

Protecting Ethnographic Field Notes

from Legal Discovery

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As anthropologists have shifted their focus toward research in their own culture, they increasingly run the risk of becoming entangled in high stakes litigation. From the perspective of most litigants, an anthropologist is an ideal witness. Typically, she is a skilled and trained interviewer with no stake in the organizations she is researching, thus making her difficult to discredit in court. The fact that she has likely recorded extensive interviews with everyone involved makes her a treasure trove of information. And yet, anthropologists rely heavily on their confidentiality guarantees to subjects when conducting their research. Without such guarantees, many subjects would no doubt refuse to participate in anthropological research, or self-censor their comments to such a degree as to make field work untenable. What then should a dedicated anthropologist do when faced with a subpoena? I propose to answer exactly that question. In this paper, I review the relevant law dealing with discovery of anthropological research data and make several recommendations to anthropologists facing

a hostile discovery process. I then review three cases involving sociological researchers facing similar quandaries. Finally, I comment on the social implications of applying legal discovery techniques designed for the physical sciences to qualitative research.

I begin by considering the relevant law. Under American law, there is no constitutional or common law privilege which can exempt researchers from participating in litigation (Crabb, 1996, p. 19). Moreover, there is “a general duty to testify” (Crabb, 1996, p. 16) governed in Federal Courts by Rule 45 of the Federal Rules of Civil Procedure. Rule 45 gives litigants broad leeway in what information they can require witnesses to provide; in fact, it states that “the information sought need not be admissible at the trial if it appears to be reasonably calculated to lead to the discovery of admissible evidence”. A faint glimmer of hope remains in Rule 45(c)(3)(B)(ii) which allows courts to quash or modify a subpoena requiring an unretained expert to testify “not describing specific events or occurrences in dispute”. This exception was meant to protect unretained experts from being compelled to testify while not providing any such protection for “factual” testimony (Crabb, 1996, p. 21). It is very unclear how this exception would fare in cases involving ethnographic fieldnotes.

There are several other laws that a clever attorney might use to quash a subpoena for fieldnotes. If a researcher is willing to testify but unwilling to turn over fieldnotes, he may argue that his testimony is sufficient since according to Judge Lemuel Shaw, “there is no difference between compelling a witness to produce a document and compelling him to give testimony when the facts lie in his own possession” (Carrington and Jones, 1996, p. 62). In addition, a researcher could make a constitutional argument by citing “academic freedom

and the attendant freedom of scientific inquiry” (Traynor, 1996, p. 136). The researcher would argue that because the state’s attempt to compel disclosure interferes with academic freedoms protected by the First Amendment, it must be analyzed under “strict scrutiny”, a far more difficult standard than would normally be used (Traynor, 1996, p. 138). While difficult to apply in practice, this approach is bolstered by comments from the US Supreme Court such as “academic Freedom, though not a specifically enumerated constitutional right, has long been viewed as a special concern of the First Amendment” and “academic freedom and political expression are areas in which the court should be extremely reticent to tread” (Traynor, 1996, p. 139).

A reluctant ethnographer might also claim that compelling her to place her fieldnotes in the public record would constitute a “taking” without just compensation (Traynor, 1996, p. 140–142). An anthropologist who planned on writing a book based on several years of study could argue that by placing her confidential fieldnotes in the public domain, she has been stripped of the opportunity for just profit since any reporter or author can now publish works based on her fieldnotes. Furthermore, Traynor suggests that courts might be sympathetic to a researcher’s concerns over loss of profit from disclosure “if a researcher’s prospects of future research depend upon the researcher’s assurances of confidentiality to others”. He notes that if “a compelled breach might impair a researcher’s future livelihood”, the court has an interest in preventing such disclosure. Note that such an argument involves actual harm that could occur for an individual anthropologist, not general harm that might befall the entire anthropological community if fieldnotes are subpoenaed in one particular case.

There is one final area of law that might provide recourse to a reluctant ethnographer: state journalist shield laws. Such statutes typically protect journalists from being compelled to turn over notes or names of confidential informants. Although the Supreme Court strongly repudiated the notion of a reporter's privilege in *Branzburg v. Hayes*, later courts have been extremely sensitive to reporters' needs (O'Neil, 1996, p. 44–46). Moreover, many state legislators have passed laws granting an equivalent explicit protection to journalists. Unfortunately, many of these laws only protect members of the institutional press (Traynor, 1996, p. 143–145). Nevertheless, Traynor suggests that a legally aggressive researcher could demand protection under such laws because of the Fourteenth Amendment's Equal Protection Clause. Because freedom of speech is a fundamental right guaranteed by the First Amendment, the Equal Protection clause requires that any law which infringes upon it must be analyzed under strict scrutiny. The Supreme Court has held that in order for a speech regulating law to meet strict scrutiny, it must be content neutral. Reporter shield laws that protect only institutional media are clearly not content neutral in that regard (Traynor, 1996, p. 145–146).

The following three cases showcase the law described above. In the first case, *Richards of Rockford Inc v. Pacific Gas & Elect. Co.*, a construction company sued a California electric utility. Marc Roberts, a professor of public health at Harvard University, had recently conducted interviews with the utility employees as part of a research project investigating how large organizations make environmental decisions (O'Neil, 1996, p. 38). The construction company attempted to subpoena Roberts' interview records. While the court claimed that

“society has a profound interest in the research of its scholars, work that has the unique potential to facilitate change through knowledge” (Crabb, 1996, p. 22), it quashed the subpoena based solely on nonconstitutional grounds (O’Neil, 1996, p. 38). Wiggins writes that the court found “that the public interest in maintaining confidentiality between academic researchers and their sources outweighed the plaintiff’s interest” because the subpoenaed information could easily be acquired elsewhere (Wiggins and McKenna, 1996, p. 75). While this case failed to establish a broad constitutional privilege for scholars, it buttressed the notion that the researcher’s interests, including that of future researchers and their subjects, must be balanced against the probative value that confidential research data provides.

The second case involves a graduate student completing a study on the sociology of the American restaurant. The student, Mario Brajuha, worked at a restaurant for over a year while conducting interviews with other employees. After the restaurant burned down in a suspicious fire, the grand jury investigating the fire deposed Brajuha and subpoenaed his research notes (Wiggins and McKenna, 1996, p. 74). Brajuha testified at length but refused to turn over his journal, claiming a scholar’s privilege (O’Neil, 1996, p. 41). O’neill notes that “when the grand jury pressed for the journal, the trial court ruled in his favor – partly because he had” cooperated so extensively, but partly because of the trial judge’s reluctance to undermine the scholarly process (O’Neil, 1996, p. 41). In his opinion, the judge wrote eloquently on the importance of fieldwork in anthropology and the benefits of anthropology and sociology to the larger society (O’Neil, 1996, p. 41). Although the Second Circuit Court of Appeals later overturned the trial court and ordered Brajuha to turn over his journal,

it did so not because it didn't acknowledge a scholar's privilege, but because Brajuha had failed to make a case for that privilege (O'Neil, 1996, p. 41). According to Crabb, "the court found the facts pertaining to the alleged privilege too sparse in absence of any testimony from scholars about the nature of the researcher's work or methodology and the need for confidentiality" (Crabb, 1996, p. 23). Had Brajuha's attorney been less sloppy in providing supporting opinions from the academic community and had he framed the research as part of a considered research plan, Brajuha might very well have won the case. Note that the appellate court cautioned that "actual observation of criminal activity is not subject to a claim of privilege" (Wiggins and McKenna, 1996, p. 83).

The last case involves litigation between the Exxon Corporation and several plaintiffs seeking damages relating to the Exxon Valdez oil spill. Caught in the middle was J. Steven Picou, a sociologist conducting a four year longitudinal study of communities impacted by the Valdez spill (Picou, 1996, p. 149–151). Without his knowledge, several plaintiffs cited his early published results. Picou sought and received a protective order guaranteeing respondent confidentiality, even though he was forced to turn over most of his data to Exxon. The court's decision rested on Exxon's need to examine and verify data underlying studies that were being used against it in court (Picou, 1996, p. 153). Moreover, the court refused to grant access to unpublished and incomplete data since the release of such data "did not have probative value and was inconsistent with the ethics and norms of the scientific community" (Picou, 1996, p. 153).

Having examined both the law and relevant court cases, I now turn my attention to

recommendations for anthropologists facing hostile legal discovery. It is vital that researchers recognize that overly broad subpoenas are common in litigation and mean “just about as much as the asking price for a rug in an oriental bazaar” (Traynor, 1996, p. 125). Just as in a bazaar, the opening offer “is normally just a means of opening discussion between discoverer and discoveree” (Crabb, 1996, p. 31). Traynor notes that such “negotiations can often result in substantial limitations on the subpoena” (Traynor, 1996, p. 127) and, if nothing else, can endear the researcher to the court. He suggests that, “undoubtedly, a court will be more sympathetic toward a researcher who makes a reasonable attempt to resolve the dispute without court intervention” (Traynor, 1996, p. 127). Such sympathy will likely be needed since “busy trial judges do not welcome discovery disputes” (Crabb, 1996, p. 30–31). Crabb further recommends that researchers do not “simply tell a judge that a request is ‘burdensome’ [since] judges are inured to such claims because lawyers make them frequently” (Crabb, 1996, p. 30–31). Nevertheless, researchers can avail themselves to the statutory protection afforded by Rule 45 and ask the judge to quash or limit the subpoena (Traynor, 1996, p. 127). Even (and especially) if negotiations fail, negotiations still serve an important function since they are required for a judge to issue a protective order (Traynor, 1996, p. 131). Such an order seals confidential data from the public and requires that recipients make a good faith effort at protecting the data.

Another technique for handling subpoenas is to raise the costs for the requester; after all, if fishing expeditions are free, there’s no reason not to embark on one. Rule 45 dictates that researchers compelled to disclose must be “reasonably compensated” and that “the

court has a duty to protect a non-party researcher from ‘significant expenses’ connected with production of a subpoena” (Traynor, 1996, p. 135). As a corollary, researchers whose records have been subpoenaed may request a court order whereby the party that requests the subpoena must indemnify the researcher against any liabilities and legal expenses resulting from the violation of confidentiality (Traynor, 1996, p. 146). If the requesting party was forced to adopt the liability for the breach of confidentiality it demanded, it may very well decide it can forgo the subpoena of confidential information.

Finally, researchers should consider the possibility of refusing an order to compel documentation and risk going to prison for contempt of court. Traynor notes that “the court may itself release the researcher from custody if it realizes that coercion is ineffective against one who makes a principled commitment to honor a promise of confidentiality” (Traynor, 1996, p. 147). He cites one judge who suggests that judges are especially willing to forgo coercive punishments when “disobedience to the order is based on an established articulated moral principal”. In other words, coercive punishments appeal to the judiciary only to the extent that they compel disclosure; when they become merely punitive, there is no longer any justification for them (Traynor, 1996, p. 147). The American Sociological Association may very well have articulated such a principal in its Code of Ethics which states that “confidential information provided by research participants must be treated as such by sociologists, *even when this information enjoys no legal protections or privilege and legal force is applied*” (Wiggins and McKenna, 1996, p. 83).

In closing, I’d like to examine some of the reasons underlying courts’ interest in fieldnotes

and other qualitative data. Carrington provides the standard explanation when he suggests that “the quality of any scientist’s conclusions is solely dependent on the quality of his underlying data” (Carrington and Jones, 1996, p. 63). While that might be true in the physical sciences, it does not generally hold true for anthropologists. The quality of their conclusions depends upon their fieldwork, of which only the merest shadow is reflected in their fieldnotes and research data. Jasanoff suggests that while rigorous examination of raw experimental data is needed to uncover errors in the physical sciences, for many reasons, rigorous examination of qualitative data is unlikely to be of probative value (Jasanoff, 1996, p. 108–111). Yet because courts continue to apply fact finding techniques designed for the physical sciences to more qualitative fields, they can expend a great deal of effort acquiring and analyzing data that has no value whatsoever. This question needs more work, both by scholars of science and legal experts.

It is ironic that the same attributes that make anthropologists so appealing as witnesses depend on freedom from overzealous discovery. Nevertheless, I have shown how the law does provide some protection for beleaguered anthropologists. I have also analyzed several recent cases that demonstrate how researchers can protect their data from aggressive discovery processes. Finally, I proposed several suggestions for researchers facing discovery and concluded by discussing an interesting issue regarding how courts misapply fact finding techniques from the physical sciences when dealing with anthropologists.

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