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Above the Law: Research Methods, Ethics and the Law of Privilege

Geoffrey R. Stone*

In Anticipating Law, Palys and Lowman set forth the rationale for a “researcher-participant privilege” and advise scholars how best to preserve the confidentiality of their research in the face of a legal system that has not looked kindly on such a privilege. Although I am inclined to agree with Palys and Lowman that a researcher-participant privilege would, on balance, be beneficial, the case for the privilege is hardly self-evident. Moreover, the advice Palys and Lowman offer researchers in the absence of such a privilege is, in my judgment, unwise. I will briefly address both of these points.

The Researcher-Participant Privilege

Most of the rules of evidence, like most of the “rules” of research, are designed to get at the truth. For the most part, the rules of evidence exclude “unreliable” information from the consideration of the trier of fact. Privileges, however, are an exception. Privileges generally exclude reliable information in order to further a competing social policy. The effect of evidentiary privileges may thus be to increase the likelihood of erroneous fact-finding in criminal or civil proceedings. Because this is a high price to pay, the social policy furthered by a privilege must be quite weighty to justify the cost to the truth-finding function of the legal process.

The most well-entrenched evidentiary privilege, which is applicable in every American jurisdiction, protects confidential communications between a lawyer and a client for the purpose of legal advice. The rationale of the attorney-client privilege is that clients will not be candid with their attorneys if everything clients disclose to their attorneys can be used against them in court, and attorneys cannot give sound legal advice to their clients if clients are less than candid in their disclosures to their attorneys. Because this privilege facilitates full and candid discussion between the attorney and the client, the privilege arguably enhances the overall reliability of the legal process, even though it renders inadmissible some evidence that might be both relevant and reliable.

Other privileges, such as the marital privilege (which governs confidential communications between spouses), the physician-patient privilege, the psychotherapist-patient privilege and the priest-penitent privilege are recognized in some jurisdictions, but not in others. Some of these privileges

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originated at common law; others are the result of legislation. Some jurisdictions
have legislatively enacted a journalist-source privilege, although the Supreme
Court has held that the First Amendment does not establish such a privilege as a
constitutional right.¹

Palys and Lowman argue that scholarly researchers should enjoy an
evidentiary privilege for confidential information they learn from research
participants in the course of their scholarly research. The argument is that such a
privilege is necessary to protect both academic freedom and the confidentiality of
research participants. More fundamentally, they maintain that such a privilege is
necessary to ensure that research participants will feel free to disclose
confidential information to researchers without fear that the information will
later be made public.

Certainly, from the perspective of scholars, this is an appealing proposal.
It may be less appealing, however, from the perspective of society as a whole. As
with other privileges, whenever such a privilege is invoked it may increase the
risk of erroneous fact-finding in criminal and civil cases. As a consequence, some
individual whose life, liberty or property is on the line may face an increased risk
of an inaccurate decision by the legal trier of fact. This is not to be taken lightly.

But we have other privileges, so why not a researcher-participant
privilege as well? There may be several reasons why the researcher-participant
privilege hasn't taken hold. First, unlike the attorney-client privilege, the
disclosures involved in scholarly research rarely concern matters likely to come
before the courts. Thus, it is only in unusual circumstances that the absence of
the privilege will have a chilling effect on research. A much higher percentage of
attorney-client communications concern matters that are, or could be, relevant to
litigation. The absence of an evidentiary privilege would thus have a much more
serious and more pervasive dampening effect on the candor of attorney-client
communications than on the candor of researcher-participant communications.

Second, most of the well-entrenched privileges implicate privacy interests
that are deeply-rooted in the very nature of the protected relationship. In a
significant sense, these privileges are designed not only to encourage confidential
communications, but also to respect the inherent privacy of the marital,
physician-patient, psychotherapist-patient and clergyman-penitent relationship.
The researcher-participant relationship typically lacks that essential
characteristic.

Third, the general trend has been an increasing skepticism about
privileges. The absence of empirical evidence that privileges actually serve their
intended purpose (facilitating open communication), especially outside the
attorney-client context, weighed against the loss of occasionally significant
evidence in specific cases, has fueled a general hesitancy to add still more

privileges to the list. Indeed, the trend has been to narrow rather than to broaden the scope of existing privileges.²

Having said all this, I remain sympathetic to the idea of the researcher-participant privilege. In at least some circumstances, the absence of such a privilege could inhibit research participants from cooperating fully and candidly with a scholarly project; in at least some circumstances, the refusal of such individuals to participate, or to participate fully and candidly, could undermine the reliability of the study and perhaps even preclude the research entirely; in at least some circumstances, the loss of the research could be a significant loss for society; and in at least some circumstances, the “evidence” wouldn’t have existed in the first place if the participant hadn’t been ensured confidentiality, so recognition of the privilege (at least in those circumstances) would sacrifice little, if anything, of value to the legal process.

The closest analog, of course, is the journalist-source privilege, which has received only mixed support. My own view is that the Supreme Court was wrong to reject a constitutional basis for the journalist-source privilege, and that the First Amendment could readily be understood to embrace some form of researcher-participant privilege, as well. But, at least for the moment, that is water over the dam. Short of a significant shift in the direction of the Supreme Court, proponents of the researcher-participant privilege, like supporters of the journalist-source privilege, will have to undertake the difficult and gritty work of persuading Congress and the state legislatures, one-by-one, that such a privilege is sound public policy. In the past, universities have demonstrated their capacity to work the legislative halls on matters of great importance to higher education. That they haven’t rallied the troops in this instance may speak volumes about the perceived need for such a privilege – at least relative to competing concerns in higher education.

It is important to note that the absence of a formal researcher-participant privilege does not mean that information conveyed to the researcher is freely available to every tomdickandharry litigant who wants it. To the contrary, courts exercise considerable discretion under Rule 45 of the Federal Rules of Civil Procedure and under the Wigmore test, as suggested by Palys and Lowman, to protect confidential information. Courts ordinarily will deny compelled disclosure of such material, and use protective orders and redaction to preserve confidentiality, unless the party seeking disclosure can demonstrate “a substantial need for the . . . material that cannot be otherwise met without undue hardship.”³ These are important protections that often will shield disclosure of

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³ Federal Rules of Civil Procedure 45(c)(3)(B). See Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (to obtain confidential information in this context the interests of the moving party “must be strong and the extent of the intrusion carefully limited”). See also B. Crabb, Judicially Compelled Disclosure of Researchers’ Data: A Judge’s View, 59 Law & Contemporary Problems 9, 25-30 (1996); P. Carrington & T. Jones, Reluctant Experts, 59 Law & Contemporary
confidential participant-researcher communications, even without a full-scale evidentiary privilege.

Even with these protections, however, there will inevitably be situations in which the absence of a formal privilege will impair scholarly research. Consider, for example, a social science study designed to explore the economic origins of crime, in which the researcher seeks information from individuals in the community about drug use, unlawful gun possession and other criminal activity. If it is known that police can compel the researcher to disclose such information about specific individuals, the study will certainly be hindered. One partial solution to this dilemma, short of a full-scale privilege, would be for the courts to give real bite to the concept of “substantial need” upon a showing that disclosure will significantly undermine research. That is, courts could hold that it is inappropriate to compel disclosure of such information unless the stakes for the legal system are unusually high\(^4\) and clearly outweigh the research need for confidentiality. This much could (in theory) be accomplished even without a formal privilege.

The key advantage of a full-scale privilege, analogous to the attorney-client privilege, is that it would admit of no case-by-case “balancing” of the competing interests. It would provide absolute protection against compelled disclosure of any information protected by the privilege, regardless of anyone else’s need for the information. This difference may be less significant than appears, however, for the trend has been to narrow even the established evidentiary privileges in this ad hoc direction.\(^5\)

**Researchers Above the Law**

In order to maximize the possibility that researchers will be able to assert confidentiality in this uncertain legal environment, Palys and Lowman advise scholarly researchers (a) to promise absolute confidentiality to research participants and (b) to be willing to go to prison for contempt of court rather than to breach that guarantee. There are several flaws in this advice.

First, a researcher following this advice would be considerably less than fully honest with research participants. In the absence of a legally recognized

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\(^4\) Suppose, for example, the police need the name of an individual who has participated in a research project in order to find a kidnapped child.


Indeed, even those courts that have considered a researcher-participant privilege have tended to define them in terms of a balancing of competing interests. See In re Grand Jury Subpoena Dated January 4, 1984, 750 F.2d 223 (2d Cir. 1984). See also M. Traynor, Countering the Excessive Subpoena for Scholarly Research, 59 Law & Contemporary Problems, 119, 129 (1996).
(and absolute) researcher-participant privilege, such a promise would create the distinctly misleading impression that the researcher has the legal authority to ensure confidentiality. In fact, however, the researcher will be able to honor such a promise only by violating the law. This unwittingly implicates the participant in an unlawful agreement. Whether or not this exposes the participant to possible criminal liability, it is unethical to deceive a research participant in this manner.

Second, a researcher who follows this advice places his employer (typically a university) in an exceedingly difficult position, presumably without its permission. If the researcher expressly sought the university-employer’s authorization to mislead research participants in this manner, a responsible university would likely deny permission. But if the researcher takes it upon himself to follow the authors’ advice, his conduct may expose the university to (a) considerable public embarrassment for employing a researcher who misleads research participants and then violates the law, (b) possible civil liability to the research participant if the researcher (either at the university’s direction or otherwise) ultimately discloses the information to the court -- in breach of the “absolute” guarantee of confidentiality, or (c) possible criminal or other government sanction if the researcher-employee refuses to obey a court order to disclose the information.

Moreover, the researcher who makes such a promise places himself in a serious dilemma. He risks losing his job for knowingly making an ethically questionable promise that may place his university-employer in legal jeopardy; if he ultimately discloses the information because of a court order he breaches his unqualified promise of confidentiality and thus renders himself vulnerable to possible civil liability to the participant for breach of contract; and if he refuses to obey a court order to disclose the information, he may be fined and/or imprisoned.

All of which brings me to the most basic question. Is it ethical for a researcher to promise absolute confidentiality if the only way he can fully honor the promise is by refusing to comply with a lawful judicial order? The answer, in my judgment, is “no.”

The essence of the authors’ claim is that considerations of “academic freedom” and professional “ethics” support their conclusion as the necessary extension of a higher law. This is unpersuasive. Scholars and universities in this nation operate in a privileged environment. But even scholars and universities are not above the law. It is not for scholars and universities to judge for themselves which laws they will obey and which they will flaunt. Such an

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attitude, if embraced in practice, would disserve higher education and threaten the distinctive position scholars and universities enjoy. Such an approach would be arrogant, self-righteous and misguided.

I do not mean to suggest that violation of the law is never ethical, either as a form of civil disobedience or otherwise. But it should be a last resort and reserved for matters of high principle. Before reaching that point, researchers and universities must decide whether recognition of a researcher-participant privilege is truly a matter of fundamental concern to the research community. If so (and this conclusion is far from obvious), they must then make a serious and sustained effort within our political and legal system to educate and persuade voters, courts and legislators to enact such a privilege as essential to the ability of researchers and universities to fulfill their responsibilities to society.

If they undertake such an effort, they may succeed. Increasing numbers of states have enacted the journalist-source privilege in recent years. But in the absence of such an effort, law violation by individual researchers is an inappropriate and self-aggrandizing response to the challenge. And if the community of universities and researchers is not willing to make this matter a high priority for sustained political and legal action, then courts and legislators should not recognize the privilege and researchers should conform their behavior to the requirements of the law.

What about the individual researcher who believes she needs to guarantee absolute confidentiality to her participants in order to undertake her research? Is she justified in making such a promise? For the reasons noted above, such conduct would be unethical with respect to both the participants and the employer-university. But even putting those issues aside, let's suppose we reach the moment of truth. The judge orders the researcher to disclose information because it is of substantial importance to an on-going legal proceeding. If the researcher has expressly promised participants absolute confidentiality, she may feel a strong moral obligation to honor her promise, and even go to jail if necessary. This may be thrilling. The researcher will likely fancy herself a martyr and may even make it into the Times. After all, she is standing on principle in honoring her sacred promise to the participant. But this is all circular. The researcher had no business – professionally, legally or ethically – making the promise in the first place. By making the initial promise, the researcher falsely constructs the role of martyr. If she hadn’t offered the unwarranted guarantee of absolute confidentiality, the dilemma – and the drama -- wouldn’t exist.

Palys and Lowman see this situation differently both because they think recognition of a researcher-participant privilege would be good public policy (I agree) and because they embrace a cynical view of the citizen’s responsibility to comply with the law. They seem to think that it is appropriate and ethical for an individual to calculate whether the benefit of pursuing his self-interest exceeds the cost imposed upon him for violating the law. If so, it’s apparently acceptable
to violate the law. It is not so simple. An individual does not act ethically or responsibly if he kills his business partner because he's willing to spend 20 years in jail. And a researcher does not act ethically or responsibly if he subverts the legal process by unlawfully refusing to disclose relevant information to a court because he's willing to serve six months in jail.

How would we draw the line if we were to embrace so arrogant an approach to the law? If Palys and Lowman can disobey this law because they think it unduly interferes with their ability to undertake their research, what about a law against wiretaps? Is it ethical for a researcher unlawfully to wiretap phone calls in order to enhance his research? Is it ethical for a scholar to break into a subject’s home in order to find information that might advance her study? What is the ethical principle that grants the scholar the right to violate some of these laws but not others? Or are we free to violate them all? Except as a last resort, the way to change “bad” laws is to change them.

Finally, suppose we get to the last resort. Suppose over the next ten years universities and researchers make a concerted effort to educate and persuade voters, courts and legislators to adopt the researcher-participant privilege -- without success. Is it then appropriate for scholars to take matters into their own hands and unconditionally promise confidentiality to participants, knowing that they will have to violate the law to fulfill the promise? No. Civil disobedience (if that’s what this is) is not appropriate whenever one “loses” in the political and legal process. Such action may be ethical when the moral stakes are high and when the “system” is oppressive, unjust and illegitimate, but there is no ethical basis for such action merely because citizens, courts and legislators don’t do what scholars think is in their best interests. To compare the moral plight of the researcher who cannot promise absolute confidentiality to that of African-Americans who refused to leave segregated lunch counters or to that of individuals subpoenaed by congressional committees to disclose Communist affiliations is to profoundly inflate the moral dimension of the researcher’s dilemma. Yes, it would be good if scholars could ensure research participants absolute confidentiality. And, yes, it would be good if the government were to fund all worthwhile research. But neither is a right of high moral dimensions.

Ironically, all of this is largely unnecessary. The proper course for a researcher who cannot count on the protection of an absolute researcher-participant privilege is not to promise unconditional confidentiality, but to promise unconditional confidentiality within the limits allowed by the law. Although some research-participants may not be satisfied by this, they will be few and far between. In any event, this is the most one can responsibly promise, and it is thus the most one should promise.

Palys and Lowman argue that if researchers cast their promise in this form it may discourage courts from protecting confidentiality. The great weight of
opinion is that this concern is without foundation.\textsuperscript{7} Courts are highly unlikely to disadvantage a researcher because he promises confidentially “within the limits allowed by law.” Making a promise that one cannot honor without violating the law is not likely to prove an effective way to win over the courts. The proper course is to make the case on the merits – both case-by-case and legislature-by-legislature -- that sound public policy justifies the protection of confidentiality when it is necessary to the research enterprise.

Readers with comments should address them to:

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\textsuperscript{7} See, e.g., J. Cecil & G. Wetherington, Foreward, 59 Law & Contemporary Problems, 1, 5 (1996); O’Neil, A Researcher’s Privilege: Does Any Hope Remain, 59 Law & Contemporary Problems 35, 36, 40, 46 (1996); E. Wiggins & J. McKenna, Researchers’ Reactions to Compelled Disclosure of Scientific Information, 59 Law & Contemporary Problems, 67, 82 (1996); M. Traynor, Countering the Excessive Subpoena for Scholarly Research, 59 Law & Contemporary Problems 119, 132 (1996). See also Farnsworth v. Proctor & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (“Even without an express guarantee of confidentiality there is still an expectation, not unjustified, that when highly personal and potentially embarrassing information is given for the sake of medical research, it will remain private.”); Lampshire v. Proctor & Gamble Co., 94 F.R.D. 58 (N.D. Ga 1982). The one decision the authors cite in support of this concern in no way suggests that the court would have granted any greater confidentiality to the documents in question if the questionnaire had not said “except as provided by law.” Atlantic Sugar Ltd. v. United States, 85 Customs Court 128 (1980).
20. Julie Roin, Taxation without Coordination (March 2002).