

# **1. The Legal and Ethical Status of Surreptitious Recording in Dialect Research: Do Human Subjects Guidelines Apply?**

DONALD W. LARMOUTH  
University of Wisconsin–Green Bay

## **Four Principles**

The development of small, easily concealed tape recorders has made it possible for dialect researchers to gather data in the field without revealing to their informants that they are being recorded; this equipment differs greatly from the recording equipment used by Manley in his New England research, which required a touring car full of heavy batteries and a microphone as big as a dinner plate to make his aluminum disc recordings. The desire for samples of natural, unguarded speech undistorted by the interview situation makes the use of concealed tape recorders a serious temptation, but it also raises questions about the legal and ethical status of such surreptitious recording.

This chapter focuses on the legal and ethical issues associated with surreptitious recording, especially as they are informed by human subjects guidelines developed by universities, professional societies, and granting agencies. I do not discuss whether such recording is necessary to gather accurate data for dialectologists and other scholars interested in language. But lest the discussion become too abstract, I also give some consideration to a few cases that are probably representative of situations in which fieldworkers might gather linguistic data.

Many colleges and universities have established official guidelines for the conduct of research and have appointed institutional review boards to examine research proposals. In response to a request circulated in the *Newsletter of the American Dialect Society*, several members submitted copies of the human subjects guidelines in force at their institutions. Such guidelines fre-

quently cite the policies and regulations of the Department of Health and Human Services (HHS) or statements from professional societies and organizations such as the American Psychological Association. While such policies must be applied in the review of federally funded research, it is clear that they are often extended to all research involving human subjects. Whether or not this application is officially the case at a particular institution, however, these guidelines do represent a general agreement among investigators about the ethical principles to be followed in such research.

As might be expected, HHS guidelines are directed at research that has the potential of direct psychological or physiological impact upon human subjects or involves “protected populations and sensitive subjects” such as minors, mentally retarded or disabled individuals, prisoners, pregnant women, or test subjects for new drugs. Research involving illegal behavior or other matters of potential risk to the subjects also is mentioned specifically in many instances. However, because few human subjects statements mention tape recording, and then only in passing, it is necessary to infer the legal and ethical status of surreptitious recording from more general statements on the conduct of research involving human subjects, statements that apply the principles of risk, deception, confidentiality, and informed consent.

### RISK

All human subjects guidelines specifically address the principle of risk to the human subjects involved in the research. Risk is often broadly defined as the possibility of any physical, psychological, legal, economic, or social injury—which would seem to include just about everything. For dialect fieldwork, the definition of *minimal risk* seems to be most important. The following language from the University of Wisconsin–Milwaukee’s protocol is representative of definitions of minimal risk in human subjects guidelines: “‘Minimal risk’ means that the risk of harm anticipated in the proposed research is not greater, considering probability and magnitude, than those risks ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.”

## DECEPTION

Frequently discussions of risk mention deception. In several instances, human subjects guidelines require much detailed review of research proposals if deception is involved. While there do not appear to be very good formal definitions of deception in these guidelines, it is reasonable to infer that surreptitious recording constitutes deception, even though it is not mentioned in this context. Simply put, deception means that the subject is not informed of the true purpose of the research or is given a misleading impression of the nature of the research. The institutional guidelines typically require the investigator to explain and justify any deception in the research plan. Apparently the acceptability of deception is really based upon whether it poses a risk to the subject, and it is also linked to the idea of informed consent. The language of the American Psychological Association's statement of ethical principles in the conduct of research with human subjects suggests that subjects should eventually be informed of the nature and purpose of the research: "When the methodological requirements of a study necessitate concealment or deception, the investigator is required to ensure the participant's eventual understanding of the reasons for this action. Such deception or concealment increases the investigator's responsibility to protect the welfare and dignity of the research participant."

Consistent with this principle, some institutional statements require the investigator to "debrief" human subjects if deception or concealment has been part of the research design, as the following language from Memorial University of Newfoundland specifies: "Deception should only be used where clearly necessitated by the objectives of the research, and only when debriefing is possible. On those rare occasions when deception can be justified, debriefing should always take place as soon as possible. Consent to use data must always be obtained from the subject after debriefing. Deception may never be used when any risk to the subject is involved."

## CONFIDENTIALITY

Human subjects guidelines usually require the investigator to indicate what precautions will be taken to safeguard identifiable records or individuals involved in the research, both for immediate use of the data and for long-range use by the principal investigator or other investigators or agencies. Inevitably, there is a link both to the consideration of risk and to the principle of informed consent. Again, the language of the American Psychological Association's statement on ethical principles in the conduct of research with human subjects is representative. "Information obtained about the research participants during the course of an investigation is confidential. When the possibility exists that others may obtain access to such information, ethical research practice requires that this possibility, together with the plans for protecting confidentiality, be explained to the participants as part of the procedure for obtaining informed consent."

The American Anthropological Association specifically mentions tape recordings in its statement of principles of professional responsibility. "Informants have a right to remain anonymous. This right should be respected both where it has been promised explicitly and where no clear understanding to the contrary has been reached. These strictures apply to the collection of data by means of cameras, tape recorders, and other data-gathering devices, as well as data collected in face-to-face interviews or in participant observation."

## INFORMED CONSENT

All human subjects guidelines that have been examined thus far specifically mention the principle of informed consent. The following language from the University of Wisconsin-Milwaukee protocol is typical: "Except as provided elsewhere in this or other subparts, no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative." In many instances, institutional review boards

have adopted consent forms that require the signature of the subjects, and the investigator is obliged to keep signed copies of these consent forms in a confidential file. Federal regulations define informed consent as including the following elements (statements referring only to medical treatment and similar matters have been deleted):

1. A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures that are experimental.
2. A description of any foreseeable risks or discomforts to the subject.
3. A description of any benefits to the subject or to others that may reasonably be expected from the research.
4. A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained.
5. An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject.
6. A statement that participation is voluntary, that refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and that the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

Thus far, we have seen that many universities have established detailed statements governing the use of human subjects in research, in conformity with federal regulations and the ethical guidelines of professional societies. Nevertheless, it is important to note that decisions resulting from hearings held in July 1980 have significantly limited the application of these principles, effectively exempting some categories of research from federal regulations, as indicated in the following language from the Federal Register: "The regulations contain broad exemptions for educational, behavioral and social science research which involves little or no risk to research subjects. These exemptions

constitute a major deregulation from rules in force at the present time [1980]. They exclude most social science research projects from the jurisdiction of the regulations.” This language makes it important to examine the nature of such exempted research, although some ethical questions are likely to remain, even if many legal constraints and requirements are removed.

### Criteria for Exempted Research

Several statements of human subjects guidelines reflect the deregulation of several broad categories of research, even exempting them from review by institutional review boards. The following language from the policy statement of the University of Wisconsin–Milwaukee is drawn directly from guidelines in the Federal Register:

1. Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.
2. Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), if information taken from these sources is recorded in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.
3. Research involving survey or interview procedures, *except* where one or more of the following conditions exist: (i) responses are recorded in such a manner that the human subjects can be identified, directly or through identifiers linked to the subject; (ii) the subject's responses, if they became known outside the research, could reasonably place the subject at risk of criminal or civil liability or be damaging to the subject's financial standing or employability; or (iii) the research deals with sensitive aspects of the subject's own behavior, such as illegal conduct, drug use, sexual behavior, or use of alcohol. All research involving survey or interview procedures is exempt, without exception, when the respondents

- are elected or appointed public officials or candidates for public office.
4. Research involving the observation (including observation by participants) of public behavior, *except* where one or more of the following conditions exists: (i) observations are recorded in such a manner that the human subjects can be identified, directly or through identifiers linked to the subjects; (ii) the observations recorded about the individual, if they became known outside the research, could reasonably place the subject at risk of criminal or civil liability or be damaging to the subject's financial standing or employability; or (iii) the research deals with sensitive aspects of the subject's own behavior such as illegal conduct, drug use, sexual behavior, or use of alcohol.

It should be noted that institutional guidelines often require investigators to file a statement arguing and justifying a claim that their proposed research falls within the guidelines for exempted research. Overall, it seems clear that these descriptions of exempted research are linked to the principles of risk, deception, confidentiality, and informed consent.

Since the exempted research involves survey and interview procedures as well as the observation of public behavior, it might seem at first glance that linguistic fieldwork would be exempted. However, several factors would appear to contradict, or at least qualify, such a conclusion. First, concerning confidentiality, present acoustic technology is such that the identification of an individual whose responses have been tape-recorded is not only possible but relatively easy. More important, perhaps, is the fact that such recordings are not protected from subpoena. As Bethany Dumas of the University of Tennessee–Knoxville so aptly put it at an American Dialect Society symposium on surreptitious recording in 1985, “The law does not recognize a linguist/informant privilege.” While this statement came as a surprise to many people present at the discussion, there is no way that a fieldworker can protect tape recordings or notes from legal seizure unless he or she is willing to go to prison for contempt of court. Thus, a simple assurance that the fieldworker will not use the informant's name in papers or publications does not constitute a full guarantee of confidentiality of records.

This point bears directly upon the principle of risk in interview material. While the typical dialect interview often includes a structured questionnaire in which the informant's responses would seem to involve minimal risk, such interviews usually include an open-ended conversational component as well, during which it is certainly possible for an informant to discuss potentially damaging information. Thomas Clark of the University of Nevada–Las Vegas was also a participant in the 1985 ADS symposium, and his investigations of the vocabulary of gaming were such that he felt obliged to caution some of his informants not to talk about any criminal behavior of which they had direct knowledge. While this may be an extreme case, similar in some respects to the work of David Maurer and Jake Latta on criminal argot, an open-ended interview still invites the possibility of potentially damaging statements. Much the same could be said of recordings of public behavior, where the investigator has no control of what the participants might say. It would seem clear, then, that the statements describing exempted research do not automatically exclude linguistic fieldwork in general, much less specific investigations of language phenomena associated with potentially risky human behavior.

#### Four Cases

It may be productive at this point to test the application of these principles in a series of representative situations in which surreptitious tape recording might be used by a fieldworker. Again, the purpose of the discussion is not to determine whether surreptitious recording is necessary to ensure the collection of good data but to focus upon legal and ethical issues.

#### INDIVIDUAL FIELDWORK INTERVIEW

A dialect investigator uses a concealed microphone in a private interview, following a structured questionnaire part of the time and taking visible notes (phonetic transcription, comments, etc.). The fieldwork interview has several components, including a wordlist, circumlocution questions, a reading sample, and free



conversation. As part of the interview, the informant is also asked about educational experience, travel, regional and ethnic origins of parents and grandparents, and work experience, which is intended to enable later sociological classification of the informant's responses. The purpose of the research is explained in general terms: the interviewer expresses an interest in local history and vocabulary but does not stress interest in phonology or grammar, in the hope that the informant will not be excessively self-conscious about details of grammar or pronunciation. The fieldworker also explains that the informant's identity will not be revealed when the results of the fieldwork are presented or published.

In this case, which is probably representative of a great deal of linguistic fieldwork, the use of a hidden microphone would appear to compromise the principle of informed consent, even though the general purpose of the investigation has been explained. As noted earlier, assurance that the informant's name will not be used is not a full guarantee of confidentiality, and since the investigator has not told the informant about the recording and cannot protect the recordings against subpoena, the informant is not fully aware of the potential risk. Under these conditions, should the informant express knowledge of criminal activity, for example, he or she would be at significant risk, and the investigator could not diminish that risk without revealing that the interview had been recorded and offering to destroy the tape, or at least that part of it which implicates the informant, in a debriefing session after the interview. Given the private nature of the interview, the responsibility of the investigator would seem to be very great, and the principles of informed consent, risk, and deception could be very seriously compromised if the informant is not debriefed and offered the opportunity to destroy all or part of the tape recording.

#### SMALL-GROUP INTERVIEW

A dialect researcher uses a concealed microphone in a group interview situation, where open conversation takes place among the fieldworker and the informants, who are from different families in the community. Again, the fieldworker takes notes and

follows a structured questionnaire part of the time, eliciting multiple responses to specific questions about vocabulary or the various ways people in the community might pronounce particular items. But the fieldworker also encourages extended free conversation among the participants about the nature and history of their community, so as to obtain samples of less guarded discourse. Again, the purpose of the research is explained to the informants in general terms: the interviewer expresses an interest in local history and vocabulary but does not stress interest in phonology or grammar, except to encourage the group to discuss variant forms that have emerged in the course of the interview. The fieldworker also explains that the informants' identities will not be revealed when the results of the fieldwork are presented or published.

In this case, where people from different families are involved in the same setting, the principle of informed consent is still compromised by the fact that the informants do not know they are being recorded. It might also be argued that the responsibility of the investigator to protect potentially damaging statements is diminished by the fact that other people are present. This would seem especially to be the case if the group does not represent a particular faction or subgroup within the larger community but is instead a gathering of people not otherwise significantly associated with each other. An individual would be less likely to assume confidentiality in such a setting, since any one of the people in the group could conceivably report what was said. However, if the group as a whole knows of potentially criminal behavior (as might be the case among a group of college students involved in drug use, for example), or if the group as a whole is involved with social behavior that might put them at risk if it was to become known, then the ethical problems with surreptitious recording would appear to be very little different from those of the one-on-one interview.

#### CONVERSATION IN PUBLIC PLACES

A dialect researcher uses a hidden recorder in a public place, such as a bar, supermarket, or department store, to record incidental conversation as well as conversation initiated by the field-

worker directly. The fieldworker does not take visible notes and does not indicate the purpose of the work. The fieldworker also does not obtain the identities of people whose conversations are recorded, and their consent is not sought before or after the fact. The conversations being recorded are generally short. For example, the fieldworker might identify himself or herself as a newcomer to the community and ask a few general questions about the area or might ask directions to the airport. The fieldworker does not ask personal questions about home life, political views, social activities, and so forth. The fieldworker may also sit or stand passively and not actively participate in conversation but record the conversations of others in the situation—people who are speaking in normal voices and are being overheard without effort by others in the situation. However, the fieldworker does not approach or intrude into clearly private conversations, such as two people in a close tête-à-tête.

In this case, the situation is much less structured than either of the interview cases, and since the material being recorded can be overheard by anyone in a public setting, it would seem at first glance that the fieldworker's ethical responsibility must be greatly diminished. Obviously, the people in the situation have not been informed that anything unusual is taking place and have no opportunity to grant or withhold their consent. So long as the fieldworker is avoiding clearly private conversations, the sense of risk and deception would also seem to be minimal. Yet there are public settings, such as gay bars or head shops, where the patrons are self-selected and assume themselves to be members of a group with common interests and behavior that might not be approved by the society at large and where their presence, if it was to become more widely known, could be damaging. Likewise, as in other settings, if the participants in a conversation manifest knowledge of criminal behavior, and if law enforcement authorities became aware that surreptitious recordings were made, the tapes conceivably could still be subpoenaed, although it would be much more difficult for the authorities to do so, and other avenues of investigation would be more likely in any event. Overall, it would seem that surreptitious recording in this sort of situation does not raise as many ethical questions as the more structured individual and group interviews do, but there is still some potential for placing the participants at risk.

## RECORDING IN PUBLIC GATHERINGS

A dialect researcher uses a concealed recorder in a meeting (such as a public hearing on commercial fishing regulations or a change in zoning laws) to record public statements, responses to questions, and incidental comments from the audience as well as the platform party. The fieldworker does not take visible notes and does not indicate that he or she is anything more than a passive observer. The fieldworker does not obtain the identities of people whose comments are recorded, although some may be identified in the process of the meeting itself. In addition to recording formal statements and public questions, the fieldworker also mingles and picks up incidental comments during and after the meeting—comments directed to other members of the audience and not to the platform.

In a public meeting, the direct participants would clearly seem to have no expectation or requirement of informed consent. In such an unstructured public environment, open to anyone who wishes to come, any comments an individual might make are available to anyone who might hear them. So long as the fieldworker is recording the activities of the meeting itself, it would seem that none of the principles of informed consent, confidentiality, or risk are compromised. However, the situation changes if the fieldworker also records conversations incidental to the meeting—if, for example, the fieldworker records a conversation among three or four people in which they discuss their own violations of commercial fishing laws. In effect, not all communication taking place at a public meeting is “public” in the sense that the meeting itself is, and it would seem that the ethical risks rise sharply when the fieldworker records incidental conversations without the knowledge of the participants.

All four of these cases suggest that the linguistic fieldworker is never completely free of ethical concerns when recording material surreptitiously. The greatest responsibility is assumed in the private one-on-one interview situation, which is also the most frequent strategy for field research. If we are willing to take the guidelines of institutions and professional societies as declarations of ethical standards as much as legal stipulations, it would seem that the fieldworker is clearly proceeding ethically if, immediately after completing the interview, the informant is told

that the interview has been recorded and is offered the opportunity to review and/or destroy all or part of the tape. In the group interview situation, one could reach the same conclusion, particularly if the participants represent a particular faction or subgroup whose collective activities or knowledge might place them at risk. The argument for debriefing is perhaps not as strong when the group is more heterogeneous, more broadly representative of the larger community. And so long as the fieldworker stays away from private conversations, it would seem that ethical expectations are not severely compromised by surreptitious recording in public settings, although with some qualifications as earlier noted. It also seems clear that the decision to use concealed microphones and recorders should not be arrived at casually, merely to avoid the inconvenience of asking permission and explaining the potential risk to the informant; indeed, to remain fully within the ethical guidelines accepted in the academic community, it would seem that surreptitious recording ought ordinarily to be avoided unless there are very compelling reasons to use it.

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