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Forced Disclosure of Academic Research

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I. INTRODUCTION

Courts are uncertain about whether academic research deserves special protection. Procedural rules generally provide for broad discovery, suggesting that courts should enforce reasonable requests for research data. Conversely, academic freedom implies that academics should receive special protection against forced disclosure, and courts should not honor requests for research material. Courts that receive subpoena requests for academic research, therefore, may consider two methods of analysis that often lead to different results. One approach considers subpoenas of academic research under the procedures and principles that rule 45 of the Federal Rules of Civil Procedure (Federal Rules)[1] and its companion rules and case law provide. A second approach, the academic freedom approach, considers subpoena requests under the first or fourteenth amendments to the United States Constitution, or the common law, codified in rule 501 of the Federal Rules of Evidence.

This Note advocates that courts follow the procedures that rule 45 and its progeny provide to evaluate the special concerns of academic researchers, rather than rely on the Constitution to shield the academic researcher under the mystical guise of academic freedom. Part II of this Note examines the four cases in which federal courts have decided whether to force an academic to disclose his research. Part III focuses on the guidelines that the relevant Federal Rules establish for forced disclosure. Part IV discusses the academic freedom approach to forced disclosure and the common law and constitutional arguments that favor academic freedom. Part V analyzes the Federal Rules and academic freedom approaches and concludes that courts should use the Federal Rules to determine whether to disclose subpoenaed academic research and avoid unnecessary constitutional analysis.

II. THE PRINCIPAL CASES

Only four federal court decisions have addressed the issue of whether to enforce a subpoena that seeks disclosure of academic research: *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*,[2] *Dow Chemical Co. v. Allen*,[3] *Wright v. Jeep Corp.*,[4] and *Andrews*

1. All references to rule numbers in this Note refer to the Federal Rules of Civil Procedure unless the author indicates otherwise.
2. 71 F.R.D. 388 (N.D. Cal. 1976).
3. 672 F.2d 1262 (7th Cir. 1982).
4. 547 F. Supp. 871 (E.D. Mich. 1982).

v. Eli Lilly & Co.[5] In *Richards, Wright,* and *Andrews*, the courts applied a balancing test similiar to the approach that the Federal Rules adopt. In *Dow Chemical* the court also used the federal rules approach, but additionally endorsed the academic freedom analysis. A review of these cases suggests the volatility that still exists in a seemingly dormant area of the law.

A. Richards of Rockford, Inc. v. Pacific Gas and Electric Co.

In *Richards*[6] the plaintiff subpoenaed information that an academic researcher had compiled during confidential interviews with employees of Pacific Gas and Electric Company. The interviews were part of a research project examining the internal decision-making process that the defendant used to make environmental decisions.[7] The issue before the court[8] was whether the plaintiff's interest in obtaining the subpoenaed information outweighed the public interest in ensuring the confidentiality of the academic's research.[9]

The *Richards* court first recognized the presumption that a party to a lawsuit has a right to every person's evidence.[10] The court noted, however, that enforcing the subpoena would ruin the academic's research project because he could not obtain the data that he needed without promising his sources confidentiality.[11] Forced disclosure would destroy confidentiality and thus "severely stifie research."[12] In balancing the interests of the academic against those of the requesting party, the court considered the civil nature of the trial, the nonparty status of the deponent, the ease of obtaining the requested information from other sources, and the significance of the subpoenaed information to the requesting party.[13] The court concluded that the subpoenaed information was largely supplemental, and held that because the harm resulting from

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5. 97 F.R.D. 494 (N.D. Ill. 1983).

6. 71 F.R.D. 388 (N.D. Cal. 1976).

7. *Id.* at 389. The interview data was relevant because one interview question concerned the reason the defendant purchased the plaintiff's product. *Id.*

8. Although settlement of the conflict on the eve of trial rendered moot the question of whether to enforce the subpoena, the court issued an opinion because of the "importance and novelty of the question presented." *Id.* at 388-89.

9. *Id.* at 389.

10. *Id.* (citing Blackmer v. United States, 284 U.S. 421, 438 (1932)).

11. *Richards*, 71 F.R.D. at 390.

12. *Id.*

13. *Id.* The court relied on the broad discretion that courts gain from rule 26 as authority to apply the interest balancing test. *Id.* at 389, 391.

forced disclosure greatly exceeded the requesting party's need for the information, the subpoena was unenforceable.[14] The *Richards* court, therefore, held that the academic's research was not discoverable under the Federal Rules.[15] Although the court analogized between the confidentiality of an academic's research and of a newsman's sources, the latter of which receives first amendment protection,[16] the court refused to decide whether the public interest in the confidentiality of academic research also deserves constitutional protection.[17]

B. Dow Chemical Co. v. Allen

In *Dow Chemical*,[18] Dow asked the Environmental Protection Agency to issue an administrative subpoena[19] demanding data from an ongoing experiment that exposed monkeys to various levels of TCDD[20] to determine when the monkeys incurred injuries.[21] When researchers discovered no signs of damage to monkeys that received low levels of TCDD, Dow Chemical Company, a producer of TCDD, requested the data to prove that the chemical was safe.[22] The academic researchers balked at the request for disclos-

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14. *Id.* at 390-91.
15. *Id.* at 391.
16. *Id.* at 390.
17. *Id.*
18. 672 F.2d 1262 (7th Cir. 1982).
19. Administrative agencies issue administrative subpoenas. Either the agency issuing the subpoena, 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 20.01[1] (1983) [hereinafter cited as MEZINES], or a nonagency party to an administrative proceeding, 4 MEZINES at § 23.03[6], may request the subpoena. The Federal Rules establish a framework used in some agency level proceedings for determining whether to force disclosure of information subject to an administrative subpoena. *See* 4 MEZINES at § 23.01[2]; 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 45.02[2] n.4 (2d ed. 1984). The Federal Rules, however, do not provide a complete solution to the conflict concerning forced discovery in an administrative context. 5A J. MOORE, *supra*, at ¶ 45.02[2]. Rather, the courts must look to the pertinent statutes and regulations to see if Congress has established any special grants or limitations on a particular agency's ability to issue administrative subpoenas. The *Dow Chemical* analysis, however, closely follows the Federal Rules' framework. The court balances factors like the relevance of the requested information, the requesting party's need for the information, and the subpoenaed person's burden of compliance. *Dow Chemical*, 672 F.2d at 1270-74; *see infra* notes 72-116 and accompanying text. For purposes of this Note, whether the subpoena arose in an administrative law context is irrelevant. This Note focuses on the framework under the Federal Rules, not the framework under a special grant of power by Congress to an administrative agency.
20. TCDD stands for the chemical tetrachlorodibenzo-p-dioxin. *Dow Chemical*, 672 F.2d at 1266.
21. The facts of *Dow Chemical* are set forth in the district court opinion, United States v. Allen, 494 F. Supp. 107, 108-11 (W.D. Wis. 1980).
22. United States v. Allen, 494 F. Supp. at 110, 112-13. Dow Chemical Company re-

ure, and Dow sought to enforce the subpoena. The administrative law judge granted the motion for disclosure, stating that the parties had the right to see "any and all relevant evidence which might bear on the final decision."[23] The federal district court, however, overturned the motion on appeal,[24] and the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.[25]

The court of appeals cited administrative laws of discovery as the basis for its decision. The court balanced the relevance of the subpoenaed information and the requesting party's need for the subpoenaed information against the researchers' burden of compliance through disclosure of the requested data. The court concluded that because the researchers' burden of compliance outweighed the requesting party's need for the information, the

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quested the information for use at an Environmental Protection Agency hearing that would decide whether the company could continue manufacturing TCDD. *Id.* The Environmental Protection Agency controls the registration of TCDD under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (1982).

23. United States v. Allen, 494 F. Supp. at 109. The standard for determining relevence, however, is problematic. If a nonagency party requests a subpoena when the requested information normally is not subject to a subpoena, *see* Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1233 (2d Cir. 1976), or when the requested information must be probative rather than merely relevant, *see Dow Chemical*, 672 F.2d at 1270-71 n.13, the courts may require the nonagency party to show something beyond the mere relevance and reasonableness of the subpoena request.

If the agency issues a subpoena for its own use the courts define relevance in terms of whether the information that the parties seek would further the agency's purpose in issuing the subpoena. *See* FTC v. Anderson, 631 F.2d 741, 745-46 (D.C. Cir. 1979). For example, if the agency's purpose in issuing a subpoena is to investigate possible violations of the law, courts view tbe relevance of the subpoenaed information in light of the general purpose of the investigation. *See* FTC v. Anderson, 631 F.2d at 746 (quoting FTC v. Texaco, 555 F.2d 862, 874 (D.C. Cir.), *cert. denied*, 431 U.S. 974 (1977)); *cf.* SEC v. Arthur Young & Co., 584 F.2d 1018, 1023, 1031 (D.C. Cir. 1978) (placing limitations and standard of reasonableness on relevance). Defining relevance narrowly would stifie an agency's investigatory capabilities and thus serve as a disincentive and impediment to the investigatory process. FTC v. Texaco, 555 F.2d at 879. In an adjudicative setting, however, the agency's purpose in issuing a subpoena is to ensure that certain evidence is available for use against a violator of the law. Because the adjudicative hearing does not require as broad a definition of relevance as an investigation, the court can focus upon the relationship between a particular piece of information and a specific matter at the hearing or charge in the complaint. *See Dow Chemical*, 672 F.2d at 1271-72 n.13; FTC v. Anderson, 631 F.2d at 746. Courts have recognized that while an agency "could have required production of the materials . . . in a *pre*-complaint investigation, it could not . . . seek sucb information via *post*-complaint discovery procedures." FTC v. Browning, 435 F.2d 96, 102 (D.C. Cir. 1970). Thus, the relevance of an administrative subpoena may depend on whether a party makes the request in conjunction with an agency investigation or adjudication.

24. United States v. Allen, 494 F. Supp. at 113.

25. *Dow Chemical*, 672 F.2d at 1278.

subpoena was not enforceable.[26]

The majority also reasoned that the subpoena would violate the researchers' right to academic freedom.[27] Although the court conceded that under the present facts it did not have to consider the academic freedom question, the court nonetheless suggested that academic freedom is always at issue when parties try to force an academic to disclose his research.[28] The court warned that forced disclosure is "an intrusion into university life which would risk substantially chilling the exercise of academic freedom."[29]

C. Wright v. Jeep Corp.

In *Wright*[30] the defendant subpoenaed an academic's published study and its underlying data, which concluded that the defendant's jeep had a disproportionately high rollover rate in accidents.[31] In order to test the validity of the academic's conclusions, the defendant requested that the academic disclose the data which he compiled during the study. The academic objected to the subpoena, claiming that a constitutional and common-law privilege protected his data, and that the request for information would place too onerous a burden on the academic.[32] The court identified the issue as whether a party's need for evidence justified subpoena-

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26. *Id.* The court stated that Dow did not demonstrate a sufficient need for the information because: (1) Dow requested the information in an adjudicative proceeding, *id.* at 1267-68, *see Allen*, 494 F. Supp. at 111-12; (2) the subpoenaed data was from ongoing research, *Dow Chemical*, 672 F.2d at 1273-74, and (3) the academic researchers were not parties to the adjudication, *id.* at 1277.

27. *Dow Chemical*, 672 F.2d at 1274-76. Judge Fairchild, who wrote for the majority, has written opinions for several academic freedom cases. In addition to *Dow Chemical*, Judge Fairchild wrote two majority opinions holding that academic freedom is a valid constitutional concern. *See* Eichman v. Indiana State Univ., 597 F.2d 1104 (7th Cir. 1979); Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972). He also wrote two dissenting opinions when the majority failed to extend constitutional protection to academic freedom. *See* Fern v. Thorp Pub. School, 532 F.2d 1120 (7th Cir. 1976); Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

28. *Dow Chemical*, 672 F.2d at 1276-77.

29. *Id.* at 1277. In a concurring opinion, Judge Pell objected to the majority's reliance upon the notion of academic freedom. *Id.* at 1278. Judge Pell did not reject the academic freedom argument explicitly, but he did state that the majority's discussion of academic freedom was unnecessary because the present facts afforded an adequate basis for the decision. *Id.* at 1279. Judge Pell also pointed out that the record was not complete enough to rule upon the academic freedom issue because neither the parties to the action nor the district court addressed the issue. Only the State of Wisconsin raised the issue in an amicus curiae brief. *Id.* at 1278.

30. 547 F. Supp. 871 (E.D. Mich. 1982).

31. *Id.* at 873.

32. *Id.*

ing a nonparty academic's research.[33]

The court concluded that it should follow the procedures set forth in the general discovery provisions of rule 26(b)(1), which allows discovery of all relevant information if no exceptions apply.[34] After determining that the subpoenaed information was relevant because the plaintiff needed the study for trial, the court considered the arguments that the academic advanced to resist the subpoena. First, the court determined that no first amendment privilege exists to protect the researcher from disclosing information that is relevant to the court proceedings.[35] Second, the court held that no common-law privilege protects academic research, and the court refused "to create a new privilege that would shield academics from testifying."[36] Last, although the court conceded that the subpoena imposed a burden upon the academic,[37] the court issued a protective order under rule 45(b)[38] to ensure that the burden which the court imposed on the academic researcher was not unreasonable.[39] The *Wright* court then denied the academic's motion to quash the subpoena, but required that the defendant pay the academic for the reasonable cost of supplying the documents and for the ensuing inconvenience.[40]

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33. *Id.* at 872.

34. *Id.* at 874. Rule 26(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery . . . ." FED. R. CIV. P. 26(b)(1); *see infra* notes 75-78 and accompanying text.

35. 547 F. Supp. at 875. While the court recognized that the Constitution afforded some protection to researchers attempting to protect confidential information, the court found that the first amendment did not apply because the subpoenaed information was not confidential. *Id.* at 876.

36. Rule 501 of the Federal Rules of Evidence directs courts to apply state law to questions concerning privileges when state law supplies the rule of decision. While the court found that Michigan law was controlling, the court concluded that Michigan law did not provide the academic with a privilege to resist the subpoena. *Id.* at 875; *see infra* note 152 and accompanying text.

37. *See infra* note 88 and accompanying text.

38. For the text of rule 45(b), see *infra* note 64. *See also infra* note 65.

39. 547 F. Supp. at 876-77; *see infra* notes 126-27 and accompanying text.

40. 547 F. Supp. at 876-77. The court stated that, in certain circumstances, the cost which a court imposes upon a party requesting a subpoena could include a fee for a portion of the original research expenses. The court, however, did not specify the circumstances that would justify charging this fee. *Id.* at 877.

D. Andrews v. Eli Lilly & Co.

In *Andrews*[41] a medical researcher sought to quash a rule 45(b)[42] subpoena for a registry that he had compiled over a ten year period as part of a research project.[43] The medical researcher had studied the relationship between the ingestion of a certain drug[44] by pregnant women and a glandular cancer of the vagina in their female offspring.[45] A drug manufacturer subpoenaed the medical registry for use in a lawsuit that victims of the cancer brought against the drug manufacturer.[46] The subpoena demanded production of all records and testimony concerning persons in the registry who either had the disease or had a history of exposure to the drug.[47]

In deciding whether to enforce the subpoena, the court employed a hardship test, balancing the "hardship imposed on [the manufacturer] by quashing the subpoena against the hardship imposed on [the medical researcher] by permitting . . . discovery" of the registry.[48] The manufacturer claimed that without the subpoenaed information it could neither test the validity of the medical researcher's conclusions, nor prepare adequately to cross-examine the opposing party's witnesses.[49] The court did not accept this argument.[50] Instead, the court first found that disclosure of the registry data would threaten the confidentiality between the researcher and the participants in his study. Enforcing the subpoena would jeopardize the entire study by hindering, if not halting, the flow of

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41. 97 F.R.D. 494 (N.D. Ill. 1983).

42. For the text of rule 45(b), see *infra* note 64.

43. *Andrews*, 97 F.R.D. at 496.

44. The drug was diethylstilbestrol (DES). *Id.*

45. The registry contains the names of women who had developed vaginal adenocarcinoma, a glandular cancer, and indications of whether the patients' mothers had ingested DES while pregnant. *Id.*

46. Plaintiffs in product liability suits against manufacturers of DES often have relied on this particular study to establish causation between the use of DES and adenocarcinoma. *Id.*

47. *Id.* at 497. The medical researcher maintained that compliance with the subpoena would result in the disclosure of every record contained in the registry. *Id.*

48. *Id.*

49. *Id.*

50. The court characterized the manufacturer's need for the information as "nothing more than a speculative hope that [the manufacturer] will find something that undermines the widely-accepted conclusions of the medical profession about DES. Such speculation does not make for a strong claim of need." *Id.* at 498. The court reasoned that because ample evidence corrobrated the researcher's findings, the likelihood that access to the registry information would assist the manufacturer was slim. *Id.* at 498 n.12.

data into the registry.[51] The court understood that exposing the registry would destroy the researcher's work on the causes and treatments for the vaginal cancer.[52] Second, the court felt that forced disclosure of information from an ongoing study places a substantial burden on researchers. Premature disclosure of unanalyzed data could suggest inaccurate conclusions and discredit the entire study.[53] Early disclosure also could have a negative impact on the exchange of ideas between researchers.[54] Last, the *Andrews* court did not issue a protective order because the court concluded that the order would not alleviate the burden which the subpoena would impose by forcing the disclosure of information from the ongoing research.[55] Instead the court refused to enforce the rule 45 subpoena request.[56]

Although the researcher advanced the argument that a first amendment privilege protected his research, the court did not address this issue because it believed that rule 45 was broad enough to accommodate the researcher's claim.[57] The court, therefore,

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51. *Id.* at 499-500. The manufacturer argued that removing the names from the registry would preserve confidentiality. The medical researcher reported that the size of the registry made deletion of the names impossible. In addition, the nature of the registry information alone would reveal the identity of the patients and doctors. *Id.* at 502.

52. *Id.* at 499-500. The court stated: "All parties agree that the Registry is truly unique; there is no other repository of data like it." *Id.* at 496.

53. *Id.* at 502. The court quoted from the Affidavit of Dr. Leonard T. Kurland of the Mayo Clinic: "[G]iven an opportunity to complete the research unobstructed by disclosure request[s], would [provide] the greatest likelihood of achieving tested and supported conclusions. Any forced premature disclosure could subject the researchers to professional ridicule and criticism." *Id.* at 502-03; *see infra* notes 112-16 and accompanying text.

54. 97 F.R.D. at 503. Quoting from the Affadavit of Robert E. Scully (Harvard Medical School), the court stated:

> Involuntary disclosure of this uninhibited communication among scientists to parties that are not participants in the research demolishes the freedom of thought and interchange of ideas that is so essential to productive research. Also, interpretation of the speculations, hypotheses, and possible or probable conclusions by outsiders carries a serious risk of being faulty, resulting in . . . misinformation and possibly unjustifiably discrediting the [researcher].

See infra notes 112-16 and accompanying text.

55. 97 F.R.D. at 503. The party had offered to pay the expenses that the researcher incurred in complying with the subpoena in an effort to minimize the burden to the researcher. The court, however, stated that the party's offer failed to address the true nature of the burden imposed—damage to the registry because of a breach of confidentiality, and damage to the project because of premature disclosure of data from an ongoing research project. *Id.* at 497 n.8.

56. The court did allow forced disclosure of the registry data pertaining to the specific plaintiffs suing the party because the court reasoned that the plaintiffs had waived their rights to confidentiality by bringing suit. *Id.* at 504. The court quashed those parts of the subpoena demanding disclosure of information concerning people who did not bring suit. *Id.*

57. *Id.* at 498-99 n.13. For the text of rule 45, see *infra* note 64. The court also did not

characterized the medical researcher's first amendment claim as one consideration that the court must weigh against the requesting party's need for the information.[58]

E. Summary of Principal Cases

Courts enjoy great flexibility when deciding whether to enforce a subpoena for academic research. One court has employed an interest balancing test and did not consider the constitutional or common law privileges of academic freedom.[59] Other courts have refused to reach an academic freedom claim when the Federal Rules provide an adequate remedy.[60] Only one court has relied on the academic freedom privilege as a justification for its decision.[61] Most courts consider factors such as the relevance of the requested information, the requesting party's need for the information, and the burden that the subpoena would impose on the academic researcher.[62] When evaluating the researcher's burden, courts generally consider whether the subpoena breaches an agreement of confidentiality between the researcher and the participants, whether the subpoena requests information from an ongoing research project, and whether protective measures are available to ensure that a request for information is not unreasonable.[63]

III. Forced Disclosure Under Rule 45

Rule 45[64] establishes the framework that courts should use to

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discuss the common-law privilege.

58. *Id.* at 498-99 n.13, 500-02.

59. *See* Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982).

60. *See* Andrews v. Eli Lilly & Co., 97 F.R.D. 494 (N.D. Ill. 1983); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976).

61. *See* Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982).

62. *See, e.g., Andrews*, 97 F.R.D. at 497; *Richards*, 71 F.R.D. at 390; *cf. Dow Chemical* 672 F.2d at 1270-77 (addressing academic freedom as well as relevance, need, and burden).

63. *See, e.g., Dow Chemical*, 672 F.2d at 1276, 1277-78; *Andrews*, 97 F.R.D. at 497-503; *Richards*, 71 F.R.D. at 390.

64. Rule 45 of the Federal Rules of Civil Procedure states in part:

> **(a) For Attendance of Witnesses; Form; Issuance.** Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

decide whether to issue and enforce a subpoena.[65] The rule controls the forced attendance of witnesses[66] and deponents[67] and the forced production of documentary evidence.[68] Rule 45 applies to any person, regardless of whether he is a party to an action.[69] The

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(b) For Production of Documentory Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the suhpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

. . . .

(d) Subpoena for Taking Depositions; Place of Examination. (1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. . . . The subpoena may command the person to whom it is directed to produce . . . designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

FED. R. CIV. P. 45.

65. A court may issue two types of subpoenas under rule 45. Rule 45(a) provides for a subpoena to compel the attendance of witnesses—formally known as a subpoena *ad testificandum*. Rule 45(b) provides for a subpoena to compel the production of documentary evidence—formally known as a subpoena *duces tecum*. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil §§ 2453-54 (1971) [hereinafter cited as WRIGHT & MILLER]; *see also* 5A J. MOORE, *supra* note 19, at ¶¶ 45.04-.05. The differences between rule 45(a) and rule 45(b) subpoenas are numerous. For example, under rule 45(b) the court may quash a subpoena for documentary evidence, but the court cannot quash a subpoena for the attendance of witnesses under rule 45(a). Thus, any protective measure that a person requests under rule 45(a) must come from the protective orders available under rule 26(c). Despite the differences between the two types of rule 45 subpoenas, the analysis that courts undertake to determine whether to enforce either subpoena is the same: the information must be relevant, or the court must balance the requesting party's need for the information against the burden that the subpoena would impose upon the person subject to the subpoena. Because the same analysis applies to both subpoenas, this Note refers to the rule 45(a) subpoena *ad testificandum* and the rule 45(b) subpoena *duces tecum* simply as a subpoena.

66. FED. R. CIV. P. 45(a); *see* 5A J. MOORE, *supra* note 19, at ¶ 45.04.

67. FED. R. CIV. P. 45(d); *see* 5A J. MOORE, *supra* note 19, at ¶¶ 45.07-.08.

68. FED. R. CIV. P. 45(b); 5A J. MOORE, *supra* note 19, at ¶ 45.05.

69. FED. R. CIV. P. 45. 5A J. MOORE, *supra* note 19, at ¶ 45.02[3]; *cf.* rule 34 (controlling the production of documents and discovery of parties). For a discussion of the distinction between rule 45 and rule 34, see 4A J. MOORE, *supra* note 19, at ¶ 34.02; 9 WRIGHT & MILLER, *supra* note 65, at § 2452.

Courts disagree on whether they should consider the distinction between parties and nonparties when deciding whether to force disclosure of information. *See In re* Coordinated Pretrial Proceedings, 669 F.2d 620, 623 (10th Cir. 1982). *Compare* Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976) *with* FTC v. Dresser Indus., Inc., 1977-1 Trade Cas. (CCH) ¶ 71, at 489, 491. In cases that address the forced disclosure of academic research, courts should determine whether the academic is a party to

information that the person seeks, however, must be for use in an adjudicative setting.[70] Although rule 45 broadly defines the materials a party may request,[71] certain documents are outside the scope of the rule. Courts employ a three-step analysis to determine whether to force disclosure of subpoenaed information under rule 45. First, courts determine whether the requested information is within the scope of rule 45. Second, courts must evaluate the requesting party's need for the subpoenaed information. Last, courts should balance the requesting party's need against the burden that the request for information imposes upon the person subject to the subpoena. If the burden of complying with the subpoena is unreasonable, courts then must determine whether a protective device could lessen the burden that the subpoena imposes.

A. The Scope of Rule 45: Relevance

If a request for the forced disclosure of information is unreasonable and oppressive, courts will not enforce it.[72] When deciding

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the litigation. *Dow Chemical*, 672 F.2d at 1262; *Richards*, 71 F.R.D. at 390. If the academic researcher is a party, courts should treat him the same as other parties to the litigation regarding requests for information. *See* 4 MEZINES, *supra* note 19, at § 26.65; 4A J. MOORE, *supra* note 19, at ¶ 34.02. *But see infra* notes 112-116 and accompanying text (discussing the burdens peculiar to academics). An academic researcher who is a party cannot evade proper information requests from adverse parties in light of the liberal discovery rules governing parties to a lawsuit. *See infra* note 135; 4 J. MOORE, *supra* note 19, at ¶ 26.02. Conversely, when the academic is not a party, courts should give the academic's research special consideration when deciding whether to enforce a subpoena. *Dow Chemical*, 672 F.2d at 1277; *see* United States v. Allen, 494 F. Supp. at 109.

70. Courts issue subpoenas to assure that an adjudicative body has all the relevant information that it needs to decide a controversy. 9 WRIGHT & MILLER, *supra* note 65, at § 2451. In the absence of an adjudication, the Federal Rules do not provide for the forced inspection of documents. Sullivan v. Dickson, 283 F.2d 725 (9th Cir. 1960), *cert. denied*, 366 U.S. 951, *cert. denied*, 368 U.S. 884 (1961). Thus, rule 45 does not require an academic researcher to disclose information during the investigatory stages of a suit. Unfortunately, no clear demarcation exists between what constitutes adjudication and what constitutes investigation. A party may seek forced disclosure of information under the guise of a pending action when the nature of the action still may be highly investigative. In that case, the Federal Rules afford the federal district courts great discretion in controlling the discovery process. *See* Federal Election Comm'n v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980). District courts should refuse to enforce any subpoena that is purely speculative, *see Andrews*, 97 F.R.D. at 498 (N.D. Ill. 1983), and not a reasonable request that directly relates to the issues before the adjudicative body. *But see supra* note 19 (discussing the use of administrative law subpoenas by governmental agencies in an investigative rather than adjudicative setting).

71. The rule states: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . . ." FED. R. CIV. P. 45(b).

72. FED. R. CIV. P. 45(b); *see supra* note 65; Continental Coatings Corp. v. Metco, Inc., 50 F.R.D. 382, 384 (N.D. Ill. 1970); Dart Indus. Inc., v. Liquid Nitrogen Processing Corp., 50

whether a request for information is unreasonable and oppressive, courts generally focus on the threshold question of whether the subpoenaed information is relevant.[73] If the court determines that the information is relevant, the party requesting the subpoena has met the first test.[74] Rule 45(d) incorporates the rule 26(b)(1) relevance of requested information standard.[75] Information is relevant if it is "reasonably calculated to lead to the discovery of admissible evidence."[76] While this standard is quite broad and favors the party requesting the subpoena,[77] if the academic researcher can convince the court that the subpoenaed information is not relevant, he does not have to disclose its contents.[78]

F.R.D. 286, 290 (D. Del. 1970); *see also* 5A J. MOORE, *supra* note 19 at ¶ 45.05[1].

73. *See Andrews*, 97 F.R.D. at 497.

74. If the court determines that the requesting party met the first test, the court then must undertake a complete analysis of the case to determine whether to enforce the subpoena. The court will consider several factors, including the burden that the subpoena imposes, *see infra* notes 88-116 and accompanying text, and the need for the subpoenaed information, *see infra* notes 79-87. *See* United States v. IBM, 83 F.R.D. 97, 104 (S.D.N.Y. 1975); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 82 (E.D.N.Y. 1975).

75. For the text of rule 45(d), see *supra* note 64. Some commentators believe that the 26(b) standard only applies to the rule 45(d) subpoena *duces tecum* at depositions. *See, e.g.*, 9 WRIGHT & MILLER, *supra* note 65, at § 2452. The similarity between the language of rule 45(b) and rule 45(d), however, suggests that the standard of rule 26(b) should apply to rule 45(b) as well. For the text of the relevant part of rule 26(b), see *infra* note 136.

76. FED. R. CIV. P. 26(b)(1); *see* United States v. IBM, 83 F.R.D. at 105-06; 4 J. MOORE, *supra* note 19, at ¶ 26.56. The Federal Rules of Evidence also define relevant evidence: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; *see* Gray v. Board of Higher Educ., 92 F.R.D. 87, 90 (S.D.N.Y. 1981), *rev'd on other grounds*, 692 F.2d 901 (2d Cir. 1982).

77. *See* United States v. AT&T, 461 F. Supp. 1314, 1341-43 (D.D.C. 1978).

78. *See supra* note 70. Courts must ensure that the subpoenaed information bears some relation to the pleadings to prevent parties from engaging in hopeless and time-consuming "fishing expeditions." Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 886-87 (D.N.J. 1967). Courts, however, must not stifle the discovery process by strictly applying the relevance standard if "the precise litigation posture has not yet become known." *Gray*, 692 F.2d at 906. The timing of the request for information is crucial. In the early stages of discovery, when the parties have not yet defined the issues clearly, a large body of information satisfies the rule 26(b) test because this information may lead to the discovery of admissible evidence. The courts, therefore, will find the information relevant. *See* 4 J. MOORE, *supra* note 19, at ¶ 26.56[1]. Conversely, as the parties focus the issues more narrowly near the trial date, a smaller pool of information satisfies the rule 26(b) standard, and courts will tend to find information irrelevant. Thus, although courts believe that most information is relevant, the likelihood of a court finding information irrelevant increases as the time for trial approaches.

B. Need For the Subpoenaed Information

Once the court has established that the subpoenaed information is relevant, the court must analyze the requesting party's need for that information.[79] The court confronts two issues. First, the court must determine the importance of the information to the requesting party. Courts use different tests to decide whether information is important. One court recently held that the requesting party must demonstrate a "particularized need."[80] Another court created a mathematical formula and defined need as "a function of the probative value of the evidence [which the requesting party] hopes to discover multiplied by the likelihood that it will be discovered as a result of the instant subpoena."[81] Regardless of the test that the court uses, if it finds the information is crucial to the requesting party's case, the court will order forced disclosure of the information.[82] Conversely, when the subpoenaed documents are of questionable importance to the requesting party's case, the court examines the party's need for the information more critically, and is less likely to force disclosure of the subpoenaed material.[83] Finally, if the disclosure of the documents requires a duplication of effort,[84] the court will not force disclosure. Generally, if a party fails to demonstrate convincingly a need for the requested information, the court will not enforce the subpoena.[85]

The second issue that the court confronts in determining whether the requesting party needs the subpoenaed information is the likelihood that the requesting party can get the information from another source.[86] Even though the requesting party proves the requisite need, if the subpoenaed information is available through other channels, the court may not force the subpoenaed person to hand over the information.[87]

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79. *See Dow Chemical*, 672 F.2d at 1272-73.

80. EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 338 (7th Cir. 1983).

81. *Andrews*, 97 F.R.D. at 498 n.12.

82. *See Gray*, 692 F.2d at 906.

83. *Compare* City of Groton v. Connecticut Light & Power Co., 84 F.R.D. 420, 422 (D. Conn. 1979) *with* Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 562 (S.D.N.Y. 1977).

84. *See* Tavoulareas v. Piro, 93 F.R.D. 24, 27 (D.D.C. 1981).

85. *See Dow Chemical*, 672 F.2d at 1273; *Andrews*, 97 F.R.D. at 498.

86. *See, e.g., Gray*, 692 F.2d 901; *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

87. *See* Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp., 91 F.R.D. 414, 416-17 (N.D. Ga. 1981); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 90 F.R.D. 45, 47-48 (N.D. Ill. 1981); *In re* Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 467 (S.D.N.Y. 1973); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 40 F.R.D. 318, 328 (D.D.C. 1966). *But see* Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 998 (10th Cir. 1965).

C. *Burdensomeness*

Once the court has determined that the subpoenaed material is relevant and that the requesting party needs it, the court must consider the burden that it would impose upon the subpoenaed person if it decided to enforce the subpoena.[88] Rule 45 authorizes a subpoenaed person to move to quash or modify an unreasonable and oppressive subpoena.[89] The burden of showing the unreasonable and oppressive nature of the subpoena is upon the subpoenaed person.[90] Historically, courts have considered several factors in determining whether a subpoena is unreasonable and oppressive:[91] the breadth of the request,[92] the subpoenaed party's ability to incur expenses,[93] the time period that the request covers,[94] and the reasons underlying the request.[95] Courts should balance these elements against a standard of reasonableness to determine whether the burden on the academic researcher is excessive.[96] Because no single factor is conclusive evidence of unreasonableness, courts must weigh all the factors on a case-by-case basis.[97]

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88. The subpoenaed person must endure some degree of hardship. A claim of inconvenience, for example, would not frustrate a proper request for information. *See* Freeman v. Seligson, 405 F.2d 1326, 1337 (D.C. Cir. 1968) (inconvenience of complying with subpoena not sufficient reason to quash); Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 767 (D.C. Cir. 1965) (even though government was nonparty, inconvenience in complying with subpoena was not sufficient reason to quash).

89. FED. R. CIV. P. 45(b); see *supra* note 64 for text of rule 45(b).

90. Sullivan v. Dickson, 283 F.2d 725, 727 (9th Cir. 1960); Tele-Radio Sys. Ltd. v. De Forest Elec., 92 F.R.D. 371, 375 (D.N.J. 1981). The nature of this burden varies from case to case. For example, if the need for the subpoenaed information is slight, the subpoenaed person has little to prove in order to establish that he should not have to disclose the information. *See* United Air Lines, Inc. v. United States, 26 F.R.D. 213, 216-17 (D. Del. 1960). The burden that the subpoenaed person must overcome, however, is particularly heavy if other protective measures are available. *In re* Coordinated Pretrial Proceedings, 669 F.2d 620, 623 (10th Cir. 1982); Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d at 766; *see also* 5A J. MOORE, *supra* note 19, at ¶ 45.05[2].

91. For a discussion of the reasons that forced disclosure is uniquely burdensome to the academic researcher, see *infra* notes 112-16 and accompanying text.

92. *See* Peck v. United States, 88 F.R.D. 65, 73 (S.D.N.Y. 1980); United States v. IBM, 83 F.R.D. at 104, 106.

93. *See* United States v. IBM, 83 F.R.D. at 108.

94. *Id.* at 107.

95. *Dow Chemical*, 672 F.2d at 1269.

96. *See id.* at 1270.

97. For examples of cases holding that the relevant factors did not support a finding that the subpoena was unreasonable and oppressive, see *In re* Folding Carton Antitrust Litigation, 83 F.R.D. 251, 255 (N.D. Ill. 1978) (hampering defendant's business not sufficient reason to balk at discovery request); United States v. IBM, 83 F.R.D. at 108-09 (nature and importance of inquiry justified substantial burden of compliance); United States v. American Optical Co., 39 F.R.D. 580, 587 (N.D. Cal. 1966) (absorption of reasonable costs is duty

1. Breadth, Cost, Time, and Purpose Limitations on Subpoenas

A party must specify reasonably in the subpoena the documents that he requests.[98] If a subpoena request is too broad or vague, the court will not enforce the subpoena because it places an onerous burden on the subpoenaed party.[99] Courts have denied requests for " 'all documents reviewed by or considered by said task force' "[100] and "[a]ny and all like or related records . . . ."[101] Because the man-hours and materials that the subpoenaed party uses in complying with the subpoena are often expensive, cost is always a consideration.[102] Although the person subject to a request for information must absorb some degree of expense in producing the information, the cost must be reasonable.[103] To determine what is reasonable, the court examines the relative size and resources of the parties.[104] The court then determines who should incur the expense, the requesting party or the subpoenaed party. If an individual subpoenas material in the possession of a large corporation, the argument that the subpoena requires the corporation to incur unreasonable expenditures to produce the requested material is weaker than if the two entities are of similar size and resources. If the requesting party has meager resources and the subpoenaed party has vast resources, the subpoenaed party should incur the cost of production as an overhead expense.[105]

The requesting party may not subpoena documents that span too long a period of time.[106] The absolute amount of time that the request covers, however, is not dispositive of the burden issue,[107] but the request must be reasonably specific.

Another element that the court should consider in determining whether disclosing the subpoenaed information is excessively burdensome to the subpoenaed party is the requesting party's rea-

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of subpoenaed party).

98. 5A J. MOORE, *supra* note 19, at ¶ 45.05[1]; *see* United States v. IBM, 83 F.R.D. at 107-08.

99. *See Dow Chemical*, 672 F.2d at 1278.

100. *Peck*, 88 F.R.D. at 73.

101. H. Kessler & Co. v. EEOC, 53 F.R.D. 330, 333, 336 (N.D. Ga. 1971).

102. Rule 45 specifically provides for the advancement of costs as a condition of answering the subpoena. FED. R. CIV. P. 45(b)(2); *see infra* text accompanying notes 131-35.

103. *See* Celanese Corp. v. E.I. duPont de Nemours & Co., 58 F.R.D. 606, 611 (D. Del. 1973) (if cost of production is unreasonable, requesting party must pay expenses).

104. United States v. IBM, 83 F.R.D. at 108.

105. *See* Blank v. Talley Indus., Inc., 54 F.R.D. 627, 627 (S.D.N.Y. 1972).

106. *See* United States v. IBM, 83 F.R.D. at 107. *But see* Biliske v. American Live Stock Ins. Co., 73 F.R.D. 124, 126-27 (W.D. Okla. 1977).

107. Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973).

sons for seeking the information. If the purpose of the subpoena is the discovery of information that the requesting party legitimately needs, the courts should favor disclosure. If the request is purely conjectural,[108] however, the courts should protect the person subject to the subpoena. Although the trial judge has great discretion in setting the scope of discovery,[109] he should not be excessively speculative in assessing a party's motive for requesting a subpoena.[110] Yet, if the subpoenaing party's motives are in issue, the court should deny the request if the subpoenaing party makes it in bad faith.[111]

2. Burdens Unique to the Academic Researcher

The academic researcher faces a unique burden when a party subpoenas his work product. Regardless of whether the researcher has completed his study, prematurely disclosing his facts, data, and conclusions could damage his standing in the academic community.[112] Such forced early disclosure denies the researcher any opportunity for constructive peer review before publication.[113] Moreover, early disclosure of research that is not in publishable form could subject the academic researcher to negative peer review.

When a subpoena requests information and data from an ongoing research project, the problems are even more acute. The time and effort that the academic must spend to comply with a subpoena detract from the methodical completion of his work. Also, the potential for error in the disclosed data is higher if the academic releases the information without the benefit of subsequent research to verify that the data from the ongoing project is accurate.[114] Likewise, the requesting party could subpoena the ten-

108. *Andrews*, 97 F.R.D. at 498; *see, e.g., supra* note 50.

109. *See* Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980); Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 991 (D.C. Cir. 1979).

110. *See Gray*, 692 F.2d at 906.

111. The Federal Rules controlling discovery contemplate an exercise of good faith in all discovery requests. Georgia Power Co. v. EEOC, 295 F. Supp. 950, 954 (N.D. Ga. 1968). If bad faith is present, the discovery request violates federal discovery procedures and thus is unenforceable. *See* H. Kessler & Co. v. EEOC, 53 F.R.D. at 336.

112. *Dow Chemical*, 672 F.2d at 1273; *Andrews*, 97 F.R.D. at 503. Forced disclosure may "'check the ardor and fearlessness of scholars,'" *Dow Chemical*, 672 F.2d at 1276 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring)), and thereby "threaten substantial intrusion into the enterprise of university research," *Dow Chemical*, 672 F.2d at 1276; *see supra* notes 53-54 and accompanying text.

113. *Dow Chemical*, 672 F.2d at 1273; *Andrews*, 97 F.R.D. at 503.

114. *Dow Chemical*, 672 F.2d at 1273-74; *Andrews*, 97 F.R.D. at 502-03.

tative results of a research project, knowing that the final product could prove disfavorable to his cause.[115] Furthermore, once the academic receives a subpoena for information from an ongoing project, he has a disincentive to complete the study if he knows that once the court enforces the initial subpoena, the requesting party may make subsequent demands for disclosure.[116]

D. Protective Measures

Rules 45(b)[117] and 26(c)[118] authorize courts to construct protective measures[119] to reduce the burden or harm that a subpoena may impose upon the subpoenaed party.[120] If the court is unable to fashion a protective order that reduces the burden to the subpoenaed party, then the court will deny the subpoena.[121] Rule 45(b) and rule 26(c), however, apply to different situations. Rule 45(b) clearly allows protective orders only in those cases in which a request for documentary evidence is unreasonable or oppressive.[122] If a subpoena requests a deposition, however, the subpoenaed party must look to the protective conditions of rule 26(c), which rule 45(b) incorporates by reference.[123] Even though the Federal Rules

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115. *See Dow Chemical*, 672 F.2d at 1276.

116. *Id.*

117. For the text of rule 45, see *supra* note 64.

118. For the text of rule 26(c), see *infra* note 137.

119. A protective order is a device that the court authorizes and constructs to allow discovery subject to various degrees of limitation. The purpose of a protective measure is to temper the expansive scope of discovery and protect individuals who become involved in the discovery process, whether voluntarily or involuntarily. *See* 4 J. MOORE, *supra* note 19, at ¶¶ 26.67, 45.05.

120. FED. R. CIV. P. 26(c), 45(b). A court considering a protective order in an administrative setting must examine the relevant statutes and regulations. *See supra* note 19. When the request for information is in conjunction with an agency investigation, courts generally are reluctant to prohibit the gathering or use of subpoenaed information. *See* FTC v. Anderson, 631 F.2d 741, 747-48 (D.C. Cir. 1979). Courts may feel that administrative agencies, and not courts, initially should establish the procedures to reduce the burden of an administrative subpoena. FTC v. Texaco, 555 F.2d at 884. For examples of cases in which courts have imposed protective orders, see *Dow Chemical*, 672 F.2d 1262 (refusal to enforce an administrative subpoena); SEC v. Arthur Young, 584 F.2d at 1033-34 (allocation of costs to distribute fairly the expense of complying with an administrative subpoena); FTC v. Lonning, 539 F.2d 202, 210-11 (D.C. Cir. 1976).

121. *See* United States v. Allen, 494 F. Supp. 107, 113 (W.D. Wis. 1980), *aff'd sub nom. Dow Chemical*, 672 F.2d at 1277; *Andrews*, 97 F.R.D. at 503. Although in *Dow Chemical* the Seventh Circuit expressed concern over the district court's reason for not reducing the burden of the subpoena, it held that the ruling was not an abuse of the district court's discretion. *Dow Chemical*, 672 F.2d at 1277.

122. FED. R. CIV. P. 45(b); *see supra* note 71.

123. FED. R. CIV. P. 45(d); *see Andrews*, 97 F.R.D. at 497 n.7. For a discussion of the difference between subpoenas requesting testimony and those requesting documentary evi-

direct subpoenaed parties to different protective measures depending on the nature of the information that the subpoenaing party requests, rule 45(b) and rule 26(c) both employ a standard of reasonableness.[124] The subpoenaed party, therefore, may argue that the subpoena is unreasonable under either federal rule.

1. Rule 45(b)

Rule 45(b)(1)[125] allows a court to modify or quash a subpoena if the person subject to the subpoena has made a timely motion to the court and has met its burden of showing that the subpoena is unreasonable and oppressive.[126] If the subpoenaed party can convince the court to modify the subpoena, the court may impose a more reasonable burden on the subpoenaed party.[127] If the subpoena is extremely burdensome, however, the court may quash the subpoena entirely.[128] The court's decision to quash is reversible on appeal only for abuse of discretion by the trial court.[129] Because the trial judge has great discretion in controlling matters of discovery, appellate courts rarely find an abuse of discretion.[130]

Rule 45(b)(2)[131] allows the courts to deny a subpoena if the

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dence, see *supra* note 65.

124. Rule 45(b) authorizes a court to quash or modify a subpoena if it is unreasonable and oppressive. Rule 26(c) allows the imposition of protective conditions upon a showing of "embarrassment, oppression, or undue burden or expense," all of which connote an underlying standard of unreasonableness. Courts and authorities maintain that "it appears . . . the test for unreasonableness or oppression is the same for both rules." *Andrews*, 97 F.R.D. at 497 n.7; *see* Solargen Elec. Motor Car Corp. v. American Motors Corp., 506 F. Supp. 546, 549 (N.D.N.Y. 1981); Los Angeles Memorial Coliseum Comm'n v. National Football League, 89 F.R.D. 489, 496 (C.D. Cal. 1981); FED. R. CIV. P. 45(b) Advisory Committee Notes; 5A J. MOORE, *supra* note 19, at ¶ 45.05[2].

125. Rule 45(b)(1) states that the court may "quash or modify the subpoena if it is unreasonable and oppressive . . . " at any time before the subpoenaed party must comply with the subpoena. FED. R. CIV. P. 45(b)(1).

126. 5A J. MOORE, *supra* note 19, at ¶ 45.05[2].

127. *See* Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982). One effective method of modifying a subpoena request is to allow the trial judge to conduct an *in camera* inspection of the documents and then rule on whether forced disclosure is reasonable. *See* Continental Coatings Corp. v. Metco, Inc., 50 F.R.D. 382, 384 (N.D. Ill. 1970).

128. *See, e.g., Dow Chemical*, 672 F.2d at 1262; *Andrews*, 97 F.R.D. at 494.

129. Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975). In one case the trial court abused its discretion by quashing a subpoena when a party seeking the document already had offered to pay the production expenses. *See* Goodman v. United States, 369 F.2d 166, 169 (9th Cir. 1966).

130. Buchanan v. American Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983); *Dow Chemical*, 672 F.2d at 1278.

131. Rule 45(b)(2) provides that the court may "condition denial of the motion [for a subpoena] upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things." FED. R.

requesting party does not advance the reasonable costs of producing the documents.[132] Although rule 45(b) does not guarantee that the subpoenaed person will incur no expenses in complying with the request for information, the rule does imply that the court will not enforce a subpoena which imposes unreasonable costs on the subpoenaed party.[133] Some commentators have stated that the person subject to the subpoena must show that the request is "unreasonable and oppressive" before the courts should require the requesting party to pay the expense of producing the documents.[134] Although the language of rule 45(b) is unclear, a strict reading of the rule indicates that the "unreasonable and oppressive" requirement applies only if the subpoenaed party asks the court to quash or modify the subpoena.[135] Arguably, therefore, courts should honor a motion to advance the reasonable costs of producing the documents, regardless of whether the subpoenaed party can prove that the subpoena is unreasonable and oppressive.

2. Rule 26(c)

Because rule 26(b) provides a virtually unchecked right to discovery,[136] rule 26(c) allows a person to seek a protective order from oppression, undue burden, or unnecessary expense.[137] The person

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CIV. P. 45(b)(2).

132. *See* 5A J. MOORE, *supra* note 19, at ¶ 45.05[2].

133. *See id.*

134. *See, e.g., id.*

135. FED. R. CIV. P. 45(b).

136. Rule 26(b) provides in part:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

137. FED. R. CIV. P. 26(c). The rule states:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that

seeking the protective order must show good cause for protection from the discovery request.[138] He may rely on any of the eight protective measures that rule 26(c) suggests, and courts may establish additional means of protection as justice requires.[139]

The academic researcher can rely on two particular protective measures in rule 26(c) to resist a subpoena request. First, rule 26(c)(1) provides that no discovery take place.[140] Courts[141] and commentators,[142] however, recognize that judges rarely grant this type of protective order because of its harsh results and because some lessor protective measure usually will suffice. Second, rule 26(c)(7) provides "that . . . confidential research . . . not be disclosed or be disclosed only in a designated way."[143] The researcher, however, must establish that a confidential relationship exists between himself and the research participants.[144] The trial court has great discretion under rule 26(c) to decide whether to issue a protective order. "If the court happens to be sensitive to the [academic researcher's] needs, it may employ rule 26(c) to protect the confidential . . . information. [B]ut if the trial court is hostile towards the [researcher's] position [he] may have no alternative but to disclose the information."[145]

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the discovery may be had only by a metbod of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery he conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to he opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id.; see WRIGHT & MILLER, *supra* note 65, at § 2036.

138. FED. R. CIV. P. 26(c); *see* 4 J. MOORE, *supra* note 19, at ¶ 28.68.

139. WRIGHT & MILLER, *supra* note 65, at § 2036.

140. For a discussion of the protective condition of rule 26(c)(1), see *id.* § 2037.

141. *See* Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); *In re* Westinghouse Elec. Corp., 570 F.2d 899, 903 (10th Cir. 1978).

142. *See* 4 J. MOORE, *supra* note 19, at ¶ 26.69; WRIGHT & MILLER, *supra* note 65, at § 2037.

143. FED. R. CIV. P. 26(c)(7); *see supra* note 137. See WRIGHT & MILLER, *supra* note 65, at § 2043 for a discussion of the protective condition of rule 26(c)(7).

144. *See Andrews*, 97 F.R.D. at 494; Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976).

145. Note, *Preventing Unnecessary Intrusions on University Automony: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1544 (1981) (footnote omitted).

IV. ACADEMIC FREEDOM

In addition to the relevance, need, and burden arguments that an academic researcher may assert to resist a subpoena under the Federal Rules, the academic also may argue that he does not have to disclose his research because it falls within the scope of academic freedom.[146] Academic freedom means that the subpoenaed information is privileged and, therefore, under rule 26(b)(1), not subject to forced disclosure.[147] A researcher may claim the privilege of academic freedom under one of three theories.[148] First, the academic may assert a common law privilege against forced disclosure.[149] Second, the academic may characterize his research as property, or his right to conduct research as a liberty under the due process clause of the fourteenth amendment.[150] Last, the academic researcher may assert a first amendment right to academic freedom.[151]

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146. For purposes of this Note, academic freedom means "the right of the individual faculty member to teach, *carry on research*, and publish without interference from the government, the community, the university administration, or his fellow faculty members." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 594 (1970) (emphasis added); *see also* Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447, 451 n.11 (1963).

147. Rule 26(b)(1) states: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action. . . ." FED. R. CIV. P. 26(b)(1) (emphasis added).

148. These three theories are not the exclusive means of arguing for academic freedom. For example, the researcher can request protection under the fourth amendment search and seizure clause. A subpoena containing an overly broad request for information may constitute an unreasonable search and seizure. *See, e.g.*, See v. City of Seattle, 387 U.S. 541, 544-45 (1967); United States v. IBM, 83 F.R.D. 97, 102 n.7 (S.D.N.Y. 1979); *see also* 5A J. MOORE, *supra* note 19, at ¶ 45.05[1]. In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), however, the Supreme Court stated that a fourth amendment argument would bar disclosure in a noncriminal context only if the requested information was not "particularly described." *Id.* at 208. Another possible constitutional argument to resist a subpoena is the fifth amendment protection against self-incrimination. The Court, however, has rejected this defense in a noncriminal setting. *Id.* Finally, a researcher might assert a constitutional defense under the ninth amendment. T. EMERSON, *supra* note 146, at 613.

149. The policy arguments for a common-law privilege are similar to the policy arguments in favor of a constitutional privilege, but the analyses are different. Note, *supra* note 146, at 1556 n.119. While the constitutional privilege springs from the first and fourteenth amendments, *see infra* notes 171-202 and accompanying text, the common-law argument "is based on society's need for effective decisionmaking by [academic researchers] in a position to affect the public welfare." Note, *supra* note 145, at 1556 n.119.

150. T. EMERSON, *supra* note 146, at 613.

151. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cooper v. Ross, 472 F. Supp. 802, 812 (E.D. Ark. 1979); T. EMERSON, *supra* note 146, at 598; Note, *supra* note 145, at 1549, 1551 n.87. Academic freedom under the first amendment is one of several areas in which the Supreme Court has created a constitutional right to protection where formerly one did not exist. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy);

A. Common-Law Privilege

Rule 501 of the Federal Rules of Evidence codifies the general common law privilege that immunizes a subpoenaed person from forced disclosure.[152] Rule 501 charges the courts to examine a claim of privilege "in the light of reason and experience" and under "principles of common law."[153] The Supreme Court has held that by enacting rule 501 Congress "manifested an affirmative intention not to freeze the law of privilege."[154] Thus, the Supreme Court's interpretation of Rule 501 provides courts with the freedom to develop rules of privilege on a case-by-case basis.[155]

The analysis of a common law privilege is a two-step process. The first step that the academic researcher must take is to meet Professor Wigmore's four requirements:[156] (1) the person relaying the information must relay it confidentially;[157] (2) confidentiality must be essential to the relationship between the parties in question;[158] (3) the community at large must have an interest in fostering the confidential relationship;[159] and (4) the injury resulting from disclosure must be greater than the benefit of disclosure.[160]

NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (right to association). Extending first amendment protection to an academic whose research is subject to a subpoena is not shocking considering that the Court protects journalists' confidential sources. *See* cases cited at *Andrews*, 97 F.R.D. at 501 n.23. For examples of cases that draw an analogy between the confidential relationship problems of the academic researcher and those of the newsman, see *id.* at 500-01 & n.23; *Richards*, 71 F.R.D. at 390.

152. Rule 501 of the Federal Rules of Evidence states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

153. *Id.; see* Note, *supra* note 145, at 1555.

154. Trammel v. United States, 445 U.S. 40, 47 (1980).

155. *See id.*

156. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (1961).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* For examples of common law privileges that courts have recognized, see Trammel v. United States, 445 U.S. at 51 (priest-penitent); Fisher v. United States, 425 U.S. 391, 403 (1976) (attorney-client); United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977) (husband-wife); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (priest-penitent); United States v. Gordon, 493 F. Supp. 822, 823-24 (N.D.N.Y. 1980) (priest-penitent).

The common-law privilege focuses on the confidentiality of the information and the confidentiality of the relationship between the source of the information and the person subject to the subpoena. An academic researcher, therefore, may rely on the common-law privilege only if his research is confidential.[161] The second step that the courts must take to determine whether the requested material is subject to the common-law privilege is to balance the need for an evidentiary privilege against the countervailing need for full disclosure of all relevant facts.[162] The two-step analysis serves as a check on subpoenaed parties that rely too heavily on the common-law privilege because the analysis provides a balancing of interests test[163] similiar to the test that rule 45 and rule 26 adopt. The common-law privilege protects confidential relationships between researchers and their sources from "unbridled subpoena power."[164] Yet the courts should not take lightly any extension of the common-law privilege to academic researchers because extension of the privilege is counter to the search for truth.[165] "[T]o create a new privilege that would shield academics from testifying"[166] would unduly frustrate legitimate discovery requests—something a court is unlikely to do.[167] For an academic researcher to feel secure in relying on a common-law privilege argument, therefore, confidential

161. *See* Wright, 547 F. Supp. at 874-76 (rejection of common-law academic privilege argument because the information sought was not confidential). Interestingly, in the two instances in which the courts have addressed disclosure of academic research containing confidential data, the courts have ignored the common-law privilege found in rule 501 of the Federal Rules of Evidence. *See Andrews*, 97 F.R.D. 494; *Richards*, 71 F.R.D. 388. Furthermore, reliance on a common-law privilege is problematic because it does not address all the various situations that may face the academic researcher; it does not apply to those situations in which academic research is not confidential, yet nonetheless should not be subject to forced disclosure. For example, the research data at issue in *Dow Chemical* was not confidential and, thus, would not warrant protection under the common-law privilege analysis. Because of the ongoing nature of the research, however, the court refused to enforce the subpoena. *Dow Chemical*, 672 F.2d at 1276. A common-law privilege analysis, therefore, is inadequate in certain situations; it unduly focuses on confidentiality and ignores pertinent factors such as relevance, need, and burden, which receive adequate consideration under the Federal Rules.

162. Note, *supra* note 145, at 1551-61; *see, e.g.*, Trammel v. United States, 445 U.S. 40, 50 (1980).

163. *See* EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 334-35 (7th Cir. 1983).

164. Branzburg v. Hayes, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting).

165. *See* Trammel v. United States, 445 U.S. 40, 50 (1979); United States v. Nixon, 418 U.S. 683, 710 (1974).

166. *Wright*, 547 F. Supp. at 875.

167. *See id.* (citing *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. 1981)); *infra* notes 184-91 and accompanying text.

research must be at issue and the interests against disclosure must outweigh the interests that favor it.[168] Most importantly, however, the academic researcher must find a court which is sympathetic to the common-law privilege argument—a court that would characterize the relationship between researcher and research participant as one that society should protect. Currently, no court has accepted this argument.[169]

B. The Due Process Clause[170]

Academic freedom first appeared as a constitutional issue in the context of the fourteenth amendment due process clause.[171] One commentator has argued that the expansive notion of "liberty" in the due process clause allows the courts to view academic freedom as a constitutional issue.[172] Although academic due process has been the topic of much discussion,[173] it has not appeared as an argument to prevent the forced disclosure of academic research. Thus, the persuasive effect the argument would have on a court in such a context is unknown.

For an academic researcher to establish a fourteenth amendment due process violation of his property rights, he must establish

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168. This balancing of interests analysis is very similar to that under the Federal Rules, *see supra* notes 79-116 and accompanying text, and is in some way inferior to the framework found in the rules. *See supra* note 160 and accompanying text.

169. *Wright*, 547 F. Supp. at 875; *cf. Andrews*, 97 F.R.D. at 500 (recognizing confidential relationship between researcher and participant as important to society and deciding that forced disclosure would hurden society generally and the academic researcher specifically). The *Dow Chemical* court did profess that society needs to protect academic freedom, hut that court based its academic freedom argument on first amendment grounds rather than on a common-law privilege rationale. *Dow Chemical*, 672 F.2d at 1274-75.

170. The due process clause protects the general public and academic researchers from deprivation of life, liberty, or property, without due process of law. The fifth amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This discussion assumes that court enforcement of a subpoena is adequate state action. The scope of due process under the fifth and fourteenth amendments is identical. Thus, this Note will not treat as significant whether the complainant claims deprivation of his rights by a state or federal entity.

171. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (compelling attendance at certain nonprivate or nonparochial schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating state statutes requiring the teaching of certain subject matter). Neither *Meyer* nor *Pierce* mentioned a violation of first amendment rights, perhaps because the Court had not applied the first amendment to states at the time it decided these cases. *See* T. EMERSON, *supra* note 146, at 598-600.

172. T. EMERSON, *supra* note 146, at 613.

173. *See, e.g.*, Joughin, *Academic Due Process*, 28 LAW & CONTEMP. PROBS. 573 (1963).

a property interest in his research. Courts have held that an academic only has a property interest in research data before he publishes it.[174] Before publication the academic may be relying on his research to enhance his standing in the academic community. The value of the research may diminish significantly if the court forces the academic to disclose his results prematurely.[175] The academic forfeits his property interest once he publishes his research because then he has offered the benefits of his research to the community. Once the research data is in the public domain it is subject to discovery requests just like any other piece of relevant information that a litigant needs. In an academic setting, courts usually address the right to liberty in the context of students' rights to admission[176] and teachers' rights to employment without unjustifiable discharge.[177] Persons who have made successful academic liberty claims generally have argued that a party has invaded their interest in personal[178] rather than economic liberty.[179] An academic resisting a subpoena, therefore, could characterize his interest as a personal right to conduct his research free from unjustifiable interruption, rather than as a pecuniary interest in the future income that his research would generate. No court, however, has addressed this issue in connection with the issue of forced disclosure of academic research.

C. *First Amendment Academic Freedom*

Although academic freedom does not appear in the language of the first amendment,[180] commentators and courts recognize aca-

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174. *Compare Dow Chemical*, 672 F.2d at 1262 (academic researchers had direct interest in research because the study was in an ongoing unpublished stage) *with Wright*, 547 F. Supp. at 871 (information was not confidential and of no true worth to researcher because he had published it).

175. *See Dow Chemical*, 672 F.2d at 1273-74; *Andrews*, 97 F.R.D. at 502-03; *supra* text accompanying notes 112-14.

176. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

177. *See, e.g.*, Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552 (5th Cir. 1982) (nontenured professor possesses no property or liberty interest and thus has no due process claim); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977) (no showing of due process violation); *see also* Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972) (violation of first amendment rights).

178. Examples of personal liberty violations include statutes prohibiting students from attending private schools, *see Pierce*, 268 U.S. at 510, and laws preventing teachers from teaching certain subjects, *see Meyer*, 262 U.S. at 390.

179. *See* T. EMERSON, *supra* note 146, at 600.

180. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

demic freedom as a first amendment concern[181] and parties usually base their academic freedom arguments upon the first amendment.[182] While teachers and academics frequently rely on the first amendment, few cases discuss the academic freedom argument exclusively.[183] Courts, however, do discuss academic freedom in the context of forcing a faculty member to disclose his vote on a particular tenure decision. Forced disclosure of tenure voting is similiar to forced disclosure of academic research because in both instances a court orders an academic to disclose information

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the Government for a redress of grievances." U.S. CONST. amend. I.

181. *See, e.g., Dow Chemical*, 672 F.2d at 1274. The *Dow* court stated that "scholarly research is an activity which lies at the heart of higher education, [and therefore] comes within the First Amendment's protection of academic freedom." *Id.; see* T. EMERSON, *supra* note 146, at 593-626.

182. T. EMERSON, *supra* note 146, at 593-626.

183. If courts discuss academic freedom, they discuss it as a secondary issue in the context of another more important issue. *See infra* text accompanying notes 203-10. One situation in which teachers have relied on the first amendment is for employment matters. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); *cf.* Barenblatt v. United States, 360 U.S. 109 (1959); Alder v. Board of Education, 342 U.S. 485 (1952). These cases held that academic freedom is a factor to consider in deciding what an organization can force a teacher to do as a prerequisite to employment. A second situation in which academics have relied on the first amendment is when a state forces the academic to teach in a certain manner. In Epperson v. Arkansas, 393 U.S. 97 (1968), an Arkansas statute prohibited state schools or universities from teaching the theory of evolution. In striking down the statute, the Court referred to the importance of preserving constitutional rights in the educational setting and noted the academic's right to teach what he chooses. The Court, however, did not mention academic freedom. *See Epperson*, 393 U.S. at 104-06; T. EMERSON, *supra* note 146, at 605-06. Instead, the Court chose to base its decision on freedom of religion. *See Epperson*, 393 U.S. at 106-09.

In Sweezy v. New Hampshire, 354 U.S. 234 (1957), the New Hampshire Attorney General investigated a professor for giving his students a lecture on socialism. The lower court cited the professor for contempt because he refused to answer the Attorney General's questions. The Supreme Court reversed the decision:

> 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 . . . . 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.

Id. at 250. The Court, however, did not discuss academic freedom; rather it questioned the Attorney General's authority to conduct the investigation. *See id.* at 251-55.

A third situation in which academics have relied on the first amendment is when they have lost their jobs. In Mount Healthy Board of Education v. Doyle, 429 U.S. 274 (1977), the Court established a two part standard to determine whether firing a teacher violates his constitutional rights. First, the teacher must demonstrate that the Constitution protects his conduct and that his conduct resulted in the loss of his job. *Id.* at 285-87. Second, the trial court must determine whether the university has shown that it would have fired the teacher even if he had not been exercising his academic freedom. *Id.* at 287. For additional cases in this area that utilize the *Mount Healthy* tests, see Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979).

against his will, and in both instances the academic claims the special protection that academic freedom affords under the first amendment. An analysis of two recent cases on the forced disclosure of tenure votes, therefore, sheds light upon how much an academic researcher may rely on the first amendment to avoid forced disclosure of his research.

1. *In re Dinnan*

In *Dinnan*[184] a member of the faculty tenure review committee refused to answer deposition questions concerning his vote on an associate professor's tenure.[185] The faculty member claimed that under the academic freedom privilege he did not have to disclose his vote.[186] The court held that "no privilege exists that would enable [the faculty member] to withhold information regarding his vote on the promotion of [the associate professor]."[187] The court reasoned that the faculty member had an obligation to aid the truth-seeking process by disclosing information properly within the scope of discovery.[188] The court concluded that the case presented no constitutional issue of academic freedom.[189] Although the court conceded the importance of academic freedom, it stressed that academic freedom should not afford protection to any and all actions by academics or universities. Academics should not be able to rely on academic freedom to frustrate legitimate fact-finding and avoid responsibility for their actions.[190] The court concluded that the faculty member had failed to show a "compelling justification" for refusing to disclose his tenure vote.[191]

2. *Gray v. Board of Higher Education*

In *Gray*[192] a black professor wanted to compel discovery of the votes that two members of the faculty tenure committee cast concerning his tenure.[193] The committeemen argued academic freedom

184. 661 F.2d 426 (5th Cir. 1981).

185. *Id.* at 427. The associate professor brought an employment discrimination suit against the University of Georgia. *Id.*

186. *Id.* The faculty member also relied on the right to a secret ballot in trying to convince the court that his vote should not be subject to forced disclosure.

187. *Id.* at 427.

188. *Id.* at 432-33.

189. *Id.* at 427.

190. *Id.* at 432.

191. *Id.* at 430.

192. 692 F.2d 901 (2d Cir. 1982).

193. *Id.* at 901-02.

in an attempt to resist discovery.[194] The trial court used a balancing of interests test in which it weighed the professor's right to discovery against the need to protect the information that the committeemen exchanged confidentially.[195] The court found that the committeemen deserved protection under the constitutional notion of academic freedom[196] and that society had an interest in the smooth operation of academic institutions.[197]

On appeal, however, the Second Circuit reversed the trial court decision. The Second Circuit also used a balancing test in its analysis, but acknowledged that academic freedom is " 'a special concern of the First Amendment.' "[198] The court stated that the discovery rules deserve "broad and liberal treatment,"[199] however, thereby recognizing the tension between an academic's constitutional privilege and a litigant's need for information in preparing for trial. The court decided that if it denied the professor access to the tenure votes at this early stage of discovery, he would be chasing "an invisible quarry," without a " 'full and fair opportunity,' to demonstrate employment discrimination."[200] If a party is seeking evidence that is crucial to its case, the court held that it should allow discovery "despite a claim of First Amendment privilege."[201] Like the *Dinnan* court, the *Gray* court concluded that academic freedom would not protect the academic from disclosing his tenure

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194. *Id.* at 903.

195. Gray v. Board of Higher Education, 92 F.R.D. 87, 90 (S.D.N.Y. 1981), *rev'd*, 692 F.2d 901 (2d Cir. 1982).

196. *Gray*, 92 F.R.D. at 91 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

197. *Gray*, 92 F.R.D. at 93.

198. *Gray*, 692 F.2d at 903 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

199. *Gray*, 692 F.2d at 904. The *Gray* court added that liberal treatment of the rules of discovery was particularly important when a claim requires proof of intent. In *Gray* the professor had alleged a violation of his fourteenth amendment civil rights, which requires proof of intentional discrimination. *Id.* at 904-05.

200. *Id.* at 906 (quoting Texas Dep't of Community Affairs v. Burdine, 50 U.S. 248, 255-56 (1981)).

201. *Gray*, 692 F.2d at 906 (citing Herbert v. Lando, 441 U.S. 153 (1979)). The court considered the conditions that it should require before it orders a tenure committeeman to disclose his vote. The court accepted the guidelines that the American Association of University Professors (AAUP) established, which provide that if a tenure candidate receives a meaningful written statement of reasons from the tenure committee and has access to proper grievance procedures, reviewers of a request for disclosure should preserve the confidentiality of the voting process. *Gray*, 692 F.2d at 907. Absent a statement of reasons, however, the balance tips toward discovery and away from recognition of the academic freedom privilege. *Id.* at 908.

vote.[202]

D. The Power of Academic Freedom: The Constitutional Aura

Academic freedom rarely appears as the sole argument in a case.[203] Parties generally make an academic freedom argument to add constitutional support to their position. In *Gray*, for example, in addition to the academic freedom privilege, the tenure committee asserted the right to a secret ballot and claimed that the professor had breached his employment contract.[204] Parties often used the academic freedom argument to add a constitutional aura to an otherwise bland contractual dispute.[205] By making a constitutional argument, the academic hopes for a higher standard of review.[206]

A large gap, however, exists between the number of academic freedom claims that parties make and the number which receive serious judicial consideration.[207] Even in cases in which courts seriously consider an academic freedom claim, they generally do not accord the claim the deference of an enumerated constitutional right. Instead, courts consider academic freedom as one factor in a balancing test.[208] The Supreme Court, however, has never treated academic freedom as a constitutional right. "The Court has simply used the principles of academic freedom for support in the application of traditional legal doctrine."[209] Furthermore, courts recognize that the concerns which academic freedom allegedly protects fall

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202. *Gray*, 692 F.2d at 908-09.

203. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (academic freedom argument joined with freedom of religion argument); *Dow Chemical*, 672 F.2d at 1262 (academic freedom mentioned in conjunction with Federal Rules analysis); *In re* Dinnan, 661 F.2d at 426 (academic freedom argument joined with contractual right to secret ballot arguments).

204. *Gray*, 692 F.2d at 903.

205. *See, e.g.*, Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552-53 (5th Cir. 1982) (nontenured teacher also raised due process argument to a basic employment contract dispute).

206. Courts that address the standard of review applicable to an academic freedom argument state that the argument warrants a high standard of review. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), Justice Frankfurter stated: "[Academic] inquiries . . . must be left as unfettered as possible . . . except for reasons that are exigent and obviously compelling." *Id.* at 262 (Frankfurter, J., concurring). The *Dow Chemical* court stated:

> Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference . . . is surprisingly sparse. But what precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited.

Dow Chemical, 672 F.2d at 1275.

207. T. EMERSON, *supra* note 146, at 614.

208. *Gray*, 692 F.2d at 907-08; T. EMERSON, *supra* note 146, at 610.

209. T. EMERSON, *supra* note 146, at 610.

under other more specific constitutional guarantees like freedom of expression, freedom of religion, due process, or the rule against vagueness.[210] The academic researcher, therefore, should not rely solely on an academic freedom claim to frustrate an order to disclose his research.

V. Analysis

If an academic researcher refuses to comply with a subpoena, the subpoenaing party may seek judicial enforcement. In resolving the conflict, the court has a choice between two lines of analysis. Under one approach the court follows the procedures set forth in the Federal Rules of Civil Procedure, while the other approach suggests that the court grant the academic the privilege of academic freedom. In the past, courts have relied on the federal rules analysis.[211] This trend should continue if courts follow *Richards, Wright*, and *Andrews* and disregard *Dow Chemical*. This part of this Note advocates that rule 26 and rule 45 provide better protection for the academic than he would receive under the academic freedom analysis. A court should not honor a claim of academic freedom, but should focus upon the framework that these rules establish for enforcing discovery requests.

A. *Federal Rules Analysis Versus Academic Privilege Analysis*

Courts should rely on a federal rules analysis rather than the academic freedom approach for three reasons. First, both approaches afford the researcher the same remedies.[212] Second, the special concerns that weigh in favor of creating an academic privilege already command attention under the federal rules burden analysis. Last, by using the Federal Rules to resolve disputes over the enforcement of subpoenas, courts will not run the risk of granting academic freedom constitutional stature.

First, if a court finds that a subpoena violates a researcher's right to academic freedom, the court will not enforce the subpoena. Similarly, if a court following the Federal Rules determines that a subpoena request is unreasonable, the court will quash the subpoena. The court may protect the researcher by acknowledging

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210. *Id.*

211. *Wright*, 547 F. Supp. at 871; *Andrews*, 97 F.R.D. at 494; *Richards*, 71 F.R.D. at 388.

212. *Compare Andrews*, 97 F.R.D. at 503-04 (not forcing disclosure of research because burden on academic researcher was too great) *with Dow Chemical*, 672 F.2d at 1277-78 (not forcing disclosure of research because of academic freedom argument).

that he has a "constitutional right" to academic freedom, or by using the protective conditions of federal rules 26(c) and 45(b) to minimize the burden that the subpoena imposes. The remedy that the party receives under either analysis is the same.

Second, in confronting the problems that are unique to the academic researcher,[213] courts should perform a burden analysis under the Federal Rules, and not an academic freedom analysis. The academic may argue that the subpoena request is unreasonable, oppressive, and unenforceable under the Federal Rules. The researcher's specific harm—which weighs in favor of creating an academic privilege—is already part of the burden analysis.[214] The researcher may rely on an established body of law under rule 26 and rule 45 instead of the vague, unpredictable concept of a constitutional or common-law academic privilege.

The third reason that courts should rely on the federal rules analysis and not the academic freedom approach is that under the academic freedom approach researchers argue for constitutional protection,[215] and academic freedom does not merit constitutional protection. Once courts afford a legal principle constitutional status, subsequent use of that principle may become difficult to control.[216] Because an academic freedom claim addresses issues that the Federal Rules adequately cover, courts should rely on the more narrow provisions of the Federal Rules and avoid unwieldly constitutional issues. Extending specific constitutional protection to academic freedom easily could create a double-edged sword that protects the academic's rights in one respect, but actually threatens the academic's freedom in another.[217] In *Gray* the court stated that "academic freedom is illusory when it does not protect faculty from censurious practices but rather serves as a veil for those who might act as censors."[218] Expanding the concept of academic freedom to protect all the actions of professors and administrators "would give any institution of higher learning a *carte blanche* to practice discrimination of all types."[219] Thus, if academic freedom gains constitutional stature, it may assist a researcher in fighting a

213. *See supra* notes 112-16 and accompanying text.

214. *See supra* notes 88-115 and accompanying text.

215. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. at 603-04; Sweezy v. New Hampshire, 354 U.S. at 250; *see supra* notes 180-210 and accompanying text.

216. T. EMERSON, *supra* note 146, at 615-16.

217. *See, e.g., In re* Dinnan, 661 F.2d at 430.

218. *Gray*, 692 F.2d at 909.

219. *In re* Dinnan, 661 F.2d at 431.

subpoena, but academic freedom also would allow the university to balk at a teacher's discovery requests. As a result, the privilege would harm the person it strives to protect.

Judicial reliance on the concept of academic freedom also is unwise because academics could frustrate legitimate discovery requests by creating a shield that would allow them to avoid responsibility for their actions.[220] Although some academics may work within an ivory tower of secluded protection, extending specific constitutional protection to academic freedom could transform the tower into an inaccessible fortress. Although constitutional rights are not absolute, providing special protection to academic freedom would elevate the academic to a position in which he only would have to cooperate with the most compelling discovery requests. The academic researcher could balk at any request for information regardless of how small his burden,[221] or how relevant[222] and necessary[223] the information is to the subpoenaing party.

B. Recent Cases Following Federal Rules Analysis

In *Andrews*,[224] *Richards*,[225] and *Wright*,[226] three of the four recent cases on forced disclosure of academic research, the courts held that they should use the federal rules analysis and avoid the academic freedom issue. In *Andrews* the court expressly ignored the academic freedom claim and focused on the harm or burden to the researcher.[227] The subpoena request was unreasonable because it would have destroyed the academic's entire research project.[228] Likewise, in *Richards* the court stated that it need not examine any constitutional issues.[229] Using a balancing of interests test, the court weighed the burden of forced disclosure to the academic against the subpoenaing party's need for the information.[230] The court ruled in favor of nondisclosure.[231] The *Wright* court forced the academic to disclose his research because the information was

220. *Id.* at 431, 432.
221. *See supra* notes 88-115 and accompanying text.
222. *See supra* notes 72-78 and accompanying text.
223. *See supra* notes 79-87 and accompanying text.
224. 97 F.R.D. at 494.
225. 71 F.R.D. at 388.
226. 547 F. Supp. at 871.
227. *Andrews*, 97 F.R.D. at 498-99 n.13.
228. *Id.* at 500, 502, 503; *see supra* notes 114-16 and accompanying text.
229. *Richards*, 71 F.R.D. at 390.
230. *Id.* at 389-91.
231. *Id.* at 391.

not confidential.[232] By making the subpoenaing party advance the production costs, the court used the protective conditions found in the Federal Rules to lessen the burden that the subpoena imposed on the academic researcher.[233]

Dow Chemical[234] is the lone example of a court applying the academic freedom analysis to decide whether to enforce a subpoena for academic research.[235] The *Dow Chemical* court addressed the issues of relevance, need, and burden under the Federal Rules,[236] but also recommended the academic freedom argument to the researchers facing subpoena requests.[237] By accepting the academic freedom argument, however, the *Dow Chemical* court encouraged unnecessary reliance on the Constitution to address a problem that the Federal Rules already resolved. If a party claims a deprivation of his constitutional rights, the court should confront the issue under the due process clause or the first amendment and not as an issue of academic freedom. If the subpoenaed party argues that the subpoena is unreasonable or excessively burdensome, the court should confine its analysis to the Federal Rules.

C. A Judicial Framework

In determining whether to enforce a subpoena for academic research, courts should look to the relevance, need, and burden analysis of the Federal Rules. Certain factors within this analysis often are dispositive of whether the academic will have to comply with the subpoena. First, if the research is ongoing,[238] because of the unique burden that the subpoena imposes, courts should refuse to enforce the subpoena.[239] If the academic has completed his research and published his findings, however, courts should force the

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232. *Wright*, 547 F. Supp. at 875-76.

233. *Id.* at 877; *see supra* notes 38-40 and accompanying text.

234. 672 F.2d at 1262.

235. In a concurring opinion, Judge Pell rejected the majority's reliance on the concept of academic freedom. *Id.* at 1278 (Pell, J., concurring); *see supra* note 29.

236. 672 F.2d at 1270-74.

237. *Id.* at 1274-77. Judge Fairchild suggested the academic freedom argument to the parties even though neither side raised the argument at trial. Only the University of Wisconsin, appearing as amicus curiae, raised the issue of academic freedom. *Id.* at 1278 (Pell, J., concurring).

238. *See Dow Chemical*, 672 F.2d at 1273-74, 1276-77; *Andrews*, 97 F.R.D. at 502-03; *supra* notes 114-16 and accompanying text.

239. *See, e.g., Dow Chemical*, 672 F.2d at 1278; *Andrews*, 97 F.R.D. at 503; *supra* notes 18-29 & 41-58 and accompanying text.

academic to disclose his results or underlying data.[240] Second, if the researcher relied on confidential information from participants and the subpoena threatens that confidentiality, the court should not enforce the subpoena.[241] Third, if the research focuses on a subject of social interest or public policy, courts should suppress the subpoena and allow the researcher to proceed uninhibited.[242] Last, courts should consider whether they can fashion a protective order to reduce the subpoenaed person's burden to a reasonable level. For example, under rules 26(c) and 45(b), the court may require the subpoenaing party to advance production costs,[243] or the court may impose severe limitations on the scope of the subpoena.[244] Courts should use burden-mitigating protective orders except when the research is ongoing or confidential, in which case no protective conditions short of quashing the subpoena would afford the academic an adequate remedy.[245]

VI. CONCLUSION

An academic researcher who receives a subpoena can refuse to disclose his research by arguing that the subpoena request is unreasonable under the Federal Rules of Civil Procedure, or by arguing that forced disclosure violates his academic freedom. Under the first analysis the court must determine whether the subpoenaed information is relevant, whether the requesting party reasonably needs the information, and whether the subpoena request is overly burdensome. Under the second analysis, the academic argues for special protection from a discovery request under the rubric of an academic privilege. The notion of academic freedom entails the judicial recognition of a common-law privilege or the judicial extension of a constitutional right that protects an academic researcher subject to a discovery request. The Federal Rules analysis offers a uniform means of decisionmaking, while under the academic freedom analysis courts render opinions on a case-by-case basis. In *Andrews*, *Richards*, and *Wright* the courts ignored the academic

240. *See Wright*, 547 F. Supp. at 873. *Wright* addressed a request for underlying data. *See supra* notes 30-40 and accompanying text.

241. *See Andrews*, 97 F.R.D. at 499-502; *supra* notes 41-58 and accompanying text; *see also Richards*, 71 F.R.D. at 390; *supra* notes 6-17 and accompanying text.

242. *See Andrews*, 97 F.R.D. at 500; *Richards*, 71 F.R.D. at 390.

243. *See Wright*, 547 F. Supp. at 76-77.

244. *See Andrews*, 97 F.R.D. at 504. In *Andrews*, the court denied most of the subpoena requests but did require the researcher to disclose the data relating to the interested parties. *Id.*

245. *Dow Chemical*, 672 F.2d at 1278; *Andrews*, 97 F.R.D. at 503.

freedom argument and reached the appropriate result by relying on the Federal Rules. In *Dow Chemical*, however, the court endorsed the academic freedom argument even though the Federal Rules provided an adequate means of resolving the case.

In deciding future cases concerning forced disclosure of academic research, courts should use the federal rules analysis of balancing relevance, need, and burden, in light of the protective conditions that rules 26(c) and 45(b) establish. Courts should not elevate academic freedom to a constitutional right when the Federal Rules provide an adequate framework for addressing the issue of forced disclosure of academic research.

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