Court Orders 'Sharing' of Data

In a growing number of cases, judges are demanding that confidential data be made public—and researchers often wind up feeling bruised

People who volunteer for medical experiments or answer survey questions usually do so under a promise of confidentiality. But sometimes this carefully negotiated relationship between the researcher and subject is disrupted by the intervention of the outside world. Often the disruption comes from the courts, which seize private information for use by a third party who claims to need it for a lawsuit.

The most recent example comes from Alabama, where a federal judge ruled on 1 July that a sociologist had to comply with a subpoena from the Exxon Shipping Co. The judge allowed the researcher to withhold some information because he had collected it on a confidential basis and had not cited it in a published report. Yet at the same time, the scientist was ordered to surrender raw data from a published work.

Although both the scientist and Exxon have said they were "satisfied" with the decision, in fact, neither has fully accepted it—and the decision hasn't ended the squabble over confidential data. Exxon is now pressing the researcher to reveal more details about individuals who may be plaintiffs in suits against the company in Alaska, arguing that the judge's decision requires it. And the researcher, fending Exxon off, says that he has followed professional standards and unlinked the names from the data; as a result, the subjects cannot be identified.

The Alabama case is the latest in a series of legal scuffles between researchers and corporations over confidential data. In each case, the scientist has been compelled to release files against his will. The courts have tried to protect the confidentiality of subjects by requiring, for example, that only other scientists may read the raw data. But the possibility that the identities of research subjects will be made public isn't the only fallout for the research community. Those affected by them say that the experience is not just time-consuming and expensive but often very discouraging.

The dispute involving Exxon began last October when sociologist J. Steven Picou received a notice from Exxon's lawyers asking for everything in his files on the 1989 Alaska oil spill. Picou, chairman of the department of sociology and anthropology at the University of South Alabama in Mobile, and several colleagues have been studying Alaskan coastal villages for the past 4 years,

In the crossfire. Sociologists Steven Picou *(right)* and Duane Gill in Cordova, Alaska.

measuring levels of community stress from the spill. Exxon is facing damage suits filed on behalf of at least 3000 individuals in Alaska, and Picou's research has been cited by experts on the plaintiffs' side. Exxon feels its position is perfectly understandable: "Whenever you have a lawsuit against you," says Exxon spokesman Dennis Stanczuk, "you're entitled to the same information as the person who's suing you."

The subpoena demanded that Picou immediately turn over "any documents or other information" that might bear on the spill, including notebooks, letters, working papers, handwritten responses to a survey of village residents, and other raw material. Upon reading it, the researcher says he felt as though "somebody was kicking down the door." Picou was taken aback by the "almost bullying" tone—including a demand for data from a study he hadn't even published.

Despite the subpoena's tough language, Picou and his colleagues told Exxon they would be willing to reformat some data to remove demographic details that could be used to identify individuals while retaining working notes or unpublished material. Picou claimed that the three towns he studied—Valdez, Cordova, and Petersburg—are so small that a resident could identify people who answered his survey by descriptive labels; he suggested removing some of them before sharing the 1989-1990 data. But he would not share unpublished data collected in 1991 and 1992.

Exxon declined that offer. Exxon's spokesman, Stanczuk, says Picou "was offering an interpreted database, not raw data, and what we needed was raw data." In its legal brief, Exxon said Picou was "throwing away" relevant information and that Exxon needed to analyze Picou's scientific work to be certain that his conclusions were valid; it expressed no interest in learning the identity of his subjects.

Picou asked his university to help him fight the subpoena. It agreed, and the resistance has paid off. The U.S. court for the southern district of Alabama agreed with Picou that Exxon should not be given unpublished data collected in 1991 and 1992. But the judge, William Cassady, denied Picou's request to reformat earlier (1989-1990) data to remove demographic details. Instead, because the information had been published and because Exxon "expressly states that it has no interest in learning" the identity of the survey respondents, Cassady ordered Picou to turn over the records, removing only names, addresses, and phone numbers.

In its effort to protect confidentiality, the court stipulated that the information will not go to Exxon's attorneys or staff but to its designated technical expert—sociologist Richard Berk of the University of California, Los Angeles, who will assess its validity. The judge also warned Exxon that Berk may be cited for contempt if he fails to protect the confidentiality of Picou's files. In the meantime, Exxon will pay a "reasonable" fee to have the data transferred; the company is now considering a request from Picou and his colleagues for $11,000.

The day after the ruling, Exxon sent Picou the names of hundreds of plaintiffs in the towns where Picou conducted his research, requesting "that all information as to those on the enclosed list should be provided by Dr. Picou." (Plaintiffs cannot demand confidentiality.) Exxon also filed a motion in court seeking the data. This indicates to Picou that Exxon "had a hidden agenda all along," and that it really wants to use his records to embarrass people on the witness stand. Picou informed Exxon that the list identifying individuals in the 1989-1990

data was destroyed last year, when their final questionnaires came in. Exxon's Stanczuk explains that, while the scientific issue is the main concern, "we have a right to collect information about plaintiffs if we choose." The court rejected Exxon's request as *Science* went to press.

Picou is one of a growing number of scientists who are seeing their confidential research papers dragged into court. Their response is often to assert a "scholar's privilege"—the obligation to protect the confidentiality of sources. Federal courts have ruled that researchers are entitled to protect the privacy of medical subjects and of people who respond to surveys and that scientists also have a limited right to retain control of data until they have published it. But, while the courts generally recognize these principles, they don't always apply them as scholars would like, nor do they offer full compensation for the time and energy required to meet what is demanded (see box).

The extent of disruption depends on circumstances. For example, Picou was able to deflect Exxon's subpoena because some of his recent data remain unpublished (although he did discuss this research at a symposium this spring). But the court made it clear that all Picou's data could be subject to scrutiny if he publishes reports based on them. Picou also benefited from the fact that he was a "third-party expert"—supported by the National Science Foundation and not by any of the litigants in the Valdez spill.

A company called Impact Assessment Inc., of La Jolla, wasn't so fortunate when, in 1990, its independent standing was compromised when some of its clients became plaintiffs in the *Exxon Valdez* suits. The president of Impact Assessment, John Petterson, says a group of towns and villages, financed by a state grant, hired his firm to investigate the social, psychological, and economic impacts of the oil spill and develop a mitigation plan. But when some of these Alaskan communities joined the suit against Exxon, Petterson got dragged into court, too. Both sides demanded to see Petterson's raw data. He resisted, spending $70,000 of his own money, but eventually was forced to surrender his files to court-designated experts.

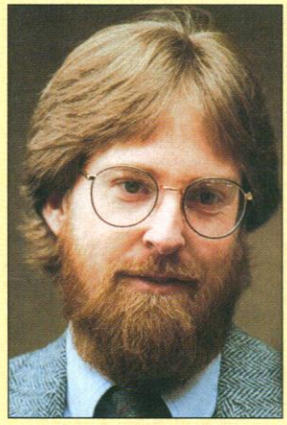
Even in the Impact Assessment case, the court tried to keep the identities of survey respondents confidential. That principle seems firmly established in the federal courts now, although state courts and agencies are less consistent in applying it. For example, three researchers who studied the responses of children to the "Old Joe Camel" cigarette ads had a hard time fending off a demand for detailed survey data from cigarette manufacturer R.J. Reynolds—data that might have made it possible to identify study participants (*Science*, 19 June 1992, p. 1620). In one of these cases, a Massachusetts doctor, Joseph DiFranza, refused to give Reynolds the names of children he had interviewed. R.J. Reynolds dropped its request for the names only days before a Massachusetts judge decided that DiFranza need not supply them. However, the judge ordered DiFranza to give Reynolds the rest of the information.

One of the three doctors—Paul Fischer of the Medical College of Georgia (MCG)—won the first battle but is now in court again to protect the confidentiality of data collected in a survey of 3- to 6-year-old children. Reynolds failed to get Fischer's data by suing in the Georgia state courts but then learned

When the Source Is a Suspect

Researchers who get tangled up in court cases involving confidential data often come away feeling bitter (see main story). But one social science researcher is paying a more tangible price: He's in jail. Rik Scarce, a 35-year-old Ph.D. candidate in sociology at Washington State University (WSU) in Pullman, has been held since 10 June in contempt of court. His crime: He refused to answer questions from a grand jury about a break-in by animal rights activists at WSU who were—he claims—the subject of his research.

Scarce, the author of a book called *Ecowarriors* published in 1990 before he became a Ph.D. candidate, has been backed by the American Sociological Association (ASA) and the state chapter of the American Civil Liberties Union. Both argue that asking Scarce to betray confidential sources will inhibit his ability to publish scholarly works. But Scarce has failed to convince the U.S. Ninth Circuit Court of Appeals, which last month rejected his plea to lift the contempt ruling. The court's opinion—if and when it issues one—would affect all researchers in the western states.



COLIN MULVANEY

In contempt. Ph.D. candidate Rik Scarce, jailed since 10 June.

Scarce's troubles began after a group called the Animal Liberation Front sent a fax to news organizations claiming responsibility for a break-in at WSU research labs on 12-13 August 1991. The activists opened animal cages, releasing mink, mice, and coyotes, and poured hydrochloric acid on computers. The Federal Bureau of Investigation has identified Rodney Coronado, a member of the Animal Liberation Front, as the chief suspect. Unfortunately for Scarce, Coronado is a friend as well as a source and was house sitting for Scarce when the break-in occurred.

Scarce wouldn't talk when a grand jury demanded to know more about Coronado and his companions, saying that disclosing such details would violate the ASA's ethical code. Coronado was a source for *Ecowarriors* and—Scarce's attorney says—possibly for future scholarly articles. Scarce told the grand jury that his field research demands that he protect his sources. According to the ASA ethics code, "Confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege and legal force is applied."

The ASA, in a brief filed on Scarce's behalf, warns that "social science fieldwork will be seriously inhibited" if researchers can be compelled to hand over information to the police. The ASA cites a 1984 federal decision in New York, in which the police wanted to subpoena the personal journal of a sociologist who had been conducting fieldwork among employees of a restaurant damaged in a suspected arson attack. Judge Jack Weinstein quashed the subpoena, recognizing that the sociologist had a "limited common law privilege" to keep information secret if the prosecutor failed to show a substantial need for it. (Weinstein's decision was later reversed on other grounds.) APA executive officer Felice Levine says that the Scarce case is analogous, and that the ASA leadership is "close to unanimous" in support of Scarce.

Meanwhile, Scarce remains in prison, and Coronado has disappeared. Scarce's attorney Jeffry Finer says that by locking up Scarce, the FBI is doing itself a disfavor: It is ensuring that radicals will not talk to Scarce in the future, cutting off one of the best sources of public information on groups the FBI wants to investigate.

–E.M.

through a university official of an easier approach: a freedom-of-information request for records generated by employees of MCG, a state school. Reynolds' lawyers promptly filed a request, and MCG legal counsel Clayton Steadman sent Fischer a memo declaring that the data "are the property of MCG" and gave Fischer 48 hours to deliver his files to MCG's legal office for inspection by an agent of R.J. Reynolds. Instead, Fischer took the data to court and sued MCG to prevent their release.

In support of Fischer, Paul Walter, chairman of the American Chemical Society's board of directors and former president of the American Association of University Professors, wrote that releasing the records would have "a serious adverse impact on the future conduct of socially beneficial scholarly work." In addition, Thomas Puglisi, an official in the Office for Protection from Research Risks at the National Institutes of Health, wrote to MCG advocating that it adopt stronger "confidentiality protections."

MCG has agreed from the outset that the children's names and addresses should be kept confidential, but it is still negotiating with R.J. Reynolds and Fischer on the disposition of other material. MCG's Steadman says that "Dr. Fischer thought [R.J. Reynolds] was going to attempt to discredit him," but Steadman notes that this is not a basis for withholding data. Steadman adds that "we're still talking about a settlement" with Fischer. Meanwhile, according to Steadman, the university lobbied successfully for a change in state law so that it now forbids release of research data until the author has published some results. This doesn't help Fischer, whose study was published 2 years ago. Unhappy with MCG's handling of the case, Fischer calls the whole episode "ugly" and "ridiculous."

That reaction is common among scientists who have been forced into the legal mill and compelled to surrender data. Worst of all, says Picou, is having to negotiate with people who don't seem to understand—or care about—the substance of your scientific efforts. He estimates that his own battle has delayed his research for nearly a year.

Picou concedes that the ruling in his case "worked out pretty well" in protecting his subjects' confidentiality and his unpublished research. But, still feeling scarred, he vows that he "will never collect data in a technological disaster again" without first getting a commitment from the litigants to shield him from the legal battle. Picou wishes he could persuade everyone involved to step out of the courtroom and resolve their differences in a scientific manner, but, given the nature of the U.S. legal system, such a reasonable outcome seems unlikely.

–Eliot Marshall

SEX DISCRIMINATION

Jenny Harrison Finally Gets Tenure in Math at Berkeley

Last week, in the final chapter of a highly publicized sex discrimination case, mathematician Jenny Harrison was appointed a full professor with tenure in the mathematics department at the University of California, Berkeley, the same department that denied her tenure in 1986. The appointment, effective 1 July, follows the unanimous recommendation of an independent tenure review committee that was set up as part of an out-of-court settlement of Harrison's discrimination suit against Berkeley. The suit was filed 4 years ago, and it has became a *cause célèbre* for women fighting sex discrimination in academics. The decision makes Harrison one of only a handful of tenured women at the top mathematics departments in the United States. (In a *Science* survey of 10 such departments during the 1991-1992 academic year, only five of 288 tenured positions were held by women [*Science*, 17 July 1992, p. 323].)

RAY BROWN

A major result. Mathematician Jenny Harrison settles her case.

Harrison says she is particularly pleased on behalf of other women. "This victory will encourage other women to aim higher," she says. Harrison also received an undisclosed amount of money, including payment of lawyers' fees, as part of the settlement. Morris Hirsch, a former chair of the Berkeley mathematics department and longtime supporter of Harrison, says, "Harrison is a terrific mathematician. [She] should have received tenure in 1986.... We're very lucky to get her now."

Most of Hirsch's colleagues in the math department didn't share that opinion in 1986, when they voted to deny Harrison tenure 19-12 with seven abstentions. It was the first time in 15 years that anyone had come up for a tenure vote in the Berkeley math department and been voted down. At the time, there were approximately 70 tenured men in the department and one tenured woman, and Harrison charged that the denial had more to do with her gender than her work. She said she had published as many papers as three of the eight men who had received tenure during her stint at Berkeley, and that her two important discoveries—mathematicians call them "major results"—at least equalled the number of major results claimed by half of the men who received tenure (*Science*, 28 June 1991, p. 1781.). Three years later, Harrison left the university, and after spending a year teaching at Yale has been unemployed since, working independently on mathematics at home.

She was also pursuing her suit, which she had filed in 1989. On 7 March of this year the university and Harrison agreed that a review of Harrison's work would be conducted by an independent group of academics to determine whether she should be given tenure. The panel, whose makeup was confidential, was assigned to examine her present qualifications—and not rehash the 1986 decision.

Science has learned that the committee consisted of seven members, five of whom were mathematicians (three from universities other than Berkeley). The grounds for the decision to recommend tenure are confidential, but it's likely that when Harrison got her third major result last year—extending calculus to fractals—she became a very tough candidate to turn down. Indeed, the committee's recommendation for full professorship, leapfrogging Harrison over associate professor rank, indicates high regard for her work. At the same time, the new fractal work allowed the university to save face by implying that Harrison's qualifications had improved since her original application—and that the 1986 decision may have been proper. "It's a win-win resolution," says provost Carolyn Christ. "We're all very happy that she was qualified in 1993."

That happiness is indeed shared by some of Harrison's colleagues, such as Hirsch, but her court battle has alienated others. "It will take a lot of healing on the part of a lot of people," says Alberto Grunbaum, who was department chairman during much of the negotiations for the settlement. And some department members don't seem to have healing in mind. "I feel the department was really wronged," says Rob Kirby, who maintains the department made the right decision in 1986 and has been unfairly damaged by the adverse publicity.

But Harrison isn't dwelling on the past. She's already on a Berkeley committee aimed at increasing the number of women and minorities in math and science. While she seems to have made her point at Berkeley, it remains to be seen what lessons other top math departments draw from her case.

–Paul Selvin

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