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Scholar's Privilege: A Normative Primer

Ryan M. Rodenberg[*] *and Anastasios Kaburakis*[**]

Professor Stanley Fish's forthcoming book, *Versions of Academic Freedom: From Professionalism to Revolution*, highlights the diverse topics and nuanced analyses in any thoughtful discussion of academic freedom. This commentary focuses on one such micro-issue under the umbrella of academic freedom – "scholar's privilege." Specifically, we outline and posit on the freedom of academics *not* to disseminate their unpublished research, particularly when subject to a litigant's subpoena.

The foundation for scholar's privilege is set forth in Rule 45 of the Federal Rules of Civil Procedure.[1] The various subsections of the rule provide parameters on a variety of issues, including: (i) the duty to avoid undue burden;[2] (ii) how to object to a subpoena;[3] and (iii) the process to compel production or inspection.[4] Rule 45(d)(3) is particularly important. It permits the court to quash or modify research-seeking subpoenas on the basis of time, travel, privilege, or general burdensomeness considerations.[5]

A quartet of noteworthy cases has illustrated how courts view a claim of scholar's privilege. The First Circuit found data collected by two scholars to be privileged in *Cusumano v. Microsoft*.[6] In *Buchanan v. American Motors*, the Sixth Circuit quashed a subpoena as unreasonably burdensome, explaining:

> Compliance with the subpoena would require the expert who has no direct connection with the litigation to spend many days testifying and disclosing all of the raw data, including thousands of documents, accumulated over the course of a long and detailed research study. Like the District Court, we note that the expert is not being called because of observations or knowledge concerning the facts of the accident and injury in litigation or because no other expert witnesses

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[1] FED. R. CIV. P. 45.

[2] FED. R. CIV. P. 45(d)(1).

[3] FED. R. CIV. P. 45(d)(2)(B).

[4] FED. R. CIV. P. 45(d)(2)(B)(i).

[5] FED. R. CIV. P. 45(d)(3)(A).

[6] Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998); *see also* Judith G. Shelling, *A Scholar's Privilege:* In re Cusumano, 40 Jurimetrics J. 517 (2000).

are available.[7]

Dow Chemical v. Allen granted protection for unpublished data, notes, and working papers.[8] In contrast, in *Wright v. Jeep,* the judge compelled the non-party academic to provide the requested research concluding that the professor was a public figure, "yet wants to remain essentially anonymous so far as the administration of justice is concerned."[9]

The freedom to control the divulgence of one's research is an important one. Colleges and universities should memorialize their support for scholar's privilege in one of two ways. First, a general duty to provide legal counsel and expenses for professors asserting the privilege in court could be included in the applicable employment agreement with language analogous to that of an indemnity provision. Second, in a context where collective bargaining agreements govern, a clause recognizing scholar's privilege could be embedded therein with the union and/or management promising to support a professor's claim of scholar's privilege when asserted in a formal judicial proceeding after being served with a subpoena.

In his new book, Professor Fish opines that an academic's "job can be properly done only if it is undistorted by the interests of outside constituencies."[10] We agree. A robust scholar's privilege preserves a professor's discretion as to the timing of research dissemination while simultaneously serving as a buffer against litigants seeking to (aggressively) compel production of academic work not yet in the public domain.

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[7] Buchanan v. Am. Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983).

[8] Dow Chem. Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982).

[9] Wright v. Jeep Corp., 547 F. Supp. 871, 872 (E.D. Mich. 1982).

[10] STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION 86 (forthcoming 2014) (manuscript at 86) (on file with FIU Law Review).