

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 93-35333

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JAMES RICHARD SCARCE,  
Appellant,

v.

UNITED STATES OF AMERICA,  
Appellee.

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Appeal from the United States District Court  
for the Eastern District of Washington

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BRIEF OF AMICUS CURIAE  
AMERICAN SOCIOLOGICAL ASSOCIATION

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BRIEF AMICUS CURIAE OF THE AMERICAN SOCIOLOGICAL ASSOCIATION

The American Sociological Association submits this Brief Amicus Curiae contingent on the granting of its motion for leave to file said brief.

Interest of Amicus

The American Sociological Association (ASA), founded in 1905, is a nationwide organization of over 13,000 members which seeks to stimulate and improve research, instruction, and discussion in the social sciences, and to encourage cooperative relations among persons engaged in the scientific study of society. The scope of

the discipline includes the study of fundamental processes (e.g., social change), basic social institutions (e.g., political and legal), and primary units of social life (e.g., groups, communities and organizations).

ASA has a longstanding policy protecting confidential information obtained from subjects, a policy which is included in its Code of Ethics. Appellant, James Richard Scarce, relied on the ASA Code of Ethics in refusing to respond to certain questions before the grand jury. ASA appears here to explicate the ethical and practical considerations underlying this confidentiality rule and to demonstrate that these considerations support judicial recognition of a qualified privilege to protect confidential research information. ASA has appeared as Amicus in other proceedings threatening the right of researchers to protect confidential information, including United States v. Doe, 460 F.2d 328 (1st Cir. 1972), and In Re Grand Jury Subpoena Dtd January 4, 1984, 750 F.2d 223 (2d Cir. 1984).

#### Argument

At issue in this case is the confidentiality of information obtained by a researcher during the course of social science fieldwork, a research method having its origin in anthropological studies and now an important method in modern sociological research as well as in other fields of social science. Fieldwork comprises the establishment of a many-sided and relatively long-term relationship with a human association, group or community for

the purpose of developing a scientific understanding of its social processes.

Standards of ethical conduct developed by professional organizations of social scientists recognize the paramount duty of researchers to protect and preserve the confidences entrusted to them. The Code of Ethics of the American Sociological Association (Exhibit A) provides, for example:

Confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege and legal force is applied.

The Principles of Professional Conduct adopted by the Council of the American Political Science Association (Exhibit B) similarly state:

[S]cholars ... have a professional duty not to divulge the identity of confidential sources of information or data developed in the course of research, whether to governmental or non-governmental officials or bodies, even though in the present state of American law they run the risk of suffering an applicable penalty.

The American Anthropological Association's Principles of Professional Responsibility (Exhibit C) provide that sources have the right to remain unidentified and that researchers must ensure that the privacy of their subjects is protected. The Ethical Standards of the American Psychological Association (Exhibit D) provide that "[p]sychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or

professional or scientific relationships," and that "[p]sychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose...."

The obligation of confidentiality reflected in these professional standards derives from both ethical and practical considerations which strongly support the recognition of a qualified privilege to protect confidential research information and the anonymity of research subjects.

I. RESEARCHER'S ETHICAL OBLIGATIONS TO THEIR SUBJECTS REQUIRE THAT CONFIDENCES BE MAINTAINED.

Unlike the ordinary citizen called to testify before a grand jury, a social scientist called to testify about information gained during fieldwork has an ethical obligation to protect the interests of the human subjects who volunteered to participate in the research and not to do harm to the subjects. As stated in the ASA's Code of Ethics, "[t]he process of conducting sociological research must not expose subjects to substantial risk or personal harm." This basic ethical principle follows from the fact that subjects of research voluntarily expose themselves to risks which they may not be in a position to evaluate fully, and also from the fact that many research populations are vulnerable to coercive practices by reason of their economic or social status.

The duty of social science researchers to protect the confidences of their subjects is an essential element of the duty not to do harm to the subjects. Confidentiality may be essential

to protect subjects from invasion of privacy, embarrassment, criminal prosecution, tax or other investigations, or civil litigation. Federal regulations governing the protection of human subjects in federally regulated research thus require that Institutional Review Boards determine that a research proposal provides "adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data," 45 C.F.R. §46.111(a)(7), and that, in seeking the informed consent of subjects, investigators provide a statement "describing the extent, if any, to which confidentiality of records identifying the subject will be maintained." 45 C.F.R. §46.116(a)(5).

## II. THE ABILITY TO PRESERVE CONFIDENCES IS ESSENTIAL TO THE GENERATION OF SOCIAL SCIENCE RESEARCH DATA.

Absent some assurance of confidentiality for research information, social science fieldwork will be seriously inhibited in several respects. First, research subjects will be less and less willing to cooperate in future research if investigators are unable to pledge confidentiality or, having promised to protect the subjects, are forced to breach this promise. Without the continued trust and cooperation of their subjects, researchers such as James Richard Scarce will be unable to proceed with their studies.

Researchers themselves will be constrained to avoid subjects that may give rise to external demands for research information. The prospect of having to divulge confidential information contrary to the basic ethical tenets of the research profession will in itself cause many researchers to avoid studies which are likely to

put them in this position. This concern may be reinforced by the fear that breaching a promise of confidentiality may open the investigator to liability to the subjects. See, Cohen v. Cowles Media Co., 501 U.S. \_\_\_\_\_, 111 S.Ct. 2513 (1991).

Research may also be inhibited by the effects of forced disclosure on the research itself. The possibility of disclosure of research information before a project is complete, with the risk that an entire project and years of effort may have to be scrubbed, may also deter some researchers from embarking on studies of high risk topics. See, In Re Application of American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989). And even where a project may continue after disclosure, the effects of expensive, time-consuming and distracting litigation on on-going research may be devastating.

These inhibiting factors will, in the ASA's view, be felt most in areas of scholarly research into some of the most pressing social problems of our time. Studies of urban homelessness and poverty, juvenile violence, organized crime, drug abuse, prostitution, race and gender discrimination, religious cults, and welfare dependency, to name but a few current examples, necessarily involve the disclosure of confidential information which might be of interest to a grand jury. As one court has put it, "[c]ompelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is the greatest." Richards of Rockford, Inc. v. Pacific Gas & Electric, 71 F.R.D. 388, 390

(N.D.Cal. 1976).<sup>1</sup>

Finally, ASA is concerned that forced disclosure of confidential research information could be abused to harass social scientists conducting studies of unpopular groups or controversial issues because of political opposition to the groups or issues themselves. The history of science is replete with examples of social scientists who have suffered retributions because of the unpopularity of their research subjects or the topic of their investigations. The Kinsey Institute once threatened to burn the records it had amassed on human sexuality when the FBI tried to learn the identity of its subjects. Nejelski & Lerman, "A Researcher-Subject Testimonial Privilege: What to Do Before the Subpoena Arrives," 1971 Wis.L.Rev. 1085. Over the years subpoenas have been directed at researchers who studied such controversial topics as the Pentagon Papers, United States v. Doe, 460 F.2d 328 (1st Cir. 1972), and the National Committee Against Repressive Legislation (NCARL), Wilkinson v. FBI, 111 F.R.D. 432 (C.D.Cal. 1986). See also, Wright & Graham, Federal Practice and Procedure:

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<sup>1</sup> The harmful effects of confidentiality breaches on scientific inquiry has been recognized in several instances by Congress. Of particular relevance to this case is the statutory prohibition against disclosure of research information funded by the Department of Justice "in any action, suit, or other judicial, legislative, or administrative proceedings." See, 42 U.S.C. §3789g. Similarly, federal officials may authorize persons engaged in federally funded research, including research on the use and effect of alcohol and other psychoactive drugs, to protect the privacy of their subjects by withholding their names and other identifying characteristics in any federal, state, or local civil, criminal, administrative, legislative or other proceeding. See, 42 U.S.C. §242a(a); 42 C.F.R. §§2a.1-.8. See also, 21 U.S.C. §872 (c); 21 C.F.R. §§ 1316.21-.24; 42 U.S.C. §242m(d).

Evidence § 5430 at p.821 (citing "suspicion" that subpoenas have been used to harass scholars). Society itself will suffer the loss if social scientists are made potentially more susceptible to such harassment merely because of their involvement in studies of controversial and unpopular subjects.

### III. THE ETHICAL AND SOCIETAL VALUES UNDERLYING SOCIAL SCIENCE RESEARCH STANDARDS SUPPORT THE RECOGNITION OF A QUALIFIED SCHOLAR'S PRIVILEGE FOR INFORMATION RECEIVED IN CONFIDENCE.

Rule 501 of the Federal Rules of Evidence provides that, except as otherwise required by the Constitution, federal statute or rules prescribed by the Supreme Court, the privilege of a witness shall be "governed by principles of the common law as they may be interpreted ... in the light of reason and experience."<sup>2</sup> The Supreme Court has recognized that Rule 501 is intended to give courts the flexibility to develop the rules of privilege on a case-by-case basis. See, Trammel v. United States, 445 U.S. 40, 47 (1980). This includes authority to formulate new privileges. See, Weinstein, Evidence ¶501[03] at p. 501-39 and n.21, citing authorities; and see generally, Wright & Graham, Federal Practice and Procedure: Evidence §5422 (1980).

Professor Wigmore identifies four factors to be considered in determining whether communications should be afforded a privilege from disclosure:

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<sup>2</sup> Rule 501 is intended to apply "at all stages of all actions, cases, and proceedings," Rule 1101(c), F.R.Ev., including proceedings before grand juries. See, Rule 1101(d)(2), F.R.Ev.

- i. The communication must originate in a confidence that it will not be disclosed.
- ii. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- iii. The relation must be one which in the opinion of the community ought to be sedulously fostered.
- iv. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 Wigmore, Evidence §2285 at p.527 (McNaughton rev. 1961 and Supp. 1991) (emphasis deleted). Since the district court in this case refused to recognize any basis for maintaining the confidentiality of the information obtained by James Richard Scarce, it made no findings with respect to any of these factors. As a number of other courts have found, however, the ethical and societal values discussed in points I and II support the protection of confidential research information from the intrusion of the grand jury.

The leading case involving compelled disclosure of social science research materials is In Re Grand Jury Subpoena Dtd January 4, 1984, 583 F.Supp. 991 (E.D.N.Y. 1984), reversed and remanded 750 F.2d 223 (2d Cir. 1984). A federal grand jury investigating a suspected arson of a restaurant subpoenaed a graduate student at the State University of New York to produce a journal he kept while doing fieldwork research with employees of the restaurant. Chief Judge Weinstein, one of the leading

authorities on the Federal Rules of Evidence, found that compelled disclosure of the journal was protected by "a limited federal common law privilege," 583 F.Supp. at 992, and, because the government was unable to demonstrate a substantial need for the journal, ordered that the subpoena be quashed.

Relying on authorities under both Rule 501 and the First Amendment, Judge Weinstein found that there is a "public interest in affording a serious scholar the opportunity to maintain the confidentiality of his research notes," 583 F.Supp. at 993, and that "[c]ompelled production of a researcher's notes may inhibit prospective and actual sources of information, thereby obstructing the flow of information to the researcher, and through him or her, the public." Id. He then focused on the value of social science fieldwork in particular:

Affording social scientists protected freedom is essential if we are to understand how our own and other societies operate. Recognized by cultural anthropologists since at least the turn of the century as a basic tool, fieldwork is used widely in other disciplines, particularly sociology and political science. In order to work effectively researchers must record observations, communications and personal reactions contemporaneously and accurately... Thus fieldnotes and diaries have been treated by professionals as confidential for ... "ethical, strategic and analytic" reasons.

Id., quoting Professor John Lofland, former Chair of the Committee on Professional Ethics, American Sociological Association.

The Second Circuit reversed Judge Weinstein's Order on the grounds that the record was too sparse to allow the court to consider whether a limited scholar's privilege should be applied

in the particular case. See, 750 F.2d at 224. The court identified several factors, however, it deemed essential to the recognition of a limited scholar's privilege, including the existence of a serious academic inquiry and a considered research plan in which the need for confidentiality is related to the accuracy or completeness of the study. See, 750 F.2d at 225. Although the record in this case is also limited, it appears that the facts are consistent with the requirements set forth by the Second Circuit.

Judge Weinstein's recognition of a limited scholar's privilege to protect information received in confidence was presaged by Circuit Judge Coffin's discussion of the issue in United States v. Doe, 460 F.2d 328 (1st Cir. 1972), a case decided prior to the adoption of Rule 501. An assistant professor of political science at Harvard University, who was an expert on the war in Indochina, had been held in contempt for refusing to answer questions before a grand jury investigating possible criminal violations in connection with the public dissemination of the Pentagon Papers. Like the Second Circuit, Judge Coffin did not explicitly recognize the existence of a scholar's privilege on the facts presented, but he did acknowledge clearly and powerfully the importance of protecting confidential research information:

[the] privilege, if it exists, exists because of an important public interest in the continued flow of information to scholars about public problems which would stop if scholars could be forced to disclose the sources of such information. Appellant is a political scientist. As is true of other behavioral scientists, his research technique rests heavily on inquiry of others as to their attitudes, knowledge, and experience. Often

such inquiry is predicated on a relationship of confidence... The reason for the claimed privilege lies not in the importance of protecting the officials and other sources per se but in the importance of preserving the flow of their communications via scholars to the public domain.

460 F.2d at 333-34 (footnotes omitted).

In the analogous area of civil discovery,<sup>3</sup> courts have also recognized that social science researchers must be protected from compelled disclosure of confidential information. While not explicitly relying on a scholar's privilege, these courts have cited the same factors underlying the privilege as grounds for relief under the civil discovery rules. Thus, in Kennedy v. Connecticut Department of Public Safety, 115 F.R.D. 497 (D.Conn. 1987), the plaintiffs in an employment discrimination action issued a subpoena to a doctoral candidate in sociology who was studying the integration of female workers in a traditionally all-male job setting at the defendant's office. The court issued a protective

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<sup>3</sup> The issue of compelled discovery of research data and other information has arisen frequently where there has been no pledge of confidentiality given to the subjects or no human subjects at all. See, e.g., In Re Application of American Tobacco Company, 880 F.2d 1520 (2d Cir. 1989); Deitchman v. Squibb & Sons, 740 F.2d 556 (7th Cir. 1984); Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982); In Re Snyder, 115 F.R.D. 211 (D. Ariz. 1987); Wright v. Jeep Corp., 547 F.Supp. 871 (D. Mich. 1982); United States v. IBM Corp., 83 F.R.D. 92 (S.D. N.Y. 1979). These cases do not involve the same issues as are presented where social scientists give a pledge of confidentiality to human subjects in return for the subjects' consent to participate in a research project. Many of these courts have nevertheless recognized society's interest in promoting free and uninhibited scientific inquiry. See, e.g., Dow Chemical Co. v. Allen, 672 F.2d at 1276 ("Clearly, enforcement of the subpoenas carries the potential for chilling the exercise of First Amendment rights.")

order to allow the redaction of all names and other identifying information from the student's notes. "Requiring [the researcher] on this record to divulge the identities of those individuals who communicated with her under a promise of confidentiality conceivably could needlessly jeopardize an important scholar-subject trust relationship without clearly serving a transcendent interest." 115 F.R.D. at 501.

Similarly, in Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D.Cal. 1976), the plaintiff subpoenaed a professor who had interviewed the defendant's employees, under a promise of confidentiality, in connection with a research project investigating the manner in which utilities make environmental decisions. The court refused to grant a motion to compel because of society's paramount interest in promoting scholarly research: "[s]ociety has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge." 71 F.R.D. at 390.

In Andrews v. Eli Lilly & Co., 97 F.R.D. 494 (N.D.Ill. 1983), rev'd sub nom Deitchman v. Squibb & Sons, 740 F.2d 556 (7th Cir. 1984), the district court refused to compel production of scientific research data underlying published studies showing a link between a certain drug and a type of cancer, because the data had been collected under a promise that it would remain confidential. The court of appeals reversed in part because it was not convinced that the limited disclosure of the data would inhibit the research study and because of the central importance of the

research to the issues in dispute. The court, however, insisted that the identities of the research subjects remain confidential. 740 F.2d at 565. Accord: Lampshire v. Procter & Gamble Co., 94 F.R.D. 58 (N.D.Ga. 1982) (protective order issued to protect privacy of research subjects), reversed in unpublished opinion; Farnsworth v. Procter & Gamble Co., 101 F.R.D. 355 (N.D.Ga. 1984) (same), affirmed, 758 F.2d 1545 (11th Cir. 1985).

In many of these cases, the courts have recognized that a qualified privilege for researchers is premised upon values traditionally protected by the First Amendment. A researcher who publishes the results of his fieldwork is engaged in information activities analogous to the protected newsgathering activities of reporters.<sup>4</sup> See, Branzburg v. Hayes, 408 U.S. 665, 681 (1972), Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975). Social science research also raises issues of free expression and academic freedom. In upholding a lecturer's right to lecture and associate over the state's interest in investigating possible subversive activities, the Supreme Court has emphasized the need to preserve academic freedom to foster new inquiries and discoveries "otherwise our civilization will stagnate and die." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). The Seventh Circuit in Dow Chemical Co. v. Allen, 672 F.2d at 1274-1277, relying upon Sweezy, expressly accepted academic freedom as a proper basis for limiting

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<sup>4</sup> The shield law creating a statutory privilege for reporters in at least one state, Delaware, reaches "scholars" as well as reporters. See, Del. Code tit. 10, Sections 4320-4326 (1974).

enforcement of a subpoena for research materials. Finally, a researcher's right to select topics and the means of carrying out his research involve both the right of free speech and the general privacy right to be let alone from government interference. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (recognizing a "freedom of inquiry"). A common law privilege for research findings obtained under a pledge of confidentiality will foster important values furthering First Amendment interests.

#### Conclusion

Judicial recognition of a qualified privilege protecting social science researchers is essential to protect researchers and research subjects alike. Scholars must be certain that they can assure their subjects of protection from disclosure; uncertainty in this area impinges upon scholarly inquiry and inhibits research into some of society's most intractable social and behavioral problems. The American Sociological Association respectfully requests that the Court take this opportunity to affirm a qualified privilege to protect confidential social science research information from forced disclosure before a federal grand jury.

April 16, 1993

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Certificate of Service

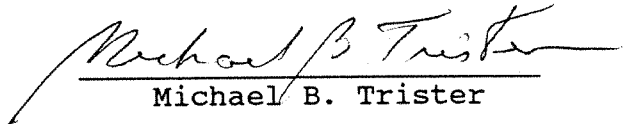
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