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SOCIAL RESEARCH AND PRIVILEGED DATA

INTRODUCTION

In 1790, the United States became the first nation in modern history to conduct a complete census, a necessity for the new republic that desired to base political power on proportional representation.¹ Thus, "social science data became the ultimate basis of sovereign power in the United States."² From these modest beginnings, the social sciences³ have emerged as a significant contributor to Government's operating needs.

It is generally considered that the "boom" in the utilization of the social sciences came with World War II⁴ and the subsequent cold war syndrome which enveloped the nation.⁵ When the threat of nuclear war began to subside, however, Government turned from international affairs to the urgent problems at home.⁶ The New Frontier of President John F. Kennedy and the Great Society of President Lyndon B. Johnson were manifestations of a different attitude not only toward other potentialities of the social sciences but also toward the definition of the proper scope of Government.⁷ The scope was broadened in response to im-

1. D. PRICE, *GOVERNMENT AND SCIENCE* 5 (1962).

2. *Id.*

3. *Social sciences* are directed toward an understanding of social institutions, groups and individuals as members of the group. These sciences include anthropology, sociology, economics, political science and demography. In addition to these "traditional" social science disciplines, the *behavioral sciences* such as social psychology are included within the term. It appears that *social sciences* and *behavioral sciences* are used interchangeably; however, social science is usually considered to be inclusive of the many group disciplines while behavioral science is exclusive. See STAFF OF HOUSE OF REPRESENTATIVES RESEARCH AND TECHNICAL PROGRAMS SUBCOMM. OF THE COM. ON GOVERNMENT OPERATIONS, 90TH CONG., 1ST SESS., *THE USE OF SOCIAL RESEARCH IN FEDERAL DOMESTIC PROGRAMS*, pt. 1, at 23-25 (Comm. Print 1967) (hereinafter cited as 1967 STAFF STUDY). For a concise analysis and explanation of these disciplines, see Pfaffman, *Behavioral Sciences*, in 1967 STAFF STUDY, pt. 1, at 341.

4. See A. DUPREE, *SCIENCE IN THE FEDERAL GOVERNMENT: A HISTORY OF POLICIES AND ACTIVITIES TO 1940* at 9 (1957); Archibald, *Federal Interest and Investment in Social Science* in 1967 STAFF STUDY, pt. 1, at 319; Crawford & Lyons, *Foreign Area Research: A Background Statement*, in 1967 STAFF STUDY, pt. 1, at 347.

5. Crawford & Lyons, *Foreign Area Research: A Background Statement* in 1967 STAFF STUDY, pt. 1, at 347.

6. The threat of over-population is one such problem. The population expansion rate in the United States is 1.85 percent per year. In thirty years, if this trend continues, the United States will have a population of 385 million to educate, house and keep healthy and law-abiding. See Moore, *Legal Action to Stop Our Population Explosion*, 12 CLEV.-MAR. L. REV. 314 (1963).

7. This is not to say that the proper scope of government prior to this time did not encompass the social sciences. See Alpert, *The Government's Growing Recognition of Social Science* in 1967 STAFF STUDY, pt. 1, at 219-28. It appears, however, that prior to

mediately felt, but only partially understood, pressures of the social ills within the nation. As a result, Government, vis-à-vis its leaders, looked to the social sciences as a means of comprehending the complex social forces which generated internal pressures. A new attitude toward the proper scope of Government brought domestic policy under the influence of scientific pragmatism.

The central domestic issues of our time . . . relate not to basic clashes of philosophy or ideology but to ways and means of reaching common goals—to research for sophisticated solutions to complex and obstinate issues. . . . As every past generation has had to disenthral itself from an inheritance of truisms and stereotypes, so in our time we must move on from the reassuring repetition of stale phrases to a new, difficult, but essential confrontation with reality.⁸

The growth of the social sciences has been overwhelming. One authority has stated that “people will look back on the twentieth century . . . as the century of social science.”⁹ The social sciences’ contributions to both Government and society have been of great importance; however, there is one dramatic conflict within the relation of Government, social sciences and society which mitigates strongly against the effectiveness of that relation. This conflict arises as a result of the confrontation between the individual’s right of privacy in his personal thoughts and actions and the social researcher’s need to inquire and thereby gain knowledge necessary for informed governmental policy.¹⁰ The problem presented by this conflict may be stated more specifically. Social sciences study man. Essential to this study and its possible affect upon policy formulation is research into the various realms of human conduct.¹¹ When that research

the 1960’s and the impact of Sputnik, there was a prevailing attitude that the social scientists were “socialists” and a “propagandist, reformist, evangelical sort of cult.” Alpert, *Congressmen, Social Scientists, and Attitudes Toward Federal Support of Social Science Research*, 23 AM. SOCIOLOGICAL REV. 683 (1958).

8. Address by President John F. Kennedy, Yale Commencement Exercise, June 11, 1962, in 1967 STAFF STUDY, pt. 1, at 171.

9. Bernard Berelson, President of the Population Council in NEWSWEEK, Aug. 15, 1966, at 82.

10. See Shils, *Social Inquiry and the Autonomy of the Individual*, in THE HUMAN MEANING OF THE SOCIAL SCIENCES 114-57 (D. Lerner ed. 1959); Orlans, *Ethical Problems and Values in Anthropological Research* in 1967 STAFF STUDY, pt. 4, at 359; Presidential Panel, *Privacy and Behavioral Research—Preliminary Summary of the Report of the Panel on Privacy and Behavioral Research*, SCIENCE, Feb. 3, 1967, at 535; Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184 (1965); Riecken, *Government—Science Relations: The Physical and Social Sciences Compared*, in 1967 STAFF STUDY, pt. 1, at 357; Westin, *Science, Privacy and Freedom* (pts. 1 & 2) 66 COLUM. L. REV. 1003, 1205 (1966); Wolfensberger, *Ethical Issues in Research with Human Subjects*, SCIENCE, Jan. 6, 1967 at 47.

11. Not all social research is directed at policy formation. Generally speaking,

is directed toward "deviant" behavior, the confidential disclosures of the research subject could be most detrimental to that subject if the research data were easily accessible to outsiders. Presently, the burden of safeguarding the research subject's confidential disclosures belongs to the researcher himself as imposed upon him by his own sense of integrity and ethical standards. The social scientists engaged in research contend that these safeguards are inadequate because they do not completely protect the research subject from the harm which may result where disclosure of data is compelled by subpoena. The ultimate safeguard is dependent upon legal recognition of the confidentiality of research data in the form of a privilege. It is the purpose of this note to examine the plausibility of such a proposal.

GOVERNMENT AND SOCIAL RESEARCH

The continuing crisis of national security requires the most efficient use of the manpower, facilities and resources of the American people.¹² Among these resources are the federal agencies that support social research upon which Government relies heavily and to which millions of dollars are allocated annually.¹³ These agencies are created by statute, by

"[r]esearch is systematic, intensive study directed toward fuller scientific knowledge or understanding the subject studied." 1967 STAFF STUDY, pt. 1, at 24. Research, however, is classified as either basic or applied. It is applied research that is considered to be policy oriented. Pfaffman, *supra* note 3, at 307.

In *basic research* the investigator is concerned primarily with gaining a fuller knowledge or understanding of the subject under study.

In *applied research* the investigator is primarily interested in a *practical use* of the knowledge or understanding for the purpose of meeting a recognized need. 1967 STAFF STUDY, pt. 1, at 25. For the purpose of this note, however, this distinction will be disregarded. The distinction seems neutral because both types of research focus on knowledge whether turned directly or indirectly to national purposes and policy formation.

Research conducted for policy formation is not necessarily "policy science research." *Policy science*, as in the case of *behavioral science*, has a tendency to be exclusive and given a restricted definition. Therefore, policy science is often confused with political science. See Lasswell, *The Policy Orientation*, in *THE POLICY SCIENCES* 4 (D. Lerner ed. 1951). Policy-oriented research may be conducted by any of the social science disciplines—therefore, the more general term social science and social research.

12. Lasswell, *supra* note 11, at 8. Common sense seems to affirm such thinking. A nation cannot flourish if inattentive to critical situations which may cause its society to deteriorate. It is, therefore, in the elementary self-interest of a nation and, vis-à-vis, its leaders to take action that will prevent the disintegration of their society.

13. Accurate statistics for 1969 are unavailable; however, for the sake of comparison, federal expenditures for social research in 1960 totaled 73 million dollars while in fiscal 1967 they totaled 380 million dollars. The expenditures for 1965-67 (estimated) have been analyzed in terms of the specific agencies to which these funds were allocated and the nature of the research each agency and its divisions supports in 1967 STAFF STUDY, pt. 1, at 26-79.

The difficulty of obtaining reliable statistics has been much criticized. The following agencies, however, are considered to be the primary supporters of social science research: National Institute of Mental Health and the Office of Education in the Department of Health, Education and Welfare; the Department of Defense; the Depart-

executive order authorized by statute or by constitutional provisions which define their power and functions.¹⁴ They are the substance of the ignoble bureaucracy which replaced "the old and simple procedure of legislatures and courts."¹⁵

Agencies were created because "practical men were seeking practical answers to immediate questions."¹⁶ Today, while their role has remained constant, the questions have changed. The problems compelling national interest and the solutions thereto involve such diverse and general areas as poverty, crime, education, welfare and housing. The events of this decade, and more recently those chronicled in the Report of the National Advisory Commission on Civil Disorders, have indicated that failure to grapple with these problems will continue to have a devastating affect upon the nation.¹⁷ Responsible government, of necessity, has therefore created new agencies and modified existing agencies to arrive at the "practical answers" to the nation's ills.¹⁸ But the urgency and threat of current problems cannot be confronted on the basis of speculation. The policies that guide government action cannot be based upon armchair theory; they must ultimately be based upon knowledge derived from a proper understanding of the ills and corruptions within the nation.¹⁹ Policy cannot be fabricated upon unsupported theory;²⁰ therefore, contemporary policy formulation is influenced by the scientific method.²¹

ment of Agriculture; the Department of State; the Veterans Administration; and the National Science Foundation. AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, *THE FEDERAL GOVERNMENT IN BEHAVIORAL SCIENCE: FIELDS, METHODS, AND FUNDS* at 20 (1964), in 1967 STAFF STUDY, pt. 1, at 254.

14. See K. DAVIS, *ADMINISTRATIVE LAW* § 1 (1959).

15. *Id.*

16. *Id.*

17. Our nation is moving toward two societies, one black, one white—separate and unequal. . . . Discrimination and segregation have long permeated much of American life; they now threaten the future of every American.

To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values. U.S. RIOT COMMISSION, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 1 (1968).

18. For a concise evaluation of federally financed research on the problems of crime, law enforcement, education, poverty, social aspects of medicine and health, social welfare, urban problems and the agencies involved, see Orlans, *Introduction to 1967 STAFF STUDY*, pt. 2, at 1-23.

19. See generally Millikan, *Inquiry and Policy: The Relation of Knowledge to Action*, in *THE HUMAN MEANING OF THE SOCIAL SCIENCES*, 158-80 (D. Lerner ed. 1959); Goldenweiser, *Translating Facts into Policy*, in 1967 STAFF STUDY, pt. 3, at 348-52; Goodenough, *The Growing Demand for Behavioral Science in Government: Its Implications for Anthropology*, in 1967 STAFF STUDY, pt. 3, at 335-43; Weber, "Objectivity" in *Social Science and Social Policy*, in 1967 STAFF STUDY, pt. 3, at 519-28.

20. For specific examples of the use of social research in policy making, see 1967 STAFF STUDY, pt. 3, 435-519.

21. The formulation and execution of policy usually consists of four steps:

Basic to this method is the research process wherein hard data is collected which will ultimately lead to hypothesis and hopefully sound theory.

Social research is employed because it provides empirical data that these agencies have recognized to be of incomparable assistance in the formation, implementation and evaluation of national policies and programs.²² The reason, as one authority indicates, is that

... we produce a good quantitative picture of what is going on. We can study dispassionately subjects that arouse irrational feelings in others. We make discoveries that shatter social myths and commonly held perceptions.²³

Perhaps Harold Orlans, consultant to a congressional study on the use of social research in federal domestic programs, has best articulated the relationship of social science research and Government.

The present [Congressional] inquiry is conducted out of a . . . conviction that social facts count, that the ideas underlying and synthesizing these facts count, and that both should be made to count more in the affairs of government. The powers of the federal government are too great to be used blindly or carelessly; the problems which the nation faces are too complex to yield to impulse or ignorance. To comprehend adequately and to serve effectively the constantly changing needs of our restless people, our government needs better social and economic knowledge.²⁴

(1) a clarification of goals, (2) an exhaustive evaluation of the situation to be met, (3) the selection of a course of action by weighing the probable consequences of various alternatives, and (4) the determination of optimum means for carrying out the action decided upon.

Rothwell, *Foreword to THE POLICY SCIENCES* at ix (D. Lerner ed. 1951).

22. Orlans, *Introduction to 1967 STAFF STUDY*, pt. 3, at 3.

23. Orville Brim, President of Russell Sage Foundation, in *NEWSWEEK*, Aug. 15, 1966, at 81.

24. Orlans, *Introduction to 1967 STAFF STUDY*, pt. 1, at 2. With respect to the specific problems or issues that confront federal agencies, social research provides the following assistance:

(a) . . . research that illuminates the basic nature of the social problems with which the government must deal; (b) . . . research that provides current information about the social conditions and changes that are the factual basis for policy formation and program guidance; (c) . . . studies designed to evaluate progress and impediments in carrying out government programs and to aid assessment of their success; (d) . . . direct consultation with government agencies with regard to these problems; (e) . . . theories derived from past research which suggests innovative and promising approaches to new and current problems.

Likert, *Responses by Social Scientists to a Subcommittee Inquiry on Federally Financed Social Research*, in *1967 STAFF STUDY*, pt. 3, at 122. This theory, which is typical of fifty-one other responses representing a spectrum of the social science disciplines, is responsive to the following question posed by the subcommittee: "What can your pro-

Government sponsored social research is either intramural or extramural. Intramural research employs social scientists as advisors for special problems or as special personnel to conduct "in-house" operations.²⁵ Extramural research is conducted outside the agency and is usually originated by contract, grant or fellowship.²⁶ Extramural research, with which this note is exclusively concerned, accounts for approximately three-fourths of all federal expenditures for social research.²⁷

A contract arrangement for research originates where the agency is unable to undertake a major research project with its own personnel.²⁸ Grants are similar to contracts because a formal agreement is common to both; however, the project originates with a non-governmental employee or group, usually university-affiliated, that requests funding with the belief that the research proposal is timely and of significant value.²⁹ In his situation, the prospective grantee may not be motivated purely by governmental interests but rather is interested in obtaining capital to finance a project in which he is interested.³⁰ Where the grant is approved, however, it would seem that such approval would rest upon the relevance of the proposed project to the needs of the grantor agency. Regardless of interests and motivation, the research product will ultimately be used for the same purposes:

... to assist the nation—which is a political, social, psychological and economic body—in accommodating new technology; and to help the nation to deal with many serious problems at home and overseas.³¹

SOCIAL RESEARCH AND THE INDIVIDUAL

Social science deals with the study of society through the individuals comprising that society.³² This study oftentimes involves direct inter-

fessional field contribute today, on the basis of present knowledge, in helping the nation to cope with its domestic social problems?"

25. See Beals, *Background Information on Problems of Anthropological Research and Ethics*, in 1967 STAFF STUDY, pt. 4, at 322-23.

26. *Id.* at 323.

27. Reuss, *Foreword* to 1967 STAFF STUDY, pt. 1, at iii.

28. Beals, *supra* note 25, at 323.

29. *Id.*

30. The characteristic procedure of obtaining research funds from the federal government is for the investigator to decide what he wants to do and then to locate a source of funds. The investigator's activities are, of course, influenced by his knowledge of the areas in which research funds are available.

Letter from Stuart W. Cook, Chairman of the American Psychological Association, to the *Valparaiso University Law Review*, Nov. 11, 1969, on file in the Valparaiso University Law Library.

31. Orlans, *Introduction* to 1967 STAFF STUDY, pt. 4, at 3.

32. See Hilgard & Lerner, *The Person: Subject and Object of Science and Policy*, in *THE POLICY SCIENCES* 16 (D. Lerner ed. 1951).

action between the social scientist and the individual in the research process. Here lies "[t]he root of the conflict between the individual's right to privacy and society's right of discovery. . . ."³³

Three traditional methods of research wherein the conflict arises most clearly have been categorized as

first, self descriptions elicited by interview, questionnaires and personality tests; secondly, direct observations and recordings of individual behavior; and thirdly, descriptions of a person by another serving as an informant, or the use of secondary data such as school, hospital, court or office records.³⁴

To minimize the infringement upon an individual's privacy, efforts are made to obtain the individual's consent, to keep the data anonymous and to maintain confidentiality of the data.³⁵

"The essence of the claim to privacy is the choice of the individual as to what he shall disclose or withhold, and when he shall do so."³⁶ When the individual has chosen to permit entry into his private sphere, he has, in effect, consented to surrender his right of privacy. But this may not be construed as an unconditional surrender. The individual has not consented to the subsequent use of his information without qualification.³⁷ Consent is conditional and there is a scope to which it is applicable.³⁸ Therefore, when the respondent is asked to complete a questionnaire or to answer questions for a specific purpose, he has not consented that his information be used for purposes detrimental to his

33. Presidential Panel, *supra* note 10, at 455.

34. Ruebhausen & Brim, *supra* note 10, at 1196.

35. *Id.*

36. *Id.* at 1198.

The right to privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the facts of his personal life. It is a right that is essential to insure dignity and freedom of self-determination.

Presidential Panel, *supra* note 10, at 453.

The claim to private personality is "the demand which the individual may make that his private personal affairs shall not be laid bare to the world." Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 362 (1915).

37. [C]onsent to the revelation of private personality for one purpose, or under one set of circumstances, is not license to publish or use the information so obtained for different purposes or under different conditions. This is especially so when the operative consent is implied or when it would be reasonable to assume that the initial consent would not have been given for the new purpose or the different situation. Further, varying degrees of consent must be recognized. Consent, however given, may be restricted in numerous ways—as to the methods to be used, the risks to be taken, the degree of information the subject wishes to receive or give, the type of data to be obtained, or the uses to which it may be put.

Ruebhausen & Brim, *supra* note 10, at 1199.

38. See W. PROSSER, TORTS § 18 (1964).

well-being. Mere introspection indicates that meaningful rapport within the relationship cannot be attained unless it is understood that consent is qualified. The same would be true for research directed at illegal participation in a riot,³⁹ the probability of hard drug use among marijuana users⁴⁰ and motivation towards prostitution⁴¹ and homosexuality.⁴² In such studies, it would appear that cooperation could only be expected on the potential respondent's own terms—privacy will be surrendered only upon an assurance of confidential treatment by the researcher. The *quid pro quo* has been described as:

Social scientists, whose disinterested quest for knowledge certainly must be acknowledged, may claim the privilege of permitted entry into the private sphere. Privacy, like freedom, can be restricted for good reason, but it is essential in our outlook that the diminution should be voluntary and retractable. Just as a free man has not the right to sell himself into slavery or to establish an irremovable dictatorship, so the particular privacy which an individual suspends by making particular disclosures to another (in this case the interviewer) must be *reinstated* by the treatment which the disclosed private information receives. The particular confidences must be respected; they must not be transmitted in their particular form to anyone else; they may be introduced into the public sphere only by generalization and anonymity. This protection is provided when there is no disclosure of its particular private contents to anyone else, i.e., as long as personal identities are completely and securely obliterated.⁴³

Anonymity is perhaps the most fundamental means of reinstating

39. See generally Sears & McConahay, *Participation in the L.A. Riot*, 17 SOCIAL PROBLEMS 3 (1969). This article was the result of survey data gathered in the Los Angeles ghettos and was funded by the Office of Economic Opportunity.

40. See generally Goode, *Multiple Drug Use Among Marijuana Smokers*, 17 SOCIAL PROBLEMS 49 (1969). The author interviewed 200 marijuana users in order to determine if there was a causal connection between the use of marijuana and stronger drugs like heroin. The author admitted that finding interviewees for a study of an illegal activity was difficult because of fear of detection by law-enforcement agencies; however, even if the interviewee did submit, he was evasive or dishonest. This study was funded by the National Institute of Mental Health.

41. See generally Bryan, *Apprenticeships in Prostitution*, 12 SOCIAL PROBLEMS 287 (1964).

42. See generally Ward & Kassebaum, *Homosexuality: A Mode of Adaptation in a Prison for Women*, 12 SOCIAL PROBLEMS 206 (1964). This study was supported by the National Institute of Mental Health. Its purpose was to acquire research information through interview and questionnaires of prison inmates which would reflect the reasons for the extreme amount of homosexuality in penal institutions for women.

43. Shils, *supra* note 10, at 126.

the individual's privacy.⁴⁴ It is convenient, as well as expedient, to design the research program so that the particular response of an individual cannot be identified to him. Accordingly, anonymity is achieved by eliminating names and name blanks on questionnaires, reports and evaluations. Such a research program can be very effective in nullifying the threat that data might pose to the individual. While in some instances the researcher might be able to match particular communications with an individual, the fallibility of human memory is an additional, effective safeguard.⁴⁵

Non-identifiable data, however, is not possible in all research programs. The longitudinal research programs of various groups within society have "become an increasingly important part of the total social science effort."⁴⁶ A longitudinal research study measures the growth and change of an individual over a specified period of time. A specific example of this is the American Council on Education Study on Campus Unrest.⁴⁷ The study was conducted by gathering data at various intervals during and subsequent to the subject's college career.⁴⁸ Because follow-ups were necessary, it was essential that identifying data accompany the factual data.⁴⁹ Therefore, since this type of research will not permit anonymity, it can no longer be asserted that "the invasion of privacy . . . may well be regarded as de minimis."⁵⁰ *A fortiori*, it follows that where anonymity is not possible, confidentiality arises more saliently as the principal means of reinstating the conditionally surrendered privacy.

The basic factor which the researcher must consider in maintaining confidentiality is control.⁵¹ Where there is no control in the use and accessibility of the data, there can be no confidential treatment of the privacy-related data; confidentiality implies inaccessibility of data for

44. See Ruebhausen & Brim, *supra* note 10, at 1205.

45. *Id.* at 1206.

46. Boruch, *Educational Research and the Confidentiality of Data*, 4 A.C.E. RESEARCH REP. 11 (1969).

47. See Walsh, *A.C.E. Study on Campus Unrest: Questions for Behavioral Scientists*, SCIENCE, July 11, 1969, at 157.

48. *Id.*

49. *Id.*

50. Ruebhausen & Brim, *supra* note 10, at 1200.

51. Control may be accomplished by coding data and making the code available to responsible officials. A locked file is also a means of control. A more radical means of control is destruction of all potentially harmful data. *Id.* at 1206.

Control techniques have become very elaborate because of the ingenuity of computer science. The A.C.E. Study on Campus Unrest has employed a controlled data access system to record the statistical and identifying data gathered in their study. This code linkage system between the two data banks will provide an intelligence system only by linking the two systems together. Other methods are also available such as innoculating data files with randomized error whose properties are known but which make the data, even when linked, unreliable. See Boruch, *supra* note 46, at 18-33.

purposes other than those to which the respondent has consented.⁵² If the researcher should permit access without compulsion, his respondent's right of confidentiality has been violated. The violation, however, does not occur directly as a result of the research process; to the contrary, it results from the researcher's voluntary actions in failing to maintain proper control over confidentiality. Therefore, the ultimate safeguard against a voluntary breach of the respondent's privacy lies in the integrity of those in control of the confidential data—the researchers, their professions and those agencies supporting the research project.⁵³

Research study teams have drafted guidelines to protect confidentiality. Illustrative of such efforts are the following pertinent sections of the American Council on Education Study on Campus Unrest Guidelines:

1. The complete confidentiality of all data gathered in this study will be maintained, including the confidentiality of the names of all specific respondents, of all persons named by specific respondents, and of all institutions and groups involved or named in the study.

....

5. Henceforth, all investigators, data collectors, field investigators and other researchers involved in this study . . . will explicitly undertake to protect all confidential information, whether recorded or not, that is revealed to them. They will specifically agree to refuse to divulge confidential information to any person or group, including investigative agencies, committees, and courts of law, and even if their records are subpoenaed.

....

8. Certain aspects of this study should obviously not be confidential. These include the over-all research design, all research instruments, and the general findings of the study.⁵⁴

52. See note 44 *supra* and accompanying text.

53. The problem of determining who should be responsible for maintaining high ethical standards in a research program has caused no little controversy. The following question was posed to 53 social scientists:

What do you believe is the responsibility of federal officials, professional associations, and research institutions, respectively, to ensure that ethical standards are maintained in the conduct of social research?

Question No. 16, Inquiry on Federally Sponsored Social Research, in 1967 STAFF STUDY, pt. 3, at 7. The responses were varied with the majority determining that the responsibility lay with the individual investigator. The various responses are recorded in 1967 STAFF STUDY, pt. 3, at 8-214.

54. Advisory Committee A.C.E. Study on Campus Unrest, *Statement on Confidentiality, Use of Results, and Independence*, SCIENCE, July 11, 1969, at 158-59.

In some instances, social science professions have adopted ethical codes in an attempt to control the conduct within a research project.⁵⁵ These codes are valuable because they instill an awareness of the sensitive problems and issues which arise in the research process.⁵⁶ These codes, however, are gratuitous at best because they are upheld when convenient and ignored when inconvenient or burdensome.⁵⁷ Only one professional standard has been adopted that contains self-enforcing provisions capable of effectively controlling research.⁵⁸ Enforceability depends upon the profession's ability to impose sanctions upon its members. The typical sanction is disbarment; however, where a license is unnecessary, the sanction becomes meaningless.⁵⁹ Because social science professions have failed to adopt formal codes of ethics or the means to enforce them where they do exist, the profession's ability to preserve confidentiality may be considered minimal.

Aside from the individual research teams and their respective professions, the Government and its agencies have taken an interest in the responsibility for confidential treatment of research data. This interest is exemplified by congressional hearings⁶⁰ and agency regulations imposed upon research teams.⁶¹ Thus, by executive order, the Department of State has been required to review and approve all federally funded research projects in foreign countries.⁶² Similarly, the Surgeon General has ordered the denial of research grant applications unless proper safeguards are provided to insure confidentiality.⁶³ Simply stated, the order requires

55. The society for Applied Anthropology, The American Psychological Association and The American Association of University Professors have adopted codes covering ethical research standards. See 1967 STAFF STUDY, pt. 4, at 298-312.

56. Presidential Panel, *supra* note 10, at 456-57.

57. Boruch, *supra* note 46, at 37.

58. See *Ethical Standards of Psychologists*, 18 AM. PSYCHOLOGIST 56 (1963).

59. See Orlans, *Introduction to 1967 STAFF STUDY*, pt. 4, at 14-15. This writer doubts the sincerity of the social science professions in enacting ethical codes.

Part of the problem . . . is that many scholars in these fields are by no means persuaded that they are, or ought to be, a profession in any meaningful sense—for instance, in the sense that would ultimately require legal certification to practice, codes of professional conduct, and means of enforcing them.

Id. at 14.

60. See *Hearings on Psychological Tests and Constitutional Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); *Special Inquiry on Invasion of Privacy Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 1st Sess. (1966); *The Computer and Invasion of Privacy Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 1st Sess. (1966).

61. See notes 62-69 *infra* and accompanying text.

62. Riecken, *supra* note 10, at 364-65.

63. Memorandum from Surgeon General to the Heads of Institutions Conducting Research with Public Health Service Grants, Feb. 8, 1966, in 1967 STAFF STUDY, pt. 4, at 223-24. The order states in relevant part:

No new, renewal, or continuation research or research training grant in support

the researcher to stipulate in his application that the proposed project will proceed only with the consent of the subjects and that confidentiality will be maintained.⁶⁴ The enforcement of these two conditions is left to a peer group at the grantee's institution (usually faculty members from a variety of disciplines) that is charged with reviewing the research procedures and assuring the Public Health Service that all conditions will be satisfied.⁶⁵

Another example of government control of research is the requirement of the Office of Education that all questionnaires be submitted to the Bureau of Research for clearance before the project is initiated.⁶⁶ All projects involving data-gathering instruments require submission of a statement giving "provisions for anonymity and confidentiality of response. . . ."⁶⁷ The rationale for government intervention has been stated as:

[Leaving] the decision entirely to the individual researcher himself, or to a group of his colleagues, would seem to us to violate seriously what some political scientists term *the principle of shared or countervailing force*. The researcher and his colleagues represent a party at interest—the scientific party: and there is good reason to believe that any party-at-interest is likely, more often than not, to give himself the benefit of the doubt. Whether he does or not, the public generally *thinks* or

of clinical research and investigation involving human beings shall be awarded by the Public Health Service unless the grantee institution will provide prior review of the judgment of the principal investigator or program director by a committee of his institutional associates. This review should assure an independent determination: (1) of the rights and welfare of the individual or individuals involved, (2) of the appropriateness of the methods used to secure informed consent, and (3) of the risks and potential medical benefits of the investigation.

64. *Id.*

65. *Id.*

66. Office of Education, SUPPORT FOR RESEARCH AND RELATED ACTIVITIES 14 (1967), in 1967 STAFF STUDY, pt. 4, at 196.

67. *Id.* A few of the criteria which the questionnaires must satisfy for clearance are:

1. Does the item deal with an area which—either through custom or through Constitutional or statutory protection—is generally regarded as highly personal or optionally private?
2. Does the item call for self-incriminating or self-demeaning admission or confession?
3. Does the item request highly personal or confidential information about someone other than the respondent himself?
4. Does the item enter a domain which is politically sensitive from the viewpoint of the individuals who may be affected?

Address by Herbert S. Conrad to The National Council on Measurement in Education Symposium on Invasion of Privacy in Research and Testing, Oct. 28, 1966, in 1967 STAFF STUDY, pt. 4, at 201.

suspects that he does. And in our democracy, both theoretically and pragmatically, the views of the public must be recognized as of paramount importance.

. . . [T]he role of government . . . is to serve as an honest broker between the scientist who presses for scientific freedom, and the public which, generally speaking, places considerably greater emphasis on the value of personal privacy.⁶⁸

Confidentiality is properly emphasized as the primary means of minimizing the privacy-probing of the research process. If, as one author suggests, a "law of confidence"⁶⁹ does exist, that law, as it applies to the research process, means that where personal information is disclosed for research purposes, an implied or express bond of confidence arises between the researcher (including those he represents) and his subject that the information will not be used in a manner contrary to the subject's wishes. Agency regulations and professional ethics support this "law" to the extent of prohibiting voluntary loss of control over research data.

Where the researcher is compelled to make disclosure by subpoena, however, control is lost and confidentiality destroyed. In this instance, the individual's right of privacy is not violated by the research process or the researcher; to the contrary, the offender is the authority with subpoena powers. The threat of a subpoena to the control of confidential data has prompted some social researchers to seek "the prompt passage of legislation that will grant privilege status to communications between respondents and legitimate scientific investigators."⁷⁰ Only a privilege will provide the control necessary to the preservation of confidentiality.

THE WOODLAWN ORGANIZATION STUDY

In 1960, The Woodlawn Organization (T.W.O.), with the support of Office of Economic Opportunity (O.E.O.) funds, initiated a manpower training program involving teenage gangs on Chicago's South Side.⁷¹

A well-known sector of Chicago's black ghetto, Woodlawn is afflicted with poor housing and health, and a high crime and unemployment rate, particularly among young males. In the

68. Address by Herbert S. Conrad to The National Council on Measurement in Education Symposium on Invasion of Privacy in Research and Testing, Oct. 28, 1966, in 1967 STAFF STUDY, pt. 4, at 203.

69. Jacob, *Privacy and the Law*, 2 LAW & COMPUTER TECHNOLOGY 22 (1969).

70. Advisory Committee A.C.E. Study of Campus Unrest, *Statement on Confidentiality, Use of Results, and Independence*, SCIENCE, July 11, 1969, at 159.

71. Walsh, *News and Comments*, SCIENCE, Sept. 19, 1969, at 1244.

early and middle 1960's, the area was troubled with street gangs, notably the two strongest rival groups, the Blackstone Rangers and Devil's Disciples. For The Woodlawn Organization, it was natural to view a federal manpower training project for gang youth as a way to meet both unemployment and crime problems. What distinguished this Woodlawn project was that it was the first major attempt in a federally financed program to use the gang structure.⁷²

In April of 1967, Professor Irving A. Spergel of the School of Social Service Administration at the University of Chicago was requested by the O.E.O. to conduct an evaluation study of the project.⁷³ The study was implemented by various research methods including questionnaires of gang members and narrative reports by observers at the four training centers.⁷⁴ The questionnaires were not anonymous and the narrative reports made reference by name to individuals observed in the training centers by members of the study team.⁷⁵ The questionnaires revealed "significant information on individuals; and the study team had pledged that the research materials would be kept in strict confidence."⁷⁶

In spite of the confidential nature of the data, a Senate investigation subcommittee headed by Senator John L. McClellan issued two subpoenas, "the first demanding access to data gathered during a 5-week period at the two Ranger centers and the second implementing an interest in all information . . . compiled."⁷⁷ The reason given for the subpoenas was to examine the "financial workings of the project."⁷⁸ Professor Spergel, the grantee, was concerned with the actual motive for the committee's interest in the research data; however, the investigator was given access to the data under a verbal assurance of confidentiality.⁷⁹ It was subsequently discovered that the pledge had been broken when the investigator returned some of the materials which he had "inadvertently" mixed with his own papers before returning to Washington.⁸⁰ Thereafter, a newspaper account of the Senate investigation contained materials taken from the study data.⁸¹ The study was terminated almost im-

72. *Id.*

73. *Id.*

74. Interview with Irving A. Spergel, Professor in the School of Social Service Administration at the University of Chicago and Director of T.W.O. Evaluation Study, in Chicago, Nov. 10, 1969.

75. *Id.*

76. Walsh, *supra* note 71, at 1244.

77. *Id.*

78. *Id.*

79. *Id.* at 1245.

80. *Id.*

81. *Id.*

mediately.⁸² An ensuing evaluation report included the following comment :

The hazards of evaluation research have been multiplied and serious questions must be raised as to whether adequate research can be performed under conditions of great organizational hostility, high level politics, and continued threat of action project termination.⁸³

THE DOCTRINE OF PRIVILEGE

The outcome of The Woodlawn Organization Study indicates that the researcher's assurances of confidentiality and his *de facto* codes and guidelines are quite meaningless when not recognized by law. Such recognition lies in a privilege that would shield research data from disclosure in a judicial or legislative proceeding.

A privilege may be created either by statute or judicial fiat.⁸⁴ The latter, however, is an unlikely avenue to attain recognition of privileged status. While there have been exceptions,⁸⁵ the attitude of the courts is that a privilege should be avoided when there is no Common Law or statutory authority because it frustrates the general rule that every person is liable to provide all relevant information in his possession upon subpoena by any authorized investigative body.

The day of new judge-made privilege is apparently over. Prevailing judicial sentiment, as expressed in the reported cases and buttressed by the support of commentators and the organized bar, is that privileged communications, being generally in derogation of the common law, are not recognized unless expressly established by law.⁸⁶

At Common Law and by legislative decree, the doctrine of privilege has fared better. The Common Law extended privileged status to the attorney-client relationship as a "natural exception to the then novel right

82. *Id.*

83. *Id.* The "action project termination" induced by the compulsory disclosure is a good illustration of the legal fact that not all confidential material between two persons will necessarily be confidential to a third party. See *Communist Party v. Subversive Act. Con. Bd.*, 254 F.2d 314, 321 (D.C. Cir. 1958).

84. See 8 WIGMORE, EVIDENCE § 2286 (3d ed. 1961) (hereinafter cited as WIGMORE).

85. See *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1959) (priest-penitent privilege recognized); *Binder v. Ruvell*, Cir. Docket No. 52 C2535, Cir. Ct. Cook County, Ill. (1952) (psychiatrist-patient privilege recognized); *In re Kryschuk & Zulynick*, 14 D.L.R. 2d 676 (Sask. Magis. Ct. 1958) (social worker-client privilege recognized).

86. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1228, 1229 (1962).

of testimonial compulsion.”⁸⁷ Many other “natural exceptions” have since been created by the various state legislatures. Among these have been the physician-patient,⁸⁸ psychologist-patient,⁸⁹ accountant-client⁹⁰ and journalist-informant⁹¹ privileges. It is apparent that these “professional privileges” reaffirm the obligation of confidentiality expressed in their individual ethical codes.⁹² The privilege does not, however, enable the professional to refuse disclosure; to the contrary, the layman is the holder of the privilege.⁹³ It has therefore been stated that “[t]he policy of privilege is to give the holder a right of privacy.”⁹⁴

A legitimate claim of the right of privacy is not sufficient to merit privileged status.

The theory underlying all professional . . . privileges is that protection from forced disclosure is justified only if the social utility of the professional relationship is so great that it outweighs society's interest in the correct disposal of litigation.⁹⁵

Upon this theory, social research data will not be privileged if disclosure of privacy-related information is essential to the usefulness of a relationship; to the contrary, data will be privileged if society cannot demonstrate a superior “need to know.”

87. 8 WIGMORE § 2290, at 543. Attorneys were the only professional group accorded a privilege by common law; however, an argument may be made that the clergy enjoyed a similar privilege. 8 WIGMORE § 2394. For American statutes embodying the attorney-client privilege, see 8 WIGMORE § 2292. The privilege of clergy are collected and analyzed by Kuhlman, *Communications to Clergymen—When Are They Privileged?*, 2 VAL. U.L. REV. 265 (1968).

88. See 8 WIGMORE § 2380.

89. The statutes are listed in Ruebhausen & Brim, *supra* note 10, at 1206-07. The authors indicate that “[t]his statutory privilege does not . . . seem to extend to psychological research.” *Id.* at 1207.

90. A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 346 (1949).

91. Fourteen states now recognize the journalist-informant privilege. They are collected in D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 324 n.80 (1969).

92. See, e.g., *Ethical Standards of Psychologists*, 18 AM. PSYCHOLOGIST 56 (1963). That a privilege brings the professional's ethics and the law into harmony may be one positive reason for the doctrine of privilege. 8 WIGMORE § 2291 at 553-54.

93. There is one exception. With the journalist-informant privilege, the journalist is the holder of the privilege because he alone is able to protect the identity of his informer. See Note, *The Right of a Newsmen to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 82 (1950).

94. *Symposium—Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1287, 1369 (1969).

[Privileges] are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping.

Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 111 (1956).

95. Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 WASH. U.L.Q. 362, 365.

Guidelines of Privilege

When confronted with the claim of privilege, various courts⁹⁶ and commentators⁹⁷ have determined that Dean Wigmore's four criteria must be satisfied before the claim may be recognized.⁹⁸ While these criteria, if satisfied, do not "create" a privilege, they are persuasive and provide a helpful framework within which a given profession's claim for privileged status can be analyzed and perhaps justified.⁹⁹

"Do the Communications Originate in a Confidence of Secrecy?"¹⁰⁰

Wigmore makes no attempt to define "in a confidence;" however, his analysis of the physician-patient relationship provides some insight into the meaning of the phrase.

In only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense. Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of medicine

96. See, e.g., *Lindsey v. People*, 66 Colo. 343, 19 P. 531 (1919); *State v. Bixby*, 27 Wash. 2d 144, 177 P.2d 689 (1947); *State v. Smythe*, 25 Wash. 2d 16, 169 P.2d 706 (1946).

97. See, e.g., *Slovenko, Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 179 (1960); Note, 4 KAN. L. REV. 597, 598 (1956); Note, 106 U. PA. L. REV. 266, 270 (1957).

98. 8 WIGMORE § 2285 at 527.

99. Where there is no statutory authority for granting a privilege, the claim of privilege has been recognized if the court determines that Wigmore's criteria have been satisfied. In *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1959), Judge Fahy cited Wigmore's four canons governing privileged communications and in his concurring opinion stated that "[w]hen reason and experience call for recognition of a privilege which has the effect of restricting evidence, the dead hand of the common law will not restrain such recognition." *Id.* at 279.

In *In re Kryschuk & Zulynik*, 14 D.L.R. 2d 676 (Sask. Magis. Ct. 1958), Magistrate Wakeling granted a privilege to a social worker-client relation stating that Wigmore's "rules seem to me to be important and apply to this case." *Id.* at 677. The court determined that the work of the Department of Social Welfare would be handicapped if the confidences of the relationship were not privileged. *Id.* The underlying policy appears to have been based on the benefits derived from Department's role in preserving family relations.

100. 8 WIGMORE § 2380(a) at 829. For the purposes of this note, Wigmore's "fundamental conditions" are used as they appear in paraphrase throughout his treatise. These conditions, as they originally appear as formalized rules, are as follows:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (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 WIGMORE § 2285 at 527.

in which the patient himself attempts to preserve any real secrecy. Most of one's ailments are immediately disclosed and discussed. The few that are not openly visible are at least explained to intimates. No statistical reckoning is needed to prove this.¹⁰¹

It appears that the outcome of applying Wigmore's first criteria to a given relationship depends upon the subjective attitude of the respondent. One writer suggests that this attitude might be indicated by whether the respondent *desires* or *is confident of* absolute confidentiality.¹⁰² It would seem to follow that the subjective attitude is largely determined by the nature of the privacy which the research process will disclose. Therefore, if through interviews or questionnaires the respondent is requested to disclose sensitive or even incriminating information, it is likely that such responses would not be given unless the respondent was assured of confidential treatment.¹⁰³ Furthermore, research into controversial or sensitive areas is conducted under verbal assurances of confidentiality.¹⁰⁴ In such instances, the respondent's expectation of confidentiality is no longer subjective because there may be reliance upon an objective statement.

"Is the Inviolability of that Confidence Vital to the Due Attainment of the Purposes of the Relation?"¹⁰⁵

Wigmore's second requisite that confidentiality be essential is also illuminated by his rather caustic appraisal of the physician-patient relationship.

Even where the disclosure to the physician is actually confidential, it would nonetheless be made though no privilege existed. . . . If no difference appears [between those states with a privilege and those without], then this reason for the privilege

101. *Id.* § 2380(a) at 829.

102. Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 WASH. U.L.Q. 362, 384.

103. Therefore, Wigmore states that with the exceptions of venereal disease and criminal abortion there is nothing else that the patient would desire to be kept secret. 8 WIGMORE § 2380(a) at 829.

Consider the following response to a social researcher's inquiry concerning riot information:

I heard a friend of mine say 'Hey! They rioting up on 12th.' I said what are they doing and he said looting. That's all it took to get me out of the house. He said the police was letting them take it; they wasn't stopping it; so I said it was time for me to get some of these diamonds and watches and rings. . . . If I saw something that I could get without getting hurt, I got it.

TRANSACTION, Sept., 1967, at 15.

104. See, e.g., Walsh, *News and Comments*, SCIENCE, Sept. 19, 1969, at 1244.

105. 8 WIGMORE § 2380(a) at 829.

is weakened; for it is undoubted that the rule of privilege is intended not to subserve the party's wish for secrecy as an end in itself but merely to provide secrecy as a means of preserving the relation in question whenever without the guarantee of secrecy the party would probably abstain from fulfilling the requirements of the relation.¹⁰⁶

The test appears to be whether the layman would avail himself of the professional's services without the benefit of absolute confidentiality. Ultimately, this will depend upon the layman's need for creating the relationship and its practical advantage to him. It is likely that in most cases a patient would consult a doctor, a penitent a priest, or a client a lawyer regardless of a privilege *because they need professional assistance*.¹⁰⁷ The social researcher-respondent relationship is unique in this respect. The respondent has no *need* for consulting with the researcher while the researcher must have the assistance of his subject. Indeed, it is difficult to imagine a situation where a respondent or any individual would have some compelling reason for seeking the services of a social researcher. Privacy is too highly valued. If the respondent does submit to the researcher's privacy-probing, he does it not for any personal benefit; rather, he does it gratuitously, asking only that his privacy be reinstated by the researcher's confidential treatment.

"Is the Relation One Which in the Opinion of the Community Ought to be Sedulously Fostered?"¹⁰⁸

This criteria is perhaps the key to understanding the policy behind the privileged status granted to certain professional relationships. Wigmore further paraphrases this requisite in his treatment of the priest-penitent relation by asking "does the . . . relation deserve recognition and countenance?"¹⁰⁹ According to this criteria, the success or failure of establishing or maintaining a privileged status depends upon the importance which the community places on the relation. The test is rather pragmatic and perhaps rightly so. If a privilege is to be granted, the

106. *Id.* at 829-30.

All professional privileges are subject to this weakness save the attorney-client relation because it is universally accepted; therefore, its practical value in a jurisdiction with a privilege cannot be compared with a jurisdiction without a privilege.

107. This generalization is based upon the supposition that in most cases, including the attorney-client relationship, the layman never consciously considers the possible misuse of the information he places in the hands of his confidant. However, where the nature of the information creates apprehension of misuse, a privilege will minimize any attempt to conceal relevant information which may prevent the effectiveness of a socially desirable relationship.

108. 8 WIGMORE § 2285 at 527.

109. *Id.* § 2380(a) at 829.

community should be convinced of its utility.

There are several ways to measure the utility of a relationship. In the context of the social researcher-respondent relation, it might be argued *a fortiori* that the pragmatic value of a certain relationship within society might be commensurate with the funds that society is willing to invest in it. To carry this one step further, if the legislators reflect the will of the people in budgeting and distributing tax revenues, then presumably it is the will of the community that such research be recognized and countenanced.

Medicine, law and religion all have an important role in promoting the welfare of society. Can the same be said of social science?

[T]he nation cannot adequately confront its myriad social problems without a significant increase in social science knowledge. Social conditions are constantly being altered by rapidly developing science and technology, population growth, the hastening deterioration of urban America made more critical everyday by continued outward migration of youth from rural America seeking opportunity in already overburdened cities. We need to learn how and why, for example, discontent and alienation are generated in a society with such a high degree of general affluence and why problems of unemployment and poverty persist despite continually increasing efforts to solve them. Answers to these questions will not come easily but they will come more quickly if support for social science research is sharply increased and if the social sciences are encouraged to probe to the root causes of social problems.¹¹⁰

"Would the Injury to the . . . Relation by Compulsory Disclosure Be Greater Than the Benefit to Justice?"¹¹¹

The fourth criteria requires a value judgment.¹¹² Courts or law-making bodies must decide whether the benefits produced by social research are more valuable than society's interest in the correct disposal of litigation.

If the researcher is compelled to breach his pledge of confidentiality, the relationship with his subject would be destroyed. The element of

110. S. 508, 91st Cong., 1st Sess. (1969), cited in 115 CONG. REC. S701 (daily ed. Jan. 22, 1969) (Remarks of Senator Harris in the introduction of a bill for the creation of a National Foundation for the Social Sciences) (hereinafter cited as N.S.S.F. Bill).

111. 8 WIGMORE § 2396 at 878.

112. The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme.

Judge Learned Hand in *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir. 1937).

trust is nullified and the entire research project may be jeopardized.¹¹³ Furthermore, it is conceivable that the general public, cognizant of the social researcher's inability to maintain confidentiality, might become hostile toward any social study regardless of who causes disclosure of the confidential material.¹¹⁴

A further consideration is that the ever-present threat of compulsory disclosure may have an effect upon the types of studies which social scientists are willing to undertake. A controversial study is more likely to be the target of a subpoena than one concerning the benign areas of human conduct. In studies that are simultaneously investigated by legislative groups, police agencies and courts, vulnerability to compulsory disclosure becomes more acute. The future of research into controversial social phenomena may be jeopardized because of the social scientist's reluctance to undertake such studies.

While controversial research is potentially harmful to the respondent, the researcher himself may also be harmed. The researcher embarking upon a potentially hazardous study must make a conscious decision concerning what action he will take in the event his data is subpoenaed.¹¹⁵ Realizing a moral obligation to protect his subject's confidences, a subpoena presents the researcher with a trilemma: he may refuse to produce his records or testify and thereby subject himself to a contempt citation; he may produce the data and thereby harm his confidant, the study, future studies and possibly his own sense of integrity; or he may falsify or destroy his data and risk subsequent prosecution. None of these alternatives are desirable; however, one study group has selected the first alternative as the best course of action to follow in the

113. See notes 77-83 *supra* and accompanying text.

114. The A.C.E. Study on Campus Unrest was conducted when the McClellan special investigations committee announced "that it would begin subpoenaing data about students for its study of campus violence." Walsh, *A.C.E. Study on Campus Unrest: Questions for Behavioral Scientists*, SCIENCE, July 11, 1969, at 157. At the same time, the Students for a Democratic Society publication, *New Left Notes*, carried an article entitled "There's a Man Going Round Doing Surveys" which warned members and sympathizers not to take part in the study. The result was a lack of cooperation on the part of many elements within the student society whose cooperation was necessary to effective research into campus disturbances. Oberlin and Swarthmore College also refused to participate in the study because of the controversial nature of the study and possible misuse of data. *Id.*

Robert F. Boruch, Research Associate for the American Council on Education, has commented that:

[t]he implied danger of obtaining data which is controversial in any sense, is likely to discourage some researchers from doing timely work. Social science may, in the extreme, become a device for documenting and providing *post hoc* explanations for rather trivial events. . . .

Letter from Robert F. Boruch to the *Valparaiso University Law Review*, Nov. 6, 1969, on file in the Valparaiso University Law Library.

115. Ruebhausen & Brim, *supra* note 10, at 1207.

event of a subpoena :

Convinced that it is the ethical responsibility of the investigator and his advisors to protect the confidentiality of data gathered and the anonymity of all respondents, we advise and counsel all researchers in this study to refuse to release or provide any confidential information, even if directed to do so by a subpoena or other court process from a legislative body or court of law.¹¹⁶

Society's interest in the correct disposal of litigation must be weighed against these facts and speculations concerning the harm that results from forced disclosure. One critic of the professional privilege states that "they do not in any wise aid the ascertainment of truth, but rather they shut out the light."¹¹⁷ The truth that research data might lend to any private or public litigant would seem to consist primarily of the research subject's innocent disclosures of legal misdeeds. The admissibility of such disclosures into evidence is questionable and their confessional value "ought in no system of law to be relied upon as a chief object of truth."¹¹⁸

The real value of confidential research data to law enforcement bodies and officials is the information and "leads" it may provide which they themselves would be unable to obtain without an aggressive investigation. If the raw data of a drug study were produced under subpoena, therefore, the information therein with supplementary investigations might yield enough evidence to indict and perhaps convict certain individuals for using or selling drugs. Admittedly, drug use, gang wars and student riots are tragic and potentially disastrous to society. While society is protected from such conduct by the courts and law enforcement agencies, it is nevertheless arguable that society's interests are best served by using such data for the purpose for which it was obtained—to provide an empirical basis upon which these problems can be more fully appreciated and understood in the hope that out of understanding will come

116. Advisory Committee A.C.E. Study of Campus Unrest, *Statement on Confidentiality, Use of Results and Independence*, SCIENCE, July 11, 1969, at 159.

Ruebhausen and Brim maintain that because of the non-statutory common law privileges and the constitutional privilege against self-incrimination, a statute may not be necessary.

Thus it is conceivable that privilege could be extended by the courts to other situations—perhaps in a persuasive case, where a research scientist was willing to resist a subpoena and risk imprisonment, in order to protect the private research data in his possession.

Ruebhausen & Brim, *supra* note 10, at 1207.

117. McCORMICK, EVIDENCE 152 (1954).

118. 8 WIGMORE § 2396 at 878.

ameliorative action.¹¹⁹

THE EXECUTIVE PRIVILEGE

Another form of privilege may be applicable to social research data when it is generated by a project funded or controlled by a government agency. This privilege is generally categorized under "state and official secrets"¹²⁰ or "executive privilege."¹²¹ The policy underlying this privilege is that

where the government needs information for the conduct of its functions and the persons possessing the information need the encouragement of anonymity in order to be induced to make full disclosure, the protection of a privilege will be accorded.¹²²

This privilege shields the identity of informers supplying the Government with information concerning the commission of crimes.¹²³ Yet, other information is needed by government which does not necessarily involve crime and which is only obtainable from the individual himself.

An attempt to get it by mere compulsion might be tedious and ineffective; and a concession of anonymity in this context would be meaningless. Thus where alternative methods of getting needed information are impracticable enough, it is

119. [T]here is a definite national interest involved in making it possible for scientific investigators to guarantee legally the confidentiality of the information they collect. Research into controversial contemporary social problems, some of which may involve activity currently defined as illegal, is of the utmost importance in understanding these problems, pinpointing their causes, and suggesting the most appropriate avenues for remedying them.

Letter from Kenneth Keniston, Director Behavioral Sciences Study Center, Yale University, to the *Valparaiso University Law Review*, Nov. 3, 1969, on file in Valparaiso University Law Library.

Confronted with the reality of a national drug problem, President Nixon has stated that the solution does not lie in strict law enforcement. "The answer is information. The answer is understanding." N.Y. Times, Dec. 4, 1969, at 31, col. 7.

An argument might be made that the privileged status of social research data will not have an adverse affect upon the administration of justice and the fact-gathering necessary to its procedures. Regardless of any privilege, law enforcement agencies and other interested parties are free to conduct their independent investigations which theoretically could be as effective as the scientist's inquiries. In short, a privilege closes no doors to officials who may wish to gather similar information by their own methods for their own purposes. *But cf.* Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1261 (1962).

120. 8 WIGMORE § 2367 at 745.

121. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949).

122. 8 WIGMORE § 2377 at 780.

123. *Id.*

expedient for government to promise to cloak the information in some special degree of secrecy in exchange for ready and truthful disclosure.¹²⁴

The executive privileges have been created by statutes and regulations.¹²⁵ The following sections of the Selective Service Act are illustrative of such statutes and corresponding regulations.

The Director is authorized to prescribe such rules and regulations as may be necessary to preserve the confidential nature of the individual confidential records. . . .¹²⁶ [N]o officer or employee of the Selective Service System shall produce a registrant's file, or any part thereof, in response to a subpoena or summons of any court without the consent, in writing, of the registrant concerned, or of the Director of Selective Service.¹²⁷

One social science endeavor that has come under the protection of the executive privilege is the national census. The Bureau of Census is an agency within and under the jurisdiction of the Department of Commerce.¹²⁸ The Secretary of Commerce administers the agency and appoints the enumerators who collect statistical data.¹²⁹ These enumerators are required by oath to perform their duties in accordance with the Census Act.¹³⁰ These duties include preserving the confidentiality of all data collected.

In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates.¹³¹

The provisions of section 9(a) of the Census Act prohibit agency personnel from using census information for non-statistical purposes.¹³² Furthermore, publication of census information may not identify a particular establishment or individual.¹³³ A recent amendment precludes any outside intrusion by subpoena upon census data.

124. *Id.* at 781.

125. *Id.* But cf. Note, *Discovery Against Federal Administrative Agencies*, 56 HARV. L. REV. 1125, 1130 (1943).

126. Selective Service Act of 1947 § 7, 50 U.S.C. § 327 (1964).

127. 32 C.F.R. § 1670.17(b) (1969).

128. Census Act of 1954 § 1, 13 U.S.C. § 2 (1964).

129. Census Act of 1954 § 1, 13 U.S.C. §§ 23-24 (1964).

130. See 25 OP. ATT'Y GEN. 228 (1904). The grantee of an agency-sponsored research program is not required to take an oath. He may, however, be required to conduct his research according to the terms dictated by the grant or contract. See notes 60-69 *supra* and accompanying text.

131. Census Act of 1954 § 1, 13 U.S.C. § 8 (1964).

132. Census Act of 1954 § 1, 13 U.S.C. § 9(a) (1964).

133. *Id.*

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.¹³⁴

To insure that the several enumerators (census takers) will discharge their duties in a proper fashion, the enumerator who discloses his confidential data may be subject to a \$1000 fine, two-year imprisonment or both.¹³⁵

The confidentiality provisions of the census law have received a considerable amount of judicial treatment.¹³⁶ One recent case concerning the policy of the census privilege is *Federal Trade Commission v. Dilger*.¹³⁷ In *Dilger*, the Seventh Circuit ruled that the statutory privilege of section 9(a) of the Census Act applied both to census data in the possession of the Bureau and also to "file copies" in the possession of a corporation.¹³⁸ There was some confusion over the issue not only because of the statute's vagueness but also because tax information is shielded against disclosure only when in the possession of the Director of Internal Revenue.¹³⁹ The court relied upon *United States v. Bethlehem Steel Corp.*¹⁴⁰ wherein the court held that it is the *information* furnished to the Census Bureau that is privileged.

One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the government, another

134. Act of Oct. 15, 1962, Pub. L. No. 87-813, 76 STAT. 922, *amending* 13 U.S.C. § 9 (1958) (codified at 13 U.S.C. § 9(a) (1964)).

135. Census Act of 1954 § 1, 13 U.S.C. § 214 (1964).

136. *See, e.g.,* *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958); *Supervisors of Boone County v. Village of Rainbow Gardens*, 14 Ill. App. 2d 504, 153 N.E.2d 16 (1958); *State ex rel. Lytell v. La. State Bd. of Health*, 153 So. 2d 498 (La. App. 1963); *Stahl v. Bd. of Finance of City of Patterson*, 62 N.J. Super. 562, 163 A.2d 396 (1960).

137. 276 F.2d 739 (7th Cir.), *cert. denied*, 364 U.S. 882 (1960).

138. *Id.*

139. *Id.* at 743.

140. 21 F.R.D. 568 (S.D.N.Y. 1958).

purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests. Accordingly, Congress created a privileged status as to the information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse.¹⁴¹

The court concluded that since the FTC could not, under the statute, obtain the original census report in the Bureau's possession, it should not be permitted "to do indirectly that which it cannot do directly."¹⁴²

To hold to the contrary, we believe, would run counter to the Congressional purpose of the Census Act and the assurances given by the Government to the public. These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the

141. *Id.* at 570.

142. 276 F.2d 739, 743 (1960). The same reasoning might be applied to social research data in light of *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* apparently stands for protection of the "individual's" right to privacy from state intrusion, at least within the confines of the marital bedroom. Therefore, it would appear that *Griswold* protects from state inquiry matters which one has a right to keep to himself. In this context, it may be argued that one has a right to keep problems or thoughts within himself as a means of protecting his privacy. However, inherent in any definition of privacy is a "plastic duality; sharing and concealment." Ruebhausen & Brim, *supra* note 10, at 1189. When an individual voluntarily suspends his right of concealment and shares his personality with the researcher, he may be doing so for reasons which may be directly or indirectly therapeutic. Sharing may provide direct therapy through the psychological satisfaction that comes with unburdening oneself of all mental and emotional "hang-ups."

We need to share in order to feel a useful part of the world in which we live; we need to share in order to test what we truly believe, to obtain the feedback from others which will shape our thoughts, support our egos and reduce our anxiety.

Id.

Sharing may also be indirectly therapeutic to an individual for it fulfills the aspiration to contribute knowledge that will aid in improving the society in which the individual lives. The point is that whenever an individual chooses to divulge himself to another person whether he be a priest, a psychotherapist or perhaps a social researcher, there is a degree of therapy which inheres in the discourse. Its therapeutic value, however, arises out of a feeling of corporate privacy created and consecrated by a pledge of confidentiality. The effect is that the scientist or hearer is granted the role of an alter-ego to facilitate the therapy of sharing. The result is a unification of two separate personalities into a corporate sphere of privacy which conceivably may be one of those penumbras formed by emanations from the Bill of Rights and any other rights which the Ninth Amendment might protect. Therefore, for the courts to force the social researcher to divulge his data, when that data could never have been obtained but for the researcher's promise of confidentiality, is an unwarranted invasion of the subject's privacy by a state agency and as such violates the rule in *Griswold*. To allow disclosure of the private matters in court is to allow the state to do indirectly that which it may not do directly, and such procedure violates the due process clause of the Fourteenth Amendment.

Department of Commerce. We do not think that another arm of the Government [the Federal Trade Commission] can be heard to say that such representations may be avoided in this indirect manner. The United States has given its word and should be permitted to keep it.¹⁴³

Shortly after the *Dilger* decision, the same issue was decided differently by the Second Circuit in *St. Regis Paper Co. v. United States*.¹⁴⁴ The Supreme Court granted certiorari¹⁴⁵ and Justice Clark, speaking for the majority, affirmed the *St. Regis* decision, ruling that "the Federal Trade Commission may require a corporation to furnish its file copies of reports made to the Census Bureau."¹⁴⁶ The Court overcame several obstacles in reaching its decision, including the express confidentiality provision printed on the census file copy providing that the report was for census use only and not "for purposes of taxation, investigation or regulation."¹⁴⁷ Furthermore, a presidential proclamation after the enactment of the census statute indicated that no person can be harmed in any way by furnishing the information required. In addition "[t]he census has nothing to do with . . . the enforcement of any national, state or local law or ordinance."

In construing the statute, the Court determined that census information is not clothed with general secrecy.¹⁴⁸ The obligation of secrecy pertains only to officers receiving the information; "literally construed, the restrictions of the statute go no further."¹⁴⁹ The Court took notice of the Solicitor General's argument that free and full disclosure of statistical data "can be accomplished only through the creation of a *confidential relationship* which will extend the privilege to the petitioner and like reporting companies."¹⁵¹ The Court, however, was unable to agree.

Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. That this statute does not do. Congress did not prohibit the use of the reports *per se* but merely restricted their use while in the hands of those persons

143. 276 F.2d 739, 744 (1960).

144. 285 F.2d 607 (1961).

145. 368 U.S. 208 (1961).

146. *Id.*

147. *Id.* at 215.

148. *Id.* at 216. See also proclamation by President Hoover, Nov. 22, 1929, cited in 36 OP. ATT'Y GEN. 366 (1930).

149. 368 U.S. 208, 216-17 (1961).

150. *Id.* at 217.

151. *Id.* at 218 (emphasis added).

receiving them, i.e., the government officials. Indeed, when Congress has intended like reports not to be subject to compulsory process it has said so.¹⁵²

The Court's ruling that census information is not clothed with general secrecy was opposed by the Census Bureau culminating in the amendment to section 9(a).¹⁵³ The legislative history of this particular amendment illustrates the effect of a non-privileged status upon the role of an agency purporting to be "The Fact Finder for the Nation."¹⁵⁴ Luther H. Hodges, then Secretary of Commerce, stated that the *St. Regis* decision "had an extremely adverse effect on Bureau operations"¹⁵⁵ The fact that census data was no longer completely protected from outside intrusion "interposed an impediment in the statistics-gathering process. . . ."¹⁵⁶ Respondents would now have to destroy all such file copies and thus sever "reporting continuity."¹⁵⁷ Many companies lost faith in the promises of the Bureau and the response to surveys deteriorated.¹⁵⁸ Others were reluctant to cooperate in future statistical inquiries.¹⁵⁹ "The lack of confidence and cooperation will reduce the number of voluntary reports and correspondingly will reduce the accuracy of statistics."¹⁶⁰ The net effect of the Court's ruling that the Census Bureau did not control all of its data regardless of its location was considered to harm the Government and the public "without any commensurate value."¹⁶¹

The legislative response to the *St. Regis* decision is indicative of Congress' concern for the privacy of those individuals and establishments that are legally obligated to submit to the enumerator's questions. It also demonstrates concern for the impact that decision might have on the efficiency and effectiveness of future censuses. Social scientists engaged in other types of social research contend that the legislature should respond with similar protection for their data and for the same reasons.¹⁶²

152. *Id.* at 218.

153. See note 134 *supra* and accompanying text.

154. Letter from Luther H. Hodges to President Lyndon B. Johnson, July 24, 1962, cited in 1962 U.S. CODE CONG. AND AD. NEWS 3190.

155. *Id.*

156. *Id.* at 3191.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. The argument for similar privileged status might be stated that just as census information is gathered for purposes of soliciting data for national policy formulation, the social scientist gathers information for the purpose of analyzing grass-root causes of society's ills in order that through understanding may come guidelines for social action. Census taking, as other social research endeavors, involves a certain amount of privacy-

The fact that the census research is protected by privilege and other similar research is not has prompted one writer to comment that "[t]his inconsistency can be considered discriminatory."¹⁶³

Another basic inconsistency exists in the requirements for acquisition of federal grants in social research. In order to obtain these research grants, the various supporting agencies require that certain procedures be followed to protect the rights of the respondents.¹⁶⁴ In other situations, the agency acts as a "broker" between the public and the researcher by screening all objectionable research material before it is used.¹⁶⁵ It is apparent that agencies feel obligated to regulate the research they promote to insure that it will be properly conducted. Confidential treatment of data is required to protect the individual subject's rights. While the researcher must promise confidentiality, however, he, as opposed to the census enumerator, is afforded no authority to enforce his promise. If a public investigatory body succeeds in compelling disclosure, the prescribed requirements of confidentiality are of little value. Compliance on the part of the researcher would amount to a meaningless gesture.

These apparent inconsistencies could be resolved by according privileged status to information acquired by the social scientist. There appears to be two alternative methods by which this might be accomplished. The first alternative would involve an administrative regulation dealing with the confidentiality of research it supports. The second alternative would involve a statutory mandate such as section 9(a) of the Census Act.

Government agencies have a certain amount of authority under the "housekeeping statute"¹⁶⁶ to create regulations to promote the purposes and effectiveness of their programs. Accordingly, the agency administra-

probing and depends upon cooperation of its respondents to be effective. To obtain cooperation, the data is given confidential treatment that is preserved inviolate by granting privileged status to the data; it is recognized that only by preserving the confidentiality of the sources can the sources themselves be preserved. Congress considered it more important to preserve confidentiality of census data than to allow access by subpoena to that information because of a desire to avoid any adversities which might impede the taking of the census. The question now becomes whether census information is more important to the nation than information obtained by research into those social and behavioral problems that threaten the very existence of the nation.

163. Boruch, *supra* note 46, at 37.

164. See note 63 *supra* and accompanying text.

165. See note 67 *supra* and accompanying text.

166. Administrative Procedure Act of 1946 § 3, 5 U.S.C. § 301 (1964).

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Id.

tor may regulate the usage of records and information belonging to that agency.¹⁶⁷ The administrator, in effect, could claim a privilege for agency records if subpoenaed.¹⁶⁸ There are, however, several complications in this approach. Regulations are not necessarily law until a court has decided that they shall be treated as law. Ultimately, the court will determine whether or not the particular information is immune from legal process.¹⁶⁹ Furthermore, the "housekeeping statute" provides that the agency's authority does not include "withholding information from the public or limiting the availability of records to the public."¹⁷⁰ Finally, the statute applies to the records and information in the agency's custody. In the typical research grant, the raw data is in the custody of the grantee institution or research staff. It appears, therefore, that while the raw data is in the custody of the research grantee, the particular supporting agency might find it impossible to challenge a subpoena directed at the data.

The second alternative, a statutory mandate, might be realized in the recently introduced Senate bill entitled "National Foundation for the Social Sciences Act of 1969."¹⁷¹ This bill was introduced to overcome the inadequacies and possible inequities in social science research sponsored by the National Science Foundation (N.S.F.).¹⁷² The N.S.F. is oriented more toward the physical sciences than toward the social sciences; therefore, the bill is aimed at achieving an independent status for the social sciences which will more effectively promote government's interests in these disciplines.¹⁷³ In its present form, the bill does not contain any provision regarding the manner in which research is to be conducted.¹⁷⁴

If the present bill were amended to include confidentiality provisions similar to those in the Census Act, the status accorded census data might be recognized for social research data. Such an amendment could obviate the problems posed by the administrative regulation because the confidentiality would be statutory instead of regulatory and could thereby provide total protection from compulsory disclosure regardless of custody or possession. There are, however, problems inherent in this proposal. This bill does not purport to encompass all social research funded by other

167. *Id.*

168. See 8 WIGMORE § 2378 at 801.

169. See Annot., 32 A.L.R.2d 391 (1953).

170. See note 166 *supra*. Whether this portion of the act effectively prevents the agency head from declaring a privilege is doubtful. See 8 WIGMORE § 2387 at 800-05.

171. N.S.S.F. Bill, *supra* note 110.

172. *Id.* at S701.

173. *Id.*

174. The proposed bill is reported in full in 115 CONG. REC. S702-04 (daily ed. Jan. 22, 1969).

governmental agencies.¹⁷⁵ Therefore, those research projects funded with non-N.S.S.F. funds would not be protected by the proposed law. A further consideration is that the bill was first introduced in 1966.¹⁷⁶ It has since been reintroduced on two different occasions but has not been passed by the Congress.¹⁷⁷

If the N.S.S.F. becomes a reality, it would promote studies susceptible to outside intrusion. Likewise, researchers interested in a controversial area of research, which might also be of interest to official investigatory bodies, could apply to the N.S.S.F. for the necessary funds, knowing that protection would be available under its statutory mandate. The N.S.S.F. might become a haven for innovative research into some of the relevant but controversial American social problems.

CONCLUSION

This note has focused upon two existing avenues wherein an argument may be advanced for extending privileged treatment to data obtained in social research projects. Since there is no statutory or common law authority for granting a professional privilege to the social researcher-subject relationship, it is unlikely that research data would be protected. In an extreme set of circumstances, however, a court might grant a privilege to an obstinate social researcher who refuses to disclose his data or sources on the basis of satisfying Wigmore's criteria rather than force the scientist to breach his promise of confidentiality.

It would seem that the most appropriate and perhaps successful means for acquiring such status may exist in the authority vested by Congress in those agencies that actively promote social research. One such agency, while embryonic in development, is the N.S.S.F. If the N.S.S.F. Bill should be enacted, Congress should consider amending the present bill to include a privilege similar to that presently accorded census information. Such a statute could provide the protection needed by social research.

Other supporting agencies might also extend privileged status through internal regulations. While there would be several obstacles in drafting such a proposal, perhaps the most critical would be articulating who and what is privileged. One possibility might lie in defining the social researcher in terms of his function and nexus with a supporting agency. Therefore, the privilege might be restricted and the holder defined

175. According to the bill, the N.S.S.F. is to serve as a subcontractor for those government agencies which request that research be conducted in a given area or might appreciate such research. See Carter, *Social Sciences: Where Do They Fit in the Politics of Science*, in 1967 STAFF STUDY, pt. 1, at 373.

176. 115 CONG. REC. S699-700 (daily ed. Jan. 22, 1969).

177. *Id.*

as a person engaged in social research projects so nominated and funded by a public agency. Accordingly, any data collected by such a person would fall within the privileged scope. In effect, the agency would have the authority to privilege any information obtained in the course of a government-sponsored research project. The grant or contract would contain the terms under which disclosure may be made. The agency would assume more responsibility for confidentiality and any outside party desiring to compel disclosure would have to deal directly with the agency. Furthermore, because most social research today receives at least part, if not all, of its financial support from the Government, the Government's support and sanction of a project would provide sufficient qualifications to bring the data within the scope of the privilege. Admittedly, this scope would exclude research data supported by private foundations and corporations. These institutions, however, provide a very small amount of the funds utilized in the total social research effort.

The problem of whether the privilege should be extended to social research data and, if so, what form it should take, may admit of no simple solution. It is submitted that research into some of the more perplexing and critical areas of human conduct and expression is too important, and the assurance of confidentiality too critical, to risk jeopardizing the entire study because of the relevance of some data to a judicial or legislative proceeding. It should be noted, however, that the want of privilege has not forced martyrdom upon any social researcher, nor can one rightfully say that law enforcement bodies are flagrantly parasitic, feeding off otherwise inaccessible information. The case has not arisen where such information and the method by which it was initially obtained and subsequently employed has been at issue. Should that case arise, emphasis will undoubtedly be placed upon the incompatible aspects of confidentiality and vulnerability of research data. If and when a researcher is successfully compelled to divulge his confidential data, he has, in effect, been converted into a government informer who, because of his intimacy with the subject, was able to elicit privacy-related information. The social researcher, however, desires to comment, not upon his subjects, but rather upon misconceptions and outdated notions about the way things are. This is his purpose, and if he is successful, he should be allowed to pursue his goals unhindered by the fear that his thoroughness and aggressiveness might subject his data to official scrutiny.