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Scientific Research and the First Amendment: An Academic Privilege

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INTRODUCTION

A university professor pursues research in a new scientific field. The implications or results of that research attract the interest of one or both parties in pending litigation. Through pretrial discovery, one party seeks to obtain the scientist's findings or background data. The researcher, wishing not to divulge the requested material, resists the subpoena. The court is then called upon to decide between the litigant's desire to obtain the data and the researcher's judgment to withhold them.

This scenario sounds simple enough. Yet the resolution of these conflicting claims varied dramatically in two recent federal court decisions. We might review these cases briefly at the outset since they help to amplify the competing legal claims.

A research group at the University of Wisconsin-Madison had undertaken studies of the effects of a particular chemical compound upon rhesus monkeys. While the research was in progress, the Environmental Protection Agency (EPA) threatened to cancel production of chemically related pesticides made by the Dow Chemical Company. Relying partly on evidence derived from one facet of the Wisconsin study, the EPA ordered emergency suspension of certain uses of two Dow pro-

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ducts and scheduled cancellation hearings.[1] While preparing its defense, Dow sought to obtain background materials from the research studies. An administrative law judge ordered the principal investigators, Professor James Allen and Dr. John Van Miller, to appear before Dow attorneys and produce numerous documents from their study, including facets which were germane to the threatened cancellation but apparently not relied upon in the administrative proceedings. The researchers demurred, citing both the burdensome nature of extensive discovery and the disruptive effects of such intervention before the completion of their studies. They also argued that the probative value of the subpoenaed material was limited and insisted that Dow's needs did not outweigh the scientific value of nondisclosure.

The district court agreed with the researchers and denied enforcement of the administrative subpoenas.[2] The Seventh Circuit Court of Appeals affirmed,[3] citing essentially the arguments which the researchers had successfully advanced in the district court: the minimally probative value of the materials, the dangers of premature disclosure, and the burdensome nature of compliance. The appellate court added another important dimension to the case. Attorneys for the state of Wisconsin had argued, in an amicus curiae brief, that such discovery might also jeopardize academic freedom. Two of the three appellate judges agreed; they recognized that such demands for the partial results of scientific experiments "threaten substantial intrusion into the enterprise of university research and . . . are capable of chilling the exercise of academic freedom."[4] This concern provided an "additional reason" for affirming the district court's refusal to enforce the subpoenas.

Meanwhile, a superficially similar dispute was underway in a federal district court in Michigan. The Jeep Corporation, defending a personal injury suit resulting from alleged defects in one of its vehicles, sought to obtain research data from a study conducted by the Highway Safety Institute of the University of Michigan. In its recently published

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[1] There were, in fact, four related studies involving the use and testing of chemical compounds at four levels of solution intensity. The subpoenas related to only two of the studies, since the respondents had indicated they would voluntarily turn over to Dow the results of the other two studies. One of these latter studies was not disclosed and became the subject of a parallel, but unreported proceeding in the same federal district court. United States v. Barsotti, Civ. No. 80-C-677 (W.D. Wis. Dec. 31, 1980) (petition to enforce administrative subpoena).

[2] United States v. Allen, 494 F. Supp. 107 (W.D. Wis. 1980), *aff'd sub nom.* Dow Chem. Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982).

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

[4] *Id.* at 1276.

form, the study identified possible safety problems with several utility vehicles, including a "disproportionately high" rollover rate in accidents for the Jeep CJ-5. Jeep's desire for the data presupposed that the plaintiff would call as an expert witness Dr. Richard Snyder, the University of Michigan professor who had conducted the research. Thus, in support of its subpoena, the company argued that the background materials were essential for its own pretrial preparation.

The Michigan researcher, like his Wisconsin colleagues, resisted the subpoena. He too cited the burdensome nature of such a demand, especially for one who was neither a party to the lawsuit, nor even an inevitable witness. He further asserted that as a constitutional matter a scientific researcher and writer "has a First Amendment right . . . that protects him from testifying against his will" and "an academic privilege to refuse to testify."[5] The *Jeep* court was considerably less receptive to these claims than the *Dow* court had been. Finding no precedent for any of the asserted privileges, and assuming the raw data would be of considerable value to the defense of the personal injury suit, the Michigan federal judge ordered full compliance with the subpoena.[6]

While the two cases do clash in their response to the researcher's claim, there are important factual differences. Perhaps most meaningful is the contrast between research in progress (as in the *Dow* case) and completed research with widely published results (as in the *Jeep* case). The *Dow* court expressed concern about the disruptive and professionally damaging effects of premature disclosure; such a fear would have been remote in the *Jeep* case because the principal findings had been widely disseminated by the Insurance Institute for Highway Safety in a report printed the year before the suit.

Several other factual distinctions might also be legally significant. The Michigan researcher in *Jeep* adamantly refused to respond, asserting an absolute immunity from compelled testimony. The Wisconsin researchers in *Dow*, by contrast, had already agreed to produce documents and materials relating to the one facet of their study which had been cited in the EPA order banning the Dow herbicides. Thus, the potentially most probative part of the study already had been revealed before the issue came to court. In the *Jeep* case, however, the researcher's intransigence barred the company's access to all facets of the

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[5] Wright v. Jeep Corp., 547 F. Supp. 871, 873 (E.D. Mich. 1982).

[6] *Id.* at 875-76. The same issue had been decided differently in a parallel case involving a different plaintiff but the same safety study and the same researcher. Buchanan v. American Motors Corp., Misc. No. 81-436 (E.D. Mich. Oct. 23, 1981) (granting motion to quash subpoena duces tecum).

study, regardless of their potential relevance.

If the researchers were more cooperative in one case than the other, the contrast between the two corporate petitioners cut precisely the other way. Dow demanded everything; its appetite apparently was not assuaged by the researchers' partial compliance. Its appellate briefs seemed not to acknowledge the burdensome or intrusive character of its demand even after the district court had been persuaded by those considerations. The posture of the Jeep Corporation was more accommodating. While the reach of its subpoena was physically broad, Jeep disclaimed any desire to compel disclosure of "confidential sources," and offered to have stricken from the files the names of particular accident victims who had been subjects of the study.[7] This conciliatory move presumably undercut the researcher's claim for categorical protection.

One final factual difference may help to explain the divergent results. The *Jeep* court termed the Michigan professor a "person who has become a public figure as a result of a research project yet wants to remain essentially anonymous so far as the administration of justice is concerned."[8] Although the Wisconsin researchers were surely not unknown within their field — they apparently had published in scholarly journals the results of earlier studies — their current inquiry was still in progress. The difference seems to turn not upon the published or unpublished status of research findings, but rather upon the medium of publication. The Highway Safety study did not appear in an obscure scientific journal but in a separate printed report commissioned and published by an arm of the insurance industry. Thus, the court may have considered the Michigan researcher's academic freedom claim to be less "pure" than those of his Wisconsin colleague — somehow compromised, or even waived, by the sponsorship of the study and the medium and manner of its dissemination.

The factual differences between the cases are significant and substantial. Putting them aside, however, one cannot avoid the basic dissonance in the two courts' appraisals of the researcher's constitutional claim for protection. The great solicitude shown by the Seventh Circuit for the Wisconsin laboratory contrasts markedly with the summary rejection of a similar claim by the Michigan district court. Since both courts assumed they were writing on essentially clean legal slates, it might now be appropriate to review available precedents and then seek to reconcile the few extant cases.

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[7] Wright v. Jeep Corp., 547 F. Supp. 871, 876 (E.D. Mich. 1982).

[8] *Id.* at 872.

I. SCIENTIFIC RESEARCH IN THE COURTS

The legal status of scientific research may require adjudication in several contexts. First is the validity of governmental control of the *conduct* of research.[9] A wide variety of regulations, many threatened or proposed and some enacted, has prompted legal analysis. Perhaps the concern about genetic — and particularly recombinant DNA — research has been the principal catalyst.[10] There has also been deep concern about government regulation of fetal development, brain research, and studies of such highly sensitive subjects as genetic differences in intelligence among population groups.[11] Although the courts have not yet directly addressed these issues, legal scholars and scientists have begun to anticipate the issues they will face when the first lawsuit arrives. The analytic challenge in this area has been to define the precise nature of scientific research as a potentially protected activity, recognizing that research combines elements of both "speech" and "conduct" in a novel and perplexing blend.

A second context involves government limits on publication of research findings. The scientific community was deeply alarmed some months ago when the Department of Defense prevented the presentation of more than one hundred scientific papers at a professional meeting because security clearance had not been obtained from Pentagon officials; at least some of the banned reports concerned wholly unclassified research.[12] The federal government has recently tightened its information classification scheme, thereby reversing a twenty-five year trend toward relaxation of such restrictions on the flow of scientific information.[13] Restrictions imposed under several federal statutes have inhibited the international exchange of scientific information.[14] These and other concerns recently evoked a major study of "Scientific Communication

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[9] *See generally* Delgado & Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349 (1978); Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203 (1977).

[10] *See, e.g.*, Delgado & Millen, note 9 *supra*, at 349-51; Wade, *Congress and the Right of Research*, 4 CIV. LIB. REV., Mar.-Apr. 1978, at 59.

[11] *See, e.g.*, Davidson, *First Amendment Protection for Biomedical Research*, 19 ARIZ. L. REV. 893, 893-94 (1977); Favre & McKinnon, *The New Prometheus: Will Scientific Inquiry Be Bound by the Chains of Government Regulation?*, 19 DUQUESNE L. REV. 651, 651-52 (1981); Comment, *Lawmaking and Science: A Practical Look at In Vitro Fertilization and Embryo Transfer*, 1979 DET. C.L. REV. 429.

[12] N.Y. Times, Sept. 5, 1982, at 1, col. 1.

[13] N.Y. Times, Feb. 1, 1982, at 6, col. 1.

[14] *See Federal Restrictions on Research*, ACADEME, Sept.-Oct. 1982, at 18a-20a.

and National Security" by the National Academy of Sciences, the National Academy of Engineering and the National Institute of Medicine.[15]

A third and quite different context is that of governmental control of access to scientific information, almost the obverse of the problem posed by the *Dow* and *Jeep* cases. Several recent claims filed under the Freedom of Information Act[16] have amplified the statutory restrictions on public access to research findings and data which are under government control.[17] For the most part, public access is limited to grant applications and progress reports submitted to federal agencies. The Freedom of Information Act presumably would not expand access to materials which remained in the researcher's laboratory or university files and which were neither published nor submitted for review to the granting agency.[18] Nonetheless, potential for future conflict exists in the Freedom of Information area as it does in the two other contexts described above.

The *Dow* and *Jeep* cases represent a fourth and quite distinct context for challenge to the legal status of research. These are by no means the first cases in which researchers have resisted legal attempts to obtain either their primary research materials or the identity of sources on which research findings were based.[19] For example, an extensive survey in 1976 revealed that during the previous decade no fewer than fifty subpoenas had been issued to university scholars demanding the production of such information. At least one researcher was incarcerated for refusing to reveal the sources of sensitive information: a Colorado social scientist who mistakenly believed his study of rape victims was protected by federal law spent eight hours in jail for refusing to release information to a trial court about one of the victims he had studied.[20] Such demands may come from a variety of sources — grand juries, legislative investigating committees, criminal prosecutors or defendants,

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[15] SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY (1982) (National Academy Press).

[16] 5 U.S.C. § 552 (1976).

[17] *See, e.g.*, Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974) (research design information contained in application for funding by National Institute of Mental Health available through Freedom of Information Act).

[18] D. Pritchard, Freedom of Science Information Under Federal Law (July 1982) (unpublished lecture to the Mass Communications and Society Division and the Science Writers Educators Group, Association for Education in Journalism).

[19] For an earlier discussion of these issues, see Hendel & Bard, *Should There Be A Researcher's Privilege?*, 59 AM. A.U. PROFESSORS BULL. 398 (1973).

[20] Chron. of Higher Educ., Dec. 4, 1978, at 1, col. 3.

government agencies, or private parties in civil litigation.[21] The problems, and the appropriate responses, will vary substantially under these different situations, just as they will vary among the disciplines in which the challenged research is conducted.

The response of subpoenaed researchers has also varied considerably. In some cases, the mere threat of jail or some other sanction has caused researchers to capitulate. For other scholars, recalcitrance eventually paid off. A research economist at UCLA, who had studied the "street economy" of Los Angeles ghettos, was called before a local police department panel which was investigating alleged police complicity in inner-city crime. Despite threats of six months in jail and a $500 fine, the economist refused to reveal the names of persons he had interviewed for his research. Neither sanction was actually invoked. The researcher later recalled, however, the ominous effect of this experience.[22]

Given the frequency with which the issue has been presented, it is surprising to find so few court decisions which define the researcher's claim to confidentiality or academic freedom. One early skirmish a dozen years ago involved the Institute for Sex Research at Indiana University. A threatened interpretation of the state obscenity law would have required production or destruction of extensive research materials in the Institute's files and archives. A plea for protection was granted by the federal district court, which reasoned that "the state had unconstitutionally intruded itself into . . . protected activity [—] the right of scholars to do research and advance the state of man's knowledge."[23]

The next and more relevant episode involving a researcher's claim to confidentiality concerned Professor Samuel Popkin, a young Harvard political scientist whose research interest was Vietnamese village life. Popkin was called before a grand jury investigating the unauthorized release of the Pentagon Papers. He refused to answer questions which might have yielded the names of Americans and Vietnamese whom he had interviewed during his studies. He also declined to tell the grand jury whether he had ever discussed his study with Daniel Ellsberg. Popkin was cited for contempt of court and sentenced to jail for up to eighteen months; he appealed unsuccessfully.[24] While further proceedings were pending, Popkin was freed after several days in jail when the trial judge unexpectedly dismissed the grand jury whose questions he

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[21] *See* Nejelski & Lerman, *A Researcher-Subject Testimonial Privilege: What to Do Before the Subpoena Arrives*, 1971 WIS. L. REV. 1085, 1089-91.

[22] Chron. of Higher Educ., Dec. 4, 1978, at 1, col. 3.

[23] Henley v. Wise, 303 F. Supp. 62, 66 (N.D. Ind. 1969) (three-judge court).

[24] United States v. Doe (*In re* Popkin), 460 F.2d 328 (1st Cir. 1972).

had refused to answer.

In extenuation, Popkin argued he had a "scholar's first amendment privilege" not to reveal confidential sources vital to his research. The First Circuit Court of Appeals acknowledged the important public value of scholarly access to information, but drew a distinction between Popkin's communication with research subjects, for whom he might claim some protection, and less sensitive communications with professional and academic colleagues. The court eventually held that Popkin could be forced to identify persons who were not government officials or research subjects, but suggested he might claim a privilege for the names or sources and for his own beliefs related to his research.[25]

The next case also involved a Harvard social scientist. Professor Marc Roberts, a public health economist, had interviewed employees of the Pacific Gas and Electric Company (PG&E) while studying the process by which ultilities make environmental decisions. Later, a construction company sued PG&E in federal court, seeking recovery for an alleged breach of contract.[26] In pretrial discovery, the plaintiff claimed that information in Professor Roberts' study might bear upon the corporate decision which triggered the lawsuit. PG&E thus sought notes of Roberts' interviews. With the support of Harvard's general counsel, who had also advised Popkin, the researcher demurred.

The district court found it unnecessary to decide Roberts' constitutional claim. Nonconstitutional considerations — the nonparty status of the deponent, the uncertain probative value of the data, and the possible utility of other sources — led the court to deny the discovery order.

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[25] *Id.* at 332-34. The *Popkin* court did not pass directly upon a claim of privilege with respect to the scholar-subject or scholar-source relationship, but rather with respect to the scholar-colleague relationship. The opinion contains at best an oblique negative implication about the former two relationships; the court observed that Popkin's argument for protection "falls short of immunizing a scholar from testifying about conversations with those who are not his sources." *Id.* at 334. In rejecting a scholar-colleague privilege, the court noted that "to the extent that a scholar qua scholar is asked about statements made to him by other scholars we do not conceive of him as in any different position from that of a doctor asked about his conversations with other doctors, or a lawyer about his talks with other lawyers." *Id.* A similar conclusion was reached by the court in United States v. Doe (*In re* Falk), 332 F. Supp. 938 (D. Mass. 1971) (international law professor's appearance before grand jury investigating Pentagon Papers unlikely to inhibit lawfully transmitted information from contacts in government, education and industry; motion to quash subpoena denied); *see also* O'Neil, *Shield Laws: Partial Solution of a Pervasive Problem,* 20 N.Y.L.F. 515, 532 (1975); Robertson, note 9 *supra*, at 1241.

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

Along the way, the court recognized a persuasive analogy between the researcher's claim and that of a journalist seeking to withhold communications with or the identity of confidential sources. The judgment in Roberts' favor reflected, in the court's view, "the importance of maintaining channels of communication between academic researchers and their sources . . . ."[27] The opinion thus contained more than a hint of the court's willingness to recognize a researcher's constitutional privilege, should the absence of nonconstitutional grounds make such a judgment necessary.

There is one recent and potentially useful precedent. A group of chiropractors sued the American Medical Association and the American College of Radiology alleging a "conspiracy to defame" and various violations of the antitrust laws. In preparing for trial, both parties sought background data from a series of articles in *Consumer's Reports* which had disparaged chiropractic medicine. Consumers Union and the author refused to produce the subpoenaed materials. They invoked claims of confidentiality shared with journalists, but since the studies in question resembled scholarly research more than newspaper stories, the basis of the claim was a bit different. In upholding the deponents' refusal to produce the materials, the court found that the subpoena implicated significant first amendment interests even though most, if not all, of the requested materials previously had been disclosed elsewhere.[28] This court, like others which reached the same conclusion, stressed such nonconstitutional factors as the probative value of the material, the burdensome nature of the subpoena, and the untapped potential of alternative sources.

II. SOURCES OF PROTECTION: A BROADER LEGAL PERSPECTIVE

These few direct precedents suggest the lines of legal analysis an embattled researcher might follow. In certain situations, the requested information arguably will fall within one of the traditionally recognized privileges. For example, if the research subjects were the clients of an attorney-scholar, or the patients of a physician-researcher, the statutory privilege for such relationships should protect against compelled disclosure.[29]

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[27] *Id.* at 390.

[28] *In re* Consumers Union, 495 F. Supp. 582 (S.D.N.Y. 1980).

[29] There is one recent caveat: a Wisconsin court has held that the physician-patient privilege does not protect the identities of subjects of a biomedical research project conducted by a clinical psychologist, because the subjects were not technically "patients." State *ex rel.* Pflaum v. State of Wis. Psychology Examining Bd., No. 82-909 (Wis. Ct.

Scholars occasionally have sought more explicit protection than is afforded by these traditional privileges. For example, a Delaware law designed primarily to safeguard the relationship between journalists and their sources also brings researchers and scholars within its protections.[30] Comparable protection does not appear to exist elsewhere.

In the absence of explicit statutory protection, the researcher faced with a subpoena for sensitive information typically can meet the criteria by which evidentiary privileges are broadly determined — that, in Wigmore's parlance, the communications must be made in a confidence that they not be disclosed; that the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; that the relationship must be one which, in the opinion of the community, ought to be "sedulously fostered"; and that the injury which would inure to the relationship by virtue of the disclosure must outweigh the benefit that would result from forcing a witness to disclose the information.[31] Yet merely meeting such criteria — which the scholar can usually do in subpoena cases — would do little more than indicate the procedural appropriateness of according protection if a substantive basis for doing so exists. It is to the quest for such substantive grounds that we now turn, and for which we must look to relevant analogies.

The most obvious such analogy is the journalist's claim for legal protection of sensitive sources and other information. While a growing number of states protect that relationship in whole or part by "shield laws,"[32] many states have no such laws and even those which do seldom afford full protection to journalists for the identity of and communications with confidential sources.[33] The journalist-source relationship has thus been the focus of substantial litigation during the past decade.

The critical Supreme Court test of the journalist's claim came in 1972 in *Branzburg v. Hayes*.[34] A bare majority of the Justices held only that a journalist may not refuse on constitutional grounds to answer questions regarding sensitive sources posed by a grand jury. Jour-

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App., Dist. 1, Feb. 14, 1983).

[30] DEL. CODE ANN. tit. x, §§ 4320-4326 (1975) (Reporter's Privilege Act permits full-time researcher-writers to refuse to reveal sources).

[31] 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961).

[32] *E.g.*, PA. STAT. ANN. tit. 28, § 330(a) (Purdon 1958).

[33] *See* Note, *Shield Laws: The Legislative Response to Journalistic Privilege*, 26 CLEV. ST. L. REV. 453, 466-72 (1977).

[34] 408 U.S. 665 (1972) (newsman had no privilege to refuse to identify source, whom he had observed manufacturing hashish).

nalists, said the Court, must respond to such inquiries just like other citizens; despite the high value of unrestricted news gathering, society has a paramount interest in the pursuit of criminal investigation by grand juries. The majority was not persuaded that denial of such a claim of privilege would cripple an otherwise free and healthy press. Moreover, the Court observed that any response to reporters' pleas should come from legislators and not from judges.[35]

Crucial to the outcome was the brief concurring opinion by Justice Powell. While he accepted the disposition of the pending cases, Powell noted the narrow scope of the judgment. The plurality had, he cautioned, made clear that "no harassment of newsmen will be tolerated."[36] Moreover, the absence of good faith on a grand jury's part might well alter the result. In each case, he stated, there should be a careful balancing of conflicting constitutional claims and interests, bearing in mind the propriety of the enforcement process, the availability of alternative sources, and the probable effect of the inquiry upon the particular journalist.

The volume of lower court litigation which followed has left *Branzburg* almost more the exception than the rule. First in civil cases[37] and later even in criminal cases,[38] lower federal and state courts have found convenient avenues for distinguishing *Branzburg*'s denial of protection for journalist-source relationships. Although some reporters will face fines or imprisonment for refusal to identify sources or reveal conversations,[39] the proportion of those who have successfully tested the issue is impressive. Save in the extreme case, for example, in which a journalist may hold the key to a criminal defense,[40] the reporter's chances for success now seem promising. In one of the most recent such cases, a federal district judge observed almost casually that "within certain limits now recognized in our law, the [newspaper] and its reporters are protected by the First Amendment from compelled disclosures of

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[35] *Id.* at 705-06.

[36] *Id.* at 709-10.

[37] *E.g.*, Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972) (journalist's first amendment privilege outweighed public interest in disclosure when racial discrimination in sales of housing was at issue).

[38] *E.g.*, United States v. Cuthbertson, 630 F.2d 139 (3rd Cir. 1980) (published witness statements sought by criminal defendants for in camera review not privileged), *cert. denied*, 454 U.S. 1056 (1981).

[39] *See, e.g.*, O'Neil, note 25 *supra*, at 515 n.2 (discussing case examples).

[40] *E.g.*, *In re* Farber, 78 N.J. 259, 394 A.2d 330 (reporter's materials involving murder case not privileged when no other source was available for material evidence), *cert. denied*, 439 U.S. 997 (1978).

'the sources and source material' which they relied on in writing and publishing the articles . . . ."[41] In short, the law seems to have evolved from *Branzburg*'s presumption of nonprotection to a current presumption of protection — a shift which has been as important for journalists and their first amendment rights as it has been subtle and unheralded.[42]

The critical issue for cases like *Dow* and *Jeep* is, of course, how far the journalist's claim avails the academic researcher. This analogy is, like most, both persuasive and imperfect. There are important similarities between the journalist's sources and the researcher's materials. Indeed, the *Branzburg* Court itself recognized that "the informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists."[43]

Apart from the Supreme Court's recognition of this affinity, the effects of compelled disclosure on the two intellectual processes seem strikingly similar. Concerns advanced by scholars in the 1976 subpoena survey closely resemble the fears of journalists. Most of the scholars who responded expressed the need for strict legal protection for the confidentiality of the sources of research studies. Almost three-quarters of the respondents said they believed that with such protection potential sources would be more willing to participate in research projects. Roughly half the group indicated a belief that academic investigators would more willingly undertake controversial research if they could be assured that their sources would not be subject to the possibility of revelation in court.[44]

Beleagured scholars echo these concerns. Professor Marc Roberts, the Harvard political economist subpoenaed in the *PG&E* case, provides a telling example. He had promised confidentiality to the PG&E employees he interviewed about the company's decisionmaking processes. That promise was apparently valuable, if not vital, in obtaining his research data. It was also that promise which inclined him and Harvard's chief legal counsel to resist the subpoena on constitutional as well as procedural grounds. Following his victory in court, Roberts insisted that the "long run interests of society in the acquisition of knowledge" clearly outweighed the discovery interests of the plaintiff

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[41] Alexander v. Chicago Park Dist., 548 F. Supp. 277, 277-78 (N.D. Ill. 1982) (reporter's observations about park system were neither "source material" nor privileged).

[42] *See* Murasky, *The Journalist's Privilege:* Branzburg *and its Aftermath*, 52 TEX. L. REV. 829 (1974).

[43] Branzburg v. Hayes, 408 U.S. 665, 705 (1972).

[44] *See* Chron. of Higher Educ., Dec. 4, 1978, at 1.

in the contract suit.[45]

Other researchers have expressed similar concerns. Professor Paul Bullock, the UCLA economist threatened with contempt following his studies of the inner city "street economy," insisted that "serious damage" would have ensued if he had been forced to reveal to the police the names of his subjects. Over the years, he had established a close and cordial relationship with groups of ghetto youth — a relationship which, if invaded, probably would have precluded any further research in that community.[46]

These concerns about a researcher's confidential relationships have received some passing judicial recognition. The *Popkin* court was willing, at least, to protect the scholar's refusal to disclose the names of certain subjects.[47] The *PG&E* court observed that "[m]uch of the raw data on which research is based is simply not made available except upon a pledge of confidentiality. 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."[48] Even the less benign opinion in the *Jeep* case praised the company's disinclination "to compel the disclosure of confidential sources" and its willingness to protect the identity of accident victims by removing individual names before disclosure.[49] Thus, courts which deny full protection for researchers may nonetheless find merit in claimed confidentiality of source relationships.

The interest in confidentiality of sources has two dimensions. For researchers, as for journalists, there may well be an independent communicative interest which deserves discrete protection. Popkin's Vietnamese, Bullock's ghetto youth, Roberts' PG&E employees, and even Snyder's accident victims may all have a right to speak anonymously and without fear of reprisal — a right which, for practical reasons, only the researcher can assert in court. In addition, a court order compelling disclosure might harm anonymous sources more than reporters or researchers. In the journalistic context, one commentator has recently argued that "the source's interest, rooted squarely in the First Amendment, is qualitatively different from that of the reporter and under the Court's own constitutional methodology deserves explicit con-

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[45] *Id.*

[46] *Id.*

[47] United States v. Doe (*In re* Popkin), 460 F.2d 328, 334 (1st Cir. 1972).

[48] Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976).

[49] Wright v. Jeep Corp., 547 F. Supp. 871, 876 (E.D. Mich. 1982).

sideration and a high degree of protection."[50] The source, in other words, should have both a right to speak through the reporter or researcher, and a corollary right *not* to be forced to speak when the reporter or researcher is asked to violate a promise to the source who prefers anonymity.[51]

Obviously, not all research cases fit this mold. Unless one extends to rhesus monkeys a comparable solicitude, *Dow* involves no claim to confidentiality of source relationships. In many cases, researchers in the natural and physical sciences could not rationally invoke the journalist's source analogy. Here the most cogent concern is a different one. The research involved in *Dow* was complex, continuing, incomplete and — at the time of the subpoena — inconclusive. It was therefore the threat of premature disclosure that the deponents most feared. The very nature of research presupposes ample opportunity for testing and validation. Compelling the revelation of preliminary findings or raw research data, even in the limited context of a collateral lawsuit, poses great risk for the careful scientist. Cross checks, reruns, controls, experiments, and other forms of validation represent as vital a part of the process of inquiry as preliminary experiments yielding initial results like those subject to the *Dow* subpoenas.[52] In this regard, the scientific researcher may claim an interest which the journalist may not: although reporters have rightly resisted compelled disclosure of notes, drafts, and other unpublished materials, the risks of discovery after publication seem far less grave.

Apparently only the *Dow* court has had occasion to discuss the "premature disclosure" or "interruption of research" claim. The circumstances of the case suggested an affinity to more familiar first amendment interests:

> The researchers could reasonably fear that additional demands for disclosure would be made in the future. If a private corporation can subpoena the entire work product of months of study, what is to say, further down the line, the company will not seek other subpoenas to determine how the research is coming along? To these factors must be added the knowledge of the researchers that even inadvertent disclosure of the subpoenaed data

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[50] Note, *The Rights of Sources: The Critical Element in the Clash over Reporter's Privilege*, 88 YALE L.J. 1202, 1217 (1979).

[51] *Cf., e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (religious believer need not display state motto on his license plates); Talley v. California, 362 U.S. 60 (1960) (law requiring distributors of handbills to supply names and addresses of distributors unconstitutional).

[52] *See, e.g.*, Ferguson, *Scientific Inquiry and the First Amendment*, 64 CORNELL L. REV. 639, 640-44 (1979).

> could jeopardize both the studies and their careers. Clearly, enforcement of the subpoenas carries the potential for chilling the exercise of First Amendment rights.[53]

There was an additional if less clearly articulated concern. The researchers in *Dow* argued, and the district court agreed, that such early intervention in the research process might well impair prospects for eventual publication. Because, as the court noted, "peer review and publication of the studies [were] crucial to the researcher's credibility and career and would be precluded by whole or partial public disclosure of the information,"[54] a familiar and well-protected first amendment freedom might be chilled by subpoenas like those in *Dow*.

There is a third distinct constitutional concern — this one also more compelling for researchers than journalists. Compelled disclosure of research materials, particularly in controversial areas, might inhibit or distort future inquiry by the respondents or by others contemplating controversial fields. Harvard East Asian scholar John K. Fairbank emphasized this concern at the time of the *Popkin* case:

> My observation is that a subpoena has an effect of intimidation both on the person subpoenaed and on those who might have contact with him. I can testify from personal knowledge that in the early 1950's . . . the widespread subpoena of China scholars had the public effect of inhibiting realistic thinking about China, and I believe the result carried over into unrealistic thinking about Chinese relations with Vietnam and helped to produce our difficulties there.[55]

Similar concern emerged in the 1976 subpoena survey. Paul Bullock, the UCLA economist, remarked after his narrow escape from legal jeopardy: "If I were to undertake a similar study, I'd want to know that I'm somehow protected on the confidentiality of that kind of information. I don't want to be shoved into jail."[56] While such a chilling effect may be difficult to demonstrate, particularly in terms of redirected or foregone research, a risk exists in this area comparable to risks which courts have recognized in relation to legislative investigations,[57] loyalty oaths,[58] and university classroom surveillance.[59] An ex-

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[53] Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276 (7th Cir. 1982) (footnote omitted).

[54] *Id.* at 1273.

[55] N.Y. Times, Apr. 24, 1972, at 35, col. 3.

[56] Chron. of Higher Educ., Dec. 4, 1978, at 10, col. 4.

[57] *E.g.*, Gibson v. Florida Legislative Investigating Comm'n, 372 U.S. 539, 544 (1963) (NAACP need not disclose membership list to legislature).

[58] *E.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (state university teachers may not be required to take loyalty oath which might prohibit advocating violent overthrow in the abstract).

tension of comparable solicitude to research subpoena cases does not seem unwarranted. It is the controversial research topic which is in greatest jeopardy; the same controversial topic is probably also the societal interest which deserves the greatest legal protection. This rationale is not unlike the reasoning by which the Supreme Court recently barred compelled disclosure of the names of contributors to, and recipients from a controversial minor political party.[60] Notwithstanding the strong post-Watergate interest in maximum campaign candor and disclosure, the Court recognized an overriding first amendment interest in protecting controversial groups from reprisal and harassment. These interests may, in both contexts, be protectable only by resisting compelled disclosure of sensitive information.

Finally, the subpoenaed researcher surely can invoke the protection accorded the scholarly community under the rubric of academic freedom. Although a subpoena or discovery order seeking research materials seldom will pose a threat of the magnitude of a loyalty oath, subversive activities investigation, or a surveillance program, the underlying principles are surely comparable. The values of which the courts have often spoken in oath and other cases are surely present here, if in less obvious or dramatic degree. Professor Thomas I. Emerson, who has expounded at length on the constitutional premises of academic freedom, suggests the relationship in this way:

> The basic concepts of freedom of expression embodied in the First Amendment are readily applicable to many aspects of academic freedom. Those principles can easily be extended to protect the faculty member in his academic rights to direct expression, that is, in his right to be free of interference in his teaching, research, and publication . . . . Freedom of expression concepts would also apply to such problems as improper legislative proscription of the curriculum, and to many features of student academic freedom . . . . Ultimately any system of freedom of expression depends upon the existence of an educated, independent, mature citizenry. Consequently realization of the objectives of the First Amendment requires educational institutions that produce graduates who are trained in handling ideas, judging facts and argument, thinking independently, and generally participating effectively in the marketplace of ideas. Hence the First Amendment could be said to require the kind of educational institutions that are capable of producing such results.[61]

While the legal significance of these broad principles may be less

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[59] *E.g.*, White v. Davis, 13 Cal. 3d 757, 767-68, 533 P.2d 222, 228-29, 120 Cal. Rptr. 94, 100-01 (1975) (police officers may not pose as students to gather information for dossiers when such reports do not pertain to illegal acts).

[60] Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 103 S. Ct. 416 (1982).

[61] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 613 (1970).

apparent in research subpoena cases than in those Professor Emerson had more immediately in mind, their extension to situations like *Dow* and *Jeep* seems entirely valid. Untrammeled research is at least as essential to the protection of academic freedom as is untrammeled teaching. A university — or an academic community — which enjoys freedom of thought or inquiry in the classroom but not in the laboratory could hardly be termed an academically free institution. Without safeguards for freedom of research, even seemingly free inquiry in the classroom soon would be in peril.

III. SOME PRACTICAL DESIDERATA

We come at length to some practical considerations which may be useful in cases of the *Dow/Jeep* variety. We begin with the assumption that the researcher enjoys at least minimal constitutional protection, if not the absolute or unqualified constitutional privilege which may ideally exist. If courts will accord at least modest protection to the researcher's claim, then particular factors become crucial to the incidence and degree of its recognition.

First, courts should at the threshold consider the potential utility of alternative sources of information. If the party seeking the data has not exhausted all other possible avenues of inquiry, the request should be denied, or at least postponed, for that reason alone. Most courts passing upon journalist source claims have asked this much;[62] courts faced with research subpoena challenges should ask no less.

Second, proof of the probative value of the information should be necessary even if the deponent has raised no constitutional claim. When constitutional interests are affected, courts should be more rigorous in applying the test; more than a general showing of relevance should be required and the precise probative value of the requested data to issues in litigation also should be probed.[63]

The relationship of the researcher to the litigation is also meaningful. In cases in which a scholar is virtually certain to be called as a witness by one or both sides, as in the *Jeep* case, a nexus exists which is absent

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[62] *E.g.*, Zerilli v. Smith, 656 F.2d 705, 712-15 (D.C. Cir. 1981) (newsperson's qualified first amendment privilege outweighed criminal defendant's interest in compelling disclosure because defendant failed to exhaust possible alternative sources of information).

[63] *E.g.*, Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (considering news accounts of mayoral candidate's flirting and unauthorized coffee breaks to be of marginal value to candidate's contempt suit when weighed against newsperson's qualified first amendment privilege).

if the researcher will not be summoned by either party.

The type of legal proceeding in which the issue arises should also have some bearing. Courts have properly weighed the journalist's or researcher's claim more heavily in routine civil suits than in criminal cases, especially in those rare criminal cases in which information held only by a third party might be critical to a suspect's defense.[64] Presumably, the same continuum which has developed in the journalist's source context could also apply to research cases.

Third, careful consideration should be given to the effects of disclosure upon persons other than the subpoena respondent. If, for example, pledges of confidentiality have been made to confidential sources, a protective order might suffice, as in the *Jeep* case. In other situations, such protection might be pointless and only a nondisclosure order would provide a meaningful safeguard for unidentified sources. (The use of the term "source" may be overly broad. In the research context, there may be other unrepresented interests as well. Staff members, visiting scientists, fellow scholars at other institutions, graduate students, and others may have played roles in the process which would warrant concern for their interests. Thus, when we speak of "sources" in assessing the effect of disclosure on others, we should also have such persons in mind.)

Fourth, the status of the research must be carefully assessed. A demand for data supporting a finished publication is one thing; a request for raw material in progress is quite another, as the *Dow* court recognized. When further studies remain to be done or validation would ordinarily follow, that is, when, in the view of the scientific community, the research is "incomplete" even though reportable findings may exist, the court should indulge a strong presumption against intervention. If discovery is nonetheless deemed necessary, all possible precautions should be taken to reduce the risks of premature disclosure.

Fifth, and closely related, there should be a determination of the effects of research findings or results upon eventual publication. As the *Dow* court cautioned, premature disclosure might not only inhibit or deter meaningful publication of carefully validated and refined conclusions, but also jeopardize the reputations and professional standings of the principal investigators. In a case like *Jeep*, however, in which the definitive report of the study has already appeared in print, the mere prospect of additional publications from the same raw material would weigh much less heavily against discovery.

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[64] *E.g.*, *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

Sixth, some consideration should be given to the principal investigator's reasonable expectations. If, for example, the requested material would have been subject to disclosure through freedom of information requests or other access channels, then a waiver of the claimed confidentiality may be fairly presumed. In most research cases, however, such a waiver would be unlikely, save with respect to materials already included in reports to government agencies or in applications for future funding. No such waiver could be reasonably inferred with respect to other unpublished research materials.

Finally, courts should consider the contribution of each decision to transcendent principles of free inquiry and the advancement of knowledge. Without disparaging the interests of individual litigants, judges may properly take a broader view of the interests at stake. The researcher or scientist who seeks in such a case to resist disclosure may well be viewed as a representative of the larger scholarly or scientific community. The consequences of granting or denying a demand for research data should not be limited to the immediate parties, but should be placed in a much broader intellectual context. The resolution of each such claim has potentially profound implications for the pursuit of truth and the enhancement of knowledge.