

RESEARCH AND ITS REVELATION: WHEN SHOULD COURTS COMPEL DISCLOSURE?

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I

INTRODUCTION

As a longtime commentator on the uneasy relationship between law and science, I was asked to review six of the symposium papers in this issue of *Law and Contemporary Problems* that address judicially compelled disclosure of an unretained expert's research results and opinions.¹ The debate embodied in these papers is both lively and well-informed. After completing my review, however, I found myself largely in agreement with all the authors, yet still without a very clear answer to the question posed in the title—when should courts compel disclosure?

The papers' clear explanation of why the law favors disclosure and why researchers sometimes find it burdensome and oppressive should help bridge the gap between the culture of law and the culture of research—especially scientific research. What is missing, however, is a synthesis that would provide a broader policy context and a framework for distinguishing between different kinds of cases and fact patterns. Thus, my objective in this review is to outline a conceptual matrix for the papers rather than to criticize them. I also suggest amendments to Rule 45 of the Federal Rules of Civil Procedure that would ease the friction between the law and experts who want to avoid other peoples' litigation.

II

WHY IS DISCLOSURE AN ISSUE?

To assure rational and informed verdicts in civil litigation, the Federal Rules of Civil Procedure give litigants broad power to seek and obtain information. As Judge Crabb explains in her article, "judges operate within a system that places a high priority upon obtaining relevant evidence that will aid in the truth-finding process."² Professor Carrington and Ms. Jones also emphasize

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1. My paper—as well as the papers of J. Steven Picou, Paul Fischer, and Francis McGovern—comments on the articles by Judge Barbara Crabb, Robert O. Neil, Paul Carrington and Traci Jones, Elizabeth Wiggins and Judith McKenna, Sheila Jasanoff, and Michael Traynor.

2. Barbara B. Crabb, *Judicially Compelled Disclosure of Researcher's Data: A Judge's View*, 59

this high priority. They suggest that “[a]s a mark of the importance attached to the entitlement of adversaries to possible relevant evidence, Rule 45 authorizes any lawyer in any action in any federal court ... [to invoke the power of the court system] to coerce ... desired disclosure.”³

Professor O’Neil, however, cautions that the effects of compelled disclosure on scholarship can be “devastating.”⁴ He identifies four problems created for researchers by subpoenas: (1) disruption of the reporting and disclosure process within which scholarly investigations are usually conducted; (2) interference with the research process itself; (3) misinterpretation or misunderstanding of research results; and (4) concerns about compromising promises of confidentiality made to people who agree to be research subjects.

These statements of the countervailing arguments on compelled disclosure are clear enough, but they miss what ought to be at the heart of the debate. The question should not be whether the institutional interests of the judicial system are more important than the institutional interests of scientists and other researchers, but rather how to optimize society’s development and use of knowledge. Though not addressed explicitly in the symposium papers, it also should be noted that the answer to this question does not depend on whether one has a “plaintiffs’ perspective” or a “defendants’ perspective.” Both plaintiff and defense lawyers have sought discovery from experts who are otherwise uninvolved in litigation, and both have opposed it.

The fundamental problem of optimizing the development and use of knowledge is best understood in terms of competing needs for information. From this broader social perspective, if subpoenaed information improves the resolution of a dispute at no cost other than annoying an unretained expert, it should be disclosed. On the other hand, if disclosure is so damaging to research that society is deprived of important knowledge, a court should seriously consider limiting a litigant’s rights to discovery. Real cases, of course, typically fall somewhere between these simple and obvious extremes.

Although courts do not always explicitly address the competing needs for information, this policy issue clearly motivates many of the decisions regarding disclosure disputes. Perhaps the best example of such motivation is the case of Dr. Arthur Herbst, whose ongoing research on the drug diethylstilbestrol (“DES”) and its relationship to certain forms of cancer became the target of discovery.⁵ In the process of his research, Dr. Herbst compiled a registry that monitored “the clinical, pathological, and epidemiological aspects of clear cell

LAW & CONTEMP. PROBS. 9, 9 (Summer 1996).

3. Paul D. Carrington & Traci L. Jones, *Reluctant Experts*, 59 LAW & CONTEMP. PROBS. 51, 51 (Summer 1996).

4. Robert M. O’Neil, *A Researcher’s Privilege: Does Any Hope Remain?*, 59 LAW & CONTEMP. PROBS. 35, 36 (Summer 1996).

5. For a more detailed discussion of this case, see Crabb, *supra* note 2, at 10-16; Elizabeth C. Wiggins & Judith A. McKenna, *Researchers’ Reactions to Compelled Disclosure of Scientific Information*, 59 LAW & CONTEMP. PROBS. 67, 72-73 (Summer 1996).

adenocarcinoma of the genital tract and was the only centralized repository of data on that disease.”⁶

The relevance of the registry to the litigation was clear and undisputed, and so was the adverse effect disclosure would have on Dr. Herbst’s research. The resulting loss of confidentiality would make it difficult, if not impossible, for him to continue collecting information. The district court quashed the defendant’s subpoena, noting that if disclosure were compelled, the registry would be compromised, and “all society [would] be the poorer ... [and] a unique and vital resource for learning about the incidence, causes and treatment of adenocarcinoma [would] be lost.”⁷ On appeal, however, the Seventh Circuit recognized the need to strike a balance between the competing informational needs of society and the litigants, and ordered the lower court to fashion appropriate limitations on the scope of disclosure.⁸ Ultimately, “[a]fter procedural wrangling and much negotiation, the parties reached agreement on a method of producing the requested data stripped of its identifiers.”⁹

III

CONFIDENTIALITY

As the Herbst case illustrates, perhaps the strongest argument for protecting unretained experts from discovery is concern about the confidentiality of information provided by research subjects. Analytically, however, this issue is just one part of the broader concern that compelling disclosure may result in limiting the knowledge that research produces for society. If a researcher forthrightly qualifies assurances of confidentiality with a proviso that data will not be disclosed *except as required by law*, some potential research subjects may hesitate to participate.¹⁰ For example, such a caveat surely would limit AIDS research.

Compelled disclosure is most likely to occur when researchers explore areas like AIDS, and potential subjects for such research are the people who most likely will fear the consequences of disclosure. Thus, it is precisely where upfront limitations on confidentiality are most necessary that they do the most harm. As a practical matter, an investigator may face a nasty Hobson’s choice: (1) either be frank about the potential for disclosure, which will drive off potential subjects; (2) break an unqualified promise; or (3) refuse to disclose and go to jail for contempt. The choice often will be quite urgent. In most cases, discovery orders are not immediately appealable, even when they are directed to a nonparty.¹¹

6. Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 558 (7th Cir. 1984).

7. *Id.* at 560.

8. *See Id.* at 563-65.

9. Wiggins & McKenna, *supra* note 5, at 81 n.39.

10. *See* Michael Traynor, *Countering the Excessive Subpoena for Scholarly Research*, 59 LAW & CONTEMP. PROBS. 119, 122 (Summer 1996).

11. *Id.*; *see also* Crabb, *supra* note 2, at 32.

Because society benefits from research, investigators should be protected as much as possible from this scenario. An absolute scholar's privilege, however, would go too far.¹² Though federal statutory law does protect some research information,¹³ "neither legislatures nor courts have granted researchers an absolute privilege to protect the confidentiality of research data,"¹⁴ and it is unlikely they will do so in the future.¹⁵ In the end, society must rely primarily on the sound discretion of judges, but the guidance provided in the Federal Rules of Civil Procedure on how to exercise this discretion could be improved. For example, Rule 45 presently allows a court to quash or limit a subpoena if it "requires disclosure of a trade secret or other confidential research, development, or commercial information."¹⁶ This focus on only adverse economic and commercial impacts may lead courts to ignore some of the other very serious effects compelled disclosure can have on research. Amending the rules to address these concerns would institutionalize the better reasoned judicial decisions in this area and would help ameliorate some of the hostility scientists hold for the law.¹⁷

IV

OTHER FACTORS AFFECTING DECISIONS ABOUT COMPELLING DISCLOSURE

There are important analytical distinctions between the different kinds of information experts provide and between the different ways in which information from unretained experts is used. The special knowledge experts bring to court consists of both facts and the ability to reach conclusions based on those facts and on other evidence in a case. For example, if an environmental scientist was asked to investigate the effects of an oil spill, he or she would probably already know or have access to facts such as the density and solubility of different kinds of oil. This kind of information, coupled with case-specific details, would provide the factual predicate for the expert's conclusions, which would be reached through the reasoning and methodology of his or her field.

Experts thus provide facts, opinions, or a mix of the two, and the information sought from an unretained expert can fall into any of these three categories. Motions to quash subpoenas of unretained experts are usually raised when an expert testifying for one party relies on someone else's research results, and the opposing party wants to examine the underlying data or assumptions. Again, Dr. Herbst's case provides a prime example. The plaintiffs' experts relied heavily on his work and his published articles, and the defendant was "threatened with ... having [him] as a potent [adverse] expert witness ...

12. See *infra* Part VII for further discussion of the scholar's privilege.

13. See *infra* Part VIII for a discussion of statutory protection.

14. Traynor, *supra* note 10, at 119.

15. See Crabb, *supra* note 2, at 24.

16. FED. R. CIV. P. 45(c)(3)(B)(i).

17. See *infra* Part IX for a discussion of how to improve the resolution of disputes about disclosure to better address the concern that research may be adversely affected.

without his ever taking the stand or being subject to cross-examination.”¹⁸ As a result, the Seventh Circuit ruled that the defendant was entitled to review Dr. Herbst’s underlying data in order to explore its relationship to his opinions.

Although the distinction between data and opinions was not an issue in the Herbst case, the difference can be important.¹⁹ It is one thing to force disclosure of data, but quite another matter to force an unretained expert to formulate opinions that might be relevant. In the case of *Karp v. Cooley*,²⁰ for example, the plaintiff sought to compel Dr. Michael DeBakey, a heart surgeon, to opine about the handling of a particular case by other doctors. The court, however, refused to order Dr. DeBakey to testify after finding that he knew nothing about the medical details of the case and did not want to delve into them.²¹

Forcing the revelation of preliminary, unreviewed reports raises similar issues. In *United States v. Allen*,²² for example, the judge rejected an attempt by Dow Chemical to subpoena information related to studies on the effects of low level exposure to a chemical known as dioxin.²³ In its decision, the court took notice that “[i]n the early stages of any research project there are likely to be false leads or problems which will be resolved in the course of the study.”²⁴ It also found that “[t]o force production of all [the subpoenaed information would] likely ... jeopardize the study by exposing it to ... criticism ... before there has been an opportunity for the researchers ... to make sure the study is the result of their best efforts.”²⁵ The court’s decision thus recognized the minimal probative value of work in progress as well as the substantial burden of compliance on the unretained experts.

The *Allen* case apparently involved both data and preliminary reports based on the data, leaving open the question of how a court would react to a subpoena that sought only raw data. If a party wanted to have a retained expert review and interpret data from someone else’s research, the legal analysis might be different. Suppose, for example, that the chemical composition of a

18. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561 (7th Cir. 1984).

19. See, e.g., *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976) (noting that the exercise of district court’s discretion should be informed, among other factors, by “the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony”).

20. 349 F. Supp. 827 (S.D. Tex. 1972), *aff’d*, 493 F.2d 408 (5th Cir.), 419 U.S. 845 (1974). For further discussion of this case, see Crabb, *supra* note 2, at 29-30.

21. The court found that Dr. DeBakey “had not been employed to give any expert medical opinion; that he would not accept any employment in this case; that he had never examined Mr. Karp; that he had never seen Mr. Karp; that he would refuse to express any medical opinion concerning the treatment of Mr. Karp; that he would not express any medical opinion based upon hypothetical questions even if asked to do so; and in connection with the Cooley-Liotta mechanical heart used in Mr. Karp, he would refuse to express an in-court expert opinion concerning that device.” *Karp*, 349 F. Supp. at 836.

22. 494 F. Supp. 107 (W.D. Wis. 1980), *aff’d sub nom.* *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1984). For further discussion of this case, see Crabb, *supra* note 2, at 21-22; O’Neil, *supra* note 4, at 39-40; Wiggins & McKenna, *supra* note 5, at 70-71.

23. Dioxins are actually a family of chemicals. The “family member” at issue in the case was 2,3,7,8-tetrachlorodibenzo-p-dioxin. *Allen*, 494 F. Supp. at 108.

24. *Id.* at 113.

25. *Id.*

waste water discharge were at issue in a case, and that a professor (an unretained expert) had conducted a study of the river into which the discharge flowed. Suppose further that the study included gas chromatography data which had never been interpreted, but could be downloaded to a computer disk. If experts reasonably rely upon such information to determine the composition of waste water, it would qualify under Fed. R. Evid. 703 as the basis for an opinion by a retained expert, and the *Allen* concerns about probativeness would not apply. The issue would be the burden on the unretained expert, and a court's decision would again come down to the fundamental problem of balancing short term information needs in the context of litigation against society's long term information needs.

In conducting this kind of analysis, both the *Allen* court (Judge Crabb was the district court judge) and the court in the *Herbst* case were clearly sensitive to the effect disclosure can have on research²⁶ and to the need for the kind of balancing discussed in some of the symposium papers.²⁷ As discussed at the end of Part II, however, the Federal Rules of Civil Procedure do not unequivocally embrace this kind of analysis; Fed. R. Civ. P. 45(c)(3) and the advisory notes focus only on economic impact. "Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness [C]ompulsion to give evidence may threaten the intellectual property of experts denied the opportunity bargain for the value of their services."²⁸ Again, amending the federal rule to recognize the broader social concerns more explicitly would be a significant improvement.

V

SUBPOENA ABUSE AND THE PEER REVIEW PROCESS

The use of experts in litigation has increased dramatically over the last twenty years, and one unfortunate result has been the manipulation of research by litigants. In some cases, lawyers have sponsored studies by private research organizations that publish the results only if they are helpful to the sponsoring lawyer's client.²⁹ Although this practice can introduce an unhealthy bias into a

26. Of course, litigation does not always impede research. In some cases it may actually spur research efforts. As Judge Crabb points out in her paper, "[a]lthough some individual researchers may be deterred from entering a particular field because of its controversial and public nature, others may be attracted to it for the same reason." Crabb, *supra* note 2, at 18.

27. See *id.* at 26-27 (listing seven factors for a court to consider, and suggesting that "[I]f a party seeking discovery shows that the discovery consists of unique information of significant probative value at the heart of the case, this showing will outweigh almost any claim of burdensomeness or breach of confidentiality"; Traynor, *supra* note 10, at 136-46 (detailed discussion of constitutional issues and policy questions, and of how to preserve significant matters for appellate review); Wiggins & McKenna, *supra* note 5, at 75-88 (listing concerns raised by subpoenas to researchers, and discussing balancing the interests of litigants and researchers; the concerns include economic and temporal burdens, confidentiality of data and privacy of research participants, and disclosing incomplete and unpublished research findings).

28. FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee's note (1991).

29. See Philip E. Enterline, *Toxic Torts: Are they Poisoning the Scientific Literature?*, 30 AM. J. INDUS. MED. 121 (1996).

field's literature, so long as authors reveal their sources of support, the problem is not severe. If there is such disclosure, and if a paper goes through the regular peer review process, its validity should be judged as other scientific work is judged.

Other kinds of legal entanglement with research present far more serious problems. For example, litigants may attempt to use discovery and subpoenas as tools for harassing researchers whose results are unfavorable to one side, especially when a large number of cases might be affected. Professor O'Neil's paper recounts one case in which the court quashed a subpoena, expressing concern for "the potential ... chilling effect on research."³⁰ The court noted the value of scientific and applied research and suggested that "discovery offers an avenue for indirect harassment of researchers whose published work points to defects in products or practices."³¹

The current litigation about the alleged impact of silicone breast implants on women's health has produced a particularly egregious example of harassment through discovery. The first reliable epidemiologic study in this area, conducted by the Mayo Clinic, was not published until the middle of 1994, several years after the first lawsuits were filed.³² It showed that women with implants were "no more likely to develop connective tissue disease (or related symptoms and abnormal blood tests) than [women] without implants."³³ The plaintiffs' lawyers, displeased with these results, responded with subpoenas to the author of the article and to other epidemiologists working in the field. In these subpoenas, the researchers "were asked to produce absurdly large volumes of documents, many of no conceivable relevance."³⁴ According to one prominent doctor, this has had "a chilling effect on implant research; no one will want to do it, given the likely consequences. Even more important, this use of subpoena powers threatens the very existence of several large epidemiologic databases"³⁵

Worse still were the breast implant plaintiffs' efforts to subpoena peer review records from the *New England Journal of Medicine*, the journal in which the Mayo Clinic study was published.³⁶ Although the subpoenas were quashed, the very attempt to breach the anonymity of peer review raises serious questions. Review lies at the heart of the scientific community's development of new ideas through a process of testing and refinement. One philosopher of science has written that this process not only reflects the scientific method, but that "it *is* the scientific method itself."³⁷

30. O'Neil, *supra* note 4, at 40 (citing *In re Snyder*, 115 F.R.D. 211, 215 (D. Ariz. 1987)).

31. *In re Snyder*, 115 F.R.D. 211, 216 (D. Ariz. 1987).

32. See S.E. Gabriel et al., *Risk of Connective-Tissue Diseases and Other Disorders After Breast Implantation*, 330 NEW ENG. J. OF MED. 1697 (1994).

33. MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* 101 (1996).

34. *Id.* at 145-46.

35. *Id.* at 146.

36. See *Id.* at 145.

37. John Ziman, *What is Science?*, in *INTRODUCTORY READINGS IN THE PHILOSOPHY OF*

Anonymity in the review process assures frank criticism, and it should not be compromised except under the most unusual circumstances.³⁸ From the perspective of legal relevance, there is simply no reason for disclosure of either reviewers' names or of anonymous reviewer comments made with the understanding that they will not be passed along to a paper's author. Peer reviewers acquire no information from the review process that is not in the manuscripts they consider. If a manuscript is flawed, a litigant's retained expert should be capable of identifying its problems just as well as those who reviewed the manuscript for purposes of publication.

Moreover, the importance of protecting the peer review process is explicitly recognized by the law in other contexts. "Concern that the candor necessary to the effective functioning of [hospital peer review committees] would be destroyed if their proceedings were discoverable has led to the adoption of statutes in a number of states conferring a privilege from discovery upon [them],"³⁹ and all fifty states provide at least some protection for the individuals who participate in medical peer review.⁴⁰ In some ways the argument for protecting the peer review of research is even stronger. Medical peer review is usually an issue when the hospital conducting it is a party in litigation and if it merits protection, so too should research peer review conducted by nonparties. Society relies on this process to help assure the quality of research in science and other fields.

VI

THE PLACE OF PEER REVIEW IN LITIGATION AND THE IMPACT OF *DAUBERT*

Litigants seek information about peer review because they see it as excellent ammunition for cross-examination. The district court in the case of Dr. Herbst's work, however, suggested that studies should be immune from discovery precisely because they have withstood the review process.⁴¹ As Judge Crabb discusses in her paper, the court considering the subpoena of this work found that the defendant's "need for the data was speculative because Herbst's study had been subjected to the scrutiny of the medical profession for more than a decade and 'nothing in the record indicate[d] [anything] other than that [Herbst's] conclusions ha[d] been fully corroborated.'"⁴² The Seventh Circuit,

SCIENCE 35, 40 (E.D. Klemke et al. eds., 1980).

38. One example would be a case in which the issue under litigation was misconduct in the context of peer review. See, e.g., Eliot Marshall, *Trial Set on Peer Review*, 273 SCI. 1162 (1996).

39. Donna M. Bloemer, *Kentucky's Approach to the Discoverability of Peer Review*, 23 N. KY L. REV. 275, 276 (1996).

40. Looking beyond the benefits of active internal review in medicine, some commentators have suggested a more general self-analysis or audit privilege. See generally Joseph E. Murphy & Ilise L. Feitshans, *Protecting the Compliance Audit* PLI CORP. LAW & PRAC. COURSE HANDBOOK (1996); Michael J. Holland, *The Self-Analysis Privilege: Obscuring the Truth but Safeguarding Improvement?*, 25 THE BRIEF 52 (Fall 1995).

41. See *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494, 498 (N.D. Ill. 1983).

42. Crabb, *supra* note 2, at 13 (quoting *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 562-

however, “gave short shrift” to this suggestion, “point[ing] out that no one had publicly reviewed the actual core data behind Herbst’s studies or identified the basis and evidence upon which he classified a patient’s ‘exposure’ or ‘nonexposure’ to DES.”⁴³

Judge Crabb quite correctly criticizes this effort to substitute peer review for the usual litigation tools of discovery and cross-examination. She goes too far, however, when she distinguishes between legal and scientific methods for testing the validity of research results and implies that they may be incompatible. In particular, she misconstrues the Supreme Court’s unambiguous admonition in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴⁴ that “[t]he subject of [a scientific] expert’s testimony must be ‘scientific ... knowledge.’”⁴⁵ Research not recognized as scientifically valid outside the courtroom cannot suddenly become valid under nonscientific criteria just because it is proffered as evidence. Thus, her argument that *Daubert* “[does] not suggest that ... [scientifically accepted] methods would be the sole means of challenging a theory or a study”⁴⁶ seems off target.

This statement apparently confuses tools of inquiry with criteria of validity. If it means only that litigants should be free to use cross-examination and other legal modes of inquiry to explore *scientific* validity, there is no real dichotomy between law and science, and I agree with the assertion. I also would agree that a litigant should be free to explore questions of bias—and even veracity—that peer reviewers normally might not consider. If the statement means there are special legal criteria for deciding what constitutes scientific knowledge, however, I do not agree, and neither does *Daubert*.⁴⁷

The Supreme Court’s non-exclusive list of factors to be considered in assessing “whether the reasoning or methodology underlying [an expert’s] testimony is scientifically valid”⁴⁸ was aimed at helping trial courts determine if evidence meets the criteria scientists themselves consider. The Court’s frank acknowledgement that courts (and scientists) also might apply other factors reflects the fact that science cannot be simply defined,⁴⁹ but it does not mean that non-scientific modes of analysis should be used to test scientific validity in the context of litigation.

Though I question some of Judge Crabb’s discussion of *Daubert*, I agree with her ultimate assessment of its likely impact on discovery. She concludes

63 (7th Cir. 1984); citing *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494, 498 (N.D. Ill. 1983)).

43. *Id.*

44. 509 U.S. 579 (1993).

45. *Daubert*, 509 U.S. at 589-90.

46. See Crabb, *supra* note 2, at 14.

47. *Daubert*, 509 U.S. at 589-90, 592-93.

48. See *id.* at 592-93.

49. Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 756-757 (1994) (“noting that seeking a perfect definition [of science] is futile. Science is a complex enterprise that cannot be captured adequately in a compact statement.”).

that its emphasis on scientific validity and its "explicit delegation of gatekeeping responsibility to the trial judge [will] likely ... spur litigants to seek discovery that will not only help persuade a jury of the inadequacy of a particular study result but will convince the trial court that the result does not meet *Daubert's* standards for admissibility."⁵⁰ If the case prompts this response, the end result should be better informed verdicts and better informed decisions about the admissibility of disputed expert testimony.

VII

THE SCHOLAR'S PRIVILEGE—A CONFUSING SIDESHOW

Some of the cases discussed in the symposium papers address the plight of researchers who attempted to avoid subpoenas by asserting a broad "scholar's privilege," a legal theory that has not been favorably received by the courts. For the analysis of forced disclosure by unretained experts, these cases are mostly a confusing sideshow. Two of the leading decisions involved criminal rather than civil matters, and the information sought had nothing to do with expertise and very little to do with scholarship. They are relevant to the unretained expert issue only because the scholar's privilege could be an argument for quashing a subpoena if the privilege were recognized and if the unretained expert's information was directly related to scholarship. These are big ifs.

In both of the criminal cases, sociology graduate students sought to avoid providing information to a grand jury.⁵¹ In one case, from the Second Circuit, the student was working in a restaurant to gather information for his dissertation on the sociology of the American restaurant.⁵² A suspicious fire and explosion occurred at the restaurant, and as part of the investigation, the journal he kept was subpoenaed. The district court quashed the subpoena, holding that by analogy the qualified privilege accorded journalists "applies to any scholar collecting data with a view to publication,"⁵³ but the ruling was reversed on appeal.⁵⁴ The appellate court found the record "too sparse to serve as a vehicle for consideration of whether a scholar's privilege exists, much less to provide grounds for applying it[.]"⁵⁵ The court also admonished that whatever the result of further proceedings on the issue, "[a]ctual observation of criminal activity is not subject to a claim of privilege."⁵⁶

The other case, from the Ninth Circuit, involved an investigation into who

50. Crabb, *supra* note 2, at 14.

51. Both cases are discussed in O'Neil, *supra* note 4, at 41-42. The Second Circuit Case is also discussed in Crabb, *supra* note 2, at 22-23, and in Wiggins & McKenna, *supra* note 5, at 73.

52. See *In re Grand Jury Subpoena Dated January 4, 1984*, 750 F.2d 223 (2d Cir. 1984).

53. See *In re Grand Jury Subpoena Dated January 4, 1984*, 583 F.Supp. 991, 992 (E.D.N.Y. 1984).

54. See *In re Grand Jury Subpoena*, 750 F.2d at 224.

55. *Id.*

56. *Id.* at 226. Ultimately, "the federal prosecutor accepted production of the journal edited by [the student] to remove privileged material as full compliance with the subpoena." Wiggins & McKenna, *supra* note 5, at 83.

had vandalized a Washington State University animal research facility.⁵⁷ The graduate student was not a suspect, but his houseguest was. The student refused to give information about the guest because the guest was participating as a subject in the student's sociology research. The Ninth Circuit was even harsher than the Second Circuit in its rejection of the scholar's privilege, noting that to its knowledge, no court "has actually recognized a scholar's privilege to withhold from a federal grand jury confidentially obtained information which is relevant to a legitimate grand jury inquiry Accordingly, [the court] decline[d] to acknowledge such a privilege as a matter of federal common law."⁵⁸

The reluctance of both circuits to embrace the scholar's privilege argument is understandable. First, the relationship between the information sought and the academic research was tenuous. The journal in the restaurant fire case was clearly "scholarly work product," but claiming that entries relating to a possible arson were the kind of information expected in sociological research seems dubious at best. The relationship between the information at issue in the vandalism case and the student's academic work was even more remote. Second, neither case involved expertise. For purposes of the litigation, the students were not experts; had either been willing to testify, he would have been a lay witness.

Judicial skepticism of the scholar's privilege is also apparent in civil cases. Judge Crabb's paper discusses several examples and concludes that they "give little evidence that a researcher's privilege is emerging or that if one did, it would offer researchers any more protection than they have now."⁵⁹ She also concludes that "amended [Fed. R. Civ. P.] 45(c)(3)(B) provides researchers with as much protection as a conditional [researcher's] privilege would."⁶⁰

VIII

STATUTORY PROTECTION

Although courts have not recognized any absolute privileges against the disclosure of research information, several federal statutes do afford some protection, at least under certain circumstances.⁶¹ One statutory provision "protects information obtained through activities carried out or supported by the Agency for Health Care Policy and Research... . [It] provides a self-executing grant of confidentiality ... to all projects that fall within its scope."⁶² Another provision "gives the Secretary of Health discretion to grant federal confidentiality certificates ... [that give a researcher] discretion to refuse to divulge the identity of the individual source who furnished ... data."⁶³ A similar statute gives the attorney general discretion to authorize drug abuse research-

57. *See In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993).

58. *Id.* at 403.

59. Crabb, *supra* note 2, at 24.

60. *Id.* at 24-25

61. For a detailed discussion of these statutes, see generally Traynor, *supra* note 10.

62. *Id.* at 123.

63. *Id.*

ers to withhold the names or other identifying characteristics of research subjects.⁶⁴

Only the statute governing the Agency for Health Care Policy and Research provides absolute protection. Indeed, it forbids researchers from disclosing information unless they have the consent of the establishment or person who supplied the information to them. The other protective statutes simply allow a researcher to withhold the identity of research subjects, and they apply only if proper certificates are obtained.

Some of the cases discussed above might have been avoided if the researchers involved had obtained confidentiality certificates, but this protection would not address concerns about the time and expense of redacting files or the problem of premature disclosure of results. The identity of the people in Dr. Herbst's database might well have been protected, for example, but the end result would have been about the same. He would have had to produce most of his data. Moreover, the statutes do not protect the peer review process.

From the perspective of researchers, broader statutory protection might seem an easy answer to the problems of compelled disclosure; this approach, however, would tip the balance too far in favor of nondisclosure. Justice requires that every reasonable effort be made to get the facts right at a trial, even if the process sometimes interferes with the lives and work of nonlitigants. Witnesses to traffic accidents or murders must testify if subpoenaed. The same principle should apply to anyone with relevant information.

Nevertheless, it would still be appropriate to provide more protection for the peer review process. This reform does not necessarily require a statute, however. As discussed in the following section, such protection can be accomplished by amending Fed. R. Civ. P. 45.

IX

IMPROVING THE PROCESS FOR RESOLVING DISPUTES ABOUT COMPELLED DISCLOSURE

As Professor Jasanoff points out in her paper, the compelled disclosure of research by unretained experts is but one part of a larger debate about the relationship between law and science.⁶⁵ Much of this debate has resulted from profound misunderstanding and even mistrust between the two cultures.⁶⁶ Genuine

64. 21 U.S.C. § 872(c) (1996).

65. See generally Sheila Jasanoff, *Research Subpoenas and the Sociology of Knowledge*, 59 LAW & CONTEMP. PROBS. 95 (Summer 1996).

66. As Judge Crabb puts it, "[c]onflict between [law and science] is inherent in the divergent ways in which they operate. This conflict is exacerbated by the fact that scientists are almost as ignorant of the needs and workings of the legal system as lawyers and judges are of scientific activity." Crabb, *supra* note 2, at 10; see also STEVEN GODLBERG, *CULTURE CLASH: LAW AND SCIENCE IN AMERICA* (1994); PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991); SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE AND TECHNOLOGY IN AMERICA* (1995); Black, *supra* note 49; Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113; Joseph Sanders, *From Science To Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1 (1993); Peter H. Schuck, *Multi-Culturism Redux: Science, Law, and Politics*, 11 YALE L. & POL'Y

improvement of the relationship can come only if scientists (and others who conduct research) and members of the legal profession make a concerted effort to learn more about how the “other side” thinks and works. From this perspective, the symposium papers must be judged a resounding success.

The papers by Judge Crabb,⁶⁷ Michael Traynor,⁶⁸ and Elizabeth Wiggins and Judith McKenna⁶⁹ suggest how research workers can maximize the protection the legal system affords them. These papers counsel that researchers must understand that a subpoena usually should be viewed as an “opening bid” and that haggling and negotiation are expected.⁷⁰ Judge Crabb further advises that because of the nature of litigation, “researchers must educate the judge about [their research and how discovery would disrupt it] if they want [these factors] taken into consideration.”⁷¹

Professor O’Neil’s paper, on the other hand, communicates the researcher’s concerns about subpoenas.⁷² His explanation of how “compelled disclosure—especially premature disclosure—may cause [grave harm] to [the research process’s] integrity”⁷³ should sound a cautionary note for all courts that must resolve such discovery disputes. It is encouraging that after reviewing a number of cases, he concludes that much valuable experience has been gained and that a number of courts have provided helpful guidance.⁷⁴ In the end, his views are not too different from those of Judge Crabb and Mr. Traynor. He concludes that “[w]hat should not change is the persistent and conscientious pursuit by scholars and their lawyers of whatever protection the courts may afford to the quest for knowledge.”⁷⁵

Though this convergence on consensus is a significant step toward mutual understanding, it does not reach perhaps the most important issue raised in Professor Jasanoff’s paper: What do lawyers do with an unretained expert’s information once they obtain it? Generally, an attorney’s objective is to open up

REV. 1 (1993); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

67. Crabb, *supra* note 2, at 30-32.

68. Traynor, *supra* note 10, at 121-48.

69. Wiggins & McKenna, *supra* note 5, at 88-91.

70. Crabb, *supra* note 2, at 31 (arguing that unless an unretained expert can establish an alternative source for the information sought, show that the information does not have probative value, or provide some other reason for not complying with a subpoena, “[i]t is far more likely that the judge will direct the requester and the researcher to negotiate the terms of a modified subpoena that meets the concerns of the researcher and the needs of the requester”); Traynor, *supra* note 10, at 125 (“Researchers unfamiliar with court procedures and subpoenas may be jolted when served with a subpoena at their workplace or residence.”); Wiggins & McKenna, *supra* note 5, at 89 (“Researchers are likely to view a subpoena as a nonnegotiable command of the court. Most attorneys, on the other hand, view the scope of the subpoena’s document request as an opening bid.”).

71. Crabb, *supra* note 2, at 30.

72. See O’Neil, *supra* note 4, at 36.

73. *Id.* at 37.

74. See *id.* at 49.

75. *Id.*

the very process of scientific reasoning to the full force of adversarial scrutiny.⁷⁶ This goal immediately raises the question of whether courts are institutionally qualified to take the next step—that is, to “evaluate both the probity and scientific validity of these materials and their adequacy as a foundation for challenged evidence.”⁷⁷ Professor Jasanoff suggests that courts are qualified and that legal skepticism about science need not degenerate into mindless deconstruction.⁷⁸ After discussing various approaches courts might consider,⁷⁹ she ultimately returns to the need “for judges to develop a keener sense of how science works”⁸⁰ and how science’s internal constraints might therefore mesh with or impede the requirements of the law.⁸¹

Based on their research into the final outcome of nine cases, Wiggins and McKenna also conclude that, by and large, courts are up to the task. They found that “[w]ith sufficient sensitivity to the professional and scientific issues [discussed in their paper], courts can minimize litigation-related disruption of the development of medical and scientific knowledge without denying litigants access to the evidence necessary to legitimate claims and defenses.”⁸² Thus, there is no need for radical reform. Nonetheless, there are five changes to Fed. R. Civ. P. 45 that would improve the process by focusing judicial attention more explicitly on the special concerns of scientists and of other researchers.⁸³

First, in order to ease the harsh choice of having to be cited for contempt before taking an appeal of a subpoena, Rule 45 should grant unretained experts standing to appeal directly. Second, the rule should explicitly state that a court must weigh the impact of a subpoena on the conduct of scientific, technical, or other specialized research, whether or not there is an economic impact on the specific individual subpoenaed. Third, Rule 45 should protect the anonymity of the peer review process. Review comments not passed along to the author(s) of a paper and the identity of anonymous reviewers should be discoverable only under extreme and unusual circumstances. Fourth, the rule should also protect

76. Jasanoff, *supra* note 65, at 95-96.

77. *Id.* at 96.

78. *Id.* at 100-02. Judge Crabb’s suggestion that something other than scientific criteria might be used in court to assess scientific validity must give one pause on this point, however. See Crabb, *supra* note 2, at 12-14.

79. See Jasanoff, *supra* note 65, at 115-17. The three approaches she suggests all merit consideration: the careful screening of party experts, the appointment of independent experts, and the use of review panels. Professor Carrington and Ms. Jones also suggest consideration of court-appointed experts in connection with unretained experts. Carrington & Jones, *supra* note 3, at 63-64. For a more general discussion of the use of court-appointed experts, see Joe S. Cecil & Thomas E. Willging, *Accepting Daubert’s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995 (1994).

80. Jasanoff, *supra* note 65, at 117.

81. *Id.*

82. Wiggins & McKenna, *supra* note 5, at 91; see also Crabb, *supra* note 2, at 26-30 (suggesting a number of ways in which courts can fashion solutions that accommodate both scientific and legal concerns).

83. For a discussion of some earlier proposals for amending Rule 45 to address the problems associated with subpoenas issued to unretained experts, see Mark Labaton, Note, *Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas*, 1987 DUKE L.J. 140.

the identity of individual research subjects. Finally, to encourage the kind of negotiated solutions that already occur in many cases, Rule 45 should contain a mechanism whereby an unretained expert is paid attorney fees if a compromise offer is made to the party seeking disclosure and the court's ruling requires no disclosure beyond the offer.

X

CONCLUSION

Although the question posed in the title is still without a definitive answer, I hope my comments have narrowed the issues and clarified the kind of analysis a court should undertake when disputes arise about compelled disclosure by unretained experts. Ultimately, the best hope for improving the resolution of such disputes is for lawyers to present the research and litigation issues clearly and for courts to develop a "keener sense" for the area of expertise involved. Part of the problem may be that scientists often do not know how to avoid or contest a subpoena. Indeed, informal discussions with several scientists indicate they may not be aware of the statutory protection currently available to them. The problem goes deeper, however, and more protection is required. Adopting the proposed changes to Rule 45 would address this need. The changes would constitute explicit recognition by the law of the special concerns of science and would help bridge the gap between the two professional cultures. Too often this gap hinders the law's use of information only experts can provide.