

# Symposium

## FOREWORD: SYMPOSIUM ON CENSORSHIP AND INSTITUTIONAL REVIEW BOARDS

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As the regulation of research ethics in American universities has expanded, so has controversy over its legitimacy. On April 6 and 7, 2006, nearly two dozen scholars from around the country gathered at the Northwestern University School of Law to discuss “Censorship and Institutional Review Boards.” Contributing to the vigorous exchange of ideas were medical research scientists, social scientists, law professors, university administrators, Institutional Review Board (“IRB”) members, and current and former high-level federal government officials.<sup>1</sup> The views at the conference ranged from strong advocacy for the existing regulatory scheme to calls for its abolition, with most scholars falling somewhere in between. What follows is an account of parts of this debate—as told by supporters and opponents alike—which, we hope, will inform the understanding of an institution that has rearranged traditional notions of academic freedom.

Besides simply introducing the articles in this issue, we set out in this Foreword to do two things. First, we hope to provide some of the context for the debate that unfolded at Northwestern in April 2006. Although IRBs may seem foreign to those outside of the academy, what they seek to regulate is quite familiar: the manner in which information is gathered. To illustrate the values at stake, we provide examples from a familiar setting that also involves research—journalism. Second, the Foreword highlights

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<sup>1</sup> See Philip Hamburger & James Lindgren, Censorship and Institutional Review Boards, Conference Schedule, <http://irbinfo.blogspot.com/> (last visited Mar. 7, 2007). Bernard A. Schwetz, Director of the Office for Human Research Protections, was invited but declined to participate.

the relative ease with which journalists conduct their studies when, in a university setting, an academic wishing to conduct similar research is likely to run into obstacles in the course of seeking IRB approval. In the end, our Foreword merely presents the juxtaposition and raises the obvious but under-theorized questions. For answers and theories, the reader should turn to the articles that follow.

In early January 2007, ABC News *Primetime* broadcast a story about ABC's partial replication of the famous 1960s obedience experiment of Stanley Milgram.<sup>2</sup> In ABC's version:

One of the first participants in the study was Troy, a 39-year-old electrician. Like all the participants, he was paid \$50 and was told that the money would be his to keep, even if he quit the experiment early. Brian, in the role of the "experimenter," informed Troy that he was taking part in a learning and memory study and would be teaching word pairs to Ken, who was really a plant in the experiment.

If Ken got a word pair wrong, Troy was instructed to punish him with an electric shock from another room. The more word pairs Ken answered incorrectly, the more intense the shocks seemed to become. After getting a few wrong, at 75 volts, Troy heard what he thought was Ken shouting in pain—but it was really an automatic audio cue that was set to go off at that voltage.

Each shock after that triggered a similar audio cue of pain. At 105 volts, Troy became uncomfortable. At 150 volts, he heard Ken plead, "That's all. Get me out of here. I told you I had heart trouble. My heart's starting to bother me. . . . Let me out!" Troy looked questioningly at the experimenter, who told him he must continue. Though he was clearly uncomfortable, Troy continued with another word pair before the experiment was stopped.<sup>3</sup>

ABC found that 65% of the men and 73% of the women followed orders, thinking that they were administering painful (and perhaps life-threatening) shocks to another subject begging not to be shocked. Although replicating a laboratory experiment is an uncommon journalistic practice, ABC's study is by no means unique. Reporters' investigations frequently reveal deeper truths—whether political or psychological, intended or otherwise. Similarly, the press often conducts research that plausibly could have appeared in scholarly journals as opposed to broadsheets or the nightly news. One ready example is Adam Liptak and Janet Roberts's *New York Times* study examining possible links between voting in cases before the

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<sup>2</sup> See Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963).

<sup>3</sup> Caroline Borge, *Basic Instincts: The Science of Evil; 'Primetime' Re-Creates a Famous Experiment to Understand How Ordinary People Can Perform Unthinkable Acts*, ABC NEWS, Jan. 3, 2007, available at <http://abcnews.go.com/Primetime/print?id=2765416>.

Ohio Supreme Court and donation patterns to individual justices' campaigns.<sup>4</sup>

In most American universities, however, replication of any of these studies would have run into problems. The researchers would have needed prior approval from a group of their peers before beginning work, and it is far from a foregone conclusion that they could have received the necessary approval. Because the Milgram replication involved both deception and the possibility of psychological damage to the subjects, most (but not all) university IRBs would have rejected the project in anything like the form that ABC used. As to the Ohio Supreme Court study, some IRBs would have determined that the work was exempt from review, while others would have required the written, informed consent of the subjects in the study: justices, former justices, former judicial candidates, and law firms making the donations. We can surmise that not all subjects of the Ohio Court project would have given permission to be studied (possibly because they might have been embarrassed by the results). For this reason alone, the project would not have been able to proceed in some universities. And in universities that ultimately would have allowed the Ohio Court study, an IRB's determination of the project's status could have taken a month or two.

With the First Amendment to the U.S. Constitution guaranteeing, at least on its face, freedom of speech and press to both academics and journalists,<sup>5</sup> how has it come to pass that journalists may conduct and publish research without prior restraint, while academics may not? Surely the answer cannot be simply that universities receive federal funds; after all, some news organizations, such as public radio and television, are federally funded. Further, it cannot be that newspapers tend to do less damage to their subjects than do college professors, since publicly exposing wrongdoers is a much bigger part of journalism than of social science research. Indeed, when a journalist studies or writes a story about the influence of money on court decisions or the activities of a racist or a corrupt official, no one expects the subject of the story to escape harm from its revelation. How are social science researchers supposed to expose wrongdoing without

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<sup>4</sup> Adam Liptak & Janet Roberts, *Tilting the Scales? Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

<sup>5</sup> Admittedly, American courts have not yet settled just how the First Amendment's original prohibition against governments requiring permission before speaking or publishing might affect the federal ethical regulation of research that is not itself federally funded. The exchange between James Weinstein and Philip Hamburger that follows offers doctrinal and normative analyses of this very issue. See James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493 (2007); Philip Hamburger, *Two-Dimensional Doctrine and Three-Dimensional Law: A Response to Professor Weinstein*, 101 NW. U. L. REV. 563 (2007); James Weinstein, *The Dimensions of Constitutional Analysis: A Reply to Professor Hamburger*, 101 NW. U. L. REV. 569 (2007).

harming the reputations of the wrongdoers, as the ethical principle of “benevolence” applied by IRBs seems to require?<sup>6</sup>

The answer to this question is important if the academy is to continue as a forum that both reflects and shapes the society around it. As the 1967 *Kalven Report* of the University of Chicago explained:

The mission of the university is the discovery, improvement, and dissemination of knowledge. Its domain of inquiry and scrutiny includes all aspects and all values of society. A university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions. By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting.

The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the critic.<sup>7</sup>

One cannot be a good critic, it would seem, if the criticism must be so innocuous as never to cause anyone significant distress or harm.

Many of the federal regulators and university administrators who have created the bureaucratic environment in which professors operate seem to be insensitive to the process of trial and error by which human knowledge normally advances. News organizations could not operate if they had to get prior approval before researching their stories, get their questions approved beforehand by a review board, and wait two months before they could even begin researching. Journalist Jonathan Rauch sees the process of creating and spreading knowledge as a large, decentralized machine that seeks out and corrects errors: “By trying out a billion propositions every day, and watching most of them fail, and then trying out another billion, a critical society becomes a huge error-seeking machine, able to find grains of gold in mountains of sand with astonishing speed.”<sup>8</sup> Rauch notes, “[a]s we check and criticize and find common ground, as we propose ideas and they fall apart and we try again, our knowledge advances.”<sup>9</sup>

Keeping Rauch’s ideas in mind, we pause to ask a few questions. How does the IRB regime influence the health and welfare of the American public? With its potential for slowing down or deterring studies that may lead

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<sup>6</sup> See THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH, REPORT OF THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, 44 Fed. Reg. 23,192 (Apr. 18, 1979).

<sup>7</sup> KALVEN COMMITTEE: REPORT ON THE UNIVERSITY’S ROLE IN SOCIAL AND POLITICAL ACTION (1967), available at <http://www.uchicago.edu/docs/policies/provostoffice/kalverpt.pdf>.

<sup>8</sup> JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 150 (1993).

<sup>9</sup> *Id.* at 75. Not surprisingly, this sanguine view of how science progresses is not universally held. Sometimes social science diverges or gets more confused. See generally CHARLES E. LINDBLOM & DAVID K. COHEN, USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING (1979).

to positive medical, scientific, and intellectual developments, how did the current system of censorship arise? Is prior restraint either constitutional or good public policy? Is such a regulatory scheme the best way to protect human subjects from unjustified harm? Is the problem of ethical research even grounded on the right philosophical principles? Scholars in this Symposium examine these questions and many more regarding the past and future regulation of research ethics, a field ripe for both creative research and common sense. We encourage you to read the articles that follow.

