Ethical Escape Routes for Underground Ethnographers

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U.S. colleges and universities have developed rules and procedures for protecting the rights of research subjects that have forced participant observation field researchers underground. As currently articulated by campus-based administrators in units known as Institutional Review Boards, or IRBs, federal regulations prohibit faculty and students from gathering research data by interacting with subjects without first obtaining formal authorization from a university human subjects' protection committee.[i] Participant observing ethnographic sociologists, who commonly appreciate that their field interactions were research only in retrospect, must as a result either abandon their methodology or gather data in the uneasy awareness that they might be charged with violating ethics rules.[ii]

The fieldworker's dilemma is not an inevitable result of federal law. It has been constructed by the development of IRB rules and procedures in ways that depart from regulatory intent. After describing several common features of ethnographic data gathering in sociology that make prior approval impossible, I describe several ways that the regulatory framework should be understood in order both to be more consistent with the regulatory purpose and to enable much if not all participant observation fieldwork to be conducted above ground.

Then I argue for the need to develop a culture of legality in IRB administration. Fieldworkers would not be in the current dilemma if they had sufficient clout to insure that IRB administrators attend closely to their problems. But there are no prospects that ethnographers will bring in sufficient research funding to induce administrators to be more consistently responsive. Successes may be achieved on one campus or another, but

a nationally reliable route for taking ethnographic fieldworkers out of the shadows depends on ongoing criticism and oversight of IRB power. This in turn depends on changing the culture of IRB administration. The necessary institutional transformation could begin if IRB administrators would respect a few basic norms of legality—a form of administrative ethics-- as they review the ethics of researchers.

How Fieldworkers Become IRB Outlaws

When their research has one or more of the following features it is not possible for ethnographic researchers to seek pre-authorization for their observations and interviews, no matter how sincere the will to comply.

1. When researchers participate in naturally occurring social life and write fieldnotes on what they observe, they will often encounter people and behavior they could not anticipate. Indeed, one of the strongest reasons for conducting participant observation research is the view that the current state of knowledge, as shaped by fixed design research that pre-specifies the kind of people to be studied and the ways to study them (sampling designs, formalized questions and protocols, time and space delimited situations in which to observe) is artificial, a product not of the subjects' social lives but of methodological prejudice. Put in positive terms, the distinctive virtue of ethnographic research is establishing "salience," or what is relevant to the people studied independent of any outsiders' preconceptions (Stinchcombe 2005, p. 8). The "grounded discovery" theme has been appreciated for decades and remains vivid in current methodological thinking (Becker 1958, Glaser and Strauss 1967).

Thus the very rationale for fieldwork is often unpredictability. Because social life is created through interaction, a systematic feature of ethnographic fieldwork is the in-

situ discovery of the people with whom subjects are interacting. Since this is precisely what must be discovered, preliminary statements about research design for participant observation, however sincerely stated, often become vacuous as soon as the researcher enters the field.[iii]

2. Participant observation research cannot be pre-approved when it is the upshot of a life retrospectively defined as a resource for scientific study. While Becker (1953), in a famous article on marijuana use, alludes to interviews facilitated by a research institute, he nowhere describes precisely how he obtained his data. The piece was written when he was still a graduate student. Anyone familiar with his biography will suspect that the paper exploits observations he made while working as a musician at parties, in dance halls and jazz clubs, even before he entered graduate school. John Irwin (1970) entered graduate school as an ex-con. Having been imprisoned as an armed robber, his study of "the felon" drew on his pre-university life and had unique value because of its real world grounding.[iv] When an ethnography is in part autobiographical memory, it can carry distinctive authority but it will be unable to meet the pre-approval requirements of IRBs.

3. Participant observation fieldwork will be incompatible with the pre-approval requirement when new data emerge from experiences in which the line between personal life and research activities is blurred. Erving Goffman's empirical materials often came from observations he made in the course of his everyday life in public places. Elijah Anderson has drawn on decades of his everyday experience in diverse racial settings in Philadelphia to write on race relations in everyday urban life. (For a recent example, see Anderson 2004). I wrote up a study, "What is Crying?," that was based primarily on

episodes which emerged unexpectedly: witnessing audience reaction to a sign language version of "Silent Night" at a primary school's holiday show; watching what happened when 8 year olds struck out at Little League baseball games; listening to a store clerk describe his anguish over the need to send his delinquent son back to El Salvador in order to avoid the U.S. criminal justice system; casually asking a UCLA human subjects administrator about her vacation plans (Katz 1999, 164, 181, 188, 199-200).

Blurring boundaries between personal and research life does not necessarily indicate an incapacity to plan research. It is a strategically valuable way to gain first-hand data on behavior in an extraordinarily diverse range of social contexts. A diversity of naturally occurring situations enables the analyst to find patterns of constancy in conduct across variations in context, thus to rule out explanations that would misguidedly attribute causal power to conditions that appear in only some of the behavior's contexts. For example the UCLA administrator began crying, not in response to my complaints about the IRB system but as she anticipated experiencing another mountain-top sunrise. Positive forms of crying are in fact frequent in everyday social life and they had been systematically neglected in research on the nature and contingencies of crying.

Ethical Escape Routes

If the requirement for pre-authorization condemns most participant observation fieldwork to an underground existence, this was not the original intent. At least five paths have been available for accommodating ethnographic fieldwork to the IRB system. Each has been blocked by a combination of administrative failure to develop implementing guidelines; the private character of IRB decision-making, which blocks

researchers from learning about the accommodations that have been worked out by some of their colleagues; and discretionary interpretations not based on public debate.

1. The Limits of University Auspices

In the Federal-Wide Assurances (FWA) through which universities define an IRB system that will satisfy federal law, the regulatory system is limited to research conducted under the school's auspices or with campus resources. The following language is taken from UCLA's FWA (http://www.oprs.ucla.edu/human/). Similar language is used as a standard limiting set of conditions.

> ...this Assurance applies to all research involving human subjects, and all other activities which even in part involve such research, regardless of sponsorship, if one or more of the following apply:
>
> 1. the conduct or recruitment of the research involves institutional resources (property, facility or funding, including extramural funds administered by the institution), or
> 2. the research is conducted by or under the direction of any employee, student or agent of this institution in connection with his or her institutional responsibilities, or
> 3. the research is conducted by or under the direction of any employee, student or agent of this institution using any property or facility of this institution, or
> 4. the research involves the use of this institution's non-public information to identify or contact human research subjects or prospective subjects.

Much ethnographic fieldwork in sociology falls outside these limiting conditions. What is retrospectively recognized as fieldwork often occurs before the researcher takes on any university responsibilities as a student or faculty member. Much participant observation occurs without using university funds or affiliation to get access.

IRBs generally have not defined the boundaries with case illustrations, although auspices is a threshold jurisdictional issue. In one UCLA case, an undergraduate applied for IRB approval and received, in his first official response from the committee, a formal declaration that he had "violated" IRB rules for data gathering activities undertaken before he applied. "Data gathering" had started off campus, at a cocktail party, during a political fund raising event, when an unanticipated topic emerged in a casual conversation. (The topic was about generational differences in the memories of 60s era social movement event.)

One set of especially significant problem situations arises out of the public advocacy activities of people employed as university researchers. Ethnographic case studies have a narrative potential that makes them attractive vehicles for translating technical research findings into publicly consumable forms. Researchers who have developed prestigious academic careers based on formally defined, quantitative research that is routinely processed through IRB review may find that the narrative portrayal of individual biographies is more effective in generating public discourse. The line between intellectual activity within and beyond university jurisdiction may then become a matter of contention.[v]

A senior ethnographer at an east coast university recently described her dilemma at a national meeting of sociological fieldworkers. Earlier in her career, she had received

sufficient prominence to be appointed by the governor to an unpaid position on a committee overseeing professional service deliverers in a state-regulated health field. As she began to organize a book reporting what she had learned about the workings and limits of this form of public regulation, she realized that her data had been collected over the course of many years without IRB review. Her academic stature was a basis for her appointment by the governor, but was this sufficient connection to her university to justify IRB jurisdiction? And if she had changed her university affiliation during the course of her public service, from which should she seek authorization?

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2. Limiting IRB Oversight to Funded Research

Richard Shweder (this issue) has effectively clarified that the federal regulatory framework allows universities to limit IRB oversight to funded research.[vi] At a national conference of sociological ethnographers at UCLA in 2002, Stuart Plattner, an anthropological ethnographer and then a human subjects protection official at NSF, acknowledged that it was a local campus option to include non-funded research within the FWA. This was a surprise to most of the faculty present, and the point was disputed by some IRB staff. As Shweder puts it:

> At most colleges and universities, this completely elective internal action…has been taken by academic administrators without the full knowledge, involvement and direct consent of faculty ruling bodies.

Putting aside issues of academic freedom and the balance of power between university administrators and faculty, this peremptory administrative move sacrificed an opportunity to shape a regulatory system that researchers could effectively apply to the

realities of their research. Just because of its relative informality, non-funded research bristles with difficult issues for researchers who would like to comply. Because there may be no formal moments to consider ethical issues in unfunded research, researchers often do not know whether they are out of compliance for not coming to the IRB. The extension of IRB jurisdiction to non-funded research inevitably leads to the development of an uncomfortable culture of dishonor in the relationship between research faculty and university administration. The informality of unfunded research, and the lack of real risk to subjects, means that researchers often do not know when to bring a project to the IRB in the first instance or when to return when research practices diverge from early plans.

3. The Neglected Waiver Clause

Federal policy for the protection of human subjects is defined in 45 Code of Federal Regulations 46. Under 45 CFR 46.101 (i): "department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy." Waivers offer a clear legal basis to fashion university ethics policies flexibly and creatively. But IRBs have been developed to dramatize ethical sensibilities on a local basis. It would require a national initiative to negotiate waivers for no or low risk forms of social research.

4. Resurrecting the Exemption Provision

Under section 45 CFR 46.101, research is said to be exempt from all review, whether pre- or post-data gathering, under certain conditions. In the section most relevant

the ethnographers, research is exempt when it consists of interview procedures or observation of public behavior, unless: (i) information obtained is recorded in such a manner that human subjects can be identified... **and** [my emphasis] (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability, or be damaging to the subjects' financial standing, employability, or reputation."[vii] This language means that most interview and much observational research is outside the requirements of IRB review if data are recorded without identifying subjects, **whether or not** there is a reasonable basis for anticipating that subjects, if identified, would suffer legally, economically or socially.

Despite the literal meaning of the language, IRBs have evolved so that they now require review before researchers can rely on the exemption language. The commonsense reading of the regulatory language, that exempt research is exempt from review, was not undermined through an abrupt policy change. The first wiggles in a straightforward reading developed when IRBs began to require that department committees or chairs review and approve claims of exemption. IRB oversight in effect deferred to discipline-based ethics cultures.

In 1999, a series of problems in biomedical research at prominent universities, most famously injury to subjects at Duke and deaths at Penn and Johns Hopkins, led to a widespread reexamination of the rigor of IRB protections. In response a culture of compliance was developed. Across the nation's campuses, industrious efforts to manifest compliance soon included required training courses in research ethics, a flow of reports to federal overseers of violations by researchers, and the formal certification of exemptions, which now became rebuttable "claims."

For ethnographic fieldworkers and many other campus researchers, the exemption language became a Catch 22. A researcher could not receive retrospective certification of the exempt status of prior interaction with subjects, but observational fieldworkers often could not meaningfully describe the data gathering they planned to do without conducting fieldwork to describe the site and some of its social contours. IRB policies now generally assert that there is no exception for "pre-tests." The demand for a formal pre-certification of exempt status meant that a substantial part of observational field research would inevitably be conducted underground.

As the process for obtaining certificates of exemption has become routinized, the affected research community has lost awareness of this revision of the regulatory language. But regulatory history is clear that the exemption provisions were inserted specifically to accommodate social researchers who had criticized proposed versions of the regulatory scheme as violating what they saw as constitutional protections against prior restraints. Charles McCarthy, the head of the committee responsible for the regulations, recalled that

> In 1979, after issuance of controversial proposals...my quiet corner of HHS, OPRR [Office for Protection from Research Risks], was buffeted by strident criticism. Threats and epithets were hurled at us from all sides. ...The charges were led by Ithiel de Sola Pool, who insisted that our four pages of fine print in the Federal Register were about to lay waste to the First Amendment of the Constitution.... Friendly champions of social and behavioral sciences showed us how to back away from our unpopular positions while continuing to offer what we felt were reasonable protections for the dignity and rights of subjects.... We

> discovered that we could write exemptions for broad categories of social and behavioral research--categories in which subjects' behavior seemed to us little different than the commerce of daily life. It has been estimated that up to 80% of social and behavioral research funded by our Department is now exempt. For the rest, we thought it not unreasonable to concern Institutional Review Boards with matters of privacy and confidentiality, and with efforts to protect unsuspecting and vulnerable subjects (McCarthy 1984, 8-9) .

There is no evidence to support a view that there was an official intention to use "exemption" language in some tortuous manner to require human subjects' protection administrators to concern themselves with exempt research. The drafters of the regulations clearly wished to respect researchers' fear that prior restraints would do fundamental damage to traditions of free inquiry. The intent is so clear that the practice by federal granting agencies of making the release of funds contingent on IRB certification of exemption appears to be a direct violation of the federal regulations under which the federal officials operate.

There are many additional reasons supporting the view that, by imposing a blanket ban on self-exemption, universities have undermined legislative intent. If the drafters had intended to deny self-exemption, why would they have used such misleading language? It is telling that self-exemption was the practice for several years after the regulations were in effect. Universities initially read the regulations with the common sense understanding that when a law mandating a review system specifies activities that are exempt from its reach, it is not stating in some sloppy manner that review is required; it is stating that the activity is exempt from review under the regulations.

5. An Objective Definition of "Research"

The federal regulatory scheme applies to "research" on human subjects. In the definitions of the federal regulations (§46.102 [d]) "Research means a systematic investigation...designed to develop or contribute to generalizable knowledge." A major expansion of IRB jurisdiction is being institutionalized through a novel, vague, unnecessary and impractical reading of "research."

Oral historians clearly study "human subjects" but have long protested that their work should not be within IRB jurisdiction. In October, 2003, The Chronicle of Higher Education reported: "Federal Agency Says Oral History Is Not Subject to Rules on Human Research Volunteers." Michael A. Carome, the associate director for regulatory affairs of the federal Office for Human Research Protections, was quoted as writing to an association of oral historians that their work is typically beyond regulation because they "'do not reach for generalizable principles of historical or social development' that could be used to predict the future.... Rather, they explore 'a particular past.'"

Oral history is a critical borderline discipline that merges on one side with ethnographic interviewing in the social sciences and on the other, with research in the humanities. While the federal regulatory framework does not limit its reach to disciplines in the "sciences," it has never been seen to reach all forms of university-based inquiry conducted through interaction with human subjects. Write-ups from student outings and biographical recollections have been understood as part of pedagogy, not "research." Administrative studies used to form policy are outside of IRB jurisdiction, although the

boundaries of this category may not be clear. (Are the essays in this journal issue administrative studies or contributions to scientific research, or both, or something else?) Many observers of the evolution of IRB jurisdiction have imagined that journalism schools would be immune because they would raise First Amendment-like protests against the IRB as a prior restraint/licensing mechanism. If oral history is officially regarded as outside IRB jurisdiction because it does not "reach for" generalization, journalistic investigation, political muckraking, and historical research that explores "a particular past" might also be left outside of IRB review.

The meaning of the oral history exception is not yet settled. However it is already apparent that, as with the extension of IRB jurisdiction to non-funded research and the gutting of the exemption clauses, policy evolution widely is being handled by administrative fiat. Local negotiations have developed privately, based on each campus's power dynamics. At UC-Berkeley, where an oral history program is unusually well institutionalized and the absence of a medical school seems to moderate administrative anxieties, research that otherwise might be subject to IRB review were it to be conducted within social science departments may avoid that review if it is accepted for administration within the oral history program.[viii] At UCLA, an IRB staff member expeditiously responded to Carome's statement by holding a phone conversation with the official. The campus human subjects administration quickly sent faculty a declaration that "open ended qualitative type interviewing" is within the scope of 45CFR46, and thus IRB jurisdiction, when "the person engaged in such activities **intends** to develop or contribute to generalizable knowledge" [my emphasis] (University of California at Los Angeles (2003).[ix]

Although presented as a neutral reading of the regulatory language, a highly consequential choice has been made by reading "research" as a matter of "intention." The regulatory language actually speaks of “design,” not intention, and links “design” to a concept of “systematic investigation”: research is “a systematic investigation...designed to develop or contribute to generalizable knowledge." A straightforward reading is that systematic investigation means pre-specified protocols and research design means formalized research procedures, such as sampling design, questionnaire design, the design of experimental manipulations, and the standardized control of the researcher's interaction with subjects. The last includes formalized instructions for introducing a study to potential subjects, for gaining rapport, for responding to subjects' confusions about questions being asked, etc. Federal government guidance on human subjects protections regulations stress the theme of formality in understanding the “research” that is covered.[x]

Read as limited to investigations that are systematically designed, as that concept is understood within the traditional rhetoric of science, the “research” governed by IRBs would not cover the unsystematic, constantly changing, informally devised methods of ethnographic fieldwork.[xi] Typically the “design” of a participant observation study emerges in the field and is clearly visible only in retrospect.

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research was created under the National Research Act of 1974 (Pub. L. 93-348). In the Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, a document created by the Commission in 1979 and universally referred to by IRBs as providing the theoretical framework for human subject

protections, initial definitions are provided to limit the scope of concerns. To set off "practice" from "research," the report states: "Research is usually described in a formal protocol that sets forth an objective and a set of procedures designed to reach that objective" (Research 1979, p. 5). The National Commission appreciated that there are ethical issues in practices conducted outside of "research"; it did not attempt to prescribe a normative framework for all interactions that university investigators have with the people they write about.

In addition to adhering to the historical meaning of the phrase within the development of the federal regulations, the adoption of a subjective standard is administratively unwise. As opposed to a common sense reading of "designed" as a matter of formal protocol, the construction of intention will be ambiguous; it encourages invasive investigations into researchers' states of mind; and it hinges on an unstated, eternally unsettled distinction between the humanities and sciences. An objective reading of "research" as a matter of formal design would protect science researchers who make personal inquiries in order to develop biographical case materials that vividly illustrate the points they have developed through IRB-approved, fixed design studies.

The Need for Legality

Except for the waiver clause, each of the escape routes discussed here has been recognized to some extent on one campus or another. Harvard allows professors to check whether graduate student work is exempt; review by the IRB is not required.[xii] Chicago has opted out of requiring IRB review for non-funded research.[xiii] Oklahoma has adopted an objective standard that defines "research" according to investigative formalities, not intention.[xiv] Claims of violations of IRB policies seem to have been

rejected at several campuses on the basis that the investigations were conducted independent of university auspices.[xv] The University of Pennsylvania, recognizing the practical difficulties of prior review of ethnographic research, does not require it.[xvi] At MIT, explicit policies exclude investigations using case materials to illustrate journalistic-type writings, thus insulating researchers who publish controversial advocacy writing from attacks alleging failures to obtain prior approval from an IRB.[xvii]

There is no reason to believe that there are unique grounds for special ethical philosophies on these campuses. More likely, some faculty members have been able to get their administrations to attend responsively to reasoned proposals on accommodating the regulatory system to the realities of research. What is needed is a national process to accommodate ethnographer research with the IRB system. What is needed for such a process is the development of a culture of legality in IRB administration.

Legality is a culture for shaping the interactions between the powerful and those they govern. Three features of legality are critically important for solving the ethical fieldworker's dilemma. A baseline principle is that those in power should never command the impossible.[xviii] If universities wish to outlaw ethnographic fieldwork, they might do so consistent with legality (although given the role of ethnographic texts as political speech, prohibition would not necessarily be consistent with the U.S. Constitution). If they don't, they must devise a regulatory system that is amenable to compliance by good-faith researchers.

A second requirement is that, before policies become effective, those who would be affected must have the opportunity, in a discourse open to the research community in general, to show regulators how they would be affected. Such a requirement does not

limit the freedom or magnitude of power of the governors. Public consultation with the governed before policies are implemented enables those in power to anticipate the meanings their commands will have in fact, and thus better to implement the ruling will.

A third necessary feature of legality would be the publication of IRB decisions, at least in those instances where the subject's privacy needs and the researcher's property rights permit. This means not just the current practice of publishing models of consent forms but publishing the applications submitted and the consent requirements, if any, that were imposed. It would quickly follow that subsequent researchers, both within and across campuses, would use prior IRB decisions as precedents referenced in their own applications. IRB decision-makers would be pressed to articulate a justification for the differential treatment of cases. Public review of IRB decisions and justifications would press toward consistency and toward more probing understandings for the requirements that IRBs impose and for IRB decisions to deny applications.

Legality is an intermediary remedy for the problems of IRB governance; it is not a quick fix but neither does it abolish the system. Philip Hamburger (2005) has recently argued for abolishing IRBs on the logic that by requiring prior government consent for inquiry, IRBs are censorship mechanisms that unconstitutionally license the exercise of 1st Amendment rights. But even if the courts block government entities from making research grants contingent on prior IRB review, private philanthropies might retain the condition, and in any case schools would not necessarily abandon a role in overseeing research ethics.

As the examples of accommodation noted above indicate, the ability of faculty to influence administration in higher education seems linked to academic institutional

prestige. University prestige is based on faculty eminence, and eminent faculty have more success in getting the ear of their administration, even without hauling a sack of research funds to meetings. Legality is an especially fertile process for growing a culture that would overrun stratification differences within and among schools. By encouraging reviewable, reasoned explanations for decision-making, legality would facilitate ongoing, unrestricted debates over ethics administration, which in turn would foster patterns of national consistency.

The key issue about IRB administration is not what decisions to make on any given question, nor even how to read the regulations; the central matter is the process that will be used to make decisions and authoritative interpretations. Ambiguities about the reach of a school's "auspices," the definition to be given "research" that falls within IRB control, how to apply the "exemption" clauses so that all researchers of good will can comply with ethics requirements … all of these issues must be worked out somehow. There is a long list of other troublesome issues that come up when proposals receive full IRB review, such as how to anticipate and assess "risk"; the role that IRBs should take in judging the scientific worth of a project when they balance its benefits with its risks; and what the sanctioning regime should be if violations are found. Just as the discretionary character of IRB power throws deep shadows onto ethnographic fieldwork, it keeps local researchers in the dark about the treatment of the applications of neighboring colleagues and blinds local administrators to thoughtful resolutions achieved on other campuses. For all affected parties except tyrannical or insecure administrators, legality should be an attractive way of pooling intelligence into a horizontally and vertically collaborative evolution of the power to oversee research ethics.

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NOTES

[i] For the evolution of human subjects' protection measures as applied to social and behavioral scientists, Citro, C. F., D. R. Ilgen, et al. (2003). Protecting participants and facilitating social and behavioral sciences research. Washington, D.C., National Academies Press.. For a brief summary, Singer, E. and F. J. Levine (2003). "Protection of Human Subjects of Research: Recent Developments and Future Prospects for the Social Sciences." Public Opinion Quarterly 67(148-164. .

[ii] Non compliance is a widely discussed secret.

> According to Berkeley's Ann Swidler, IRBs "turn everyone into a low-level cheater," in much the way that unreasonably low speed limits encourage disrespect for traffic laws. "We are pushing for compliance among the faculty and grad students in the cultural anthropology department," [Kathy] Ewing [cultural anthropology chair at Duke] says, weighing her words. "But I'm not sure there is much relationship between what people agree to do for the human-subjects committee and what they do in the field." Shea, C. (2000). "Don't Talk to the Humans: The Crackdown on Social Science Research." Lingua Franca 10(6).

[iii] What is at stake is not a mere formality. Participant observers usually come across conduct that, if revealed, would embarrass subjects and which subjects, if asked, might not consent to see in publication. (For an unusually frank discussion, see Bosk, C. L. (2001). Irony, Ethnography, and Informed Consent. Bioethics in Social Context. B. Hoffmaster. Philadelphia, Temple University Press**:** 199-220.; also Emerson, R. M. and M. Pollner (1988). "On the Uses of Members' Responses to Researchers' Accounts." Human Organization 47(3): 189-198.).

[iv] In a phone interview, Irwin explained that the data for his book came from the contacts he had at San Quentin which dated back to his "cohort" in the 1950s. When he returned to do his PhD research, he knew many inmates who had remained or returned, and he could not divide the social relations and knowledge for the book into pre-grad school and grad school phases of his biography.

[v] This is what happened in two cases when the psychologists, Elizabeth Loftus and Michael Bailey, active in two independent lines of research, were brought under investigation by their IRBs for developing illustrative case material for rhetorical purposes Tavris, C. (2002). "The High Cost of Skepticism." Skeptical Inquirer 26(July/August): 41-44., Burt, S. and L. Jorgensen (2003). Northwestern U. panel to investigate prof's
research tactics. Daily Northwestern. Evanston.. Some universities have anticipated such dilemmas and have created policies exempting illustrative case material from IRB review.

[vi] More precisely, federal government funded research. No doubt some colleague of Shweder's at the University of Chicago will argue that, just as there is no free lunch, there is no unfunded research.

[vii] The multiple negatives in the regulatory language sometimes confuse researchers and IRB administrators alike. The correct reading is that either anonymity or an absence of reasonably likely risk from disclosure will sustain the exemption defined for interviews and observation of public behavior. Even if there is reasonably likely risk from disclosure, anonymity in recording preserves the exemption. Note also that the regulation

speaks of anonymity at the moment in which "information ... is recorded"; it does not require a prediction that subjects will remain anonymous. This is important because anonymity often is ultimately out of the researcher's control, since the research subjects or others aware of the study could often disclose their own and other subjects' identities.

[viii] Interview with Richard Candida Smith, April, 2004.

[ix] The email to which this document was attached contained the warning, "Information contained within is confidential and should be treated as such." I rely here on phone advice from the chief human subjects' staff administrator that this restriction was a matter of form that could be disregarded.

[x] "In the Belmont Report the term research designates *'an activity designed to test an hypothesis, permit conclusions to be drawn, and thereby to develop or contribute to generalizable knowledge.'* Research is usually described in a formal protocol that sets forth an objective and a set of procedures to reach that objective." http://www.pnl.gov/hs/researchdefined.html

[xi] I have argued that a lack of pre-set design for data gathering is not accidental, not equivalent to a lack of fore-thought, not a basis for understanding ethnographic field studies as lacking in methodological rigor. Participant observation fieldwork rests its methodological strengths specifically on its ability to find unanticipated variations or exceptions in the field, and on its retrospectively systematic character. See Katz, J. (1982). A Theory of Qualitative Methodology: The Social System of Analytic Fieldwork. Poor People's Lawyers in Transition. New Brunswick, New Jersey, Rutgers University Press**:** 197-218., Katz, J. (2001). Analytic Induction. International Encyclopedia of the

Social and Behavioral Sciences. N. J. Smelser and P. B. Baltes. Oxford, U.K., Elsevier. 1**:** 480-484..

[xii] As of December 14, 2005, the following language was on the Harvard website: "Final determination of whether research is exempt should be made by the investigator--in consultation with a faculty or department adviser for student or staff investigators--**only** in unambiguous cases. For example, interviews with political candidates about their views on issues of public relevance, or anonymous surveys of adults on non-sensitive topics." http://www.fas.harvard.edu/%7Eresearch/guidelines.html

[xiii] As compelling as are Shweder's arguments, they will become moot if legislation removes the ability of research institutions to opt out of IRB review for non-funded research. See HR 4697 and S3060 of the 107th Congress; HR 3594 of the 108th Congress.

[xiv] The University of Oklahoma's website guides researchers to a decision tree on which, at the branch relevant to ethnographers, a study is thrown out of IRB jurisdiction unless "observation and interviews are informed by predetermined constructs."

[xv] Loftus, E. F. and M. J. Guyer (2002). "Who Abused Jane Doe?: The Hazards of the Single Case History, Part I." Skeptical Inquirer 26(May/June): 4-32, Loftus, E. F. and M. J. Guyer (2002). "Who Abused Jane Doe?: The Hazards of the Single Case History. Part II." Skeptical Inquirer 26(July/August): 37-41, and personal communications with Prof. Loftus.

[xvi] The Penn language, which embraces a post-hoc censorship role, is far from ideal, but at least it demonstrates that campuses can recognize the observational fieldworker's dilemma, and that IRBs, even at a university where harm to a research subject led to

death and a threat to close down all research funding, are not obligated by federal regulations to review ethnographic research before data is gathered..

> If an investigator begins a project and later finds that the data gathered could contribute to generalizable knowledge, has changed in some fashion as to now require IRB review, or that he or she may wish to publish the results, the investigator should submit a proposal to the IRB for review as soon as possible. If the IRB does not approve the research, data collected cannot be used as part of a study, thesis or dissertation nor may the results of the research by published. http://www.upenn.edu/regulatoryaffairs/human/SOP2004/GA102.pdf From University of Pennsylvania, Institutional Review Boards Standing Operating Procedures, "effective date" stated as 07/01/04.

[xvii] "Research does not include interviews used to provide quotes or illustrative statements – used in journalism or related projects." (Downloaded from the MIT website, December 22, 2003).

[xviii] For foundational statements and detailed administrative implications see Fuller, L. L. (1969). The Morality of Law. New Haven :, Yale University Press., 70-71 and Davis, K. C. (1980). Discretionary justice : a preliminary inquiry. Westport, Conn., Greenwood Press.