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Charles R. Knerr

James D. Carroll

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## CONFIDENTIALITY AND CRIMINOLOGICAL RESEARCH: THE EVOLVING BODY OF LAW\*

CHARLES R. KNERR\*\* AND JAMES D. CARROLL\*\*\*

Criminal justice researchers often enter into confidential relationships with their research subjects.<sup>1</sup> In attitudinal research, personality testing or observation of subjects, confidentiality may be promised to a subject by a criminologist. In acquiring information from archival sources, or in securing information from informants knowledgeable in the affairs, attitudes, beliefs or behavior of a subject, a

confidential relationship may be nurtured, occasionally over a long period of time.

"Confidentiality" refers to the conditions under which scientific data, acquired from or about research subjects, is used by criminologists. Confidentiality concerns professional and personal ethics: a promise or vow, explicit or otherwise, to a source of research data not to disclose the source's identity, or not to disclose or attribute certain facts, opinions or beliefs of the source. Confidentiality refers to the status of research information, and involves questions of whether and under what circumstances research data will be transmitted by the criminologist to others, questions of maintaining the anonymity of research sources, and questions regarding the revelation of what is learned from or about a subject.<sup>2</sup>

A legal problem may arise concerning confidences developed during research: criminologists can be subpoenaed by various governmental authorities and ordered to disclose information obtained from or about a subject. The subpoena can order the disclosure of the identity of the research subject or information pertaining to the subject. A researcher may either obey such an order and violate a vow to the subject, or refuse to obey the court order and suffer certain consequences, such as imprisonment.

This legal problem is not hypothetical, as a number of academic researchers and their staff have been subpoenaed in recent years.<sup>3</sup> Several of these researchers have been held in contempt for

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\*\* Assistant Professor, Department of Political Science, the University of Texas at Arlington.

\*\*\* Attorney and Professor, Department of Public Administration, the Maxwell School, Syracuse University.

<sup>1</sup> See, e.g., REISS, *THE POLICE AND THE PUBLIC* (1971); SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); Wolfgang, *Ethical Issues of Research in Criminology*, in *SOCIAL RESEARCH IN CONFLICT WITH LAW AND ETHICS* 23 (P. Nejedli ed. 1976); Bailey & Lott, *Crime, Punishment and Personality: An Examination of the Deterrence Question*, 67 J. CRIM. L. & C. 99 (1976); Farrington, *Self Reports of Deviant Behavior*, 64 J. CRIM. L. & C. 99 (1973); Heinz et al., *Sentencing-by Parole Board: An Evaluation*, 67 J. CRIM. L. & C. 1 (1976); Krohn, Waldo & Chiricos, *Self Reported Delinquency*, 65 J. CRIM. L. & C. 545 (1974); Smith and Stevens, *Drug Use and Hustling*, 14 CRIMINOLOGY 155 (1976).

<sup>2</sup> This definition is based in part upon the work of one of the authors, Carroll, *Confidentiality of Social Science Research Sources and Data: The Popkin Case*, 6 Publication of Am. Political Sci. 268 (1973).

<sup>3</sup> The authors have identified eighteen such subpoena incidents involving twenty-two academic researchers and their staff. The facts surrounding each incident were acquired through personal and telephone interviewing and through acquisition of all available written or published materials. For an account of the incidents, see J. Carroll & C. Knerr, *Confidentiality of Social Science Research Sources and Data*, (1976) (unpublished research report submitted to the Russell-Sage Foundation, New York City).

refusal to comply with a court order.<sup>4</sup> Three researchers have been imprisoned for refusing to breach confidential research relationships.<sup>5</sup>

Clashing interests surround researcher-subject communications: those of society in scientific data about criminal behavior and the criminal justice system, those of prosecutors and judicial authorities in securing information relevant to judicial decision-making, and those of individual citizens in preserving private spheres of activity. At question is the unfettered conduct of scientific inquiry. Also at question is the power of public authorities to compel evidence which could be used to the detriment of research subjects. These clashing interests can be quite intense in criminal justice research, since the criminologist is often in close contact with the major sources of subpoenas—prosecutors and judicial authorities.

The purpose of this article is to review the evolving body of law concerning the confidentiality of criminologist-subject communications. The case and statutory law<sup>6</sup> suggest that a researcher-subject

testimonial privilege is now recognized in certain situations.<sup>7</sup>

#### PROBLEMS EXPERIENCED BY CRIMINOLOGISTS

Numerous incidents involving the confidentiality of criminal justice research data have occurred

<sup>4</sup> Six individuals have been held in contempt of court for refusing to disclose confidential research information. In two of these incidents proceedings were terminated without action being taken. In one of the remaining incidents, the contempt of court conviction was overturned by a higher court. *People v. Newman*, 32 N.Y.S.2d 379, 298 N.E.2d 651, 345 N.Y.2d 562 (1973). In the remaining three incidents the researchers were imprisoned.

<sup>5</sup> The three researchers are: Dr. Samuel Popkin, then of Harvard University, and now of the University of Texas at Austin; Ms. Carole Morgan, now associated with the National Institute for Corrections, Denver, Colorado, and her research assistant.

<sup>6</sup> *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976). *Richards* concerned the petitions of an academic researcher and his principal research assistant to be relieved from disclosing research notes and presenting personal testimony sought by a party to a breach of contract and defamation proceeding. In quashing the subpoenas, the court held that trial courts are invested with broad discretion in supervising discovery, including balancing the interests of the private litigant in obtaining the information sought against the costs of providing it.

In *Newman* the New York Court of Appeals held that the administrator of a methadone research and treatment center need not produce records to a grand jury investigating the commission of a crime. Several federal research statutes, 42 U.S.C. § 242a(a) (1970), 21 U.S.C. § 1175(a) (Supp. V 1975), and 21 U.S.C. § 872(c) (1970) protected said records from court ordered disclosure.

In addition to the case law, a large number of federal and state statutes have been enacted protecting the confidentiality of certain forms of researcher-subject communications: 21 U.S.C. § 872(c) (1970) (drug research subject identities); 42 U.S.C. § 242(a) (1970) (mental health and drug research subject identities); 42 U.S.C.

§ 3771(a) (Supp. V 1975) (research data generated by grantees and contractors of the Law Enforcement Assistance Administration, U.S. Department of Justice); 42 U.S.C. § 4582 (1970) (records of drug search projects); ARK. STAT. ANN. § 43-917 (1964) (information gatherer shield law); ARK. STAT. ANN. § 82-2629(c) (1976) (drug research subject identities); CAL. HEALTH & SAFETY CODE § 11603 (West 1975) (drug research subject identities); CONN. GEN. STAT. ANN. § 19-496(d) (West 1958) (drug research subject identities); DEL. CODE tit. 16, § 4772(d) (Rev. 1974) (drug research subject identities); GEO. CODE ANN. § 79A-831(c) (Supp. 1977) (drug research subject identities); HAW. REV. STAT. § 329-58(c) (1976) (drug research subject identities); IDAHO CODE § 37-2747(d) (1977) (drug research subject identities); ILL. ANN. STAT. ch. 56½, § 1508(b) (Smith-Hurd 1977) (drug research subject identities); IND. CODE § 35-24.1-5-8(d) (Burns 1975) (drug research subject identities); IOWA CODE ANN. § 204-509(4) (West Supp. 1977) (drug research subject identities); LA. REV. STAT. ANN. § 40-992(c) (West 1977) (drug research subject identities); MD. ANN. CODE art. 52A, § 8 (Supp. 1977) (researchers under grant or contract to the Maryland Department of Juvenile Services); MASS. GEN. LAWS ANN. ch. 94C, § 24(b) (West 1975) (drug research subject identities); MINN. STAT. ANN. § 595.023 (West Supp. 1976) (information gatherer's shield law); MONT. REV. CODES ANN. § 93-701-4(6) (researchers studying child mentality, in civil proceedings); MONT. REV. CODES ANN. § 54-323(3) (drug research subject identities); NEV. REV. STAT. § 453.296 (1977) (drug research subject identities); N.H. REV. STAT. ANN. § 126-A:4-9 (Supp. 1973) (shield for "scientific investigators" authorized by the Commissioner of Health and Welfare); N.Y. CIV. RIGHTS LAW 79-j (McKinney 1976) (records of the Multi-State Information Center for Psychiatric Patients, a research and demonstration data bank); N.Y. PUB. HEALTH LAW 3371 (McKinney 1977) (records of drug research projects); N.C. GEN. STAT. § 90-113.3(c) (1975) (drug research subject identities); N.D. CENT. CODE § 19-03.1-39(4) (1971) (drug research subject identities); OKLA. STAT. ANN. tit. 63, § 2-106(G) (West Supp. 1977) (drug research subject identities); PA. STAT. ANN. tit. 35, § 780-137(c) (Purdon 1977) (drug research subject identities); TENN. CODE ANN. § 24-113 (Supp. 1977) (information gatherers shield law); TENN. CODE ANN. § 52-1446(a) (1977) (drug research subject identities); TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.02(c) (Vernon 1976) (drug research subject identities); WASH. REV. CODE ANN. § 69.50.508(d) (Supp. 1976) (drug research subject identities); W. VA. CODE § 60A-5-508(d) (Supp. 1976) (drug research subject identities); WIS. STAT. ANN. § 161.335(7) (West Supp. 1977) (drug research subject identities); WYO. STAT. § 35-347.52(d) (1975 Supp.) (drug research subject identities).

<sup>7</sup> Based upon prevailing case law, researchers subpoenaed by the federal courts in connection with civil

over the last decade. The most serious of these arose in 1976, when two researchers under sponsorship of the Law Enforcement Assistance Administration [hereinafter referred to as LEAA] to study the behavior and treatment of alleged sex-crime victims, were subpoenaed by a Colorado county court and ordered to disclose the research records pertaining to two alleged victims. The research files were sought in connection with impending prosecution of two juvenile suspects. The researchers declined to provide the files as ordered, contending that anonymity had been promised to all research participants and that the LEAA required maintenance of confidentiality under threat of severe penalty.<sup>8</sup> The judge held that informal prom-

ises would not justify the refusal to produce records as ordered, and federal law was not controlling. When the researchers persisted in refusing to comply with the requirements of the subpoena, they were held in contempt of court and were ordered incarcerated until such time as the requirements were fully met. The two researchers were then taken into custody and confined to a cell in the county courthouse. The researchers' counsel located the research subjects whose records were sought, secured their written consent to disclose information concerning them, and then complied with the subpoena. The researchers were subsequently released.<sup>9</sup>

In another study of alleged sex-crime victims, one sponsored by a private foundation, the principal investigator, a social psychologist, was similarly subpoenaed to disclose a research file to a local prosecutor. The file was sought in connection with the pre-trial investigation of a suspect. The social-psychologist refused to disclose the file on the grounds that anonymity had been promised to all participants. When the prosecutor pledged to pursue a contempt of court proceeding if the file were not disclosed, the researcher threatened to destroy the file rather than breach a personal commitment. The prosecutor offered a counterthreat: prosecution for destruction of evidence should the file be destroyed. Believing that no legal grounds existed for resisting the subpoena and that severe penalties might be suffered if the file were destroyed, the social psychologist complied with the subpoena. Three additional subpoenas were subsequently issued; each required disclosure of a research file and the requirements of each were fully met.<sup>10</sup>

In another incident, a sociologist who had completed a participant-observation study of socialization patterns of new policemen was subpoenaed to disclose all research notes and files and to testify before a civil court investigating an alleged act of police brutality that he supposedly witnessed. In the proceeding arranged for such disclosure the researcher asserted an absolute scholarly privilege not to reveal research data. No challenge was made

proceedings have a right to refuse to disclose confidential research communications, as held in the *Richards* decision. Researchers who have received a legal shield under provisions of 21 U.S.C. § 872c (1970) or 42 U.S.C. § 242a(a) (1970) also have a right to refuse to comply with a court order, as held in the *Newman* decision. Other existing legal shields, as discussed in notes 20-54 *infra* and accompanying text, may be protective, provided the courts uphold the applicability and constitutionality of these statutes. For commentaries on this topic, see: COMM. ON FED. EVAL. RESEARCH, *PROTECTING INDIVIDUAL PRIVACY IN EVALUATION RESEARCH* (1975); *Social Research in Conflict with Law and Ethics* (P. Nejeleski ed. 1976); RIVLIN & TIMPANE, *ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION* (1976); Boness & Cordes, *The Researcher-Subject Relationship: The Need for Protection and a Model Statute*, 62 GEO. L.J. 243 (1973); Carroll, *supra* note 2; Feuillan, *Every Man's Evidence Versus a Testimonial Privilege for Survey Researchers*, 40 PUB. OPINION Q. 39 (1976); Hendel & Bard, *Should There be a Researcher's Privilege*, 59 AAUP BULLETIN 398 (1973); Knerr & Carroll, *Social Scientists and the Courts: The Development of a Testimonial Privilege*, 15 SOC. SCI. J. 103 (1978); Nejeleski & Finsterbusch, *The Prosecutor and the Researcher: Present and Prospective Variations on the Supreme Court's Branzburg Decision*, 21 SOC. PROB. 3 (1973); Nejeleski & Lerman, *A Researcher-Subject Testimonial Privilege: What to do Before the Subpoena Arrives*, 1971 WIS. L. REV. 1085 (1971); Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COL. L. REV. 1184, at 1206-1207 (1965); Shah, *Privileged Communications, Confidentiality, and Privacy: Privileged Communications*, 1 PROFESSIONAL PSYCH. 56 (1969); Tyler & Kaufman, *The Public Scholar and the First Amendment: A Compelling Need for Compelling Testimony*, 40 GEO. WASH. L. REV. 995 (1972); Note, *Protection from Discovery of Researchers' Confidential Information: Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388 (1977), 9 CONN. L.R. 326 (1977); Note, *Social Research and Privileged Data*, 4 VAL. U.L. REV. 368 (1970).

<sup>8</sup> During oral arguments researchers referred to the provisions of 42 U.S.C. § 3771(a) (Supp. V 1975), which requires researchers under grant or contract to the LEAA to protect the privacy of the subjects of research, and immunizes such research data from judicial and administrative proceedings. Penal ties for violations prescribed by 42 U.S.C. § 3771(c) (Supp. V 1975): a fine not to

exceed \$10,000, imprisonment not to exceed one year, or both.

<sup>9</sup> Description of this incident is based upon personal interviews with one of the researchers and with LEAA officials. Several months after these events transpired, the Colorado State Attorney ordered an expungement of all records pertaining to the proceeding. No published account is available.

<sup>10</sup> Description of this incident is based upon a personal interview with the social-psychologist. No published accounts of the incident are known to exist.

to this assertion and the proceedings were terminated.<sup>11</sup>

In another participant-observation study of police socialization patterns, a sociologist was ordered to testify before a police board investigating an alleged act of brutality. Believing that all parties would benefit from disclosure, the sociologist complied with the subpoena.<sup>12</sup>

During a study of drug users, a sociologist was subpoenaed to testify as a defense witness for one of the research participants. The defendant sought substantiation for a claim that drugs were used for religious purposes. The sociologist refused to answer certain questions on fifth amendment grounds, claiming that criminal activity had been witnessed (drug use) and that this activity had not been reported to the proper authorities as required by law. The researcher was not compelled to testify.<sup>13</sup>

A court order is not the only form of disclosure pressure which can be exerted upon a criminologist; informal demands can be made including pressures which make it difficult for the criminologist to resist in the absence of legal protection. For example, a sociologist investigated crime victimization and found that in certain areas of a large city only a small percentage of crimes were actually reported to the police. When a local newspaper published an article summarizing the research findings, the police chief of the city in question publicly disputed the results and demanded the names and addresses of all interviewees to verify the findings. The sociologist declined to provide this information on the grounds that absolute assurances of anonymity had been extended to all participants. Pressures ceased shortly thereafter.<sup>14</sup>

In another incident, research was conducted regarding the judicial and administrative handling of motor vehicle violators. The researcher discovered that one operator had been convicted of

twenty-three major violations in a two-year period, but had not experienced a suspension of driving privileges. Mention was made of this in the final report. When an official of the state motor vehicle department demanded the identity of this individual, the request was refused since anonymity had been promised to all participants. A second demand was also refused. The efforts to secure the identity of the participant were ultimately halted.<sup>15</sup>

In yet another incident, during an experimental study of ex-felon behavior, one of the research participants became a suspect in a murder case, and police officials pressured the researchers to provide the research files pertaining to this participant, and threatened to subpoena the researchers if necessary. Contending that absolute assurances of confidentiality had been made to all participants, the researchers refused to provide any information. As in the former examples, pressures subsequently ceased.<sup>16</sup>

Criminologists thus frequently experience a privacy or confidentiality problem during research, augmented by their reluctance to cooperate, by the pressures put on them to reveal confidential data or by their unanticipated discovery of extremely sensitive information. One criminologist has noted that:

The criminologist studying uncaught criminals in the open finds sooner or later that law enforcers try to put him on the spot—because, unless he is a complete fool, he uncovers information that law enforcers would like to know, and, even if he is very skillful, he cannot always keep law enforcers from suspecting that he has such information.<sup>17</sup>

#### STATUTORY PROTECTION

One of the major approaches to extending legal protection to criminologists is through legislative enactment of a statute upholding the privileged status of researcher-subject communications. Although no legislature has enacted an absolute privilege similar to that enjoyed by attorneys, by phy-

<sup>11</sup> The subpoena was issued in connection with a defamation action, *Geiser v. Seattle Times Co.*, No. 776-763 and No. 778-830 (Superior Court of Washington State, Kings County, 1974). The researcher's assertion of an absolute privilege not to reveal confidential data was made in a proceeding before Vincent F. Leahy, Commissioner, State of Massachusetts, Boston, October 30, 1974. (Transcript on file with the authors.)

<sup>12</sup> Description is based upon Kirkham, *The Criminologist as Police Officer* 30-31 (1973) (unpublished paper delivered before the American Society of Criminology).

<sup>13</sup> Description is based upon Yablonsky, *The Problems of Deviant Research*, 6 *CRIMINOLOGIST* 10 (1968), and upon *Universities: Risks of Research*, *TIME*, Dec. 22, 1967, at 40.

<sup>14</sup> Description is based upon a personal interview with the sociologist. No published accounts of this incident are available.

<sup>15</sup> Description is based upon an anonymous response to a survey conducted by the Am. Psych. Assn., as reported in *ETHICAL PRINCIPLES IN THE CONDUCT OF RESEARCH WITH HUMAN PARTICIPANTS* (1973).

<sup>16</sup> Description is based upon personal interviews and upon an account of the incident as described in an unpublished paper, Feuillan, *Every Man's Evidence: Should There be a Testimonial Privilege for Survey Researchers?* (May 1974) (paper presented before a joint meeting of the American and World Assoc. for Public Opinion Research).

<sup>17</sup> POLSKY, *HUSTLERS, BEATS, AND OTHERS* 147. (1967).

sicians and by others,<sup>18</sup> the question of such a privilege has been reviewed.<sup>19</sup> And, in recent years, the Congress and several state legislatures have enacted several limited privileges or immunities.<sup>20</sup>

### *Federal Immunity Statutes*

One federal statute is applicable to research data generated by researchers under grant or contract to the LEAA and states that:

Except as provided by Federal law other than this chapter, no officer or employee of the Federal Government, nor any recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter. Copies of such information shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceedings.<sup>21</sup>

The provisions of this statute are very narrow, as protection is conferred only upon researchers under grant or contract to the LEAA. Moreover, the immunity extends only to written records and not to the mental impressions of the criminologist. Protection is not afforded against legislative subpoenas,<sup>22</sup> nor is protection extended to information

pertaining to the conduct of future crimes.<sup>23</sup> The protection is also somewhat limited because state and local judicial authorities may hold that federal law is not controlling and that state or local law should prevail.<sup>24</sup>

Despite these limitations, the statute may provide relief to a number of criminologists—those under grant or contract to the LEAA. Moreover, all research data is protected, including identities and the content or nature of what was learned from or about a research subject, and, in contrast to other federal researcher statutes discussed below, the immunity is automatically conferred on all LEAA researchers. No administrative action is necessary to implement the statute.<sup>25</sup>

Another federal statute permits the U.S. Attorney General to:

[A]uthorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization obtained.<sup>26</sup>

While this "privilege" appears to provide broad coverage, the statute is embedded within a section pertaining to drug research programs and officials responsible for administering the immunity have actually interpreted the statute to apply only to drug research.<sup>27</sup> Only those criminologists investigating the relationship between drug use and crime would therefore be conferred the immunity. Moreover, other limitations on this statute's utilization can be noted. By the statute protection is extended only to those researchers who have received a specific grant of immunity and administrative review is required of pertinent documents provided by the researcher.<sup>28</sup>

<sup>18</sup> A number of relationships have been deemed important by American legislatures, and are legally protected, in some jurisdictions, and under certain circumstances, including: attorney-client, priest-penitent, husband-wife, physician-patient, psychiatrist-patient, accountant-client, social worker-client, psychologist-client, journalist-source, employer-stenographer, and school teacher-student, among others. For a review of these statutes see R. WEINBERG, *CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATION* (1967) and 8 WIGMORE ON EVIDENCE § 2290 (3d ed. 1940).

<sup>19</sup> See Mass. State Sen. Bill No. 705 (1973); *PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY* 567-87 (1977); Boness & Cordes, *The Researcher-Subject Relationship: The Need for Protection and a Model Statute*, 62 GEO. L.J. 243, 278 (1973); Comm. on Fed. Eval. Research, *Protecting Individual Privacy in Evaluation Research* (1975) (Nat. Acad. of Sci.)-(Appendix B).

<sup>20</sup> See, e.g., 21 U.S.C. § 872(c) (1970); 42 U.S.C. § 242a(a) (1970); 42 U.S.C. § 3771(a) (Supp. V 1975); CAL. HEALTH & SAFETY CODE § 11603 (West 1975); TEX. REV. CIV. STAT. ANN. art. 4476-15 § 5.02(c) (Vernon 1977). These and other statutes are discussed in the text at notes 20-54 *supra*.

<sup>21</sup> U.S.C. § 3771(a) (Supp. V 1975).

<sup>22</sup> Only one incident is known of a legislative subpoena demanding research data. For a review of this incident,

see *Antipoverty R & D: Chicago Debate Suggests Pitfalls Facing OEO*, 165 SCIENCE 1243, (1969).

<sup>23</sup> See the administrative regulations implementing this statute, at 41 Fed. Reg. 54845 (1976) [codified as 28 C.F.R. 22 (1977)].

<sup>24</sup> For an illustration of this problem, see the case cited note 29 *infra*.

<sup>25</sup> See, however, the regulations implementing this statute, cited note 23 *infra*.

<sup>26</sup> U.S.C. § 872(c) (1970).

<sup>27</sup> See the administrative regulations implementing this statute, at 21 C.F.R. 1316.21 (1977).

<sup>28</sup> *Id.* 21 C.F.R. 1316.21 requires shield applicants to submit the following information: (1) the researcher's controlled substance registration number, if any; (2) the location of the research project; (3) a general description of the research or a copy of the research protocol; (4) a

However, in certain respects this provision provides broader protection than the LEAA statute. Unlike the LEAA statute, under this provision both testimony and written records are immune from compulsory disclosure proceedings. Also, the provision does not require the researcher to be under grant or contract to a federal agency to receive the immunity. Finally, and perhaps most importantly the statute has been reviewed and upheld.<sup>29</sup>

A third federal statute empowers the Secretary of the Department of Health, Education, and Welfare to:

[A]uthorize persons engaged in research on mental health, including research on the use and effect of alcohol and other psychoactive drugs, to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify such individuals.<sup>30</sup>

By this statute the legal needs of a segment of the criminological research community may be served. If authorized, the immunity extends to all proceedings, irrespective of level of government. Coverage is extended to "mental health" research, which is not explicitly defined, but determined by administrative discretion.<sup>31</sup> The research project need not be sponsored by the Department of Health, Education, and Welfare.<sup>32</sup> And, like the drug research statute, this statute has been reviewed and upheld.<sup>33</sup>

Several other federal statutes provide relief from compelled testimony. For example, the Drug Abuse Office and Treatment Act of 1972 confers a limited immunity on the "records of the identity, diagnosis, prognosis, or treatment of any patient . . . of any drug abuse prevention function."<sup>34</sup> However the immunity granted is very limited, as a balancing

provision has been included in the statute which allows courts to order disclosure where there is "good cause."<sup>35</sup> The statutes protecting census data<sup>36</sup> and social security data<sup>37</sup> also create immunities for and by the Social Security Administration. University-based research is not protected by either of these statutes.

### *State Statutes*

State legislatures have also enacted statutes which may protect certain forms of research and certain types of research data. However, such statutes are of limited importance as none of them protect a broad segment of the criminal research community.

Several state legislatures have enacted statutes protecting research into drug abuse and use. In 1970 the National Conference of Commissioners on Uniform State Laws adopted the Uniform Controlled Substances Act, which contained two provisions protecting the identity of drug research subjects.<sup>38</sup> The Conference urged states to adopt the model statute and at least thirty-seven states have now adopted the model statute or similar versions. Of these, twenty-eight states enacted stat-

21 U.S.C. § 1175 (Supp. V 1975)). See also 42 U.S.C. § 4582 (Supp. V 1975).

<sup>35</sup> 42 U.S.C. § 4582(b)(2)(C) (Supp. V 1975).

<sup>36</sup> 13 U.S.C. § 9 (1970), which reads in part: "Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

<sup>37</sup> 42 U.S.C. § 1306 (1970).

<sup>38</sup> Pertinent provisions of the Uniform Controlled Substances Act are § 504(c):

A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the [appropriate person or agency], nor may he be compelled in any State or local civil, criminal, administrative, legislative or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

and § 508(d):

The [appropriate person or agency] may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1970).

specific request to withhold the names and/or any other identifying characteristics of the research subjects; and (5) the reasons supporting the request.

<sup>29</sup> *People v. Newman*, 32 N.Y.S. 2d 379, 298 N.E. 2d 651, 345 N.Y. 2d 562 (1973).

<sup>30</sup> 42 U.S.C. 242a(a) (Supp. V 1975).

<sup>31</sup> For proposed administrative regulations implementing this statute, see 40 Fed. Reg. 56692 (1975).

<sup>32</sup> See the proposed regulations implementing this statute, at 40 Fed. Reg. 56692 (1975).

<sup>33</sup> *People v. Newman*, 32 N.Y.S. 2d 379, 298 N.E. 2d 651, 345 N.Y. 2d 562 (1973).

<sup>34</sup> Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, § 408 (a), 86 Stat. 65 (1972) (Codified at

utes containing one or both of the model law's provisions protecting the identity of drug research subjects.<sup>39</sup> Investigations of drug abuse are thus protected by several federal statutes and state statutes in more than one-half of the states. Only those criminologists investigating drug use would be protected by these statutes. Moreover, all of these privileges are conferred upon researchers and application must be made to the proper authorities in each state.<sup>40</sup>

Several of the state newsmen shield laws may protect criminological researchers. For instance, Minnesota's Free Flow of Information Act<sup>41</sup> extends protection to any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for purpose of transmissions dissemination, or publication to the public."<sup>42</sup> A certain segment of the

criminological research community might be protected under the provisions of this statute.<sup>43</sup> The newsman statute in Arkansas may also protect certain researchers. The statute protects "any editor, reporter, or other writer for any newspaper or periodical or manager or owner of any radio station."<sup>44</sup> Interpreted broadly, this statute could extend coverage to a small number of criminologists.<sup>45</sup> Tennessee's newsman statute defines newsman as "a person engaged in gathering information for publication or broadcast."<sup>46</sup> The privilege is limited, however, by a provision which allows the Tennessee Court of Appeals to order disclosure in certain situations.<sup>47</sup>

The New Hampshire legislature enacted a statute which empowers the State Commissioner of Health and Welfare to authorize a privilege for "scientific investigators." The statute immunizes from compulsory disclosure "all information, records of interviews, written reports, statements, notes, memoranda, or other data procured in connection with such scientific studies and research conducted by the department, or by other persons, agencies, or other organizations so authorized by the commissioner."<sup>48</sup> Under this statute, criminologists could be authorized to withhold information from public authorities.<sup>49</sup>

Several other state statutes protect a narrow range of research data. The New York legislature enacted a statute protecting records of the Multi-

<sup>39</sup> States which have enacted the provision regarding a drug researcher privilege include: Arkansas (ARK. STAT. ANN. § 82-2629(c) (1976)); California (CAL. HEALTH & SAFETY CODE § 11603 (West 1975)); Connecticut (CONN. GEN. STAT. ANN. § 19-496d (West 1958)); Delaware (DEL. CODE tit. 16, § 4772(d) (Rev. 1974)); Georgia (GEO. CODE ANN. § 79A-831(c) (Supp. 1977)); Hawaii (HAW. REV. STAT. § 329-58(c) (1976)); Idaho (IDAHO CODE § 37-2747(d) (1977)); Illinois (ILL. ANN. STAT. ch. 56½, § 1508(b) (Smith-Hurd 1977)); Indiana (IND. CODE § 35-24.1-5-8(d) (Burns 1975)); Iowa (IOWA CODE ANN. § 204-509(4) (West Supp. 1977)); Louisiana (LA. REV. STAT. ANN. § 40-992(c) (West 1977)); Massachusetts (MASS. LAW ANN. ch. 94C, § 24(b) (West 1975)); Nevada (NEV. REV. STAT. § 453.296 (1977)); New Mexico (N. M. STAT. ANN. § 54-11-39(c) (Supp. 1975)); New York (N. Y. PUB. HEALTH LAW 3371 (McKinney 1977)); North Carolina (N.C. GEN. STAT. § 90-113.3(e) (1975)); North Dakota (N.D. CENT. CODE 19-03.1-39(4) (1977)); Oklahoma (OKLA. STAT. ANN. tit. 63, § 2-106(G) (West Supp. 1977)); Pennsylvania (PA. STAT. ANN. tit. 35, § 780-138(c) (Purdon 1977)); Tennessee (TENN. CODE ANN. § 52-1446(a) (1977)); Texas (TEX. REV. CIV. CODE ANN. art. 4476-15, § 5.02(c) (Vernon 1977)); Washington (WASH. REV. CODE ANN. § 69.50.508(d) (Supp. 1976)); West Virginia (W. VA. CODE § 60A-5-508(d) (Supp. 1976)); Wisconsin (WIS. STAT. ANN. § 161.335 (7) (West Supp. 1977)); Wyoming (WY. STAT. § 35-347.52(d) (Supp. 1977)).

<sup>40</sup> The authors have communicated with the various officials responsible for conferring the shields cited at note 38 *supra*, and found that relatively few of the statutes have been administratively implemented. Most of the state officials contacted reported that no researcher had ever requested a shield, and thus no administrative procedures had ever been set forth. One of the states which has implemented its shield, Montana, has reportedly licensed two researchers in accordance with State of Mont. Bd. of Pharmacists, Law, Rules, and Regulations (1977).

<sup>41</sup> MINN. STAT. ANN. § 595.021-595.024 (West Supp. 1976).

<sup>42</sup> MINN. STAT. ANN. § 595.023 (West Supp. 1976).

<sup>43</sup> No criminologist has yet, to the authors' knowledge, asserted that the provisions of MINN. STAT. ANN. § 594.023 extend to academic or other research. The question has therefore not been reviewed by the courts.

<sup>44</sup> ARK. STAT. ANN. § 43-917 (1975 Supp.).

<sup>45</sup> No criminologist has yet claimed that ARK. STAT. ANN. § 43-917 protects communications with research subjects. Until such time as a researcher claims such a shield, the issue will remain unsettled.

<sup>46</sup> TENN. CODE ANN. § 24-113 (1976 Supp.).

<sup>47</sup> TENN. CODE ANN. § 24-115 (1976 Supp.). Disclosure situations are:

(1) where "there is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law";

(2) where a demonstration has been made "that the information sought cannot reasonably be obtained by alternative means"; and

(3) where a demonstration has been made that there is "a compelling and overriding public interest of the people of the state of Tennessee in [having] the information."

<sup>48</sup> N.H. REV. STAT. ANN. § 126-A:4-a (1973 Rev.).

<sup>49</sup> No criminologist has yet requested to be so authorized. Communication with Mr. Robert E. Whalen, Comm. of Health and Welfare, State of New Hampshire, Sept. 23, 1977.



state Information System for Psychiatric Patients, a data bank used for research and demonstration purposes.<sup>50</sup> Moreover, Montana recognizes a privilege for researchers studying child mentality.<sup>51</sup> Finally, researchers studying juvenile delinquency under grant or contract to the Maryland Department of Juvenile Services are also protected from court ordered disclosure.<sup>52</sup>

### CONSTITUTIONAL PROTECTION

Privileges can also be created through reference to, and extensions of, constitutional authority. In recent years, several academic researchers have sought to use the first amendment to the United States Constitution as authority to resist subpoenas. Newsmen and journalists have similarly asserted a constitutional right not to reveal confidential information. The relevant case law thus involves both newsmen and researchers.

#### *The First Amendment Claim*

The argument that the first amendment exempts the production of evidence has received exhaustive attention by legal scholars.<sup>53</sup> An extended analysis

<sup>50</sup> N.Y. CIV. RIGHTS LAW 79-j (McKinney 1975). For a review of the origins of this statute, see Curran, *et al.*, *Protection of Privacy and Confidentiality*, 185 SCIENCE 797 (1973).

<sup>51</sup> MONT. REV. CODE ANN. § 93-701-4(6) (1964). The provision states:

Any person engaged in teaching psychology in any school, or who acting as such is engaged in the study and observation of child mentality, shall not without the consent of the parent or guardian of such being so taught or observed testify in any civil action as to any information so obtained.

<sup>52</sup> MD. ANN. CODE art. 52A § 8 (1974), which reads in part:

All records, reports, statements, notes and other information which have been assembled or procured by the Department of Juvenile Services for purposes of research and development and which name or otherwise identify any person or persons are confidential records within the custody and control of the Department and its authorized agents and employees, and may be used only for the purposes of research and study for which assembled or procured.

<sup>53</sup> See, e.g., *Constitutional Protection for the Newsmen's Work Product*, 6 HARV. C.R.C.L. REV. 119 (1970-71); Comments, *The Newsmen Privilege After Branzburg v. Hayes: Whither Now*, 64 J. CRIM. L. & C. 218 (1973); Note, *Constitutional Law—First Amendment—Privilege Not to Appear and Testify Before Grand Jury Granted to Reporter Seeking to Protect Sensitive Source Where Government Fails to Establish Compelling Need—Caldwell v. United States*, 46 N.Y.U.L. REV. 617 (1971); *Constitutional Law—Evidence—No Testimonial Privilege for Newsmen*, 51 N. CAROLINA L. REV. 562 (1973); Notes: *Reporters and Their Sources: The Constitutional Right to a Constitutional Relationship*, 80 YALE L. J. 2 (1970).

of the argument is not necessary here. In essence, the claimants have argued that in gathering information, it is often necessary to agree either to shield the identities of the sources of these articles or to publish only part of the facts revealed. They have further argued that if these confidences are forcibly breached the sources will be deterred from furnishing information to the detriment of the free flow of information guaranteed by the first amendment.<sup>54</sup> Claimants have argued that the societal interest in the free flow of information exceeds the interests of prosecutors and judicial authorities in securing information needed for litigation.

#### *Criminal Proceedings*

Privilege claims based upon the first amendment, when advanced in criminal proceedings, have not been recognized by judicial authorities. The first researcher claims to such a right were made by several professors subpoenaed to testify before a federal grand jury investigating the release and dissemination of the Pentagon Papers. An important case involved the privilege claims of Professor Samuel Popkin, an authority on village life in Viet Nam.<sup>55</sup> In refusing to answer several questions posed by members of the grand jury, Popkin stated:

Any loss in a scholar's ability to obtain information freely lowers the quality of public debate and inhibits the advancement of knowledge upon which our society depends. When questioning a scholar

<sup>54</sup> This is a summary of the argument used in the leading case 408 U.S. 665 (1972). *Branzburg* concerned the petitions of three newsmen subpoenaed by grand juries investigating alleged criminal activities in Kentucky, Massachusetts, and California. All three argued that:

[T]o gather news it is often necessary to agree either not to identify the source of the information published or to publish only parts of the facts revealed, or both; that if the reporter is nonetheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.

408 U.S. at 679-80.

The court held, in four separate opinions, two concurring and two dissenting, that the first amendment does not protect a journalist's sources from revelation in grand jury proceedings. Justices Burger, Blackmun, Powell, White, and Rehnquist wrote the opinion of the court, with Powell filing a separate concurring opinion.

<sup>55</sup> *United States v. Doe*, 460 F. 2d 328 (1st Cir. 1972). For an analysis of the *Popkin* case, see Carroll, *supra* note 2.

about matters connected with his research, the Government should demonstrate a strong need for having the questions answered. Without such a demonstration or a showing that the questions relate to the scholar's own participation or direct involvement in the commission of a crime, a scholar should be permitted to refuse to answer questions about his contacts and sources. An unlimited right of grand juries to ask any questions and expose a witness to citations for contempt could easily threaten scholarly research.<sup>56</sup>

The grand jury rejected Popkin's claim of a testimonial exemption and moved to require him to testify. In an unpublished opinion, the federal district court also rejected Popkin's claim, and when he failed to testify as ordered, held him in contempt. In reviewing the appeal of the contempt order, the United States Court of Appeals for the First Circuit held<sup>57</sup> that Popkin need not answer all of the grand jury's questions because several were "badly phrased,"<sup>58</sup> but that he must answer those questions pertaining to other scholars who were known to be associated with the production and dissemination of the Pentagon Papers.<sup>59</sup> When Popkin persisted in refusing to answer these questions, he was taken into custody and imprisoned for eight days.<sup>60</sup>

Although the Popkin factual circumstance raised some interesting points, the leading United States Supreme Court case is *Branzburg v. Hayes*.<sup>61</sup> *Branzburg* concerned the petitions of three newsmen not to breach confidences when ordered to do so by grand juries. All three newsmen claimed that their ability to gather provocative news would be diminished if reporters were compelled to disclose confidential information. However, a majority of the

Supreme Court disagreed with these claims<sup>62</sup> and held that even if the free flow of information were somewhat constrained, the public's interest in securing incriminating evidence outweighed that of assuring the reporting of crimes to the press. As the court noted:

[T]he grand jury's authority to subpoena witnesses is not only historic, but essential to its task. . . . Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.<sup>63</sup>

*Branzburg*, however, did not deny altogether the validity of the first amendment claim. And, after *Branzburg*, certain justices have gone to some pains to specify what circumstances might warrant the upholding of a claim. The "tests" that post-*Branzburg* courts have occasionally used are those that were introduced in *Branzburg* in the dissenting opinions of Justices Stewart, Brennan and Marshall, who argued that a first amendment claim should prevail unless the government can demonstrate

(1) that there is a probable cause to believe that

<sup>62</sup> Four opinions were written by the *Branzburg* Court. Justice White wrote the opinion of the Court, in which Chief Justice Burger, Justices Blackmun, Powell and Rehnquist joined. These justices held that the first amendment should not be used to create a new testimonial privilege, that the interests of society in prosecuting crime outweighed the interests of society in news of criminal activities, and that the various legislatures should forge new testimonial privileges, not the courts.

Justice Powell wrote a concurring opinion, in which he emphasized the "limited nature" of the Court's holding, stating that "[t]he Court does not hold that newsmen . . . are without constitutional rights." *Id.* at 709. Justice Powell contended that the courts would remain a source of balancing the freedom of the press against the obligation of citizens to give relevant testimony. *Id.* at 710. Justice Stewart wrote a dissenting opinion, joined by Justices Brennan and Marshall, which embraced a balancing approach to the first amendment claim *vis-a-vis* the public interest in the efficient administration of justice. He stated that "the government must not only show that the inquiry is of compelling and overriding importance, but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought." *Id.* at 739-40. According to these justices, none of the cases before them satisfied these "tests."

Justice Douglas wrote a separate dissenting opinion. *Id.* at 711-25. He stated that "there is no area of inquiry not protected by a privilege," and that "a newsmen has an absolute right not to appear before a grand jury." *Id.* at 712.

<sup>63</sup> *Id.* at 689-709.

<sup>56</sup> Unofficial transcript of the testimony, as published in the HARVARD CRIMSON, March 29, 1972. Other comments made by Popkin are reported in Carroll, *supra* note 2, at 270.

<sup>57</sup> 460 F.2d 328 (1st Cir. 1972).

<sup>58</sup> *Id.* at 337. (Aldrich C.J., concurring). For a listing of the questions of contention, see 460 F.2d at 331 and Carroll, *supra* note 2, at 271.

<sup>59</sup> The court held: "While we acknowledge that scholars customarily discuss their work with colleagues and in doing so may perhaps violate confidences, a privilege which would give comprehensive protection to such collateral discussions would make scholars a uniquely privileged class in the broadest sense." 460 F.2d at 334. The court thus forged a limited testimonial exemption for confidential sources or research data, but not for confidential *non-sources* (e.g., colleagues of researchers).

<sup>60</sup> Popkin was released when the grand jury was discharged at the government's request.

<sup>61</sup> 408 U.S. 665 (1972).

the newsman has information that is clearly relevant to a specific probable violation of law; and

- (2) that the information sought cannot be obtained by alternative means less destructive of first amendment rights; and
- (3) that a compelling and overriding interest in the information exists.<sup>64</sup>

Despite the application of those tests the post-*Branzburg* courts in an unbroken line of decisions, have consistently held that journalists must disclose confidential information when ordered to do so in criminal proceedings.<sup>65</sup>

#### *Civil Proceedings and the First Amendment*

The courts have consistently relieved researchers and newsmen from complying with subpoenas originating from civil litigants. The controlling case is *Baker v. F & F Investment Co.*,<sup>66</sup> decided shortly after the *Branzburg* decision. In *Baker*, a journalist was relieved from disclosing the identity of a source used for a newspaper article on real estate practices in Chicago. The court held that:

While we recognize there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedom . . . we are of the view that there are circumstances, at the very least in civil cases, in which the public's interests in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony.<sup>67</sup>

Recognizing this necessary balance of interests, the court then established a set of standards for determining when first amendment claims in civil litigation would prevail. Included in these standards were questions as to whether the subpoenaed wit-

ness was a party to the litigation, whether there were other sources available, whether disclosure of the identity of a source was essential to the orderly administration of justice and whether the identity of the source went to the heart of the case.<sup>68</sup>

In a subsequent case, *Democratic National Committee v. McCord*,<sup>69</sup> these standards were used by a District court to quash several subpoenas issued to newsmen. The court determined that the newsmen were not parties to the action, that the "parties on whose behalf the subpoenas were not issued" had not demonstrated that the testimony and materials went to the "heart of the claim," that the parties had not shown that alternative sources had been exhausted and that there had not been a showing by the parties of the materiality of the documents and other materials sought.<sup>70</sup> In several subsequent cases, other subpoenas issued to newsmen by civil litigants were similarly quashed on first amendment grounds by application of the *Baker* standards.<sup>71</sup>

The first civil case involving a researcher's claim of a first amendment-based privilege occurred in *Richards of Rockford, Inc. v. Pacific Gas and Electric Co.*<sup>72</sup> There, two subpoenas seeking testimony and research notes were issued to an economist and research assistant studying public utility decision-making. The economist and the research assistant claimed that they were entitled to the privilege upon application of *Baker*-like standards. The researchers noted that they were not parties to the action and had no interest in the outcome, that they conducted interviews under an agreement of confidentiality, that there was no public interest represented in behalf of disclosure, that there was no showing that alternative sources of information had been exhausted by the plaintiff and that there was no showing that the testimony sought went to the "heart of the dispute."<sup>73</sup>

The court accepted the researchers' claimed standards and held that while the issues in the case did not rise to that of constitutional status, the force of the arguments warranted quashing both

<sup>64</sup> *Id.* at 743.

<sup>65</sup> See *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975); *Lewis v. United States*, 501 F.2d 418 (9th Cir. 1974); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972); *In re Farr*, 36 Cal. App. 3d 577, 11 Cal. Rptr. 649 (1974); *Morgan v. State*, 325 S.2d 40 (Fla. App. 1975); *Lightman v. State*, 15 Md. App. 713, 294 A.2d 194 *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied* 411 U.S. 951 (1973); *People v. Dan*, 41 App. Div. 2d 687 (N.Y. 1973); *In re WBAI-FM v. Proskin*, 42 App. Div. 5 (N.Y. 1973); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974).

<sup>66</sup> 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 896.

<sup>67</sup> *Id.* at 783.

<sup>68</sup> Findings put into a question format.

<sup>69</sup> 356 F. Supp. 1394 (D.D.C. 1973).

<sup>70</sup> *Id.* at 1397-98.

<sup>71</sup> *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Apecella v. McNeil*, 66 F.R.D. 78 (E.D.N.Y. 1975).

<sup>72</sup> 71 F.R.D. 388 (N.D. Cal. 1976).

<sup>73</sup> Memorandum of Points and Authorities in Opposition to Plaintiff's Motion For Order Compelling Production of Documents Pursuant to Subpoena at 16, *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*

subpoenas.<sup>74</sup> The researchers were subsequently relieved from complying with the subpoenas.

### Summary

With respect to the first amendment claim, the courts have without variance used a balancing test and have held that the interests of society and the administration of justice are greater in criminal matters than in civil proceedings. The courts are thus more likely to refuse a claim of privilege in a criminal case and to accept the claim, where warranted, in a civil proceeding. Criminologists should therefore weigh the necessity of avowing confidentiality to research subjects, for in the absence of specific statutory protection, criminal justice researchers could be exposed to possible penalties for refusing to breach confidences.

### AN ABSOLUTE PRIVILEGE?

Dean Wigmore, the influential authority on evidentiary rules,<sup>75</sup> has argued that in order for a communicant-communicator relationship to be regarded as important to society, and therefore be legally protected, the following criteria should be met:

- (1) The communications must originate in a confidence that they will not be disclosed;
- (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- (3) the relation must be one in which the opinion of the community ought to be sedulously fostered; and
- (4) the injury that would inure to the relation by the disclosure must be greater than the

<sup>74</sup> 71 F.R.D. at 391.

<sup>75</sup> Various commentators and courts have explicitly recognized Dean Wigmore's criteria as controlling. See Boness & Cordes, *supra* note 7; Shah, *supra* note 7; Slovenco, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE ST. L. REV. 175 (1970); Note, *Social Research and Privileged Data*, *supra* note 7. See also *Branzburg v. Hayes*, 408 U.S. at 682; *International Telephone and Telegraph Corp. v. United Telephone Co. of Florida*, 60 F.R.D. 177 (M.D. Fla. 1973); *Baylor v. Mading-Dugan Drug Co.*, 57 F.R.D. 509 (N.D. Ill. 1972).

benefit thereby gained by the correct disposal of litigation.<sup>76</sup>

Empirical evidence is not available to determine whether these criteria are being met by criminological researchers. Certain questions remain: Are the interests of society in criminal justice research greater than the interest in the correct disposal of litigation? Under what circumstances may these interests be lesser or greater? Is there a substantial and continuing need for protecting researchers? What are the sentiments of the research community? Who may claim such a privilege—the researcher or the subject? Are there circumstances in which disclosure may be of help to subjects? How may "criminologist" be defined for statutory purposes?

Legal authorities have on occasion elevated the interests of the research community above those of governmental authorities. For instance, in the *Richards of Rockford* case, the judge noted that "[s]ociety has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge."<sup>77</sup> Other case law may be cited reflecting the attitudes of judicial authorities toward scholarly researchers.<sup>78</sup>

The various legislatures or the courts may recognize an absolute privilege for criminologists.<sup>79</sup> Whether this occurs will in part be determined by the actions of the research community and by the actions of individual researchers in challenging subpoenas.

<sup>76</sup> 8 WIGMORE ON EVIDENCE § 2285 (3d ed. 1940).

<sup>77</sup> 71 F.R.D. at 390.

<sup>78</sup> See, e.g., the decisions in *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E. 2d 610 (1969).

<sup>79</sup> The Federal Privacy Protection Study Commission, established under provisions of The Privacy Act of 1974, Pub. L. No. 93-502, 88 Stat. 1896, considered the question. See PRIVACY PROTECTION STUDY COMMISSION, *supra* note 19, at 567-87, in which the Commission recommended a testimonial exemption for federally supported researchers. A criminologist-subject testimonial privilege statute modeled after 42 U.S.C. § 3771(a) (Supp. V 1975) has been drafted for consideration by the Washington State Legislature (on file with the authors).