EVIDENTIARY PRIVILEGE FOR RESEARCHERS ITS PRESENT STATE AND A PROPOSAL FOR ITS FUTURE

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"If you have knowledge, let others light their candles in it."
– attributed to Margaret Fuller[1]

For centuries, researchers have placed enormous importance on the freedom to research and write about what they choose.[2] It has long been understood that the advance of knowledge and the flourishing of artistic creativity are encouraged if researchers and artists are able to carry out their endeavors without fear of retaliation by institutions or governments.[3] Though researchers at universities and other institutions frequently speak out to defend academic freedom at universities from perceived threats like the elimination or weakening of tenure,[4] researchers have largely ignored an equally grave threat to their work, which entails being forced to divulge the identities of individuals who provide them with information for their academic work in legal or other governmental proceedings.

Reporters, and other persons who do investigative reporting, the results of which are published in newspapers, magazines, and other media, have considered their ability to protect the identity of those who provide them with information and their observations of them, to be of utmost importance.[5] Reporters argue that without the ability to reliably promise those who provide them with sensitive information that their identities will be protected from disclosure, such sources would be afraid to give the information to the press or to allow their activities to be observed.[6] If the sources' refuse to provide information to the press, it is

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1 Margaretfuller.org http://www.margaretfuller.org/index.php?option=com_content&view=article&id=90:sermon-award-winner&catid=40&Itemid=82 (last visited December 30, 2014).

2 See generally, Ralph F. Fuchs, Academic Freedom. Its Basic Philosophy, Function, and History. 28 Law and Contemp. Probs. 431 (1963).(discussing the history of protection of academic freedom in the academy).

3 See generally id., and Stacey E. Smith, Note, Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities, 59 Wash & Lee L. Rev. 299 (2002).

4 E.g., Evan R. Goldstein, Torture and Tenure at Berkeley, Chron. of Higher Ed., May 9, 2008, at 5.; Marianne M. Jennings & Stephen K. Happel, Op.-Ed., Don't Eliminate Tenure Just to Trim Deadwood, Christian Sci. Monitor, Feb. 22, 1996, at 18; Aaron Petkov, Detroit's Wayne State University Looks to Destroy Tenure, Labornotes (August 15, 2012), http://www.labornotes.org/2012/08/detroit%E2%80%99s-wayne-state-university-looks-destroy-tenure.

5 See e.g., Hope Yen, Proposed Media Shield Law Offers Modest Shelter, Buffalo L. J., Mar. 20, 2008, p.18-22; SPJ Board Votes to Create Endowed Legal Defense Fund for Journalists, States News Service, Sept. 4, 2014.

6 See e.g., Editorial, An Internet-Era Shield Law, L.A. Times, Dec. 31, 2009, p.28.; David B.

further argued, that matters of vital public importance, such as corruption, threats to public health and safety, or worse will not come to the public's attention.[7] However, all of these reasons apply with equal force to justify recognition of the right of academic researchers to keep their sources confidential as well.

Examples of the ways in which academic research serves a role similar to journalism in bringing matters of public concern to the light are not hard find. Academic studies of illicit subcultures or individuals engaged in illegal behavior help the public understand the history of conflicts, why people engage in criminal behavior, and how it can be prevented. However, such studies require academics to give their subjects assurances of confidentiality if the researchers are to secure the subjects' participation in the study.[8] For example, researchers who interviewed participants in paramilitary groups in Northern Ireland argued in a recent federal court case that maintaining the confidentiality of their subjects was critical to their ability to document the course of the sectarian conflict that wracked that province for decades, so that future generations will have a better understanding of what occurred.[9] Similarly, the work of medical and psychological researchers alerts the public to threats to their health and leads to treatments for illnesses. However, to do their work, they also promise confidentiality to their subjects in order to secure their cooperation as a matter of course, given that subjects probably do not want information about their conditions made public.[10] The need to promise confidentiality also extends to the study of government institutions. For example, researchers have noted that studies of police departments, including interviews with officers and observations of their activities while on duty, are often not possible without promising the participating officers that their identities will be protected by the researchers.[11]

A prominent case illustrating the need for laws protecting the confidentiality of research subjects, is that of sociologist Rik Scarse, who was incarcerated for 159 days for contempt of court because he refused to reveal information about a person that he had interviewed who was a member of a radical environmental group, and

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Rivkin Jr., & Lee A. Casey, Reporters Need a Federal Shield Law, Wall St. J., Apr. 22, 2013, p. A15; Margaret Sullivan, A Blow for the Press, and for Democracy, N.Y. Times, Jul. 28, 2013, p.12; Editorial, Shielding Journalists, Wash. Post, Sept. 23, 2013, p.A14.

7 Id.

8 See e.g., Marvin E. Wolfgang, Confidentiality in Criminological Research and Other Ethical Issues, 72 J. Crim. L. & Criminology 345,350 (1981); Josine Junger-Tas & Ineke Haen Marshall, The Self-Report Methodology in Crime Research, 25 Crime and Just. 291, 349 (1999); Paul J. Draus, et. al., Cracking the Cornfields: Recruiting Illicit Stimulant Drug Users in Rural Ohio. 46 Sociological Q. 165, 196 (2005).

9 See United States v. Moloney (In re Price), 685 F.3d 1, 16 (1st Cir. 2012).

10 Ronald Bayer et. al., Guidelines for Confidentiality in Research on AIDS, 6 IRB: Ethics and Human Res. at. 1 (1984); Christine Khosropour & Patrick S. Sullivan, Risk of Disclosure of Participating in an Internet-Based HIV Behavior Risk Study of Men Who Have Sex with Men, 37 J. of Med. Ethics 768 (2011); Ross A. Thompson, Vulnerability in Research: A Developmental Perspective on Research Risk, 61 Child Development 1, 2 (1990)

11 See e.g., Richard J. Lundman & James C. Fox, Maintaining Research Access in Police Organizations, 16 Criminology 87, 92, 94 (1978).

who was a suspect in a federal criminal investigation.[12] Scarce's research into the radical environmental movement was the first of its kind, providing new insights into a branch of the environmental movement dedicated to "direct action," a term describing tactics that diverged from more mainstream environmental groups to include civil-disobedience and property destruction.[13] Scarce's ordeal stands as a reminder to all researchers who use subjects involved in criminal activities or who have sensitive or damaging information to divulge, that without protection from compelled revelation, they might face the difficult choice between contempt of court, and having to reveal information that could hinder future research into such topics.

The forgoing examples illustrate the point that without the ability to keep the identity of research subjects confidential, scholars would be impeded in their capacity to produce scholarship that serves the public interest, in the same way that failing to protect journalists' ability to shield the identity of their sources impedes their ability to report news that is in the public interest. It follows that there is no logical reason for not protecting the subjects of academic research, if such protection should be offered to journalistic sources.

Arguments in favor of extending an evidentiary privilege to researchers that would permit them to keep their sources and subjects confidential have been made for many years,[14] but with little acknowledgment of the patchwork of existing law that protects researchers' ability to maintain confidentiality. The aim of this article is to survey the breadth of the evidentiary privilege that the work of academic researchers currently have in the United States, and to suggest the wide adoption of a proposed statute that erases the distinction between researchers and reporters in terms of whether they are legally entitled to protect their confidential sources and subjects, and grants a broad privilege to all information gained by researchers and journalists in the course of their work.

The article opens with a survey of state and federal law, which shows that the work of academic researchers probably enjoys some form of evidentiary privilege in at least seventeen states and in a minority of the federal circuits, and that this privilege is often grounded in two sources: 1) statutes and rules that were written to protect journalists, or 2) judicial opinions involving assertion of the journalist's privilege by non-journalists. The article then discusses laws that allow government officers to extend privilege to researchers for specific projects, as well as the power that state and federal courts enjoy to privilege academic research under their rules

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12 Rik Scarce, Researcherly Ethics and Courtroom Antics: Where Researchers Stand in the Eyes of the Law, 26 Am. Sociologist 87, 90-91, 95 (1995).

13 Id. at 89-90.

14 E.g. Kathleen Bond et. al., Confidentiality and the Protection of Human Subjects in Social Science Research: A Report on Recent Developments [with Comments and Rejoinders], 13 Am. Sociologist 144, 146-47 (1978); Robert H. McLaughlin, From the Field to the Courthouse: Should Social Science Research be Privileged?, 24 Law & Soc. Inquiry 927, (1999); Development in the Law-Privileged Communication in the Law: VI. Institutional Privileges, 98 Harv. L. Rev. 1592, 1610 (1985); Kathryn L. Steffen, Comment, Learning from our Mistakes: The Belfast Project Litigation and the Need for the Supreme Court to Recognize and academic Privilege in the United States, 3 Penn. St. J. of L. & Int'l. Aff. 324,326 (2014);

of evidence and civil procedure. Finally, it will argue in favor of adoption, in modified form, of a model statute proposed by Profs. Samuel Hendel and Robert Bard,[15] at both the state and the federal level in order to erase the hard-to-justify distinction between journalists and researchers in terms of whose sources should be protected by an evidentiary privilege, and to eliminate the inconsistencies created by the multiplicity of laws that might offer some protection to researchers.

The Federal Constitutional Basis for Privilege: Branzburg v. Hayes

Branzburg v. Hayes[16] represents the U.S. Supreme Court's primary exposition on the constitutional basis for the reporter's privilege. This case arose when a reporter, Branzburg, observed the making of hashish from marijuana and was later called before a state grand jury to implicate the persons involved.[17] Two other petitioners, also reporters, both reported stories about the Black Panther Party, which, at the time, was a controversial revolutionary organization.[18] These two petitioners were later called to state and federal grand juries respectively to testify about what they had seen and heard while reporting their stories.[19] All three reporters claimed that the free flow of information protected by the First Amendment gave them a right not to divulge information about their confidential sources, and that being forced to give information about their sources would cripple their ability to gather and disseminate news.[20]

In its holding, the Supreme Court refused to recognize a general privilege for reporters under the First Amendment's guarantee of freedom of the press,[21] but made it clear that First Amendment rights were implicated when a reporter was forced to reveal confidential sources.[22] Furthermore, the Court specifically noted that a grand jury summons to a reporter to divulge information about a confidential source must be done in good faith,[23] and suggested that for the request to withstand constitutional scrutiny, the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[24]

The Court's reluctance to find a robust evidentiary privilege for journalistic sources was not surprising given judges' general reluctance to recognize new

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15 Samuel Hendel & Robert Bard, Should there be a Researcher's Privilege?, 59 AAUP Bull. 398 (1973)

16 408 U.S. 665 (1972).

17 Id. at 668.

18 See Garrett Albert Duncan, Black Panther Party, Encyclopaedia Brittanica, http://www.britannica.com/topic/Black-Panther-Party (last visited Jul. 7, 2015)

19 Branzburg at 672-80.

20 Id. at 679-81.

21 Id. at 697.

22 Id. at 707.

23 Id.

24 Id. at 700.

evidentiary privileges.[25] In his article, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*,[26] Raymond F. Miller noted that courts have generally justified the recognition of new privileges to protect the privacy of communications within important relationships, and to safeguard individual privacy.[27] Courts appear to take seriously the notion that new privileges should not be created unless they are strongly justified, given the importance of access to all relevant evidence in reaching just resolutions in criminal and civil cases. Accordingly, judges have generally left the creation of new privileges to legislatures.[28] However, the willingness of the *Branzburg*-Court to find that newsgathering enjoyed some protection under the First Amendment,[29] suggested the importance that the Court placed on this activity, and gave lower courts a precedent for the creation of a privilege for journalists' sources.

In his opinion in *McKevitt v. Pallasch*,[30] Judge Richard A. Posner discusses the reception of *Branzburg* in the federal courts of appeals, and notes that many appeals courts that have considered the case have found that there is a reporter's privilege.[31] Judge Posner inferred that one basis for these holdings is Justice Lewis F. Powell's statement in his concurring opinion that claims of journalistic privilege should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings,[32] along with the fact that the four dissenting justices in *Branzburg* would have gone further than Powell in protecting journalist's sources under the First Amendment.[33] Judge Posner also notes that although many circuit courts recognize a reporter's privilege, they do not agree as to its scope, with some, for example, recognizing the privilege generally, but not in cases, like *Branzburg*, that involved a grand jury proceeding.[34] Furthermore, according to Posner,[35] among the cases that recognize a journalist's privilege, some do not refer to *Branzburg* as the source of the privilege,[36] some treat the "majority" opinion in *Branzburg* as a plurality opinion,[37] and some read as *Branzburg* as explicitly recognizing a reporter's privilege.[38]

Some courts of appeals have been prepared to expand the definition of a

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25 See infra p.20-22.

26 31 Conn. L. Rev. 771 (1999).

27 Id. at 782.

28 Infra, p.20-22.

29 Supra note 22.

30 339 F.3d 530 (7th Cir. 2003).

31 Id. at 532.

32 Branzburg v. Hays, 408 U.S. 665, 709-10 (1972).

33 McKeivitt at 531-32.

34 Id. at 532. See e.g. In re Grand Jury Proceedings, 5 F.3d 397, 402-03 (9th Cir. 1993).

35 Id.

36 E.g., Titan Sports, Inc. v. Turner Broad. Sys., 151 F.3d 125, 128 (3rd Cir. 1998).

37 E.g., United States v. Smith, 135 F.3d 963, 968-69 (5th Cir. 1998).

38 E.g., Shoen v. Shoen, 5 F.3d 1289. 1292 (9th Cir. 1993).

reporter in terms of who is entitled to keep sources confidential. *Von Bulow v. von Bulow*,[39] which was decided by the United States Court of Appeals for the Second Circuit in 1987, exemplifies a case in which a circuit court extended the journalist's privilege to a non-journalist. *Von Bulow* arose out of a civil suit that was filed against a wealthy man by his stepchildren who claimed he allegedly attempted to murder their mother.[40] During the discovery phase of the trial, the court ordered a close friend of the defendant to deliver to the plaintiff a copy of a manuscript that she was writing about the defendant's earlier criminal trial for attempted murder.[41] When the friend refused to comply with the order claiming that she was entitled to the reporter's privilege, the district court held that she was not entitled to such a privilege, and eventually cited her for civil contempt of court.[42] When the contemnor appealed the civil contempt ruling, the appeals court held that though she was not entitled to invoke the journalist's privilege in her case,[43] that privilege extended to anyone who could demonstrate "…the intent to use material -- sought, gathered or received -- to disseminate information to the public and that such intent existed at the inception of the…process."[44] As of 2015, four other circuit courts of appeals, the First,[45] the Third,[46] the Ninth,[47] and the Tenth,[48] appear to employ a definition of a journalist that it broad enough to encompass non-journalists who gather information for publication, which is a definition broad enough to include academic researchers.

By adopting a broad definition of who is entitled to protect their sources, all of these courts acknowledged, as did the Supreme Court in *Branzburg*,[49] that the process of newsgathering receives some protection under the First Amendment,[50] and that the source of this First Amendment protection is a strong belief in the importance of the free flow of information.[51] This holding has led these courts to

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39 811 F.2d 136 (2nd Cir. 1987)

40 Von Bulow Stepchildren Sue Him for $56 Million, N.Y. Times, July 20, 1985, http://www.nytimes.com/1985/07/20/us/von-bulow-stepchildren-sue-him-for-56-million.html

41 Von Bulow v. Von Bulow, 652 F. Supp. 823, 824 (S.D.N.Y 1986).

42 Von Bulow v. Von Bulow, 811 F.2d at 138.

43 Id. at 146-47.

44 Id. at 144.

45 See e.g., Cusumano v. Microsoft Corp., 162 F.3d 708, 715 (1st Cir. 1998) (applying the privilege to an academic researcher).

46 See e.g., Titan Sports, Inc. v. Turner Broad. Sys., 151 F.3d 125, 131 (3rd Cir. 1998) (adopting the broad definition of a journalist used in von Bulow).

47 See e.g., Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) (applying the privilege to a book author in a civil case); but see, In re Grand Jury Proceedings, 5 F.3d 397, 399-400 (9th Cir. 1993) (refusing to apply the privilege to an academic researcher in a grand jury proceeding).

48 See e.g., Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) (applying the privilege to a filmmaker).

49 Branzburg v. Hays, 408 U.S. 665, 707 (1972).

50 See Titan Sports, Inc., 151. F.3d at 128-30; Cusumano, 162 F.3d at 714; Shoen, 5 F.3d at 1293; Von Bulow, 811 F.2d at 144; Silkwood, 563 F.2d at 436.

51 See Titan Sports, Inc., 151. F.3d at 128; Cusumano, 162 F.3d at 714; Shoen, 5 F.3d at 1292; Von

extend the protections of the First Amendment to all those who gather information with the intent to publish, just as reporters do, without requiring them to be affiliated with a traditional news corporation or to be explicitly identified as a journalist.[52] In other words, these courts saw no meaningful distinction between the work of journalists that was deserving of constitutional protection, and the work of the non-journalists at issue in the cases.

As Justice White pointed out in his opinion for the Court, this privilege had not been recognized by state courts.[53] However, by 1972, seventeen states had enacted statutes creating a privilege for journalists,[54] and, after *Branzburg*, some state courts used the *Branzburg* opinion in that case to justify recognizing a privilege.[55] In those states where a journalist privilege is protected by statute, state legislators and other officials have generally justified these laws by saying they are needed to protect the public's right to receive information about matters of great importance specifically by facilitating journalists' use of confidential sources.[56] Some officials have also cited the need to provide additional protection for whistleblowers who seek to expose corruption.[57] In the wake of *Branzburg*, at least one legislator spoke in support of her state's shield law by saying that it was need to ensure protection for journalists' First Amendment rights.[58] As of 2015, every state except Hawaii and Wyoming extended some privilege to journalists' sources either by statute (thirty-seven states), court-made rule of evidence (two states) or state appellate court ruling (nine states).[59]

State Reporter's Shield Statutes[60]

The fact that so many states have by one means or another decided to protect journalists from having to reveal their sources indicates that they place significant importance on the free flow of information that this protection facilitates. However, in finding a balance between protecting sources and facilitating discovery in the

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Bulow, 811 F.2d at 142; Silkwood, 563 F.2d at 437.

52 See e.g. notes 45-48.

53 Id. at 685-86.

54 Id. at 689 n.27.

55 See e.g., Morgan v. State, 337 So. 2d 951, 953 (Fla. 1976); State v. St. Peter, 315 A.2d 254,255-56 (Vt. 1974); Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va. 1974);

56 E.g., Associated Press, Shield Law Balances Free Press, Fair Trial, May 7, 2009, available at 2009 WLNR 30344154.

57 E.g., Jennifer Byrd, Reporter Shield Law Heads to WA Governor, Associated Press, Apr. 17 2007; Dee Hall, Wisconsin Shield Law Is Promising Step Forward, Green Bay Press-Gazette, May 7, 2010, at A10.

58 See Henny Wallis, Reporter's Shield Law Passes First Test, Eugene Register-Guard, Feb. 20, 1973, at 1A.

59 This information was gathered by the author through a survey of state statutes, court rules and applicable precedents. Note that state appellate courts have based their rulings protecting journalists' sources on both state and federal constitutional provisions.

60 For the purposes of this study, the District of Columbia is considered a state.

judicial process, states have adopted different definitions of who may protect their sources from court-ordered revelation. Although most of these statutes might have been written with journalists in mind, some employ a definition of journalist that is broad enough to encompass academic researchers. For the purposes of categorizing jurisdictions whose reporter's shield laws extend to academic researchers, the term academic researcher follows the definition suggested in the Hendel and Bard article. Specifically, their proposed law would apply to any "… person regularly or occasionally engaged in the purposeful collection, collation, and analysis of information, when obtained under promise of confidentiality, with the intent of bringing such information, analysis, and/or recommendations to public attention."[61] Obviously, this definition is very broad, and includes persons who are not affiliated with institutions of higher learning or organizations dedicated to research, but this definition accounts for the reality that there are people doing academic research who are not affiliated with such institutions.[62]

The states can be divided into two categories in terms of whether state law recognizes an evidentiary privilege for researchers. The first category includes states that have no statutes, rules, or appellate case law that could be plausibly read as extending an evidentiary privilege to researchers, and the second category includes states that have legislation or case law extending such a privilege. The following states have statutes or case law that arguably or explicitly create a researcher's privilege: Alaska,[63] California,[64] Delaware,[65] Georgia,[66] Illinois,[67] Louisiana[68], Maine[69], Massachusetts[70], Michigan[71], Minnesota[72], Missouri[73],

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61 Hendel and Bard, supra note 15 at 399.

62 See e.g., Audra Wolfe, Doing Scholarship from Outside Academe, Vitae, Dec. 4, 2014, https://chroniclevitae.com/news/824-doing-researchership-from-outside-academe, (last visited Jul. 21 2015).

63 Alaska Stat. §§9.25.300-390 (2014).

64 Cal. Evid. Code § 1040 (West 2015) (arguably giving academic researchers at public educational institutions a privilege against divulging confidential information related to researchership).

65 Del. Code Ann. tit. 10 §4320 (2015).

66 Ga. Code Ann. §24-5-508 (2015).

67 735 ILL. Comp. Stat. Ann. 5/8-902 (2015).

68 La. Rev. Stat. Ann. §§ 45:1451-1459 (2015); See also Louisiana v. Fontanille, 1994 La. App. LEXIS 191, *3 (La. App. 5th Cir. 1994).

69 Me. Rev. Stat. tit. 16 § 61 (2015).

70 See Sinnott v. Boston Retirement Bd., 524 N.E.2d 100, 103-04 (Mass. 1988).

71 Mich. Comp. Laws §§ 767.5a.,767A.6(6) (2015); See also In re Photo Marketing Assoc. Int'l., 327 N.W. 2d 515, 517-18 (Mich. Ct. App. 1982).

72 Minn. Stat. § 595.023 (2015).

73 See State ex. Rel. Classic III v. Ely, 954 S.W.2d 650, 655-56 (Mo. Ct. App. 1997).

Nebraska[74], New Hampshire,[75] North Carolina,[76] South Carolina,[77] Tennessee,[78] Texas,[79] Utah,[80] and West Virginia.[81]

Georgia's shield law is typical of those with language broad enough to protect researchers. Its protections extend to the following:

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through any newspaper, book, magazine, radio or television broadcast, or electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party….[82]

Conversely, Kentucky's statute is a prime example of a narrowly focused shield law that extends its protection only to reporters who are associated with traditional media companies:

No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.[83]

Even in states where the definition of a reporter is broad enough to extend to researchers, these statutes vary as to the situations in which their protections are applicable. For example, the Michigan shield statutes only protect reporters from subpoenas issued by grand juries and prosecutors,[84] while North Carolina's shield law applies to all legal proceedings,[85] and Nebraska's shield law applies to all state proceedings, including legislative hearings.[86] Note that some state shield laws provide a lower level of protection by providing for a host of conditions that make

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74 Neb. Rev. Stat. §§20-144-147 (LexisNexis 2015).

75 See Mortgage Specialists v. Implode-Explode Heavy Indus., 999 A.2d 184, 189 (2010).

76 N.C. Gen. Stat. § 8-53.11 (2015).

77 S.C. Code Ann. § 19-11-100.

78 Tenn. Code Ann. § 24-1-208 (2015).

79 Tex. Civ. Prac. & Rem. Code § 22.021 (West 2015)

80 Utah R. Evid. Rule 509.

81 W. Va. Code § 57-3-10 (LexisNexis 2015).

82 Ga. Code Ann. §24-5-508 (2015).

83 Ky. Rev. Stat. Ann. § 421.100 (LexisNexis 2015).

84 Mich. Comp. Laws Serv.§§ 767.5a.,767A.6(6) (LexisNexis 2015).

85 N.C. Gen. Stat. § 8-53.11.

86 See Neb. Rev. Stat. §20-146.

the privilege inapplicable,[87] while others provide apparently absolute protection for a reporter's sources.[88]

Discretionary and Nondiscretionary Privilege for Research Subjects and Data

So far, the article has discussed the protection that researchers have acquired for their confidential sources and subjects under statutes and doctrines that were primarily devised with traditional reporters in mind. However, there are some state and federal statutes that allow government officials to provide evidentiary privilege to research subjects if they determine that such protection is necessary for the research to be conducted. The existence of these laws shows that policy makers understand the need for researchers to be able to credibly promise their subjects confidentiality if they are to glean information needed to make public policy.

For example, a federal statute gives the Secretary of Health and Human Services the right to do the following:

…authorize persons engaged in biomedical, behavioral, clinical, or other research

that uses federal funds (including research on mental health including research on 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 connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State, or local, civil, criminal, administrative, legislative, or other proceedings to identify such individuals.[89]

Additional examples include a statute that authorizes the United States Attorney General to allow researchers studying matters related to the enforcement of federal narcotics laws to keep confidential the identities of the research subjects,[90] and a statute that prohibits federal employees and those engaged in research funded by the Office of Justice Programs from revealing the identities of research subjects.[91]

Some state officials also have the power to privilege the identities of research subjects who might not otherwise participate in a study without the promise of confidentiality. For example, a California law authorizes the state attorney general to privilege the identity of subjects that participate in research into the use of controlled substances,[92] and a New Hampshire law allows the state's Commissioner of Health and Human Services to privilege information obtained

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87 See e.g., N.C. Gen. Stat. § 8-53.11(c)-(d).

88 See e.g., NEB. REV. STAT. §20-146.

89 42 U.S.C.S. §241(d) (LexisNexis 2015).

90 21 U.S.C.S. § 872(c) (LexisNexis 2015).

91 See 42 U.S.C.S. §3789g(a) (LexisNexis 2015).

92 Cal. Health & Safety Code § 11603 (Deering 2015).

for the purposes of medical or scientific research.[93] Minnesota[94] and Michigan[95] have laws that forbid, except in a few circumstances, the disclosure before any state tribunal of information that was collected by the state health department for the purpose of promoting public health.

Rules of Civil Procedure

Federal and state rules of civil procedure provide some protection to researchers who do not wish to reveal sensitive information about their subjects, although not as comprehensively or with the same level of certainty as a shield law. The Federal Rules of Civil Procedure (FRCP) do this by limiting access to the normal tools of pre-trial discovery "…if the court determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."[96] Although this power granted by the FRCP does not formally privilege the information that researchers gather, it is a tool that provides some protection because it allows researchers to make the claim that turning over sensitive information about research subjects would be burdensome. This argument has succeeded on several occasions in federal court. For example, in *In re Snyder*,[97] the trial court granted a motion to quash a subpoena that had been served on a retired auto safety researcher to testify in a case against an auto manufacturer. Although the court rejected the researcher's claim that his data were privileged under federal law,[98] it granted the motion to quash on grounds of burdensomeness, arguing, among other things, that forcing him to testify would set a precedent that could deter future research into topics where subjects would demand confidentiality, and could result in researchers having to answer many subpoenas regarding their work.[99]

Federal courts have also ruled that researchers may avail themselves of the courts' power to issue protective orders limiting the scope of what they can be compelled to disclose in civil litigation under the Federal Rules of Civil Procedure.[100] Specifically, the rules allow courts to issue protective orders to shelter parties from, among other things, "…annoyance, embarrassment, oppression, or undue burden or expense" in the discovery process.[101] For example, in *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*,[102] a federal district court issued a protective order that limited the information that the New England Journal of Medicine had to divulge regarding the identity and comments of its peer reviewers, since

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93 N.H. Rev. Stat. Ann.§ 126-A: 11 (LexisNexis 2015)

94 Minn. Stat. § 144.053 (2015).

95 Mich. Comp. Laws Serv. §§ 333.2631 - 2632 (LexisNexis 2015).

96 Fed. R. Civ. P. 26(b)(2)(B),(b)(2)(C).

97 115 F.R.D. 211 (D. AZ. 1987).

98 Id. at 213.

99 Id. at 215. See also, Morriss v. BNSF Ry. Co., 2014 U.S. Dist. LEXIS 3757 at *6-7, 17 (D.NE. 2014).

100 Fed. R. Civ. P. 26(c)(1).

101 Id.

102 249 F.R.D. 8 (D.Mass. 2008)

this would interfere with the journal's peer review process.[103] Federal courts are divided on the question of whether and to what extent the confidentiality of the peer-review process should be upheld in litigation.[104]

The Federal Rules of Civil Procedure also allow courts to quash or modify subpoenas to "unretained experts," if the subpoena requires disclosing the expert's opinion, or information that does not relate to specific occurrences in the dispute and was not the result of a study requested by a party.[105] One of the intended effects of this rule has been to guard against experts having their intellectual property "taken" by being forced to testify,[106] but it also provides researchers with a tool to prevent the revelation of confidential sources that their work might have relied upon. Civil procedure rules like those in the Federal Rules of Civil Procedure that allow experts to quash or modify subpoenas or to issue protective orders also exist in state courts.[107]

Rules of Evidence

Federal and state rules of evidence provide yet another avenue for the protection of the confidentiality of research subjects. Specifically, the rules of evidence in federal courts and in the courts of several states give judges the discretion to recognize new evidentiary privileges, apart from any privileges that might exist in state statutes, or that are based on federal or state constitutional law. Accordingly, in these jurisdictions, there are three ways that the identity of research subjects might be protected.

Federal Rule of Evidence 501 is the most prominent example of a rule of evidence that allows for the recognition of new privileges. This rule reads as follows: "[t]he common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: The United States Constitution; a federal statute; or rules prescribed by the Supreme Court."[108] Pursuant to this rule, the federal courts have recognized a host of privileges, including attorney-client, spousal, and clergy-penitent.[109]

To date, the federal courts have not been very receptive to claims that academic researchers deserve a privilege under Rule 501. For example, in *Wright v. Jeep Corp*., a federal district court in Michigan rejected the notion that there was a common law evidentiary privilege for academic research, stressing the importance of access to evidence in the civil justice process.[110] On the other hand, in *In re Grand Jury Subpoena*, the Second Circuit Court of Appeals considered whether it was

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103 See id. at 13-15.

104 See Martin J. McMahon, Academic Peer-Review Privilege in Federal Court, 85 A.L.R. Fed. 691.

105 F.R.C.P. 45(d)(3)(b)(ii).

106 See F.R.C.P. 45 advisory committee's note.

107 E.g.,Fla. R. Civ. P. 1.280.(c) (FL); I.R.C.P. 45(d)(1) (ID); Mass.R.Civ.P. 26(c) (MA)

108 F.R.E. 501.

109 See 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence 384-961 (4th ed. 2013)(discussing the evidentiary privileges that have been recognized in federal court).

110 547 F. Supp. 871, 875 (E.D. Mich. 1982).

proper for the district court to have quashed a grand jury subpoena that would have required a graduate student, Mario Brajuha, to divulge information for his dissertation obtained from sources whom he had promised confidentiality.[111] Noting that Brajuha had not established a basis in the record for the court to rule on his request for recognition of an academic privilege under Rule 501, the court remanded the case to the district court for further proceedings.[112] However, it did not deny that an academic privilege might be protected under Rule 501, if Brajuha were able to establish an adequate basis for such protection.[113] No other federal court has suggested that a privilege for researchers' sources might find protection under Rule 501.[114]

The states are split nearly evenly as to whether their trial courts are permitted to privilege evidence based on court rulings. Twenty-six states[115] allow their trial courts to create privileges, while the remainder and the District of Columbia explicitly prohibit their lower courts from issuing such rulings. In those states that allow their trial courts to create new privileges under state rules of evidence, none have used these provisions to protect a researcher's privilege. Instead, such a privilege is protected, if at all, by state statute,[116] by rule of evidence,[117] or by appellate court decision based on a constitutional provision.[118]

Finally, it should be noted that some researchers can find sanctuary under the physician-patient[119] and psychotherapist-patient[120] privileges. Although these privileges were not intended to protect researchers, they might be available to physicians and psychotherapists who are basing their research on patients whom they have treated.

A Proposal for Expanding Recognition of an Evidentiary Privilege for Researchers.

The foregoing discussion of the ways in which researchers are afforded privilege for their work reveals a makeshift system of protections that are available to researchers depending on the jurisdiction, and sometimes about the research or the researcher's employer. The privilege for researchers' sources is also not as widespread or as easily utilized as the privilege for journalists sources. The forgoing also suggests that efforts to expand the researcher's privilege should be

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111 750 F.2d 223, 224 (2nd Cir., 1984).

112 Id. at 225-26.

113 Id. at 225.

114 See F.R.E. 501 case note 75.

115 Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia.

116 E.g., Del. Code Ann. tit. 10 §4320.

117 E.g., Utah R. Evid. Rule 509.

118 E.g., State ex. Rel. Classic III v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997).

119 See Mueller & Kirkpatrick, supra note 109, at 765.

120 See Jaffee v. Redmond, 518 U.S. 1, 7 (1996).

aimed at the adoption of legislation expanding the privilege, rather than seeking recognition of it in the courts.

The evidence supporting this conclusion is found in the judiciary's reluctance to create new evidentiary privileges based on anything other than constitutional arguments. When it comes to common law arguments for new privileges, the judges of American courts appear to be firm believers in the phrase popularized by Dean Wigmore in his treatise on evidence, that "[T]he public… has a right to every man's evidence,"[121] and are, therefore, reluctant to find new privileges unless grounded in constitutional law.[122] For example, in the twenty-five years following the adoption of the Federal Rules of Evidence by the United States Supreme Court, "…the federal courts have exercised this authority [under FRE 501] to confirm the eight privileges which existed in the common law prior to 1973 and to introduce one new privilege [psychotherapist-patient]."[123] Over roughly the same time period, recognition of new privileges by state courts was negligible.[124]

Constitutional arguments for recognizing new evidentiary privileges have done better in courts. For example, important privileges and doctrines of exclusion in criminal cases are constitutionally based, as are doctrines that allow the exclusion of evidence that might reveal state secrets and the identity of government informers.[125] Furthermore, as was mentioned above, litigants have gotten at least some recognition of a privilege that would apply to researchers' subjects in four of the federal circuit courts of appeals and in a few state appellate courts based on First Amendment arguments,[126] but only *after* the Supreme Court opened the door to this expansion with its *Branzburg* opinion when it noted that the First Amendment affords some protection to journalists from having to reveal their sources.[127] This suggests that *Branzburg* was the catalyst for these court opinions, as opposed to a general eagerness on the part of judges to create new privileges, and the fact that more courts have not used *Branzburg* to create a privilege for researchers is more evidence of this reluctance.

Since the Nineteenth Century, the legislatures have replaced the judiciary as the primary developers of privilege law,[128] given that the courts clear reluctance to create more evidentiary privileges. It follows from this conclusion that legislatures should be the focus of efforts to secure changes in the law that will provide researchers with an unambiguous evidentiary privilege for their subjects.[129]

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121 United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting Wigmore, Evidence (3d ed.) § 2192).

122 See Branzburg v. Hayes, 408 U.S. 665, 688 (1972) .

123 Miller, supra note 26 at 775.

124 Id. at 780.

125 See e.g., Mueller & Kirkpatrick, supra note 109 at 430-31.

126 See supra notes 39 -48 and accompanying text.

127 See e.g., von Bulow v. von Bulow, 811 F.2d 136, 142 (2nd Cir. 1987)(noting that Branzburg established that newsgathering enjoyed some First Amendment protection).

128 See Development in the Law – Privileged Communication: I. Introduction: The Development of Evidentiary Privileges in American Law (p.1), 98 Harv. L. Rev. 1450, 1455-63 (1985).

129 But see Miller, supra note 26, at 801 (arguing for greater involvement by the courts in the

V. A Legislative Proposal

Hendel and Bard's 1973 proposal for a shield law for researchers is a useful proposal to build upon because of its breadth in terms of who enjoys its protections and because of the balance it strikes between protecting the identity of research subjects and the need for evidence in criminal and civil trials. Their proposal borrows from provisions in existing reporter's shield laws to create a broad privilege for all of those who offer information in the public interest. For example, regarding its protections, the Hendel and Bard proposal is very similar to some reporter's shield laws already in existence,[130] except that it eliminates any suggestion that the law's protections are restricted to traditional journalists. Note also, that the proposal does not require anyone to be affiliated with a specific type of organization or institution to enjoy its protections. In this respect, the Hendel and Bard proposal is like the more liberal reporter's shield laws that do not require affiliation with any traditional media organization, [131] and therefore, recognizes that independent researchers deserve the protection of the law as well.

Hendel and Bard would allow covered individuals to assert the privilege "… whenever there is a reasonable possibility that [compelled] testimony may compromise confidential sources of information relevant to public pursuits or require revelation of confidential information gathered in the course of his or her activities as a researcher."[132] This language would appear to cover a range of information similar to that protected by some existing statutes,[133] in that it would protect the identities of a researcher's sources and subjects, information obtained from them, and a researcher's personal observations of sources and subjects. Hendel and Bard would also extend the privilege to non-confidential as well as to confidential communications, which also mirrors some existing statutes.[134] Finally, like some existing shield laws, the Hendel and Bard proposal would not require researchers to give a promise of confidentiality to their subjects and sources to invoke the privilege.[135]

The scope of the protection afforded by the Hendel and Bard proposal is also quite broad in terms of the fora in which it can be applied. For example, Hendel and Bard would allow researchers to assert the privilege before grand

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development of privilege law).

130 See e.g., supra note 83 and accompanying text.

131 See e.g., Minn. Stat. §595.023.

132 Hendel & Bard, supra note 15, at 399.

133 See e.g., Colo. Rev. Stat. §13-90-119(2) protects "…news information received, observed, procured, processed, prepared, written, or edited by a newsperson, while acting in the capacity of a newsperson."

134 See e.g., Colo. Rev. Stat. §13-90-119(1)(b); In re Paul, 513 S.E.2d. 219, 223 (Ga. 1999) noting that "…statutory language [of Georgia's reporter's shield law] does not distinguish between the source's identity and information received from that source or between non-confidential and confidential information."

135 See e.g., Kurzynski v. Spaeth, 538 N.W.2d 554, 599 (Wi. 1995) (holding that a reporter's right to keep information confidential does not depend on whether a promise of confidentiality was made to the source of the information).

juries, legislative committees, and criminal and civil courts.[136] In this, the scope of the proposal's protection mirrors some existing reporter's shield laws,[137] and goes further than others which, for example, only protect against subpoenas in criminal investigations.[138] Extension beyond the civil and criminal justice context to legislative committees makes sense, in that these bodies have subpoena power,[139] and can force the revelation of confidential sources and subjects.

Hendel and Bard would allow assertion of the new privilege in all but the following circumstances:

The government shows there is probable cause to believe that the [covered person] has information which is clearly relevant to a specific, probable, and imminent violation of law involving serious personal injury.

He or she personally witnessed a crime involving serious personal injury.

The material has actually been broadcast or published or otherwise publicly disseminated.

The testimony is requested by a defendant charged with a felony and a judge determines that such testimony or records would have probative value in exculpating the defendant.

The evidence is sought in a bona fide civil suit for libel or invasion of privacy against the [researcher] or his publisher.[140]

Furthermore, in all such cases, the authors would require that the party seeking disclosure of the information demonstrate that "…the information sought cannot effectively be obtained by alternative means less destructive of First Amendment rights."[141] These provisions make the proposal less protective then some existing shield laws. For example, the Nebraska shield law has no exceptions,[142] but the proposal is similar to the North Carolina shield law in the exemptions that it lists.[143]

Although absolute protection for sources and subjects of academic studies might sound attractive, there are sound reasons why such a level of protection is problematic. First, privileges of all types interfere with one of the primary functions of the justice system, namely the search for truth,[144] which must be

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136 Hendel & Bard, supra note 15, at 399.

137 See supra note 86 and accompanying text.

138 See supra note 84 and accompanying text.

139 Frank Arey, Legislative Subpoenas, 1, http://www.ncsl.org/documents/lsss/legislative_subpoenas.pdf (last visited Jul. 17, 2015).

140 Hendel & Bard, supra note 15, at 399.

141 Id.

142 E.g.,Neb. Rev. Stat. §20-146.

143 See N.C. Gen. Stat. § 8-53.11.

144 See David A. Kaplan & Brian M. Cogan, The Case Against Recognition of a General Academic Privilege, 60 U. Det. J. Urb. L. 205, 216 (1983) (quoting In re Dinnan, 661 F.2d 426, 430 (5th Cir. 1981))

established for the courts to dispense justice under law. Some critics of broad evidentiary privileges point out the difficult position that a litigant can face if she cannot get access to evidence that could be very important to establishing her case.[145] Others argue that the lack of a reporter's shield law does little to impede the flow of information from confidential sources to reporters,[146] and that such laws could have the effect of allowing confidential sources to use researchers and reporters to spread false information without being held accountable in court.[147]

For these reasons, the right balance must be struck between protection of sources, and the courts' powers in discovery to bring the truth to light.[148] Hendel and Bard's proposal was designed to strike a balance between these two imperatives,[149] and represents a middle ground between an absolute privilege for confidential sources (e.g. Nebraska's shield law), and the case-by-case balancing approach advocated by some as an alternative to a shield law to protect researchers.[150]

Note particularly that the Hendel and Bard proposal gives the privilege to researchers, not to the subject that wishes to remain confidential.[151] Giving the privilege to the information gatherer is a common feature of reporter's shield laws,[152] and stands in marked contrast to the attorney-client privilege, where the client holds the privilege.[153] There are practical reasons for this arrangement. First, researchers should be able to correct the record if sources make public statements that contradict information that was given in confidence to the researcher,[154] or if sources publicly attack the accuracy of researchers' work.

The need to protect researchers by giving them the privilege weighs in favor of the deletion of two exceptions in the Hendel and Bard proposal: 1) the exception that allows a source who provided information to a researcher and who is facing a felony charge, to compel the researcher to provide exculpatory testimony, and 2) the exception that permits a researcher to be compelled to testify when the researcher has personally witnessed a crime involving serious personal injury. For reasons that will be discussed, these two exceptions have the potential to seriously undermine the benefits of the privilege that the proposal seeks to promote.

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145 See id. at 207-08. See also Mueller & Kirkpatrick, supra note 109, at 413-14.

146 See John D. Castiglione, A Structuralist Critique of the Journalist's Privilege, 23 J. L. & Pol. 115, 140 (2007).

147 Cf. id. at 132-34.

148 See generally Mueller & Kirkpatrick, supra note 109, at 409-14. (discussing the concepts underlying evidentiary privileges, and how privileges are balanced with the need for fact-finding).

149 See Hendel & Bard, supra note 15, at 400.

150 See Kaplan & Cogan, supra note 144, at 224, 235-37.

151 See Hendel & Bard, supra note 15, at 399.

152 See e.g., supra notes 63-69, 71-72, 74, 76-79.

153 Mueller & Kirkpatrick, supra note 109, at 654.

154 See Richard Sauber, When Can Reporters Reveal Sources?, Wash. Post, Apr. 10, 2006 at A17, suggesting that reporters have the right to reveal the identity of a source if the person publicly denies being a source in some situations.

Hendel and Bard cite sensitivity to civil liberties as a reason for allowing researchers to be compelled to testify about confidential information provided by source when the source that provided the is facing a felony charge, and asks the researcher to provide exculpatory testimony;[155] however, the authors don't consider the problems that this might cause for researchers. Some of the researchers who would need the privilege the most, particularly criminologists and sociologists studying individuals or groups that engage in criminal behavior would face the constant threat of becoming involved in criminal trials. Some researchers would certainly forgo studying certain subjects out of fear of becoming involved in a criminal case as a witness for the defense.

Similar reasons justify the deletion of the exception for situations in which researchers have witnessed a violent crime, given that some researchers would certainly forgo studying certain subjects if they thought it could result in having to testify about what they had seen. The extension of privilege to knowledge of another's participation in a crime is well established in the law of evidence, such as in attorney-client privilege law.[156] Failure to extend the privilege to researchers in these situations could hamper the study of subjects who might regularly engage in violent activities, such as para-military groups or criminal gangs.

VI. Conclusion

This article has surveyed the condition of the privilege laws that enable researchers to protect the confidentiality of their subjects and sources and of their observations of them. It has also argued for the adoption of legislation that would extend this protection to researchers in the form of a law that would cover both researchers and reporters. Finally, the article has advanced the argument that efforts at reform should be aimed at legislatures as opposed to courts, given the latter's reluctance to create new privileges.

Until most states modify their evidentiary privilege laws to include researchers, those who face having to reveal information about confidential sources should avail themselves of the protection of the laws of their jurisdiction, or take other steps to protect themselves from liability. For example, researchers should always fully inform their research subjects about the situations in which they will disclose, or might be forced to disclose, their identities and/or the information that the subjects have provided to the researcher. Reporters[157] and researchers[158] at most institutions are bound by ethical guidelines not to reveal the identity of sources who have been promised confidentiality subject to whatever conditions the parties agreed to without the permission of the source, and face civil liability for breach of contract if they violate a promise of confidentiality.[159]

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155 Hendel & Bard, supra note 15, at 400.

156 See Mueller & Kirkpatrick, supra note 109, at 614.

157 See e.g., Society of Professional Journalists, Anonymous Sources, http://www.spj.org/ethics-papers-anonymity.asp, (last visited Jul. 22, 2015)

158 See e.g., Stanford University Human Research Protection Program Policy Manual, ch. 11, http://humansubjects.stanford.edu/hrpp/Chapter11.html (last visited Jul. 19, 2015).

159 Cf. Cohen v. Cowels Media Co., 501 U.S. 663, 670 (1991).

A further precaution that can be taken to protect the identity of research subjects is to obscure the identity of the subjects in the data that is collected. Some of the measures that researchers have used to protect the identity of their subjects in this way include "…[the] immediate separation of identifiers from collected data; selective recording of information to reduce [the] potential for identifiability by inference; procedural controls, including rapid comingling of data to make linking responses to an individual more difficult; and technical controls like encryption to protect data in transit and storage."[160] These techniques have the benefit of obscuring the identity of research subjects in the event that a researcher's data are seized by the government[161] or by any unauthorized persons.

Still, adopting a shield law that covers researchers is a better option, given that the precautions listed above are not a substitute for laws that protect researchers from subpoenas and search warrants, and the legal problems these create. However, there are several reasons why it will be difficult to get any proposal to privilege researchers' sources of information enacted in more jurisdictions. First, there does not appear to be any concerted lobbying effort by professional organizations that represent researchers in support of laws protecting a researcher's privilege, although the American Sociological Association lent support to one of its members involved in a legal battle to keep his sources confidential.[162] This may be because the organizations, such as the American Association of University Professors, the Academy of Criminal Justice Sciences, and the America Public Health Association, prioritize changing policy in ways that are more closely related to the academic interests of their members,[163] or are focused on protecting academic freedom and tenure.[164] Second, researchers are a popular target for politicians, who frequently criticize them for laziness or irrelevance.[165] Until researchers make recognition of an evidentiary privilege for their confidential sources a priority, major changes will not happen.

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160 Brian Jackson et. al., Human Subjects Protection and Research on Terrorism and Conflict, 340 Science 434 (2013).

161 Data from researchers might be admissible in court depending on its content and intended use. The seizure of such data is a possibility in states where the shield law only protects researchers from being compelled to divulge confidential information, as opposed to those that protect researchers from being compelled to testify and protect their data from compelled disclosure. Compare N.C. Gen. Stat. § 8-53.119(b) (protecting a journalist's materials from disclosure) with Ky. Rev. Stat. Ann. § 421.100 (offering no protection to a journalist's materials).

162 Facing jail, a sociologist raises questions about a researcher's right to protect sources, Chron. Higher Educ., Apr. 7, 1993, at A10.

163 See e.g., American Public Health Association, Policy Statements, https://www.apha.org/policies-and-advocacy/public-health-policy-statements (last visited Jul. 21, 2015).

164 See e.g., American Association of University Professors, About, http://www.aaup.org/about/mission-1 (last visited Jul. 21, 2015).

165 See e.g., Karen Hertzog, Educators frustrated by Walker's comments about Faculty Work, Milwaukee J.-Sentinel, Jan. 30th 2015, 2015 WLNR 2941493. (discussing Wisconsin Gov. Scott Walker's comment that University of Wisconsin faculty did not work hard enough); Kevin Kiley, Another Liberal Arts Critic, Inside Higher Ed., Jan. 30th 2013, https://www.insidehighered.com/news/2013/01/30/north-carolina-governor-joins-chorus-republicans-critical-liberal-arts (last visited Jul. 21, 2015); Tyler Kingkade, Pat McCrory Lashes Out Against 'Educational Elite' And Liberal Arts College Courses, Huffington Post, Feb. 2nd, 2013, http://www.huffingtonpost.com/2013/02/03/pat-mccrory-college_n_2600579.html (last visited Jul. 21, 2015).