Researcher-Participant Privilege, Confidentiality, and the Jailhouse Blues

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Research participants can be expected to share legally sensitive information only when they are confident that those with whom they are sharing it can be trusted to maintain its security and confidentiality. However, researchers can never be certain that their participants' data will not become the target of a judicial order for disclosure in the form of a subpoena or search warrant. Judicially compelled disclosure places the researcher in a conflict of duties between honouring the ethical responsibility to protect participant confidentiality on the one hand, and the legal duty to comply with the law on the other. Criminologists Ted Palys and John Lowman argue that, where such a conflict arises, the researcher retains the right to resist disclosure as a matter of principle; on the grounds that ethical principle transcends law, researchers may adopt an "ethics-first" approach in which a disposition to noncompliance with compelled disclosure would guide research practice from the earliest stages of research design. The alternative to an ethics-first approach

On peut s'attendre des participants à une recherche qu'ils partagent leurs données juridiquement sensibles uniquement s'ils sont assurés que ceux avec qui ils partagent ces informations maintiendront leur sécurité et leur confidentialité. Cependant, les chercheurs ne peuvent avoir la certitude que les données sensibles de leurs participants ne deviendront pas l'objet d'une ordonnance judiciaire de divulgation sous la forme d'une citation à comparaître ou d'un mandat de perquisition. La divulgation judiciaire place le chercheur dans une situation où il doit remplir des obligations conflictuelles, soit d'une part, honorer la responsabilité éthique de protéger la confidentialité des participants, et d'autre part, se conformer à la loi. Les criminologues Ted Palys et John Lowman avancent que, lorsqu'une telle situation conflictuelle survient, le chercheur conserve le droit de s'opposer à la divulgation par principe ; au motif que ce principe éthique transcende le droit, les chercheurs peuvent adopter une approche axée sur l'éthique dans laquelle une dispo-

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would be the "law-of-the-land" approach, in which participants would be informed that confidentiality would be maintained only to the extent permitted by law. Under a law-of-the-land approach, the researcher would comply with a judicial order for disclosure once all legal means of resisting it have been exhausted. There are three arguments in Palys and Lowman's case for ethics-first: (1) that the best way to protect confidentiality is to "Wigmorize" it in anticipation of a judicial test of privilege; (2) that to offer a qualified promise of confidentiality would be to undermine any claim to privilege according to Wigmore criteria; and (3) that to warn participants about the possibility of court-ordered disclosure is unnecessary, because such an eventuality does not qualify as a reasonably foreseeable risk. All three arguments are subject to criticism on legal grounds, while the suggestion that civil disobedience can be an appropriate way of responding to compelled disclosure is criticized on philosophical grounds.

sition de non-conformité quant à la divulgation obligatoire de données guiderait la pratique de la recherche dès les premiers stades de la conception d'un projet de recherche. L'alternative à cette approche serait une approche par laquelle les participants seraient informés que la confidentialité ne serait maintenue que dans les limites permises par la loi. Sous cette seconde approche, le chercheur se conformerait à une ordonnance judiciaire de divulgation dès l'épuisement de tous les moyens légaux permettant d'y résister. Il existe trois arguments en faveur de l'approche de Palys and Lowman axée sur l'éthique : (1) que la meilleure façon de protéger la confidentialité est de la « Wigmorizer » en prévision d'une évaluation judiciaire du privilège de confidentialité ; (2) qu'offrir une promesse de confidentialité relative aurait pour effet de miner toute revendication de privilège selon les critères de Wigmore ; et (3) qu'il est inutile d'avertir les participants de la possibilité d'une divulgation ordonnée par le tribunal, car une telle éventualité ne constitue pas un risque raisonnablement prévisible. Ces trois arguments font l'objet de critiques pour des motifs juridiques, tandis que la suggestion selon laquelle la désobéissance civile peut être un moyen approprié afin de répondre à une divulgation forcée est critiquée pour des motifs philosophiques.

Introduction

Human participant research is an essential tool for the pursuit of knowledge both as a good in itself and as one of the principal instruments of progress in medicine, social policy, and justice. But the collection of personal data can, sometimes in ways impossible to anticipate, place information in the hands of researchers that will later be targeted for disclosure by a subpoena or search warrant. Research participants can be expected to share certain kinds of information about themselves only when they have strong reasons to believe that it will remain confidential. Moreover, an important part of the informed consent process by which people are enrolled as research participants is an explanation of the measures the researcher is prepared to take to maintain confidentiality. A judicial order for the disclosure of research data will place the researcher in a conflict of duties between honouring the trust upon which the researcher-participant relationship is based, and the legal duty to comply with the law. A researcher might reduce the potential for such a conflict by informing participants about the risk of compelled disclosure as part of the consent process, but offering participants a qualified assurance of confidentiality might compromise the quality of information a researcher can expect to obtain.[1]

The *Tri-Council Policy Statement* (*TCPS2 2014*), which sets out federal guidelines for the conduct of human participant research in Canada, advises researchers that the protection of participant confidentiality is an ethical duty "central to respect for participants and the integrity of the research project."[2] It also acknowledges that tensions can arise between "the requirements of the law and the guidance of the ethical principles" set out in the

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1 This dilemma can also be characterized as the choice between making an unlimited promise of confidentiality, which will be proven to have been misleading should research data be subjected to court-ordered disclosure, and warning participants that their data may be subject to court-ordered disclosure, which can discourage participation (see Marvin E Wolfgang, "Confidentiality in Criminological Research and Other Ethical Issues" (1981) 72:1 J Crim L & Criminology 345 at 349–50).

2 Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research Council of Canada, Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (Ottawa: Secretariat on Responsible Conduct of Research, December 2014), online: Government of Canada <www.pre.ethics.gc.ca/pdf/eng/tcps2-2014/TCPS_2_FINAL_Web.pdf> at 60, art 5.1 [*TCPS2 2014*].

TCPS2 2014.[31] Tensions of this kind are most likely to arise where research data is targeted for disclosure by judicial order in the form of a subpoena or search warrant.[4] Such a situation raises the issue of whether research data is protected by researcher-participant privilege.

The Supreme Court of Canada adopted the Wigmore test as the appropriate judicial mechanism to assess claims of privilege in *R v Gruenke* in 1991.[5] The common law recognizes that communications arising from certain relationships, such as the solicitor-client relationship, are presumptively privileged and hence inadmissible as evidence.[6] These communications are said to be protected by a "class" privilege: one need only demonstrate that the particular relationship at issue falls within a recognized class in order to receive the benefit of the presumption of inadmissibility.[7] In *Gruenke*, the Supreme Court of Canada established definitively that all other communications are presumptively admissible, but that this presumption will be rebutted if the communications at issue satisfy the following four criteria of the Wigmore test:

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

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3 *Ibid* at 10.

4 A related issue concerns the circumstances under which a researcher is legally or ethically obligated to disclose identifiable research data collected under a promise of confidentiality, not because of a judicial order for disclosure, but for the sake of preventing harm. This issue is beyond the scope of this paper. For a thorough consideration of this topic, see Derek J Jones & Interagency Advisory Panel on Research Ethics, "Interface of Law & Ethics in Canadian Research Ethics Standards: An Advisory Opinion on Confidentiality, Its Limits, & Duties to Others" (2007) 1:1 McGill Health L Publication (McGill JL & Health) 101.

5 [1991] 3 SCR 263, 67 CCC (3d) 289 [*Gruenke* cited to SCR].

6 *Ibid* at 286.

7 *Ibid* (establishing that this presumption can then be rebutted by establishing an exception to the general rule).

> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[8]

Communications that are presumptively admissible, but which satisfy all four of the Wigmore criteria, are protected by "case-by-case" privilege, as opposed to class privilege.[9]

At the time of writing, researchers have challenged orders for disclosure of research data by asserting researcher-participant privilege on only two occasions in Canadian legal history. In 1994 Russel Ogden, then a graduate student in the School of Criminology at Simon Fraser University, was subpoenaed by a coroner regarding his research on assisted suicide in the HIV/AIDS community in Vancouver.[10] The coroner wished to know the identity of a person who was thought to have assisted in the suicide attempt of an

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8 *Gruenke*, *supra* note 5 at 284 [emphasis omitted], citing John Henry Wigmore, *Evidence in Trials at Common Law*, vol 8, ed by Colin McNaughton (Boston: Little, Brown and Company, 1961) at §2285. The Wigmore test was first introduced into Canadian jurisprudence in *Slavutych v Baker* [1976] 1 SCR 254, 55 DLR (3d) 224 [*Slavutych* cited to SCR], where the Supreme Court of Canada held in *obiter* that the communication at issue was privileged, because it met all four Wigmore criteria (Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis Canada, 2014) at paras 14.16–14.19). It was not until its decision in *Gruenke*, though, that the Court determined conclusively that the Wigmore criteria are to be used to assess case-by-case privilege (*ibid* at para 14.22).

9 *Gruenke*, *supra* note 5 at 286.

10 Ted Palys & John Lowman, *Protecting Research Confidentiality: What Happens When Law and Ethics Collide* (Toronto: James Lorimer and Company, 2014) at 28, 40 [Palys & Lowman, *Protecting Research Confidentiality*]. In the interest of full disclosure, it should be noted that Ted Palys and John Lowman were professors in the Department of Criminology at Simon Fraser University when Russell Ogden entered the MA program in Criminology at that institution in September, 1991. However, neither Palys nor Lowman served as members of his thesis committee. Ogden's thesis supervisor when he entered the program was Dr. Robert Gordon who was standing in for Dr. Brian Burtch until he returned from a sabbatical leave in July, 1992. Dr. Burtch was replaced as Ogden's thesis supervisor by Dr. Verdun-Jones on December 8, 1992. Ogden successfully defended his thesis on February 8, 1994. Ogden received a subpoena to testify before a coroner's inquest on May 25, 1994 (*Ogden v Simon Fraser University*, [1998] BCJ No 2288 (QL) at paras 2–3, 7, 1998 Carswell-BC 3260 [*Ogden*]).

AIDS victim who had botched an attempt to end her life with an overdose of Seconal. The incident came to the attention of the coroner through an article in the *Vancouver Province*[11] published in May 1991, several months before Ogden entered the Master of Arts program at Simon Fraser University.[12] When asked about his knowledge of the case at the coroner's inquest, Ogden refused to answer, arguing that any of his communications with his research participants was privileged.[13] The coroner agreed with Ogden and released him from further questioning.[14]

On June 4, 2012, Luka Magnotta, a Montreal sex worker, was arrested for the murder and dismemberment of Montreal university student Lin Jun. On April 12, 2013, Magnotta was indicted on charges of first-degree murder, causing indignity to a human body, broadcasting obscene material, using the postal service to distribute obscene material, and criminal harassment.[15] The publicity surrounding the case prompted a former research assistant to approach police to inform them that, in 2007, he had interviewed Magnotta while working on a study led by Professors Chris Bruckert and Colette Parent, criminologists at the University of Ottawa.[16] The Magnotta interview had been conducted as part of a study on the escort industry. The interview had been transcribed and anonymized using the pseudonym "Jimmy." The researchers had followed meticulous confidentiality protocols in the study, going so far as to have a research assistant sign the participants' pseudonyms on consent forms so that a comparison of handwriting samples could not result in re-identification.[17] When police investigators requested a copy of the Jimmy interview, Bruckert and Parent refused, forwarding it instead to their legal counsel, from whom it was later seized by police on the authority of a search warrant. Bruckert and Parent petitioned to have the search

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11 *Ogden*, *supra* note 10 at para 4.

12 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 36–37.

13 *Ibid* at 43–44, 48.

14 *Ibid* at 52–53.

15 "Luka Magnotta to Stand Trial on 1st-Degree Murder", *CBC News: Montreal* (12 April 2013), online: <www.cbc.ca/news/canada/montreal/luka-magnotta-to-stand-trial-on-1st-degree-murder-1.1331284>.

16 Miriam Shuchman, "Researcher-Participant Confidentiality Now a Formal Concept in Canadian Law", News, (2014) 186:4 CMAJ 250 at 250.

17 *Ibid*.

warrant quashed on the grounds that, as Ogden had argued, information obtained in the context of research is privileged.[18]

The Quebec Superior Court assessed the admissibility of the Jimmy interview by applying the Wigmore test to Bruckert and Parent's claim of researcher-participant privilege.[19] The Crown conceded that the first three Wigmore criteria had been satisfied.[20] The arguments focused on the fourth criterion, which requires in this case that the court weigh the social value in protecting confidential communications against society's interest in investigating and prosecuting crime.[21] The Superior Court held that, in this case, the balance tipped in favour of protecting the confidentiality of the research data given its marginal probative value with respect to the investigation of the alleged crime.[22] Accordingly, the court quashed the search warrant on the ground that the research interview was protected by researcher-participant confidentiality privilege.[23]

Although *Parent v R* is the first instance of a Canadian court recognizing the concept of researcher-participant privilege, the decision has not obviated the potential for conflict between ethics and law with respect to judicially compelled disclosure. While the Superior Court recognized the value of human participant research and the importance of confidentiality to the research enterprise, this recognition was accompanied by the proviso that any such claim of privilege would be "situation specific."[24] Researchers must continue to be mindful of the possibility that their participants' data might attract the interest of the legal system. Research institutions, which can expect to share the legal costs of defending research confidentiality, have responsibilities in this area as well, particularly given an interpretation of the *TCPS2 2014* issued by the Panel on Research Ethics following the *Parent* decision:

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18 *Ibid*.

19 *Parent v R*, 2014 QCCS 132, 308 CCC (3d) 493 [*Parent*].

20 *Ibid* at para 18.

21 *Ibid* at para 145.

22 *Ibid* at para 211.

23 *Ibid* at paras 212, 215.

24 *Ibid* at para 148.

> Certain areas of research … are more likely to put researchers in positions where they may experience tension between the ethical duty of confidentiality and disclosure to third parties. … Institutions under whose auspices or within whose jurisdiction such research is being conducted should establish a policy that explains how it will fulfill its responsibilities to support its researchers.[25]

This raises the questions of what researchers should tell potential participants in their information letters, what research ethics boards (REBs) should advise researchers to tell potential participants, and what policies universities should adopt. Ted Palys and John Lowman, criminologists at Simon Fraser University, have studied these issues extensively. Their many publications exploring these topics span the past two decades.[26] In their 2014

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[25] Canada, Interagency Advisory Panel on Research Ethics, "Privacy and Confidentiality", TCPS 2 Interpretations (Ottawa: Panel on Research Ethics, 4 February 2016), s 2(E), online: Government of Canada <www.pre.ethics.gc.ca/eng/policy-politique/interpretations/privacy-privee/> [Panel on Research Ethics, "Privacy and Confidentiality"].

[26] See e.g. Ted Palys & John Lowman, "Defending Research Confidentiality 'To the Extent the Law Allows:' Lessons From the Boston College Subpoenas" (2012) 10 J Academic Ethics 271 [Palys & Lowman, "Defending Research Confidentiality"]; John Lowman & Ted Palys, "PRE's 'Interface of Law & Ethics in Canadian Research Ethics Standards: An Advisory Opinion on Confidentiality, Its Limits & Duties to Others': The 'Law of the Land' Doctrine in All but Name" (2007) 1:1 McGill Health L Publication (McGill JL & Health) 117 [Lowman & Palys, "PRE's Advisory Opinion"]; John Lowman & Ted Palys, "Strict Confidentiality: An Alternative to PRE's 'Limited Confidentiality' Doctrine" (2007) 5 J Academic Ethics 163; Ted Palys & John Lowman, "Protecting Research Confidentiality: Towards a Research Participant Shield Law" (2000) 21:1 CJLS 163 [Palys & Lowman, "Shield Law"]; John Lowman & Ted Palys, "Subject to the Law: Civil Disobedience, Research Ethics, and the Law of Privilege" (2003) 33 Sociological Methodology 381 [Lowman & Palys, "Subject to the Law"]; Ted Palys & John Lowman, "Anticipating Law: Research Methods, Ethics, and the Law of Privilege" (2002) 32 Sociological Methodology 1 [Palys & Lowman, "Anticipating Law"]; John Lowman & Ted Palys, "The Ethics and Law of Confidentiality in Criminal Justice Research: A Comparison of Canada and the U.S." (2001) 11:1 Intl Criminal Justice Rev 1; John Lowman & Ted Palys, "Limited Confidentiality, Academic Freedom, and Matters of Conscience: Where Does CPA Stand?", Commentary, (2001) 43 Can J Crim 497; Ted Palys & John Lowman, "Social Research with Eyes Wide Shut: The Limited Confidentiality Dilemma", Commentary, (2001) 43 Can J Crim 255; Ted Palys & John Lowman, "Ethical and Legal Strategies for

monograph, *Protecting Research Confidentiality*, they argue that, in the face of legally compelled disclosure of research data, researchers retain the moral right to protect participant confidentiality over their legal duty to obey the law.[27] Thus the researcher, pursuant to the right of academic freedom and the ethical bond upon which the researcher-participant relationship is based, may opt for an "ethics-first" approach, according to which she may make an unconditional promise of confidentiality to prospective research participants provided that she is prepared to defy a judicial order for disclosure.[28] The alternative is the "law-of-the-land" approach, which conceives of the researcher's commitment to participant confidentiality as circumscribed by the legal obligation to obey the law, including a judicial order for disclosure of confidential information.[29] Thus a researcher employing the "law-of-the-land" model will qualify a promise of confidentiality by informing potential participants that the confidentiality of their data will be protected only to the extent permitted by law.[30] On this approach, once researchers have exhausted all legal means of resisting judicially compelled disclosure, they must comply with a court order to disclose the confidential data of their participants, and they must warn participants of this possibility as part of the process of obtaining their participants' informed consent.[31]

Palys and Lowman worry that general adoption of the "law-of-the-land" approach by researchers, and coercive efforts by REBs to steer researchers in that direction, would have a corrosive effect on human participant research, particularly in fields such as criminology and health research.[32] An unconditional promise of confidentiality, they argue, is es-

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Protecting Confidential Research Information" (2000) 15:1 CJLS 39 [Palys & Lowman, "Ethical and Legal Strategies"].

27 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 20.

28 *Ibid* at 16, 108, 243.

29 *Ibid* at 16, 109.

30 *Ibid* at 87. For an earlier articulation of the law-of-the-land approach, see Palys & Lowman, "Defending Research Confidentiality", *supra* note 26 at 272. For an earlier articulation of the distinction between the law-of-the-land approach and the ethics-first approach, as well as a defence of the latter, see Lowman & Palys, "PRE's Advisory Opinion", *supra* note 26.

31 Palys & Lowman, "Defending Research Confidentiality", *supra* note 26 at 272.

32 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 18–19. See also Bert Black, "Research and Its Revelation: When Should Courts Com-

sential to the conduct of research that may uncover extremely sensitive information.[33] In the health context, this includes research on "sexual attitudes, preferences, or practices; HIV/AIDS and other STIs; the use of alcohol, drugs, or other addictive products; illegal conduct; psychological well-being and mental health; genetic information, including biological samples stored for future use; [and] epidemiological information."[34] Reasonably foreseeable circumstances can arise, particularly in research involving the potential for discovery of illegal activity, in which success in enrolling participants will be contingent on the degree of confidentiality the researcher is prepared to offer. In the case of information concerning very serious criminal activity nothing less than an unqualified promise of confidentiality may do.[35] According to Palys and Lowman, it is a promise

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pel Disclosure?" (1996) 59:3 Law & Contemp Probs 169 at 171 (recognizing that some health research, such as AIDS research, would be limited when confidentiality is promised "except as required by law" [emphasis omitted]).

33 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 18–19.

34 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 19.

35 There is some experimental evidence that measures the effect of degree and type of promised confidentiality or anonymity on participants' willingness to disclose personal information. For example, Singer et al found, in a meta-analysis of 113 research reports, that confidentiality assurances result in a statistically significant improvement in response to questions about sensitive data, although the effect is "small" (Eleanor Singer, Dawn R Von Thurn & Esther R Miller, "Confidentiality Assurances and Response: A Quantitative Review of the Experimental Literature" (1995) 59 Public Opinion Q 66 at 67–68, 74); a study of degree of disclosure in studies with anonymous versus non-anonymous methods found no significant difference in response (Maureen Murdoch et al, "Impact of Different Privacy Conditions and Incentives on Survey Response Rate, Participant Representativeness, and Disclosure of Sensitive Information: A Randomized Controlled Trial", (2014) 14 BMC Med Res Methodol 90 at 1, online: <bmcmedresmethodol.biomedcentral.com/articles/10.1186/1471-2288-14-90#Abs1>); in a study of confidential versus anonymous collection methods for obtaining information about substance use, it was found that "the lack of total anonymity in the confidential mode of survey administration does not necessarily impede the same kind of self-reports of alcohol, tobacco and other drug consumption given anonymously" (Roland S Moore & Genevieve M Ames, "Survey Confidentiality vs. Anonymity: Young Men's Self-Reported Substance Use" (2002) 47:2 J Alcohol Drug Educ 32 at 32); and a study comparing degrees of confidentiality in the collection of personal information (i.e., neutral, confidentially assured, and confidentiality not assured) found no significant difference in disclosure scores across treatment conditions (Bella Ko-

a researcher should be able to make in good faith.[36] In its absence, they argue, the validity, reliability, and integrity of research into legally sensitive areas will be compromised at best and, at worst, thwarted altogether.[37]

In arguing that a researcher retains the moral right to disobey a judicial order for disclosure,[38] they characterize their "ethics-first" approach to research practice as a "civil-disobedience ethic."[39] While defying compelled disclosure would be an option of last resort, the choice between "ethics-first" and "law-of-the-land" approaches would need to be made in the very earliest stages of research design, as the measures a researcher is prepared to take in order to protect confidentiality must be clearly communicated to participants as part of the informed consent process. Adopting a disposition to civil disobedience might seem an immoderate approach to research, but Palys and Lowman offer a nuanced and multifaceted argument in support of their "ethics-first" approach.

The first strand of their argument exhorts researchers to "Wigmorize" research data by designing research protocols so as to best support a claim of privilege.[40] Although we endorse this recommendation as a reasonable and prudent precautionary measure, in Part I.A we question whether the Wigmore test offers the kind of shield imagined by Palys and Lowman. The second strand of Palys and Lowman's argument concerns the first criterion of the Wigmore test, which stipulates that privileged communications must originate in a context in which it is clearly enunciated that they will not be

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bocow, John M McGuire & Burton I Blau, "The Influence of Confidentiality Conditions on Self-Disclosure of Early Adolescents" (1983) 14:4 Prof Psychol Res Pr 435 at 435). In the literature we reviewed, we found no experimental data involving the kind of highly sensitive personal information at the centre of the Ogden or Parent and Bruckert cases (i.e., assisted suicide or participation in the sex trade).

36 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 16, 108, 243.

37 *Ibid* at 18–19; Palys & Lowman, "Ethical and Legal Strategies", *supra* note 26 at 74.

38 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 16, 87.

39 *Ibid* at 17, 289.

40 *Ibid* at 242.

disclosed.[41] Palys and Lowman argue that in order to satisfy this criterion, researchers should be careful to avoid the use of qualifying phrases in assurances of confidentiality such as "except as required by law." Such qualifications might later be interpreted by a court as a waiver of privilege.[42] While we agree that researchers should avoid any actions or statements that would constitute a waiver of privilege, we argue in Part I.B that the Supreme Court of Canada's jurisprudence establishes that a limited promise of confidentiality will not necessarily vitiate the first Wigmore criterion. Hence, researchers may, in the interest of full disclosure, alert potential participants to the possibility of compelled disclosure without abandoning any claim to privilege. The third strand of Palys and Lowman's argument concerns the researcher's duty to inform participants of reasonably foreseeable risks. They argue that the possibility of court-ordered disclosure does not qualify as such because in the only instances in which researchers have faced judicially compelled disclosure in Canada, the researchers were successful in resisting forced disclosure on the basis of researcher-participant privilege.[43] In Part I.C, we support Michael Jackson and Marilyn MacCrimmon's suggestion that case law on informed consent from the health care context might be used to inform the concept of reasonable foreseeability in the research context.[44] If the analogy with health care is sound, prospective research participants are entitled to be informed of even improbable risks provided that the consequences of those risks are severe.[45] In our view, the consequences of a court-ordered disclosure of legally sensitive data would rise to that level.

Palys and Lowman might argue that a researcher's commitment to "ethics-first" civil disobedience would foreclose any risk of disclosure. However, we highlight some practical and philosophical limitations to this position. Civil disobedience may be feasible when the impugned data exists only in the researcher's mind and has no external representation, whether physical or electronic. Any externally existing data is subject to being forcibly seized by the state (as well as to loss, theft, or accidental discovery). Further, the value of any promise to defy compelled disclo-

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41 *Slavutych*, *supra* note 8 at 260.

42 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 200–01.

43 *Ibid* at 121, 242.

44 Michael Jackson & Marilyn MacCrimmon, *Research Confidentiality and Academic Privilege: A Legal Opinion* (1999) [unpublished, archived online: Simon Fraser University <www.sfu.ca/~palys/JackMacOpinion.pdf>] at 12–13, 113.

45 *Ibid*.

sure would depend on whether the researcher possesses the psychological capacity to follow through on it, including the fortitude to serve a prison sentence if necessary; this is something that would be difficult for both researcher and participant to ascertain in advance. Moreover, the participant would have no legal recourse should a researcher renege on his or her promise to defy a court order. With these considerations in mind, a potential participant might reasonably balk at an offer of "ethics-first" civil disobedience in defense of personal information. The appeal to civil disobedience is subject to criticism on extra-legal grounds as well, because, as we shall argue, it is not clear that an "ethics-first" approach provides sufficient justice-based reasons to warrant an act of civil disobedience.

Although we use Palys and Lowman's terms "ethics-first" and "law-of-the-land" throughout, we argue that those employing the so-called "ethics-first" approach have an ethical obligation to tell participants that the confidentiality of their legally sensitive, identifiable data depends on the researcher's resolve to face the consequences of defying a court order, that participants have no legal recourse if researchers fail in their resolve, and, in the case of identifiable data that exists independently of the researchers, that the researchers cannot guarantee the data will be destroyed before authorities of the state seize it. Without this disclosure, the so-called "ethics-first" approach fails to uphold the ethical principle of informed consent. The so-called "law-of-the-land" approach, by contrast, can comply with all applicable ethical principles, as long as certain measures are taken, as discussed in Part II.

We conclude by setting out our recommendations for researchers and REBs, including the specific steps researchers should take when collecting sensitive data that may be sought by a court or tribunal.

I. "Law-of-the-Land" versus "Ethics-First": A Critical Analysis

A. The first strand: "Wigmorize" the research data

According to the first strand of Palys and Lowman's argument, researchers have an ethical responsibility to "Wigmorize" their research data.[46] When data satisfies the four requirements of the Wigmore test, a court will

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[46] Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 242.

hold that the data is privileged and therefore inadmissible[47] and immune from forced disclosure.[48] If a court will not order the data to be disclosed, then there is no reason to warn participants about possible limits on confidentiality. Hence, Palys and Lowman recommend that researchers offer their participants unconditional promises of confidentiality once their data is Wigmorized.[49]

The problem with this argument is that fully Wigmorizing research data is beyond the control of researchers.[50] Since, according to the *TCPS2 2014,* the duty to protect confidentiality is an ethical duty,[51] it would be a breach of that duty for a researcher to promise something that cannot be delivered. Risk of judicially compelled disclosure aside, research confidentiality can be compromised in innumerable ways due to mischief, inattention, or any of the myriad instantiations of Murphy's Law. Even if a researcher could be reasonably confident that the design of her protocols would meet the first three criteria of Wigmore, the outcome of the case-specific calculus of interests required by the fourth criterion would be unknowable in advance. This is why the Supreme Court of Canada has recognized the impossibility of giving an unconditional guarantee of confidentiality in the context of case-by-case privilege.[52]

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47 *Gruenke*, *supra* note 5 at 286.

48 Halsbury's Laws of Canada (online), *Evidence*, "Privilege and Related Grounds of Exclusion" (VIII.1) at HEV-172 "Overview of Privilege and Related Claims" (2014 Reissue).

49 Palys & Lowman, *Protecting Research Confidentiality*, supra note 10 at 242–43. For earlier exhortations to researchers to Wigmorize their data, see Lowman & Palys, "PRE's Advisory Opinion", *supra* note 26 at 120; Palys & Lowman, "Anticipating Law", *supra* note 26 at 5.

50 For a similar observation regarding the tenuous nature of the common law protection for researcher-participant privilege in the American context, see James Lindgren, "Anticipating Problems: Doing Social Science Research in the Shadow of the Law", (2002) 32:1 Sociol Methodol 29 at 31.

51 *TCPS2 2014*, *supra* note 2 at 57–58.

52 See *R v National Post*, 2010 SCC 16 at para 69, [2010] 1 SCR 477 [*National Post*]:

> The bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed. In the end, the extent of the risk will

The ease of complying with the first three criteria is illustrated both by the Crown's concession and by the Court's analysis in *Parent v R*. The Crown in *Parent* conceded that the researchers had met the first three Wigmore requirements.[53] The Court accepted this admission,[54] but went on to explain that it would have found that the first three criteria had been met regardless of the Crown's admission.[55] It held that the first criterion was met on the basis of the extensive evidence demonstrating that confidentiality was integral to the research project, including the prominent role of confidentiality in the recruitment material, the consent form, the training of interviewers, and the approval granted by the REB.[56] Thus, researchers can meet the first criterion by simply engaging in similar actions to protect confidentiality. The second criterion states that confidentiality must be essential to the relationship at issue.[57] In *Parent*, the petitioners satisfied this criterion by showing that participants would not have participated in the research if confidentiality had not been guaranteed, because participants would face serious and multiple risks of harm if confidentiality were to be breached.[58] Researchers can ensure compliance with the second criterion by simply documenting the existence of these factors in their own research. The third criterion states that the relationship at issue must be one which "ought to be sedulously fostered."[59] Here, the relevant relationship is that of researcher-participant. The Court in *Parent* easily concluded that the researcher-participant relationship ought to be sedulously fostered, given the importance in our democratic society of academic freedom as well as the value of research results in informing public policy, programs, services, and law-making.[60]

> only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance.

53 *Parent*, *supra* note 19 at para 18.

54 *Ibid*.

55 *Ibid* at para 19.

56 *Ibid* at para 93.

57 *Ibid* at para 84. See also *Gruenke*, *supra* note 5 at 284.

58 *Parent*, *supra* note 19 at paras 101–04.

59 *Ibid* at para 84. See also *Gruenke*, *supra* note 5 at 284 [emphasis omitted].

60 *Parent*, *supra* note 19 at paras 120, 141.

Thus, academic researchers in a university setting need not re-establish the third criterion; they can simply rely on the analysis in *Parent*.[61]

The fourth criterion, however, is not as straightforward, and, as the Supreme Court of Canada has recognized, it "does most of the work" in the Wigmore analysis.[62] The fourth criterion is the balancing stage, where the court weighs the value of protecting the confidentiality of the data against the public interest in correctly disposing of the litigation at issue.[63] The scales will not always tip in favour of protecting the confidentiality of research data.[64] As Justice Bourque explains in *Parent*, "[t]he public interest in academic freedom is of great importance, but not absolute."[65] The issue will be decided by "the probative value of the evidence sought … and the nature and seriousness of the alleged wrong-doing," on the one hand, and

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[61] It should, however, be noted that researchers in a less regulated environment may need to make out their own case. See *National Post*, *supra* note 52 at para 57:

> The third criterion (that the source-journalist relationship is one that should be "sedulously fostered" in the public good) introduces some flexibility in the court's evaluation of different sources and different types of "journalists". The relationship between the source and a blogger might be weighed differently than in the case of a professional journalist like Mr. McIntosh, who is subject to much greater institutional accountability within his or her own news organization. These distinctions need not be canvassed in detail here since the appellants have made out on their evidence, in my opinion, that in general the relationship between professional journalists and their secret sources is a relationship that ought to be "sedulously" fostered and no persuasive reason has been offered to discount the value to the public of the relationship between Mr. McIntosh and his source(s) in this particular case.

[62] *Ibid* at para 58.

[63] *Ibid* at para 59. See also *Gruenke*, *supra* note 5 at 284; *M (A) v Ryan*, [1997] 1 SCR 157 at paras 29, 32, 37, 143 DLR (4th) 1; *Parent*, *supra* note 19 at para 145.

[64] See Wayne Renke, "Researcher Privilege Recognized (This Time): A Comment on *Parent* and *Bruckert v. the Queen*" (2014) 22:3 Health L Rev 5 at 8–9 (recognizing that in future claims of researcher-participant privilege, the first three Wigmore requirements will likely be decided as they were in *Parent*, but that the same cannot be said for the fourth requirement).

[65] *Parent*, *supra* note 19 at para 149.

the public interest in protecting the confidentiality of the data on the other.[66] Courts must also consider whether the information in question is "available by any other means."[67]

The ultimate question underlying these factors is whether protection of confidentiality will result in injustice, as the judge in *Ryan* would not countenance the possibility "that 'occasional injustice' should be accepted as the price of the privilege."[68] Examples of such injustice include an accused in a criminal proceeding being prevented from answering the Crown's case, and a defendant in a civil action being prevented from answering the plaintiff's case.[69] As such, the scales will tip in favour of disclosure when it is sought by an accused or by a defendant.[70] Admittedly, an accused's claim for disclosure is stronger than that of a defendant, because the accused in a criminal proceeding has more to lose, namely, his or her very liberty, as opposed to the money and reputation at stake in a civil action. That being said, the interest of a defendant can still outweigh the value of protecting confidential data, as illustrated by the Supreme Court of Canada's decision in *M (A) v Ryan*, where the Court ordered the plaintiff's psychiatrist to disclose a subset of her notes and records to the defendant because they did not satisfy the fourth Wigmore requirement.[71] Although the interests served in preserving the confidentiality of the communications between the plaintiff and the psychiatrist were compelling,[72] they were outweighed by the probative value

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66 *Ibid* at para 145. See also *National Post*, *supra* note 52 at para 61.

67 *Parent*, *supra* note 19 at para 152. See also *M (A) v Ryan*, *supra* note 63 at para 37.

68 *M (A) v Ryan*, *supra* note 63 at para 32.

69 *Ibid* at para 36.

70 For an articulation of this principle as it pertains to an accused in the criminal context, see Jackson & MacCrimmon, *supra* note 44 at 88. Lowman and Palys do recognize that a "defendant's innocence" will likely override the interest in research confidentiality during the balancing that happens at the fourth criterion: Lowman & Palys, "PRE's Advisory Opinion", *supra* note 26 at 121. However, they argue that because they have not found any cases where research data was sought for the sake of establishing a "defendant's innocence," such a scenario does not pose a reasonably foreseeable risk (*ibid*). For our response to this argument, see Part I.C.1, *below*.

71 *M (A) v Ryan*, *supra* note 63 at para 41.

72 *Ibid* at para 29:

of the communications, given that the communications could bear directly on the issue of liability in the civil action.[73] Specifically, the communications had the potential to exonerate the defendant. While it was not a researcher-participant case, the factors that outweighed privilege in *M (A) v Ryan* would very likely outweigh a claim for researcher-participant privilege. The interests served by the psychiatrist-patient relationship are at least as valuable, if not more so, than the interests served by researcher-participant privilege.[74]

Although disclosure requests by an accused or a defendant are those most likely to succeed, the public interest in investigating crime can also outweigh the value of protecting the researcher-participant relationship.[75] More specifically, thwarting the investigation of crime is another instance of an injustice that courts will not countenance as the price of privilege. For example, in *National Post*, the Crown sought disclosure of an allegedly forged document in order to use forensic analysis such as fingerprint and DNA testing to determine the identity of its author.[76] A majority of the Supreme Court of Canada rejected the National Post's application to set aside

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> [The interests served by protecting the communications from disclosure] include injury to the appellant's ongoing relationship with Dr. Parfitt and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

73 *Ibid* at para 41.

74 See *ibid* at paras 29, 30 (regarding the interests served by the psychiatrist-patient relationship); *cf Parent*, *supra* note 19 at paras 120, 130 (the interests served by the researcher-participant relationship "include academic freedom … the pursuit of knowledge and the free flow of ideas," which contribute to our understanding of the human condition and improving "the social condition of vulnerable and marginalized communities").

75 See *National Post*, *supra* note 52 at para 58; *Parent*, *supra* note 19 at paras 149, 206. Other public interests that can outweigh the value of protecting the researcher-participant relationship include national security and public safety: *National Post*, *supra* note 52 at para 58; *Parent*, *supra* note 19 at para 145.

76 *National Post*, *supra* note 52 at paras 2, 14.

a search warrant for the document.[77] Not every criminal investigation will vitiate privilege,[78] but in this case the majority held that the alleged crime was serious.[79] Perhaps more significantly, the impugned document was not merely a record of reports of alleged criminal activity; it was "the very *actus reus* [or *corpus delicti*] of the alleged crime."[80] Given the parallels in the societal interests underlying the journalist-source relationship and the researcher-participant relationship,[81] the majority's reasoning in *National Post* would very likely also apply in a research context.

What these cases demonstrate, and what the courts' reasoning affirms, is that the analysis at the stage of the fourth criterion is situation-specific.[82] Researchers cannot know at the outset whether their research will meet the fourth criterion, because they cannot know what interests might be weighed against the interest in protecting research confidentiality.[83] Requests by an

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77 *Ibid* at paras 2–3.

78 *Ibid* at para 61.

79 *Ibid* at para 71 ("the dissemination of forged bank entries designed to 'prove' an egregious conflict of personal financial interest on the part of the Prime Minister involving public funds is of sufficient seriousness to justify amply the decision of the police to investigate the criminal allegations within the limits of their ability and resources").

80 *Ibid* at para 77, citing *R v National Post*, 2008 ONCA 139 at para 115, ACWS (3d) 796 [*National Post*, ONCA].

81 *National Post*, *supra* note 52 at para 55 (societal interests in the journalist-source relationship include free expression and helping to "fill what has been described as a democratic deficit in the transparency and accountability of our public institutions"). *Cf Parent*, *supra* note 19 at paras 120, 130 (the interests of the researcher-participant relationship include "academic freedom … the pursuit of knowledge, and the free flow of ideas," which contribute to our understanding of the human condition and to improving "the social condition of vulnerable and marginalized communities").

82 *Parent*, *supra* note 19 at para 148.

83 *National Post*, *supra* note 52 at para 69 ("[i]n the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance"). Palys and Lowman acknowledge the truth of this statement (Palys & Lowman, "Anticipating Law", *supra* note 26 at 11; Palys & Lowman, "Shield Law", *supra* note 26 at 166). However, they argue that the possibility of a court favouring disclosure of data over protection of research confidentiality is not

accused or a defendant, and requests by the state when the alleged crime is serious, or when the probative value of the impugned data or document is high, or when the data are not available by any other means, will likely override any claim to case-by-case privilege. For these reasons, researchers are not entitled to assume at the outset that their data will meet the fourth Wigmore criterion, and thus they are not entitled to promise unconditional confidentiality on the assumption that they have Wigmorized their data.

In *Parent*, the two key factors at the fourth step were (i) the lack of the data's probative value, and (ii) the availability of the same information from other, non-confidential sources.[84] Regarding the first of these factors, the Crown anticipated that Magnotta would put forward a defence of not criminally responsible (NCR) on account of mental disorder and that his responses to the research questions "could shed light on [his] mental state."[85] In assessing this argument, the Court considered the expert opinion of a psychiatrist who had served on the Ontario Review Board where he conducted between 500 and 600 assessments of individuals claiming to be not criminally responsible due to mental disorder.[86] The psychiatrist concluded that the likelihood that the data – the Jimmy interview – would be relevant to the NCR assessment was extremely low.[87] Magnotta gave his responses five years before the alleged crime took place, but most elements of the NCR assessment relate to the accused's mental state at the time when the crime was committed.[88] The psychiatrist acknowledged a remote possibility that Magnotta's responses could relate to the first element of the NCR assessment, which is not tied to the time of the crime, and which refers to "the presence or absence of the diagnosis of a mental disorder in the individual."[89] To resolve this issue, the Court ordered that the data be dis-

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"reasonably foreseeable" because it has never happened in Canada. For a description of Palys and Lowman's position on this issue, as well as our response to their argument, see Part I.C.1, *below*.

84 *Parent*, *supra* note 19 at paras 145, 177, 186-87, 190–91.

85 *Ibid* at para 160.

86 *Ibid* at paras 73–75.

87 *Ibid* at paras 166–67.

88 *Ibid* at paras 162, 166.

89 *Ibid* at paras 162, 165.

closed to the Court.[90] In so doing, the Court was motivated by the seriousness of the criminal offences at issue and the magnitude of the public interest in investigating such a crime.[91] Justice Bourque then read Magnotta's responses and concluded that all the responses were neither relevant to the first element of an NCR assessment, nor to Magnotta's state of mind at the time of the alleged crime, nor to the essential elements of the crime.[92] Accordingly, the Court concluded that the potential relevance of the research data was minimal;[93] in other words, it was lacking in probative value.[94] The foregoing discussion illustrates that the *Parent* decision is only a limited victory for researcher-participant confidentiality. The confidentiality afforded to the research data was not absolute. The Court did in fact order disclosure of the data, albeit on a quite limited scale, namely to the Court alone. Thus, if what Magnotta expected was unconditional confidentiality, he did not get it. In regard to the second factor, namely the availability of the same information from other sources, the Court held that the Crown had access to more relevant contemporary information regarding Magnotta's mental state that could be used in an NCR assessment.[95] Specifically, the police had gathered information about Magnotta's personality and lifestyle by interviewing his acquaintances.[96]

To summarize, the (limited) victory of Professors Bruckert and Parent was not the result of a preference for research confidentiality over the investigation of crime. On the contrary, their victory depended on a nuanced balancing of competing factors. Nothing that Professors Bruckert and Parent did or could have done affected the two factors most salient to the fourth criterion: the probative value of the data and the availability of the same information from other sources. Rather, these particular factors happened to be relevant because of the context of the disclosure request at issue. Researchers cannot assume that their data will satisfy the fourth criterion merely because the data of Professors Bruckert and Parent

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90 *Ibid* at para 183.

91 *Ibid* at para 179.

92 *Ibid* at paras 186–88.

93 *Ibid* at para 190.

94 *Ibid* at para 211.

95 *Ibid* at paras 169, 177.

96 *Ibid* at para 191.

did. As such, a promise of unconditional confidentiality issued in anticipation of reasonably foreseeable disclosure requirements, and on the assumption that research data has been Wigmorized, would be inappropriate.

B. The second strand: Does the first Wigmore criterion require an unlimited promise of confidentiality?

The second strand in Palys and Lowman's argument is the contention that researchers can increase their chances of successfully Wigmorizing their data by promising unconditional confidentiality, because anything less could undermine the researcher's ability to satisfy the first criterion of the Wigmore test.[97] Recall that the first criterion provides that the communications at issue "must originate in a confidence that they will not be disclosed."[98] In support of their argument, Palys and Lowman cite some American decisions where, according to their interpretation, courts ordered disclosure of data on the basis of the limited nature of the promise of confidentiality.

The first of these decisions is *Atlantic Sugar v United States*.[99] In this case, some companies had responded to a questionnaire provided by the International Trade Commission.[100] Atlantic Sugar sought and obtained an order for disclosure of the answers to those questionnaires for use in litigation in which it was involved.[101] One of the companies that answered the questionnaire brought a motion seeking a stay of the disclosure order until the other companies were given an opportunity to make submissions on the issue.[102] The court refused to grant the motion, noting that the questionnaire promised that the responses would remain confidential "except as required by law," and that the "requirement of disclosure for the purpose of judicial

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97 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 89, 126, 201–02. See also Palys & Lowman, "Anticipating Law", *supra* note 26 at 9.

98 *Gruenke*, *supra* note 5 at 284. See also *M (A) v Ryan*, *supra* note 63 at para 20; *Parent*, *supra* note 19 at para 84.

99 85 Customs Court Reports 128 (Cust Ct 1980), 1980 WL 114432 [*Atlantic Sugar* cited to Customs Court Reports].

100 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 202.

101 See *ibid*; *Atlantic Sugar*, *supra* note 99 at 128.

102 *Atlantic Sugar*, *supra* note 99 at 128.

review is such a requirement."[103] According to Palys and Lowman, the limitation on the promise of confidentiality embodied in the phrase "except as required by law" created a waiver of privilege.[104]

In the *Re Dolours Price* (*Boston College*) case, researchers had conducted interviews with former members of the Provisional Irish Republican Army and other political organizations in order to preserve the recollections of individuals involved with the conflict in Northern Ireland known as the Troubles.[105] The interviews took place at Boston College.[106] In 2011, law enforcement authorities from the United Kingdom made a formal request pursuant to the Mutual Legal Assistance Treaty for assistance from the United States with the investigation into the murder of Jean McConville, a suspected British informer.[107] In turn, US authorities issued subpoenas to Boston College for the recordings of the interviews.[108] Boston College and the researchers brought motions seeking to quash the subpoenas, but they were unsuccessful,[109] and interview recordings were eventually turned over to police in the United Kingdom.[110] The Court of Appeals for the First Circuit noted that the agreement with the participants contained a clause restricting access to the interviews until after the death of the interviewees, but that

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103 *Ibid*.

104 Palys & Lowman, "Defending Research Confidentiality", *supra* note 26 at 280. See also Lowman & Palys, "PRE's Advisory Opinion", *supra* note 26 at 121; Palys & Lowman, "Anticipating Law", *supra* note 26 at 9.

105 *Re Dolours Price*, 685 F (3d) 1 (1st Cir 2012), 41 Media L Rep 1075 at 4-5 [*Boston College* cited to F (3d)]. For a useful discussion and analysis of the *Boston College* case, see Frank Murray, "Boston College's Defense of the Belfast Project: A Renewed Call for a Researcher's Privilege to Protect Academia" (2013) 39:3 JC & UL 659; Palys & Lowman, "Defending Research Confidentiality", *supra* note 26.

106 *Boston College*, *supra* note 105 at 5.

107 *Ibid* at 3.

108 *Ibid* at 6.

109 *Ibid* at 7–8.

110 April Witteveen, "Boston College Oral History Project Faces Ongoing Legal Issues", *Library Journal* (12 March 2015), online: <lj.libraryjournal.com/2015/03/litigation/boston-college-oral-history-project-faces-ongoing-legal-issues/>.

this clause did not contain the word "confidentiality."[111] In reproducing this passage, Palys and Lowman suggest that the lack of an explicit promise of confidentiality in this clause was a factor in the Court's decision to uphold the subpoenas.[112] In contrast, Palys and Lowman attribute Ogden's success in meeting the first Wigmore requirement to his promise of unconditional confidentiality.[113] The inference to be drawn, presumably, is that researchers should emulate Ogden's example.[114]

Palys and Lowman's reliance on *Atlantic Sugar* and *Boston College* suffers from at least two problems. First, neither *Atlantic Sugar* nor *Boston College* stand for the principle that a limited promise of confidentiality will undermine researchers' ability to satisfy the first Wigmore requirement. The courts in those two cases did not even apply the Wigmore framework. In addition, the passage noting the absence of the word "confidentiality" in a clause of the research agreement formed no part of the *ratio* in *Boston College*. This passage occurs in the "factual background" section of the decision.[115] The majority's actual reason for upholding the subpoenas was its conclusion that the public interest in law enforcement and unimpeded criminal investigations outweighs any interest in protecting academic confidentiality.[116] Far from basing its decision on any limitation to the promise of confidentiality, the majority observed that although Boston College officials recognized the possibility of legally compelled disclosure, the agreements with the research participants did not warn of any potential limits to the promise of confidentiality.[117] The majority went on to hold that the unlimited promise of confidentiality could not assist the researchers in this case because, as the majority put it, "the mere fact that a communication was made in express confidence … does not create a privilege..."[118] Instead of sup-

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111 *Boston College*, *supra* note 105 at 5.

112 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 203.

113 *Ibid* at 48, 54.

114 *Ibid* at 89, 93–94, 202.

115 *Boston College*, *supra* note 105 at 7.

116 *Ibid* at 16–18.

117 *Ibid* at 19.

118 *Ibid* at 19, citing *Branzburg v Hayes*, 408 US 665 at 682, 92 S Ct 2646, citing Wigmore, *supra* note 8 at §2286.

porting Palys and Lowman's argument, the majority's decision in *Boston College* actually contradicts it.

Second, the Supreme Court of Canada has considered whether a limited promise of confidentiality would undermine the first Wigmore requirement, and, in *M (A) v Ryan*, concluded that it would not.[119] In this case, the plaintiff was sexually assaulted, and then sought counseling from a psychiatrist to address the mental distress caused by the assault.[120] The plaintiff also sued her alleged assailant in a civil action, and he in turn brought a motion to obtain her psychiatrist's records.[121] A majority of the Supreme Court of Canada granted the defendant's request and ordered the psychiatrist to disclose to the defendant a subset of her notes and records under specified conditions.[122] The Court held that these notes and records were not privileged, because they did not satisfy the fourth Wigmore requirement.[123] But for present purposes, the significant aspect of the decision is the majority's holding that the first Wigmore requirement *was* satisfied, despite the psychiatrist's warning to the plaintiff that a court might one day order disclosure of her notes and records.[124] In other words, the psychiatrist did not make an unconditional promise of confidentiality to the plaintiff. Rather, she engaged in what Palys and Lowman would call the "law-of-the-land" approach by warning the plaintiff about the possibility of court-ordered disclosure. And yet, the majority held that the first Wigmore requirement was still satisfied. Interestingly, the Master who heard the motion at first instance adopted Palys and Lowman's perspective insofar as he held that the limitation on the psychiatrist's promise of confidentiality meant that the first Wigmore requirement was not met.[125] The majority of the Supreme Court of Canada, however, explicitly rejected the Master's reasoning.[126]

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119 *M (A) v Ryan*, *supra* note 63 at para 24.

120 *Ibid* at paras 2–3.

121 *Ibid* at para 6.

122 *Ibid* at para 41.

123 *Ibid* at paras 28, 29, 41.

124 *Ibid* at para 24.

125 *AM v Ryan*, 40 ACWS (3d) 730 at para 2, [1993] BCJ No 1234 (QL).

126 *M (A) v Ryan*, *supra* note 63 at para 24.

The majority's reason for rejecting the proposition that only an unconditional promise of confidentiality would satisfy the first Wigmore criterion is as follows:

> With the possible exception of communications falling in the traditional categories, there can never be an absolute guarantee of confidentiality; there is always the possibility that a court may order disclosure. Even for documents within the traditional categories, inadvertent disclosure is always a possibility. If the apprehended possibility of disclosure negated privilege, privilege would seldom if ever be found.[127]

By its very nature, case-by-case privilege is not absolute, and so it is impossible to provide absolute guarantees of confidentiality in situations subject to case-by-case privilege. If limited promises of confidentiality necessarily undermine a claim for privilege, then case-by-case privileges would never exist. But the Supreme Court of Canada has repeatedly affirmed that case-by-case privilege does in fact exist.[128]

Thus, it is not the case that an unconditional promise of confidentiality is needed to satisfy the first Wigmore requirement.[129] Nor must researchers promise to defy a court order in order to meet the first requirement.[130] As Professors Jackson and MacCrimmon explain, in light of the majority's decision in *M (A) v Ryan*, a researcher can overcome the negative impact of a disclosure warning by taking certain steps, which are set out below in Part II.[131]

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[127] *Ibid*. See also *National Post*, *supra* note 52 at para 69 (where the Supreme Court stated that absolute guarantees of confidentiality in journalist-source relationships, for which privilege is determined on a case-by-case basis, are impossible).

[128] See *M (A) v Ryan*, *supra* note 63 at paras 19–20; *National Post*, *supra* note 52 at paras 51–53.

[129] Palys and Lowman acknowledge the truth of this statement (Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 199–200, 206). And yet they continue to appeal to the need to satisfy the first Wigmore criterion in support of their "ethics-first" approach (*ibid* at 201–03).

[130] Jackson & MacCrimmon, *supra* note 44 at 80.

[131] *Ibid* at 104–07, citing Paul Jones, *Opinion Prepared for the Canadian Association of University Teachers* (1999) [unpublished] at 7–8.

C. The third strand: Is court-ordered disclosure reasonably foreseeable?

1. Which risks are reasonably foreseeable?

As argued in Part A above, some research data will fail to satisfy all four of the requirements of the Wigmore test. Palys and Lowman do not view this as a problem for their argument, because they believe that the possibility of a court ordering disclosure of research data in Canada is so remote that it cannot be considered "reasonably foreseeable" for the purposes of securing informed consent.[132] While the *TCPS2 2014* stipulates that researchers must warn potential participants of "reasonably foreseeable" disclosure requirements,[133] Palys and Lowman argue that the possibility of a court upholding a subpoena or search warrant for the disclosure of research data falls short of this threshold. In their view, the probability of such an eventuality does not qualify as "reasonably foreseeable."[134] If an event is not reasonably foreseeable, then researchers have no obligation to warn prospective participants about it.

In support of this argument, Palys and Lowman note that, of all the research ever conducted in Canada, only twice has a state body tried to access confidential research data: first from Ogden and then from Bruckert and Parent.[135] The lynchpin in their argument is the utter lack of court-ordered disclosure of confidential research data in Canada.[136] Of those researchers who have received disclosure requests in Canada, *none* have been required to comply with such requests. In both Ogden's case and the case of Professors Bruckert and Parent, the researchers won; the respective tribunals held that the data was privileged, and the researchers were not required to disclose it.[137] For Palys and Lowman, this means that "[t]he odds are probably greater that a research participant will be involved in a road accident on his or her way to an interview appointment."[138] But of course, no researchers include such a warning in their information letters or consent forms.

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132 Jackson & MacCrimmon, *supra* note 44 at 121.

133 *TCPS2 2014*, *supra* note 2 at 28–29, 61–62.

134 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 121.

135 *Ibid* at 242.

136 *Ibid* at 103, 121, 286.

137 *Ibid* at 103; *Parent*, *supra* note 19 at paras 213–16.

138 *Ibid* at 242.

This raises the question: what does it mean for a risk to be "reasonably foreseeable"? The *TCPS2 2014* provides examples of reasonably foreseeable risks, but it does not suggest a test to define the concept.[139] Palys and Lowman's conception of "reasonable foreseeability" is limited insofar as it recognizes only the probability of an event, but not its seriousness.[140] This is an issue in respect to which Jackson and MacCrimmon offer useful guidance as their conception of reasonable foreseeability incorporates both the probability of an event and the seriousness of its consequences.[141] In support of their view, Jackson and MacCrimmon rely on jurisprudence on the doctrine of informed consent in the health care context[142] to flesh out what it means for a risk to be "reasonably foreseeable" in the research context.[143] According to the doctrine of informed consent under Canadian common law, a physician has a duty to disclose all material risks of treatment in order to obtain the patient's informed consent to that treatment.[144] Courts use an

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139 See e.g. *TCPS2 2014*, *supra* note 2 at 61 ("research that involves interviewing high-risk families about intergenerational violence raises a reasonably foreseeable prospect that researchers may acquire information that a child is being abused").

140 Note, however, that Palys and Lowman do give one indication that the seriousness of the consequences informs their conception of a researcher's disclosure obligation: "In research like Ogden's, where the potential harms of disclosure to a participant are substantial, the risk of a court order for disclosure should be raised, along with a statement by the researcher about what he or she will do if that were to occur" (Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 103–04). And yet, in the same paragraph, they seem to suggest that the prospect of a criminal conviction for a crime other than murder would not be substantial enough to warrant warning prospective participants about possible court-ordered disclosure (*ibid* at 103).

141 See Jackson & MacCrimmon, *supra* note 44 at 12–13, 113.

142 For a comprehensive account of the Supreme Court of Canada's jurisprudence on informed consent in the health care context, see Paul McGivern & Natalia Ivolgina, "Legal Liability in Informed Consent Cases: What are the Rules of the Game?" (2013) 7:1 McGill JL & Health 129.

143 Jackson & MacCrimmon, *supra* note 44 at 12–13, 113.

144 Halsbury's Laws of Canada, *Medicine and Health* (Markham, Ont: LexisNexis Canada, 2013) at HMH-72, HMH-73 (2013 Reissue) [Halsbury's, *Medicine and Health*]; *Hopp v Lepp*, [1980] 2 SCR 192 at 195–96, 112 DLR (3d) 67; *Reibl v Hughes*, [1980] 2 SCR 880 at 884, 114 DLR (3d) 1.

objective standard to assess whether a risk is material.[145] They ask whether a reasonable person in the patient's position would want to know about the risk.[146] Material risks include those that are remote but would entail serious consequences, such as death or paralysis.[147] Put another way, even "an 'unusual' or improbable risk should be disclosed if its effects are serious."[148] A reasonable person would want to know about risks involving grave consequences even when the probability of the occurrence of such risks is low.

Employing the concept of material risk in the research context means that a researcher has a duty to warn prospective participants about the kinds of risks that a reasonable person would want to know about when deciding whether to participate in research. If, for example, participation in a particular study involves a risk that police may seize the raw data in order to lay criminal charges against the participant, then the researcher has an obligation to warn about this risk, even if it is remote. Given the grave consequences of a criminal conviction or a finding of civil liability, it is arguable that a reasonable person would want to know about such a risk.[149]

Using the concept of material risk to inform the meaning of reasonable foreseeability in the research context is compelling for at least the following three reasons. First, this approach is consistent with the jurisprudence on a researcher's duty to disclose. Canadian courts have held that a researcher's disclosure obligation, like that of health practitioners, is assessed according to an objective standard.[150] Researchers must disclose all risks that a reasonable person in the prospective participant's position would want to consider. The difference between researchers and health practitioners is that

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145 See *Hopp v Lepp*, *supra* note 144 at 209; *Ciarlariello v Schacter*, [1993] 2 SCR 119 at 133, 100 DLR (4th) 69.

146 See *Hopp v Lepp*, *supra* note 144 at 208; *Ciarlariello v Schacter*, *supra* note 145 at 133; Halsbury's, *Medicine and Health*, *supra* note 144 at HMH-73.

147 See *Hopp v Lepp*, *supra* note 144 at 209; *Reibl v Hughes*, *supra* note 144 at 884–85; Halsbury's, *Medicine and Health*, *supra* note 144 at HMH-73. See also McGivern & Ivolgina, *supra* note 142 at 142.

148 *Rawlings v Lindsay* (1982), 20 CCLT 301 at 306, 13 ACWS (2d) 376 (BCSC), cited in *Bryan v Hicks* (1995), 10 BCLR (3d) 239 at 7, 62 BCAC 109.

149 See Jackson & MacCrimmon, *supra* note 44 at 113.

150 See e.g. *Halushka v University of Saskatchewan* (1965), 53 DLR (2d) 436 at 443, 52 WWR 608 (Sask CA).

the standard of disclosure imposed on researchers is *higher* than the standard imposed on health practitioners:

> In my opinion the duty imposed upon those engaged in medical research … to those who offer themselves as subject for experimentation … is at least as great as, if not greater than, the duty owed by the ordinary physician or surgeon to his patient. There can be no exceptions to the ordinary requirements of disclosure in the case of research as there may well be in ordinary medical practice. The researcher does not have to balance the probable effect of lack of treatment against the risk involved in the treatment itself. The example of risks being properly hidden from a patient when it is important that he should not worry can have no application in the field of research. The subject of medical experimentation is entitled to a full and frank disclosure of all the facts, probabilities and opinions which a reasonable man might be expected to consider before giving his consent.[151]

The Supreme Court of Canada affirmed this passage in *obiter* in *Hopp v Lepp*.[152] The higher disclosure standard for researchers supports the proposition that researchers have an obligation to warn about even low-probability risks that have serious consequences.

Second, the Interagency Advisory Panel on Research Ethics confirms this approach in its 2007 interpretation of the first *Tri-Council Policy Statement*, entitled "Researchers and the Duty to Warn: Limits on the 'Continuum of Confidentiality?"[153] In this interpretation, the Panel endorses an objective standard insofar as it recommends that informed consent should be understood from the perspective of a reasonable prospective participant: what information would a reasonable prospective participant want to know in deciding

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151 *Ibid*.

152 *Hopp v Lepp*, *supra* note 144 at 205–06.

153 Canada, Interagency Advisory Panel on Research Ethics, "Researchers and the Duty to Warn: Limits on the 'Continuum of Confidentiality?'", TCPS Interpretation (Ottawa: PRE, 2007) online: Government of Canada <www.pre.ethics.gc.ca/archives/tcps-eptc/interpretations/docs/Researchers_and_the_Duty_to_Warn-Limits_on_the_Continuum_of_Confidentiality_april_2007.pdf> [Panel on Research Ethics, "Researchers and the Duty to Warn"].

whether to participate in research?[154] The Panel's answer is that a reasonable person would want to know about any limits on the confidentiality of his or her data,[155] such as the possibility of court-ordered disclosure of that data.

Third, this approach upholds one of the foundational values underpinning the *TCPS2 2014*: the principle of respect for persons, which implies respect for autonomy.[156] The principles of respect for human dignity, persons, and autonomy provide the conceptual foundation for informed consent as defined by the *TCPS2 2014*.[157] Warning participants about the possibility of court-ordered disclosure of their data ensures that their consent to participate in research is truly informed. The significance of these principles is not merely theoretical; Steven Picou reports that one of his research participants committed suicide when the Exxon Corporation sought identifiable data Picou had collected for his research about stress levels and social disruption as a result of the Exxon Valdez oil spill in Alaska in 1989.[158] The Exxon Corporation sought to use the data in litigation concerning damages from the oil spill.[159] Participants had been "guaranteed confidentiality";[160] from this it can be inferred that they were not warned about the possibility of court-ordered disclosure of their identifiable data. It is not surprising, then, that Chapter 3 of the *TCPS2 2014* states that to obtain informed consent, a researcher must provide "information indicating who may have a duty to disclose information collected, and to whom such disclosures could be made."[161] Researchers can perhaps most reasonably address this requirement by borrowing the concepts of informed consent and material risk from the health care context and applying them to the research context.

In response to this critique, Palys and Lowman might reply that, even if a court does order disclosure of a participant's data, the possibility of disclo-

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154 *Ibid* at para 30.

155 *Ibid* at para 31.

156 *TCPS2 2014*, *supra* note 2 at 6.

157 *Ibid*, ch 3.

158 J Steven Picou, "Compelled Disclosure of Scholarly Research: Some Comments on 'High Stakes Litigation'" (1996) 59:3 Law & Contemp Probs 149 at 151–52.

159 *Ibid*.

160 *Ibid* at 151.

161 *TCPS2 2014*, *supra* note 2 at 29.

sure still does not constitute a reasonably foreseeable risk, because the researcher can refuse to disclose the data.[162] And, if no disclosure of data will occur, then there is no risk about which participants must be warned. This – the final bulwark of their argument – is the appeal to civil disobedience.[163] The researcher can defy a court order and accept the consequences,[164] which could include incarceration for being held in contempt of court.[165] Palys and Lowman are not the sole defenders of this course of action: it also enjoys the support of the American Sociological Association's Committee on Professional Ethics,[166] among others.[167] Further support for this position, moreover, might arguably be found in a response from the Committee's Chair who explained that an academic is entitled to promise potential research subjects unlimited confidentiality as long as the academic is willing to back up that promise by defying any court order to disclose data and by accepting the consequences of such defiance, including a sentence of jail time.[168]

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162 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 245–46.

163 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 17, 289.

164 *Ibid* at 246.

165 For an earlier articulation of Palys and Lowman's recognition of researchers' willingness to serve jail time in order to protect research confidentiality, see Palys & Lowman, "Defending Research Confidentiality", *supra* note 26 at 272.

166 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 250–51.

167 See e.g. Wolfgang, *supra* note 1 at 353.

168 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 251. But note that the American Sociological Association has also made the following statement: "[I]t is also important that all consent forms and processes, and research protocols be designed and administered to describe clearly the limits on confidentiality so that the subjects fully comprehend these limits in determining their participation" (Panel on Research Ethics, "Researchers and the Duty to Warn", *supra* note 153 at para 32, citing American Sociological Association, "Issues in Confidentiality and Research Data Protections: A Report and Draft Recommendations to NHRPAC Social and Behavioral Sciences Working Group", in National Human Research Protections Advisory Committee, *Recommendations on Confidentiality and Research Data Protections* (Rockville, Maryland: NHRPAC, 2002) at 4).

2. Practical limitations of a civil disobedience ethic

A researcher's ability to resist compelled disclosure is subject to certain practical limitations. Palys and Lowman recommend that researchers personally maintain care and control of their data, in order to prevent the university from turning over the data when requested to do so by state authorities,[169] but police are authorized to use force in executing a search warrant.[170] Unless a researcher intends to return force with force, a mere refusal to turn over data will be futile.[171]

Alternatively, a researcher might plan to destroy the data on learning of a search warrant or on receiving a summons in civil litigation. In such an event, fighting off the police with force would be unnecessary, because the data would cease to exist before a state authority tried to seize it. Of course, researchers would face legal consequences for destroying data in the face of a search warrant or summons,[172] but a researcher acting on an "ethics-first"

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169 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 246, 351.

170 *Savinkoff v Borodula* (1957), 13 DLR (2d) 131 at 138, 120 CCC 165 (BCSC) (officers may use reasonable force and ingenuity in executing a search warrant); *R v Kong Yick* (1918), 25 BCLR 269 at 269–70, 33 CCC 86 (SC) (the power to enter under a warrant includes the power to "[break] open" and "use force", and the inclusion of these words in the warrant are unnecessary). In the Bruckert and Parent case, police seized the transcript of the Magnotta interview from the office of Bruckert and Parent's lawyer (Shuchman, *supra* note 16 at 250).

171 Note that an exception exists when the data has no external existence (for example, in the form of paper or digital recordings), but rather exists solely in the researcher's mind. This may occur, for example, when a researcher has interviewed participants in person but not collected or recorded any identifiable information, such as the participants' names. In this case, a mere refusal to disclose information would be effective, as was the case with Russel Ogden.

172 Such consequences could include being charged with disobeying a court order pursuant to section 127 of the *Criminal Code*, which is punishable by up to two years' imprisonment (RSC 1985, c C-46), or with obstruction of justice pursuant to subsection 139(2) of the *Criminal Code*, which is punishable by up to ten years' imprisonment (*ibid*). Rule 60.11(5) of Ontario's *Rules of Civil Procedure* sets out a wide range of possible consequences for a finding of contempt in the civil context, including imprisonment "for such period and on such terms as are just," paying a fine, paying the legal costs of other parties, or "any other order that the judge considers necessary" (RRO 1990, Reg 194). If the

disposition to civil disobedience might be prepared to accept the consequences, presumably even if it means serving time in jail.[173]

However, this strategy will prove ineffective in many circumstances. Granted, it could succeed in a civil context where the researcher receives a summons instructing him or her to provide documents at an examination for discovery or in court.[174] In this type of situation, the researcher has notice of the disclosure request and thus the opportunity to destroy the data. But that same opportunity will rarely exist in the criminal context. Most search warrants are issued *ex parte*, that is, without notice to the party subject to the search warrant.[175] The rationale for this practice is not difficult to fathom: police will seldom succeed in obtaining criminal evidence if they warn suspected criminals about their search ahead of time. Although a judge issuing a search warrant may, in some circumstances, order that notice be given to the affected party, doing so is generally a matter of the judge's discretion.[176] A judge will decline to make such an order when faced with the risk that the evidence will be "made to disappear."[177] Such a risk would exist when

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researcher is a party to civil litigation, then she or he may also be subject to the consequences associated with spoliation. See Marie-Andrée Vermette, "Spoliation and Sanctions for the Failure to Preserve Relevant Documents in Canada" in Bryan Finlay, Marie-Andrée Vermette & Michael Statham, eds, *Electronic Documents: Records Management, e-Discovery and Trial* (Toronto: Canada Law Book, 2010) (loose-leaf) 5-29.

173 Although researchers in Canada have thus far avoided this fate, researchers in the US have been less fortunate. In 1972, Samuel Popkin was imprisoned for refusing to disclose confidential research data to a grand jury: James D Carroll & Charles R Knerr, "A Report of the APSA Confidentiality in Social Science Research Data Project" (1975) 8:3 PS 258 at 258. Similarly, Rik Scarce spent 159 days in jail for refusing to disclose research data (Rik Scarce, "Scholarly Ethics and Courtroom Antics: Where Researchers Stand in the Eyes of the Law" (1995) 26:1 The American Sociologist 87 at 94–96). Lowman and Palys also draw an analogy between researchers and journalists, and note the willingness of some journalists to serve jail time for the sake of protecting their sources. For example, "American journalist Judith Miller … spent 85 days in jail in 2005 for refusing to name a White House source who leaked the identity of a CIA agent" (Lowman & Palys, "PRE's Advisory Opinion", *supra* note 26 at 121).

174 See e.g. *Rules of Civil Procedure*, *supra* note 172, r 34.10(3), 53.04(1).

175 See *National Post*, *supra* note 52 at para 80.

176 *Ibid* at para 83.

177 *Ibid*.

the subject of the warrant has made prior statements extolling the virtues of defying court orders, especially statements published in a highly public forum such as a book, an academic journal, or a research consent form.

Even when defying a court order is feasible, such a course of action is subject to further limitations. If we use the notion of material risk to understand the concept of informed consent, then researchers are obligated to inform participants that the promise of confidentiality rests on the researchers' willingness to pay the price for defying a court order, such as by serving time in jail.[178] In other words, merely telling prospective participants that their data will remain confidential, even if a state authority seeks disclosure of that data, is not sufficient. A reasonable prospective participant would want to know that the confidentiality of his or her data depends on the researcher's resolve to choose incarceration over compliance with compelled disclosure. Participants are entitled to assess for themselves the likelihood of a researcher actually upholding such a promise.[179]

There may be a certain romantic appeal to the notion of serving jail time for the sake of principle, but the appeal as well as the commitment may vanish when the possibility no longer seems remote. In that event, researchers may find that they are simply not psychologically capable of following through on their promise. Aside from the considerable psychological adjustment required by prison life, there are onerous natural consequences involved in being removed from society. For example, generally speaking, an employer is not required to hold an employee's job while that person serves

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178 See Geoffrey R Stone, "Above the Law: Research Methods, Ethics, and the Law of Privilege", Discussion, (2002) 32:1 Sociol Methodol 19 at 23 (arguing that, in the absence of an unequivocal legal recognition for researcher-participant privilege, it is unethical for researchers to promise absolute confidentiality without informing participants that the researchers will need to break the law in order to uphold that promise).

179 In *Protecting Research Confidentiality*, Palys and Lowman do not state that participants should be warned that the confidentiality of their data may depend on the researcher's willingness to defy a court order and potentially go to jail. They merely advocate that researchers make an unambiguous promise of confidentiality and then keep it (*supra* note 10 at 243). In "Subject to the Law," in contrast, Lowman and Palys argue that there is no deception involved in their approach; stating that participants "should be informed about the nature of the law and the researcher's position regarding it," such that participants can decide whether they trust the researcher to maintain the promise of confidentiality (*supra* note 26 at 387).

out a jail sentence.[180] Serving a prison sentence, then, may require considerable personal sacrifice. If confidentiality depends on whether a researcher has the moral fibre to make this sacrifice, this is a material fact that a prospective participant is entitled to know so that the participant may assess for himself or herself the likelihood that a researcher will follow through on such a promise.

Merely explaining to a potential participant that the confidentiality of their data depends on the willingness of the researcher to go to jail, however, is still not sufficient to uphold the principle of informed consent because a promise to defy a court order, even if made explicit in an information letter, is problematic for an additional reason. As Jackson and MacCrimmon explain, such a promise may be misleading if a participant believes that it carries some legal weight, because courts will not enforce such a promise.[181] If a researcher reneges on his or her promise to defy a court order, participants are left with no legal remedy.[182] Contracts that are contrary to public policy are legally unenforceable,[183] and a contract to commit a criminal offence is a clear example of a contract that is contrary to public policy.[184] As mentioned above, disobeying a court order and obstruction of justice are criminal offences pursuant to sections 127 and 139(2) of the *Criminal Code* respectively.[185] Even if a researcher's refusal to obey a court order does not rise to the level of one of these criminal offences, the researcher's promise would likely still constitute a contract to interfere with the administration of justice, which is another example of a contract that is contrary to pub-

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180 An exception would exist if the employment contract or collective agreement provides otherwise. This, however, is extremely rare. Aside from the fact that most academics do not have enough bargaining power to hold out for a provision stipulating that their salary will be paid while they are incarcerated, very few would think to request such a provision.

181 Jackson & MacCrimmon, *supra* note 44 at 135.

182 *Ibid*.

183 SM Waddams, *The Law of Contracts*, 6th ed (Aurora, Ont: Canada Law Book, 2010) at para 557; see *Continental Bank Leasing v Canada*, [1998] 2 SCR 298 at 342–43, 163 DLR (4th) 385 (courts will not enforce a contract that is contrary to public policy).

184 Waddams, *supra* note 183 at para 565; Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd ed (Markham, Ontario: LexisNexis Canada, 2012) at para 10.15.

185 *Supra* note 172.

lic policy.[186] Thus, in order to fully comply with the principle of informed consent, researchers must tell participants not only that the confidentiality of their data depends on the researchers' willingness to go to jail, but also that, if the researcher reneges on that promise, the participants will have no legal recourse.

In response, Palys and Lowman state:

> [I]t would be a mistake to conceptualize a research-ethics policy purely in legalistic terms, hence our writing this book. The conceptualization of the researcher-participant relationship as a 'contract' may be appropriate for some biomedical research, but it makes much less sense in qualitative field research, particularly that which is community based, where the researcher-participant relationship depends on empathy and trust rather than the legal concept of contract.[187]

Participants involved in criminology research may not view their relationship with researchers as a contractual one. Thus, it may not come as a disappointment to them to learn that they are without legal remedy should researchers renege on their promise to defy a court order. If participants have no expectation of being able to legally enforce the researcher's promise to go to jail, then there is no reason to warn them that such a promise is legally unenforceable. However, the claim that participants have no expectation of being able to legally enforce such a promise is an empirical one, and, as such, is subject to confirmation or refutation. The information letter and the consent form are the best empirical indicators of a participant's expectations regarding the research relationship. To demonstrate that a participant truly does not expect to be able to use legal remedies, the researcher should include such a statement in the information letter/consent form. This brings us back to the proposition that, when an information letter promises that a researcher will defy a court order, it should also explain that if the researcher reneges on this promise, the participant would have no legal recourse. In this way, researchers can provide empirical proof that their participants do not conceive of their relationship as a contractual one.

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[186] GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 368–69; *Flexi-Coil Ltd v Smith-Roles Ltd*, [1981] 1 FC 632 at 636, 50 CPR (2d) 29, aff'd [1982] 1 FC 553, 9 ACWS (2d) 132 (FCA) (a contract which impedes the administration of justice is illegal and void), cited in Fridman at 368–69.

[187] Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 287.

The problem with such a warning is that it is unlikely to achieve the desired effect. Palys and Lowman's purpose in advocating for an unconditional promise of confidentiality is to support valid and reliable research.[188] Their concern is that potential participants will not enroll in research studies if their data is subject to court-ordered disclosure, or, if they do enroll in such studies, their responses will be less than fully forthcoming.[189] Thus, Palys and Lowman urge that participants must be promised absolute confidentiality. But it turns out that, in order to comply with the requirements of informed consent, this so-called promise of absolute confidentiality actually amounts to no more than a promise to defy a court order and go to jail, along with a warning that if the researcher changes his or her mind and discloses the data in order to avoid jail, the participant will have no legal means to enforce the researcher's promise. It is not clear that such a limited promise will encourage potential participants to take part in the research, or that it will enhance the validity and reliability of research results.

3. Civil disobedience: Some philosophical considerations

In practice, adopting an "ethics-first" approach to human participant research would mean privileging the obligation to maintain participant confidentiality over the legal duty to comply with a judicial order for disclosure. Thus, Palys and Lowman characterize their "ethics-first" approach to

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188 Palys & Lowman, "Ethical and Legal Strategies", *supra* note 26 at 74; Palys & Lowman, "Shield Law", *supra* note 26 at 163.

189 Palys & Lowman, "Shield Law", *supra* note 26 at 169. As discussed above, the existing academic literature assessing the effect of promises of confidentiality on the quality of participants' responses does not address the kind of highly sensitive personal information at the center of the Ogden or Bruckert and Parent cases (i.e., assisted suicide or participation in the sex trade). See *supra* note 35. That being said, there is some anecdotal evidence, which has received judicial support, in support of the notion that participants need an unconditional guarantee of confidentiality before they will disclose such highly sensitive information. In *Parent*, Justice Bourque found as fact that the ability of Bruckert and Parent to undertake research on sex work would be jeopardized if confidentiality had not been upheld in that case (*Parent*, *supra* note 19 at para 205). In reaching this conclusion, Justice Bourque accepted Bruckert's evidence that the majority of her participants would not have participated in the research without a "binding promise of confidentiality" and that without a binding promise of confidentiality, at least one participant would be less than forthright when responding to research questions (*ibid* at paras 203–04).

research practice as a "civil disobedience ethic."[190] However, implicit in the "ethics-first" approach are controversial assumptions about the relationship between ethics and the law that remain unexamined in *Protecting Research Confidentiality*.

A useful discussion of principled noncompliance with the law is found in John Rawls' *A Theory of Justice*, where civil disobedience is defined as "a public, nonviolent, conscientious yet political act contrary to the law usually done with the aim of bringing about a change in the law or policies of the government."[191] Rawls acknowledges that his definition owes much to a tradition that goes back to HA Bedau and Martin Luther King.[192] It is a definition that accommodates civil disobedience in political contexts[193] approximating Rawls' "nearly just society" as "one which is well-ordered for the most part but in which some serious violations of justice nevertheless do occur."[194] What would distinguish defensible acts of civil disobedience from contempt for the law are their implicit appeal to a "public conception of justice."[195] In other words, civil disobedience is a kind of political theatre that serves the cause of legal reform by drawing public attention to a palpable injustice in the law, an injustice which will qualify as such by that same public's standards of fairness.

This is why Ronald Dworkin suggests that to engage in genuine civil disobedience is to "accept the fundamental legitimacy of both government and community."[196] But Dworkin offers a broader and more nuanced definition of civil disobedience than that found in Rawls by making room for a distinction between "integrity" and "justice-based" forms. Both are motivated by "convictions of principle";[197] the former is a matter of conflict

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190 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 289.

191 John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) at 364.

192 *Ibid*, n 19.

193 Hugo A Bedau, "On Civil Disobedience" (1961) 58:21 J Philosophy 653 at 661.

194 Rawls, *supra* note 191 at 363.

195 *Ibid* at 365.

196 Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) at 105.

197 *Ibid* at 107.

between the law and one's deeply held personal values, while the latter is a matter of Rawlsian defiance of the law in the interest of a public conception of justice.

Principled noncompliance raises important and vexing questions about when, and to what extent, a civil society should tolerate exceptions to the democratic and constitutional principle of equality before the law. But neither of Dworkin's concepts of principled civil disobedience would be a natural fit for a researcher looking for a principled basis upon which to disobey a judicial order for disclosure. Nowhere do Palys and Lowman suggest that Canadian law pertaining to privilege and the admissibility of evidence is oppressive, unjust, or illegitimate – or indeed that the judicial system is procedurally or structurally flawed in a way that we might reasonably expect its decisions around such issues to be compromised.[198] Thus their conception of ethics-first does not comply with Dworkin's justice-based criteria for defensible civil disobedience. Disclosure of research data would normally be sought in the interest of securing a fair trial, and would therefore be compelled in the interest of justice. In the absence of substantive concerns about the law or its administration, the researcher's decision not to comply would be based on nothing more than a difference of opinion concerning the relative value of the research enterprise versus the interest justice has in determining the truth. As Geoffrey Stone observes, "there is no ethical basis for [civil disobedience] merely because citizens, courts and legislators don't do what scholars think is in their best interests."[199]

If Palys and Lowman's notion of "ethics-first" non-compliance falls short of Dworkin's justice-based civil disobedience, neither does it lend itself to the integrity-based alternative. The values informing "ethics-first," particularly that of participant confidentiality, are part of conventional ethical research standards as codified in the *TCPS2 2014*, a document which the social science and medical research communities in Canada recognize as authoritative. As Palys and Lowman illustrate in their analysis of case law relevant to the protection of confidentiality, courts in Canada and the US

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198 If Palys and Lowman were to take such a position, then before engaging in "civil disobedience," they would be obligated to "make a serious and sustained effort within our political and legal system to educate and persuade voters, courts, and legislators to enact such a privilege as essential to the ability of researchers and universities to fulfill their responsibilities to society" (Stone, *supra* note 178 at 24 [emphasis omitted]).

199 *Ibid* at 2.

have generally been supportive of the values of participant confidentiality, the social utility of research, and the principle of researcher privilege

Palys and Lowman's ethics-first approach to the protection of participant confidentiality, and their characterization of it as a civil disobedience ethic, is based on the assumption that circumstances may arise in which the researcher's ethical duty to the protection of participants should override the legal duty to comply with compelled disclosure. However, the contrast they draw between "ethics-first" and "law-of-the-land" invites the possibility that the duty to obey the law might qualify as an ethical duty as well. In that case it would not be a matter of ethics versus the law, but of competing ethical duties. Some laws compel us to do what would be morally obligatory in their absence: those prohibiting assault, fraud and theft being obvious examples. However, much of the law serves the function of social coordination rather moral sanction. For example, there is no ethical reason why we should drive on the right hand side of the road rather than the left, but the existence of such a rule facilitates the safe flow of traffic. If "justice" is an ethical value, as might reasonably be argued, a subpoena might imply an ethical duty to comply. To summarize, it is not clear that the "ethics-first" approach provides ethically principled justification for "civil disobedience" in the face of a judicial order for disclosure.

II. Implications for Researchers and Research Ethics Boards

Researchers can promise unconditional confidentiality in good faith only when they can collect research data anonymously. The courts cannot seize what never existed.[200] It is important to distinguish between "anonymous information" as defined by the *TCPS2 2014*, which is information that "never had identifiers associated with it,"[201] and "anonymized information," which is information that included identifiers when obtained, but was later de-identified.[202] Regarding the former, researchers and REBs should con-

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200 Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 285–86. Professors Bruckert and Parent were not in this position, given that their research assistant knew the identity of "Jimmy," nor was Russel Ogden.

201 *TCPS2 2014*, *supra* note 2 at 59 ("[a]nonymous information" exists when "the information never had identifiers associated with it (e.g., anonymous surveys) and the risk of identification of individuals is low or very low").

202 *Ibid* ("[a]nonymized information" exists when "the information is irrevocably stripped of direct identifiers, a code is not kept to allow future re-linkage, and

sider carefully whether the information in question truly never had identifiers associated with it.[203] Regarding the latter, researchers cannot guarantee that identifiable information will be safe from state seizure during the time between collection of data and its anonymization.

A survey conducted online may appear to be an anonymous data collection method, but online sources can be linked to participants through Internet Protocol addresses or by using personal details that may emerge in responses to survey questions. Paper-based surveys avoid this problem but carry their own risks. In *R v National Post*, for example, the Supreme Court of Canada upheld a search warrant authorizing police to seize a confidential document and envelope provided by a source to the National Post. The purpose of seizing the document and envelope was to conduct forensic testing – specifically to identify fingerprints or to extract a DNA sample from potential saliva remnants – in order to identify the author of the document.[204] Admittedly this situation is not likely to arise in a research context. A key factor in the majority's reasons in *R v National Post* for deciding that the document was not privileged was that the document was "the very *actus reus* [or *corpus delicti*] of the alleged crime."[205] One is hard-pressed to imagine how responses to a research survey could become the *actus reus* or *corpus delicti* of a crime.[206] But the example of *National Post* should alert us to the fact that common assumptions about the security of data-gathering methods can be seriously mistaken, particularly in the area of forensic technology. Furthermore, in order to uphold a promise of confidentiality, each member of a research team must be equally committed. This was made clear in *Parent* where the only reason police had an interest in data held by Professors Bruckert and Parent was that their undergraduate research assistant took it upon himself to inform the police about the Jimmy interview.[207]

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risk of re-identification of individuals from remaining indirect identifiers is low or very low").

[203] *Ibid*.

[204] *Supra* note 52 at paras 21, 91.

[205] *Ibid* at para 77, citing *National Post*, ONCA, *supra* note 80 at para 115.

[206] Admittedly, such a situation might occur if a response to the research survey amounts to hate propaganda pursuant to sections 318 or 319 of the *Criminal Code*, *supra* note 172. Note, though, that section 319 contains the additional requirement that the impugned statement occur in a "public place."

[207] *Parent*, *supra* note 19 at para 25.

Some research will not allow anonymous collection of data. As discussed above in Part I.A, we are less sanguine than Palys and Lowman about the prospects for protecting confidentiality through attempts at Wigmorizing it. What might be required to satisfy the fourth Wigmore criterion cannot be anticipated by researchers because it cannot be known in advance what kind of legal exigencies will be weighed against the public interest in fostering human participant research.

We recommend, following Jackson and MacCrimmon, that in order to respect the dignity and autonomy of the participant and to uphold his or her right to give informed consent, researchers should warn participants about the possibility of compelled disclosure whenever this risk is reasonably foreseeable.[208] Making this warning part of the informed consent process could weaken a prospective claim to researcher-participant privilege, but as Jackson and MacCrimmon explain, in light of the majority's decision in *M (A) v Ryan* there are measures a researcher can take to reduce the potentially negative implications of a warning of potential disclosure.[209] First, in the information/consent letter, researchers should document the importance of confidentiality to the participant's decision to participate in the research.[210] This recommendation follows from the majority's conclusion in *M (A) v Ryan* that the plaintiff's request to her psychiatrist that her communications remain confidential served to mitigate the effect of recognizing the possibility of forced disclosure.[211] One way to meet this recommendation is to state in the information/consent letter that the participant would not have agreed to participate in the research without the promise of confidentiality. This brings us to the second step: the researcher and the university should promise to take every legally permissible action to protect the participant's confidentiality.[212] This recommendation follows from the majority's conclusion in *M (A) v Ryan* that the psychiatrist's promise that she would do everything

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208 See Jackson & MacCrimmon, *supra* note 44 at 121 (setting out model language that may be used in information/consent letters). For recommendations pertaining to this issue in the American context, see Carroll & Knerr, *supra* note 173 at 260–61.

209 Jackson & MacCrimmon, *supra* note 44 at 106–07, citing Jones, *supra* note 131 at 7–8.

210 Jackson & MacCrimmon, *supra* note 44 at 106–07.

211 *M (A) v Ryan*, *supra* note 63 at para 24.

212 Jackson & MacCrimmon, *supra* note 44 at 106–07, citing Jones, *supra* note 131 at 7–8.

possible to keep the plaintiff's communications confidential helped to mitigate the warning to the plaintiff about the possibility of forced disclosure.[213]

The promise to do "everything possible" to protect confidentiality needs to be fleshed out if such a promise is to be found to be persuasive by the courts and to respect the principle of informed consent. Researchers should specify the precise steps they will take in the face of compelled disclosure. If researchers are prepared to challenge any search warrant or subpoena, and if the university will financially support such efforts, including any necessary appeals, then the information/consent letter should make this clear.[214] To the extent that researchers and universities are not prepared to make these promises and keep them, the likelihood of satisfying the first Wigmore requirement diminishes. The interpretation issued by the Panel on Research Ethics (PRE) in April 2014 supports this approach. It advises universities to establish policies setting out the steps they will take in response to an attempt to legally compel disclosure of confidential research data. Researchers and their participants need to know what institutional policies support article 5.1 of the *TCPS2 2014*, which states that: "Institutions shall support their researchers in maintaining promises of confidentiality."[215] The PRE's directive goes on to specify that such a policy "should include an explanation of the nature and the scope of the support, a mechanism to determine the level of support in individual cases, the source of funding (e.g., dedicated fund, insurance, agreement with professional association) and any other relevant criteria."[216] Researchers must know this detailed information in advance before communicating it to prospective participants. This information, and its communication in the consent process, would allow researchers to mitigate the potentially negative effects of informing participants about the potential for forced disclosure, thereby allowing them to meet the first Wigmore requirement.

Conclusion

Despite the best efforts of researchers and REBs, it will always be possible for a researcher to find herself in a conflict of duties between protecting

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213 *M (A) v Ryan*, *supra* note 63 at para 24.

214 Jackson & MacCrimmon, *supra* note 44 at 121.

215 *TCPS2 2014*, *supra* note 2 at 60.

216 Panel on Research Ethics, "Privacy and Confidentiality", *supra* note 25, s 2(E).

confidentiality and complying with the law. No research protocol or ethics policy can anticipate all eventualities and thus researchers are not entitled to forgo warning participants of the possibility of compelled disclosure on the assumption that the data will be Wigmorized. Adopting a disposition to disobey a lawful judicial order, however, does not, in our view, constitute an ethically defensible research practice. Therefore, we recommend, *contra* Palys and Lowman, that researchers adopt a kind of "law-of-the-land" approach, insofar as researchers are obligated to warn participants about the possibility of forced disclosure of their sensitive, identifiable data. On the other hand, we agree with Palys and Lowman that striving to satisfy the Wigmore criteria is the best way to protect the confidentiality of research data. A warning about forced disclosure, though, will not necessarily undermine the Wigmorizing of research data.

Palys and Lowman worry that adopting "law-of-the-land" approach might serve to suppress or discourage some kinds of research.[217] However, in order to achieve genuine informed consent, those adopting an "ethics-first" approach are obligated to inform participants of the possibility of compelled disclosure, as well as of the fact that no promise to defy compelled disclosure is legally enforceable.

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[217] Palys & Lowman, *Protecting Research Confidentiality*, *supra* note 10 at 103, 290. For this reason, Palys and Lowman have also advocated that legislatures in Canada should enact research shield legislation, similar to the statutory confidentiality certificates available in the US (*ibid* at 366). While a discussion and analysis of US confidentiality certificates is beyond the scope of this paper, we endorse the call for further investigation and engagement in the issue of enacting similar legislation in Canada, particularly given the uncertainties involved in attempting to Wigmorize research data.