

social research Update

Research without consent

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- **This *Update* questions the assumption that the consent of participants or subjects is ethically required for research to be done**
- **Consent is needed in some circumstances to protect people's privacy and rights**
- **Seeking consent is not appropriate when the subject is public or when rights are being violated**

The principle of consent is routinely accepted in codes of research ethics. The British Sociological Association, for example, suggests that

As far as possible participation in sociological research should be based on the freely given informed consent of those studied. (BSA, 2002, s.16.)

On the face of the matter, the principle of voluntary consent is difficult to disagree with. Restrictions on dealing with human subjects have been strongly influenced by the experience of medical care. The abuses of the Nazi era led to the development of the Nuremberg Code to protect research subjects (see Kimmel, 1996, ch 2.) Certainly, failure to obtain consent, and failure to inform people of the consequences of participation, has been at the root of serious violations of human rights. However, research refers to an enormously diverse range of activity, and generalisations that are valid for some purposes are not necessarily applicable in others.

The argument for consent

The central argument for obtaining consent from participants is that research is liable to be intrusive, and intrusion is only legitimate if consent is obtained. People have a sphere of action that is private, and theirs to control. Privacy is "the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others." (Westin, cited Kimmel, 1988) The principle is clearly set out in the Australian National Health and Medical Research Council's guidance:

Individuals have a sphere of life from which they should be able to exclude any intrusion ... A major application of the concept of privacy is information privacy: the interest of a person in controlling access to and use of any information personal to that person. (NHMRC, part 18).

Research which intrudes into the private space of the individual, without that person's consent, breaches that person's rights.

The scope of the right to privacy is extensive, arguably much more wide-ranging than researchers have recognised. In the first place, the principle applies to more than research participants: it covers anyone who is the subject of research, not just those who are delivering the information. If one person talks about others—such as a member of the family, a colleague, a person who has been abusive or abused—and the subjects all have rights to privacy, their consent also needs to be sought. Second, the principle applies not just to what a person reveals, but to anything that might be discovered about them. It covers, for example, records, observed behaviour and possessions. The ESRC framework states that

human participants (or subjects) are defined as including human beings, human beings who have recently died ... and human data and records (such as, but not restricted to, medical, genetic, financial, personnel, criminal and administrative records ...) (ESRC, 2005, p 7)

It would not be good enough to report an interview without consent, even if the interviewee is not identified; by the same token it cannot be good enough if the information consists of anonymous numerical data. There also has to be consent to use such data. Third, if the information belongs to the person, and the individual consents to its release for specific purposes, that person continues to have rights over it. This should apply, in principle, to the secondary use of material. Individuals may give consent to researchers on condition that their information will be used for certain purposes, but that consent should not be presumed to extend to later researchers who come across the data and re-present it in different contexts, for different purposes.

There are ethical questions to raise about the general principle of privacy (see Spicker, 2006), but its influence

on the way we interpret the ethics of research has been profound. It leads to the central precept that actions have to lie in the control of the research subject. Research subjects have the right to be informed about research, to consent, or to withdraw from it if they are not content.

The limits to voluntary participation

There are important limitations to the right to privacy enjoyed by individuals in public settings. Privacy applies in the sphere of life which is personal and private. Much social life is not. Sometimes research is done into organisations, institutions, and social and political roles. Sometimes it is concerned with public behaviour, such as community involvement or political action. These are treated in most codes of guidance as research with “human subjects”, even if the organisation is the main subject of interest, because respondents from within the organisation are human. But the rules which apply in these circumstances cannot be the same as those which apply to people individually. In the case of research into organisations, human subjects are involved because of their organisational roles, and personal material is left aside. Normally the only consent that would be sought would be the consent of the organisation, not of each person who works for it.

There are however many circumstances in which the information that is being sought in research is not private. Public actions can be publicly observed. The British Society of Criminology states that researchers should

base research on the freely given informed consent of those studied in all but exceptional circumstances. (Exceptional in this context relates to the exceptional importance of the topic rather than difficulty of gaining access.) (BSC, 2006)

This seems to imply that it is not legitimate for a researcher to attend

and report on a criminal trial without the consent of participants in that trial — including the judge, jury, accused and counsel. Of course, it is not meant to be taken that way; that would make it impossible to report on a trial at all. The public nature of the act makes the ability to report and comment essential to the functioning of the system of criminal justice.

Published codes of ethics tend to be vague about the distinction between public and private, but the Social Research Association mentions it explicitly:

there can be no reasonable guarantee of privacy in ‘public’ settings since anyone from journalists to ordinary members of the public may constitute ‘observers’ of such human behaviour and any data collected thereby would remain, in any case, beyond the control of the subjects observed. (SRA, 2003, p 33)

Several codes of ethics recognise the distinction implicitly. For example, the BSA code refers to “participant or non-participant observation in non-public spaces” (BSA, 2002, s 32). The references to “non-public places” show what the authors of the guidelines really have in mind.

Information is defined as public by its character, not by its location. People do private things in public spaces (like exchanging intimacies), and public things in private spaces (like cutting political deals). Where information is public, it is available to researchers without any necessity to obtain individual consent. The Canadian Tri-Boards advise research ethics boards

that certain types of research—particularly biographies, artistic criticism or public policy research—may legitimately have a negative effect on organizations or on public figures in, for example, politics, the arts or business. Such research does not require the consent of the subject. (Government of Canada, 2003, section G)

The distinction between public and private information is also central

to the defence of the secondary analysis of data. Information that has moved into the public domain, like census returns or research reports, can legitimately be used without further reference to the subjects of the information. This is not implicit consent. What happens, rather, is that consent becomes morally irrelevant, because the information is beyond the rights of the individual to control.

Research often has a public function. It holds government to account. It is essential to the function of a democracy that government is open, and that officials are held accountable for their actions. In the case of public institutions, officials are accountable by virtue of their formal roles. It is not intrinsically unethical to use the Freedom of Information Act, which may require officials to provide responses. On the contrary, the passage of information is fundamental to democratic processes. Ethical guidelines in the US exempt the examination of government from other rules for human subjects altogether (US Department of Health and Human Services, 2005.)

Reviews of government action are public in their very nature. Neither officials nor public agencies have the right, legally or morally, to consent to research in circumstances where their work is publicly accountable. Criticisms of the actions of people in authority do not require their consent, and indeed the integrity of research could be jeopardised by the act of seeking consent. Observation, recording, and criticism are not only sanctioned; if there is an ethical bar, it is that it is illegitimate to put stumbling blocks in their way.

The case for examining other kinds of public material may be less immediately powerful, but it can still be argued that a society in which the examination of independent and commercial organisations, health providers, creative artists or people

engaged in criminal activity are obstructed is a weaker, less legitimate society than one where such things are allowed freely.

The rights of research subjects

Many published codes of ethics treat the rights of research participants as primary. The Association of Social Anthropologists, for example, suggests that

most anthropologists would maintain that their paramount obligation is to their research participants and that where there is conflict, the interests and rights of those studied should come first. (Association of Social Anthropologists, n.d., s.1.1.a)

The idea that there is a primary obligation to participants supposes that research is, at root, a private matter depending on the relationship between the researcher and the research participant. This is at best a half-truth. There are some aspects of the research relationship that are negotiated between researchers and participants, but only some are. The rights of participants are of two kinds. On one hand, there are particular rights: rights which are special to individuals, by virtue of their relationships. Contractual rights are an example. Particular rights in research are generated by the relationship between the researcher and people who participate in research. Researchers, as a general proposition, should behave towards research participants with integrity. If they promise confidentiality, for example, they should hold to it, and if they are working in circumstances where confidentiality cannot be maintained, they should not be promising it. (See Israel, 2004).

The other kind of rights are general rights, that apply to everyone. People who are the subjects of research have general rights, like everyone else. They have human rights, including rights to privacy where appropriate, and the right not to be exploited. But human rights do not work only in one direction. Other

people have them, too. Rights are social. If a research subject is abusing the rights of another person, it is not necessarily the case that the researcher is bound to respect or protect that subject's position. The rights of research participants are not unlimited and they do not pre-empt other ethical issues.

This brings us to circumstances where obtaining consent can be positively unethical. The US Office for Protection from Research Risks states that people who are observed in public are not entitled to have consent sought unless they are in circumstances where "any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability ..." (cited — uncritically — by the SRA, 2003, p 33.) People are primarily "at risk of criminal or civil liability" when they break the law or breach the rights of others. If a researcher witnesses exploitation, racism, even genocide, this means that the consent of the perpetrator is needed before the information is revealed. This is worse than a misunderstanding of ethical requirements; it is disgraceful.

The case against consent

There are three main objections to obtaining consent. The first is practical: there are contexts in which it is neither feasible nor desirable to obtain voluntary consent from the people being studied. Observing a crowd at a football match, watching drivers in moving cars, or attending a meeting of shareholders cannot generally be done with the consent of all participants, and the idea that consent ought to be obtained poses a major obstacle to the prospect of research being done at all.

The second problem is methodological. One of the most basic axioms of social research method is that the methods used, and even the presence of a researcher, may alter the behaviour of research subjects. In research primers,

this is often referred to as the Hawthorne Effect, after a classic set of management studies which found that workers responded differently when their work was being examined than when it was not (see Olsen et al, 2004). There are many different ways of trying to respond to this problem, but if the purpose of the research requires the researcher to minimise the impact of the research process on behaviour, the research needs to be minimally obtrusive and may be covert. This is commonly the case in public settings, where both the possibility of generalisation and accountability may be compromised.

Practical and methodological implications do not trump ethical ones, and if voluntary consent ought to be obtained, typically because the information dealt with is personal and private, it may be necessary to conclude that the research should not be done. But there may also be ethical objections to the pursuit of informed consent. There are contexts in which the process of research is guided by other ethical considerations. In some of the cases considered here, such as public activities, the role of government, criminal activity and criticism in the public interest, reliance on the consent of research participants may be morally wrong. Consent cannot be taken as the default position. This needs to be reflected in the guidelines produced by learned societies and other relevant bodies involved with ethical issues.

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