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RESEARCH ETHICS IN LEGAL WRITING: CHALLENGES FOR EMPIRICAL RESEARCH

Alissa J. Hartig*

The conference program for the 2018 LWI Biennial Conference provided evidence of a growing interest in empirical research in legal writing. Ann Nowak's presentation,¹ based on the article for which she received the Deborah Hecht Memorial Writing Award, and a panel by Shaun Spencer, Kenneth Chestek, Brian Larson, and Lance Long² were just two out of a number of sessions devoted to such studies. Empirical research can come in many forms: while some scholars draw on publicly available documents, others conduct research that involves the participation of individuals who have been specifically recruited to help answer research questions. While both forms of research present challenges for research design, the latter poses unique ethical issues that will need to be addressed by the legal writing community as more and more such studies are published.

For legal writing scholars with training in areas in which research with human participants is common, many of these ethical issues are familiar. The majority of law faculty, however, are unlikely to have had such training, and law schools rarely, if ever, have structures of their own in place to provide oversight of this type of research. At law schools that are affiliated with a research university, legal writing scholars should have access to a university office that oversees research using human subjects, which in turn runs the university's Institutional Review Board, or IRB. For scholars at independent law schools, resources for human subjects research training and oversight may not be as easily accessible.

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¹ Ann Nowak, *The Benefit of Reading Aloud in the Legal Writing Classroom*, LWI Biennial Conference, Milwaukee, Wisconsin (July 12, 2018).

² Shaun Spencer, Kenneth Chestek, Brian Larson, and Lance Long, *Weird Science: The Empirical Study of Legal Writing*, LWI Biennial Conference, Milwaukee, Wisconsin (July 14, 2018).

Types of studies that could fall under the umbrella of human subjects research include online surveys of faculty, analyses of student writing, or interviews with practicing lawyers. For legal writing faculty who are new to human subjects research, it may be difficult to imagine what kinds of ethical issues studies like this could present. The fact that most IRB training materials are designed for biomedical research³ often makes this even harder to see. In practice, there are three main principles that are used to guide decisions about ethics in human subjects research: respect for persons, beneficence, and justice.⁴

To give a sense of what these principles look like in practice, consider the first of these principles: respect for persons. This principle requires that research participants be free from undue influence in choosing to participate in a study, aware of the risks and benefits of participating, and able to freely withdraw their participation at any time.⁵ In accordance with this principle, IRBs typically require researchers to document the process of informing participants about the study and obtain signatures or other similar indications of participants' informed consent. Informed consent alone, however, does not necessarily protect participants' rights. For a legal writing scholar who is conducting research in a classroom setting, the question of undue influence can arise when students feel pressured to participate in a study because the researcher is also assigning their course grades. Offering compensation for

³ The Collaborative Institutional Training Initiative (CITI Program), the leading provider of research ethics training in the United States, was initially founded by a group of biomedical researchers. See <https://about.citiprogram.org/en/mission-and-history/> (last visited Nov. 3, 2018). While the program now offers training materials for Social-Behavioral-Educational (SBE) research as well, these materials are designed with an emphasis on fulfilling continuing education requirements for physicians, psychologists, and nurses. See <https://about.citiprogram.org/en/course/human-subjects-research-2/> (last visited Nov. 3, 2018).

⁴ NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, THE BELMONT REPORT (1979), available at <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/read-the-belmont-report/index.html#xbasic> (last visited Oct. 11, 2018). These principles are incorporated, by reference to the Belmont Report, into the federal regulations governing human subjects research. See 45 CFR §46.101(c) (providing that the judgment of department and agency heads “shall be exercised consistent with the ethical principles of the Belmont Report”).

⁵ BELMONT REPORT, *supra* n.4, at Part C, Section 1.

participating in a study may be appropriate in some cases, but offering an amount that would unduly influence an individual who would otherwise not choose to participate in the study would also violate the principle of respect for persons. Determining the amount or form of compensation that would exert an undue influence depends on a number of factors, including the burdens that the study imposes on participants' time and the likely financial circumstances of potential participants.

In the sessions that I attended that featured human subjects research, presenters mentioned having received relevant research training through an IRB. These presenters also mentioned having had either prior training in conducting human subjects research or a research collaborator who had such experience. For scholars without these resources, obtaining guidance on research ethics for their own empirical studies may prove daunting. One challenge facing the discipline is finding ways to help legal writing faculty who are new to this kind of research navigate some of the unfamiliar ethical issues that it can present. Other challenges that I would highlight include the following:

- How will law schools ensure that studies that involve human subjects research receive appropriate oversight?
- How will journals and law reviews that publish studies based on human subjects research ensure that ethical standards have been met throughout the research process and reporting of results?
- For journals that require authors to provide access to the original data sources on which their research is based, what policies and procedures will be used to ensure that research participants' privacy is protected?

There are clear benefits to using empirical data to conduct research in legal writing. Empirical research offers a way to test theories in the real world and to understand complex phenomena in a way that is grounded in data rather than speculation. At the same time, when this research involves human participants, it also requires us to pay close attention to the protection of participants' rights. Addressing these challenges can only strengthen the discipline.