness.*[48]

If, like privilege, the right to make full answer and defence is not absolute, then the Supreme Court will engage in a balancing exercise that weighs the right of a research participant to privacy with the right of an accused to a fair trial. Jackson and MacCrimmon based their opinion that research-participant privacy will generally lose out to the defendant's right to full answer and defence on the Supreme Court of Canada's rulings in civil suits related to sexual assault (*M(A.) v. Ryan*; *A.(L.L.) v. B.(A.)*) and criminal cases involving sexual assault (*R. v. O'Connor*) and murder (*R. v. Gruenke*). Most of their hypothetical examples involved heinous discovery,[49] i.e., situations where the researcher serendipitously discovers some heinous circumstance, such as being told the identity of a murderer and realizing an innocent person has been convicted and is being sent to prison for life.

Instead of focusing on these worst-case scenarios, consider other cases that might arise in research on prostitution. One of Lowman's studies included observing police enforcing the communicating law (*Criminal Code* section 213). This statute prohibited any public communication for the purpose of engaging in prostitution or engaging the services of a prostitute. As this was a summary offence, the maximum sentence was six months in prison. In practice, clients rarely went to prison. Indeed, in Vancouver from 1991 to 1994, 87 per cent of clients found guilty of communicating received an absolute or conditional discharge, and thus did not end up with a criminal record. Since that time, most of them were not even charged, but diverted into British Columbia's Prostitution Offender Program, colloquially known as John School. In this research, Lowman assured police that he would not divulge their identities. Without this pledge, the officers would not have participated. Limited confidentiality would have fatally compromised research validity.

What if one of the men charged with communicating, realizing that a researcher had observed the defendant's interaction with police, subpoenaed the researcher as a material witness? How would a court weigh the various factors in the face of a claim for privilege in this instance? The likelihood is that even if convicted, the offender would not go to jail. Indeed, if given a discharge, six months after the date of conviction he would not even have a criminal record. The harm caused by this hypothetical wrongful summary conviction is hardly on a par with the harm done to David Milgaard, Donald Marshal, or Guy Morin — three men wrongfully convicted of murder who spent many years in prison. Yet the harm done to police research could be considerable. Given that the Supreme Court has clarified that a defendant's right to a fair trial is not absolute, the seriousness of the offence may well play a part in a court's evaluation of the importance of the two rights should they conflict.

When it comes to implications of *R. v. O'Connor* for claims of researcher-participant privilege, Jackson and MacCrimmon's analysis did not discuss key differences in this therapeutic situation as compared to research. The complainants had alleged that the bishop sexually assaulted them. They wished to see him punished. Thwarting his ability to use whatever means he could to mount a defence has the appearance of conflict because it helps to achieve these objectives.[50] In such situations, the court's attempt to balance competing interests takes into account the interest of a complainant who has something to gain by revealing information to one party, but not to another.[51]

Research participants usually do not have this appearance of conflict of interest. Prostitution research participants divulge information in confidence about their own criminal and sexual activities to a researcher with the full knowledge they are offering us data that we will compile, analyze, and publish. Participants divulge information on the condition that the researcher does not release their names. Research participants typically receive nothing direct or tangible for their participation other than, perhaps, a hope that someone will hear their voices. Occasionally the researcher pays them each a modest fee. Their primary motive is to provide information for the purpose of the greater good, and the only reason the information is available in the first place is because the researcher pledged

confidentiality — a compelling reason to recognize researcher-participant privilege when the research concerns sensitive topics.

Writing for the majority, Justices Lamer and Sopinka described the considerations that would be involved in balancing the privacy interests in therapeutic records of an accuser relative to the right of the accused to access them. One element they note, which Jackson and MacCrimmon largely bypassed, concerned the probative value of the records in question. In her dissenting opinion, Madame Justice L'Heureux-Dubé made the following remarks about therapeutic records of the type considered in *R. v. O'Connor*:

> *[T]he assumption that private therapeutic or counselling records are relevant to full answer and defence is often highly questionable, in that these records may very well have a greater potential to derail than to advance the truth-seeking process:*
>
> . . . medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. *Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient.* Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.[52] *[Emphasis in original]*

We could make many of the same comments with respect to research records, although different issues arise also in the research context. Scientific and legal standards of validity overlap, but differ in important respects. How would the court treat interview data? Does an interview transcript

have greater probative value than hearsay? Does information from a taped interview have greater probative value than a set of notes taken during an interview? In the case of observational field notes, would it make a difference if the researcher generated the notes *in situ* or at the end of the observational period, or later that day? Are there any circumstances under which data are completely safe from probing by the courts? For example, are completely anonymized field notes and interview transcripts of any use to a court? What if the researcher conducted the interviews years ago — is his or her memory reliable?

A related issue involves destruction of data. Jackson and MacCrimmon offered a cautionary tale arising from *R. v. Carosella,*[53] a Supreme Court of Canada decision that dealt with destruction of documents created during the confidential interactions of a therapist and a patient who was also a complainant in a sexual assault case. In that case, a woman who had been sexually assaulted first visited a Sexual Assault Crisis Centre (the centre), where she was interviewed for more than an hour. As Jackson and MacCrimmon explained:

> *During the interview she was informed that whatever she said could be subpoenaed and introduced into court. The complainant said that was all right. The interviewer took about 10 pages of notes. After the interview, the complainant contacted the police and charges were laid.*

Carosella, the accused, made an application for the notes two years later. However, six months prior to his application, the Board of Directors of the centre passed a motion authorizing the destruction of several hundred files, which included the notes from the Carosella case. Carosella argued that the destruction of the notes violated his right to a fair trial. The case went all the way to the Supreme Court, which agreed with Carosella and stayed his charges. Although Jackson and MacCrimmon distinguished the therapeutic and research contexts, including their note that anonymizing interview records is considered ethical research practice (but not consistent with good therapeutic practice), they suggested any destruction or anonymization of identifiable data should be part of a clear plan, and should occur prior to

any legal interest that might make the data interesting as evidence. After a third party expresses interest in research data, destruction of that material could lead to problems:

> *. . . researchers who destroy records once the records are subpoenaed or ordered to be produced in court may be subject to legal sanction. Section 127 of the Criminal Code makes it an offence to disobey a court order and section 139 makes it an offence to obstruct justice. In addition, a court retains the power to punish for contempt. Section 127 of the Criminal Code makes it an offence to disobey a court order and section 139 makes it an offence to obstruct justice. In addition, a court retains the power to punish for contempt.*

Jackson and MacCrimmon's analysis of *R. v. Carosella* suggests that researchers who deal with sensitive information would be wise to:

1. include in their ethics applications their plans to anonymize data and destroy any original tapes, in order to make clear that their destruction is standard practice for the protection of research participants; and
2. destroy tapes and anonymize transcripts as soon as practicable.

Another factor the court considers is whether the case is criminal or civil. In *M.(A.) v. Ryan*, Madame Justice McLachlin wrote:

> *[T]he interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case,*

> *where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.*

In criminological research, participants' greatest concern is usually that a third party might use the information they supply to prosecute them, discipline them, or terminate their employment. Until recently, there was no recorded case of an attempt to obtain confidential research information to aid a prosecution. That changed in 2012 when detectives from the Service de Police de la Ville de Montréal (SPVM) executed a search warrant to obtain an audio tape and transcribed interview from Drs. Chris Bruckert and Colette Parent of the University of Ottawa. We return to this pivotal case in our penultimate chapter.

## Summary of the Wigmore Strategy

The likelihood of a researcher receiving a subpoena and a court asking her/him to reveal confidential research information is remote. In Canada, only Ogden, Bruckert, and Parent have had to defend research confidentiality in court. The importance of Ogden's case was that it established the Wigmore test as the only mechanism available in law to assert researcher-participant privilege. That it took nineteen years for a second case to arise, the one involving Bruckert and Parent, indicates just how rare this threat is in Canada.

If past US experience is anything to go by, even if a researcher receives a subpoena, the likelihood of there being an order to disclose identifying information is minuscule. The odds are probably greater that a research participant will be involved in a road accident on his or her way to an interview appointment. Because the risk has occasionally materialized, some research administrations require researchers to limit confidentiality "to the extent law allows" without defining that standard or advising researchers how to achieve it.[54]

Given that the common law is all they have to fend off challenges to research confidentiality, Canadian researchers and universities have an ethical responsibility to Wigmorize their research projects so that they really can protect confidentiality to full extent that law permits. Generally, to enhance a researcher's ability to assert privilege using common law, a research design should include four core elements:

1. Researchers should secure institutional ethics approval as part of demonstrating that their research is consistent with the ethics of their discipline and the TCPS, and that it is an authorized research project.
2. The application to a Research Ethics Board should include a discussion of why confidentiality is essential to undertaking the proposed research project, or why it is not. The application should provide clear evidence that any confidentiality guarantee is part of a well-considered research plan. Researchers should ask prospective participants if they would participate in the research if they knew that the researcher might disclose their name. A record should be made of the response as long as the record itself does not jeopardize confidentiality.[55] Such a record would provide further evidence that confidentiality was, and is, essential to this particular researcher-participant relationship.
3. On the basis of the researcher's experience, colleagues' experiences, and the extant literature, the researcher should consider the range of challenges to confidentiality that might reasonably be anticipated, and consider whether the benefits of doing the research outweigh the interests that might be represented in any reasonably foreseeable challenge to confidentiality.
4. If the researcher is convinced that the research is worth doing and that they could not do it without a guarantee of confidentiality, ensure that they make an unambiguous promise to that effect, and keep it.

In light of the existing North American jurisprudence, it appears courts will maintain confidentiality of participant identities in most cases.