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CRIMINOLOGY

CONFIDENTIALITY IN CRIMINOLOGICAL RESEARCH AND OTHER ETHICAL ISSUES*

MARVIN E. WOLFGANG**

I. INTRODUCTION

This article is intended to stimulate discussion of ethical issues involved in research in criminology and criminal justice. I will touch on related issues bearing on the teaching of those subjects as well, for many who face moral dilemmas in acquiring knowledge also face such dilemmas in attempting to impart knowledge.

Criminology is the systematic, scientific study of crime, criminals, and society's reaction to both. The belief system of the canons of science inheres in my reference to research. The acquisition of knowledge, for its own sake or for some other utilitarian end, is achieved by means of relatively detached and dispassionate perspectives. I suppose that in Austin Turk's¹ terms, this approach is predominantly empirical, although not necessarily devoid of or insensitive to the legal or polemical definitions of reality. Applied in its common sense to the actions of the professional researcher in criminology, the term "ethics" refers to the set of principles governing conduct. I am applying that term to the professional researcher in criminology. Some of the issues I shall raise are also issues in other disciplines of research and teaching; some are peculiarly specific to criminology; all, I am asserting, are ethical issues. But some observers may challenge their ethicality and claim instead that these

* An earlier version of this paper was presented at the Conference on Ethics, Public Policy and Criminal Justice, Center for the Study of Values, University of Delaware, Newark, Delaware (Oct. 23-25, 1980).

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¹ A. Turk, Legal, Polemical, and Empirical Definitions of Criminality (paper presented at the Conference on Ethics, Public Policy and Criminal Justice, Center for the Study of Values, University of Delaware, Newark, Delaware, Oct. 23, 1980).

may be only dilemmas of decisions that have no right or wrong, good or bad quality. I think they do, else I would not raise them.

The most common and classical issues have been addressed many times in essays, in litigation, and in codes of ethics drawn up by professional organizations like the American Sociological Association and the American Psychological Association, to which codes I shall refer later. The classical issues relate to protection of human subjects, invasion of privacy, confidentiality of records and interviews, accessibility to data, and immunity of researchers from prosecution. I will expand on one or two of these familiar issues and raise others that are less widely discussed.

II. RESEARCH STYLES

Research style raises a variety of classical ethical issues. Four episodes of court cases involving social scientists illustrate the serious issues of legal protection of rights of investigators to protect their sources of information and of immunity from being questioned by public agencies.

*Case 1.*² In November, 1972, Samuel Popkin, a Harvard political scientist, became the first American scholar jailed for not revealing his confidential sources of information about the unauthorized release of the Pentagon Papers. When he declined to identify his sources to a federal grand jury before which he appeared for ten hours, he spent one week in jail until the jury was dismissed.

*Case 2.*³ A private research firm conducted a major social experiment designed to measure the impact of various negative income tax plans on labor force behavior and other activities of low income families in New Jersey for the Office of Economic Opportunity (OEO). Respondents filled out detailed questionnaires with information about their income, expenditures, and living arrangements after researchers had promised absolute confidentiality. The Mercer County prosecutor subpoenaed the research firm to submit individual case records to ascertain which recipients of federal aid programs had received illegal double payments from New Jersey Welfare. A U.S. senator crusading against welfare reform demanded individual files from researchers, and the Government Accounting Office wanted the same for reanalysis of the data. Researchers convinced some of these agencies that they did not need identified case histories and substituted the aggregate data instead.

² Nejliski & Finsterbusch, *The Prosecutor and the Researcher: Present and Prospective Variations on the Supreme Court's Branzburg Decision*, 21 SOC. PROB. 3 (1973).

³ Kershaw & Small, *Data Confidentiality and Privacy: Lessons from the New Jersey Income Tax Experiment*, 20 PUB. POL'Y 257 (1972).

Researchers had, however, no legal grounds for denying the requests if the government agencies insisted on this information.

*Case 3.*⁴ A commission appointed by the Governor of New York to investigate the riot and deaths which occurred at Attica Prison in 1971 interviewed thousands of witnesses under a pledge of confidentiality and published its report. The New York State Attorney General's office, which had been investigating criminal liability resulting from the riot, issued a subpoena for the commission's complete records. A trial court granted the commission's motion to quash the subpoena. However, in a future criminal trial, another court might compel disclosure of a witness' statements.

*Case 4.*⁵ Lewis Yablonsky, a criminologist/practitioner, while testifying in defense of one of his main informants in his hippy study, was asked by the judge nine times if he had witnessed the informant smoking marijuana. Yablonsky refused to answer on fifth amendment grounds. Although he was not legally sanctioned, he said the incident was humiliating and suggested that researchers should have guarantees of immunity.

Along these same lines, I have a more personal example, fortunately not one that has gone, or is likely to go, to court.⁶ *Delinquency in a Birth Cohort*⁷ was a study of approximately ten thousand boys born in 1945 who lived in Philadelphia from ages 10 to 18. No ethical problems in collecting and analyzing data were encountered, for we had complete cooperation from the Board of Education, the Archdiocese, and private schools with regard to access to school records. Moreover, the Philadelphia Police Department and Selective Service granted us permission to compare names and birthdates in order to determine which boys who registered for selective service had a delinquency record.

In 1970 we obtained a research grant from the National Institute of Mental Health (NIMH) to study a ten percent sample of the birth cohort and to interview those members we could locate. After diligent investigative work we located approximately sixty percent of the sample and asked them questions requiring interviews of an hour or more. None whom we found refused to be interviewed. We had no informed consent form in those days. We asked many questions concerning their

⁴ Nejedlski & Finsterbusch, *supra* note 2, at 4-5.

⁵ Irvin, *Participant Observation of Criminals*, in RESEARCH ON DEVIANCE 128-29 (J. Douglas ed. 1972).

⁶ Wolfgang, *Ethical Issues of Research in Criminology*, in SOCIAL RESEARCH IN CONFLICT WITH LAW AND ETHICS 25 (P. Nejedlski ed. 1976). The account here is an abridged and modified version.

⁷ M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972). See also Wolfgang, *Crime in a Birth Cohort*, 117 PROC. AM. PHILO. SOC'Y 404 (1973).

education, occupation, family, military service, gang memberships, and other personal history. Of special interest to us in analyzing their histories up to age twenty-six were self-reporting of both delinquencies prior to age eighteen and crimes committed from ages eighteen to twenty-six. We asked if they had committed any of thirty offenses before and after age eighteen and whether the crimes they committed resulted in their arrest.⁸

Many of the young men revealed to the interviewers that they had committed a variety of crimes. This study did not mark the first use of the self-report technique.⁹ However, most previous studies in the United States had drawn subjects from juniors and seniors in high school who reported in mostly anonymous questionnaires or protected interviews relatively innocuous juvenile status offenses such as stealing from their mothers' pocketbooks, truancy, or petty larceny. Even the relatively sophisticated studies conducted in Denmark, Norway, and Sweden dealt mostly with petty offenses. The birth cohort follow-up in Philadelphia explored a much wider range of criminal offense behavior, including serious crimes such as robbery, burglary, rape, and even criminal homicide.

⁸ The questions related to the following offenses:

1. Been out past curfew.
2. Played hookey from school.
3. Run away from home.
4. Made an obscene phone call.
5. Hurt someone badly enough to require medical treatment.
6. Used heroin.
7. Taken a car for joyriding.
8. Disturbed the people in a neighborhood with loud noises.
9. Set off a fire alarm for the fun of it.
10. Threatened to hurt someone if he didn't give money or something else.
11. Taken some money from someone without his knowing it.
12. Had heroin in your possession.
13. Smoked pot.
14. Stolen something from a store.
15. Passed a bad check.
16. Forced a female to have sexual intercourse with you.
17. Broken into a residence, store, school, or other enclosed area.
18. Used a weapon to threaten another person.
19. Helped a girl to have an abortion.
20. Purposely damaged or destroyed property.
21. Gone to a house of prostitution.
22. Killed someone not accidentally.
23. Been drunk in public.
24. Carried a gun without a permit.
25. Carried a switch-blade or other big knife.
26. Had pot in your possession.
27. Hurt someone in a minor way, like knocking him down.
28. Bought or accepted property which you knew was stolen.
29. Had sexual intercourse before you were married.
30. Had sex relations with another male.

⁹ McClintock, *The Dark Figure*, in COLLECTED STUDIES IN CRIMINOLOGICAL RESEARCH 13-27, 31-34 (Council of Europe 1970).

Many of the young men in the Philadelphia study revealed to the interviewers that they had committed a variety of crimes. Four respondents informed us that they had been involved in criminal homicide—one before reaching eighteen—and seventy-five respondents claimed to have committed forcible rapes. Neither these offenses nor the other less serious admitted offenses resulted in any respondent's arrest.

There are several major ethical, scientific, and legal issues involved in the collection of these offense data:¹⁰

A. SHOULD WE HAVE HAD WRITTEN INFORMED CONSENT?

Each cohort member who was located for an interview generally cooperated. Interviews were conducted in 1971, a period just prior to the intensive concern for research using human subjects, prior to the requirement of the Department of Health, Education and Welfare that research proposals contain forms about such research, before university committees in research ethics were established, and before screening committees at HEW were functioning formally. Interviewers informed members orally that responses would be strictly confidential, used only for research purposes, and analyzed in the aggregate, with no single individual identified or identifiable in the final research report. We interpreted cooperation in replying to questions, many of which were personal and sensitive, as consent to the uses we announced at the outset. Laws on privacy, informed consent, confidentiality, and accessibility to records were yet undeveloped. Nevertheless, there were sound reasons against requesting written consent.

Consider the psychology of the interview. Although researchers generally contacted cohort subjects first by mail or telephone, sometimes initial contact was at the subject's front door. In that event had the

¹⁰ As with the cohort study, a myriad of ethical problems arise with other styles of research in deviance and crime. Participant observation in juvenile gang research may involve, as it did for John Wise who worked for James Short and Fred Strodtbeck in Chicago, direct observations of delinquent and criminal activities followed by result tabulation and recordation. J. SHORT & F. STRODTBECK, *GROUP PROCESSES AND GANG DELINQUENCY* (1965). In a study soon to be published, Bernard Cohen observed, *not* as a participant, the street network activity of heterosexual female prostitutes in about 30 street locations in New York City for several years. He described his qualitative naturalistic ethnomethodology and then kept count and blended in his quantitative analyses. He observed solicitations and other offenses, but he contends that because observation took place only in public places, the acts would have occurred whether or not he observed them from his car or some other post. He claims that he did not intrude into the lives of his subjects and that he did not have an obligation to report offenses, despite his giving no one assurances of confidentiality. Nor did he obtain informed consent to view the public performances of the prostitutes. B. COHEN, *DEVIAN STREET NETWORKS: PROSTITUTION IN NEW YORK CITY* (1980). Under these circumstances, Cohen contends, he violated no ethical restraints of scientific inquiry. I think he is right. Carl Klockars also experienced these dilemmas about disclosures of crimes that came to his attention in *The Professional Fence*. C. KLOCKARS, *THE PROFESSIONAL FENCE* (1974).

interviewer asked for written consent, the subject might have wished to be more fully apprised of the mechanics and ultimate use of the interview. For example, he could have asked to see the interview schedule. Compliance with such a request would have nullified the advantages of proceeding gradually from neutral to sensitive questions. It is impossible to know how many refusals such a process would have promoted.

Moreover, the form of the written consent could or could not have contained reference to the refusal of the research staff to reveal information to the police. We did not know then and still do not know whether a court order could indeed impound the records, whether any member of the staff who had access to specific information could suffer prosecution and imprisonment for protecting records, or whether any effort to conceal data would be successful. Without the reference, the form would have been inadequate and therefore misleading. With the reference, without admitting that one or more of these agencies might have the authority to confiscate, or impound our records, the form again would have been misleading. If the form admitted that justice authorities could impound our records refusals to participate would have been so abundant that the project would have been impossible. Either lies or agnostic replies would have been the interviewees' responses to a variety of hypothetical questions. The former would be unethical; the latter would invite refusals to be interviewed.

On the other hand, the oral request for participation in a sociological research maintained a minimum of formality, permitted the respondent to refuse to answer any specific question (of course, a written consent does not preclude specific question refusals), and permitted employment of the pretested question positioning intended to maximize the likelihood of response. The result was rapport and cooperation.

B. SHOULD THE RESULTS OF THE INTERVIEW BE PUBLISHED?

Our Center unequivocally supports publication of the results with the protections announced in letters and orally by the interviewers. No single individual will be identified or identifiable and all data will be aggregated. Undeniably, publication in professional journals or books produces a new layer of visibility of the research. Newspapers and other media summarizing our earlier original birth cohort study thereby made the police and courts aware of the character of the study. The same certainly will occur with publication of the follow-up reporting not only many of the personal, sociopsychological variables in the lives of cohort members, but also the self-reported delinquencies and crimes. At that point, police and other agencies could exert pressure on the research

team¹¹ at the Center to reveal the names of those cohort members who informed us of their crimes. The danger of publication would then become a function of the degree to which threats of such pressure are real.

We still intend to publish, under the assumptions that (1) pressure to disclose names is an unlikely event, and (2) our Center can effectively function as a buffer between our research subjects and the acquisition of our files by outside persons.

C. ARE MEMBERS OF THE RESEARCH STAFF ACCESSORIES AFTER THE FACT?

Having obtained information about criminal offenses from identified subjects, the researchers stand in a posture of harboring information, if not hiding individuals or abetting escape. The researcher does not have the mantle of the clergy or of medical practitioners for protection. Probably the "crime," if any here, is misprision of a felony, which is obsolete in most jurisdictions but still an offense under federal law.

The traditional research response to the charge of being an accessory is that he or she is a neutral, disinterested recipient of data collected only for scientific research purposes. The purpose for obtaining the information is to aid the scholarly enterprise and to provide guidance for a rational social policy. Data obtained that could have direct untoward consequences to subjects are not the possession of the state but of science. Research is not designed to treat, help, or harm individual subjects, and the social scientist is not a representative of any branch of government with an obligation to execute certain police or judicial duties. It may be argued that technically he *is*, but the social definers do not perceive or define him as such. The scientist might contend that he is not even sure that the information given him is valid or correct; the rebuttal is that it gives cause for official investigation.

D. ARE MEMBERS OF THE RESEARCH STAFF OBSTRUCTING JUSTICE?

To the extent that notions of justice relate to the punishment of offenders, anyone who has information about crimes and fails to report it denies the system of justice its capacity to function relative to those crimes and their perpetrators. Courts, however, generally construe obstruction of justice more narrowly and require obstruction of proceedings actually pending, with specific intent to do so.

¹¹ Researchers are not granted judicial protection based on the first amendment. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court rejected a reporter's privilege based on that amendment. However, there are some narrow areas of protection, as in the case of research on the effect and use of drugs, according to the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 872 (1970).

Unwillingness to report reflects an uncompromising respect for the conditions of scientific research that explicitly provide for confidentiality. Moreover, the research neither helps nor hinders the police and prosecutory functions of society for were it not for the scientist's inquiry, the information would not be available to authorities anyway.

E. IS THERE, NONETHELESS, AN OBLIGATION TO SOCIETY AND CRIMINAL JUSTICE TO REPORT THIS KNOWLEDGE, TRANSCENDING THE ETHICS OF CONFIDENTIALITY OR THE INTERESTS OF SCIENCE?

Putting aside questions of legality, this question asks whether the scientific researcher has broader moral responsibilities than his research perimeters. Does the absence of written informed consent minimize the impropriety of revealing criminal behavior by respondents, or would revelation be ethically worse than not revealing the information? The scientist may be viewed as ethically accountable only to the myopic limits of his scientific vision. Over its long history, science has created codes of conduct possessing deep traditions. Thus, in the Philadelphia study the scientist values protecting the individual used for his research above the interests of capture for criminal justice. Society until now has generally permitted the scientist his priority allocation. Again, the scientist seeks neither to help nor harm the individual respondent per se, nor to help nor hinder the criminal justice system. His role is neither benevolent nor malevolent.

If a medical laboratory research project unrelated to cancer research inadvertently discovered that a volunteer subject had cancer, the researcher might feel rightly obligated to inform the subject, because such information might save a diseased person's life. Many other examples are imaginable in which revelations to the research subject and to others could have beneficial effects. Is it conceivable that a piece of information about a research subject may be discovered that would be harmful to him but of considerable benefit to many others? If so, no such situations exist in the criminological research under discussion. It may be said that if any researcher doubts the moral obligation to maintain confidentiality, he should abstain from this kind of research. He would thereby satisfy his sense of ethics that lie outside the framework of those of science.

F. WHAT SHOULD A RESEARCH CENTER DO IF THE POLICE, PROSECUTOR, OR COURT REQUESTS THE FILES?

Our position is clear: we would not honor the request. We would make every effort, short of using aggressive force, to prevent the files

from being examined or taken from the Center's premises. We would, if necessary, enter into litigation to protect the confidentiality of the records. There is no United States Supreme Court case affirming or rejecting this position.

Even if the staff is not viewed as accessory after the fact or as obstructing justice for refusing to identify subjects, a court may still hold staff members in contempt if they do not submit the files to examination or impounding upon a court order. Whether a research staff is immune from contempt remains undecided in the caselaw. Nevertheless, were our Center's staff declared by the courts as not immune from prosecution, we would still maintain a posture of unwillingness to reveal names.

G. CAN A RESEARCH STAFF DEVELOP A TECHNIQUE THAT CAN PROVIDE A FAIL-SAFE PROTECTION AGAINST IDENTIFICATION OF INDIVIDUAL SUBJECTS IN A RESEARCH FILE?

There are techniques that surely would delay, if not forever prevent, subject identification. Researchers might use computer tapes on cards that show only identification numbers representing names for the file that is to be analyzed statistically in the aggregate.¹² Number-name combinations might be on a separate computer tape which can be deposited in a bank account in a foreign country where accounts are secret. Although no law prohibits this procedure, the account owner (in our example the Center) may still be subject to charges of contempt for failing to produce the tape.¹³ Nevertheless, considering the paramount purpose of confidentiality, such a process is both pragmatically expedient and ethical. However researchers decide to catalogue their data, in studies such as that conducted in Philadelphia they should not record the names of victims or other identifying facts about specific crimes unless absolutely essential for the research. Without such details, the files are less useful to law-enforcement officials.¹⁴

¹² This suggestion was made in Blumstein, *Science and Technology*, in TASK FORCE REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967).

¹³ Similar issues have been raised in Wolfgang, *The Social Scientist in Court*, 65 J. CRIM. L. & C. 239 (1974).

¹⁴ Recently, the Northern District of California stressed the need to preserve confidentiality in *Richards of Rockford, Inc., v. Pacific Gas and Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976). Plaintiff, seeking final payment for delivery of 135 spray cooling modules for use in one of the gas company's power plants, brought an action for breach of contract against Pacific, which withheld final payment because the spray modules allegedly did not perform as guaranteed. Plaintiff deposed a professor who, under a pledge of confidentiality, had interviewed employees of the gas company as part of a research project which involved inquiring into the decision to install the spray cooling facility. On the advice of counsel, the professor,

III. PUBLIC POLICY STATEMENTS

Another ethical issue pertains to the issuance of public or social policy statements. Increasingly, public decisionmakers are listening to social scientists in general and criminologists in particular. Even if these officials do not always take our advice, they often request our testimony. The efficacy of such testimony is unclear. Having been involved in some of these dramas, I have felt keenly the pressure of considering the ethics of presenting scientific evidence vulnerable to criticism before bodies that intend to act on the testimony. Scientific evidence is presentable in a relatively bland, descriptive fashion without explicit leaps to interpretation beyond the data. Absent interpretation, however, an audience usually will receive the data in ways that conform to their own predilections. If the researcher offers his own conclusions, he should do so with a clearance to his conscience that he has done his best work with the available material at his command. If the testimony bears on social policy, the researcher must struggle with determining when a Sumnerian (William Graham Sumner) description moves to a Wardian (Lester F. Ward) prescription.

The scientific issues of reliability and validity can reach the threshold of an ethical issue when statements relating to crime and punishment could affect the lives of many thousands of persons: how many replications of one good study are required for firm prescriptive conclusiveness? This and similar questions continue to disturb the scientific community, especially in light of conflicting and contradictory findings on such topics as deterrence, incapacitation, plea bargaining, and the death penalty. If one has a posture on a particular policy issue and the scientific evidence is equivocal, should the researcher avoid offers to testify? Is self-imposed silence an ethically acceptable position to science? I think not, even if there is fear that the presentation of findings may be abusively employed or distorted in interpretation by others.

Allow me again to give an example from my own research experience on the topics of race, rape, and the death penalty. Science deals with probabilities, not certainties. At what point a probability state-

and later his research assistant, refused to disclose either the identity of the gas company employees interviewed or the content of the interviews.

According to the court, the issue was "whether on these facts, plaintiff's interest in satisfying its discovery request outweighs the public interest in maintaining confidential relationships between academic researchers and their sources." *Id.* at 389. Noting that neither the professor nor his assistant were parties to the proceeding, that they initiated their research with no view to this litigation, that the central subject of the litigation was not central to the study, and that factual issues dividing the parties were resolvable without recourse to statements of the gas company employees, the court stated that "[c]ompelled disclosure of confidential information would without question stifle research into questions of public policy, the very subjects in which the public interest is the greatest." *Id.* at 390.

ment can become morally prescriptive is not clear, despite our reliance on tests of statistical significance. In one instance research was performed to determine whether there was *differential* sentencing based on race of the offender and victim. When the carefully collected data revealed differential treatment by race, I finally concluded in official judicial testimony that such a differential was inferentially *discriminatory*. The difference between these two terms—"differential" and "discriminatory"—signified a prescriptive leap.¹⁵

Most people's attitudes about the death penalty rest fundamentally upon one or more ethical assertions. Teachings from social or behavioral science may be a factor in these determinations, but research from these disciplines is often selectively used to buttress pre-existing beliefs and moral postures. The judiciary, especially at the federal level, has increasingly admitted social science research in testimony by expert witnesses and in Supreme Court briefs.

Over ten years ago, Michael Finkelstein traced the history of judicial reasoning in jury discrimination cases and showed that for some time the Supreme Court had been reasoning according to its intuition of probabilities.¹⁶ Finkelstein argued that statistical support should replace intuition in judicial reasoning. The Court later cited him in its *Whitus v. Georgia*¹⁷ decision which, as de Cani noted,¹⁸ marked the beginning of the Court's "willingness to listen to a probabilistic argument that the group from which the jury was chosen was not a representative cross-section of the community."

My own initial involvement in the presentation of social science research was in the *Maxwell v. Bishop*¹⁹ case in the Arkansas district court, which involved a black convicted of raping a white and sentenced to death. Research had demonstrated that out of twenty-eight legal and extralegal variables concerned with the offense of rape, the offender, and the victim, the only variable that emerged as overwhelmingly statistically significant was that of blacks raping whites, relative to the sentence of death. Now, permit me to refer to my previous account:

I was asked under cross-examination if I had ever been in Arkansas before my appearance as an expert witness for the Legal Defense Fund. I

¹⁵ Some of the following has been adapted from my article, *The Death Penalty: Social Philosophy and Social Science Research*, 14 CRIM. L. BULL. 18 (1978).

¹⁶ Finkelstein, *Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

¹⁷ 385 U.S. 545, 552 n.2 (1966).

¹⁸ de Cani, *Statistical Evidence in Jury Discrimination Cases*, 65 J. CRIM. L. & C. 234, 235 (1974).

¹⁹ 257 F. Supp. 710 (E.D. Ark. 1966), *denial of appeal rev'd and remanded per curiam*, 385 U.S. 650 (1967), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded per curiam*, 398 U.S. 262 (1970).

responded in the negative. The Assistant Attorney General used this response to imply that I did not fully understand the social conditions or the litigation processes in Arkansas. It was further brought out under cross-examination that Garland County, in which Maxwell had been tried, was not included in the survey sampling of Arkansas counties. The state argued that failure to include Garland County was a fatal error, that the generalized conclusions drawn from the Arkansas rape-death penalty study could not apply to the *Maxwell* case.

Based upon my research, this conclusion was absurd. We had taken a carefully drawn random sample of counties in Arkansas, as well as in the other ten Southern states, without attention to the counties in which specific cases for litigation may finally occur. Our primary interest had been to determine whether there had been a customary, institutionalized, systematic process of differential sentencing to the death penalty based on race; hence, the specific litigated cases were of no consequence to our random selection. If we had drawn our sample counties purposefully to pick counties in which cases like *Maxwell* had occurred, we would have destroyed the statistical randomness of the selection of counties and would also have distorted the character of the scientific inquiry. Yet, this fact and this kind of reasoning had little impact on either Assistant Attorney General Fletcher Jackson or Judge J. Smith Henley.

The social scientist who becomes involved in testifying and displaying research evidence must also be prepared for opinions that contravene the traditional specific canons of response. For example, Judge Henley accepted my conclusion that sentencing patterns of Arkansas Negroes convicted of raping white victims "could not be due to the operation of the laws of chance." He accepted the conclusion that a black convicted of raping a white woman had about a 50 per cent chance of receiving a death sentence, and that any man convicted of raping a woman of his own race stood only a 14 per cent chance. But Judge Henley thought the difference could be explained on grounds other than race, and contended that the imposition of the death sentence might be due to some factor for which statistical analysis had not been possible or presentable. He announced in his decision that the "variables which Dr. Wolfgang considered are objective . . . broad in instances . . . imprecise . . . Discrimination moreover is a highly subjective matter [and might not] be detected by a statistical analysis . . . Statistics are elusive things at best, and it is a truism that almost anything can be proven by them." These are common assertions made by persons who are not social scientists trained in statistics. Yet, the social scientist who becomes involved in testifying in this area must be prepared for arguments and decisions that are political or that reside in legal vicissitudes outside the framework of social science inquiry and evidence.²⁰

Upholding the conviction in *Maxwell*, the United States Court of Appeals for the Eighth Circuit²¹ acknowledged the extensive and sophisticated research, yet concluded that "nothing has been presented in Maxwell's case which convinces us, or causes us to seriously wonder,

²⁰ Wolfgang, *supra* note 13, at 244.

²¹ *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968).

that, with the imposition of the death penalty, he was the victim of discrimination based on race." The court's resistance to social science research is blatant:

Whatever value [the statistical] argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a longer period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial. Although the investigation and study made by Professor Wolfgang in the summer of 1965 is interesting and provocative, we do not, on the basis of that study, upset Maxwell's conviction and, as a necessary consequence, cast serious doubt on every other rape conviction in the state courts of Arkansas.²²

The court was unwilling both to accuse a state of discriminatory conduct in sentencing proportionately more blacks than whites to the death penalty over a twenty-year period and to acknowledge that Maxwell may have been a victim of such a practice, despite its statement that "we do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this."²³ Michael Meltsner recounted in his book *Cruel and Unusual* that "if race were not related to capital sentencing in Arkansas, the results observed in the twenty-year period study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ."²⁴ Juxtapose this statement against the court's use of such phrases as "we do not say that there is no ground for suspicion" and "there are recognizable indicators." How different the language of science and the court! A probability of 0.02 becomes "recognizable indicators."

Although recognizing social science research in its 1976 death penalty decisions, the Supreme Court was careful to minimize its use.²⁵ As

²² *Id.* at 148.

²³ *Id.* at 147.

²⁴ M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 100-01 (1973).

²⁵ As Meltsner also shows, the Supreme Court reflected an increasing receptivity to social science research in the *Furman* decision. The basis for inferring cruel and unusual punishment in the imposition of the death penalty hinged on the interpretation and relationship between the eighth and fourteenth amendments. Both Justices Douglas and Marshall accepted the social science research that showed discrimination in the imposition of the death penalty. But in the brief before the Supreme Court in the *Fowler* case in 1974, Solicitor General Robert Bork inserted the following statement about research: "In any event, we do not think that the meaning of the Eighth Amendment should turn on the results of the latest social science research." Brief for the United States as Amicus Curiae at 37 n.13, *Fowler v. North Carolina*, 428 U.S. 904 (1976).

Moreover, the abundance of research on deterrence introduced to the Court has resulted in no definite judicial conclusionary statements. The testimony of Thorsten Sellin that the

Hugo Bedau noted:

One of the most galling features of the *Gregg*, *Proffitt*, and *Jurek* decisions is the way the court reacted, or rather failed to react, to the social science research published in the years since *Furman*. With perhaps one exception, the court passed it by without significant acknowledgement, discussion, or rebuttal. This was especially conspicuous in the *Gregg* ruling. . . . For social scientists and jurists who had expected that this round of death penalty cases would find the Supreme Court resting its decision, at least in part, on the results of careful and relevant empirical investigations, the *Gregg* decision can be viewed only as a bitter disappointment. Four years ago, in his dissent in *Furman*, Chief Justice Burger complained of the 'paucity' of evidence relied on by the majority ruling in favor of abolition. This year's ruling in *Gregg* rests on even less.²⁶

Until the Supreme Court can come to grips with probabilistic and inferential statistics, intuitive, clinical, and vague judgments will continue, as will *ethical* decisions.

IV. EVALUATION RESEARCH AND THE $P < .05$

Norval Morris raised an interesting question about the "burglar's nightmare."²⁷ We ordinarily think of random representative samples or assignments as scientifically acceptable, even ethically proper. But suppose burglars alike in all important particulars were assigned randomly to experimental and control groups, the experimentals to be released six months or a year earlier than they ordinarily would be and the controls at their regularly appointed time. How would the burglar assigned to the control group respond? He could say that it is unjust and unethical to be put into the control group and that he deserves to be released early also. Can science, for the sake of determining whether early release pro-

death penalty has no ascertainable deterrent effect led to its abolition in England. Isaac Ehrlich's econometric analyses, suggesting that eight lives were saved by such execution was quickly challenged by a series of other econometric studies that denied the correlation between executions and the homicide rates. See Bailey, *Murder and Capital Punishment*, 45 AM. J. ORTHOPSYCH. 669 (1975); Bailey, *Rape and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES 336 (Bedau & Pierce eds. 1976); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s*, 61 MINN. L. REV. 743 (1977); Passell & Taylor, *The Deterrence Controversy*, in CAPITAL PUNISHMENT IN THE UNITED STATES 59 (Bedau & Pierce eds. 1976); Peck, *The Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164, 359 (1975-76); B. Forst, V. Filator & L. Klein, *The Deterrent Effect of Capital Punishment* (unpublished manuscript).

A recent panel of the National Research Council of the National Academy of Sciences has carefully reviewed the literature on deterrence and provided new models of analysis. As mentioned earlier, the panel concludes that the evidence is currently inconclusive because of the inadequacy of the data.

²⁶ Bedau, *New Life for the Death Penalty*, 223 NATION 144, 146-47 (1976).

²⁷ Morris, *Punishment, Desert, and Rehabilitation*, in EQUAL JUSTICE UNDER LAW 137 (U.S. Dep't Justice 1976).

duces no more recidivism, justify retention of some subjects in prison? The burglar says no, the scientist says yes.

Evaluation research presents a whole series of ethical issues, far more than we can explore here. But there is at least one overriding commentary I wish to make. Scientists and researchers have an ethical obligation to know about the most robust and sophisticated research techniques available, else their findings may be faulty and fall far short of a conclusion on the basis of the best available evidence. The newest and most complex techniques are not always applicable to certain kinds of data; hence, the researcher should seek to fit his analyses to the quality of his material. Moreover, as probability statistics have become increasingly admitted into litigation both in civil and criminal proceedings, some judges have come to accept the P value of .05 as nearly sacred in determining what is acceptable and what is unacceptable science. Neither scientists nor judges should be so rigorously wedded to the notion of .05 to ignore consistent patterns and trends of P values a bit more than .05. The ethics of our findings are not bound by an invariable obedience to such limited notions of reality.

V. RESEARCH FUNDS

The source of research funds may not pose a moral dilemma for many recipients. Nevertheless pressure to adopt unpalatable suggestions, unmanageable time constraints, or politicization of the funding agency may put into question the ethics of accepting funds from that source. It is unlikely that the researcher will seek or accept funds from a group whose views he considers unacceptable or intolerable, irrespective of the imposition of those views on the research.

Some researchers would not accept funds from major corporations because of presumed unethical practices in the acquisition of wealth. Others, opposing the power of government, may likewise refuse government funds for research, however free from interference in the research. In either case the danger of manipulation of research findings by the funding agency often provides an additional disincentive to accepting research funds. Where the agency does impose its views on the research, say by conditioning publication of results on their conformity with the agency's views, the scientist who values freedom of publication and scientific inquiry prostitutes his integrity by accepting such conditions. Recognizing the possibility that research will facilitate the misuse of power in both the private and public spheres, the Code of Ethics of the American Sociological Association affirm[s] the autonomy of sociological inquiry.

The sociologist must be responsive, first and foremost, to the truth of his

investigation. Sociology must not be an instrument of any person or group which seeks to suppress or misuse knowledge. The fate of sociology as a science is dependent upon the fate of free inquiry in an open society.²⁸

VI. TEACHING CRIMINOLOGY

I am indebted to Professor Jerome Hall for the provocative suggestion that it is ethically good and sound for a criminology professor to disclose to new students his ideological preferences within the subject matter to be discussed. Such disclosures permit the students to take those perspectives into account when digesting hypotheses, findings, and interpretations offered by the professor. An instructor controls the interactive dynamics of the classroom through the choice of topics, selection of readings, and the approaching and concluding of a topic. I should think that topics such as free will and determinism, consensus versus conflict, correctional treatment versus retribution, and the just deserts model and others are proper candidates for the presentation of one's perspectives. Whether the perspectives are based on the best available scientific evidence may be of some consequence; but, however they are derived, teachers should display them explicitly. Scientists and teachers in other disciplines such as astronomy, biology, and even mathematics must sense this same disclosure obligation. But in criminology and criminal justice, where the law, ethics, and science converge on so many topics, disclosure is vital.

Revealing personal biases in a textbook may fulfill a teacher's obligation to disclose. But can a professor ethically require his own students to purchase the textbook? The book is, after all, nothing more than the written, usually more elegant and comprehensive, presentation of the professor's learning. Arguably, the process of putting such a book together is itself a claim that the book is the best in the field. Moreover, students need not elect to take the course. Therefore, requiring its purchase is reasonable and logical. To further insulate the ethical propriety of requiring one's own textbook, the professor might divest himself of the royalties and thereby reduce the cost to students.

VII. CONCLUSION

I conclude by referring to a reply by Professor Stephen J. Morse to Judge Bazelon's argument for more welfare programs in order to reduce poverty and ultimately crime. Professor Morse argues against what he calls "welfare criminology" and for a firm sentencing policy in criminal justice. He raises a number of ethical issues:

Is it immoral to ask that the cost of reducing crime be borne by the mor-

²⁸ *Toward a Code of Ethics for Sociologists*, 3 AM. SOC. 316, 318 (1968).

ally responsible agents who have been convicted of crimes beyond a reasonable doubt, rather than by innocent persons? If mandatory sentences of humane duration significantly reduce the crime rate (in contrast to poverty programs which have not done so), can it reasonably be claimed that such a program is amoral or immoral? To be sure, we cannot be certain which would be more effective, increased social welfare or criminal justice reform. But given this uncertainty and the past failures of social justice solutions, it does seem clear the social justice adherent is not entitled to claim that his position is *the* moral one, and that alternative analyses and suggestions are immoral.²⁹

The Report of the Task Force on the Role of Psychology in the Criminal Justice System speaks eloquently about the reasons for the importance of ethics in this field:

While other institutions, such as mental hospitals, also restrict individual freedom, the criminal justice system is the principal locus of legitimate force in American society. The consequences of its misapplication may be severe and irreversible. An additional reason for placing a high priority on ethical consensus in criminal justice is that the people processed by that system are likely to be poor or minorities and thus to have little access to conventional means for redressing their grievances.³⁰

Scientific research and ethics are interrelated, especially in criminal justice. Ethical decisions are made and changed based on subjective perceptions of good and evil, right and wrong. Changes in science are mostly cumulative and, within the sustained value system of the canons of science, change is improvement in the understanding and the acquisition of knowledge. When ethics and science intersect, the historical moment is important. For when the qualitative difference of our ethics meets the quantitative maturation of our science, each impinges on the other in ways that require constantly new interpretations. The ethical issues of justice today are little different from those raised by Plato, Aristotle, Kant, and others. The science of today is little understood by a demographic generation removed from today. To mesh the two is our perennial problem.

²⁹ Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1249, 1265 (1976).

³⁰ *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCH. 1099, 1100 (1978).