

The Violation of Ethics in Legal Research: Indemnity and other Accountability Provisions

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Introduction

All of mankind's greatest discoveries are courtesy the joy of research. Yet, even the most prolific of researchers are not exempt from speculations about possible unethical methods. Much has been written about scientific fraud; from Newton and his suspicious adjustments (which have now come to be termed in the scientific community as the 'fudge factor') to Pasteur and his pre-emptive announcement of a vaccine which had yet to complete the experimental stage, it seems as if the lure of fame could make even the greats weak¹.

Of course, it is easier to hold researchers in certain fields of study accountable as compared to others. For example, it would be very difficult for a theoretical physicist to cover up manipulations in his research, given that any recognition would only come his way after the data was experimentally verified. In the social sciences, however, since results are not lab run and the human race can be extraordinarily fickle; such certainty is hard to come by.

Depending upon the incentive or what is at stake, researchers may be tempted to colour outside the lines of ethical conduct. After all, who would tell? In order to counter this issue, most research organizations of repute now have institutional policies and actions plans to check questionable research practices. These policies are referred to as 'safeguards' and researchers in many such institutions are contractually obliged to stick to the accepted framework of conducting the research.

A scene from the Oscar nominated film 'Julie and Julia'² is one of the first things that comes to mind when thinking about the power exercised by a researcher during the process of data collection. It's a small thing which possibly may not have even registered on the mind of the

¹ H. F. Judson, THE GREAT BETRAYAL: FRAUD IN THE CULTURE OF SCIENCE (2004).

² Columbia Pictures, JULIE AND JULIA (2009).

ordinary common viewer, but is an ethical accountability nightmare for any monitoring organization. The protagonist, Julie Powell, is interviewed by her friend for an article about their generation turning thirty. However, much to her surprise, the article turns out to be an unflattering portrait that humiliates Julie, completely manipulating the interview responses to suit the author's pre-decided narrative.

In the film, of course, the friend is a foil who helps the protagonist come into her own, so naturally the need for consequences for her actions do not register for the viewer. In real life, however, the interview could very well have been the one that launched a barrage of inquiries, disciplinary actions, retractions and the like. Such issues, of course may be more common in research studies that we would like to believe. A researcher may knowingly or unknowingly tempt the informant into a false sense of security, in order to access information which may not ordinarily have been forthcoming. Given that the research process is entirely a researcher run machine, how do we enforce accountability mechanisms?

This particular work shall be looking at both the ethical perspective as well as concrete accountability mechanisms governing the research process. Throughout the course of this project, I shall reiterate the point using examples of research gone awry due to lack of accountability mechanisms. While highlighting the need to have adequate checks and balances in place, I shall also attempt to describe a few important measures that would help hold researchers to higher ethical standards.

I. Need for Accountability and the Basic Rules of Research Ethics

The principles of ethics in the empirical research are relatively straightforward and rely upon the classic trifecta mentioned in the Belmont Report³. These are respect for persons (primarily operating in the sphere of consent), beneficence (a balance between risk and reward for the subject) and justice (ensuring fairness at all stages in the research process).

³ The Commission, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1978).

In order for any research to be ethical, there must exist a state of genuine uncertainty in the mind of the researcher. This state of uncertainty is referred to as ‘equipoise’⁴. Consequently, a researcher going in with a predetermined narrative, interviewing participants with the intent to elicit a particular answer or selectively analyzing the data received would not only be guilty of research misconduct, but would also ultimately sabotage their own process. Therefore, the need for an accountability mechanism is in the interests of the research process.

A. The Reader as the ultimate accountability mechanism

The problem of research misconduct reached astonishing heights during the ongoing outbreak of the COVID pandemic. With pharmaceutical companies and microbiology researchers struggling to come up with a cure or, at the very least, a vaccine for the disease, there has also been a simultaneous explosion of research papers postulating possible solutions, on the basis of dubious data and questionable inferences. This phenomenon (humorously and cleverly) dubbed a ‘paperdemic’⁵ by one author seems to have spurred a fresh debate on accountability mechanisms in research. The underlying question seems to be: what stops a researcher from peddling frivolous, fake or manipulated publications in the name of research?

A possible response to this question (and one that may be considered idealistic by many) is that eventually all research derives its validity from the reader. A strong academic community would therefore be the ultimate accountability mechanism for research in the social sciences. While the sanctions issued by the research community may not be binding, backlash from the peer group is often responsible for retracted publications and errata issued by the offending researcher.

B. The Imbalanced Power Equation

Accountability is a strategic mechanism primarily used in public administration to ensure good governance and the following of ethical practices. The onus is predicated on the

⁴ Cook, and C. Sheets, *Clinical Equipoise And Personal Equipoise: Two Necessary Ingredients For Reducing Bias In Manual Therapy Trials*, 19 (1) THE JOURNAL OF MANUAL AND MANIPULATIVE THERAPY, 55, 56 (2011).

⁵ R J Dinis-Oliveira, *COVID-19 research: pandemic versus “paperdemic”, integrity, values and risks of the “speed science”*, 5(2) FORENSIC SCIENCES RESEARCH, 174, 175 (2020).

existence of power imbalances between parties, which is sought to be corrected by increasing answerability or responsibility on the part of the more powerful party.

Of course, this power imbalance has now come to the forefront of research ethics, and is a consideration that even the most amateur researcher is expected to be cognizant of. The Belmont Report makes note of this principle under the category of justice. The ‘vulnerability’ of the researched, and the inherently authoritarian position of the researcher creates a chasm that could really only be addressed by a carefully designed process to even out imbalances in authority⁶.

C. Consequences (or lack thereof)

While pushing for retractions, manipulation checks and informant feedbacks seems to have become *de rigueur* in academic circles, the more significant issue is the lack of very real and tangible consequences to malpractices by researchers. The ‘name and shame’ method only works as long as public memory serves, and even that depends entirely upon the vigilantes of the academic community.

It would be wise for institutions to push for the formulation of Research Ethics Committees to look into allegations of research misconduct. These Research Ethics Committees (hereinafter referred to as RECs) would be separate from the Institutional Review Boards. The former would be a quasi-judicial and permanently constituted organization, whereas the latter would have powers of supervision and could be comprised of subject experts.

It may also be pertinent to mention, at this stage of this discussion, that the accountability mechanisms are entirely different from the system of consequences. The latter comes into play once the damage is already done, and therefore deals with penalizing researchers for taking up questionable methods of conducting research or ‘research misconduct’. The former, on the other hand is almost pre-emptive and cautionary in nature, seeking to prevent the damage

⁶ Richards, and L J Schwartz, Ethics of qualitative research: are there special issues for health services research?, 19 (2) FAMILY PRACTICE, 135-137 (2002).

from being caused in the first place. It is this latter category that is the focus of this work and shall now be discussed further.

II. Common Accountability Mechanisms and Accepted Safeguards in Research

As can be evidenced by the discussion above, the ultimate goal for any researcher, ethically speaking, is to conduct a research that ‘leaves no trace’, either physically or mentally. The research process is therefore expected to be a smooth and non-invasive or intrusive mechanism. However, that may not always be possible, simply due to the pressure (whether self-imposed or peer) to yield results. There have been several instances where the lack of adequate protocol in the conduct of research experiments has led to the process going haywire.

The Stanford Prison experiment, conducted by Philip Zimbardo⁷ in 1971 seems to be one of these. Already considered radical at the time, the experiment today has attained enough bad publicity to almost become a cliché, but a discussion of it is still relevant, particularly in the context of the accountability measures for researchers.

In the 1971 experiment, which was designed to study the impacts and responses to tyranny and authority, the researcher was personally involved in the process, participants were not given the option to opt out despite being given an assurance as to the contrary and the experiment got out of hand very quickly. In fact, less than a week in, the experiment had to be terminated.

Interestingly, the experiment was re-attempted in the year 2001 by a team of the British Broadcasting Network (BBC). This time around, the research team was careful to ensure that adequate mechanisms were put not just to ensure that the researchers were aware of their roles, but also to deal with the potential calamities highlighted during the previous attempt. As opposed to the previous experiment, the researchers were no longer integrated into the experiment. In fact, the power structure was fragmented to allow interventions from multiple

⁷ C Haney, et al, *A Study of Prisoners and Guards in a Simulated Prison*, 9 NAVAL RESEARCH REVIEWS, 1, 4 (2002).

points, including independent psychologists, paramedics and an ‘ethics’ panel comprising five members⁸.

Other commonly accepted safeguards in ethical research are discussed below.

A. Contractual Liabilities: Indemnity and insurance

Usually, the process of research and data collection is largely based on the model of self-regulation⁹. The obvious expectation is for researchers to be ethical, but very rarely is this expectation defined, qualified or even introduced to the researcher. The ethical ‘sweet spot’, so to speak, in terms of research is for there to be no lingering after-effects of the research on either the mind or the body of the researcher.

As there are attempts the world over to make the research process more streamlines and less opaque, research contracts are often used in the interim to ensure researcher compliance to ethical guidelines and standards. Termination of the research contract ends researcher involvement in the entire process, and the reasons may range for a failure to obtain adequate consent from participants to mismanaging of sanctioned funds. However, any contractual liabilities underscored in the research contract do help to bring in some semblance of monitoring and control to the research process, outside of what the researcher is himself involved in.

Many organizations may choose to have iron-clad terms for the contract, and depending upon the significance of the research and its findings, the researcher may be called upon to indemnify the organization for any harm that may occur as a consequence of the research.

B. Institutional Review Boards (hereinafter referred to as IRBs)

Most Institutional Review Boards are set up to monitor finances, often pertaining to cases where a particular amount is allotted to a researcher under the terms of a grant, or fellowship or any other financial incentive. However, that is not all that such Boards are good for. IRBs

⁸ Reicher, and S A Haslam, *Rethinking the psychology of tyranny: the BBC prison study*, 45(1) THE BRITISH JOURNAL OF SOCIAL PSYCHOLOGY, 1 (2006).

⁹ R Tarling, MANAGING SOCIAL RESEARCH: A PRACTICAL GUIDE (2005).

can actually act as a sounding board for increasing the answerability or accountability of researchers. Put simply, an independent IRB may well be as integral to the research process as perhaps the researcher himself. In fact, the United States has, through case law and official reports upheld the liability of institutions for the oversight of their IRBs and RECs for failures to prevent unethical methods of conducting research¹⁰.

IRBs have the primary tasks of reviewing researcher progress and conformation to the ethical methods of research. IRBs may have sub-divisions, such as the Research Ethics Committees and Data Safety Monitoring Boards or they may be independent and separate entities in and by themselves. Whatever the organizational structure, these committees must be vested with the authority to terminate or suspend the research process in the review of data collected reveals red flags or the research process throws up possibly dangerous roadblocks.

C. Research Impact Assessment (hereinafter referred to as RIA)

A Research Impact Assessment is usually done by the organization of institution sanctioning funds for or directly sponsoring a research project. As pressure grows for institutions to take ownership of the research that they fund, RIAs could become more common. Any investment in research should yield demonstrable results, whether conveyed through policy changes or significant advancements in understanding. For example, many research journals of repute have an impact factor which is calculated on the basis of citations and readership, demonstrating the reach of the journal. Research may also be thought of in the same way. However, the impact of research is not as easily calculated. This is a problem currently plaguing the research community and there seems to be no definite answer.

D. Action Plan

A researcher should have a plan of action, where he/she is able to visualize possible problematic outcomes and has a set plan to deal with them. Deviation from this plan would obviously raise suspicions, and the researcher would therefore be held accountable for any diversions. The action plan may be highlighted at the finalization of research design stage, as

¹⁰ Hoffman, and J W Berg, *The Suitability of IRB Liability*, 67 UNIVERSITY OF PITTSBURG LAW REVIEW, 365, 383 (2005).

it is imperative that the researcher demonstrate enough foresight to make allowances for things to go wrong.

While it is almost imperative for the researcher to have a concrete action plan relating to subjects having impaired decision making abilities, due to a physiological disability, or general vulnerability, it is simply good practice to also keep a general set of guidelines handy for possible roadblocks.

Conclusion

In the book ‘Engines of Anxiety: Academic Rankings, Reputation, and Accountability’, the authors make note of the pressures to perform, aptly noting,

“Concerns about accountability measures are especially relevant because quantitative evaluation has come to permeate social life. If it seems difficult to escape talk of accountability and assessment, it is because these ideas are now far more common than in the past.”¹¹

The research process is only as ethical as an institution’s dedication to it. Integrating accountability and responsibility to the research process is imperative not just for the integrity of the process but also for the well-being of society in general. Unethical research could only ever be productive in comic book fandom but the enthusiasm would not carry forward in real life.

New scholarship is a great source of our own ideas and understanding of the accountability mechanism. The journal ‘Accountability in Research’, for example, actively works to push academic debates on how to strengthen the accountability mechanism in the research process. The brainchild of Adil E. Shamoo almost four decades ago, the journal recently features multiple articles on the explosion of research in the wake of the COVID pandemic.

Many of the mechanisms discussed above are new, almost nascent in origin but the potential to contribute to the ironing out of the kinks in the research process is immense. As

¹¹ Espeland and M Sauder, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY, 3 (2016).

organizations continue to grow and evolve, it can only be hoped that the ethics aspect would not be an afterthought in the research process but at the forefront of it. Only then could truly groundbreaking inroads be made into hitherto unexplored territory.