

# A RESEARCHER'S PRIVILEGE: DOES ANY HOPE REMAIN?

ROBERT M. O'NEIL\*

## I

### INTRODUCTION

Scholars and subpoenas coexist uneasily. For at least a half century, formal demands for discovery of research results, or research in process, have posed an acute dilemma for the scholarly community. A scholar's unique academic research can, through judicial action, be wrested from the scholar and involved in often-lengthy litigation. Courts have struggled to balance the contending interests, particularly during the last quarter century. Sometimes the demands are granted, and sensitive material is required to be turned over to litigants. Other times, scholars have prevailed—usually on rather narrow, fact-based principles.

The research topics that have triggered such demands by the judicial system have varied with the issues of the times. Perhaps the first such dispute involved FBI threats to subpoena highly sensitive material on sex research held by the Kinsey Institute at Indiana University. Since the Institute had pledged confidentiality to many of its research subjects, its officers insisted it could not comply with the FBI demand and would, if necessary, “accept the consequences of such defiance.” In the end, the FBI backed down and a legal resolution was not required.<sup>1</sup>

In the 1960s and 1970s, several research issues that reached the courts grew directly out of the Vietnam War.<sup>2</sup> The years since then have brought cases involving demands for disclosure of research on subjects as varied as unsafe automobiles,<sup>3</sup> medical devices,<sup>4</sup> and employee morale in large public utilities.<sup>5</sup> The 1990s have seen the focus of such litigation shift to research on cigarettes and their effects. Mounting pressures on the tobacco industry, chiefly through damage claims by former smokers or their families, or by states seeking to recover the costs of treating smokers, have intensified the potential importance of

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\*Professor of Law, University of Virginia; Director, Thomas Jefferson Center for the Protection of Free Expression.

1. See Paul M. Fischer, *Fischer v. The Medical College of Georgia and the R. J. Reynolds Tobacco Company: A Case Study of Constraints on Research*, in *ACADEMIC FREEDOM: AN EVERYDAY CONCERN*, 33, 41 (E. Benjamin & D. Wagner eds., 1994).

2. See, e.g., *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982); *United States v. Doe* (In re Popkin), 460 F.2d 328 (1st Cir. 1972).

3. *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982).

4. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984).

5. *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388 (N.D. Cal. 1976).

such research to high-stakes litigation. Several notable cases<sup>6</sup> have pitted the interests of tobacco companies involved in or preparing for litigation against the desires of researchers to resist the compelled disclosure of their research.

The large number of cases concerning the issue of compelled disclosure is due to four devastating effects the disclosure can have on scholarship. First, even if documents are sealed after discovery or other safeguards are provided, once the material has been forcibly removed from the researcher's files or discs, that researcher loses control of the reporting and disclosure process. The decision concerning when, where, and how fully to make public the results of research is as central to a researcher's process of inquiry as the selection of subject matter and research methods.

Second, the very process of responding to, and then executing, a subpoena or discovery order may severely hamper the research process. Should such demands come at a critical time in the life of a study or experiment—and few stages are not potentially critical—the resulting disruption is intrusive at best, and at worst can thwart or truncate the entire research process. If the demand involves massive amounts of data, not all of which can be amassed and delivered without arresting the research process, the potential effects may be even more harsh.

Third, if compelled discovery reaches into the process and separates some data or conclusions from others to serve the interests of litigation, it will lead to the use of unverified information. Researchers usually need to validate their results before making them public, or even sharing them with colleagues.

Finally, compelled disclosure raises special concerns of confidentiality. Where subjects have been assured they will remain anonymous, the risks of disclosure are the most obvious. There are, however, many situations in which researchers would not normally promise confidentiality or anonymity in express terms, but where an expectation of such treatment would be implied—and where the researcher's credibility and future access to a subject pool could be crippled by such revelations, regardless of who causes the breach.

Thus, there are many strong justifications for protecting research from compelled disclosure. Yet, as shall be seen shortly, the courts have been surprisingly resistant to these claims. In the relatively few cases where claims for protection of research have prevailed, special circumstances (for example, over-reaching by a litigant, highly burdensome demands, or the availability of alternative sources) have helped a sympathetic judge reach such a conclusion. Elsewhere, the results have been discouraging and the prospects bleak.

The rationale for protecting the research process from compelled disclosure seems basic and familiar. Scholarship is as central to academic freedom as is classroom teaching.<sup>7</sup> The 1940 Statement of the American Association of Uni-

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6. See, e.g., *In re American Tobacco Co.*, 880 F.2d 1520 (2d Cir. 1989); *R.J. Reynolds Tobacco Co. v. Fischer*, 427 S.E.2d 810 (Ga. Ct. App. 1993).

7. See, e.g., Charles D. Hoornstra & Michael A. Liethen, *Academic Freedom and Civil Discovery*, 10 J.C. & U.L. 113, 123 (1984); J. Graham Matherne, Note, *Forced Disclosure of Academic Research*, 37 VAND. L. REV. 585, 607-15 (1984); Robert M. O'Neil, *Scientific Research and the First Amendment*:

versity Professors ("AAUP") to which more than 150 organizations and many more institutions have subscribed, declares in its opening paragraph that "teachers are entitled to full freedom in research and in the publication of the results ... ."<sup>8</sup> Professor Paul Walter, who served both as President of the American Chemical Society and of the AAUP, states the rationale in this way:

The ability to conduct scholarly research freely is an activity which lies at the heart of higher education and falls within the First Amendment's protection of academic freedom. Research and teaching activities are closely linked components of scholarly activity in American higher education. Academic freedom includes the freedom to search for knowledge; therefore, it is as much an infringement on the scholar's academic freedom to constrain or limit the scholar's research activities as to limit his or her freedom in the classroom.<sup>9</sup>

The protection of research has several facets. Most clearly, the researcher enjoys broad latitude in choosing topics for study. While government may select certain subject areas or topics as recipients of public funding,<sup>10</sup> it may not favor some viewpoints or messages and disfavor others within an area of funded research or inquiry.<sup>11</sup> Furthermore, the scope of freedom in research extends well beyond choice of topic, and encompasses the structure of a study or experiment, the hypotheses or desiderata, the timing of the process, the verification or validation of initial results, the place and medium of initial release or publication, and a host of other dimensions that might seem peripheral or even unrelated to the casual observer but which the serious researcher appreciates.

Even a cursory review of these elements of the research process suggests the gravity of potential harm that compelled disclosure—especially premature disclosure—may cause to its integrity. Thus, one would expect to find in the courts a solid legal basis for protecting that process and its results. Upon examination, one finds far less law than one might expect, and though the state of that law is mixed, its import for the balance between discovery and non-disclosure is rather discouraging.

## II

### RESEARCH AND DISCLOSURE IN THE COURTS

#### A. The Early Years

The entire history of research freedom claims in the courts spans barely a quarter century. The first two cases, which reached the federal courts in the late 1960s, seemed to offer a promising start. The earliest case involved a

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*An Academic Privilege*, 16 U.C. DAVIS L. REV. 837, 852 (1983).

8. *1940 Statement of Principles on Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS 3 (1995).

9. Fischer, *supra* note 1, at 41.

10. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

11. *Finley v. National Endowment for the Arts*, 100 F.3d 671, 681 (9th Cir. 1996).

challenge to Indiana's strict liability obscenity law. In voiding certain parts of the law, the court observed that mere possession of obscenity would be "prohibited to professors and researchers in psychology, law, anthropology, art, sociology, history, literature, and related areas."<sup>12</sup> Such a prohibition, the court warned, "would put in violation of the law the famous Kinsey Institute at Indiana University." Such a "chilling effect on the research, development and exchange of scholarly ideas is repugnant to the First Amendment."<sup>13</sup>

The second case involved a Southeast Asian scholar at Harvard University who had been interrogated by a grand jury seeking to determine how the Pentagon Papers had found their way to the New York Times.<sup>14</sup> The court refused to grant a broad scholar's exemption concerning information provided by confidential sources. Rather, the court held that, while a scholar might be compelled to identify persons the scholar had interviewed, protection might be available for the names and sources of research subjects, like the Vietnamese villagers to whom the researcher had apparently offered or promised anonymity, and for government officials.<sup>15</sup> The court also seemed willing to shield the researcher's own research hypotheses.<sup>16</sup> The posture of the case, an appeal from a civil contempt order, made unnecessary a definitive ruling on these issues and the court since then has never had occasion to revisit this area of the law.

In one other early and promising case, a Harvard public health professor, Marc Roberts, had conducted extensive interviews with employees of Pacific Gas and Electric Company ("PG&E") in Northern California, during a study of how utilities make decisions about environmental issues. Later, a construction company sued PG&E for breach of contract in federal court. During pre-trial discovery, the plaintiff suggested that information from Roberts's study might bear on the corporate judgment that triggered the alleged breach. PG&E then sought access to the notes of the study interviews; however, Roberts resisted granting PG&E the right to view his research.

The court ruled against PG&E's requests for disclosure without reaching the broad constitutional grounds asserted by Roberts.<sup>17</sup> Instead, the court based its decision on a number of non-constitutional factors: the fact that Roberts was not a party to the lawsuit but rather an innocent bystander; the uncertain probative value to the contract suit of the requested data; and the existence

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12. *Henley v. Wise*, 303 F. Supp. 62 (N.D. Ind. 1969).

13. *Id.* at 67.

14. *United States v. Doe*, 460 F.2d 328 (1st Cir. 1972), *cert. denied sub nom. Popkin v. United States*, 411 U.S. 909 (1973).

15. *Id.* at 334.

16. *Id.* The First Circuit refused to require scholars to disclose their opinions as to the identity of the leaks to the grand jury for fear that it would cause scholars to "think long and hard before admitting to an opinion" and thus hinder scholarly pursuits. *Id.*

17. *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388 (N.D. Cal. 1976). Roberts asserted that "compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest." *Id.* at 390.

of other sources through which comparable data could be obtained without burdening or intruding upon the scholarly process.<sup>18</sup> Clearly sensitive to the nature of Roberts's interests, the court took special note of "the importance of maintaining confidential channels of communication between academic researchers and their sources . . . ."<sup>19</sup>

Thus, while these early cases seemed quite promising, many cases in the two decades since *Roberts* have been more mixed—though some of the later scholars faced with such claims of compelled disclosure have prevailed on narrow grounds. Along the way, there have been some kind words about research and scholarly pursuits, even from courts that in the end offered little solace to embattled researchers.

However, there have been several important victories. Judge Crabb issued a response sympathetic to researchers<sup>20</sup> that was confirmed by the U.S. Court of Appeals for the Seventh Circuit in a judgment that comes about as close as any court to creating a true shield for research<sup>21</sup> when the Dow Chemical Company sought from a senior University of Wisconsin scientist massive data relating to an Environmental Protection Agency pesticide ban. Persuasive to both federal courts in *Dow Chemical Company v. Allen* were the following factors: the researcher's non-party status; the grave risks of premature disclosure of research findings on a highly volatile topic—the effects of Agent Orange on troops in Vietnam; the hazards of disrupting research in progress (or diverting the researcher's time and attention at a critical stage); and the potentially chilling effects of such subpoenas on the conduct of future research. While none of these factors alone, nor all of them taken together, justified a constitutional shield, by focusing upon potentially serious disruptions of academic research, the *Dow* courts came about as close to recognizing a researcher's privilege as any court before or since.

The frailty of precedent in favor of researchers soon became clear. Two years after the *Dow* case, the Seventh Circuit reached a substantially less sympathetic view when it revisited compelled disclosure issues in the context of a pharmaceutical company's demand for studies of a contraceptive device.<sup>22</sup> There was, however, an important factual difference that aids in an explanation of this disparity: The district court flatly barred all discovery without any of the findings of potential impact that Judge Crabb had so carefully made in *Dow*. The court of appeals thus needed to do little more than say that some of the requested material might be available without risking grave harm to the researcher and, on that basis, send the case back to the trial judge. Moreover, the court of appeals cited *Dow* with approval, as standing for the view that in such cases "premature publicity must be guarded against."<sup>23</sup> Partly for that reason,

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18. *Id.*

19. *Id.*

20. *United States v. Allen*, 494 F. Supp. 107 (W.D. Wis. 1980).

21. *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982).

22. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984).

23. *Id.* at 560.

the Seventh Circuit cautioned in this case that “[n]o discovery should be allowed of any material reflecting development of [the researcher’s] ideas or stating his or others’ conclusions not yet published.”<sup>24</sup> All was, therefore, not lost—though clearly litigants in the Seventh Circuit are on notice that blanket denials of discovery demands, even for sensitive research, will not be automatically approved.

Rulings in the Eleventh Circuit also offer some hope for researchers. Since that court hears appeals in most suits against the Centers for Disease Control (“CDC”), it is hardly a stranger to conflicts between scholars and subpoenas. The hallmark case in that circuit involved claims against Procter & Gamble resulting from toxic shock syndrome,<sup>25</sup> but the right asserted was the protection of research done by a government agency not by a private researcher. Yet the Eleventh Circuit accepted the CDC’s plea to keep confidential the identity of subjects who had taken part in the toxic shock studies, even though the subjects had apparently not been given express pledges of anonymity. In reaching the result, the Eleventh Circuit stressed two factors: first, that the CDC’s mission was to protect the health of the U.S. public through “scientific and social research supported by a population willing to submit to in-depth questioning”; and second, that subjects had a reasonable expectation of confidentiality even in the absence of express promises that their names would not be revealed.<sup>26</sup>

The early 1980s brought another notable case. A Michigan State University professor named Snyder published a study of the road-worthiness of the infamous Jeep CJ-5, focusing on the vehicle’s propensity to roll over. American Motors Company (“AMC”) and injured motorists who sued AMC repeatedly sought access to the data behind Snyder’s published conclusions. The results were mixed. In an early round, the company prevailed, though only after disavowing any desire to discover “confidential sources” and agreeing to the removal before discovery of the names of any individual accident victims who had been the subject of the study.<sup>27</sup> Later, when AMC took a harder line, a federal judge in Arizona quashed the company’s subpoena for Snyder’s data, noting “the potential for a chilling effect on research.”<sup>28</sup> The court cautioned that, despite the absence of a blanket privilege “discovery offers an avenue for indirect harassment of researchers whose published work points to defects in products or practices. There exists also a potential for harassment of members of the public who volunteer, under a promise of confidentiality, to provide information for use in such studies.”<sup>29</sup>

## B. More Recent Years

The latest rounds of litigation add two other issues—the status and interests

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24. *Id.* at 565.

25. *Farnsworth v. Procter and Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985).

26. *Id.* at 1547.

27. *Wright v. Jeep Corp.*, 547 F. Supp. 871, 876 (E.D. Mich. 1982).

28. *Snyder v. Am. Motors Corp.*, 115 F.R.D. 211, 215 (D. Ariz. 1987).

29. *Id.* at 216.

of graduate students as scholars, and the especially intense dispute between researchers and the tobacco industry. In both areas, there are intriguing splits among courts.

1. *Graduate Students as Scholars.* The first graduate student case dealt with a doctoral student at the State University of New York at Stony Brook who had kept a detailed journal in preparing his dissertation. Among his notes were recollections taken while working as a waiter at a Long Island restaurant that was later destroyed by a very suspicious fire. A federal grand jury investigating the fire subpoenaed the graduate student and his journal. The student agreed to appear and testify at length about his recollections of the restaurant and its employees, but, claiming a scholar's privilege, he refused to produce the journal.

When the grand jury pressed for the journal, the trial court ruled in the student's favor<sup>30</sup>—partly because he had been so forthcoming about his own recollections, and partly because the judge recognized how deeply a compelled disclosure of this type might undermine the scholarly process:

Affording social scientists protected freedom is essential if we are to understand how our own and other societies operate. Recognized by cultural anthropologists since at least the turn of the century as a basic tool, fieldwork is used widely in other disciplines, particularly in sociology and political science. In order to work effectively researchers must record observations, communications and personal reactions contemporaneously and accurately.<sup>31</sup>

On appeal, the U.S. Court of Appeals for the Second Circuit disagreed and held that the grand jury could obtain the journal. Although he lost the battle, the recalcitrant scholar may have won at least a part of the war. The Second Circuit acknowledged there might be a scholar's privilege but felt the conditions for claiming it had not been met in this case. To recognize such a privilege, absent a strong and detailed showing of the adverse effects of compelled disclosure on the research, "would require us to create virtually an unqualified and indeterminate immunity attaching generally to all academically related inquiries upon the bald assertion that someone was promised confidentiality in connection with the study."<sup>32</sup>

The Second Circuit was not prepared to go that far. However, the district judge's approach had raised "an arguable question as to the validity of a qualified privilege where a serious academic inquiry is undertaken pursuant to a considered research plan in which the need for confidentiality is tangibly related to the accuracy or completeness of the study."<sup>33</sup> Recognition of such a privilege—"if it exists"—was left for another day and a stronger record on the hazards of disclosure. Even then, the Second Circuit warned that such a shield could be no broader than absolutely essential—in this case, for example, it would cover only those portions of the journal to which the interests of confi-

30. *In re Grand Jury Subpoena* Dated Jan. 4, 1984, 583 F. Supp. 991 (E.D.N.Y. 1984).

31. *Id.* at 993.

32. *In re Grand Jury Subpoena* Dated Jan. 4, 1984, 750 F.2d 223, 225 (2d Cir. 1984).

33. *Id.*

dentiality unmistakably applied.<sup>34</sup>

Meanwhile, on the opposite coast, a superficially similar claim fared less well for a graduate student. A Washington State University doctoral student was called before a federal grand jury that was probing a destructive raid on the university's laboratory animal facilities conducted by the Animal Liberation Front ("ALF"). A prime suspect in the case was a member of the ALF who had house-sat the graduate student's residence during his summer absence. The graduate student and his wife, who were clearly not suspects as the raid occurred before they returned to campus, were initially interviewed by government agents. When the graduate student was later called before the grand jury, he balked, claiming that such an inquiry into his conversations with the suspect would invade his sociological research and would compel a breach of protected confidentiality as he had discussed the suspect's connections to the ALF while researching and writing a book about militant environmental groups.

The district court rejected the claim, and the U.S. Court of Appeals for the Ninth Circuit summarily affirmed.<sup>35</sup> This appeals court was far less sympathetic than the Second Circuit to even the bare possibility of a scholar's privilege to confidentially obtained information. Since journalists had long ago been denied such a shield by the Supreme Court's decision in *Branzburg v. Hayes*,<sup>36</sup> scholars and researchers could not claim a privilege because their claim would be no stronger than a reporter's. While other federal courts had occasionally recognized journalists' claims for protection, such cases were held to have reflected unusual or extenuating factors.<sup>37</sup> Nor was the Ninth Circuit persuaded by what the Second Circuit had said about the Stony Brook graduate student's journal; according to the Ninth Circuit, that case did no more than recognize a possible basis for a claim the record did not support. No other court seemed to have gone even that far, leaving the Ninth Circuit quite free to reject any such claim in the case.<sup>38</sup>

2. *Tobacco Research as the Target.* It would be surprising if the tobacco companies had not aggressively sought research data that might aid their cause. Indeed, they have sought it, ending in mixed results for scientists who have resisted those demands. In an early important case, a New York trial court rejected a cigarette manufacturer's efforts to obtain massive amounts of data on the effects of smoking on those exposed to asbestos. A major basis for the refusal to permit discovery was the court's recognition of the recalcitrant scholar's "interest in academic freedom."<sup>39</sup> The state court expressly acknowledged the validity of claims both by the American Cancer Society, which funded much of the research, and by the university at which the studies

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34. *Id.* at 225-26.

35. *Scarce v. United States*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994).

36. 408 U.S. 665 (1971).

37. *Id.* at 401-02.

38. *Scarce*, 5 F.3d at 403.

39. *In re Application of R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729 (Sup. Ct. 1987).



were conducted:

While these medical investigations are still in progress, they should not be subjected to examination and criticism by people whose interests are arguably antithetical to the medical scientists. It would have the effect of denying to these doctors the opportunity of first publication of their studies. It could also have a chilling effect and discourage future scientific endeavors.<sup>40</sup>

This sympathetic ruling turned out to be a rather pyrrhic victory in light of later developments between the same parties in the federal courts. The district court granted the subpoena, though the names of subjects and other sensitive information were redacted by a protective order.<sup>41</sup> Affirming the order, the Second Circuit rejected the pleas of non-party scientists that were similar to those the state judge had honored, noting only that "the public has an interest in resolving disputes on the basis of accurate information."<sup>42</sup> The appeals court did insist, however, that the subpoena be narrowed to focus on research materials used by the principal researcher in preparing articles published "some years ago."<sup>43</sup> Thus, the worst potential damage to be feared from such a discovery order—disruption or distortion of current, yet unpublished research—was avoided both by the terms of the protective order and by narrowing the scope of the subpoena.

One later tobacco case also marks a victory for the researcher. Dr. Paul Fischer, a professor at the Medical College of Georgia, conducted and published research about the effects of cigarette advertising on young children. In the course of a California citizen's civil suit alleging unfair business practices against R. J. Reynolds, the tobacco company sought to depose Fischer in Georgia. Fischer resisted, and the state trial court quashed the subpoena.<sup>44</sup> A Georgia appeals court sustained the scientist's claims, finding that Fischer's data had minimal bearing on the core of the California case.<sup>45</sup> "Since the effect of the advertising is not in issue," concluded the court, "any discovery from Fischer would not be reasonably likely to lead to admissible evidence."<sup>46</sup>

The tobacco giant, not so readily rebuffed, pursued a freedom of information claim against Fischer and the medical college where the research had been conducted (and which maintained some of the files). The state's attorneys gave Fischer little solace or support, insisting at one point that he would be suspended within forty-eight hours if he refused to accede to demands to release the data. The files were then turned over to the court pending resolution of the conflicting claims. In the summer of 1994, the trial judge ruled against Fischer on the freedom of information claim, and Reynolds immediately obtained the data it had sought.<sup>47</sup> Thus, in the end, sensitive research material, which had

40. *Id.* at 733-34.

41. *In re American Tobacco Co.*, 880 F.2d 1520, 1525 (2d Cir. 1989).

42. *Id.* at 1529.

43. *Id.*

44. *R.J. Reynolds Tobacco Co. v. Fischer*, 427 S.E.2d 810, 811 (Ga. Ct. App. 1993).

45. *Id.* at 812.

46. *Id.*

47. *See Fischer*, *supra* note 1, at 38-40; *see also* Paul M. Fischer, *Science and Subpoenas: When Do*

survived the discovery process, fell to a freedom of information claim.

The results in the cases are, as suggested, quite mixed. Researchers and scholars have enjoyed some victories, but have also suffered some damaging defeats. Yet, what remains notably absent from this field of the law is anything like a common law privilege—much less a constitutional privilege—for the research process and those who guide it. The prospects for such broad protection have been clouded by several cases in closely related areas, to which we now turn.

### III

#### ANALOGIES AND RELATED ISSUES

Quite understandably, courts reviewing challenges to research subpoenas have sought guidance from the closest analogous field, that of journalists' confidential sources. There have been several notable developments in journalism's confidential source law during the past quarter century. Perhaps the most important decision was the Supreme Court's 1972 rejection in *Branzburg v. Hayes* of a privilege for news-gatherers who had been called before a grand jury and asked to reveal confidential sources.<sup>48</sup> Several factors shaped that decision: the high order of the grand jury's historic role in developing truth; the absence of any familiar basis for such a privilege; and a sense that such matters were best left to lawmakers (since, in fact, many states had adopted "shield laws," which protected journalists from such forced breaches of confidentiality). Justice Powell, concurring separately, wished to keep open the possibility that a journalist might need protection if there were abuse of such process or harassment of a particular news-gatherer.

If journalists lost the first skirmish in the *Branzburg* case, they may well have won the war through a host of later cases. While courts have consistently declined to confer privileged status upon the gathering of news, they have rejected many subpoenas—some because they were excessively burdensome, others because the nexus was not firmly established between the information and the party's needs, and still others because the information could be obtained through alternative and less intrusive channels. Thus, over the years, journalists have fared far better than anyone reading only the *Branzburg* decision could have expected.<sup>49</sup>

Some courts have applied *Branzburg* by analogy to research disclosure issues.<sup>50</sup> It is thus fair to ask how far *Branzburg's* rejection of a reporter's privi-

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*the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS. 161 (SUMMER 1996). For an account of a related Massachusetts case involving a fellow researcher, see Marcia Barinaga, *Who Controls A Researcher's Files?*, SCI., June 19, 1992, at 1620-21.

48. 408 U.S. 665 (1972).

49. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972); Robert M. O'Neil, *Shield Laws: Partial Solution to a Pervasive Problem*, 20 N.Y.L.F. 515 (1975).

50. See, e.g., *Scarce v. United States*, 5 F.3d 397, 399-400 (9th Cir. 1993).

lege undermines the case for a researcher's privilege. Superficially, the two situations are similar enough that a parallel disposition seems sound. However, there are differences that deserve more attention than they have yet received. For example, a major premise of *Branzburg* was that legislatures, rather than courts, ought to confer whatever protection a reporter needs.<sup>51</sup> Prior to *Branzburg*, seventeen states had in fact adopted shield laws for precisely that purpose.<sup>52</sup> Here the contrast is striking: No states have legislatively protected the researcher in ways comparable to those reporters have enjoyed<sup>53</sup>—nor is there a substantial prospect of such protection in the near future.

More important is the contrast between the nature of the two activities and the potential impact upon compelled disclosure. While a forced breach of source confidentiality may have severe consequences for a reporter, the range of effects upon the scientist whose research is disrupted is potentially more devastating. The several concerns noted at the outset—disruption of a research program in process, partial or premature disclosure of untested findings, as well as breaches of promised or expected confidentiality—pose an ever graver threat to the orderly conduct of what is clearly an activity protected by the First Amendment.

Finally, there are dispositive differences in the nature of the activities themselves. News-gathering, as such, has never enjoyed clear constitutional status. In the absence of a statutory claim of access, such as that created by freedom of information laws, the journalist has seldom been able to claim even the limited First Amendment protection that a researcher might be able to claim. Research is, however, a distinctly and clearly protected activity in its own right. Thus, without in any way disparaging the basis for a reporter's claim of confidentiality, or questioning the central premise of *Branzburg*, a separate inquiry in the realm of research will prove that greater protection should be afforded researchers.

It should also be noted that the Supreme Court recently revisited the journalist's source issue in *Cohen v. Cowles Media Co.*<sup>54</sup> In *Cowles* a reporter promised absolute anonymity to a source who was crucial to a politically explosive story. Yet his editors insisted on naming the source, and the reporter reluctantly acceded. Soon after the story appeared, the source sued the newspaper and recovered damages for a common law breach of contract. The Supreme Court rejected the publisher's First Amendment claims, seeing no need to treat the state court's judgment differently from run-of-the-mill contract breaches.<sup>55</sup>

Although there was no occasion for the *Cohen* court to revisit any facet of

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51. *Branzburg v. Hayes*, 408 U.S. 665, 689-90 (1972).

52. *Id.* at 689 n. 27.

53. However, some medical researchers may be able to claim a privilege under broadly written healthcare provider (as opposed to doctor) - patient privilege statutes. See, e.g., ILL. ANN. STAT. ch. 735, ¶ 8-802 (Smith-Hurd Supp. 1996).

54. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

55. *Id.*

the *Branzburg* case or its progeny, one might ask, nonetheless, whether *Cohen* does not aid the researcher's case ever so slightly. The *Cohen* court's deference to a promise of anonymity might suggest that, despite *Branzburg's* rejection of the reporter's claim to protect that relationship, the courts might be more sympathetic to a researcher's reliance on a contractual pledge, or at least the reasonable expectation of a contractual commitment, not to reveal the subject's identity. In the several years since *Cohen*, no such claim seems to have been advanced on a research subject's behalf, although that prospect remains open for future pursuit. Such a prospect also invites a concluding review of the factors that—in the continued absence of a constitutional status for research—may favor claims raised on the research subject's behalf.

#### IV

##### FACTORS FAVORING THE RESEARCHER

As demonstrated by the mixed record of litigation, some cases obviously have far greater appeal to courts than others. First, the most compelling case is when a researcher's relations with subjects involve not only a *claim* of confidentiality (promised or expected) but an actual, legally recognized privilege. If the scholar is a physician or an attorney who has gathered sensitive data from persons who are actually patients or clients, courts would of course bar any access to such files. If some, but not all, of a group of subjects could claim such a privilege, the case for denying discovery would seem comparably compelling—if only because the need to edit around the legally privileged material would likely create a burden so substantial that the entire request should be refused.

Second, there is the pervasive issue of confidentiality beyond the core of legal privilege. Several courts (especially in cases involving the CDC) have noted the value of preserving anonymity, not only when subjects receive an express pledge, but also when they reasonably expect their participation in a major study would entail no risk of disclosure.<sup>56</sup> Here the interests are not solely, or perhaps even primarily, those of the researcher or of the immediate subjects. Rather, it is research in general and the public interest in not deterring future participants in studies that will benefit the public health and welfare. Thus, it is not surprising that several courts have quashed or severely limited subpoenas even where there was no proof of an express promise of anonymity, but simply a reasonable expectation or likelihood of such treatment.

Third, a few courts have heeded the scholar's plea not to disrupt research in progress or divert time and energy from pursuit of knowledge to less urgent endeavors.<sup>57</sup> In cases where such disruptive or distracting effects can be demonstrated, courts may be disposed to deny discovery altogether, or at least to fashion protective orders that would sharply reduce such risks by, for example,

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56. See, e.g., *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985); *Lampshire v. Procter & Gamble Co.*, 94 F.R.D. 58 (N.D. Ga. 1982).

57. See e.g., *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982); *In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d at 733-34.

confining discovery to data tied to already published findings.<sup>58</sup> The potential for scholars to raise such concerns as these warrants further attention both by lawyers and courts.<sup>59</sup>

Fourth, the potential to raise the researcher's "bystander" status has not been fully tapped. The scholar is hardly ever a party to the proceeding and usually has no economic stake in the litigation. Occasionally, demands upon researchers pertain to information so remote to the case's legal issues that a court will summarily refuse disclosure on grounds of relevance without analyzing the potential burden or other factors.<sup>60</sup> Other courts will at least recognize the "noncombatant" status of the researcher as a factor weighing in the balance against disclosure.<sup>61</sup> However, this factor does seem to deserve more scrutiny than it has typically received. It may also help to distance the researcher's claims from those of others (even journalists) whose involvement in the merits of the case may be more immediate.

Finally, something should be said about the basic relationship between the demand for data and the research enterprise. This factor may help to distinguish the most recent, and in some ways most troublesome, of the federal cases. As discussed above, sociology graduate student James (Rick) Scarce found little sympathy in a court of appeals, which summarily affirmed his contempt sentence for refusing to tell a grand jury about conversations with his friend and house-sitter who was suspected of raiding the Washington State University animal laboratories.<sup>62</sup> The Ninth Circuit's tone contrasted sharply with that of the Second Circuit in the superficially similar case of the Stony Brook doctoral student who withheld his journal from the grand jury investigation of a restaurant arson.<sup>63</sup> There were, however, some potentially important differences between the two cases. Scarce was not a wholly detached and disinterested bystander, as was the Stony Brook student. Nor was the link between the requested information and the research quite as clear in the Washington case. While the Ninth Circuit never implied bad faith or suggested that Scarce was hiding behind a scholar's claim of privilege, the facts at least create such an inference. The circumstances suggest a possible basis for distinguishing a case that is likely to be hereafter troublesome.

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58. *E.g.*, *In re American Tobacco Co.*, 880 F.2d at 1529.

59. See Virginia G. Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71, 111-16 (1984); Mark Labaton, Note, *Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas*, 1987 DUKE L.J. 140, 143.

60. *E.g.*, *R.J. Reynolds Tobacco Co. v. Fischer*, 427 S.E.2d 810 (1993).

61. *E.g.*, *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976).

62. *Scarce v. United States*, 5 F.3d 397, 399-400 (9th Cir. 1993).

63. *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223 (2d Cir. 1984).

## V

## COULD IT BE CONSTITUTIONAL?

The prospect of First Amendment protection for research is as appealing as it is elusive. For reasons we have explored, the case for bringing scholarly inquiry within the ambit of free speech seems compelling. The absence of such protection for news-gathering is not dispositive. Indeed, even a court that consistently rejects constitutional claims of journalists seeking First Amendment protection for confidential sources and other sensitive information might conceivably be swayed by the slightly different and arguably stronger claims of the researcher seeking to resist compelled disclosure. Thus, the research community rightly harbors some hope for a constitutional privilege, while continuing to seek protection through less exalted means in the real world, where no such safeguard yet exists.

Should there ever be a stronger prospect of First Amendment protection, several issues would need to be addressed in the definition of such a privilege. For example, types of inquiry and researchers entitled to such protection must be delineated. Courts should be able to distinguish under a constitutional standard, much as they have done in the non-constitutional setting, between serious scholarly inquiry of a kind that deserves such a shield and merely casual or un-systematic probing that would fall outside the logic of such protection.<sup>64</sup> On the other hand, it would be unreasonable to confine such safeguards to established senior researchers; there are situations (as the Stony Brook case suggests) where graduate students or other participants in the research enterprise should be equally entitled to protection from disclosure.

The scope of any such privilege would also need close attention. Not all materials that might be of interest to litigants are equally deserving of such protection. The clearest case for constitutional safeguards would exist, as under the current framework, where compelled disclosure would be severely disruptive of the inquiry process or of the researcher's relations with subjects or colleagues. Diverting or halting a study in progress should be especially suspect under a constitutional shield. An explicit (or strongly implied) promise of confidentiality to subjects would create an appealing case for First Amendment intervention—not only to safeguard the researcher's free expression, but that of the subjects who have chosen to "speak" on condition that they not be identified in ways that might evoke risk or reprisal. Where an expectation of confidentiality rests on less solid ground, or where the hazards of naming subjects are less acute, the case would be correspondingly less persuasive. Unpublished—and, more importantly, yet untested—data would pose a more compelling case for First Amendment protection than published data or materials related to already published studies and findings. Much as with the non-

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64. *Cf.* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993) (establishing guidelines to determine what constitutes scientific, technical, or other specialized knowledge under the Federal Rules of Evidence that may be helpful in deciding what type of research may be characterized as systematic or scholarly inquiry).

constitutional analysis, several factors would shape the scope and definition of any such privilege.

If courts ever brought research squarely under the First Amendment for such purposes, the other policy factors in the current equation would also be helpful: How critical is the moving party's need for the requested data and what alternative sources (if any) exist that would spare the researcher and the process of inquiry from interference? While these considerations have evolved in the absence of constitutional protection, they are closely analogous to questions that courts consistently and appropriately ask in First Amendment cases. Thus, they should be as much a part of the constitutional privilege as they are of the current analytical process.

A final and practical issue should be raised: How much difference would a First Amendment privilege make? As demonstrated, some courts have shown greater sympathy for the researcher and reached results that could hardly be more favorable if they rested squarely on the First Amendment. Other courts' decisions were less receptive to the process of inquiry and its needs, and seem barely to appreciate the difference between serious scholarship and, for example, commercial market research. It is in those situations that a recognized constitutional privilege for scholarly inquiry would have genuine value. Such a privilege would hardly ensure perfect consistency, any more than it does in areas that clearly fall under the First Amendment, but it would be helpful. That prospect should suffice to retain our interest.

## VI

### CONCLUSION

The status of the scholar's or researcher's right to resist compelled disclosure remains tenuous and uncertain, as it was when the first case reached the courts a quarter century ago. There has been, however, valuable experience and even some helpful guidance from a number of courts. The subject matter of the targeted research will surely continue to reflect the paramount issues of the day—much as it has evolved over the years from Vietnamese villagers and Agent Orange, to unsafe automobiles, to toxic shock, and now to smoking and cigarettes. What should not change is the persistent and conscientious pursuit by scholars and their lawyers of whatever protection the courts may afford to the quest for knowledge.