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Boston College's Defense of the Belfast Project: a Renewed Call for a Researcher's Privilege to Protect Academia

Frank Murray
Staff Writer, Boston College International & Comparative Law Review 2012 and Columbia, SIPA Journal of International Affairs 2012
Email: francisd.murray@gmail.com

Abstract

Protecting the free exchange of ideas in academia, much like in journalism, has long been considered an American value and a necessary condition for a free and healthy democracy. The importance of academic autonomy, including the processes by which scholars collect, store and exchange information, is correspondingly of great importance to anyone happily living in a free society. Recent efforts by Boston College to fight the Federal government, acting on behalf of the United Kingdom to secure confidential and highly sensitive audio tapes collected and archived as part of an academic study, sheds new light on an ailment in American law. The tremendous legal challenge that Boston College has recently endured in its unsuccessful bid to protect academic sources is not only offensive to our social conscience, but on a more technical level stands in staunch contrast to cutting edge developments in international human rights law. Ironically, the subpoena request from the United Kingdom asks the United States to perform an act that would be of highly questionable legality under European law to which the United Kingdom is bound—Article 10 of the European Convention on Human Rights. If a researcher's privilege is to be recognized in the United States, it will require the Supreme Court to recalculate, much like European courts have, the great societal value of scholarly research.

Introduction

In March 2011, the British government contacted the United States Department of Justice to initiate proceedings pursuant to the United Kingdom Mutual Legal Assistance Treaty ("UK-MLAT'), eventually resulting in the issuance of a subpoena for all materials involving two interviews from Boston College's Belfast Project.[1] Researchers at Boston College had organized the Belfast Project, an oral history of the Irish Republican and Loyalist Paramilitaries, from

[1] *See* In Re Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price, U.S. District Court, Docket NO. 11–91078, at 4 [hereinafter *In Re Dolours Price*].

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2001–2006 and archived the interviews in Boston College's Burns Library.[2] All the interviews were recorded and stored on the condition of anonymity.[3]

On December 16, 2011, the Federal District Court of Massachusetts denied Boston College's motion to quash the subpoena.[4] The court rejected the government's argument that it did not have the discretion to review Boston College's motion to quash, and granted an in camera review of the requested documents.[5] The court however, refused to recognize an academic research privilege claimed by Boston College.[6] While the case has raised concern in the academic researcher community,[7] it is nevertheless consistent with American jurisprudence regarding subpoena power and confidential research.[8] By contrast, the European Court of Human Rights (ECtHR) has taken an expansive view of Article 10 of the European Convention on Human Rights (ECHR), and has created a strong foundation for the recognition of a privilege for social commentators and their confidential sources.[9] Ironically, the very actions that the United Kingdom has requested of the United States with respect to its academic institutions, although legal in America, would likely violate ECHR Article 10, to which the United Kingdom is bound.[10]

Part I of this Note outlines the historical and contemporary role of the scholarly researcher, examining the importance of confidentiality to academic research and commentary. Part II discusses the legal status of subpoenas and academic privilege in American law, as well as the notion of source privilege for social commentary as a quickly evolving human right in the ECtHR jurisprudence. Part III analyzes the stunted growth of a scholarly researcher's privilege in America, as brought to light by Boston College's current struggle, and looks to international human rights law for guidance. This Note concludes by proposing a preferred path for the development of a researcher's privilege in America.

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[2] The Burns Library, Update on the Threat to Oral History Archives, available at http://bostoncollegesubpoena.wordpress.com.
[3] In re Dolours Price, O'Neill Aff. ¶6; McIntyre Aff. ¶9, Moloney Aff. ¶29; *see id.*
[4] *In Re Dolours Price* at 48.
[5] *Id.* at 26, 48.
[6] *Id.* at 26, 42–45, 48.
[7] *See, e.g.*, Chris Bray, *The Whole Story Behind the Boston College Subpoenas,* The Chronicle, available at http://chronicle.com/article/The-Whole-Story-Behind-the/128137.
[8] Robert H. McLaughlin, *From the Field to the Courthouse: Should Social Science Research be Privlidged?*, 24 Law & Soc. Inquiry, 927, 960–61.
[9] David Harris, Michael O'Boyle, & Colin Warbrick, Law of the European Convention on Human Rights 444–45, 466–67 (2d 2009)[hereinafter Harris].
[10] *Compare* Goodwin v. United Kingdom, (1996), Reports 1996-II, VOl 7, paras 39–46, *with* Branzburg v. Hayes, 408 U.S. 665, 688–94, *and In Re Dolours Price,* at 40–48.

Background

The Historical and Contemporary Role of the Scholarly Researcher

The idea of academic freedom in democratic societies, both in substance and as a fundamentally recognized institutional norm, can trace its roots as far back as the philosophy of intellectual freedom in ancient Greece.[11] During the Middle Ages, European scholars formed universities from self-constituted academic communities, which the Catholic Church sporadically censored.[12] Over time scholars were able to slowly shake the human intellect free from bondage maintained by the State and other religious institutions.[13]

The American tradition of academic freedom, inspired by the Renaissance, Age of Reason, and social and political notions of the American Revolution,[14] institutionally resembled the English university system.[15] The English Monarch and Church "largely respected the autonomy of the universities, in part because both needed the universities and in part because the universities were able to enlist each source of power to check incursions by the other."[16] English and American university systems also shared a lingering and immutable cultural suspicion of centralized State autocracy.[17] The resulting contemporary conception of academic freedom ubiquitously adopted by American colleges and universities, as well as most other liberalized modern nations around the world, thus relies on the fundamental premise that "'the people and the [S]tate [have] no desire to place obstacles in the way of an honest search for truth . . . .'"[18] Implicit in such an ideal is the defense of institutions, including faculty and researchers, in testing views, commenting on world affairs, and most importantly—gathering, securing, and analyzing data.[19]

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[11] Ralph F. Fuchs, *Academic Freedom. Its Basic Philosophy, Function, and History,* 28 (No.3) Law & Contemp. Probs., 431, 431 (1963) [hereinafter Fuchs].
[12] *Id.* at 433–34.
[13] *Id.* 434.
[14] *See id.* at 431.
[15] *See* J. Peter Byrne, *Academic Freedom: A "Special Concern for the First Amendment",* 99 Yale L.J. 251, 267 [hereinafter *Byrne*].
[16] *Id.* at 267.
[17] *Cf* Daniel R. Coquillette, The Anglo-American Legal Heritage: Introductory Materials 60, 363, 366–369 (2d ed. 2004) (describing an anti-autocratic culture in England and America, including King John's signing of the *Magna Carta* under duress, Parliament's attempts to limit Oliver Cromwell's power by offering him the crown, England's Glorious Revolution, as well as Puritan suspicions of the English proprietorial magistrate class, English law and political institutions in the Bay Colony).
[18] *See* Fuchs, *supra* note 11, at 436 (citing Friedrich Paulsen, The German Universities and University Study, Translation by F. Thilly and W.W. Elwang (1906) at 244.).
[19] Fuchs, *supra* note 11, at 436.

The rise of modern researchers, and their corresponding need for a protection in society, resulted from the development of scientific research value in the late 19th century.[20] Conceptions of higher education changed, and "came to be seen as scientific training for jobs rather than the moral training of gentlemen for elite professions."[21] The rapid development of social sciences further altered the nature of research, resulting in increased interest in, and funding for, areas such as political science, sociology, anthropology, psychology, and economics.[22] As the American Association of University Professors noted in its *1915 General Declaration of Principles,*[23] the "modern university is becoming more and more the home of scientific research," declaring the complete and unfettered freedom to pursue and publish inquiry to be "the breath in the nostrils of all scientific activity."[24]

As scientific activity and research came to dominate the modern university setting, the role of the academic researcher took center stage in the academic world and in society at large.[25] Today the role of the researcher maintains this consequence, and has in many ways joined that of journalists in comprising what Irish philosopher and statesman Edmund Burk referred to as the Fourth Estate of Parliament.[26] Whereas journalism has been referred to as society's daily informative voice,[27] commentators refer to scholarly research and publication as its mechanism of historical reflection and conscience.[28] Research scholars also serve both a contemporary and prospective function—they are our distillers of misinformation, our champions against propaganda, and they enable society to rationally chart the undiscovered.[29]

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[20] *See* Byrne, *supra* note 15, at 269–70.
[21] *Id.* at 270.
[22] *Id.* at 271.
[23] *General Report of the Committee on Academic Freedom and Academic Tenure,* 1 A.A.U.P. Bull. pt. 1, at 17.
[24] *Id.* at 27–28.
[25] *See* Byrne, *supra* note 15, at 271.
[26] *See* Thomas Carlyle, On Heroes, Hero-Worship, & the Heroic in History 141 (Michael K Goldberg et al. eds., 1993) (1840) ("[Edmund] Burke said there were Three Estates in Parliament; but in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact,—very momentous to us in these times . . . Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority"); Robert M. O'Neil, *A Researcher's Privilege: Does any Hope Remain?* 34 Law & Contemp. Probs., no. 3, 1996 at 35, 36–37.
[27] *See* Kara A. Larsen, *The Demise of the First Amendment-Based Reporter's Privilege: Why this Current Trend Should Not Surprise the Media,* 37 Conn. L. Rev. 1235, 1235 (2005).
[28] *See* McLaughlin, supra note 8, at 930; O'Neil, *supra* note 26, at 36–37.
[29] *See, e.g.* Fuchs, *supra* note 11, at 431–36; Samuel Hendel and Robert Bard, *Should There Be a Researcher's Privilege,* 59 AAUP Bulletin, 398, 398 (1973)[hereinafter Hendel]; McLaughlin, *supra* note 8 at 930.

The Importance of Confidentiality to Academic Research and Commentary

Although academic researchers are central to society's progress,[30] they inhabit a fragile and vulnerable position.[31] Law and academic research diverge greatly in terms of "values that they hold and the rules that they follow."[32] Compounding this reality is the highly critical and condemning role academia assumes, which over time promises to attract an exponential amount of assailment.[33] This fragility is evident in the academic community's perceptions, attitude and culture, as well as in their ability to conduct accurate, independent and socially important research.[34] In a 1976 survey, the majority of responding researchers expressed the need for strict legal protection from subpoena for the confidentiality of research study sources—and almost three-quarters said they believed that with such protection potential sources would be more willing to participate in research projects.[35] Furthermore, half of the group believed that academic investigators would be more willing to "undertake controversial research if they could be assured that their sources would not be subject to revelation in court."[36]

Current perceptions in the academic community mirror those shared by journalists.[37] According to a 2009 study, nearly 70% of newsroom leaders believe courts' attitudes towards news organizations and subpoenas were less protective of the media than they were five years previously, nearly 30% thought they were "much less" protective, and over 60% believed that both prosecutors and civil litigants were more likely to subpoena the press.[38] Following the "Climategate" incident at the University of Virginia, in which Virginia's Attorney General issued

[30] *See, e.g.* Hendel, *supra* note 29, at 398; Fuchs, *supra* note 11, at 431–36; McLaughlin, *supra* note 8 at 930.
[31] *See, e.g.*, Paul M. Fischer, *Science and Subpoenas: When do the Courts Become Instruments of Manipulation?*, 59 Law & Contemp. Probs. 159, 167 (1996) [hereinafter Fischer]; Rik Scarce, *Scholarly Ethics and Courtroom Antics: Where Researchers Stand in the Eyes of the Law,* 26 The American Sociologist 87. 87 (1995) [hereinafter Scarce].
[32] Fischer, *supra* note 31, at 167.
[33] *See id.* at 163–167; Fuchs, *supra* note 11, at 436.
[34] *See, e.g.*, RonNell Andersen Jones, *Media Subpoenas: Impact, Perception and Legal Protection in the Changing world of American Journalism,* 84 Wash. L Rev 317, 349–381 (2009)(studying the effects of media subpoenas on the perceptions of journalists and confidential sources) [hereinafter Jones]; Fischer, *supra* note 31, at 163–167; Micahel Traynor, *Countering the Excessive Subpoena for Scholarly Research,* 59 Law & Contemp. Probs. 119, 120 (1996).
[35] Robert M. O'Neil, *Scientific Research and the First Amendment: An Academic Privilege,* 16 U.S. Davis L. Rev. 837, 848 (1983).
[36] *Id.*
[37] *Compare* Rick Legon, *The Climate of Academic Freedom,* Association of Governing Boards of Universities and Colleges, available at http://agb.org/blog/2010–05/climate-academic-freedom [hereinafter Legon], *with* Jones, *supra* note 34, at 375.
[38] Jones, *supra* note 34, at 375.

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a subpoena for a scholar's climate change research, the Association of Governing Boards of Universities and Colleges released a statement in response highlighting that "we are in an era of enhanced scrutiny of higher education by state and federal policymakers."[39] The onset of increased criminal and civil sanctions on researchers has created an atmosphere that many in the community analogize to Galileo's era.[40] The ominous effect of criminal or civil investigations, including the lingering threat they pose, has been noted by many scholarly researchers such as Professor Paul Bullock—a University of California Los Angeles research economist who was brought before a local police corruption panel and threatened with fines and jail time following his refusal to divulge sources that included street criminals.[41]

The perceptions and expectations of researchers have directly affected their willingness and ability to undertake comprehensive and accurate research projects.[42] Bullock later noted that if he were "to undertake a similar study [again], [he would] want to know that [he was] somehow protected on the confidentiality of that kind of information," further noting his fears of being thrown in jail.[43] Other researchers share Bullock's perception, catalyzing an immeasurable and chilling effect nearly impossible to calculate, especially in terms of lost research.[44] This effect jeopardizes the controversial and sensitive research topics that some argue probably deserve

[39] Legon, *supra* note 37 The statement noted that that Attorney General Ken Cuccinelli, a vocal critic of global warming, issued a subpoena claiming that the professor defrauded taxpayers by using in his research what the professor once referred to in an email a statistical research "trick." *Id.* Professor Mann claimed that the Attorney General was simply trying to smear him as part of a larger campaign to discredit his science. *Id.* In support of Mann, the Union of concerned Scientists released a letter signed by 800 professors and scientists in Virginia urging Cuccinelli to drop the case, citing Virginia's long tradition of academic freedom, innovation, research and discovery. *Id.*

[40] *See* Daniel Henninger, Climategate: *What Would Galileo Do,* Wall St. J., Dec. 3, 2009, at A21; *see also* Dahlia Lithwick and Richard Schragger, *Does the Constitution really protect a right to "academic freedom"?*, Slate.com, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/06/jefferson_v_cuccinelli.single.html (describing a letter from Richard Schragger claiming that the use of prosecutorial power to investigate climate science it the academy constitutes a threat to free inquiry.); Kathleen Bond, *Confidentiality and the Protection of Human Subjects in Social Research: A report on recent developments,* The American Sociologist Vol. 13 No. 3, 144, 146 (1978)(listing numerous cases in which government requests have been made for social science research, the disclosure of which would jeopardize promised confidentiality).

[41] O'Neil, *supra* note 35, at 851.

[42] O'Neil, *supra* note 35, at 848; Joel Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law,* 31 Seton Hall Legis. J. 149, 158 (2006–2007) (describing how if potential informants believe that a subpoena can convert journalists into an investigative arm of the government, they and others will be less likely to cooperate, thus reducing the press' ability to report on governmental and social functions)

[43] O'Neil, *supra* note 35, at 851 (citing Chon. of Higher Educ., Dec. 4, 1978, at 10, col. 4).

[44] *Id.* at 851–52.

the greatest social attention and legal protection.[45] This is largely underscored by researchers' lack of interest in the law and little patience for the distraction, anxiety, and cost of legal proceedings.[46] Moreover, researchers are often deterred by concerns about ethical conduct.[47] Considerable disagreement exists in the researcher community as to how professional codes of ethics should be interpreted, redrafted, or altogether ignored in the face of frail legal protection of confidential sources.[48]

Complimenting a beleaguered scholar's chilled willingness to engage in certain subject areas is their inability to perform notwithstanding such apprehension.[49] Corporate litigation has increasingly focused on discrediting researchers and their work product.[50] A researcher's notes and personal opinions, often completely unrepresentative of their research methods, are easy

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[45] *Id.* at 852.

[46] Fischer, *supra* note 31, at 166; *see also* Jacques Feullian*, Every Man's Evidence Versus a Testimonial Privilege for Survey Researcher*s, Vol 40 No. 1 The Public Opinion Quarterly, 39, 49–50 (noting how professionally embarrassing it is for the individual researcher to work out a desperate compromise or face jail time); McLaughlin, *supra* note 8, at 930 (describing how these considerations are not the only difficult issues researchers face with respect to the current state of the law; ferociously competing demands of the professional code of ethics and the law serve as another hurdle for researchers).

[47] *See* Sudhir Venkatesh, *The Promise of Ethnographic Research: The Researcher's Dilemma,* 24 Law & Soc. Inq. 987, 988–990 (1999) (noting that if it were known that the court system would provide greater protection for confidential research material such a notes, that he would find great solace in knowing such protections existed, and his informants would be much less fearful as well); *see generally* John Lowman and Ted Palys, *Subject to the Law: Civil Disobedience, Research, Ethics, and the Law of Privilege,* 33 Soc. Methodology 381 (2003) [hereinafter Lowman]; Felice J. Levine and John Kennedy, *Promoting A Scholar's Privilege: Accelerating the Pace,* 24 Law & Soc. Inq. 967 (1999)[hereinafter Levine]; Robert H. McLaughlin, *Privilege and Practice in Social Science Research,* 24 Law & Soc. Inq. 999 (1999); Rik Scarce, *Scholarly Ethics and Courtroom Antics: Where Researchers Fall in the Eyes of the Law,* 26 Soc., Law, & Ethics 87 (1995); Geoffrey R. Stone, *Above the Law: Research Methods, Ethics and the Law of Privilege,* 32 Soc. Methodology *19* (2002).

[48] *See, e.g.*, Lowman, *supra* note 47, at 386, 388 (arguing that researchers should be prepared to defy a court order to release confidential information, and that the American Sociological Association Code of Ethics should be interpreted to at a minimum provide protection for research subjects); McLaughlin, *supra* note 47 at 1000 (describing an approach in which difficult research decisions would not be based in personal ethics or professionalism, but sublimated to mere legalities, deriving from the law an instrumentalist position); Stone, *supra* note 47, at 25–27 (arguing that the proper course for a researcher who cannot count on the protection of a privilege is "not to promise unconditional confidentiality, but to promise confidentiality within the limits allowed by the law.").

[49] *See* Fischer, *supra* note 31, at 163–167.

[50] *See, e.g.*, id. 163, 166 (describing how a medical researcher may uncover a series of side-effects to a product, resulting in the pharmaceutical company subpoenas the records in an effort to discredit the research and look for an alternative explanation).

targets for those who seek to discredit their findings outside of the normal process of scientific inquiry.[51] The threat of litigation can be used to wear down a researcher's resources, time, attention, financial support, and academic reputation.[52] Further at issue is the ability of researchers to find sources and subjects willing to cooperate under promises of confidentiality when prior promises have proven empty.[53] Research involving human subjects, for example, requires the public to have confidence that its best interests will be protected and that its anonymity will be preserved.[54] When this confidence is eroded by external forces and the delicate relationship between researcher and subject is exposed, more than mere participation is scarified—neutrality, candor and accuracy fade as well.[55]

Researchers at Boston College's Belfast Project have encountered many of the above challenges.[56] It became evident early on in the oral history project that confidentiality would be necessary to the agreement to record the interviews with IRA members.[57] This was largely due to a serious threat of reprisal faced by potential interviewees, who through their participation would be risking death by breaking the IRA code of silence.[58] Boston College researchers also felt that forced disclosure of the interviews would not only destroy the researcher-participant relationship that had been guaranteed, but would also hinder future attempts to gather oral history and other primary sources—thereby inhibiting the free exchange of ideas and stifling public policy research.[59]

In light of the recent challenges faced by social-science researchers at Boston College, as well as all scholarly researchers across the academic community, a question arises—does the law of the United States, once considered to be the ultimate bulwark of the freedom of human

[51] Fischer, *supra* note 31, at 164.
[52] *See* Fischer, *supra* note 31, at 166; Matherne, *supra* note 28, at 601.
[53] Fischer, *supra* note 31, at 164–65; Venkatesh, *supra* note 47, at 989–90 (describing that when notifying a potential participant that their rights are protected, but not against subpoenas, an uneasy silence ensues, followed by lines of hypothetical questioning that do not do well to serve as the foundation of a relationship); *see* O'Neil, *supra* note 35, at 848.
[54] Fischer, *supra* note 31, at 164.
[55] *See* Jones, *supra* note 34, at 367 (describing that in 35.4% of American newsrooms, the use of confidential sources has decreased from 2004–2009, and in 15.1% their use is significantly less.); McLaughlin, *supra* note 8, at 930–34 (noting how contemporary studies that involve socially complex and criminally related subjects depend on establishing relationships with vulnerable subjects, trust, and certain degrees of confidence and non-disclosure); Stone, *supra* note 47, at 21–22 (recognizing that "the absence of such a privilege could inhibit research participants from cooperating fully and candidly with a scholarly project; in at least some circumstances, the refusal of such individuals to participate, or to participate fully and candidly, could undermine the reliability of the study and perhaps even preclude the research entirely").
[56] *See In Re Dolours Price* (Moloney Aff. ¶28; McIntyre Aff. ¶ 8).
[57] *In Re Dolours Price* (Moloney Aff. ¶ 28; McIntyre Aff. ¶ 8).
[58] *In Re Dolours Price* (Moloney Aff. ¶ 28, McIntyre Aff. ¶ 8).
[59] *In re DoloursPrice* (Moloney Aff. ¶32; McIntyre Aff.¶ 17).

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expression and progress, provide researchers some form of privilege? And if not, have other free and democratic societies moved in this direction?

Discussion

Researchers' Privilege in the United States

American researchers' legal freedom from forced disclosure has always traversed on unsure footing.[60] No federal statutory protection currently exists, the handful of states that do recognize a journalist privilege in state common law have seemingly not extended the same privilege to researchers, and only one state has explicitly recognized the interest of researchers in its journalist shield statute.[61] With regard to federal common law, federal courts "have never recognized a Constitutional or common law privilege equivalent to the Fifth Amendment or the attorney-client privilege that would give a researcher an automatic exemption from participating in litigation" and criminal investigations.[62] Courts have however, consistently recognized the societal interest in protecting academic research,[63] and in some cases have even discussed the possibility of a Constitutional protection against compelled disclosure.[64] Courts have also displayed a willingness to respect the interests of research participants on a case-by-case basis.[65] In cases regarding confidential information and privilege, courts highlight concerns ranging from the development, warmth and fluidity of scholarship, to the institutional autonomy of universities and scholars.[66] The words of Justice Felix Frankfurter exemplify such concerns: "It matters little whether such [governmental intervention into the intellectual life of a university] occurs avowedly or through action that inevitably tends to check the ardor and

[60] O'Neil, *supra* note 26, at 35.
[61] McLaughlin, *supra* note 8 at 945, 948–49, 954 (citing Delaware, which defines "reporter" as "any journalist, scholar, educator, polemicist" or individual engaged in producing information for public dissemination in Del. Code Ann. §10 ch. 4320 [3] [1992], and referencing New York, Wisconsin and Washington, along with Massachusetts' Supreme Judicial Court's "wiliness" to consider a common law privilege in future cases).
[62] Barbra B. Crabb, *Judicially Compelled Disclosure of Researchers' Data: A Judge's View,* 59 Law & Contemp. Probs. 9, 19 (1996).
[63] *See* O'Neil, *supra* note 26, at 39; Rebecca Emily Rapp, *In re Cusumano and the Undue Buren of Using the Journalist Privilege as a Model for Protecting Researchers from Discovery,* 29 J.L. & Edcu. 265, 271 (2000); *see also* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)("[S]afeguarding academic freedom . . . is of transcendent value to all of us not merely the teachers concerned").
[64] Crabb, *supra* note 62, at 21.
[65] Ted Palys & John Lowman, *Protecting Research Confidentiality: Towards a Research-Participant Shield Law,* 21 Can. J.L. & Soc. 163, 165–66 (2006) [hereinafter Palys].
[66] *See* O'Neil, *supra* note 26, at 36.

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fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.[67]"

Yet, despite showing high regard for the fruits and fragility of academic labor and research, American courts have in practice been resistant to the idea of establishing a permanent doctrine to privilege confidential research from compelled disclosure.[68]

Promising Start

At the onset of this line of jurisprudence in the 1960s and 1970s, courts suggested possible judicial recognition of a privilege.[69] In *Henley v. Wise,* the federal court for the Northern District of Indiana struck down parts of an Indiana strict liability obscenity law, observing that mere possession of obscenity would be "'prohibited to professors and researchers in psychology, anthropology, art, sociology, history, literature, and related areas.'"[70] The court noted that the statute would "put in violation of the law the famous Kinsey Institute at Indiana University" and that the resulting "chilling effect on the research, development and exchange of scholarly ideas [would be] repugnant to the First Amendment."[71]

Another early case, *United States v. Doe,* involved a grand jury investigation of a Harvard scholar in an effort to find a link between the Pentagon Papers and the New York Times.[72] While the court refused to grant a scholarly privilege, it recognized the need for protection of names and sources of research subjects, including Vietnamese villagers the scholar had interviewed, as well as government officials.[73] The court contemplated shielding the researcher's hypothesis, noting that a forced disclosure of opinion as to the identity of the leaks would lead scholars to "think long and hard before admitting to an opinion," thus hindering scholarly pursuits, but declined to rule on the issue in accordance with the procedural posture of the case.[74]

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[67] Sweezy v. New Hampshire, 354 U.S. 234, 262 (1953); *see also* Hendel, *supra* note 29, at 401.
[68] O'Neil, *supra* note 26, 36.
[69] O'Neil, *supra* note 26, at 38 (citing Henley v. Wise, 303 F. Supp. 62 (N.D. Ind. 1969); United States v. Doe 460 F.2d 328 (1st Cir. 1972) cert denied nom. Popkin v United States, 411 US 909 (1973) [hereinafter Doe].
[70] *See* Henley v. Wise, 303 F. Supp. 62, 67–72 (1969).
[71] *Id.* at 67.
[72] 460 F.2d 329–331 The Pentagon Papers were a Department of Defense study of the United States' political-military involvement in Vietnam and were leaked to the New York Times. *id.*
[73] *See Id.* at 334.
[74] Doe, 460 F.2d at 334; O'Neil, *supra* note 26, at 38; It should be noted that Professor Popkin was found to have a legal duty to assist the state in protecting itself against acts in violation of the law, was found in contempt, and sent to jail. Feullian, *supra* note 46, at 45.

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Other early forced disclosure cases, involving disclosure requests used as a litigation tactic, display judicial sensitivity to the threat of stifling research.[75] *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, concerned a study by Harvard Public Health Professor Mac Roberts involving employees of Pacific Gas and Electric Company, in an attempt to analyze companies' decision-making processes when environmental concerns are at issue.[76] The plaintiff in *Richards,* a federal contract breach claim, sought to use the study against the utility company, but Roberts successfully resisted the request for court ordered disclosure.[77] The court did not reach its decision on Robert's proffered Constitutional grounds,[78] but employed a multi-factored balancing test.[79] The judgment did however note "the importance of maintaining confidential channels of communication between academic researchers and their sources."[80]

The height of jurisprudence favoring an academic privilege was *Dow Chemical Company v. Allen,* a Seventh Circuit Court of Appeals case where the Dow Chemical Company sought from a senior University of Wisconsin scientist large amounts of data relating to an Environmental Protection Agency pesticide ban.[81] Stopping short of declaring a Constitutional shield, the *Dow* court nevertheless cited a series of factors motivated by First Amendment concerns, which in their totality supported such protection.[82]

Frailty of Precedent and Recent Developments

Federal courts over time, however, did not develop a consistent approach.[83] Two years after *Dow,* the Seventh Circuit failed to expressly utilize its multi-factored framework of

[75] Dow Chem. Co. v. Allen 672 F.2d 1262, 1269–1277 (7th Cir. 1982)[hereinafter Dow]; Richard Rockford, Inc. v. Pacific Gas & Elec. Co. 71 F.R.D. 388, 388–89 (N.D. Cal. 1976) [hereinafter Rockford].
[76] *Rockford,* 71 F.R.D. at 390; O'Neil, *supra* note 26, at 38.
[77] *Rockford,* 71 F.R.D. at 388, 390–91.
[78] *Id.* at 390; O'Neil, *supra* note 26, at 38–39.
[79] *Rockford,* 71 F.R.D. at 390 (listing factors such as the fact that Roberts was a non-involved third party to the lawsuit, the uncertain probative value of the data to the contract suit, and alterative means by which similar data could be acquired).
[80] *Id.*
[81] *Dow,* 672 F.2d at 1266; O'Neil, *supra* note 26, 39.
[82] *Dow,* 672 F.2d at 1269–77; O'Neil, *supra* note 26, at 39 (pointing to "the researcher's non-party status; the grave risks of premature disclosure of research findings on a highly volatile topic—the effects of Agent Orange on troops in Vietnam; the hazards of disrupting research in progress (or diverting the researcher's time and attention at a critical stage); and the potentially chilling effects of such subpoenas on the on the conduct of future research.").
[83] See O'Neil, *supra* note at 39–44 (outlining divergent approaches and results by different courts over time).

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considerations laid out in the previous case,[84] while overturning in part a District Court ruling that barred all discovery requests made to a researcher.[85] The 1980s and early 1990s witnessed a mix of approaches to forced disclosure, none of which granting the level of support needed to carve out a defined or constitutionally rooted privilege.[86] For example, in *Farnsworth v. Procter & Gamble Co.*, the Eleventh Circuit accepted a Center for Disease Control plea to keep confidential the identity of subjects who had taken part in toxic shock studies, noting the importance of research supported by public willingness to submit to study, and the reasonable expectation of confidentiality, even in the absence of express promises.[87] The 1980s also saw the Federal District Court of Arizona partially protect research done by a Michigan State University professor from two litigating parties, quashing a subpoena for research that included confidential sources.[88] The court reasoned that because "discovery offers an avenue for indirect harassment of researchers whose published work points to defects in products or practices," there was "potential for harassment of members of the public who volunteer, under a promise of confidentiality, to provide information for use in such studies."[89]

Differing approaches, both between and within Circuits, have persisted in more recent years.[90] In 1984, state and federal prosecutors subpoenaed the work of graduate student and ethnographic researcher Mario Brajuha during a criminal arson investigation.[91] While the federal district court recognized a qualified privilege,[92] the Second Circuit reversed and remanded.[93] The court avoided a direct statement on the existence or nonexistence of a research privilege, and held that the district court's record was "far too sparse to serve as a vehicle for consideration of whether a scholar's privilege exists."[94]

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[84] *Dow,* 672 F.2d at 1269–77.
[85] Deitchman v E.R. Squibb & Sons, Inc, 740 F.2d 556, 564–66 (7th Cir. 1984).
[86] *See* O'Neil, *supra* note 26, at 39–44; O'Neil, *supra* note 35, at 843 (explaining that few court decisions define a researcher's claim to confidentiality or academic freedom); *see, generally* Farnsworth v. Procter and Gamble Co., 758 F.2d 1545 (11th Cir. 1985); Wright v. Jeep Corp, 547 F. Supp. 871, 876 (E.D. Mich. 1982); Snyder v Am. Motors Corp., 115 FRD 211, 215 (D. Ariz. 1987); In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F. 2d 223, 225 (2d Cir 1984); Scarce v. U.S., 5 F.3d 397 (9th Cir. 1993), cert. denied 510 U.S. 1041 (1994); In re Application of RJ Reynolds Tobacco Co, 518 NYS 2d 729 (Sup. Ct. 1987).
[87] *Farnsworth,* 758 F.2d at 1547.
[88] *Snyder,* 115 F.R.D. at 213, 216.
[89] *Snyder,* 115 F.R.D. at 216.
[90] *See, e.g.,* Cusumano v. Microsoft Corp. 162 F 3d 708, 714 (1st Cir. 1998); In re Grand Jury Subpoena, 750 F. 2d at 225–26; Scarce, 5 F.3d at 402–403.
[91] McLaughlin, *supra* note 8, at 939.
[92] *In re Grand Jury Subpoena,* 750 F.2d at 224.
[93] *Id.*at 226. The opinion did not however cover the risk of a criminal indictment growing out of the grand jury inquiry, in which case Brajuah might be compelled to produce his field notes. McLaughlin, at 939.
[94] McLaughlin, *supra* note 8, at 939 (quoting *In re Grand Jury Subpoena,* 750 F.2d at 224).

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A similar Ninth Circuit case, *Scarce v. United States,* involved a Washington State University student claiming a scholarly research privilege under the First Amendment when ordered testify before a federal grand jury regarding the break-in and destruction of a federally funded laboratory.[95] The Ninth Circuit refused to consider "even the bare possibility of a scholar's privilege to confidentially obtained information."[96] The court, reasoning that the Supreme Court had denied a journalist privilege before a grand jury in *Branzburg v. Hayes,* and that a researcher's claim could not be any stronger than a reporter's, ruled that the public interest in protecting confidential sources in research is "subordinate" to the "more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct."[97]

Unlike criminal investigations, courts have in recent years been more amenable to potential protection in civil suits, albeit still offering different approaches.[98] In 1987, a New York State trial court rejected a tobacco manufacturer's request to obtain research on the effects of smoking on participants exposed to asbestos.[99] The state court expressly recognized the scholar's interest in academic freedom, but when the parties moved the case to federal district court, the federal court granted a subpoena.[100] On appeal the Second Circuit redacted the names of subjects and other sensitive information, but nevertheless affirmed the subpoena noting that "[t]he public has an interest in resolving disputes on the basis of accurate information."[101] In 1998, however, the First Circuit took a much different approach in an antitrust suit concerning Microsoft.[102] In *In re Cusumano,* the court refused to order the professors to turn over the notes, tapes and transcripts of their relevant research.[103] Applying a balancing test colored with First Amendment concerns,[104] it analogized the interests of a scholarly researcher to those of a news reporter.[105]

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95 5 F.3d, 397 398–99 cert denied 510 U.S. 1041. Rick Scarce, the student at issue, had previously published a book entitled "Eco-Warriors: Understanding the Radical Environmental Movement," and had a long time relationship with a suspect in the case. McLaughlin, *supra* note 8, at 940–41.
96 O'Neil, *supra* note 26, at 42.
97 *Scarce,* 5 F.3d at 402 citing Farr v Pitchess 522 F.2d 464, 467–68 (9th Cir. 1975).
98 *Compare* In re American Tobacco co, 880 F 2d 1520, 1526–31 (2d Cir. 1989) *with* Cusumano, 162 F 3d, at 714 (1st Cir. 1998).
99 In re Application of RJ Reynolds Tobacco Co. 136 Misc.2d 282, 287–88; O'Neil, *supra* note 26, at 42.
100 *In re American Tobacco Co.*, 880 F.2d at 1525; In re Application of RJ Reynolds Tobacco. 136 Misc.2d 287–88.
101 *In re American Tobacco Co.*, F2d. at 1529–31.
102 *See Cusumano,* 162 F.3d at 714.
103 Rapp, *supra* note 63, at 266.
104 *Cusumano,* 162 F.3d, at 716 The *Cusumano* test was comprised of three prongs intended to determine whether, and to what extent, a subpoena should be en-forced to compel the disclosure of academic research materials. *Id.* The test requires that the party initially requesting the materials make a prima facie showing that its claim of need and relevance is

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Yet, the First Circuit is the only circuit to expressly recognize that a researcher's privilege exists, and subsequent cases within the circuit, such as *In Re Dolours Price,* have revealed the shaky foundation that a *Cusumano*-type balancing test relies upon.[106] The interview materials at issue in *In Re Dolours Price* were part of a collection held by Boston College for continued academic use.[107] The tapes included stories told by participants in the "Troubles" in Northern Ireland, and included firsthand accounts of personal involvement from members of paramilitary and political originations such as the Provisional Irish Republican Army (IRA), Provisional Sinn Féein, and the Ulster Volunteer Force.[108] The purpose of the collection was to gather and preserve for posterity stories that would aid historians and other scholars in the hope of eventually advancing knowledge of the nature of social violence through a more accurate understanding of the mindset of those who played integral roles in the events.[109] Additionally, the Belfast Project's files would constitute a database of information to assist the Irish and British governments in any potential truth and reconciliation process.[110]

Early on in the project Boston College researchers realized that confidentiality would have to be part of any agreement to record the interviews, mostly due to a fear of reprisal by potential interviewees who, through their participation, would be breaking the IRA code of silence.[111] Potential participants were unwilling to participate without assurance that their interviews would be kept confidential and locked away until their deaths.[112] Boston College thus provided each interviewee with a form containing the express condition that the materials would not be

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not frivolous; and that after this burden is met the objector, now inheriting the burden, must demonstrate the basis for withholding the information. *Id.* Finally the court, under this test, is to balance the need for the information with the objector's interest—in particular the compromised confidentiality of the objector and the potential injury to the free flow of information that disclosure portends. *Id.*

[105] *Id.* at 714 ("[a]s with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of similar level of protection for journalists and academic researchers.")

[106] Paul G. Stiles and John Petrila, Research and Confidentiality: *Legal Issues and Risk Management Strategies,* 17 Psychology, Public Policy & Law, 333, 341–42 [hereinafter Stiles]; *see* Cusumano, 162 F.3d at 716; In re Dolours Price 40–48.

[107] *In re Dolours Price* Aff. of Robert K. O'Neill, ¶3

[108] *In re Dolours Price,* at 4–5 The Troubles" were a period of great violence and political unrest in Northern Ireland from 1969 to the early 2000s. *see* id. at 5.

[109] *In re Dolours Price* Aff. of Thomas E. Hachey ¶5; Moloney Aff. ¶3, 21–23.

[110] *In re Dolours Price* Moloney Aff. ¶ 19–20, 24.

[111] *In re Dolours Price,* Moloney Aff. (explaining that such violations are punishable by death) ¶28, McIntyre Aff. ¶8.

[112] *In re Dolours Price,* Moloney Aff. ¶28, McIntyre Aff. ¶8.

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disclosed, absent the granting of permission by the interviewee, until after his or her demise.[113] Former IRA member Dolours Price, among others, signed the agreement and participated in the Belfast Project.[114]

In addressing Boston College's assertion of a researcher privilege, the Federal District Court of Massachusetts looked to three relevant First Circuit cases—*In re Cusumano, United States v. LaRouche Campaign,* and *Bruno & Stillman, Inc v. Globe Newspaper Co.*—adopting the view that First Circuit jurisprudence requires "a 'heightened sensitivity' to First Amendment concerns and invite[s] a 'balancing' of considerations."[115] Yet the court also noted the First Circuit's reluctance to describe heightened scrutiny as a privilege afforded to journalists or academics.[116] Because the case involved a criminal investigation, the court then turned to another First Circuit case, *In Re Special Proceeding*s, "where [the Court] expressed skepticism that even a general reporter's privilege would exist in criminal cases absent 'a showing of bad faith purpose to harass.'"[117] In that case, the First Circuit rejected claims for a reporter's privilege after the special prosecutor had exhausted all other means of obtaining the necessary information, relying in part on *Branzbur*g for support.[118]

In *In Re Dolours Price,* the court then continued on to a *Cusumano* analysis, but conducted it through the lens of *In re Special Proceedings* as colored by *Branzburg* concerns and valuations.[119] In evaluating the need for the information, the court noted the United States' international legal commitments, and the general legal rule, per *Branzburg,* of preventing journalistic or academic confidentiality from impeding criminal investigations.[120] The court went on to expressly deny privilege, emphasizing the seriousness of the crimes under investigation and the resulting strong government interest.[121]

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[113] *In re Dolours Price,* O'Neill Aff. ¶6; McIntyre Aff. ¶9, Moloney Aff. ¶29 The contact included language that guaranteed confidentiality "to the extent that American law allows," but Boston College nevertheless contended that despite the equivocal language in its guarantee, the promises of confidentially given to the interviewees were absolute. *In re Dolours Price,* at 6–7.
[114] *In re Dolours Price,* McIntyre Aff. ¶11, 15.
[115] *In re Dolours Price,* at 34 (internal citations omitted).
[116] *Id.* at 37.
[117] *Id.* (citing In re Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004)).
[118] *Id.* at 38–39 (noting prior cases' observations that "*Branzburg* governs cases involving special prosecutors *as well as* grand juries." [emphasis added]).
[119] *Id.* at 41–46.
[120] *Id.* at 44 (citing *Branzburg,* 408 U.S., at 692) (quoting U.S. v. Smith, 135 F. 3d 963, 971 ("Branzburg will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen")).
[121] *See In re Dolours Price,* at 45.

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In addressing the possible harm to the free flow of information and other First Amendment concerns, the court noted the possible chilling effect that compelled disclosure might have on further oral history efforts.[122] But the court ultimately deferred to the government's argument, citing *Branzburg,* that compelling production in this "*unique case*" is unlikely to threaten most confidential relationships between academics and their sources.[123] Finally, after noting that the free flow of information in this case would experience "no harm" because the Belfast Project had ended, and stating once again the "unquestioned" governmental and public interest in legitimate criminal proceedings, the court denied the motion to quash the subpoenas, granting only in an in-camera review.[124]

The Juristic Geography of a Researcher and Researcher's Privilege

The discord in United States courts over the years is largely due to a "frailty in precedent in favor of researchers," [125] but also reflects a fundamental disagreement over how to categorize scholars and their research.[126] As noted above, *Branzburg v. Hayes,* the landmark Supreme Court holding denying a journalist privilege, has significantly impacted research privilege jurisprudence.[127] *Branzburg* cemented the academic researcher-journalist analogy,[128] and remains strong precedent in cases involving criminal investigations.[129]

As a result, many have argued for an independent scholarly research privilege, noting the "dispositive differences in the nature of the activities themselves," particularly the heightened

[122] *Id.* (citing *Doe,* 460 F.2d, at 333 and *Branzburg,* 408 U.S. at 688).
[123] *Id.* at 45–46 (emphasis added)(citing Branzburg, 408 U.S., at 691). Since the issuance of the subpoena, Boston College and the Burns Library have had to respond to several concerns expressed by other research participants and institutions. For more information, visit http://bostoncollegesubpoena.wordpress.com/.
[124] *In re Dolours Price,* at 46–48. Intervening parties have appealed, with a decision by the First Circuit expected in June 2012. available at http://bostoncollegesubpoena.wordpress.com/. Massachusetts State Representative Eugene O'Flaherty has recently written Secretary of State Hillary Clinton requesting her intervention. *Id.* United States Congressman Joe Crowley has echoed a similar request. *Id.* Senator John Kerry has publicly written to Secretary Clinton, urging her to work with British authorities to "reconsider the path they have chosen and revoke their request." *Id.*
[125] *See* O'Neil, *supra* note 26, at 39.
[126] *Compare* David A. Kaplan and Brian M. Cogan, *The Case Against Recognition of a General Academic Privilege,* 60 U. Det. J. Urb. 205, 236–37 *with* Rapp, *supra* note 63, at 284; O'Neil, *supra* note 35, at 843.
[127] *Branzburg,* 408 U.S. at 703–04; *see* O'Neil, *supra* note 26, at 44.
[128] *Branzburg,* 408 U.S., at 705 ("The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.").
[129] *See In Re Dolours Price,* at 38–39 (citing *In Re Speical Proceedings,* 373 F.3d at 44–45 stating that *Branzburg* governs cases involving special prosecutors *as well as* grand juries)[emphasis added].

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severity of forced disclosure.[130] This argument relies on the fact that many of the state protections shielding journalists, as well as other court interpretations that have aided the journalist cause in the face of *Branzburg* precedent, have not been extended to academic researchers.[131] These protections were a fundamental part of the holding in *Branzburg,* with the court emphasizing the role of the legislature *vis-à-vis* the court.[132] Researchers have thus received none of the *Branzburg* safeguards, and have consequently been left exposed to the full force of the case's holding.[133]

The categorical doubt as to where scholarly researchers fall is currently complimented by disagreement as to where in the jurisprudential field an academic researcher privilege should be rooted.[134] Courts, claimants and scholars enjoy great flexibility when addressing subpoenas for academic research because no real statutory protection exists.[135] Turning to common law, some view the issue as an undue burden argument and accordingly apply Federal Rule of Civil Procedure 25(b)(1) or Federal Rule of Evidence 501.[136] Others push for a more common law based exception through the valves of Rule 501.[137] Others argue that the privilege is rooted in academic freedom, and that evidentiary analysis should fall under its considerations—thereby pushing the analysis further into the First Amendment's realm.[138]

The identity crisis of a potential researcher's privilege in American law is readily apparent in recent cases such as *In re Dolours Price.*[139] Some courts utilize a pseudo- First Amendment

130 *See e.g.*, O'Neil, *supra* note 26, at 45.
131 McLaughlin, *supra* note 8, at 945, 960 (explaining that only one of the nation's 31 state shield laws explicitly includes a reference to scholars); *see* Donna M. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath,* 52 Tex. L. Rev. 829, 917 (1974).
132 *See* Branzburg, 408 U.S., at 689–90; O'Neil, *supra* note 26, 45.
133 *See In re Dolours Price,* at 44–45; O'Neil, *supra* note 26, at 45 ("Prior to *Branzburg,* seventeen states had in fact adopted shield laws for precisely [the purpose of protecting reporters]. Here, the contrast is striking: No states [as of 1996] have legislatively protected the researcher in way comparable to those reporters have enjoyed—nor is there a substantial prospect of such protection in the near future.").
134 *See, e.g.* Crabb, *supra* note 62, at 33–34; McLaughlin, *supra* note 8, at 943–962; Rapp, *supra* note 63, at 284.
135 Matherne, *supra* note 28, at 586 Researchers may claim the privilege of academic freedom under a common law privilege against forced disclosure, or as a liberty under the due process clause, or finally as a first amendment right to academic freedom *Id.* 606.
136 Rapp, *supra* note 63, at 267–68.
137 *See* Matherne, *supra* note 28, at 586, 607. The evidentiary rule allows courts to examine a claim of privilege "in the light of reason and experience" and "under the principles of common law." Fed. R. Evid. 501.
138 *See* O'Neil, *supra* note 26 at 48; Rapp, *supra* note 63, 280–81.
139 *See* In re Dolours Price at 42. After addressing several threshold questions, the Court continued on to a *Cusumano* analysis, but conducted it through the lens of *In re Special Proceedings* as colored by *Branzburg* concerns *Id.* at 42–48.

balancing test, noting their respect for academia.[140] Others, such as the court in *Scarce,* are less sympathetic to the aims of scholarly research—especially in the *Branzburg*-like context of a criminal or grand jury investigation.[141] However, even when courts utilize a balancing test, they refuse to create an express First Amendment-based qualified privilege, and thus have been reluctant to venture into the deeper and more powerful doctrine of researcher protection as a constitutional right.[142] And even if cases such as *Cusumano* are taken to represent the foundation of a researcher's privilege as grounded in First Amendment concerns, it is not clear how fully that privilege can thrive in the shadow of *Branzburg.*[143]

The American jurisprudential landscape does contain a constant, besides dicta on the importance of academic research.[144] Evident throughout is the reality that the legal system rests on the premise that the public has a right to everyone's evidence, largely because the system has a fundamental interest in deciding cases on factual truth.[145] Exceptions to this rule extend only to those relationships which society has deemed so valuable that the interest in protecting confidentiality is greater than the normally predominant principle of fact-finding and truth.[146] American courts have thus communicated the belief that the academic researcher's interest in confidentiality is inferior to legal tribunals' interests in facts.[147] In comparison with human rights jurisprudence abroad (especially in Europe), however, American courts are increasingly isolated in this belief.[148]

Social Commentators' Privilege as a Human Right in Europe and Beyond

The European Convention on Human Rights and Article 10

The European Convention on Human Rights ("ECHR") is central to the development of European law.[149] While similar to the Universal Declaration of Human Rights and the American

[140] *See, e.g.*, *Cusumano,* 162 F.3d at 717; *In re Dolours Price,* 40–48.
[141] *See* Scarce, 5 F.3d at 402; *Branzburg,* 408 U.S. at 690.
[142] *See* Judith G. Shelling, *A Scholar's Privilege: In re Cusumano,* 40 Jurimetrics J. 517, 526 (2000).
[143] *See Branzburg,* 408 U.S., at 690; *Cusumano,* 162 F.3d at 717; Rapp, *supra* note 63, at 266–68, 270–73.
[144] *See, e.g.*, *Sweezy,* 354 U.S. at 250; Crabb, *supra* note 62, at 16; O'Neil, *supra* note 26 at 39; Rapp, *supra* note 63, 270–71.
[145] Crabb, *supra* note 62, at 16 (citing Branzburg, 408 U.S., at 688 quoting 8 John Wigmore, Wigmore on Evidence Sec. 2192 (McNaughton rev. 1961)).
[146] *Id.* (citing Trammel v. U.S., 445 US 40, 50 (1980)).
[147] *See e,g.*, *Barnzburg,* 408 U.S., at 690; *Scarce,* 5 F.3d at 402; *In Re Dolours Price,* 40–48.
[148] *Compare Branzburg,* 408 U.S. at 690 *with* Goodwin v. The United Kingdom, Eur. Ct. H.R. para 39–40 (1996); *see* Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights 444–45, 466–67 (2d ed. 2009) [hereinafter Harris].
[149] *See* George Letsas, A Theory of Interpretation of the European Convention of Human Rights 34–35 (2007).

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Declaration of the Rights and Duties of Man, the ECHR is far more than a philosophical or morally normative promulgation.[150] It represents the first international human rights mechanism "to aspire to protect a broad range of civil and political rights both by taking the form of a treaty legally binding on its High Contracting Parties and by establishing a system of supervision over the implementation of rights at the domestic level."[151] As one of the many instruments of European integration, the ECHR has, through its inherent legal formula as well as its acceptance by contracting member-states, penetrated the legal veil of domestic law.[152] Articles 32, 36, and 46 of the treaty, which provide the European Court of Human Rights ("ECtHR") with jurisdiction to receive individual complaints and interpret and apply the Convention in a binding manner, represent a limited transfer of state sovereignty to a supranational organization.[153] In this respect, the Convention and the rulings of its court have interfused with liberal rights granted within national constitutional structures in Europe—assuming the same moral and legal status in the process.[154]

ECHR Article 10 thus possesses the same social and legal status as the First Amendment does in the United States.[155] Freedom of expression, as incorporated in Article 10 of the Convention, has been said to exemplify "one of the essential foundations of a democratic society and one of the basic conditions for its progress."[156] The Article reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of

[150] *See* Donna Gomien, A Short Guide to the European Convention on Human Rights 12 (3d ed. 2005).
[151] *Id.*
[152] Letsas, *supra* note 149, at 33–34 ("[T]he effect of art 13 ECHR is to 'require the provision of a domestic remedy allowing the competent national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.") (internal citations omitted).
[153] *Id.* at 34.
[154] *See id.* at 35–36.
[155] *See id.* at 36; Jeffrey S. Nestler, *The Under Privileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege,* 154 U. Pa. L. Rev. 201, 229 (2005).
[156] Handyside Case Judgment 7 December 1976, A. 24, p 23.

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> others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[157]

Article 10 thus protects certain negative rights of natural legal persons, including the "freedom to hold opinions and to receive and impart information and ideas."[158] Of further importance in application has been paragraph two,[159] which in part qualifies the first paragraph, while affirmatively expanding its ambit to other areas of high value and special status.[160] In recent years, the court has established the principle that a State may have a positive obligation to insulate social commentators from intimidation, harassment, or violence.[161] As a result, Article 10 possesses dialectical tension, particularly apparent in paragraph two.[162] On one hand certain governmental restraints limit Article 10 freedoms by the formalities and procedures prescribed by democratic law; on the other lies the negative right to expression and non-infringement on the imparting of information, along with the government's positive obligation to protect said liberties.[163]

The European Court of Human Rights

In interpreting Article 10 with respect to social commentators, the ECtHR has repeatedly emphasized that the Convention not only protects the substance and contents of information and ideas, but also the means of acquiring them for transmission.[164] Journalists and their confidential sources have thus benefited from the court's broad interpretation.[165] The ECtHR first directly addressed the issue of journalists and confidential sources in *Goodwin v. the United Kingdom.*[166] In *Goodwin,* a British journalist attained confidential information about a

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[157] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, para 1 Nov. 4, 1950. ETS 5 [hereinafter ECHR].
[158] ECHR, art. 10 para. 1.
[159] *See* P. van Dijk & G.J.D. Van Hoof, Theory and Practice of the European Convention on Human Rights 565 (1998) [hereinafter van Dijk].
[160] ECHR, art. 10 para. 2; *see id.* at 558–59.
[161] *See, e.g.*, Özgür Güdem v. Turkey, Eur. Ct. H.R. paras.6–16, 46 (2000) (finding a violation of Article 10 where the government failed to provide protection for a newspaper that had been subject to terrorist attacks.).
[162] *See* ECHR, art. 10.
[163] *Id.*
[164] *See generally* Sanoma Uitgevers B.V. v. the Netherlands (2010); Financial Times Ltd and Others v. the United Kingdom, Eur. Ct. H.R. (2009); Voskuil v. the Netherlands, Eur. Ct. H.R., (2007); Nordisk Film & TV A/S v. Denmark, Eur. Ct. HR. (2005); Goodwin, Eur. Ct. H.R. (1996).
[165] Fact Sheet-Protection of Journalistic Sources, European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/0856B8A0-D3A1–47B4-B969–6250E84F9F3D/0/FICHES_Protection_des_sources_journalistiques_EN.pdf (last visited Mar. 26, 2012).
[166] *See Goodwin,* at para. 37–40.

company's financial ills,[167] ultimately generating an injunction against the journalist and his publishing company that restricted the story's publication, and also demanded the source's identity.[168] The journalist refused, and was fined for not complying with the order.[169] When addressing whether or not the interference was "necessary in a democratic society" to protect the company's rights, the ECtHR stated that;

> [P]rotection of journalistic sources is one of the most basic conditions for press freedom . . . Without such protection, sources may be deterred form assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information be adversely affected.[170]

In holding that a violation of Article 10 had occurred, the court further asserted that forced source disclosure "cannot be compatible with Article 10 unless it is justified by an *overriding* requirement in the public interest," and that any such "limitation on the confidentiality of journalistic sources call[s] for the most careful scrutiny."[171] The weight placed by the court on the role of social commentary, and the necessity of confidentiality in source gathering, represented the foundation of a very strong but qualified presumption of journalistic source privilege.[172]

The court has carried this strong presumption in favor of a journalistic privilege forward over the past decade and found violations of Article 10 on numerous occasions, such as *Voskuil v. The Netherlands,* where a journalist had been denied the right not to disclose his source for his articles concerning a criminal investigation of arms trafficking.[173] In its analysis the court analyzed whether or not governmental interference was "necessary in a democratic society" pursuant to Section 2 of Article 10.[174] After recognizing the government's interest in rooting out suggestions of foul play on the part of public authority, the ECtHR took "the view that in a democratic state governed by the rule of law the use of improper methods by public authority [was] precisely the kind of issue about which the public [has] the right to be informed."[175] It further noted how struck it was by the lengths Netherland's authorities were willing to go in order to obtain the information in question, and expressed concern about the discouraging effects that a forced disclosure would have on future potential whistleblowers.[176] The court

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[167] *Goodwin,* at paras. 10–11; van Dijk, *supra* note 159, at 581.
[168] *Goodwin,* at paras. 12–16; van Dijk, *supra* note 159, at 581.
[169] *Goodwin,* at paras. 16, 19.
[170] *Id.* at para. 39.
[171] *Id.* at para. 39–40, 46 (emphasis added).
[172] *See* van Dijk, *supra* note 159, at 581.
[173] *See, e.g.*,*Voskuil,* at paras. 7–14. He was sentenced to a maximum of thirty days in prison. *Id.*
[174] *Id.* at para. 45, 57–74.
[175] *Id.* at para. 70.
[176] *Id.* at para. 71.

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then concluded that this concern tipped the scale of competing interests in favor securing a free press for a democratic society, and found an Article 10 violation.[177]

Voskuil was not the last time the ECtHR has found the interests of securing and maintaining the free flow of information in a democratic society through the use of confidential sources to be paramount.[178] The court in *Financial Times Ltd and Others v. the United Kingdom* found an Article 10 violation in an order to disclose documents that could lead to the source at the origin of a takeover-bid leak.[179] In evaluating the interests of the information seeker, the court found that the current threat of damage to the company, its interests in obtaining compensation for past breaches, and the threat of damage through future dissemination of confidential information were not, even in their totality, sufficient to outweigh the public interest in protecting journalistic sources.[180] In its reasoning, the ECtHR also heavily emphasized the chilling effect of journalists being seen by the public as assisting in the identification of anonymous sources.[181]

The ECtHR has further found that such interests can withstand the compelling interests of a criminal or governmental investigation.[182] In *Sanoma Uitgevers B.V. v. the Netherlands,* journalists had, under a guarantee of anonymity and selective editing, been granted permission to cover an illegal street race.[183] Police and prosecuting authorities were afterwards led to suspect that one of the vehicles participating in the race had been used as a getaway car, and eventually secured the photographs after authorization by an investigating judge.[184] The court found an Article 10 Section 1 violation, namely on the grounds that an order compelling confidential journalistic material interferes with "the freedom to receive and impart information."[185] In continuing its analysis, the court also found a violation of Article 10 Section 2, in that Denmark's prosecutor-centric procedure for dealing with investigations seeking sensitive information was lacking and was "scarcely compatible with the rule of law."[186] The court concluded by stressing the need for an able and independent process to assess whether

[177] *Id.* at para. 72–74.
[178] *See, e.g.*, *Sanoma,* at para 100–01; *Financial Times,* at para 73; Tillack v. Belgium, Eur. Ct. H.R., para. 68 (2007).
[179] *Financial Times,* at paras. 5–17, 73.
[180] *Id.* at para. 71.
[181] *Id.* at paras. 70.
[182] *Snoma,* at paras. 10–14, 100.
[183] *Id.* at paras. 10–14.
[184] *Sanoma,* at paras. 14, 19, 21–22 (noting that threats were made to search the company's premises, and that a journalist was briefly arrested).
[185] *Sanoma,* at para. 71–72.
[186] *Id.* at paras. 96–100 (explaining that Denmark law under Article 96a of the Code of Criminal Procedure transferred power to issue surrender orders to the public prosecutor and away from an investigating independent judge, and that it therefore no longer guaranteed independent scrutiny).

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the interests of a criminal investigation override the public interest in the protection of journalistic sources.[187]

The ECtHR again solidified the value of freedom to receive and impart information in *Tillack v. Belgium,* where a journalist had complained about searches and seizures at his home and place of work following several publications relating to irregularities in European institutions.[188] The articles were based on confidential sources received from the European Anti-Fraud Office.[189] The court noted that "[a]s a matter of general principle the necessity for *any* restriction on freedom of expression must be convincingly established" as having a legitimate aim supported by sufficient government reasoning in a free and democratic society.[190] In finding a violation of Article 10, the court expressly emphasized that a journalist's right not to disclose sources could not "be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution."[191]

The Court's jurisprudence on journalism and confidential sources has not stopped at ordinary reporting, and has showed signs of having a solid legal foundation for extension and reapplication to other similar areas of social commentary.[192] In *Nordisk Film & TV A/S v. Denmark,* criminal investigators sought to acquire unaired portions and notes from research done as a part of an undercover documentary on pedophilia in Denmark.[193] When addressing whether the subpoena violated Article 10,[194] the ECtHR focused on confidential sources whom were willing and voluntary documentary participants in social science research and reporting.[195] Noting that only because the participants that could be considered traditional confidential sources were protected by the terms of the court order,[196] the ECtHR affirmed the Danish Supreme Court's finding that the sources at issue were sufficiently protected pursuant to Article 10.[197]

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187 *Id.* at para. 100.
188 *Tillack,* at paras. 14–17, 68.
189 *Id.* at para. 7.
190 *Id.* at paras. 55–60 (emphasis added).
191 *Id.* at paras. 65–68.
192 *See Nordisk Film,* at THE LAW.
193 *Id.* at Section A.
194 *Id.* at THE LAW. The court saw the interference with Article 10 Section 1 as prescribed by law and pursued by the legitimate aims of preventing disorder and crime, and therefore moved on to address the question of whether the reasoning of the national authorities was "relevant and sufficient" and the means "proportionate to the legitimate aims pursued." *Id.*
195 *Id.* at THE LAW.
196 The recordings and notes were exempted from the order whenever the handover would entail a risk of revealing the identity of any of three named persons, namely "the victim [not the Indian boy], the police officer and the hotel manager." *Id.* at Section A.
197 *Nordisk Film,* at THE LAW.

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Finally, the court has expressly noted over time that the public interest of protecting confidential sources of information, and the dangers inherent in not doing so, are not faced solely by journalists.[198] In *Gillberg v. Sweeden* for example, the Court stated that doctors, psychiatrists and researchers may have a similar interest to that of journalists in protecting their sources, as well as a professional interest in protecting secrecy akin to that of a lawyer-client relationship.[199] *Gillberg* involved an order to compel disclosure of medical research done by the public sector researcher at the University of Gothenburg.[200] The head researcher refused to comply because of promises made to test subjects regarding confidentiality, and the court found the criminal conviction resulting from his non-compliance not to be a violation of Article 10.[201] In doing so however, the majority stressed that the criminal conviction was not because of the researcher's refusal to give up professional secrecy in providing evidence, but for his misuse of office.[202] The concurrence took issue with this framing, but even in stating that the interests of society in the case at bar overrode Article 8[203] and 10 protection, noted the importance of confidentiality in research, the high degree of public interest in such endeavors, and called for a balancing test to weight competing interests.[204] The dissenting opinion called for a more nuanced approach and focused on the interests of confidentiality of the participants, the "major chilling effect that an imposition of a criminal sentence on a researcher" has, as well as the public interest in promoting medical science and research in accordance with human rights standards.[205]

Other Supportive International Law

The developing case law of the ECtHR does not stand alone in its approach to the confidentiality of a social commentator's sources.[206] Recommendation No. R(2000)7 by the Committee of

198 *See Samona,* paras 70–72 ("This danger [of depriving the news commodity of its value and interest through court intrusion], it should be observed, is not limited to publications or periodicals that deal with issues of current affairs."); Gillberg v. Sweden, Eur. Ct. H.R. paras. 121–23 (2010) (internal citations omitted).
199 *Gillberg,* para. 121–23 (internal citations omitted).
200 *Id.* at paras. 6–33.
201 *Id.* at paras. 120–27.
202 *Id.* at 124–25.
203 *Gilberg,* (J. Power concurring) (referring to Article 8 of the ECHR, which guarantees a right to private and family life, in the home and with respect to correspondence, subject to several enumerated public policy exceptions).
204 *Id.*
205 *Id,* (J Gyulumyan and Ziemele dissenting at paras. 2, 4–7).
206 *See, e.g.*, The Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy; Resolution on the Confidentiality of Journalists Sources by the European Parliament; Recommendation No. R(2000)7 Committee of Ministers of the Council of Europe March 8 2000; R. v. Nat'l Post, 2010 SCC 16, 1 S.C. R para. 34. The Canadian Supreme Court has stated that "the law should and does accept that in some situations the public interest in protecting the secret [journalist] source

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Ministers of the Council of Europe serves as another international instrument in European law supporting this premise.[207] The recommendation promulgates that domestic law of member states provide "explicit and clear protection of the right of journalist not to disclose information identifying a source in accordance with Article 10."[208] It also declares that other persons, who by their professional relations with journalists acquire such information, should be equally protected.[209]

Europe is not alone in its approach either.[210] Ontario's highest court in Canada established a journalists privilege in 2004, with the court stating that the "law of privilege may evolve to reflect the social and legal realties of our time."[211] The Supreme Court of Canada later reaffirmed this premise, noting that the law should and does accept certain situations in which compelling state interests will be dwarfed by heavily weighed interests in freedom of expression.[212] Recent cases in Canada have further widened this privilege, extending it to civil litigation.[213] The New Zealand Court of Appeal has also recognized such a privilege, noting the high degree of public interest in the dissemination of information, as well as stating that the privilege should be applied "*as a matter of course* except where special circumstances are established warranting a departure."[214] It is thus of great interest that American high courts, having the same common law lineage as Canada and New Zealand, and the same professed liberal social values as all the above mentioned democratic societies, have failed to find such approaches persuasive.[215] This is especially true in light of the fact that the United States so often holds itself up as a world leader in terms of protecting the freedom of public discourse.[216]

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from disclosure outweighs other competing public interests- including criminal investigations," and that in those situations the courts will grant immunity against disclosure of sources to whom confidentially has been promised. *Nat'l Post* 2010 SCC 16 at para. 34.. Also stating that in a balancing test the public interest in free expression will always weigh heavily in the balance. *Id.* at 64; R. V. Nat'l Post, 69 OR3d 427, Para 82 (Ontario 2004) (Can.).

[207] Recommendation No. R(2000)7 Committee of Ministers of the Council of Europe March 8 2000.

[208] *Id.* at Principle 1.

[209] *Id.* at Principle 2.

[210] *See e.g.*, Broad Corp of NZ v Alex Harvey Indus Ltd (1980) 1 NZLR 163 CA 163; R v. National Post 69 OR 3d 427 Para 82 (Ontario 2004) (Can.).

[211] R v. National Post 69 OR 3d 427 para 82 (Ontario 2004) (Can.); Nestler, *supra* note 155, at 228–29(explaining that the Canadian court interestingly used Wigmore's four criteria to find "an overwhelming interest in protecting the identity" of confidential sources, while most cite Wigmore for the proposition that a privilege should not be afforded to journalists).

[212] *Nat'l Post,* 2010 SCC 16, paras. 34, 64.

[213] *See* Globe and Mail v. Attorney General of Canada, 2010 SCC 41, paras. 6–13, 59, 65–67.

[214] Nester, *supra* note 155 at 228, citing Broad Corp of NZ v. Alex Harvey Indus. Ltd. (1980) 1 NZLR 163 CA 163 (emphasis added)

[215] *See* Nestler, *supra* note 155, at 229.

[216] *See id.*

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Analysis

A Social Value Missing in Translation

The disparity between the approaches taken by Federal courts in the United States and the European Court of Human Rights could not be more apparent.[217] American treatment is riddled with differing approaches that very rarely protect confidential research, and even when a scholar's interest is recognized, its foundation is weak[218] and consequently courts often fail to find the interests of researchers to be paramount.[219] This approach stands in stark contrast to that of European law, where it is established that interference with Article 10 rights can only be substantiated by "'imperative necessities,'" and that exceptions must be interpreted narrowly.[220] What has emerged in Article 10 jurisprudence involving confidential sources is a rigorous test, which applies near strict scrutiny to ensure that any infringement on Article 10, Section 1 is prescribed by law and has legitimate aims.[221] Any action involving confidential sources must also be justified by an overriding requirement in the public interest in a "free and democratic society" and is subject to "'the most careful scrutiny.'"[222] This is not to say that an absolute privilege has emerged,[223] but the heavy presumption in favor of confidential source protection for social commentators has cast a solid foundation in European law for a qualified researcher's privilege.[224]

It would be quite difficult to fully evaluate why the American and European systems have developed a dissonance in their approaches over time.[225] Academic research is an important and fundamental value of any free modernized society, a fact that has been clearly recognized by courts and legislatures on both sides of the Atlantic.[226] Article 10 is a modern piece of legal machinery compared to the First Amendment, having been drafted in response to the

[217] *Compare* Goodwin, para 39–40 *with* Branzburg, 408 U.S., at 690 *and* Scarce, 5 F.3d at 400–02.
[218] *See, e.g.*, Stiles, *supra* note 106, at 340 (citing *In re Grand Jury Subpoena,* 750 F.2d at 225 (stating that the party wishing to create a researcher's privilege had the burden of providing a detailed description of the nature and seriousness of the study).
[219] *Compare Branzburg,* 408 U.S., at 690 *with* Harris, *supra* note 9, at 466–67.
[220] Harris, *supra* note 9, at 443 (citing *Vereinigung Demokratischer Soldaten Osterreich and Gubi v. Austraia* A302 (1994) and 20 EHRR 56 para 37.)
[221] *See* ECHR, Art. 10 Para 2;Voskuil, paras. 54–56; Harris, *supra* note 9, at 465 (explaining that these areas are not only subject to proportionality test, but that it may be stringently applied).
[222] *Goodwin,* para 39–40; Harris, *supra* note 9, at 446.
[223] van Dijk, at 581.
[224] *See Gillberg,* para 121–23; *Nordisk Film,* at THE LAW; *Goodwin,* para. 40.
[225]
[226] *See, e.g.*, *Gillberg,* (J. Gyulumyan and Ziemele dissenting, paras 1–2, 4–5);Rapp, *supra* note 63, at 270–71; O'Neil, *supra* note 26, at 39.

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"devastating turmoil of the two World Wars and the Holocaust."[227] Yet the Supreme Court has never failed to invent ways to update the Bill of Rights through interpretation,[228] and the foundation of a qualified-privilege for social commentators' confidential sources in Europe is more so a creature of recent ECtHR adjudication than a pure Article 10 creation.[229] Amidst the political, social, cultural, historical, and institutional differences between the two legal systems, one fact remains: a shared social value has managed to translate into law in Europe, but that same translation has been obstructed in American jurisprudence.[230]

The translation of this value into American law has been hindered in part by judicial deference to social authority.[231] Tocqueville once wrote in *Democracy in America* that democratic nations have a natural and extremely dangerous tendency to "undervalue the rights of private persons" as the rights of society are extended and consolidated.[232] This natural tendency is especially prevalent today in criminal contexts, where judicial recognition of law enforcement interests often rests on a trade-off theory—the implicit acceptance that the executive branch and its security functions are of paramount importance and must be given flexibility to change with changing circumstances, and that resulting infringements on liberty are a necessary cost to guarantee security.[233] Such an acceptance found a home in *Branzburg,* where the Supreme Court cited the importance of fair and effective law enforcement and its ability to provide security for people and property as a "fundamental function of government" and a predominant interest in refusing to recognize a First Amendment privilege for journalists.[234]

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[227] Harris, *supra* note 9, at 443. Social research was not prevalent in the 18th Century, and did not become a staple of university academia until centuries after the drafting of the First Amendment. *See supra* text accompanying notes 14–29.
[228] *See* G. Edward White, *Reflections On the Role Supreme Court: The Contemporary Debate and the 'Lessons' of History,* 63 Judicature 162, 163–64. (explaining that it is well settled that the Court has accepted its role as the modern interpreter of the Constitution, and the action therefore lies in the methodology of interpretation).
[229] *Goodwin,* para. 39–40.
[230] *Compare Goodwin,* paras. 39–40 *with Branzburg,* 408 U.S. at 690.
[231] *See, e.g.*, *Branzburg,* 408 U.S. at 690.
[232] Alexis de Tocqueville, Democracy in America (noting that men have a tendency to become less attached to private rights just when it is most necessary to defend and retain what remains of them, and that true friends of liberty must be constantly on the alert to prevent the power of government from lightly sacrificing private liberties in order to achieve its own designs).
[233] Adrian Vermeule, *Posner on Security and Liberty: Alliance to End Repression v City of Chicago,* 120 Harv. L. Rev. 1251, 1260–61 (explaining how this theory best explains the *Alliance To End Repression* opinion, as well as a large judicial trend in national security law).
[234] *Branzburg,* 408 U.S. at 690.

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Branzburg's Legacy and Boston College's Recent Struggle

Branzburg did not at its inception represent a *per se* kiss of death for the future recognition of a researchers privilege,[235] but the way the opinion weighed prosecutorial considerations against the interests of social commentators in our society has remained a loaded gun in Supreme Court precedent and has heavily influenced its progeny.[236] This effect is most recently illustrated by Boston College's struggle to fight for a researcher's privilege in *In Re Doloous Price,* in which Boston College's attempt to protect the identity of a Belfast Project participant presented the court with a seldom-faced scenario—a criminal investigation of a violent felony in which the research participant and her story is both confidential academic research as well as important culpatory evidence.[237] The research subpoenaed in *In re Dolours Price* is inseparably intertwined with the identity of the research participant, making an ad hoc resolution impossible.[238]

Several themes common to American researcher privilege jurisprudence are readily apparent in *In re Dolours Price,* the first being institutional posture and judicial deference shown to law enforcement interests.[239] The United States attacked the proposition that the court possessed broad discretion to evaluate the subpoenas, arguing that judicial discretion is narrowly circumscribed by US-UK MLAT, which holds the same force as a federal statute.[240] The two exceptions to this rule in the MLAT agreement, that immediate enforcement would violate the Constitution or where such enforcement would violate a federally recognized testimonial privilege (e.g. attorney-client, spousal), were according to the United States not present in this case.[241] After addressing several procedural and interpretive issues,[242] the Court rejected this assertion concluding that it indeed had the discretion to review a motion to quash a subpoena, under the statutory authority conferred by 18 U.S.C § 3512 and the framework articulated in the UK-MLAT.[243]

While the court did carve itself out a place at the table, judicial institutional timidity soon became clear as the court declined to adopt a standard of review analogous to the Federal

[235] *See* Feullian, *supra* note 46, at 44. The court denied certiorari to *United States v. Doe* in the same year *Branzburg* was decided. 460 F.2d, *cert. denied,* 411 U.S. 909 (1973).
[236] *See, e.g, In re Dolours Price,* at 44; *Scarce,* 5F.3d at 402; McLaughlin, *supra* note 8, at 940–42; O'Neil, *supra* note 26, at 42.
[237] *See In re Dolours Price,* at 3–8.
[238] *Id.*
[239] *Id.* at 40–48.
[240] *Id.* at 8–9.
[241] *See id.* at 33.
[242] *Id.* at 9–26.
[243] *In Re Dolours Price,* at 26.

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Rules of Criminal Procedure,[244] and instead ruled that the appropriate standard of review was similar to that of evaluating grand jury subpoena.[245] In its evaluation, the court cited the importance of reciprocal compliance to MLAT, the need of foreign governments for information concerning criminal investigations, and the need for expeditious responses for domestic investigative requests.[246] The court went even further, noting that an MLAT request is not a grand jury subpoena, but a direct executive order deserved of *extreme judicial deference*.[247]

The court's review of constitutional issues and potential privilege was therefore the only hope that Boston College had of quashing the subpoena, and an evaluation of this section of the court's opinion highlights the frailty of precedent and power of *Branzburg* with regard to a researcher's privilege in American law.[248] In its motion to quash the subpoenas, Boston College petitioned the court to apply the balancing test first laid out in *Cusumano v. Microsoft Corp.*[249] The United States argued that Boston College's reliance on *Cusumano* was misplaced, as the case addressed civil discovery and other litigation issues, and did not involve criminal investigations resulting from reciprocal obligations of the United States and other foreign nations.[250] Grafting such a "quasi-privilege" for academic research was, according to the government, "dubious even under civil domestic law", and that it directly conflicted with the procedures and purpose of the MLAT treaty.[251]

The court adopted the balancing test, but decided to emphasize the reluctance of First Circuit judges to describe heightened scrutiny as a privilege afforded to journalists or academics.[252] The court stated that the answer to a balancing test with respect to criminal cases was found in *In Re Special Proceedings*, where the Court, citing *Branzburg,* expressed skepticism that even a general reporter's privilege would exist in criminal cases absent "a showing of bad faith."[253] The Court then, relying on *Branzburg,* enumerated three factors from the case that cut against the recognition of a privilege—(1) the importance of criminal investigations, (2) the usual obligation

[244] Fed. R. of Crim. P. 17(c)(2) (the court may quash or modify the subpoena if compliance would be unreasonable or oppressive); *In re Dolours Price* at 27, 33.
[245] *In re Dolours Price* at 33.
[246] *Id.* at 28.
[247] *See id.* 31–32 (noting that in most MLAT cases, the information contained in the government's application for commissioner or order pursuant to an MLAT will be sufficient to meet its burden and cause the court to approve the requested order, subject to a review of constitutional issues and potential privilege) (emphasis added).
[248] *See id.* at 33–48.
[249] Boston College Motion to Quash at 7–8. (citing *Cusumano* v. *Microsoft Corp.*, 162 F. 3d 708, 716 (1st Cir. 1998).
[250] Government's Opposition to Motion to Quash and Motion for an Order to Compel at 10.
[251] *Id.* 13.
[252] *See In re Dolours Price,* at 37.
[253] *Id.* at 37–39 (citing *In re Special Proceedings,* 373 F.3d at 37, 45, which stated that *Branzburg* governs cases involving special prosecutors *as well as* grand juries [emphasis added].)

of citizens to provide evidence and (3) the lack of proof that news-gathering required such a privilege.[254]

As noted above, the court conducted a *Cusumano* balancing test, but did so in a way that was overwhelmed by *Branzburg* concerns.[255] Unlike *Goodwin,* where the ECtHR emphasized a strong interest in social commentary, the balancing test emphasized the need for the information, noting the international legal commitments of the United States of America, and the general legal rule, as per *Branzburg,* preventing journalistic or academic confidentiality from impeding criminal investigations.[256] In expressly denying privilege, the court concluded once again with the seriousness of the crimes under investigation and the resulting strong government interest.[257] Whereas in *Financial Times,* the ECtHR displayed an extreme sensitivity to possible public perception of journalists being seen assisting in criminal investigations, the court in *In re Dolours Price* simply noted in passing that forced disclosure in this "*unique case"* is unlikely to threaten the majority of confidential relationships between academics and their sources.[258] Instead of emphasizing, as the ECtHR did in *Tillack,* that confidential sources are not a "mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of [] sources" but are indeed "part and parcel of the right to information [and are correspondingly] to be treated with the utmost caution," the court in *In re Dolours Price* denied the motion to quash the subpoenas, presenting an incredibly shortsighted view that the free flow in information in this case would experience "no harm" because the Belfast Project itself had stopped conducting interviews.[259]

What In re Dolours Price Contributes in the Search for a Solution

When evaluating potential solutions to provide protection for scholarly researchers, several lessons can be drawn from Boston College's struggle in *In Re Dolours Price.* In many ways the case serves as a microcosm, revealing the raw interests at stake in the debate over a researcher's privilege by providing a direct and unavoidable confrontation of values: perhaps the strongest interests in researcher confidentiality imaginable, pitted against a governmental interest in an international criminal investigation for a violent crime.[260]

[254] *Id,* at 38–39.
[255] *See id.* at 41–45.
[256] *See id.* at 44 The court cited United States v. Smith, for the proposition that "Branzburg will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." 135 F.ed 963, 971; *Goodwin,* para. 39–40.
[257] *In re Dolours Price,* at 45.
[258] *Compare id.* at 45–46 (emphasis added,) *with Financial Times,* paras. 70–73.
[259] *Id.* at 46–48 (emphasizing once again the "unquestioned" governmental and public interest in legitimate criminal proceedings); *Tillack,* paras. 65–68.
[260] *See id.* 40–48.

While the court's recognition of a Boston College's important interest and the application of the *Cusumano* balancing test to a criminal setting was a minor victory, it is clear that the influence of *Branzburg* prevails.[261] *Branzburg's* treatment of criminal investigatory interests *vis-à-vis* those of social commentators and the First Amendment continues to hinder the creation of a constitutionally rooted qualified-privilege.[262] The result is at best the adoption of pseudo-First Amendment balancing tests that are rooted on the outer edges of the Amendment's penumbra and colored by *Branzburg's* prioritization of executive and law enforcement interests.[263] The same can of course be said for any burden analysis put forth by evidentiary standards, which would be forced to weigh the interest of confidential research and its function in society against the competing interests of disclosure and factual truth in adjudication.[264] Combine these technical realities with judicial institutional insecurity, and their effects become even more pronounced, as is clearly apparent in *In re Dolours Price.*[265]

The case also serves as a reminder that the Federal government has assented to reciprocal agreement that, in effect, transforms the Attorney General into a tool whereby foreign governments can subpoena research and other confidential information for use in foreign tribunals.[266] While the power of the MLAT treaty is not unlimited,[267] absent a refusal by the Attorney General[268] only two situations exist wherein a researcher would be protected: where such enforcement would violate the constitution, or where such enforcement would violate a federally recognized testimonial privilege.[269] The holding in *In re Dolours Price* makes clear that neither exception applies to researchers, and given the inherent criminal interests at issue in MLAT requests, it is hard to imagine a scenario that would.[270]

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[261] *See id.*
[262] *See* Paul Nejelski and Kurt Finsterbusch, *The Prosecutor and the Researcher: Present and Prospective Variations on the Supreme Court's Branzburg Decision,* 21 Soc. Probs. 3, 8 (1974) [hereinafter Nejelski]; *Scarce,* 5 F.3d, at 400–02; *In re Dolours Price,* at 40–48; McLaughlin, *supra* note 8, at 940–42; O'Neil, *supra* note 26, 42.
[263] *See, e.g.*, *In re Dolours Price,* at 40–48, *Scarce,* 5 F.3d. at 400–02; McLaughlin, *supra* note 8, at 940–942; O'Neil, *supra* note 26, at 42.
[264] See J. Steven Picou, *Compelled Disclosure of Scholarly Research: Some Comments on "High Stakes Litigation",* 59 Law & Contemp. Probs. 149, 155 (1996) (explaining Judge Crabb's contribution to his work, that the argument of "burdensomeness" may not be compelling to a court when requested data is deemed to have "significant probative value"); Rapp, *supra* note 63, at 267–68.
[265] *See* Vermeule, *supra* note 233, at 1251, 1260–61; Tom S. Clark, *Separation of Powers, Court Curbing and Judicial Legitimacy,* Am. J. of Pol. Sci., no. 4, (2009) at 971, 985.
[266] *See In re Dolours Price,* at 30.
[267] *Id.* citing Treaty with the UK on MLA in Crim. Matters, S. Exec Rep No 104–23 at 12 ("The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles.").
[268] Government's Opposition to Motion to Quash and Motion for an Order to Compel at 7 (citing US-UK MLAT Art. 2 Sec. 2, Art. 5).
[269] *See id.* at 8.
[270] *See Branzburg,* 408 U.S., at 690; *In re Dolours Price,* at 26–34, 41–48.

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Finally, the decision displays an institutional insensitivity towards the power, importance, and fragility of social research, as well as a lack of precedent to support any burgeoning sensitivity.[271] There does not seem to be a foundation in American law for this value the way there is for intra-spousal testimony[272] and attorney-client privilege,[273] and as a result one would be hard-pressed to find a way in which the interest could trump the emphasized importance of a criminal investigation.[274] Not only does the social value of research lack constitutional footing, it lacks precedent within and across the circuits.[275] *In Re Dolours Price* points to only four First Circuit cases that are marginally on point, all of which requiring an analogy of some kind to find relevance in the opinion.[276] The limited number of cases on point is the result of most subpoenas for research either being abided by without a challenge, or being complied with after a challenge was negotiated and resolved with prosecutors outside of court.[277]The limited precedent and dicta available to tie the interests of researchers to larger societal values the way ECtHR jurisprudence does is another defining factor of *In Re Dolours Price,* and results in a short sighted conclusion that "no harm" exists to the free flow of information simply because the Belfast Project is over.[278]

These aspects of *In Re Dolours Price* are quite troubling for those who advocate for an approach anchored in common law.[279] In 1999 Robert McLaughlin published an influential analysis of a researcher's privilege in American jurisprudence.[280] McLaughlin concluded that of the numerous formulations of a possible researcher's privilege, including state shield statutes, state and federal common law, and federal statutes, the most plausible way forward would be a

[271] *In re Dolours Price,* at 34, 46–48 (stating that the free flow in information in this case would experience "no harm" because the Belfast Project itself has stopped conducting interviews, and emphasizing once again the "unquestioned" governmental and public interest in legitimate criminal proceedings, the court denied the motion to quash the subpoenas, granting only in camera review.)
[272] *See* McLaughlin, *supra* note 8, at 942–43.
[273] *See* Hickman v. Taylor, 329 U.S. 495, 508–511 (1947) (stating that an attorney's privilege is extended to their work product including "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways").
[274] *See* McLaughlin, *supra* note 8, at 957; *see also In re Dolours Price,* at 40–48.
[275] *See supra* text accompanying notes 60–148; McLaughlin, *supra* note 8, at 950.
[276] *In re Dolours Price,* at 34–39.
[277] *See* Nejelski, *supra* note 262, at 17–18.
[278] *Compare In re Dolours Price,* at 45–48 *with Tillack,* paras. 65–68 and *Goodwin,* para. 39–40; O'Neil, *supra* note 35, at 855 (arguing that courts must consider the contribution of each decision to transcendent principles of free inquiry and the advancement of knowledge, and that thus the inquiry should not be limited in its focus to solely the immediate parties).
[279] *See In re Dolours Price,* at 35–48; McLaughlin, *supra* note 8, at 960–62.
[280] *McLaughlin, supra* note 8, at 941, 960–62.

combination of federal and state common law privileges.[281] In doing so, McLaughlin noted that Federal Rule of Evidence 501 was drafted to avoid codification of, and defer to, state law,[282] and also that a clear interest has been expressed in the common law of several states with regard to researcher's privilege.[283] McLaughlin further recognized, however, the interstate nature of scholarship, and argued that federal common law tended to better reflect the connection between research and its societal benefit[284] as well as constitute a superior guiding presence in American jurisprudence.[285] Pointing to budding recognition of researchers' interests in several Court of Appeals cases,[286] as well as a lack of Congressional activity on the issue, McLaughlin concluded that a combined common law approach was the most viable.[287] This approach may be the most realistic, but issues in *In Re Dolours Price* and other recent cases cast serious doubt on whether it is the preferred course of action for the development of a privilege.[288]

While *In Re Dolours Price* occurs in a criminal context,[289] it nevertheless exposes both the frailty of precedent and judicial attitude towards social research value in federal common law when competing interests are at bar.[290] It is true, courts have gone out of their way to protect research participants on a case-by-case basis, but such protection is insufficient.[291] The intermittent, inconsistent, and all-together barley existent precedent in *In Re Dolours Price* and across the system casts serious doubt on the premise that a clear common law principle will

281 *Id.*
282 *Id.* at 941–43.
283 *Id.* at 948.
284 *See id.* at 946–47, 950.
285 *Id.* at 949.
286 McLaughlin, *supra* note 8, at 949–56.
287 *Id.* at 960–61.
288 *See In re Dolours Price,* at 40–48.
289 *In re Dolours Price,* at 28. McLaughlin admits this will likely have the hardest time finding success along with cases where the immediate social benefit of the research project is not apparent. McLaughlin, *supra* note 8, at 954.
290 *In re Dolours Price,* at 40–48; *see* O'Neil, *supra* note 35, at 843.
291 *See* Lowman, *supra* note 47, at 166–75 (arguing that a case-by-case deployment of Wigmore criteria to privilege confidential information from courts fails as a solution for several reasons including (1) such an approach is impossible to deploy before research has been started, and thus the weighing of interest required by the Wigmore test creates so much uncertainty that it may be worse than having no privilege recognized at all (2) desires to comply to the law or play to the test may create pressures to limit confidentiality in a way that jeopardizes research and threatens academic freedom (3) researchers must make a decision on whether they are willing to accept an ethical stance to defy the law ahead of time in order to be ethical in their research process, and (4) after-the-fact protections leave researchers and their participants a target for over-zealous attorneys and prosecutors).

soon emerge.[292] In fact, the *Cusumano* case noted above is the only case to date that has explicitly ruled that a researcher's privilege exists.[293] Also of increasing importance is the judicial valuation of social research, as the modern trend towards privileges, including those that have long been established, is a narrowed case-by-case ad hoc analysis designed to balance competing interests.[294] This trend coincides with an increasing judicial tendency "to avoid inflexible determinates," as well as a general movement away from creating testimonial privileges.[295] Add these considerations to the continued influence of *Branzburg,* and it is quite uncertain whether anything that could function as a serious qualified-researcher's privilege in both civil and criminal contexts will organically emerge in the federal common law without a major change in value recognition by the high court.[296]

State statutory and common law protections are even more vulnerable in light of *In Re Dolours Price.* As noted above, only three states clearly possess common law privileges for a journalist's confidential sources rooted in an interpretation of their respective state constitutions.[297] Only one of the nation's thirty-one states that have passed shield laws to protect journalists explicitly includes a reference to scholars.[298] As noted above, the inherent interstate nature of scholarship makes this handful of states' efforts woefully insufficient to protect academic interests.[299] Furthermore, the parallel interests of confidentially issues faced by reporters and researchers has "yet to command a comparable level of popular attention," thus making existing efforts clearly insufficient to constitute any kind of critical mass that could influence other state legislatures.[300] Piecing together a legal solution in a federalist system also exposes the efforts of researchers and their sources to international law enforcement arrangements.[301]

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[292] *In re Dolours Price,* at 34; *see* Levine, *supra* note 47, at 969 (arguing that although it is important to continue to advocate for a common law privilege, history has shown that the use of common law alone is necessary but not sufficient, and therefore that McLaughlin's approach does not represent a sufficient solution).
[293] Stiles, *supra* note 106, at 341–42.
[294] *See* Stone, *supra* note 47, at 22–23.
[295] Nejleski, *supra* note 262, at 6–7.
[296] *See id.* at 8; *see also In re Dolours Price,* at 40–48; In re Special Proceedings, 373 F.3d 37, 45;*Scarce,* 5 F.3d at 400–02; McLaughlin, *supra* note 8, 940–42; O'Neil, *supra* note 26, at 42.
[297] McLaughlin, *supra* note 8, at 948–49 (referencing New York, Wisconsin and Washington, along with Massachusetts' Supreme Judicial Court's "willingness" to consider a common law privilege in future cases).
[298] *Id.* at 945 (citing Delaware, which defines "reporter" as "any journalist, scholar, educator, polemicist" or individual engaged in producing information for public dissemination).
[299] *See* McLaughlin, *supra* note 8, at 946–49 (noting the particularly interesting effect that New York law has had on quashing subpoenas in tobacco litigation, and how such an approach has reflected a successful articulation of researcher's interests through the common law).
[300] *See id.* at 947.
[301] *See, e.g.*, *In re Dolours Price,* at 26–34, 41–48.

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Because treaty agreements such as MLAT[302] carry the force of federal statutory law, they would in most cases override the most extensive of state efforts to shield a researcher's confidential information.[303] As more of these agreements come into force, presumably due to an increasing need for international law enforcement cooperation, state level privileges become more and more inadequate.[304]

These deficiencies are what make the prospect of a federal shield statute so attractive.[305] A federal shield law is the most common among proposals for a researcher's privilege,[306] and if enacted would presumably protect, at a minimum, confidentiality and the fundamental human rights of third parties.[307] A statute would possess the advantage of overcoming the shaky foundation upon which a qualified-privilege would have to be constructed in federal common law,[308] and could be tailored in accordance with societal values and the needs of the justice system.[309] Congress could find Constitutional authority to pass such legislation through various channels, including notably the First and Fourteenth Amendments,[310] the commerce clause,[311]as well as the necessary and proper clause.[312] Several different proposals have been

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302 United States Department of State, Mutual Legal Assistance in Criminal Matter Treaties and Other Agreements, *available* at http://library.findlaw.com/1997/Dec/1/127851.html. The United States has 19 of these in force, 15 signed by not yet in force, not to mention dozens of other executive international agreements. *Id.*
303 *In re Dolours Price,* at 9 (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)).
304 *See In re Dolours Price,* at 40–48; United States Department of State, Mutual Legal Assistance in Criminal Matter Treaties and Other Agreements, *available* at http://library.findlaw.com/1997/Dec/1/127851.html. *Contra* Levine, *supra* note 47, at 971 (arguing that state statutes could be developed for researcher-subject relations that in turn could better convey and promote the value of a researcher's privilege).
305 *See, e.g.,* Richard Leo, *Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers,* 26 Am. Soc., 113, 130–34; McLaughlin, *supra* note 8, at 956–57 (discussing various proposals for a federal researcher shield statute); Rik Scarce, *(No) Trial (But) Tribulations: When Courts and Ethnography Conflict,* J. Contemp. Ethnography 23, 146–48.
306 *See* McLaughlin, *supra* note 8, at 954.
307 Leo, *supra* note 305, at 132.
308 *See* Nejelski, *supra* note 262, at 8 (outlining the effects the *Branzburg* ruling may have on federal common law); *see also In re Dolours Price,* at 40–48; *Scarce,* 5F.3d at 400–02; *In re Special Proceedings,* 373 F.3d, at 45 (1st Cir. 2004); McLaughlin, *supra* note 8, 940–42; O'Neil, *supra* note 26, at 42. *Contra* McLaughlin, *supra* note 8, at 954 (leaving room for the prospect of a common law privilege to emerge in federal common law).
309 *See* McLaughlin, *supra* note 8, at 956–57.
310 *Id.* at 955 (stating that the First Amendment "has been interpreted to protect the gathering of information and may be construed to protect this process where disclosure would compromise the free flow of information to the public").
311 *Id.* (drawing "on the interstate nature of scholarly research" and Congress' interest in protecting research findings that are later published through interstate media channels).

made over the years, most of which expressly recognize the social value of academic research, attempt to define a researcher, and set about to define a class of privileged materials and exceptions.[313] Other less grandiose proposals have included Congressional action to strengthen and broaden already existing programs that grant federal certificates of privilege to qualifying research, and improved Department of Justice guidelines for federal attorneys.[314]

A federal statutory solution would no doubt be welcomed by the academic community, but pursuing such an approach is not without serious drawbacks.[315] A lack of congressional activity on the issue reflects, among other things, a lack of public attention, and a serious effort to pass federal legislation is therefore unlikely.[316] A recent attempt in 1999 was the *Thomas Jefferson Researcher's Privilege Act,* which mainly focused on researchers' propriety rights, and died on the Senate floor.[317] Moreover, the lack of a federal shield statute to protect journalists may serve as a strong indicator that Congress would prefer to see any research privilege develop in a manner parallel to state shield laws for journalists.[318]

And even if a bill were to be passed, it may not be structured in a way that comports with the best interests of researchers.[319] Lawyer-politicians would be involved in almost every aspect of the drafting process, and generally have distaste for secrecy and non-transparency, particularly when contemporary crime fighting interests are at issue.[320] Furthermore, the statutory definitions of terms such as "researcher" and "confidential source" would shape the legislation, and the academic community lacks the lobbying organization and power of, for example, the

[312] *Id.* at 956 (arguing that grounds could be made that a researcher's privilege is necessary to the proper functions of a free and democratic government).
[313] *See, e.g.*, Hendel, *supra* note 29, at 398–400; McLaughlin, *supra* note 8, at 954–59.
[314] *See* Levine, *supra* note 47, 971–72; Lowman, *supra* note 47 at 386 (noting U.S. federal government recognition of the interests of confidential research via certificates in the fields of health, crime, and criminal justice).
[315] *See e.g.*, Feuillan, *supra* note 46, at 47; McLaughlin, *supra* note 8, at 960; *see infra* text accompanying notes 316–324.
[316] *Cf., e.g.*, Bruce P. Brown, *Free Press, Privacy, and Privilege: Protection of Researcher Subject Communications,* 17 Ga. L. Rev. 1009, 1011; McLaughlin, *supra* note 8, at 960 (emphasizing the lack of Congressional activity on the issue and its effect on a possible statutory solution); Joe S. Cecil and Gerald T. Wetherington, *Foreword,* 59 Law & Contemp. Probs. 1, 6 (1996) (noting that it is unlikely that scientists and attorneys will ever be of one mind about the extent to which research activities should be disclosed in the name of non-research purposes).
[317] *S. 1347,* Thomas-The Library of Congress, http://thomas.loc.gov/cgibin/bdquery/D?d106:1:./temp/~bd0pnn::½/home/LegislativeData.php?n=BSS;c=106½ (last visited Mar. 30, 2012); Lowman, *supra* note 47, at 382.
[318] McLaughlin, *supra* note 8, at 960.
[319] *See* Feullian, *supra* note 46, at 47.
[320] *See id.*

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American Bar Association.[321] Such terms may be watered down during the political process,[322] require judicial interpretation, and if the legislation is passed pursuant to the First Amendment, it may fall victim in adjudication to the uncertainties of federal common law that it was originally drafted to overcome.[323] Finally, many researchers worry that any effort to categorize or register researchers in order for them to qualify under legislation and/or an expanded federal certificate program would represent an unacceptable government encroachment on the freedom of the academic researcher community.[324]

There is however a deeper reason why a federal shield statute would ultimately not be the preferable course for a researcher's privilege. A solution that does not involve Supreme Court extension of the First Amendment protection to academic researchers' confidential sources does not sufficiently recognize the very essence of the value at stake.[325] The great role of the court, despite its institutional insecurity, has been that of sifting through ever fluctuating social values over time in search of consistent principles deserved of incorporation as abstract rights against the state.[326] The framers assumed that a confinement of such rights by the legislature in a republican system of governance would preclude the adequate implementation of certain conceptions deserved of recognition.[327] "They thus created an appeal to the Constitution as a source by which rights could be implemented," and Justice Marshall's corollary in *Marbury v. Madison* removed the majoritarian threat to such a system of incorporation, thus allowing it to become a mechanism by which the Constitution perpetuates.[328] This is true of the ECtHR as

[321] *See id.* at 47, 50 (encouraging social scientists as an allied group of professionals to be ready with more than ad hoc responses to someone else's text when a statutory proposal emerges); Daniel R. Coquillette, Real Ethics for Real Lawyers 316 (2d ed. 2012) (explaining that major lobbying by the ABA and other professional groups prevented the Sarbanes-Oxley Act from requiring mandatory reporting by lawyers to the SEC).
[322] *Id.* at 47. The entire legislation itself may have to be watered down so as to coexist with MLAT obligations. *See In re Dolours Price,* at 26–34, 41–48.
[323] *See* Feullian, *supra* note 46, at 47; Douglas E. Lee, *Do Not Pass Go, Do Not Collect $200: The Reporter's Privilege Today,* 29 U. Ark. Little Rock L. Rev. 77, 88 (2006); McLaughlin, *supra* note 8, 940–42; Nejelski, *supra* note 262, at 8; *see also In re Dolours Price,* at 40–48; *In re Special Proceedings,* F.3d 45; *Scarce,* 5 F.3d, at 400–402; O'Neil, *supra* note 26, 42.
[324] *See* Palys, *supra* note 65, at 180 (noting that a problem with certificates of confidentiality and privacy is that they are only granted by the government to certain researchers in particular fields).
[325] *See* Shelling, *supra* note 142, at 523–26.
[326] *See* White, *supra* note 228, at 170–72.
[327] *Id.*
[328] *See id.*; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . . Nor need we enquire whether similar considerations enter into review of statutes directed at particular minorities which tends

well, where the court views itself as the curator of a "free and democratic society."[329] It is therefore incumbent on the Supreme Court of the United States to give due recognition to an abstract right, which since the turn of the Twentieth Century has been necessary to the continued free exchange of ideas, academic inquiry, freedom of thought and the social acquisition of knowledge.[330] Whether the majority of Americans are acutely aware of the powerful impact these notions have on their lives and are deeply familiar with the social structure they buttress should not alone be dispositive.[331] Normative conflict in society falls under the purview of the judiciary, especially the high court, and must shape conceptions of justice and Constitutional interpretation regardless of the power of the norm's advocates and the historical mystique of countervailing interests.[332] Constitutional law enshrines, expounds,

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seriously to curtail the operation of those political processes ordinarily to be relied up upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); Marbury v Madison, 5 U.S. 137, 178–79 (1803).

[329] *See* Harris, *supra* note 9, at 443–44.

[330] *See* Byrne, *supra* note 15, at 269–70; Boston College's Motion to Quash at 10–11, 14–15; *see also Goodwin,* para. 39 ("[t]he protection of journalistic sources is one of the most basic conditions for press freedom. Without such protection, sources may be deterred form assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected.").

[331] White, *supra* note 228, at 172–73 (explaining that over time, the public will compare the rhetorical justifications for a decision with its practical consequences, and will therefore be able to make a decision on whether or not to square with the proclaimed norm, even if unfamiliar with it ex ante); *see* Paul M. Fischer, Fischer v. The Medical College of Georgia and the RJ Reynolds Tobacco Company: *A Case Study of Constrains on Research, in* Academic Freedom: An Everyday Concern 33, 41 (1994) ("The ability to conduct scholarly research freely is an activity that lies at the heart of higher education and falls within the First Amendment's protection of academic freedom. Research and teaching activities are closely linked components of scholarly activity in American higher education. Academic freedom includes the freedom to search for knowledge; therefore, it is as much an infringement on the scholar's academic freedom to constrain or limit the scholar's research activities as to limit his or her freedom in the classroom.").

[332] *See* Ronald Dworkin, Laws Empire 368–69 (1986) ("Some clauses, on any eligible interpretation, recognize individual rights against the state and nation: to freedom of speech . . . . Stability in the interpretation of each of these rights taken one by one is of some practical importance. But since these are matters of principle. substance is more important than that kind of stability. The crucial stability in any case is that of integrity: the system of rights must be interpreted, so far as possible, as expressing a coherent vision of justice. This could not be achieved by the weak form of historicism that ties judges to the concrete opinions of the historical statesman who created each right, so far as these concrete opinions can be discovered, but asks them to use some other method of interpretation when the framers had no opinion or their opinion is lost to history. . . . the Constitution expresses principles for principles cannot be seen as stopping where some historical statesman's time, imagination, and interest stopped."); Vermeule, *supra* note 233, at 1260–

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and refines over time fundamental political, moral, and social values.[333] For the judiciary to simply placate the interests of the academic researcher community with toothless dicta and balancing tests conducted on fixed scales, or to punt such important social values to a tainted political process,[334] is to abdicate a major role in the mechanism by which the Constitution retains its legitimacy.[335]

The sociological importance of this value is amplified by two phenomena in late modern societies such as ours.[336] First is the power of mass media, propaganda, and mass communications.[337] We live in the age of the Super PAC, corporate-sponsored study, and for-profit Facebook.[338] We are inundated with commercial arguments—on our phones, computers, televisions—in our movies and books—even in our visits to the doctor's office.[339] The power and money behind the mechanisms that control the distribution of truth and fact are at heights

61; Jeremy Webber, *The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges,* Paper Prepared for the Ontario Law Reform Commission (1991) at 18.

[333] *See* Dworkin, *supra* note 332, at 368.

[334] *See Branzburg,* 408 U.S., at 706; *In re Dolours Price,* at 40–48. At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. *Branzburg,* 408 U.S., at 706.

[335] *See, e.g.*, Dworkin, *supra* note 332, at 368; Heike Stintzing, *Constitutional Values and Social Change- The Case of German Marital and Family Law,* Int'l J. L. Pol'y and Family, 13, 132, 132–33.

[336] *See, e.g.* Fischer, *supra* note 31, at 167; Fuchs, *supra* note 11, at 431–36; Hendel, *supra* note 29, at 398; McLaughlin, *supra* note 8 at 930 ; Rik Scarce, *supra* note 31, at 87 (noting the hegemonic relationship between the state and scholarship).

[337] *See* James F. Hamilton, *Contesting Democratic Communications: The Case of Current TV, in* A Moment of Danger; Critical Studies in the History of U.S. Communication Since World War II 331, 331–33 (Janice Peck and Inger L. Stole eds., 2011) (arguing that the optimistic and utopian viewpoints that the internet and digital age has shaken the undemocratic hold that media organizations have over the public with their programing must be challenged); Deepa Kumar, *"Sticking It to the Man"; Neoliberalism: Corporate Media & Strategies of Resistance in the 21st Century, in* A Moment of Danger; Critical Studies in the History of U.S. Communication Since World War II 307, 315 (Janice Peck and Inger L. Stole eds., 2011) (noting that the bulk of media in the U.S. today is owned by a handful of giant corporate conglomerates).

[338] *See* Peter Overby, *A Year Later, Citizens United Reshapes Politics,* NPR (Jan. 21, 2011) http://www.npr.org/2011/01/21/133083209/a-year-later-citizens-united-reshapes-politics.

[339] *See* Philip H. Dougherty, *Advertising; The Doctor's Office: Target of Time Inc.,* N.Y. Times, (Apr. 4, 1998), http://www.nytimes.com/1988/04/04/business/advertising-the-doctor-s-office-target-of-time-inc.html.

never before seen by our society.[340] Secondly, never before has social and natural science been so deep, intellectually encompassing, delicate and important for law and public policy.[341] Even the Supreme Court turns to scientific research for empirical data to support truth in legal decision making.[342] Truth, as philosopher John Stuart Mill once wrote, is a delicate creature.[343] The belief "that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplace," but which all experience and history refutes.[344] Truth and fact in modern society must be buttressed so as not to be overwhelmed by a whirlwind of propaganda.[345] Ironically, the free marketplace of ideas must

[340] *See* Scott M. Cutlip, *The Manufacture of Opinion, in* Impact of Mass Media: Current Issues 177, 184 (Ray Eldon Hiebert ed., 4th ed. 1999)(explaining the modern struggle in mass media communications to define the truth, citing the example of The Tobacco Institute and its public relations staff that spend upwards of $20 million dollars a year trying to soften the fact that 350,000 people die annually from causes linked to cigarette smoking.); Kevin Moloney, Rethinking Public Relations, 41 (2d ed. 2002).

[341] *See, e.g.* Fischer, *supra* note 31, at 167; Fuchs, *supra* note 11, at 431–36; Hendel, *supra* note 29, at 398; McLaughlin, *supra* note 8 at 930 ; Rik Scarce, *supra* note 31, at 87 (noting the hegemonic relationship between the state and scholarship).

[342] *See, e.g.*, Brown v. Board of Edu., 347 U.S. 483, 493–95 (relying on numerous social science and psychological studies involving the psychological, social and educational effect that segregated education has on colored children, and commenting that "Whatever may have been the extent of psychological knowledge at the time of Plessey v. Ferguson, this finding is amply supported by modern authority."); *see also* Vincent James Strickler and Richard Davis, *The Supreme Court and the Press, in* Media Power, Media Politics 45, 45 (Mark J. Rozell ed. 2003)(arguing that even the Supreme Court is influenced by press coverage and public discourse in society, as the court's only substantial power is the power of public persuasion).

[343] *See* John Stuart Mill, On Liberty 27 (Elizabeth Rapaport, 1987) [hereinafter Mill].

[344] *Id.* (explaining that history teems with instances of truth put down by persecution, and that if not suppressed forever, is often thrown back for centuries.)

[345] *See* Sen. George J. Mitchell, *The Media May Devour Democracy, in* Impact of Mass Media: Current Issues 300, 300–01 (Ray Eldon Hiebert ed., 1999)(noting that the contemporary requirement of controversy in news and political process coverage may devour democracy); Michael Parenti, *Methods of Media Manipulation, in* Impact of Mass Media: Current Issues 100, 120–24 (Ray Eldon Heibert ed., 1999) (arguing that the mass media has manipulated public opinion and discourse via numerous selective tactics including suppression by omission, aggressive attacks, labeling, face-value transmission of misinformation, false balancing, and framing); Moloney, *supra* note 340, at 41. The use of PR and propaganda in liberal modern free market oriented democracies has been by big business- in defense of their economic and political interests, and by governments, to maintain power or promote a social engineering agenda. *Id.* PR has manipulated public opinion in favor of ideas, values and politics that economic and political elites (some elected) have favored. *Id.* It occurs via hiding sources, low factual and cognitive content in relation to high emotional content, and one-way communications flow. *Id.* Few scholars have rebutted this premise. *Id.*

be shielded from the modern free market, as the free flow of information is of little use if such information is distorted by special interests.[346] This is not merely a state concern, but a duty of the state because the existence of publically identifiable truth is a precondition for democracy.[347] A privilege therefore must be granted to those professions who serve as a locus and greenhouse for fact-finding, untarnished by corrupted facts paid for by free enterprise.[348] The best institutional candidate for this role is academia's scholarly researcher, who toils not

[346] Stephen K. Medvic and David A. Dulio, *The Media and Public Opinion, in* Media Power and Media Politics 207, 215–18 (Mark J. Rozell ed, 2003) (noting the modern pressures on journalists and their corresponding ability to take even objective and verifiable polling data and report it in a way that is desirable and beneficial to the agency, thereby shaping public opinion). We live in a world much different than the one that existed for most of the Twentieth Century. *See* Abrams v. United States, 250 US 616, 630 (1919) (Holmes, J., Dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

[347] *See* J. Michael Sproule, Propaganda and Democracy: The American Experience of Media and Mass Persuasion 92 (1997) (explaining that scholars and commentators have had doubts about whether democracy's people were up to the task of twentieth-century life defined by the collision of big communications and traditional democracy); McLaughlin, *supra* note 8, at 690 ("The effectiveness of a democratic government depends on an informed public. Scholarly research, especially that of the social sciences, participates in democratic government as a constant and important source of both information and knowledge."). *see also Tillack,* paras. 55–60; Mill, *supra* note 343, at 33 ("When there is static convention that principles are not to be disputed, where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable."). *See generally,* Sroule, *supra* note 347. (providing an in-depth study of the relationship of propaganda to participatory democracy in the United States during the 20th Century). The value of oral history, such as that of Boston College's Belfast Project, is even more important to a thriving democracy. *Boston College Subpoena News,* The Belfast Project (last visited Mar. 30, 2012), http://bostoncollegesubpoena.wordpress.com/. As Cleophus Thomas Jr. once said, "The value of the Oral Tradition is its democracy; it doesn't give to an intellectual elite the exclusive right to shape a communal memory and the collective memory. It makes into a common wealth the story of our shared lives. It's something we share in common–and it's like a collection plate into which we can all put something: our stories, our myths and the ease with which we are able to, in some ways, cross boundaries." *Id.*

[348] *See* Dan Gillmor, We the Media: Grassroots Journalism by the People, for the People 209 (noting that Big Business, Big Media, government, entertainment, tech companies and other consumerist interests have begun to corral the Internet, once considered to be a robust free and democratic communications system).

for profit, but for humanity.[349] Any democratic constitutional order which seeks to preserve its function must assure the survival of this last bastille of truth.[350]

A federal statute may therefore represent a practical solution, but does not represent an expressive promulgation and constitutionally supported social solution.[351] Even given its practicality however, other more pragmatic reasons support a Constitutional resolution over a purely statutory one.[352] A Constitutionally rooted privilege would fill gaps that a federal statute would inevitably possess, and its coexistence would increase the seriousness with which a judge approached a researcher's interests when competing norms were at stake.[353] Constitutional recognition would also cement the interests of researchers and their confidential sources into Constitutional law, insulating them from federal statutes that could be heavily modified or repealed at the whim of public opinion.[354] Moreover, a qualified-privilege found in the First Amendment is more democratic in application and avoids large institutional categorizations.[355] As Justice White wrote in *Branzburg,* "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photo-composition methods."[356]

Towards First Amendment Recognition

Despite the unfavorable precedent and nearly non-existent jurisprudential foundation brought to light by *In Re Dolours Price,* the building blocks of a First Amendment-based qualified-

[349] *Cf* Kumar, *supra* note 337, at 315. When looked at in this light, the researcher plays a more pivotal role in the long run than the modern media, who are almost invariably controlled by for-profit interests. *Id.*
[350] *See* Dworkin, *supra* note 332, at 368; Lawrence K. Grossman, *The Electronic Republic, in* Impact of Mass Media: Current Issues 279, 279–82 (Ray Eldon Hiebert ed., 1999) (arguing that the emerging electronic republic will be a political hybrid including increased elements of direct democracy, bringing public opinion to the center stage of policy making, lawmaking and governance.); *see also,* Kent Greenfield, The Myth of Choice 47–69 (2011) (providing a compelling look at how our anatomical limitations affect our autonomy in decision making).
[351] *See* Dworkin, *supra* note 332, at 368; Grossman, *supra* note 350, at 280–82.
[352] *See* Nejelski, *supra* note 262, at 9–10.
[353] *See* Lee, *supra* note 323, at 88. *Compare In re Dolours Price,* at 40–48, *with Goodwin,* para. 39–40.
[354] *Cf* Lee, supra note 323, at 88 (making a similar argument in the context of state statutes). Imagine, for example, how quickly a social science field study of teenage Muslim radicalism in American mosques would lose federal statutory protection in the aftermath of a terrorist attack. *See, e.g.*, Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency,* 11 Lewis & Clark L. Rev. 11141, 11141 (2007) (noting how in the aftermath of 9/11, the "Global War on Terror" "marginalized the rule of law.").
[355] *See* Nejelski, *supra* note 262, at 9–10.
[356] *Branzburg,* 408 U.S., at 704.

privilege for researchers exist.[357] This is particularly true in cases such as Boston College's Belfast Project, where an explicit or strongly implied promise of confidentiality has been given to research participants.[358] The Supreme Court of the United States has long recognized that the main purpose of the First Amendment is to maintain the free and full flow of information.[359] Recent Supreme Court jurisprudence has recognized the right to gather information on matters of legitimate public concern.[360] The Supreme Court has also declared that confidentiality is necessary to the continued exchange of valuable information.[361] To this end, the court has most recently interpreted the Federal Rules of Evidence to clearly apply the federal privilege of psychologists and psychiatrists to confidential communications of licensed social workers in the course of psychotherapy, citing the "atmosphere of confidence and trust" required for effective treatment.[362] Finally, the court has found a constitutional interest in confidentiality and in avoiding the disclosure of personal matters.[363] With respect to academic

[357] *See, e.g.*, *In re Dolours Price,* at 34; O'Neil, *supra* note 26, at 48.
[358] *In re Dolours Price,* 6–7 ("The contract included language that guaranteed confidentiality 'to the extent that American law allows,' but Boston College nevertheless contends that despite the equivocal language in its guarantee, the promises of confidentially given to the interviewees were absolute."); O'Neil Affidavit ¶ 6; McIntyre Affidavit ¶ 9, Moloney Affidavit ¶ 29; O'Neil, *supra* note 26, at 48.
[359] *See, e.g.*, Rosenbloom v. Metromedia Inc., 403 U.S. 29, 51 (1971) (citing 6 Writings of James Madison, 1790–1802 336 (G. Hunt ed. 1906); Estes v. Texas, 381 U.S. 352, 539 (1956).
[360] *See* First National Bank v Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); Houchins v KQED Inc., 438 U.S. 1, 10–11 (1978) (quoting *Branzburg* that there is an undoubted right to gather news from anywhere so long as it is done by legal means); Stanley v. Georgia, 394 U.S. 557, 564 (1969)(noting that it is well established that the Constitution extends protection to the right to receive information and ideas).
[361] *See* McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 342 (1995) ("the interests in having anonymous works enter the marketplace of ideas *unquestionably outweigh*s any public interest in requiring disclosure as a condition of entry") (emphasis added); Talley v. California, 362 U.S. 60, 64–65 (1960) ("There can be no doubt that . . . an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."); Rovario v. United States, 353 U.S. 53, 59 (1957) ("The [informer's privilege] recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.").
[362] Jeffee v. Redmond, 518 U.S. 1, 9–10 (1996); Picou, *supra* note 264, at 157 (noting that case law seems to be developing that could extend this privilege to sociologists and cultural anthropologists).
[363] Whalen v. Roe, 429 U.S. 589, 598–600 (1977); Griswold v. Connecticut, 381 U.S. 479, 499 (1965); Bruce P. Brown, *Free Press, Privacy, and Privilege: Protection of Researcher- Subject Communications,* 17 Ga. L. Rev, 1009, 1027–48 (providing a thorough evaluation of the

freedom, the court has turned to the First and Fourteenth Amendments "to help ensure that academic institutions can continue to be forums for the *unfettered* exchange of ideas."[364] The court has given academic freedom "legal existence . . . confirmed in the Constitution, statutes, regulations, policy and contracts."[365]

Even *Branzburg* is not insurmountable should the Supreme Court decide to revisit the issue.[366] As Justice Douglas once noted in *Gideon v. Wainright,* "happily, all constitutional questions are always open... And what we do today does not foreclose the matter."[367] The court could use the fact that the decision does not apply explicitly to scholarly researchers, and decide to visit the issue anew under the banner of either free flow of information or academic freedom concerns.[368]

The court could also address the holding head on, and distinguish its application to confidential scholarly research.[369] The *Branzburg* decision in effect represented the adoption of the majority view that the burden should be placed on the journalist to prove irrelevance or bad faith; as opposed to the minority view that a presumptive privilege exists with the burden on the government to demonstrate otherwise.[370] The construction of this framework was predicated on a balancing of social interests that prospectively viewed the harm to journalistic endeavors as *de minimis* in comparison to public interests in crime fighting.[371] While judicial deference to the interests of law enforcement may not be easily shaken, an increased valuation of the importance of researcher confidentiality in the judicial calculus could serve to shift the burden framework and thereby militate this tendency.[372] Such a calculus could be redrawn on a spectrum of First Amendment sensitivities, and where researchers and participants enter into a

analytical framework that could arise to support a constitutionally based researcher-subject privilege).

[364] William H Daughtrey, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities,* 25 U. Rich. L Rev. 233, 233 (1991).

[365] Rapp, *supra* note 63, 277 (quoting James A. Rapp, Education Law 11–16).

[366] Nejelski, *supra* note 262, at 5–9.

[367] 372 U.S. 335, 346 (1963).

[368] *Id.* at 8; O'Neil, *supra* note 26, at 48; Rapp, *supra* note 63, at 268–81; Shelling, *supra* note 142, at 522–26.

[369] Nejelski, *supra* note 262, at 5–9; O'Neil, *supra* note 26, at 48.

[370] Nejelski, *supra* note 262, at 6 (explaining Justice Stewart's dissent in *Branzburg* that advocated for a privilege for a grand jury request that required the disclosure of confidences unless the government showed (1) that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment Rights; (3) demonstrate a compelling and overriding interest in the information; while also explaining that Justice Douglas wrote for an absolute privilege based on First Amendment interests that override other societal interests).

[371] *See Branzburg,* 408 U.S., at 695; Nejalski, *supra* note 262, at 8.

[372] Nejalski, *supra* note 262, 5–9.

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confidential relationship in the legitimate pursuance of social or scientific understanding, the combined interests of academic freedom and the free flow of information could be recognized to be so heightened that Constitutional protection is triggered.[373]

Regardless of how the court may decide to engineer its rapprochement, a constitutionally-based qualified researcher's privilege in both a criminal and civil context will require the Supreme Court, as head of the judicial bureaucracy, to rethink its value matrix.[374] The social value of research requiring confidentiality and its corresponding legal interest must be found to be weighty to justify the cost to the truth-finding function of the legal process.[375] The ECtHR has taken a long, hard look at this issue, and has found sufficient weight in the value social commentary lends to the continued existence of a free and democratic society—even in the face of compelling competing interests.[376] In *Sweezy v. New Hampshire,* the United States Supreme Court declared:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[377]

And yet we live in an America where the law does not fully allow for the legal protection of activities necessary to the continued survival of such an atmosphere.[378] We live in a country

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[373] *See* Rapp, *supra* note 63, at 279–80. *see also In re Dolours Price,* at 4–8, 45–46 ("His 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 disclosure the sources of such information.") (quoting Doe, 640 F.2d, at 333).
[374] *See* Nejelski, *supra* note 262, at 5–9; Stone, *supra* note 47, at 19. *Compare* Branzburg, 408 U.S., at 690 *with Goodwin,* paras. 39–40. *see also Trammel,* 445 U.S. at 50–51 (describing that the recognition of an evidentiary privilege must "promote sufficiently important interests to outweigh the need for probative evidence" and must rely on the existence of "[a] public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth").
[375] Stone, *supra* note 47, at 19. *Compare Goodwin,* para 39–40, *and Tillack,* paras. 65–68 w*ith Branzburg,* 408 U.S. at 690 and *In re Dolours Price,* at 40–48.
[376] See Harris at 446, 466; *Gillberg,* paras. 121–23; *Goodwin,* para. 39–40.
[377] Sweezy v. New Hampshire, 354 US 234, 250 (1957).
[378] *See Branzburg,* 408 U.S., at 690; *Scarce,* 5 F3d, at 400–02; *In re Dolours Price* 40–48; *see also* American Sociological Association Amicus Brief, filed for Rik Scarce at 8–15, *in Scarce,* 5F.3d, 397 (arguing that First Amendment interests are furthered by the recognition of a privilege rooted in the social and ethical value of research involving information received in confidence).

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where the United Kingdom can ironically do to Boston College and other American universities through the exploitation of American law what it would most likely be condemned for doing under Article 10 of its own European human rights law.[379] We live in such a state where Boston College must plea with students studying abroad in Ireland "to avoid wearing . . . American or Boston College logos" and avoid "political discussions involving Northern Ireland in public settings," all for fear of retribution over the forced disclosure of an oral history project.[380] We live in a country where researchers who refuse to betray ethical guidelines and promises made to their participants are arrested and thrown in jail.[381]

Until this plight is recognized by the Supreme Court, and the societal value bequeathed by our fact-finders, educators, and questioners is finally allowed to translate into law, the foundation for a researcher's privilege will remain an amorphous fantasy.[382] And as long as such a foundation is missing, a holding such as: "*and we find that the researcher's interests in gathering, disseminating, and imparting legitimate scholarly information in a free and democratic society outweigh in this case the important governmental investigatory interests at bar,*" will be impossible in America.[383] When such a holding is jurisprudentially impossible in a society, that society cannot with a straight face pride itself on being open, tolerant, and free—and will, as the Supreme Court has warned, "stagnate and die."[384]

Conclusion

Boston College's recent struggle to protect an oral history archive from subpoena presents a unique opportunity to reevaluate the current state of a researcher's privilege in America. The

[379] *Compare Gillberg,* paras 121–23 *and Tillack,* paras. 65–68 *and Goodwin,* para. 39–40, *with Branzburg,* 408 U.S., at 690 *and In re Dolours Price,* at 40–48. Domestic law in the United Kingdom also recognizes a presumptive immunity in defined circumstances, subject to being overridden on enumerated grounds. Contempt of Court Act 1981 (U.K) 1981, c. 49. Section 10 of the provision reads "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the *prevention* of disorder or crime. *Id.* (emphasis added).
[380] David Cote, *Admins Alert Students of Belfast Project,* The Heights, (Mar. 30, 2012), http://www.bcheights.com/news/admins-alert-students-of-belfast-project-1.2766099#.TzEqM-O3DoR.
[381] *See e.g.*, O'Neil, *supra* note 35, at 843–45; Scarce, *supra* note 31,at 87; Theodore B. Olson, Commentary, A Much Needed Shield for Reporters, Wash. Post, June 29, 2006, at A27.
[382] *See In re Dolours Price,* at 40-–48; Daughtrey, *supra* note 364, at 233 (emphasis added) ("The courts serve as the ultimate guardians of the free expression of ideas in colleges and universities throughout the United States"); *see also* Scarce, *supra* note 31, at 92–3.
[383] *See* Nejelski, *supra* note 262, 5–9; O'Neil, *supra* note 26, at 48. *see also, Branzburg,* 408 U.S., at 690. *Compare In re Dolours Price* at 40–48 *with Goodwin,* para 39–40.
[384] *See Sweezy,* 354 U.S., at 250; *In re Dolours Price,* at 40–48.

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case presents the courts with a factual scenario in which the values of open and free academic research directly conflict with the compelling interests of law enforcement. The resulting opinion, *In Re Dolours Price,* demonstrates that hope for such a privilege has and continues to exist in a precarious state in American law. The European Court of Human Rights however, has taken a drastically different stance on the issue, casting a solid foundation for a qualified-privilege to protect social commentators and their confidential sources. In light of European human rights law, the most preferred route for an American solution is the recognition of a qualified researcher's privilege as a constitutionally rooted First Amendment right. Such a privilege would accurately reflect the important role that scholarly research plays in late modern society. For this to occur however, the Supreme Court of the United States must address its prior precedent, and must recalculate the way it weighs the value of scholarly research in a free and democratic society.