

JOURNALISM AND THE IRB

Posted by Brooke Kroeger on Mar 30



In case this comes up in your partner programs, here is the explanation Prof. Seife prepared from one of my Gallatin students, in case you are asked about submitting to the IRB. (And the short answer is NO. Never.)

Dear Dean Reiss,

Charles Seife, journalism professor and director of graduate studies here.

Journalism projects don't fall under the jurisdiction of IRBs for a number of reasons. We have a different process for resolving ethically difficult cases.

There's a legal argument and an ethical argument for why journalism isn't "human subjects research" and we don't submit to IRBs. (As it happens, I've been studying these issues for a while -- part of my work involves exposing and analyzing research misconduct.)

First the legal argument:

The legal framework for IRBs is known as the "Common Rule." There are, in fact, fields of study whose methods of inquiry should not be and were never intended to be covered by the Common Rule. Journalism is among those fields. In fact, 45 CFR §46 (and, similarly, all other regulations comprising the Common Rule) do not apply to journalism under any circumstances.

One reason is that there is no statutory basis for applying 45 CFR §46 to journalism. The statutes that authorize 45 CFR §46, such as 42 USC §289 and 42 USC §300, explicitly and repeatedly state that the scope of the law covers "biomedical and behavioral research." Journalism, which is neither biomedical nor behavioral research, therefore is not under the authority of these statutes, making it ultra vires to attempt to regulate journalism via 45 CFR §46 or any other federal regulation whose authority comes from these laws.

What's more -- and we're particularly sensitive to this in a way that even oral historians and other similar researchers are not -- it is particularly problematic to try to apply any Federal regulations to journalism. This is because doing so falls

afoul of First Amendment law and precedent. Holding that the regulation applies to journalism research would effectively grant a government-regulated body the authority to block works of journalism from being researched, written, and published. This is a prior restraint upon the press, and it is a well-established principle in first amendment law that such prior restraints are almost universally unconstitutional. (See, e.g., *Near v. Minnesota*: "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship.") To argue that a Federal regulation gives authority to exercise prior restraint upon works of journalism ignores numerous Supreme Court decisions to the contrary. Thus, the intent of statute can not be to regulate journalism.

Another reason -- and in my view, this is the weakest argument, but it seems to be the one which carries the most weight with regulators -- is that journalism does not count as "research" as encoded in the regulations. 45 CFR §46.102(d) says that "*Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge." Whenever that test is applied to journalism, it fails the "designed to develop or contribute to generalizable knowledge" clause.

Finally, be aware that these regulations are currently being revised. A couple of years ago, HHS put out an ANPRM stating that they were going to be updating the regulations, and signaled that they were going to try to address some of the confusion regarding certain categories of "human subjects" research that arguably shouldn't be covered by the regulations, and journalism was listed among them. Everyone's awaiting the NPRM -- it's well overdue -- so we don't know what the proposed rule looks like yet. But there's a very good bet that journalism is to be listed in a category known as "exempt."

Next, the ethical argument:

The IRB framework in the United States has its ethical basis in the Belmont Report -- a set of principles codified at the end of the 1970s for how to ensure the protection of human research subjects involved in biomedical and behavioral research. (Again, biomedical and behavioral -- just as the laws were written.)

Journalism as a profession cleaves to a completely different set of ethical principles than those codified by the Belmont Report; journalism -- which is often adversarial -- can not cleave to the biomedical ideal of "do not harm." Investigating wrongdoing almost necessarily involves exposing, and therefore

harming, individuals perpetrating that wrongdoing. If journalists were held to Belmont principles, the entire profession would more or less collapse. (I, for one, as a professor of journalism, would not be able to do my research if I had to submit my work for IRB approval.)

This isn't to say that we're aren't conscious of ethics. We do have our own ethical principles, which, if you examine them carefully, are often dual to what's codified in the Belmont report.

For example, as a journalist, one is generally expected to announce one's presence as a journalist working on a story before one interviews a subject for that story -- this gives us a form of informed consent. And in situations where there's ethical complexity, such as with undercover reporting, where the consent might not be given (Prof. Kroeger's an expert on this, by the way), or with interviews of minors or vulnerable populations, we generally resolve the issue by peer consultation with editors and often legal and ethical experts before proceeding on the story. (Which, while much less formal than an IRB review, serves much the same function.) For example, I'm working a piece right now involving research fraud that requires a small undercover element, and I consulted with Professor Kroeger and an editor before proceeding. We're having a similar consult next week with a student interested in looking at underage rape victims -- a doubly vulnerable population -- before she moves forward with her piece.

We are happy to do a similar consult with Daniel Bronstein regarding his proposal.

However, I ask that you not deny Dani his funding for lack of IRB approval, as doing so would be inappropriately categorizing his work as "human subjects research" as defined in 45 CFR §46 -- which it is most definitely not.

Thank you,
Charles Seife, Professor
Director of Graduate Studies