
The Forum

The Subpoena of Ethnographic Data¹

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This essay outlines the author's experience of having his ethnographic data subpoenaed. It outlines the challenges of subpoena's to research, and suggests four solutions: (1) Apply for and utilize the National Institutes of Health certificate of confidentiality by asking health-related questions over the course of one's research; (2) Establish a task force that articulates clear ethical guidelines for ethnographic research, with attention to the conditions wherein ethnographers can break confidentiality (and might also comply with subpoenas). These ethical guidelines should then be made clear to research subjects as a part of informed consent processes; (3) Demand that institutions (institutional review boards) that require confidentiality as a condition of research be required to defend that confidentiality through the office of the general counsel; (4) Socialize the cost of subpoenas, wherein scholars can be part of an insurance pool that will defend them in the event of a subpoena and thereby defend the general enterprise of ethnographic research.

KEYWORDS: confidentiality; ethics; ethnography; IRB; methodology; public sociology.

INTRODUCTION

On Wednesday, October 18, 2017, I was served with a subpoena in the case of *Prout v. St. Paul's School*. This civil litigation was brought by the family of Chessy Prout, a young woman who had accused Owen Labrie of sexually assaulting her in high school. Mr. Labrie faced trial and was acquitted of felony sexual assault but convicted on three misdemeanor counts of statutory rape and using a computer to lure a minor for sex. Ms. Prout, still in her midteens, remained anonymous throughout the trial. Yet as the trial unfolded, she was disturbed by the way the press reported her case, about Mr. Labrie's refusal to acknowledge what happened, and by the response of the school to her incident. St. Paul's was part of Ms. Prout's family—her sister and father were both alumni; three months after the incident with Mr. Labrie, she returned to the school, hopeful to move on with her life and her time at the school. She experienced the silent contempt and expressed hostility of her classmates. Feeling the school was doing little to address the issue, Ms. Prout soon left the school she had once loved, revealed her identity, began speaking out

¹ This essay draws on conversations and e-mail exchanges with Mitch Duneier and Jack Katz. Harel Shapira and Steven Lubet commented on an early draft; I am particularly indebted to Professor Lubet for his perspective as a lawyer. I wish to thank Andrew Celli for his counsel in this matter and David Madigan for his support.

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about her experiences, and wrote a book, *I Have the Right To: A High School Survivor's Story of Sexual Assault, Justice, and Hope*. Her family sued the school over how it handled her experiences in hopes of compelling the school and other schools like it to confront the sexual climates at their institutions and to do better in how they treated survivors of assault.³

Two decades before Ms. Prout attended St. Paul's, I was a student there, graduating in 1996. I also spent 2004–2005 at the school as a researcher, gathering a range of data on the institution, primarily ethnographic. This research was for my dissertation, undertaken in the sociology department at the University of Wisconsin–Madison, and resulted in the book *Privilege: The Making of an Adolescent Elite at St. Paul's School* (Khan 2011). Ms. Prout's encounter with Mr. Labrie happened on May 30, 2014, nearly a decade after I had done my research, and several years after my book had been published. I had no material knowledge of the case, nor did my ethnographic records have any information about it.

Nonetheless, Ms. Prout's family lawyers subpoenaed me to appear for a deposition and produce all documents, information, or objects I possessed about St. Paul's. Responsible attorneys take a broad view of the process of discovery—seeking information that might reasonably lead to admissible evidence. Such a broad approach is required in part because attorneys do not know what kinds of information might be available until they look for and see it; in many instances, people have interests in *not* revealing this information and so subpoenas are required. In my case, the list of materials demanded by the subpoena took up paragraphs upon paragraphs, covering several pages of text. It included not just field notes but also analysis documents, e-mails, paper drafts—in effect, anything I had relating to the school. I do not know why I was subpoenaed, but almost certainly it was because the attorneys for the Prout family wanted to establish a pattern of knowing neglect on the part of the administrators and trustees of St. Paul's School.

Several years before this subpoena, on the advice of a lawyer, I had moved almost all of my field notes out of the country to a property I did not own. The logic was that these notes were potentially valuable to my future writing but contained a lot of material that I may not want to share. If they were not in my possession, not in the country, and not under my control, I was told, I could not be compelled to produce these materials.⁴ Yet I retained some of the notes in my office. More important, the breadth of the subpoena meant my field notes were largely irrelevant. The e-mails, analysis documents, hundreds of paper and chapter drafts and files I held in digital storage contained a wealth of information. More still, even without my notes, I had knowledge that could be extracted in a deposition.

I quickly decided I could not comply with this subpoena and give over these documents for three reasons. First, some contained information that I had assured research subjects would be strictly confidential. While my field notes had been deidentified, my e-mails were not. Nor were other documents that I did not consider

³ I reveal Ms. Prout's name because of her decision to speak openly about her case.

⁴ Subsequent lawyers have suggested this was wise but hardly reliable as protection. Other lawyers have indicated that this strategy did not make much sense to them.

“research” but that I had in my possession (letters from former students, correspondence with teachers who had become friends, photographs, etc.). Further, in the deposition itself, I could be asked what I knew that was not in the documents I produced (or refused to produce). The leeway within depositions is wide, and refusal to answer questions I knew answers to could be considered contempt. In the context of a deposition, the confidentiality of one’s deidentified notes is relatively meaningless. While I certainly do not remember everything that is in my field notes, and I likely do not remember much of it with the same level of accuracy, there is a lot about my research that I recall and could be asked about, independent of what is in my notes, or whether I shared my notes.

The second reason I decided I could not comply with the subpoena is that I am currently engaged in a research project on sexual assault (Hirsch et al. 2018a, 2018b; Khan et al. 2018; Mellins et al. 2017; Wamboldt et al. 2018). I had made assurances to hundreds of students at Columbia University and Barnard College that I would keep their information confidential. I anticipated the effect of my actions upon my current research subjects. I imagined the sobering, chilling, perhaps even angering consequences if they learned that in another research project where I had promised confidentiality I had nonetheless released the information upon subpoena. Complying with a subpoena would have destroyed my relationship with my subjects, and likely, Columbia University, which had commissioned me, as part of a large research team, to do my research. It also would have violated the condition under which the undergraduates at Columbia had consented to be part of my research. In opposing the Prout subpoena I was, in part, acting in a way that was hostile to a sexual assault survivor—refusing to comply with part of her search for justice. However, I was doing so in part to protect other survivors who would not be unreasonable in feeling at risk and their trust violated were I to comply with the subpoena.⁵

Finally, I felt that my response to this subpoena would have implications for other scholars doing ethnographic work; complying would help establish a standard of behavior for future scholars. This was a very public case, covered by major media outlets around the world. To comply would provide future attorneys with evidence that such compliance was an acceptable norm within the ethnographic community.

In the process of making my decision, I contacted three organizations I thought may help me with legal advice (and hopefully represent me). The first was the general counsel of my employer, Columbia University. This office refused to defend me in any way; they reasoned that as my research on St. Paul’s had never

⁵ In personal correspondence Professor Lubet noted that “This is precisely the dilemma posed by assertions of privilege in other contexts.” He brought to my attention the example of Alton Logan, wherein two public defenders protected the confidence of a convicted murderer. This murderer had confided in them about another killing. Keeping this confidence meant that they were, in effect, accepting the continued imprisonment of an innocent man. The lawyers argued that if they had disclosed their client’s confession, they would have destroyed their ability to have candid conversations with future clients. Attorney–client privilege is legally protected in a way that ethnographer confidentiality is not, and this case represents a kind of injustice far beyond my own silence, yet it is instructive for understanding the ethical dilemmas of “privilege.” A description of the case is available online at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3389>. The innocent defendant’s account of this experience is available at <https://www.themarshallproject.org/2017/10/19/i-served-26-years-for-murder-even-though-the-killer-confessed>.

been approved by Columbia—it was done under the institutional review of the University of Wisconsin–Madison—it was not their obligation to provide me with any assistance other than a list of lawyers I could contact and personally retain as counsel.⁶ It was sobering to realize that even as a full professor and chair of my department, I could not expect the general counsel of my institution to protect my research process. My second contact was the general counsel of the University of Wisconsin–Madison, Ray Taffora. He ignored all of my correspondence, never replying to multiple calls and e-mails. I do not know the University of Wisconsin's position as I never spoke with them, but the lack of response made it fairly clear that they saw no obligation to me in this case, even though my research was done under their research protocols. Finally, I contacted Princeton University Press, which had published my book about St. Paul's. The head of the press informed me that I should inform them if their matter went further, so they could tell their general counsel. The implication was clear: that they would tell their counsel if and when they needed to represent their interest. My interest was my own concern.

This left me on my own, in a legal terrain that I had no experience with. I contacted other ethnographers who expressed sympathy and provided advice, but none of whom had experienced a subpoena themselves. Mitch Duneier pointed me to the scholarly literature, which proved enormously helpful, particularly Richard Leo's (1995) reflection upon being subpoenaed for his own dissertation research, as well as his discussion of Rik Scarce's experience with a federal grand jury subpoena. Scarce had been studying animal rights activists; the federal government suspected that some of his subjects had been breaking into labs and destroying property. Scarce's federal case was far different and more consequential than my own. Importantly, he was potentially a material witness to a crime itself insofar as he may have observed the preparation of a crime (the prime suspect had been Scarce's house sitter at the time). It is important to note that no professional privilege—that of lawyers, doctors, clergy, and so forth—applies in circumstances wherein one becomes aware of the planning of a crime (see Lubet 2017:122). Scarce's refusal to comply with the federal government meant that in 1993 he was incarcerated for contempt for five months. His reflection on this experience is necessary reading for anyone thinking through these issues, or even preparing to do ethnographic work (Scarce 1994), as is Lubet's critical legal response. I was facing not the federal government but the counsel for a family in a civil suit. Yet my obligations to past research subjects, current research subjects, the ethnographic community, and my sense of my own ability to ever do ethnographic research again if I released or discussed confidential data meant I knew I had to retain counsel to contest my subpoena. The scholarly literature allowed me to think through matter but provided little guidance for what to do (Traynor 1996).

Columbia's general counsel referred me to a series of firms, and I selected one to work with. All required a \$10,000–\$15,000 retainer. They explained that should the defense of my position be contested by the opposing attorney and require a

⁶ Every attorney I consulted about the case insisted that Columbia's general counsel should not represent me. Instead, their obligation should be to retain counsel on my behalf, counsel that would represent my interests alone. The vice president of my institution was enormously supportive of me, as were my colleagues. The general counsel's office—the office that matters in cases like this—was not.

hearing, we could expect to far exceed these costs; a deposition would be less costly but within the range of the retainer. I am fortunate in that I am a full professor at an institution that has some of the highest salaries within the academy, with a family that could aide if need be, and with a vice president of my institution who understood the necessity of protecting the faculty of the university (even if the general counsel did not). But even as one of the most financially advantaged people within the discipline, the anticipated costs would tax me. For most other researchers, a similar experience would be crippling.

In the Labrie trial, the prosecution argued that a long-running tradition at the school, “the senior salute,” was “the context for this entire event.” This “salute” was one where seniors asked younger girls on dates to “hook up” before they graduated. Mr. Labrie turned this into a competition among his friends, where boys were awarded points for the different kinds of sex they had—with more points for sexual intercourse, or for a “salute” from the relative of someone you’d previously had a relationship with. Mr. Labrie, aged 18, had invited Ms. Prout, aged 15, to a building on campus that was relatively unused on the weekend. They went to a private space on the top floor. On this both agree, but after this point their accounts diverge. Mr. Labrie maintained at trial that the entire encounter was consensual, that he used a condom but that they did not have sex. Ms. Prout went to the school nurse after the encounter for a “morning-after pill”; the nurse asked her if the sex had been consensual and Ms. Prout told her it was. Ms. Prout would soon tell family and friends that Mr. Labrie had raped her. She explained that her response to the nurse and her subsequent friendly text exchanges with Mr. Labrie were largely because she wanted to avoid the whole issue and move on with her life; my own research at Columbia has shown this is typical of those who are assaulted (Khan et al. 2018). In his defense, Mr. Labrie’s attorney used Ms. Prout’s initial report to the nurse as well as friendly text exchanges after the encounter as proof of Mr. Labrie’s innocence. The jury acquitted Mr. Labrie of felony sexual assault but given the presence of his DNA on her clothing and her seeking emergency contraception after, they found him guilty of statutory rape. The “competition” he set up, as well as his using a computer to communicate with Ms. Prout also resulted in his being found guilty of using a computer to lure a minor for sex.

Ms. Prout and her family were outraged by this outcome and felt the school had not done enough to address the tradition of the “senior salute.” They sought, as part of their civil case, evidence that this salute was known to the school for some time and that successive administrations had done nothing about it. In her civil case against the school, Ms. Prout’s attorneys argued that the “senior salute” was “a campus-wide competition that encouraged senior men to commit statutory rape,” which encouraged these men to prey on young girls on campus.

My attorney, Andrew G. Celli Jr. of Emery, Celli, Brinckerhoff, & Abady, proceeded to object to the subpoena in two ways. First, he noted that the information that the opposing attorneys were looking for was all available within the fourth chapter of my book, where I wrote about the sexual culture of the school. I had described events of “ritual sexual abuse” and suggested a toxic sexual culture wherein “Girls were expected to perform sexual acts on boys, encouraged to exploit their own sexuality, present their sexuality as a ‘gift,’ and constantly express

themselves as sexual beings” (Khan 2011:139). This, Celli argued, was all of the evidence I had and, effectively, what opposing counsel required. He also conveyed to the opposing counsel that I had no records of the senior salute in my own data, as the “tradition” was relatively new. I had no recollection of it either as a student. I certainly knew that older boys tended to want to have sex with younger girls, and that this desire increased as their time at the school drew close to an end. But while unpalatable to me (and illegal in terms of a 15-year-old being unable to consent to an 18-year-old), this was hardly unique to the context of St. Paul’s and did not rise to the level of an implicitly sanctioned tradition. My attorney conveyed to opposing counsel that they were unlikely to find what they were looking for.

The second and more important part of the objection rested on a precedent: *Cusumano v. Microsoft Corporation* 62 F.3d (1st Circuit, 1998); Celli cited this case in a written response to the subpoena. In the Microsoft case, Microsoft sought to acquire information from two researchers, Michael Cusumano of MIT Sloan and David Yoffie of Harvard Business School, in order to defend itself in antitrust litigation. The court decided in favor of Cusumano and Yoffie, arguing that “Academics engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists” (p. 708). While hardly an extensive protection (given the limits of the protection of journalists), the court’s logic and decision should nonetheless empower researchers. As the court reasoned,

If their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers. (p. 714)

The court notes, in this decision, that subpoenas to researchers should be rejected as they “would hamstring not only future research efforts” of those of the scholar under subpoena “but also those of other similarly situated scholars. . . . Even more important, compelling the disclosure of such research materials would infringe the free flow of information to the public, thus denigrating a fundamental First Amendment value” (p. 717).

After Celli sent a letter outlining our objection, the opposing counsel dropped the subpoena but retained the right to reactivate it as the case proceeded. I was fortunate; my ethnographic material was not materially essential to the case of the opposing counsel and perhaps even harmful to their arguments. I was also fortunate in being able to retain a powerful law firm

Ms. Prout’s case was

recently settled out of court, ending the matter for me and allowing me to write about it. But it left me with the realization that I may well experience subpoenas for past, current, and future research. The remainder of this essay thinks through the meaning of that possibility and suggests steps scholars and the institutions of our scholarly community might take to protect themselves, their subjects, and the scholarly enterprise more generally.

THE IMPLICATIONS OF SUBPOENAS FOR (ETHNOGRAPHIC) RESEARCH

There are legal, practical, and ethical issues to subpoenas. Presumably, as institutional review boards (IRBs) typically require confidentiality, then there should be *some* legal protections for ethnographic practice (though there might be clearly articulated limits to those protections, understood both by researchers and their subjects). The case law on this matter is weak and relatively old. Much has changed within the courts since the 1998 Microsoft ruling. Other institutions may provide marginal protection; when doing health research, the National Institutes of Health (NIH) can provide a certificate of confidentiality, yet even this federal certificate has rarely been tested in the courts. As such, while I would advise nearly all scholars to ask some health questions regardless of their research topic in order to seek such a certificate from the NIH, it does not seem that this will fully protect researchers.

As a practical matter, there is some research we cannot do without promising confidentiality. For example, since only about 3%–5% of all sexual assaults are officially reported (Mellins et al. 2017), confidentiality is a condition of being able to do empirically rigorous research on sexual assault, as it would be on several other topics (e.g., policing). Some may think that destroying field notes is the obvious solution. Yet this response is extreme, unnecessary, and inconsistent with practices of those who experience subpoenas with far greater regularity. Only a handful of ethnographers are ever subpoenaed; other professionals—lawyers, doctors, and so forth—experience litigation in orders of magnitude greater than scholars and yet scrupulously maintain their notes. Given the rarity of subpoenas, the capacity of others to retain notes, and the time and expense to producing knowledge (and the potential loss of this material), destroying notes is hardly a viable solution. IRBs can require the destruction of notes, though scholars may well want to stop promising to do so, as it seems more of a tradition than a necessity.

Even if notes are destroyed, this is not a satisfactory solution for three reasons. First, the period before one destroys field notes still puts research subjects at risk. Second, field notes are not the only documents scholars use. They construct analysis documents and drafts; they have e-mails and other digital trails of their encounters. Field notes are a relatively small part of the research materials that ethnographers produce (in my own research practice, I would say they make up less than one-fifth of my materials). We would need to destroy not just our notes but also every document or record expect for the final published version of our work. To destroy the documents and records of constructing our knowledge would be fundamentally opposed to a core tenant of the research enterprise. No doubt some of the arguments I make in my work are wrong. When other scholars argue that I am wrong about some claim or argument, it is important for me, and for others, to be able to reevaluate the basis on which my claims are made. As Professor Lubet noted to me in personal correspondence, “Destroying field notes would be an extreme—almost paranoid—precaution against an almost non-existent problem. The cost to research would vastly outweigh the value to the occasional subpoenaed ethnographer.” Finally, depositions can demand answers from ethnographers. The absence of a record is not the absence of knowledge. Such knowledge can be extracted by an

attorney, under penalty of contempt. Dishonesty—"I do not recall"—is an option but not a very good one. No matter how fastidious the scholar is, destruction of material, anonymizing information, and any other range of data protections alone will not protect subjects. There may be good reasons to anonymize field notes and "protect" them, but subpoenas are not the basis of such reasons. Instead, ethnographers must be clear with themselves and their subjects about the conditions under which they will oppose subpoenas, spelling out as precisely as possible the limits to confidentiality.

This raises three questions: (1) Should researchers ever reveal confidential information? (2) To whom are researchers ethically obligated? (3) Should researchers ever comply with subpoenas?

There are conditions where ethnographers should break confidentiality (these are rarely discussed as part of our training or our practice). If, for example, a researcher thinks a research subject is likely to do harm to themselves or to another, they have an ethical obligation to break confidentiality and intervene. Similarly, if one knows about a plan to commit a violent crime, one has an obligation to act. In research on sexual violence, our research team made these conditions clear to subjects. This may have introduced sampling bias into our research, but our ethical obligations (and legal ones) superseded this research cost. As part of our informed consent process, we explicitly outlined the conditions where we would, in fact, break our commitment to confidentiality. But if one admitted to having committed an assault, or to experiencing one but not to have reported to the school or any authorities, we did not report these (unless the abuse of a minor was involved). We asked subjects to affirm that they understood these conditions. Ethnographers have much to learn from interview researchers in this regard. Whereas interviewers have as a standard practice to review the conditions under which they will break confidentiality, ethnographers are comparatively silent on this issue. They should not be.

The challenge is that general categories are often too blunt an analytic instrument on which to base a decision rule. The standard cannot be, for example, that ethnographers report all crimes. That's in part because the category of "crime" is not so easily understood. For example, an ethnographer in the 1970s doing research about sex between men would be obligated to report that under a strict "criminal" standard. Or today, ethnographers could not understand a huge range of objects of interest if they strictly applied the "crime" standard (such as drug sales). The obvious standard is that of imminent interpersonal violence. While we may not be able to fully understand gangs or current serial abusers because of this, we have other instruments (retrospective interviews, administrative data) to get us close enough to such phenomena. The ethical rule would then supersede the loss of knowledge.⁷ As to the obligations of ethnographers, it's most distinctly to individuals and not

⁷ There is a lot of subtlety that I am glossing over. If one discovered, for example, that a research subject was a serial verbal abuser of coworkers, would you be obligated to report this to human resources, under the premise that such abuse constitutes a form of violence? The answer is not clear. Desmond (2016), for example, attempted to report an incident of racial discrimination; such discrimination could be understood as a form of "violence." My position is that rather than generate ad hoc rules, ethnographers should work within their professional organizations to articulate clearer ethical guidelines and codes of conduct. These ethical guidelines should then be conveyed to research subjects as part of informed consent.

institutions. We are obligated not to all individuals but only those to whom we have made commitments of confidentiality (or who are in clearly delineated research spaces that we consider confidential). Further, our obligations to individuals are irrespective of how we feel about such individuals. In my own case, this means keeping confidential information about men who, in my interpretation of their narratives, had committed sexual assault. Researchers must further make a distinction between the confidentiality they wish to keep on a personal basis and that which they are obligated to keep as a researcher. Finally, we should make a distinction between protecting the interests of research subjects and protecting the institutions within which they spend their lives. In the case discussed in this essay, the question is not whether the researcher has an obligation to protect St. Paul's School—I do not—it is the question of the researcher's obligation to subjects within that school. Researchers have ethical obligations to persons and persons in places, not places themselves.

There is the question of whether researchers should ever comply with subpoenas. My strongly held position is that they initially should not, but they should hold out the possibility of compliance. Researchers may not know why they are being subpoenaed (in my own case, the public nature of the civil trial made it obvious) and thereby cannot evaluate whether or not they may want to comply. As ethnographers do not have complete knowledge of the contexts they are embedded within, it is possible that if they had such complete information they would make the ethical decision to break confidentiality. Yet such conditions are relatively extreme and would be revealed over the course of litigation. The default should be to challenge the subpoena and to retain counsel. Interactions between counsel will reveal if the research may, in fact, discern an ethically compelling reason to comply. Such compliance is only ethical if subjects themselves were informed of the likelihood of such a decision.

This raises the practical question as to how researchers can bear the cost of their representation. Subpoenas seem extraordinarily rare (if my own informal asking ethnographers is at all accurate). Yet they are enormously costly. Rare yet costly events are ideal for socialization. In the case of Rik Scarce, friends fund-raised for him, and the American Sociological Association (ASA) wrote an *amicus curiae* brief. This is insufficient. I suggest an alternate strategy: legal expenses insurance.⁸

Scholars can and should put pressure on institutions to support their legal expenses. If IRBs demand confidentiality, then the institutions that impose those demands should be obligated to defend their costs. Yet my own experience suggests a weakness to this position; because I had moved institutions, both offices of the general counsel felt secure in abdicating their responsibility to defend the research practices of their current or former members—even as the lack of such defense would likely make current and future research nearly impossible. Institutional solutions are important, and as a research community we might more actively apply pressure to institutions to protect our interests, but they will likely miss some of the most precarious members of our discipline: those who frequently move institutions, graduate students, those without institutional affiliations, those who are at severely

⁸ Alternatively, the ASA could establish a legal defense fund.

underresourced institutions. Even with institutional policies, they are still likely to remain under- or uncovered, and being low- or underpaid, be the most impacted by the potential costs of legal representation. Professional organizations such as the ASA should therefore advocate on the behalf of sociologists, setting the standard that should confidentiality be demanded as a condition of research, it must be defended by counsel.

Finally, I would suggest that the potential socialization of this cost, organized by a professional organization (this would be an ideal task for the ASA), could help protect our fellow scholars. This would look something like medical insurance, where scholars, through membership, would be provided with some degree of legal counsel in the event of a subpoena. While it would help individual scholars, its impact would likely be to also reduce the likelihood of subpoenas at all. It would establish a vigorous and consistent defense of ethnographic researchers—and better social science research more generally—wherein the likely continued establishment of the precedent of protection of academic work would be maintained.

Practically, I propose four solutions:

- 1 Apply for and utilize the NIH certificate of confidentiality by asking health-related questions over the course of one's research.
- 2 Establish a task force that articulates clear ethical guidelines for ethnographic research, with attention to the conditions wherein ethnographers can break confidentiality (and might also comply with subpoenas). These ethical guidelines should then be made clear to research subjects as a part of informed consent processes.
- 3 Lobby, through organizations such as the ASA, wherein institutions (IRBs) that demand confidentiality as a condition of research be required to defend that confidentiality through the office of the general counsel.
- 4 Socialize the cost of subpoenas, wherein scholars can be part of an insurance pool that will defend them in the event of a subpoena and thereby defend the general enterprise of ethnographic research. In the absence of such insurance, establish a defense fund.

Across all of these I suggest that we maintain four interests. First, the interest in protecting the confidentiality of research subjects. Second, the interest in protecting the researcher herself. Third, the interest of “society” or nonresearch subjects who might be considerably negatively impacted by those subjects. In this case, rather than rely on ad hoc rules for the breaking of confidentiality, researchers should be clear with themselves and their subjects about when they are likely to do so. And finally, the interest in preserving the capacity of other researchers to continue to do this kind of qualitative, ethnographic research. Opposing subpoenas is in the collective interest of knowledge production, and we must find ways to collectively support other scholars as they do so.

REFERENCES

- Cusumano v. Microsoft Corporation 62 F.3d (1st Circuit, 1998).
 Desmond, Matthew. 2016. *Evicted: Poverty and Profit in the American City*. New York: Crown.

- Hirsch, Jennifer S., Shamus R. Khan, Alexander Wamboldt, and Claude A. Mellins. 2018a. "Social Dimensions of Sexual Consent Among College Students: Insights from Ethnographic Research." *Journal of Adolescent Health*. <https://doi.org/10.1016/j.jadohealth.2018.06.011>.
- Hirsch, Jennifer S., Leigh Reardon, Shamus R. Khan, John S. Santelli, Patrick A. Wilson, Louisa Gilbert, Melanie Wall, and Claude A. Mellins. 2018b. "Transforming the Campus Climate: Research on the Social and Cultural Roots of Sexual Assault on a College Campus." *Voices: Journal of the Association for Feminist Anthropology* 13: 1: 23–54. <https://doi.org/10.1111/voic.12003>.
- Khan, Shamus R. 2011. *Privilege: The Making of an Adolescent Elite at St. Paul's School*. Princeton, NJ: Princeton University Press.
- Khan, Shamus R., Jennifer S. Hirsch, Alexander Wamboldt, and Claude A. Mellins. 2018. "I Didn't Want to Be 'That Girl': The Social Risks of Labeling, Telling, and Reporting Sexual Assault." *Sociological Science* 5: 19: 432–460. <https://doi.org/10.15195/v5.a19>.
- Leo, Richard A. 1995. "Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers." *The American Sociologist* 26: 1: 113–134. <https://doi.org/10.1007/BF02692013>.
- Lubet, Steven. 2017. *Interrogating Ethnography: Why Evidence Matters*. New York: Oxford University Press.
- Mellins, C. A., K. Walsh, A. L. Sarvet, M. Wall, L. Gilbert, J. S. Santelli, M. Thompson, P. A. Wilson, S. Khan, S. Benson, and K. Bah. 2017. "Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated With Risk." *PLoS One* 12: 11: e0186471. <https://doi.org/10.1371/journal.pone.0186471>.
- Scarce, Rik. 1994. "Trial (but) Tribulations: When Courts and Ethnography Conflict." *Journal of Contemporary Ethnography* 23: 2: 123–149. <https://doi.org/10.1177/089124194023002001>.
- Traynor, Michael. 1996. "Countering the Excessive Subpoena for Scholarly Research." *Law and Contemporary Problems* 59: 3: 119–148. Retrieved November 17, 2018 (<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1006&context=lcp>).
- Wamboldt, Alexander, Shamus R. Khan, Claude Ann Mellins, and Jennifer S. Hirsch. 2018. "Friends, Strangers, and Bystanders: Informal Practices of Sexual Assault Intervention." *Global Public Health*. <https://doi.org/10.1080/17441692.2018.1472290>.