

COUNTERING THE EXCESSIVE SUBPOENA FOR SCHOLARLY RESEARCH

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I

INTRODUCTION

When researchers rely on others to provide foundational data for research, they may often need to assure these sources that their identities and identifiable data will be kept confidential. Confidential firsthand reports are essential tools for enabling researchers to explore a plethora of important questions in such areas as health, economics, and public policy. Given their availability to the public, as well as to legislators and other policy makers, such reports may advance measures to ameliorate a variety of serious problems.

Unfortunately, even the most objective research may be put at risk if it becomes bogged down in the muddy fields of litigation. A subpoena for confidential data is likely to be intimidating to a researcher regardless of his level of confidence in his objective evaluation of the data. The average researcher is ill-prepared for the sudden interference of a subpoena or the blocking tactics of an adversary flanked by expert witnesses. Yet, subpoenas are an omnipresent threat in all kinds of cases, from a products liability case against a cigarette manufacturer to a criminal prosecution of a prostitute.

But what makes a subpoena excessive? There is no simple definition, nor bright-line rule; rather, the determination involves weighing various factors: the public interest served by the research project versus the public or private interest that prompted the subpoena; the importance of guaranteeing confidentiality in gaining access to essential information and scholarly research versus an alleged right to know the identity of the confidential sources or to review the research data.

To date, neither legislatures nor courts have granted researchers an absolute privilege to protect the confidentiality of their research data. The Supreme Court's interpretation of the First Amendment fails to provide such a privilege even for newspaper reporters.¹ Likewise, statutory and judicial rules

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1. See *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that reporters are not exempt from the duty to appear before a grand jury and answer relevant questions); see also *In re Grand Jury Proceedings* (James Richard Scarce), 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994) (citing *Branzburg* for the position that there is a reporter's privilege, and denying Scarce's claim that a scholar's

of evidence ordinarily do not provide an explicit privilege for researchers.² Some rules of evidence even attempt to preclude privileges not expressly provided by statute.³ In the absence of an express privilege, the most promising means by which to counter an excessive subpoena may be federal statutes that provide for confidentiality in certain circumstances,⁴ privacy provisions in state constitutions or laws,⁵ reporters' shield laws,⁶ or rules authorizing courts to quash or modify subpoenas or issue protective orders.⁷ Although a subpoena demanding confidential research data does not automatically lead to the granting of an absolute privilege, a court may exercise its judicial discretion to undertake a balancing test that may tip the scales for confidentiality.

Although some researchers may be willing or eager to serve as witnesses themselves or to identify knowledgeable experts to serve in their stead, others may find the very process of litigation uncongenial or even demeaning, particularly when it involves undue interruption of work in progress. Their reluctance to testify may be even greater for litigation in which they are neither parties nor testifying or consulting experts.

This article examines how researchers, research institutions, and their counsel may foresee and effectively counter excessive subpoenas. The best defense against an excessive subpoena requires that the researcher be alert to the possibility of a subpoena from the earliest planning of the research, and that he remain alert throughout the process. Taking early precautions and maintaining awareness allows the researcher to take advantage of existing protections, and enables him to quickly mobilize his defense should he be served with a subpoena.⁸ This article guides the researcher (and his counsel) through each step of the process and outlines the legal devices that can be implemented to avoid or challenge a subpoena.

privilege is analogous).

2. See, for example, the absence of such a privilege in CAL. EVID. CODE §§ 900-1063 (West 1996).

3. See, e.g., *id.* § 911; see also *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1989). Cf. *Jaffee v. Redmond*, No. 95-266, 1995 U.S. LEXIS 3879 (June 13, 1996).

4. See, e.g., 42 U.S.C. §§ 241(d), 242m(d), 299a-1(c).

5. See, e.g., CAL. CONST. Art. I, § 1; Cal. Civ. Code § 56.10(c)(7); Mich. Comp. Laws Ann. § 333.2631; Minn. Stat. Ann. § 144.053; N.M. Stat. Ann. § 71-602.

6. See, e.g., CAL. CONST. Art. I, § 2; CAL. EVID. CODE § 1070; see also *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990) (holding that the shield law does not require showing by a newsperson that information was obtained in confidence).

7. See, e.g., FED. R. CIV. P. 45(c); FED. R. CIV. P. 26(c); see also David D. Siegel, *Federal Subpoena Practice Under The New Rule 45 of The Federal Rules of Civil Procedure*, 139 F.R.D. 197, 231-36 (1992).

8. This essay makes no distinction between researchers and research institutions. It is a fair assumption that confidentiality assurances made by a researcher are authorized by the supervising research institution and that the researcher's and the research institution's interests in protection and nondisclosure are shared and do not conflict in any material way. If they arrive at a final juncture of deciding whether to risk contempt for violating a court order, it is possible, but by no means certain, that the individual researcher and the institution might view the issues differently. In that event, each should be counseled separately.

II

THE PLANNING STAGES

A. Identify The Reasons For Confidentiality

Researchers should determine at the outset whether they can obtain the necessary data free from of any guarantee of confidentiality. If not, they should document the reasons requiring confidentiality. In many cases, confidentiality may be essential to protect data sources from an invasion of privacy, from embarrassment or distress, or from criminal prosecution, tax audits, or other government investigations, as well as from litigation by others.

Such confidential information is akin to a trade secret. Courts and legislatures already protect trade secrets because their value and utility depend on their not being widely known.⁹ Likewise, courts should be receptive to requests to protect essential research information because its value and utility also depends on confidentiality. The researcher who prepares a written memorandum at the inception of the research setting forth the reasons for confidentiality will be well-prepared to persuade a court that the project could not have proceeded without the assurance of confidentiality.

Case law and commentators offer guidance as to when confidentiality should be safeguarded. For example, John Wigmore's handbook on the Federal Rules of Evidence includes the following requirements for confidentiality:

- (1) The communications *must originate in a confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.¹⁰

Courts will take such factors into account when determining whether information should be accorded confidentiality protection. Researchers would be well-advised to consider these factors before proceeding with their research.

B. Give Confidentiality Assurances Sparingly

Researchers should offer assurances of confidentiality only when the assurances are the avenue to forthright and full disclosure of useful data. If an assurance was not necessary or at least justifiable, a court may not be inclined to protect the data from disclosure. Moreover, if a court refuses to uphold such an assurance, researchers and their sponsors may be liable for the ensuing

9. See, e.g., UNIF. TRADE SECRETS ACT, CAL. CIV. CODE § 3426.1(d)(1); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 39-45 (1995).

10. 8 JOHN H. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. 1961 & Supp. 1997) (emphasis in original).

breach of confidentiality.¹¹

Researchers frequently qualify their assurances by adding a proviso that confidential data will not be disclosed except as required by law. Such a proviso may alert the source to the possibility of compelled disclosure and may strengthen the researchers' defense against a claim of liability premised in contract, promissory estoppel, or tort in the event of such disclosure. On the other hand, such a proviso could lead the party subpoenaing the data to contend that the possibility of compelled production was anticipated and that enforcement of a subpoena, therefore, is not inconsistent with the qualified assurance given.¹² Nonetheless, because the proviso is so broad, it does not entirely foreclose the possibility of litigation against a researcher for disclosure. Additionally, this type of proviso may dissuade some potential research subjects from participating in research studies. Therefore, because the protective effect of the proviso is questionable, researchers should consider excluding it, especially when federal confidentiality protection is available.

Confidentiality agreements may vary depending on the source and the extent of the data. An agreement with a chemical company involved in an environmental clean-up or an insurance company involved in mass tort litigation may provide more rules governing confidential data and subpoenas than a short form of consent and confidentiality assurance that might be used in a study of mentally ill homeless persons or elderly medical patients. Such an agreement might require notification if a subpoena is served or the use of best efforts by the researcher to resist production of confidential data; it might limit the "except as required by law proviso" to a court order, not merely a subpoena; and it might provide for return or destruction of the data at the conclusion of the study.

C. Obtain Federal Confidentiality Protection, If Available

In the area of public health, federal law offers two sources of confidentiality protection. First, federal statutes limit the disclosure and use of information obtained in the course of research supported or conducted by the Public Health Service, which includes the National Institutes of Health and the Agency for Health Care Policy and Research.¹³ For example, one provision protects information obtained through activities carried out or supported by the Agency for Health Care Policy and Research:

11. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that the First Amendment does not bar a promissory estoppel action for breach of assurance of confidentiality); G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385 (1992) (arguing for the creation of an action in tort for disclosure of private facts against the source of disclosure).

12. See, e.g., *Atlantic Sugar, Ltd. v. U.S.*, 85 Cust. Ct. 128 (1980) (compelling disclosure of a non-party's answer to an International Trade Commission questionnaire, noting that persons who responded were informed that the information would not be disclosed "except as required by law"); see also Bert Black, *Subpoenas and Science—When Lawyers Force Their Way into the Laboratory*, 336 N. ENG. J. MED. 725-27 (1997).

13. See 42 U.S.C. § 203 (1994).

[N]o information, if an establishment or person supplying the information or described in it is identifiable, obtained in the course of activities undertaken or supported under this subchapter [VII] may be used for any purpose other than the purpose for which it was supplied unless such establishment or person has consented (as determined under regulations of the Secretary) to its use for such other purpose. Such information may not be published or released in other form if the person who supplied the information or who is described in it is identifiable unless such person has consented (as determined under the regulations of the Secretary) to its publication or release in other form.¹⁴

This provision, which is interpreted as giving researchers no discretion regarding disclosure of the protected data, regardless of who seeks it,¹⁵ automatically grants confidentiality protection to all projects that fall within its scope.

Second, some public officials have the authority to grant confidentiality protection under certain circumstances.¹⁶ For instance, one such provision gives the Secretary of Health discretion to grant federal confidentiality certificates for a range of both publicly and privately funded research projects:

[T]he Secretary may authorize persons engaged in biomedical, behavioral, clinical or other research (including research on mental health, including the use and effect of alcohol and other psychoactive drugs) to protect the privacy of individuals who are the subject of such research by withholding from all persons not concerned with the conduct of such research the names and other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any [f]ederal, [s]tate, or local civil, criminal, administrative, legislative or other proceedings to identify such individuals.¹⁷

To obtain a federal confidentiality certificate, a researcher must submit an application including details about the individuals having major responsibilities in the project, the research protocol, and various assurances.¹⁸ Upon receipt, the Secretary can issue a certificate, deny it and state the reasons therefor, or request additional information from the applicant.¹⁹ Once armed with a confidentiality certificate under federal law, a researcher in federal or state court, or in other proceedings, has the discretion to refuse to divulge the identity or identifying details of the individual source(s) who furnished the data upon assurance of confidentiality. The substance of the information disclosed, however, is not confidential—only the identity of the source is—and it may be aggregated with comparable data in a public report.

14. *See id.* § 299a-1(c).

15. *See* Memorandum from Susan Greene Merewitz, Senior Attorney in the Office of General Counsel of the Department of Health and Human Services, to John P. Fanning, Senior Health Policy Advisor, Jan. 30, 1995 (on file with author) [hereinafter Merewitz memo].

16. *See* 42 U.S.C. § 241(d) (1994) (giving Secretary of Health discretion to grant federal confidentiality certificates for biomedical, behavioral, clinical, and other research); 21 U.S.C. § 872 (c) (giving Attorney General discretion to authorize grants of confidentiality for educational and research programs directly related to the enforcement of laws under the Attorney General's jurisdiction).

17. 42 U.S.C. § 241(d) (1994); *see* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 505-06 (1995).

18. *See* 42 C.F.R. § 2a. Researchers should be aware that persons entering the project after the expiration date of the confidentiality certificate are not protected from disclosure. However, researchers may submit a written request for an extension of the expiration date. Upon approval, the Secretary of Health will issue an amended confidentiality certificate. *Id.* § 2a.6(c).

19. *See id.* § 2a.6(b).

These two statutory provisions overlap to some extent. Although logically one might assume that confidentiality protection is enhanced when these provisions are used in combination, this is not necessarily the case. According to federal authorities, a confidentiality certificate will weaken the protection that qualifying projects receive under the self-executing statutory grant of confidentiality.²⁰ There are two explanations for this result: First, federal confidentiality certificates give the researcher discretion to disclose the protected data. In contrast, under a statutory grant of confidentiality, the researcher may disclose the protected data only if the research subject consents after notice. Second, a federal confidentiality certificate protects only the names or other identifying characteristics of the research subjects. In contrast, a statutory grant of confidentiality protects all data obtained in the course of activities falling under the scope of the statute.²¹ It is important for researchers to have knowledge of these differences so they may determine what information is protected and when they may legally disclose protected information.

These public health statutes illustrate the variety of federal confidentiality protection that may be available to resourceful researchers. Thus, researchers are well-advised to investigate possible sources of statutory protection before resorting only to home-spun confidentiality assurances.

III

RESEARCH IN PROGRESS

A. Unlink the Names and Identifying Details of Sources from Confidential Data and Safeguard the Data

It is an elementary precaution immediately to unlink the names and other identifying details of the study participants. The researcher should safeguard the identifying names and details and their linkage to the other data by keeping them in restricted areas or locked files and, in some cases, by destroying them.²² This data should be safeguarded until they are aggregated for publication in a report wherein no ordinary reader could identify any study participant.²³

In sum a research institution and researcher should adhere to a confidentiality plan from beginning to end. Then courts, which already pro-

20. See Merewitz memo, *supra* note 15, at 2.

21. See *id.* at 2-3.

22. See Paul Nejelski & Lindsey M. Lerman, *A Researcher-Subject Testimonial Privilege: What to Do Before the Subpoena Arrives*, 1971 WIS. L. REV. 1085, 1096-98. Such aggregated reporting raises the important and separate question of whether and how studies based on confidential data can be verified or tested reliably without compromising confidentiality.

23. It is possible in some circumstances that an insider who is highly knowledgeable and astute, for example an industrial participant in a confidential study of an industry, might infer that certain data reported in the aggregate possibly relates to a particular participant. Holding researchers and research institutions to the exacting standard that it must be impossible for even the most informed and astute reader to extract individual data would be counterproductive because it would lead to dilution of reported data that could render tables and conclusions so general that they would be meaningless. I am not aware of any case on the point.

tect trade secrets when their possessors have taken reasonable steps to maintain their secrecy,²⁴ should prove amenable to protecting confidential research that has been carefully safeguarded via restricting access to only those persons directly engaged in research of the data.

B. Comply with the Requirements of Your Institutional Review Board

Research projects that use confidential data from individuals are ordinarily screened by the research institution's institutional review board ("IRB"), sometimes called the human subjects protection committee.²⁵ Such a review ordinarily ensures compliance with requisite forms and procedures for obtaining the informed consent of study participants and protecting their privacy. Should litigation nonetheless ensue, the researcher could then demonstrate compliance with the requirements of its IRB. Compliance will show the unity of interests in confidentiality of the researcher, the research institution, and the research subject and counter a contention that the confidentiality assurance was not authorized.

IV

AFTER THE SUBPOENA ARRIVES

A. Consult with Your Management and Counsel Immediately

Researchers unfamiliar with court procedures and subpoenas may be jolted when served with a subpoena. They may fear intrusion upon their work, the violation of the assurances of confidentiality they extended, or a public array of their records and computer databases in a courtroom. Subpoenas are often phrased in extraordinarily broad and demanding terms that might further alarm researchers who are unaware that sweeping subpoenas are common and mean "just about as much as the asking price for a rug in an Oriental bazaar."²⁶ Such broad subpoenas are inconsistent with Rule 45 of the Federal Rules of Civil Procedure. The court accordingly has discretion to quash the overbroad subpoena and require the requesting party to start anew instead of modifying the subpoena.²⁷

24. See, e.g., UNIF. TRADE SECRETS ACT; CAL. CIV. CODE § 3426.1(d)(2).

25. See 42 U.S.C. § 289(a); 45 CFR §§ 46.101-409. Various federal agencies have recently adopted a common Federal Policy for the Protection of Human Subjects. 56 Fed. Reg. 28003 (June 18, 1991).

26. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 560 (7th Cir. 1984). Compare *id.* with *Kennedy v. State of Connecticut Dept. of Public Safety*, 115 F.R.D. 497, 500-01 (D. Conn. 1987) (allowing deposition of researcher but also redaction of names of confidential sources).

27. See *Tiberi v. Cigna Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994); *Audiotext Communications Network, Inc. v. UC Telecom, Inc.*, No. 94-2395-GTV, 1995 U.S. Dist. LEXIS 15416, at *18-19 (D. Kan. Oct. 5, 1995) ("Use of too all-encompassing language ... violates Fed. R. Civ. P. 45"); *Insituform Technologies, Inc. v. CAT Contracting, Inc.*, 168 F.R.D. 630 (N.D. Ill. 1996) (noting earlier order quashing invasive subpoena, and quashing new subpoena, that met specificity requirement but otherwise violated Rule 45). For a strong recent state court case mandating the trial court to vacate orders "compelling a nonparty to produce materials in response to a subpoena describing generalized broad

Researchers might rashly contemplate either destroying, or concealing the data demanded or, conversely, divulging it in detail. However, the belief or hope that such behavior could stave off an appearance in court or at a deposition is unrealistic. Fear, destruction, concealment or the divulgence of confidential data is not merely inappropriate, but also self-defeating. Evasive tactics may provoke the court to rule adversely and divulsion may remove the basis for protection. Instead, the researcher should report the subpoena promptly to the appropriate officer (or other designated person) within the research institution; the officer will usually then contact legal counsel.

B. Make Timely Service of Written Objections

A researcher's first line of defense after receiving a subpoena is to make written objections to the inspection or copying of any or all of the researcher's records and data. Federal Rule of Civil Procedure 45 requires that the procedure for making an objection be set forth in the subpoena.²⁸ Specifically, the objections must be served upon the party designated in the subpoena within fourteen days after service of the subpoena, or before the time specified for compliance if such time is less than fourteen days after service.²⁹ Additionally, if records and data are being withheld because they are privileged, the claim of privilege must be made expressly and must be supported by a description of the withheld material sufficient to enable the demanding party to contest the claim.³⁰

Once the researcher has objected, the party serving the subpoena may neither inspect nor copy the researcher's records and data unless the court that issued the subpoena orders production of the documents.³¹ Once the researcher makes an objection, the party serving the subpoena can move for an order to compel production.³² Even if the court issues the order to compel production, it has a duty to protect a nonparty researcher from "significant expense" resulting from compliance with the subpoena.³³ Thus, a timely objection serves two purposes: it protects the researcher's data from disclosure for a period, and it lays the foundation for a claim for compensation to the researcher in the event that the court orders compliance with the subpoena.

C. Negotiate an Acceptable Limitation of the Subpoena or Move to Quash or Modify It

Lawyers should consider the possibility of negotiating with the party sub-

categories of materials rather than specific documents or, at least categories ... reasonably particularized," see *CalCor Space Facility, Inc. v. Superior Court*, 61 Cal. Rptr. 2d 567, 569 (Cal. App. 1997).

28. FED. R. CIV. P. 45(a)(1)(D).

29. *See id.* 45(c)(2)(B).

30. *See id.* 45(d)(2).

31. *See id.*

32. *See id.*

33. *Id.* 45(c)(2)(B).

poenaing the data. Negotiations can often result in substantial limitations on the subpoena—disclosure of data may be limited by scope, type, or time, and, moreover, to nonconfidential data. Negotiations may also serve to facilitate convenient arrangements for the appearance of the witness or in some cases for no appearance. Negotiation can be an effective, inexpensive, and muted way to counter intrusive subpoenas. Even if unsuccessful, reasonable attempts to negotiate may improve the researcher's stance before the court. This approach is reinforced by the 1991 amendment to Federal Rule of Civil Procedure 45, which enlarges the protections afforded to those persons required to assist the court.³⁴ Rule 45 gives the court discretion to quash or modify a subpoena in order to protect unretained experts.³⁵ Undoubtedly, a court will be more sympathetic toward a researcher who makes a reasonable attempt to resolve the discovery conflict without court intervention.

Further, a researcher's attempts to negotiate will be considered by the court when assessing whether to impose sanctions under Rule 45.³⁶ Under Rule 45, an attorney issuing a subpoena has a duty to avoid imposing undue burden or expense on the person subpoenaed.³⁷ Breach of this duty is punishable by sanctions, which may include lost earnings and reasonable attorney fees.³⁸

Most importantly, negotiating in good faith is a prerequisite for obtaining a protective order under Federal Rule of Civil Procedure 26.³⁹ The moving party must certify both that a good faith attempt was made to resolve the discovery conflict without court intervention, and that there is good cause for a protective order.⁴⁰ Even if the moving party cannot persuade opposing parties to discuss the conflict, he must note any efforts to arrange such a discussion on the certificate.⁴¹ A court's protective order can either condition or preclude discovery, depending on what means are necessary to protect the researcher and subjects from annoyance, embarrassment, oppression, or undue burden or expense.⁴²

If negotiations fail to limit the subpoena, the opposing party has the option of moving to quash or modify the subpoena.⁴³ Researchers and their counsel should not hesitate to file such a motion if the subpoenaing party remains obdurate against all efforts to negotiate. They may be able to persuade a court

34. *Id.* 45 advisory committee's note.

35. *Id.* 45(c)(3)(B).

36. *See* High Tech Med. Instrument, Inc. v. New Image Industries, Inc., No. C-93-4152 SBA(PJH)-ENE, 1995 U.S. Dist. LEXIS 16504, at *3, *6 (N.D. Cal. Mar. 17, 1995) (counsel breached duty under Rule 45 by failing to take reasonable steps to avoid imposing an undue burden on a non-party).

37. FED. R. CIV. P. 45(c)(1).

38. *See id.*

39. *Id.* 26(c).

40. *See id.*

41. *See id.* advisory committee's note, subdivision (c).

42. *See id.* 26(c).

43. *See, e.g., id.* at 45(c); CAL. CODE CIV. PROC. § 1987.1; *see also* Amendments to the Federal Rules of Civil Procedure, Communication from the Chief Justice of the United States, Comm. on the Judiciary, House of Representatives, 102 Cong., 1st Sess., H. Doc. 102-77, at 11-20, 132-50 (May 1, 1991).

that the subpoena is unreasonably broad and that a limited response, not involving production of confidential data, would be sufficient.

Given the court's discretion to quash or modify a subpoena,⁴⁴ the researcher should provide the court with reasons to exercise that discretion in his favor. For example, in *Richards of Rockford, Inc. v. Pacific Gas & Electric*,⁴⁵ the court addressed the question of whether the plaintiff's interest in obtaining discovery outweighed the public's interest in promoting confidential research. The plaintiff in *Rockford* deposed a professor who had investigated Pacific Gas & Electric ("PG&E") employees as part of his research into organizational structure and decision-making. At his deposition, the professor refused to disclose names of the PG&E employees.⁴⁶

The court found for the professor, but on the basis of Federal Rule of Civil Procedure 26, explicitly stating that "[t]he result ... [was] not based upon any privilege; rather it [was] founded upon the court's supervisory powers over discovery."⁴⁷ Despite its failure to recognize a researcher's privilege, the court affirmed the importance of maintaining confidentiality. It recognized that "[c]ompelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is the greatest."⁴⁸

Federal courts may also protect confidential research consistent with Federal Rule of Evidence 501.⁴⁹ Even though Rule 501 does not expressly provide for a researcher's privilege, it leaves room for a case-by-case recognition of privileges. For example, in *Trammel v. United States*,⁵⁰ the United States Supreme Court considered whether to modify the marital privilege as it existed at common law. In reaching its conclusion, the Court explained the intended scope of Rule 501: "In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide courts with the flexibility to develop rules of privilege on a case-by-case basis."⁵¹ This rationale is reinforced by Judge Weinstein who, in his treatise on evidence, reads Rule 501's "reason and experience" requirement as calling for a balancing of interests.⁵²

44. See *supra* note 27.

45. 71 F.R.D. 388 (N.D. Cal. 1976).

46. See *id.* at 389.

47. *Id.* at 389 n.2; see *United States v. Doe*, 406 F.2d 328 (1st Cir. 1972); Richard L. Marcus, *Discovery Along The Litigation/Science Interface*, 57 BROOK. L. REV. 381, 400-11 (1991) (considering the possibility of a researcher's privilege, and concluding that one should not be created).

48. *Richards*, 71 F.R.D. at 390; see Robert M. O'Neil, *Scientific Research and the First Amendment: An Academic Privilege*, 16 U.C. DAVIS L. REV. 837, 848-49 (1983).

49. FED. R. EVID. 501 (noting that privileges in certain actions "shall be governed by the principles of the common law ... in the light of reason and experience"); see John H. Derrick, Annotation, "Scholar's Privilege" under Rule 501 of Federal Rules of Evidence, 81 A.L.R. FED. 904 (1993).

50. 445 U.S. 40 (1980) (holding that the marital privilege vests only in witness spouses who may neither be compelled to testify nor foreclosed from testifying, thereby modifying earlier rule that the testimony of one spouse against the other was barred unless both consent).

51. *Id.* at 47 (citing 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate)).

52. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE §§ 501.02[3]b[iii], 501.10[4] (2d ed. 1997).

The Court furthered the recognition of a researcher's privilege under Rule 501 in *In re Grand Jury Subpoena Dated January 4, 1984*.⁵³ In that case, a Ph.D. candidate underwent questioning during a police investigation of a fire at "Le Restaurant."⁵⁴ The graduate student had been observing workers at Le Restaurant for his dissertation, "The Sociology of the American Restaurant."⁵⁵ He refused to disclose any of his notes, stating only that he had promised "many" of his sources confidentiality and that the research was necessary for his thesis.⁵⁶

The court reversed an order quashing the subpoena and remanded the case so that the researcher could make

a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality.⁵⁷

Although the court acknowledged that there was leeway in Rule 501 for a researcher's privilege, it emphasized that the privilege was not absolute.⁵⁸ Moreover, the court required the researcher to "make a good faith designation of those portions of his work arguably covered by the scholar's privilege and permit in camera inspection and redaction by the court."⁵⁹

As Professors Wright and Miller have stated, "[a] growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts."⁶⁰ Federal Rule of Civil Procedure 45(c)(3) addresses this issue:

(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it . . .

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, . . .

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without

53. 750 F.2d 223 (2d Cir. 1984).

54. *Id.* at 224.

55. *Id.*

56. *Id.*

57. *Id.* at 225.

58. *See id.*

59. *Id.* at 226.

60. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2463, at 76 (2d ed. 1995 & Supp. 1997).

undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.⁶¹

In applying the foregoing amendments, the incompleteness of a research project may also bear on a court's decision to quash or modify a subpoena. For example, the court in *Application of American Tobacco Co.*,⁶² while accepting the concept of a researcher's privilege, confined the privilege to unpublished works. The court recognized that a researcher whose work was still in progress should be protected against the loss of time, opportunity, and/or academic freedom that might ensue from a premature breach of confidentiality.⁶³ Moreover, the court deemed it important that premature disclosure in this case would have denied the doctors the opportunity of first publication of their studies.⁶⁴

In contrast, the court had reservations about protecting published findings. It reasoned that published research must undergo public scrutiny to ensure its credibility and hence should not heedlessly be protected from such scrutiny.⁶⁵

In *Dow Chemical Co. v. Allen*,⁶⁶ the court discussed various factors to be weighed with respect to subpoenas involving published findings. *Dow* involved a request for research data regarding the toxic effects of an herbicide, TCDD. At the time of the request, the researcher had not completed his project.⁶⁷ The *Dow* court acknowledged that the researcher's "interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable."⁶⁸ The Court premised its conclusion on the long history of support for academic freedom evidenced by Supreme Court precedents—precedents that create a formidable barrier to intrusion on research.⁶⁹ The court also reaffirmed earlier holdings that had factored a researcher's third-party status into the weighing process, noting that a researcher's distance from the litigation tends to make compliance with a subpoena more burdensome.⁷⁰

Finally, the court spelled out various harmful effects that could ensue from premature disclosure:

that public access to the research data would make the studies an unacceptable basis for scientific papers or other research; that peer review and publication of the study was crucial to the researchers' credibility and careers and would be precluded by whole or partial public disclosure of the information; that loss of the opportunity to publish would severely decrease the researchers' professional opportunities in the future; and that even inadvertent disclosure of the information would risk total destruc-

61. FED. R. CIV. P. 45(c)(3); see David D. Siegel, *Federal Subpoena Practice under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).

62. 880 F.2d 1520 (2d Cir. 1987). A state court in New York had earlier quashed a similar subpoena. *In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729 (Sup. Ct. 1987).

63. See *America Tobacco*, 880 F.2d at 1524, 1528.

64. See *id.*

65. *Id.* at 1529-30.

66. 672 F.2d 1262 (7th Cir. 1982).

67. *Id.* at 1266.

68. *Id.* at 1276-77.

69. See *id.* at 1275.

70. See *id.* at 1277.

tion of months or years of research.⁷¹

Robert O'Neil, noting "that the researcher enjoys at least minimal constitutional protection," has offered "some practical desiderata" for such cases, including "the potential utility of alternative sources of information;" the necessity for "proof of the probative value of the information;" "the relationship of the researcher to the litigation;" whether the proceeding is a routine civil suit or one of "those rare criminal cases in which information held only by a third party might be critical to a suspect's defense;" "the effects of disclosure upon persons other than the subpoena respondent;" "the status of the research," for example, whether the demand is "for data supporting a finished publication" or "for raw material in progress;" "the effects of research findings or results upon eventual publication;" the "principal investigator's reasonable expectations;" and "the contribution of each decision to transcendent principles of free inquiry and the advancement of knowledge."⁷²

D. Seek an Adequate Protective Order

If a researcher is unable to limit a subpoena to nonconfidential data through negotiations or court order, a court may nonetheless be receptive to a researcher's claim that at the very least he should be granted a protective order for his research.⁷³ Some of the benefits of a protective order are as follows: It can protect data from access by anyone other than the attorneys, experts, and others working directly on the case; it can limit the use of the data to the court proceeding alone; it can provide for confidentiality monitoring during the use of the data; it can assure the return of the data when the proceedings are finished; and it can require all persons utilizing the data to give assurances of confidentiality and provide for a contempt of court charge in the event of breach.

There is ample precedent for a protective order to protect confidential data. For example, in *Farnsworth v. Proctor & Gamble Co.*,⁷⁴ the plaintiffs brought a products liability action against a tampon manufacturer claiming that they had been injured by Toxic Shock Syndrome ("TSS"). In connection with the action, Proctor & Gamble ("P&G") served a discovery request on the Center for Disease Control ("CDC"), a nonparty.⁷⁵ P&G sought the names and addresses of women who had participated in the CDC's TSS studies.⁷⁶ The CDC researchers gathered sensitive information from female participants, but the CDC did not

71. *Id.* at 1273; see also O'Neil, *supra* note 48, at 839-40, 850-51.

72. O'Neil, *supra* note 48, at 853-55.

73. See FED. R. CIV. P. 26(c), 45(c)(3). See also Jacqueline S. Guenego, *Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score*, 60 FORDHAM L. REV. 541 (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428 (1991) (arguing against the need for reforms geared towards greater public access to discovery); see also Lloyd Doggett & Michael J. Muchetti, *Public Access to Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991) (defending Texas Rule of Civil Procedure 76a which establishes a presumption of openness in most civil court records).

74. 758 F.2d 1545 (11th Cir. 1985).

75. See *id.* at 1546

76. See *id.*

give its research subjects any confidentiality assurances.⁷⁷ The CDC produced all of its TSS-related research documents but refused to disclose the identities of its study participants.⁷⁸ P&G sought to compel disclosure, alleging that the information was necessary to discover biases in the studies' methodology.⁷⁹ The CDC refused to comply with the request on the ground that source disclosure would inhibit its ability to conduct future studies.⁸⁰

The circuit court held that the lower court's protective order was permissible under Federal Rule of Civil Procedure 26(c).⁸¹ It explicitly stated that the confidentiality of sources could be maintained even absent a recognized researcher's privilege, finding that "Rule 26(c) gives the district court discretionary power to fashion a protective order. The decision does not depend upon a legal privilege."⁸²

In addition, the court deemphasized the need for express assurances of confidentiality, finding that confidentiality can be protected even absent an agreement. "Even without an express guarantee of confidentiality there is still an expectation, not unjustified, that when highly personal and potentially embarrassing information is given for the sake of medical research, it will remain private."⁸³

In determining whether to grant an order protecting confidential sources, courts will weigh the competing interests. A protective order, by deterring lengthy proceedings, lessens the risks to researchers. They may be spared the lost time and opportunity costs that result from protracted hearings,⁸⁴ the compulsory disclosure of information that might jeopardize future research by "reducing, rather than increasing, the production of information useful to the resolution of lawsuits,"⁸⁵ and the concomitant risk of losing the cooperation of research subjects and even scientific colleagues.⁸⁶

The court may face challenging issue of balancing when the research report

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 1547.

82. *Id.* at 1548. For additional cases discussing the discretion of the court under Rule 26(c), see *Buchanan v. American Motors Corp.*, 697 F.2d 151 (6th Cir. 1983); *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976); *In re The Exxon Valdez Re: All cases*, Misc. No. 92-0072-RV-C (S.D. Ala.) (protective order filed June 12, 1993); *Anderson, Greenwood & Co. v. Nibisco Supply, Inc.*, 1996 U.S. Dist. LEXIS 9413 (W.D.N.Y. June 26, 1996). In some cases, a protective order may preclude discovery of documents or testimony from a nonparty researcher. *See R. J. Reynolds Tobacco Co. v. Fischer*, 427 S.E.2d 810 (Ga. App. 1993).

83. *Farnsworth*, 758 F.2d at 1547.

84. *See Virginia G. Maurer, Compelling the Expert Witness: Fairness and Utility under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71, 102-03 (1985).

85. *Id.* at 113.

86. *See David A. Kaplan & Brian M. Cogan, The Case Against Recognition of a General Academic Privilege*, 60 J. URBAN L. 205, 224-25 (1983). For an important recent case discussing the relationship between the availability of a protective order under Rule 26(c) and the exemptions under the Freedom of Information Act for records not available by law to a party in litigation with a federal agency, see *Burke v. United States Department of Health and Human Services*, 87 F.3d 508 (D.C. Cir 1996) (Wald, J.).

not only is published but also may have contributed to one party's bringing an action against another. For example, in *U.S. v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.*,⁸⁷ the government brought a civil RICO action against several defendants claiming that the defendants were part of a criminal organization that controlled the garbage industry in parts of New York. Defendants served a deposition subpoena on Peter Reuter, a nonparty economist who had authored a RAND study eight years prior to the litigation entitled *Racketeering in Legitimate Industries: A Study in the Economics of Intimidation*. Reuter's report may have contributed to the government's decision to pursue a RICO action against defendants, and the government considered using the report as substantive evidence in the case. Defendants claimed that their sole motivation for deposing Reuter was to counter the government's use of Reuter's report.

As counsel for Reuter, I moved for a protective order.⁸⁸ The district court granted the motion for a protective order conditioned upon the government's assurance that it would not use the Reuter report offensively.⁸⁹ If the government later decided to use the report, the court required it to give defendants sixty days advance notice.⁹⁰ At that point, Reuter would be obligated to respond to the defendants' written interrogatories. If interrogatories did not yield satisfactory responses, then the court could order a limited deposition. To date, Reuter has not been required to submit to any discovery.

The district court in *Private Sanitation* noted several competing factors in its analysis:

I'm fully aware . . . that if scholars could not conduct research, which would essentially involve the receipt of information that is closely guarded, many public purposes would be disserved. . . . I understand that public policy. I also understand that a defendant who the government is seeking to deprive of a good portion of his wealth also has certain rights that have to be balanced against that scholar's rights. And I would say that the best formula would be one that accommodates both, if such a formula is available.⁹¹

Dr. Reuter is not a party to this litigation. In balancing equities, one of the factors that are [sic] thrown into the scales is the fact that a person who is not involved in a dispute cannot be compelled, expert or not, to expend time and treasure to serve as a minimally-paid witness, expert or otherwise.⁹²

87. No. CV 89-1848 ILG (E.D.N.Y. July 8, 1994).

88. The case was pending in the Eastern District of New York and the subpoena was issued by the District of Maryland. On behalf of Reuter, we elected to proceed in the court where the case was pending, the court was knowledgeable about the issues, and the pertinent U.S. Attorney's office was located, rather than in the court that issued the subpoena. See FED. R. CIV. PROC. 26(c), 45(c)(3). The responding party's election may vary with the circumstances, and it may affect the ability to appeal. See 9A WRIGHT & MILLER, *supra* note 60, § 2466, at 88-89.

89. The court declined to find that Reuter was protected from discovery under the reporter's privilege: "I can't see that Dr. Reuter ... [has] a privilege—I'm talking about the balancing of equity and Rule 501... [T]here is no reporter privilege engraved into federal privilege ... [I]t's not a privilege that I am compelled to absolutely respect." Transcript of Hearing Before the Honorable A. Simon Chrein, U.S. Chief Magistrate Judge at 24-25:9-1.

90. See *id.* at 40:16-23.

91. *Id.* at 13-14:21-7.

92. *Id.* at 19-20:21-1.

There is a distinction between the deference I have to show a criminal defendant and the deference to be shown a civil defendant. Liberty is still a higher value in the value scales than the mere loss of money.⁹³

The court's approach reflects the complicated weighing process that accompanies the issuance of a protective order.

In weighing the pros and cons of a protective order, courts may also consider the status of the subpoenaed party. It might be a private research institution that is privately funded, a private research institution that is publicly funded, or a federally mandated research institution. Courts may be disinclined to intercede on behalf of the last category.⁹⁴ There is some support for the proposition, however, that a private institution's receipt of federal funds does not reduce its confidentiality protections.⁹⁵

Once a court issues a protective order ensuring confidentiality, it may impose sanctions against any party that attempts to violate confidentiality.⁹⁶

Whatever balance of competing interests a protective order may represent, it still may not settle all matters. It still involves a divulgence of confidential data to persons who were not intended recipients for purposes that were not intended. Moreover, it transfers some control over the data from the researcher to the court, with the attendant risk that a busy court will not have time for the requisite diligence to protect data adequately. There also remains the lingering possibility that if the court does not hold an evidentiary hearing or call for and review thorough affidavits at the outset, it may not be sufficiently informed of the interests of the litigants or of the public, to balance them adequately.⁹⁷

E. Notify Confidential Sources and Study Participants when There is Risk of Disclosure

Researchers should promptly notify confidential sources whenever their data is subpoenaed. Giving timely notice to them may help the researcher and facilitate a solution. The sources may waive confidentiality, thereby eliminating the problem. They may support the researcher in pursuing remedies that would limit the scope of the subpoena. Notice also amplifies the court's awareness of the researcher's concern for the privacy of confidential sources. The

93. *Id.* at 21-22:24-2.

94. See Joe S. Cecil & Eugene Griffin, *The Role of Legal Policies in Data Sharing*, in *SHARING RESEARCH DATA* 148, 150 (Fienberg et al. eds., 1985).

95. See *Forsham v. Harris*, 445 U.S. 169 (1980) (researcher's data was not accessible under Freedom of Information Act merely because researcher received federal funds). Cf. *Board of Trustees of The Leland Stanford Junior University v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991) (in ordering that a government contract be awarded to Stanford without including a provision requiring the approval of a contracting officer or other government official prior to publication or discussion of preliminary research results, the court held that Stanford could "use its own judgment on when and where to publish, notwithstanding that its research is supported with federal funds").

96. *Application of American Tobacco Co.*, 880 F.2d 1520, 1530 (2d Cir. 1989).

97. Cf. Marcus, *supra* note 73, at 481 (noting that "the ability of courts to discern whether discovery materials bear on public safety must be doubted"); Howard Schlossberg, *Researcher in Exxon Case Develops System to Thwart Demands for Data*, *MARKETING NEWS*, Sept. 16, 1991, at 7 (quoting John Petterson, who criticized a ruling that compelled him to produce confidential data pursuant to a protective order: "Exxon is important," he said, "We are nothing to the case.").

very anonymity of the participants may also give the court impetus to seal the proceedings.⁹⁸ Given the benefits that can result from giving such notification, it is not surprising that some states explicitly require notice in comparable circumstances.⁹⁹

V

WHEN DISCLOSURE HAS BEEN ORDERED

A. Seek Recovery for the Costs of Compliance with a Subpoena when Possible and Appropriate

Courts may take steps to ease the financial burden on a nonparty researcher incurred from compliance with a subpoena, even when such an accommodation might not be provided to a party.¹⁰⁰ Federal Rule of Civil Procedure 45 contains two provisions that allow nonparty researchers to recover the costs of compliance.¹⁰¹ First, researchers will be “reasonably compensated” where a subpoena requires disclosure of information and opinions obtained through a study that was not conducted at the request of any party.¹⁰² Second, if the court issues an order to compel production, the court has a duty to protect a nonparty researcher from “significant expenses” connected with the production of documents.¹⁰³ Some courts merge these two provisions, even though they provide distinct and separate grounds for recovery.¹⁰⁴

B. Develop the Constitutional Issues and Policy Questions and Preserve Significant Matters for Appellate Review

Though developing, the law in this area is largely unsettled. Whenever appropriate, counsel for the researcher should alert the trial court to the sensitivity, importance, and unresolved state of the issues. In addition to the customary affidavits, counsel might even seek an evidentiary hearing in order to develop a full record in the event of appellate review.

The following section outlines the premises for the principal constitutional

98. See Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential*, 37 HASTINGS L.J. 1 (1985).

99. See *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974); *Valley Bank of Nevada v. Superior Court*, 542 P.2d 977 (Cal. 1975). CAL CODE CIV. PROC. § 1985.3 (subpoenas for personal records of insurance); Annot., Tracy A. Bateman, *Search and Seizure of Bank Records Pertaining to Customer as Violation of Customer's Rights Under State Law*, 33 A.L.R. 5th 453 (1995).

100. See *Wertheim Schroder & Co., Inc. v. Avon Products, Inc.*, No. 91 Civ. 2287(PKL), 1995 U.S. Dist. LEXIS 79, at *19 (S.D.N.Y. Jan. 9, 1995).

101. FED. R. CIV. P. 45.

102. *Id.* at 45(c)(3)(B).

103. *Id.* at 45(c)(2)(B).

104. See *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F. Supp. 232, 264-65 (D. Del. 1992) (awarding nonparty “reasonable production costs” under its duty to protect a nonparty from “significant expense”); *Wertheim Schroder*, 1995 U.S. Dist. LEXIS at *19 (citing Rule 45(c)(3)(B)(iii) for the proposition that a nonparty should be compensated where the nonparty would otherwise incur “substantial expense”).

and policy claims that might be advanced in the trial court and preserved for appeal.¹⁰⁵ Depending on the situation, the lawyer may wish to advance them separately or invoke them in tandem to augment the rationale for quashing or modifying a subpoena or issuing a protective order.

1. *Academic Freedom and the Attendant Freedom of Scientific Inquiry.* The Continental Congress, in a letter to the inhabitants of Quebec, extolled the virtues of free expression including "the advancement of truth, science, morality, and the arts in general . . ." ¹⁰⁶ Science also has a significant place in the writings of Jefferson, Franklin, and Madison.¹⁰⁷

Thomas Emerson has reasoned persuasively that a liberal interpretation of the First Amendment encompasses academic freedom.¹⁰⁸ Emerson maintains that the First Amendment's value is linked to its fostering of democratic values. Specifically, Emerson recognizes four roles served by free expression: "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society."¹⁰⁹

These values, especially the first and second, help justify a researcher's privilege. Emerson's definition of individual self-fulfillment includes "the development of ideas [and] mental exploration."¹¹⁰ He recognizes that the free flow of information and insight is necessary to the attainment of truth. Likewise, Emerson argues that "suppression of information, discussion, or the clash of opinion . . . blocks the generation of new ideas . . ."¹¹¹

Emerson explicitly described the role of First Amendment jurisprudence in the promotion of academic freedom: "The heart of the system consists in the right of the individual faculty member to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members."¹¹²

Similarly, Alexander Meiklejohn constructed a theory of the First Amendment in accordance with notions of democratic self-government.¹¹³ According

105. This article concentrates on the rights of the researcher. For a discussion of the privacy rights of the research subject, see Lawrence O. Gostun, *Health Information Privacy*, 80 CORNELL L. REV. 451, esp. 494-513 (1995).

106. See Richard Delgado & David R. Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 356 (1978).

107. See *id.* at 358-60.

108. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

109. *Id.* at 878-79

110. *Id.* at 879.

111. *Id.* at 881.

112. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 594 (1970)); see O'Neil, *supra* note 48, at 853 ("Untrammelled research is at least as essential to the protection of academic freedom as untrammelled teaching.").

113. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4, 9, 20, 21

to Meiklejohn, voters, as the individuals responsible for governing our society, have a three-fold responsibility. The voting public must try to understand issues facing the nation, evaluate the decisions made by our governing representatives, and implement procedures for improving the decisionmaking process.¹¹⁴ The First Amendment, Meiklejohn argues, should be interpreted in a manner that will maximize the voters' ability to perform these functions.

To this end, Meiklejohn spells out four rights of expression that must not be restricted. He includes the rights to education, literature and the arts, public discussions, and "[t]he achievements of philosophy and the sciences in creating knowledge and understanding of men and their world [that] must be available, without abridgment, to every citizen."¹¹⁵ Meiklejohn's approach appears to view anything short of an absolute researcher's privilege as an "abridgment" inconsistent with the First Amendment.

The concern for academic freedom is prevalent throughout the case law. In *Sweezy v. New Hampshire*,¹¹⁶ the state brought contempt charges against Paul Sweezy when he refused to cooperate with a state attorney general's investigation. The Attorney General had questioned him with regard to a lecture he presented at a public university. Sweezy was allegedly a member of the Progressive Party in violation of the New Hampshire Subversive Activities Act.

The United States Supreme Court held that an individual's right to lecture and associate outweighed the state's interest in maintaining order.¹¹⁷ In rendering its decision, the Court recognized that "academic freedom and political expression [are] areas in which government should be extremely reticent to tread."¹¹⁸ The court emphasized the importance of academic freedom:

No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹¹⁹

In *Keyishian v. Board of Regents*,¹²⁰ the appellants were employees of a private university who refused to certify that they were not Communists. The court acknowledged the state's legitimate interest in protecting its educational system from subversion, but once again tipped the scales in favor of the First Amendment interest.¹²¹ The court stated, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and

(1971).

114. See Meiklejohn, *supra* note 113, at 255.

115. *Id.* at 257.

116. 354 U.S. 234 (1957).

117. See *id.* at 250.

118. *Id.*

119. *Id.*

120. 385 U.S. 589 (1967).

121. See *id.* at 603.

not merely to the teachers concerned."¹²²

The court based its holding on a broad reading of the First Amendment which needs "breathing space to survive."¹²³ Any encroachment on this breathing space, the majority warned, could impose a "straight jacket upon the intellectual leaders in our colleges and universities [that] would imperil the future of our Nation."¹²⁴

In *University of Pennsylvania v. EEOC*,¹²⁵ the petitioner specifically claimed an academician's qualified privilege. The EEOC requested tenure review files in connection with a pending discrimination suit. The action stemmed from a professor's allegations that she had been denied tenure in violation of Title VII. The university refused to supply the files on two grounds. First, it argued that a qualified privilege against disclosure of confidential peer reviews protected it from producing the files. Second, it argued that the files were protected in accordance with First Amendment academic freedom.

The United States Supreme Court did not agree with either of these arguments. The Court did, however outline three separate grounds that a party could advance when attempting to establish an acceptable researcher's privilege. First, the court acknowledged that content-based restrictions on academic freedom are not permissible. The court specifically emphasized that "[n]othing we say today should be understood as a retreat from this principle of respect for legitimate academic decisionmaking."¹²⁶ Second, the court conceded that confidentiality is important to the peer review process.¹²⁷ The petitioner's claim was rejected only because the balance of interests gave heavy weight to deterrence of possible sexual discrimination. Finally, the court tacitly supported the recognition of other privileges on a case-by-case basis. It cited Federal Rules of Evidence 501 and *Trammel v. United States*¹²⁸ as allowing leeway for privileges.¹²⁹ It acknowledged reluctance, however, to "exercise this authority expansively."¹³⁰ Specifically, the court said it was "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself."¹³¹ In areas distinct from confidential peer review, the government has explicitly sanctioned the value of confidential reporting in securing reliable data.¹³² The National Census is a salient example.¹³³ Another is the authorization of

122. *Id.*

123. *Id.* at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

124. *Id.* at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

125. 493 U.S. 182 (1990).

126. *Id.* at 199.

127. *See id.*

128. 445 U.S. 40 (1980).

129. *See* 93 U.S. 182, 189 (1990).

130. *Id.*; *see also* CAL. EVID. CODE 911.

131. *Id.* Compare *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

132. *See* Paul Nejelski & Lindsey M. Lerman, *A Researcher-Subject Testimonial Privilege: What To Do Before the Subpoena Arrives*, 1971 WIS. L. REV. 1085, 1101.

133. *See id.*

confidentiality certificates.¹³⁴

Academic freedom also found recognition in the significant case on affirmative action, *Regents of the University of California v. Bakke*.¹³⁵ The Court stated, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."¹³⁶ Thus, academic freedom finds its niche with blinking lights from the Constitution.

2. *Privacy, Free Speech, and Free Association.* John Robertson identifies two components of a scientist's right to conduct research. First, a scientist has a right to select research topics. Second, a researcher may select the means by which he will carry out his research.¹³⁷ The corollary is that the government has "a negative duty not to interfere."¹³⁸

Robertson suggests that if a "right to research" were recognized as a constitutionally protected right, the state could not restrict the right without a compelling interest,¹³⁹ for which it would bear the burden of proof.¹⁴⁰ A clear implication is that in a case involving confidential research, the government would have the burden of proving that a breach of confidentiality was necessary.

Robertson identifies three constitutional sources for a researcher's right: (1) liberty and privacy rights, (2) freedom of association, and (3) freedom of speech.¹⁴¹ Liberty rights, Robertson points out, are embodied in the notion of substantive due process. He then traces the varying definitions of liberty¹⁴² from *Meyer v. Nebraska*¹⁴³ (the fourteenth amendment "denotes ... the right ... to acquire useful knowledge") to *Griswold v. Connecticut*¹⁴⁴ (recognizing a "freedom of inquiry"). Although the relationship between privacy rights and a researcher's confidential sources is beyond the scope of Robertson's discussion, the marital privacy sanctioned in the *Griswold* case and the privacy rights relative to child-bearing sanctioned in *Roe v. Wade*¹⁴⁵ afford support for the privacy of a research subject to be protected from governmental interference. At the very least, a still unresolved issue of such importance merits presentation to a court.

134. See 42 U.S.C. §§ 241(d), 242(a)(a), 290 dd-3, 290 ee-3 (1994); 42 C.F.R. §§ 2.1-2.67, 2a.1-2a.8.

135. 438 U.S. 265 (1977).

136. *Id.* at 312; see also *Adler v. Bd. of Educ.*, 342 U.S. 485, 511 (1952) (Black, J., and Douglas, J., dissenting).

137. See John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1206 (1978).

138. *Id.*

139. See *id.* at 1210.

140. See *id.* at 1211.

141. See *id.* at 1212-40.

142. See Robertson, *supra* note 137, at 1212-13.

143. 262 U.S. 390 (1923); Robertson, *supra* note 137, at 1212.

144. 381 U.S. 479, 482 (1965); Robertson, *supra* note 137, at 1213.

145. 410 U.S. 113 (1973); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Robertson suggests that freedom of association also sanctions a researcher's rights because researchers "associate" on two levels. First, they associate with their research subjects when conducting investigations.¹⁴⁶ Second, they associate with other scientists when sharing their data.¹⁴⁷ These associations lend support for basing a researcher's right on the constitutional guarantee of freedom of association.

The strongest justification for a researcher's right resides in the First Amendment. The Court has recognized that free speech includes both the right to receive information¹⁴⁸ and to gather news.¹⁴⁹

3. *The Taking Issue.* In most cases, the reasonable expenses of complying with a subpoena, including attorneys' fees, can be provided for without undue difficulty by negotiation or as a court-imposed condition to judicially compelled production of data. We must, however, also explain whether a researcher, who is compelled to testify or produce data, is entitled to reasonable witness fees or other compensation. Indeed, should a subpoenaing party be allowed to obtain a free ride (or an expense-only ride) on a researcher's investment of time and money in research instead of paying a substantial premium? Most researchers are not in the market of furnishing information or testimony in litigation; moreover, time spent in responding to a subpoena may be time taken from other opportunities. Is such compelled activity a taking without just compensation of the researcher's livelihood—an invasion of the researcher's business property interests? The Advisory Committee on the recent amendment to Rule 45 of the Federal Rules of Civil Procedure states that "[a]rguably the compulsion to testify can be regarded as a 'taking' of intellectual property."¹⁵⁰

As a general rule, property interests do not materialize merely because an individual has "an abstract need or desire for," or "unilateral expectation of," a "benefit."¹⁵¹ To determine whether a protectible interest in intangible property exists, a court must first look to state law.¹⁵² Once a court is armed with the applicable state law, it may then consider whether such an interest is protected by the Fifth Amendment.

In *Ruckelshaus v. Monsanto Co.*,¹⁵³ the Supreme Court confronted four issues: whether trade secrets were a property interest? If so, whether the data-consideration and data-disclosure provisions of the Federal Insecticide, Fungi-

146. See Robertson, *supra* note 137, at 1214-15.

147. See *id.*

148. See *Martin v. Struthers*, 319 U.S. 141, 143 (1943); Robertson, *supra* note 137, at 1219-26.

149. See *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972); Robertson, *supra* note 137, at 1226-40.

150. FED. R. CIV. P. 45 advisory committee's note (citing *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982)); see 9A WRIGHT & MILLER, *supra* note 60, § 2463 at 76-78.

151. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

152. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-04 (1984).

153. 467 U.S. 986.

cide and Rodenticide Act involve a taking of such a property interest.¹⁵⁴ If there was a taking, was it a taking public use? If so, does the statute adequately provide for just compensation? The Court first determined that a property interest in trade secrets existed under state law and that Monsanto's nondisclosure of its data to others confirmed its interest in maintaining this information as a trade secret. Thereafter, the Court held that trade secrets were protectible under the Fifth Amendment. The protection of the Fifth Amendment turned on whether Monsanto had a reasonable investment-backed expectation of privacy for its property interest under the Act. Monsanto met this test for data submitted during certain periods but not others.¹⁵⁵ The court also held that any taking was one for public use¹⁵⁶ and that an adequate statutory remedy existed for providing compensation.¹⁵⁷

Similarly, in *Connolly v. Pension Benefit Guaranty Corporation*,¹⁵⁸ the Court held that in the determination of whether a regulation is a taking of property, three factors are particularly relevant. First, the economic impact of the regulation on the claimant; second, the extent to which the regulation has interfered with distinct investment-backed expectations; and, third, the character of the governmental action.¹⁵⁹ In effect, the Court weighed the nature and extent of the economic loss to the individual (or class of) property owner(s) against the nature and extent of the governmental interest.

A researcher who asserts a constitutional "taking" claim for substantial witness fees and loss of profit from a compelled disclosure of confidential sources must overcome obstacles. Although *Monsanto* recognizes a property interest in a trade secret, it also requires a researcher to show that he had a reasonable, investment-backed expectation. A court might recognize such an expectation as reasonable if a researcher's prospects of future research depends upon the researcher's assurances of confidentiality to others. Any compelled breach of such confidentiality might impair the researcher's future livelihood by discouraging potential sources of valuable information from disclosing their information to a researcher that they deem untrustworthy.

The balancing in *Connolly* raises yet another hurdle. The researcher must demonstrate that the adverse impact of compelled disclosure outweighs the na-

154. See Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 HARV. L. REV. 1330 (1991); Gregory Gelfand, "Taking" Informational Property Through Discovery, 66 WASH. U.L.Q. 703 (1988); Marcus, *supra* note 47, at 415-18.

155. See *Ruckelshaus*, 467 U.S. at 1005-14. In addition to determining whether "property" was "taken," the "court must determine whether the taking served a private purpose, in which case the Constitution forbids taking entirely, or whether the taking served a public purpose, in which case the owner must be compensated... . [I]f the taking was for a public purpose, the court must determine whether the owner received 'just compensation.'" Note, *supra* note 154, at 1337.

156. See *id.* at 1016.

157. See *id.* at 1019.

158. 475 U.S. 211 (1986).

159. See *id.* at 225 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). In land use cases, a plurality opinion of the Supreme Court articulates a "total taking" test. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1030 (1992). It is an open question whether and to what extent this test will apply to claims that intellectual property has been taken.

ture and importance of the government's need for the information. The amount of investment in the researcher's project would have to outweigh the government's legitimate interest in presenting all of the relevant evidence in a judicial proceeding. The monetary and temporal costs associated with garnering the necessary information to outweigh the government's interest might be so high as to deter such an undertaking, especially considering the risk of an unsatisfactory outcome.¹⁶⁰

A researcher who has not yet published the findings of his research is in an especially good position to counter the demand for disclosure of confidential sources by claiming a property interest in his work. Conceivably a court might favorably view the case of a researcher who has a reasonable expectation of eventual profit from work in process that has not yet been published, particularly in a competitive field. A court might well look askance at a premature subpoena for still confidential information that could be lucrative to competition and thus inimical to a researcher's property interest in his own work.¹⁶¹ In the contrasting circumstances of *American Tobacco*,¹⁶² the Second Circuit rejected the claim of a scholar's privilege under New York law when the demand for disclosure related to confidential data underlying a published report. Given that the results of the report had already been published, the court held there was no chilling effect upon scientific research.

4. *State Shield Laws And Privacy Rights.* Researchers may find reinforcement for confidentiality in state constitutions or statutes that create "reporter's shields"¹⁶³ and privacy rights.¹⁶⁴ As of 1989, twenty-six states had enacted various shield laws that protect a journalist's disclosure of information.¹⁶⁵ For example, California Evidence Code section 1070, encompasses a shield law¹⁶⁶ that protects a newsperson who refuses to divulge a legitimate source from contempt charges. Significantly, the Code's protection extends against demands for disclosure issued by the legislature or administrative agencies as well as the courts. It should be noted, however, that there remain unresolved questions of equal protection, when a researcher invokes a reporter's shield, particularly if a statute speaks in terms of institutional media.

In addition, privacy rights under state constitutions or statutes may also jus-

160. See *Mount Sinai Sch. of Med. v. American Tobacco Co.*, 880 F.2d 1520, 1529 (2d Cir. 1989).

161. See *id.* at 1527-29.

162. *Id.* at 1528.

163. See, e.g., CAL. CONST. art. I, § 2; CAL. EVID. CODE § 1070. See generally, Annot., *Privilege of Newsgatherer Against Disclosure of Confidential Sources of Information*, 99 ALR3d 37 (1980 & Supp. 1996).

164. See, e.g., CAL. CONST. art. I, § 1; see also *Kahn v. Santa Clara Cty. Superior Court*, 233 Cal. Rptr. 662 (Cal. App. 1987); *Board of Trustees v. Santa Clara Cty. Superior Court*, 174 Cal. Rptr. 160 (Cal. App. 1981).

165. See Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1566 (1989).

166. CAL. EVID. CODE § 1070; see also MICH. COMP. L. § 767.5a (1991); MINN. STAT. §§ 595.021-.025 (1992).

tify a researcher's privilege. Many states either explicitly or implicitly recognize an individual's privacy interest.¹⁶⁷ The researcher can invoke a right of privacy to protect confidential sources of research against attempted breaches of confidentiality.

a. *What constitutes the "press"?* In most First Amendment cases, the courts have little trouble defining whether the parties involved are members of the press. Hence there is little comment in the case law on just what is the full connotation of the First Amendment phrase "or of the press." In *Lovell v. Griffin*,¹⁶⁸ the Supreme Court stated that "[t]he press in its [historic] connotation comprehends every sort of publication which affords a vehicle of information and opinion."¹⁶⁹ Chief Justice Burger has added that "[t]he Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly"¹⁷⁰ Under his rationale, freedom of the press is essentially "the freedom to communicate with a large, unseen audience."¹⁷¹ This view equates the occasional pamphleteer, as well as the publisher who publishes on a relatively large scale, with the publisher of a large daily newspaper. This expansive perspective characterizes other statements of the Supreme Court.¹⁷² At least two other views of what constitutes the press have emerged, divergently elucidating the sparse text of the Press Clause.¹⁷³

One of these views would include within the definition of press, "free-lance writers, radio and television stations, magazines, academicians, and any other person possessing materials in connection with the dissemination to the public of a newspaper, book, broadcast or other form of communication."¹⁷⁴ President Carter incorporated these words in proposing legislation to prohibit the search or seizure of "work product—such as notes, interview files and film[s]" in police searches of the documentary materials of the "press."¹⁷⁵

The second view, a much narrower approach, would accord Press Clause protection only to the "institutional press," in the same tenor of most state

167. See, e.g., CAL. CONST. art. I, § 1.

168. 303 U.S. 444 (1938).

169. *Id.* at 452.

170. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 799-800 (1978) (Burger, C.J., concurring) (citations omitted).

171. *Id.* at 801 n.5.

172. See *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972); see also *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *von Bulow v. von Bulow*, 811 F.2d 136, 143-44 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987); *Smith v. A Pocono Country Place Property Owners Ass'n*, 686 F. Supp. 1053, 1055-56 (M.D. Pa. 1987); *United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979), *aff'd*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

173. See Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580-83 (1979); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 600-01 (1979); James L. Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 683-87 (1979).

174. Abrams, *supra* note 173, at 581-82.

175. *Id.* at 582 n.112 (quoting 125 CONG. REC. H 1866, 1867-88, S. 3771, 3772).

shield law statutes.¹⁷⁶ This view focuses upon the regularity of publication, the breadth of dissemination, and the regularity of employment by the individual journalist who invokes the protection. Only those who are truly in the "publishing business," rather than some other business, which happens to disseminate information on certain occasions, would be granted protection.¹⁷⁷

Some court opinions augur well for envisaging the press as extending beyond institutional confines. Justice Brennan has stated that there is no clear line consistent with the First Amendment between "a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience."¹⁷⁸ In his opinion,

[t]hat [a publication's] information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line Few published statements are of universal interest, and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is there any reason to treat [a publication] differently because it has "a limited number of subscribers."¹⁷⁹

In *Shoen v. Shoen*,¹⁸⁰ Mark and Edward Shoen served a subpoena on Ronald Watkins, a nonparty investigative author, in connection with a defamation action that they brought against their father Leonard Shoen, the founder of U-Haul. The plaintiffs claimed that Leonard Shoen had made public statements connecting them to the murder of Eva Berg Shoen, the wife of Leonard's eldest son Sam. They sought to compel Watkins to disclose the details of several interviews that he had with Leonard in connection with Watkins' book *Birthright*, which describes the struggle within the Shoen family for control of the U-Haul company. Watkins claimed that this information was protected under a reporter's privilege.

The Ninth Circuit rejected the plaintiffs' argument that a book author is not a member of the institutional press or media and hence that a reporter's privilege would not apply.¹⁸¹ The court found that Watkins had standing to invoke a reporter's privilege:

What makes journalism journalism is not its format but its content. . . . The test . . . is whether the person seeking to invoke the privilege had "the intent to use material—sought, gathered or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process." If both conditions are satisfied, then the privilege may be invoked.¹⁸²

176. *See id.* at 582.

177. *See id.* at 564-65; *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 929 (1992) (noting that it is "both appropriate and desirable that the press enjoy a special constitutional right of access in newsgathering").

178. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 782 n. 6 (1985) (Brennan, J., dissenting); *see also* John W. Wade, *The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301, 344-45 (1984); Michael Traynor, *Defamation Law: Shock Absorbers for Its Ride Into the Groves of Academe*, 16 J. C. & U. L. 373, 387 n.49, 389 n.54 (1990).

179. *Dun & Bradstreet*, 472 U.S. at 782.

180. 5 F.3d 1289 (9th Cir. 1993).

181. *See id.* at 1293.

182. *Id.* at 1293-94 (citation omitted) (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.),

*Stephens v. American Home Assurance Co.*¹⁸³ adopted a similarly broad view of who may invoke the reporter's privilege. In that case, non-party A.M. Best company sought a protective order to quash a subpoena served upon it by American Home Assurance Company, a defendant in a related case. A.M. Best publishes annual reports on the financial status of various corporations. The court found that the information sought was protected under a reporter's privilege: "The reporter's privilege is not limited to organized press. . . . 'The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.'"¹⁸⁴ Thus, more researchers may find the reporter's privilege expanding to encompass their activities as courts begin to recognize that the policy reasons for having a privilege in a journalistic context also apply to research.¹⁸⁵

b. Denial of equal protection by the shield laws. If the "press" includes articles and reports published by a researcher, then judicial pronouncements on the First Amendment freedoms of the press would apply to such works.¹⁸⁶ Many states provide shield laws that protect a newsperson from having to reveal confidential sources in certain situations yet they do not protect other persons who disseminate information (that is, researchers). Given the potential expansion of the term "press" to include researchers, might such a state statute be a denial of "the equal protection of the laws" under the Fourteenth Amendment?¹⁸⁷

It is well-established that whenever a state infringes upon a fundamental right, such as freedom of the press, the law must be analyzed under strict scrutiny to ensure compliance with the Fourteenth Amendment's Equal Protection Clause.¹⁸⁸ If a regulation classifies on the basis of the content of the publication or speech, it will violate the Equal Protection Clause. In *Carey v. Brown*,¹⁸⁹ the Supreme Court invalidated a state statute which prohibited the picketing of residences or dwellings while permitting the peaceful picketing of a residence

cert. denied, 481 U.S. 1015 (1987)).

183. No. 91 Civ. 2898 (JSM) (KAR), 1995 U.S. Dist. LEXIS 5086 (S.D.N.Y. 1995); *see also* Apicella v. McNeil Lab., Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (technical publications); *State v. Fontanille*, No. 93-KH-935, 1994 WL 25830 (La. Ct. App. 1994) (investigative book author).

184. *Stephens*, 1995 U.S. Dist. LEXIS at *23 (citation omitted) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972)).

185. *See* Craig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739 (1994).

186. *See* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

187. *Cf.* *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (state sales tax exemption for newspapers and religious, professional, trade or sports journals unconstitutionally discriminated against general interest monthly magazine on the basis of content). *But cf.* *Field Research Corp. v. S.F. Superior Court*, 453 P.2d 747, 749-51 (1969) (in defamation action, a defendant who is not a newspaper publisher or broadcaster is not eligible for the state's retraction statute). *See also* Dyk, *supra* note 177, at 939.

188. *See* *Near v. Minnesota*, 283 U.S. 697 (1931).

189. 447 U.S. 455 (1980).

which was also a place of employment involved in a labor dispute. The statute violated the Equal Protection Clause because it discriminated among picketers on the basis of the content of their speech.¹⁹⁰

In *Arkansas Writers' Project, Inc. v. Ragland*,¹⁹¹ the court invalidated a state tax scheme that exempted newspapers and some, but not all, journals or magazines from the tax. Eligibility for tax exempt status of a publisher could not be predicated on the content of its publication.¹⁹²

To deny the privilege of nondisclosure of confidential sources to a researcher while affording it to a newsperson is to draw a classification based upon the content of the speech. Arguably, such a state statute would deny researchers equal protection under the law and thus be unconstitutional. Can a researcher, who is not necessarily publishing information about current events, but instead is disseminating information in a topical fashion, claim that a denial of the privilege to him is a denial of equal protection? *Carey* and *Ragland* vindicate a researcher's right to protection on the ground that a researcher's publication is within the purview of the "press."

C. Request a Court Order that May Help Protect You from Liability for Disclosure and/or Require the Party Who Issued the Subpoena to Indemnify You

Under the Supreme Court's decision in *Cohen v. Cowles Media Co.*,¹⁹³ the First Amendment does not preclude a state court from enforcing liability in contract or promissory estoppel for breach of a promise of confidentiality. Accordingly, a researcher should consider obtaining a court order that would provide the basis for a defense of discharge by supervening impracticability¹⁹⁴ and, if possible, require the party who issued the subpoena to furnish an indemnity against such a claim and the costs of defending it.¹⁹⁵ Indeed, the potential exposure of the researcher who promised confidentiality may in itself afford a court additional reason for declining to order disclosure of confidential data.

D. If the Trial Court Orders Disclosure of Confidential Data, Consider Requesting a Stay As Well As Review by an Appellate Court

If a researcher has a persuasive rationale for confidentiality and the data is safeguarded, it should be clear that the researcher has important interests to as-

190. See *id.* at 461-62.

191. 481 U.S. 221 (1987).

192. See *id.* at 229-31. The court noted that the Arkansas Supreme Court, in upholding the statute, had stated that even if the statute was unconstitutionally discriminatory, "the exemption would fall, not the tax." *Id.* at 226. The state court judgment was reversed and the case was remanded "for purposes not inconsistent with this opinion." *Id.* at 234; see also *Leathers v. Medlock*, 499 U.S. 439 (1991).

193. 501 U.S. 663 (1991); see also G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 118 (1992) (suggesting duty of confidentiality, enforceable in tort action).

194. See RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 264 (1981).

195. Under FED. R. CIV. PRO. 45(c)(3)(B), "the court may order appearance or production only upon specified conditions." The furnishing of an indemnity would be a reasonable condition.

sert, even if these interests do not persuade the trial court. They may afford reasons for a stay pending appellate review.¹⁹⁶ A researcher should not turn over confidential data in response to a trial court order, without first considering a stay and a writ or appeal.

However, a researcher should be aware that in most cases, discovery orders are not immediately appealable, even when they are directed to a non-party.¹⁹⁷ Thus, in many cases, the only route to an immediate review of a discovery order is to violate the order and incur contempt sanctions.¹⁹⁸ As a nonparty, a researcher may immediately appeal an order imposing contempt sanctions, whether criminal or civil.¹⁹⁹

E. The Ultimate Question: Consider Refusing to Obey a Final and Binding Court Order of Disclosure and Going to Jail For Contempt

The story is not over even when an order to disclose confidential data survives whatever appellate review is available, if any, and is final and binding. The researcher still has a choice whether to obey. The sanction for disobedience is contempt, usually accompanied by coercive imprisonment or fines or both.²⁰⁰ The decision is a highly personal one. Newspaper reporters have gone to jail to protect their sources.²⁰¹ It bears recalling that the leading case establishing the work product doctrine arose when a courageous lawyer risked imprisonment for contempt.²⁰² A researcher who has a principled basis for non-disclosure could decide to carry on such a worthy tradition by refusing to obey an order for compelled disclosure.²⁰³ At some juncture the court may itself release the researcher from custody if it realizes that coercion is ineffective against one who makes a principled commitment to honor a promise of confidentiality.²⁰⁴

196. See FED. R. APP. PROC. 8. On the question of appealability and review of orders with regard to a subpoena, see 9A WRIGHT & MILLER, *supra* note 60, § 2466.

197. See *Bennett v. City of Boston*, 54 F.3d 18, 20 (1st Cir. 1995); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994); *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 367 n.4 (9th Cir. 1982).

198. See *id.* Bert Black has recently suggested that "a scientist who is not participating in litigation as an expert retained by a litigant should be given standing to appeal a subpoena directly. This would eliminate the harshness of having to be cited for contempt before appealing a subpoena." Black, *supra* note 12, at 725-27.

199. See *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1275 (9th Cir. 1990).

200. See, e.g., 28 U.S.C. § 1826; FED. R. CIV. PROC. 45(e), 70; CAL. CIV. PRO. § 1219.

201. See, e.g., *In Re Farr*, 111 Cal. Rptr. 649 (Cal. App. 1974); see also *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

202. *Hickman v. Taylor*, 329 U.S. 495 (1947).

203. See, e.g., *In re Grand Jury Proceedings (James Richard Scarce)*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994); Rik Scarce, *Protection of Confidentiality Worth Jail Time*, THE SPOKESMAN-REVIEW, June 13, 1993, at A19; see also *In Re Dinnan*, 661 F.2d 426 (11th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982); O'Neil, *supra* note 48, at 843-44, 849.

204. See *In Re Farr*, 111 Cal. Rptr. at 653 (when "disobedience of the order is based upon an established articulated moral principle ... it is necessary to determine the point at which the commitment ceases to serve its coercive purpose and becomes punitive in character"); *Catena v. Seidl*, 343 A.2d 744 (N.J. 1975) ("no substantial likelihood that further confinement will accomplish the purpose of the order"); *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983); *In Re Cueto*, 443 F. Supp. 857 (S.D.N.Y.

VI

CONCLUSION

From the inception of a study to the decision whether to refuse to obey a court order to disclose confidential data, a researcher has many opportunities to safeguard research and take a stance in court to protect the privacy of study participants, in the interest of well-grounded scientific or social analysis. Researchers have a responsibility to proceed with caution in giving confidentiality assurances and protecting data. Courts have a responsibility to balance the interests of the litigants who seek disclosure of confidential information against the interest of researchers and the public in useful studies that depend on honoring assurances of confidentiality. With common sense and good will in every quarter, there should be few spectacles of a scholar going to jail to honor his promise of confidentiality in the interest of useful research.

1978); *see also* United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (coercive imprisonment ended but punishment via imprisonment for criminal contempt followed).

In federal courts and most state courts, under the "collateral bar rule," the validity of the court order cannot be collaterally attacked in a criminal contempt or habeas corpus proceeding. *See, e.g.,* Walker v. City of Birmingham, 388 U.S. 307 (1967). California is an exception. *See In Re Berry*, 436 P.2d 273 (Cal. 1968).