

Ethics ≠ law

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There is an ongoing movement towards situated and relational, rather than static and transcendental, understandings of research ethics within Geography. Yet this tendency has not yet succeeded in destabilising a priori judgements of ethnographic engagements with unlawful spatial practices. As such, many socially and politically important projects are either sidelined or eschewed for fear of liability or complicity. In cases where ethnography is deployed, primarily in the field of participatory action research, the tensions between ethics and legality are not often explicitly engaged with. We want to suggest here, in light of increasing interest amongst geographers in 'subversive' spatial practices, that ethnographies of illegality raise a range of important ethical concerns for research practices that also inform broader understandings of situated ethical frameworks. In this vein, the authors draw on past and ongoing ethnographic experiences into illicit spatial practices (or what criminologists have termed 'edge ethnographies') to think through the entire process of research engagement – from planning to data retention – with consideration to the incommensurable relationship between ethics and law where we take situated ethics seriously.

Key words: *situated ethics, law, ethnography, illegal spatial practices, fieldwork, methodology*

Prologue: An epistemological deadlock

We were handed a bundle of court documents which included a statement from an independent 'expert' on ethics. The statement alleged that author two had been unethical in his research practices because he had participated in illegal activity. Over the next week, author two and a colleague constructed a 17 000 word response, amassing evidence from the PhD dissertation, academic sources and disciplinary association guidelines on ethical research practices which make clear that researchers can study illegal activities while maintaining an ethical position. Discussing it with legal counsel, it dawned on us that we had reached an epistemological deadlock. The witness and prosecution sought to rationalise ethics as a transcendental code that could be applied equally across all situations, suggesting that the illegal was categorically unethical. Conversely, we marshalled evidence from a less prescribed understanding of ethics that recognised the fluidity, challenges and situatedness of doing ethnographic research. In the midst of these discussions we were

forced to confront the congruences and incongruences between ethics and law. We wondered what it might mean to argue convincingly for situated ethics in the courtroom.¹

Introduction

Geographers are increasingly interested in post-Kantian understandings of ethics as an ongoing, situated, multi-sensual sensibility and set of prompts, rather than as a set of transcendental codes determined in advance of field encounters that can be rationally applied (see for instance Cloke *et al.* 2000; Dickens and Butcher 2016; Dyer and Demeritt 2009; England 1994; Horton 2008; Hynes 2013; Popke 2009; Rose 1997; Routledge 2002 2009; Smith 2001; Valentine 2005; Whatmore 1997). Situated ethics is a mode of conduct to move along and towards (Madge 2007); an evolving critical sensibility aimed at cultivating 'a disposition and an openness to difference, the multiplicity of life and, crucially, uncertainty' (Bissell 2010, 85; Braidotti 2006). Here, ethics is about debate rather than consensus (Madge

2007). This debate may take place in a public forum, but also takes place, importantly, within ourselves and with our project participants. This process exceeds 'the impartial and universal enactment of instrumental reason' exchanged among and within rational, cognitive subjects (Whatmore 1997, 38), to acknowledge the embodied, practised qualities of negotiating ethical agency as unfolding within webs of connectivity between researcher and research participants (Routledge 2002; Whatmore 1997).

Professional bodies, funding bodies and university departments are also recognising the importance of a situated, embodied and relational ethics; one that engages ethics not as 'an attribute of a pre-existing ethical subject but as a potential mobilised within particular creative instances' of spatio-temporal unfolding (Hynes 2013, 1931). The American Association of Geographers, for instance, acknowledges '[n]o one statement can possibly cover the range of ethical matters confronted by geographers' (2009, np). Likewise, Durham University encourages geographers to '[r]emember that there is no blueprint for ethical practice'.² Yet, despite geographers' and geography's ostensible embrace of situated ethics, the law seems to offer a site at which geographers fall into line.

The equation between ethics and law pushes ethnographic work concerned with explicit embodied interaction with what lies beyond legal borders into the realm of taboo. It forces institutions to back down on their statements of situated ethical practices in order to comply with the law, and can even put researchers and institutions in a situation where they are expected to act unethically with respect to research participants. In this paper, we explore the assumption that ethics and law are necessarily and unavoidably in alignment and how this assumption may produce strict, static ethical arrangements that inhibit the 'doing' of situated ethics. Given geographers are increasingly engaging the illicit (Hall 2012) – including the geographies of burglary (Bernasco *et al.* 2015), illegal occupations (Vasudevan 2015), drug dealing (Allen 2005), street racing (Falconer and Kingham 2007), maritime piracy (Hasting 2009), graffiti (McAuliffe and Iveson 2011), urban exploration (Garrett 2013) and subvertising³ (Dekeyser 2015) – these questions must have a role in our disciplinary conversations. When dealing with illegality, there is arguably even greater potential for both researcher and research participants to experience malevolent effects of unethical research.

While geographers are only beginning to grapple with these issues, disciplines such as Criminology, Sociology and Anthropology have a longer history of debating conceptual scenarios and concrete case studies. For instance, 'edge ethnography', in which the researcher

engages 'in behavior that is physically, legally, socially, or otherwise dangerous', is a recognised and widely-discussed methodology in criminology.⁴ Likewise, the Association of American Anthropology (AAA) includes among its teaching resources a module on 'researching criminal activities' where researchers are forced to confront mismatches of law and ethics.⁵ Importantly, the resources refuse final judgements or statements of how to act and, instead, repeatedly note that ethics are messy, complicated and relational. It is in this spirit that we, in this paper, consider our own and others' experiences with illicit ethnographies to raise a series of questions. Rather than casting judgements or proposing a 'framing' for illicit ethnographies, we investigate situations in the stages preceding, during and after fieldwork where our speculative embrace of situated ethics runs up against the law, where an ethical evaluation of the complex relations between researcher, research participants and research institutions that make up a particular ethnographic situation calls us to break the law. We interrogate the possibility of a more situated approach capable of providing support to researcher and research participants that facilitates ethnographic entanglements responsibly, promoting greater and contingent interactions with ethical concerns. We start, then, where all ethnographic projects do: with their inception.

Inception

Yesterday's PhD interview started off seamlessly. We shared theoretical interests, political hopes and I think I responded adequately to some of the more provocative questions. Towards the end, however, when we started discussing the ethnographic component of the proposed methodology, the temperature of our conversation dropped. 'Hmmmmmm, this all sounds a bit too innovative for this university', the proposed supervisor said. It felt like this signalled the end of his, and his university's, interest in my project with subvertising practitioners. (Author one, MA research diary, January 2015)

Oftentimes, confronted with fieldwork that strays towards legal boundaries, many of us sitting on ethics committees or working as supervisors might have heard, thought or even said 'that will never get through the ethics process'. A central, *a priori* application of codes remains prevalent in the process of research inception. Horton suggests that one of Geography's central guidelines is that, as researchers, our 'everyday practices must comply with national legislation, local rules and regulations' (2008, 367). This line-guarding is found within numerous university departments, as indicated by

the University of Oxford's statement that researchers must 'comply with ethical, legal and professional frameworks' (Dally and Kozeny-Pelling 2016). But what are the ethics of patrolling what we can do, of performing mechanical methodological restriction through uncritical reliance on the ethical coding framed by local, national and international law?

It is worth turning to the scholarly field of criminology, and more particularly, to the methodological emergence of 'edge ethnographies' (Hamm and Ferrell 1998; Miller and Tewksbury 2010). If 'the law in part reflects, incorporates, and perpetuates social privilege and social injustice' (Ferrell and Hamm 1998, 34), then it may, in some cases, debilitate an orientation towards ethical engagement with field encounters. Research practices critical about, and possibly even confrontational towards, legal systems, can for that reason be an ethical force worthy of ongoing consideration (see Caitlin *et al.* 2007). In this vein, some geographers have cultivated collaborations with activists and activist organisations, aligning shared goals through various modes of nonviolent direct action (e.g. Fuller 1999; Katz 1994; Nast 1994; Routledge 2002) that skirt the edges of or move beyond the realm of the legal.⁶ Following Hannah Arendt, who emphasised the 'not altogether happy theoretical marriage of morality and legality, conscience and the law of the land' (1972, 52), and a long history of scholarly civil disobedience (Thoreau 2001), such research underscores how challenging laws where they perpetuate injustice is not only potentially ethically acceptable but *necessary*.

The geographer Paul Chatterton, for example, highlighted in a researcher's defence statement to a UK jury that his occupation of a coal train in Yorkshire with research participants was justified and imperative in light of the coal-fired power station's 'deadly and urgent threat to society' responsible for '180 deaths a year' (see Wainwright 2009). While the actions of the researcher may have been technically illegal in that moment, the broader awareness of law and the particular contexts of the action here rendered the illegal actions ethical and even potentially legal under 'lawful excuse'. Had Chatterton been prevented from undertaking this research by his institution, none of the knowledge gained would be available for debate. Refraining a priori from researching illicit spaces and practices, through relying on the familiar mantra to 'play it safe' and 'not choose a topic that might lead you to break the law' (Denscombe 2012, 168), might therefore be more dangerous and unethical than cultivating situated ethics through the messy encounters of illicit performances, embodied situated selves, community ethics, legal systems, ethics committees, research aims and the need to protect research participants.

The criminologist Jeff Ferrell, arrested while painting trains with graffiti writers, argues that illicit ethnographies might reveal 'part of the social world that remains hidden by more traditional techniques' (1998, 25). Writing of his ethnographies, Ferrell notes that knowledge comes to us as much in 'the pits of our stomachs, in cold sweats and frightened shivers, as in our heads' (1998, 30). Only through direct immersion is it possible to viscerally trace the unlawfulness of an unlawful practice, to share with project participants the adrenaline-fuelled anxieties central to particular kinds of illicit practice. If we agree that it is sometimes across the legal boundaries of social reality that important practices and the promise of alternative futures lies (for instance, in squatting communities, pirate radio networks or illicit favela settlements), and if we consider these practices and futures as embodied, imagined, performative and affective (perhaps never emerging in the public realm) *and* as semiotic and discursive (through their public mediations and media productions), then direct immersion into illicit practices is not only ethically acceptable, but critical to socio-political apprehension.

We want to emphasise that ethical negotiations do not start from, nor end with, 'the field' (Till 2001). And we ask: should the scales of knowledge lost or gained through ethnographies into the unlawful not be given as much consideration as any other mode of research conception by departments and ethics committees? For we cannot know, in advance, what forms of affective and ethical potential investigations into the dark web, drug use or far-right extremism may unveil.

In the field

When I arrived at the subvertising workshop a few hours ago, people were already getting seated, notepads and information packs in hand. The community centre was packed. Two men arrived late, just after I started my presentation on subvertising history and theory. They slotted in the background and kept to themselves, didn't mingle with any other participants. I didn't think much of it until later, when during the practical part of the workshop, they spoke for the first time. *Are you thinking of doing any digital billboard takeovers?* Slightly uncomfortable, my co-presenter Donna responded after a moment of silence: 'No, no, these are legally a wholly different thing. What we're doing is closer to criminal damage...' As people gathered after the workshop, the two same men – perhaps ten to twenty years older than the average crowd – approached us with a certain sense of urgency. *Can we have your full name?* Donna, by now severely suspicious, responded:

'Er, no, I don't see why you'd want that'. *We want to follow you on Facebook*. 'Oh, okay, well you can follow the collective's name', Donna suggested. They kept pressing until we pretty much ran away from them.

Not knowing what to do, I rang my friend Amelia and talked her through the details: the layout of the evening, the men's looks, their not-so-subtle questioning, how they had wrenched as much info as possible, and how they had this peculiar determinacy and almost arrogance in their voices. 'Private investigators', she responded shortly. And added, before I had taken in what that actually meant, 'prepare for a raid'.

Now I'm sitting here, in my living room. I'm actually terrified. FUCK. I guess this is what my research-participants have had to deal with all along. It now makes sense, more viscerally than ever. (Author one, field notes, September 2016)⁷

This vignette underscores a point that arises in every ethnographic project where fieldwork becomes excessive to expectations. Here, however, this excessiveness stems from a closeness with project participants that requires negotiating legal lines. An educational workshop became, through the mere presence of private investigators, a risky scene, with potential legal implications for both research participants and researcher. It altered the nature and direction of the event, the researcher becoming, at best, a node holding valuable information for police authorities, and at worst, a criminal accomplice or accessory. As Mitchell highlights, the role researchers 'play in the field and beyond are not strictly and exclusively of their own choosing' (2001, 208). It is hard to know, in advance, how a situation will unfurl and on what side of legal boundaries it will land. How does an abrupt change in events, such as the one described, alter the researcher's relation to the moment? How does one act most ethically in a situation that has slipped beyond legal neutrality?

But the question of the relation between situated ethics and law extends beyond the unknowing transgression into legally dubious terrain while in the field – there are times when intentionally breaking the law becomes the most ethical action to undertake. Consider, for instance, a moment when a research participant announces a plan to undertake criminal trespass onto a railway, or even just does it without warning. As an ethnographic researcher, aware of the dangers of a solo trespass onto a terrain with many dangers, we might decide it could well be more ethical to participate consciously in the act (if only to look after one another) than to let the research participant depart on a solo adventure. The standardised refusal to

engage with the unlawful could, in this instance, put a research participant in danger with potentially fatal consequences. The positionality of the researcher, in this instance, further complicates the decision to trespass. Routledge reflects on the complex ethical process involved in undertaking illicit trespass (among other legally dubious actions) in the context of political resistance against tourism development in India, where his privileged 'whiteness [...] might have vitiated against possible legal sanctions that may have accrued to an Indian person conducting a similar action' (2002, 485), which, alongside gendered and physical qualities, allowed his enactment of the legally dubious to be '[I]aced with a frisson of excitement' (2002, 483) rather than with dread or anxiety.⁸ The researcher's positionality, both how they perceive themselves and how they expect to be perceived by others, affects the ethics of deciding to follow the solo trespasser.

These scenarios outline complex situations that defy any assumption 'that ethical guidelines and rules can be neatly, rationally applied to a given situation' (Horton 2008, 368). They point at ethical considerations in which an event's generativity itself becomes the 'framework' for making decisions ethically. We can of course never know 'ourselves at a "transparently conscious" level, at every twist and turn of "being"' (White and Bailey 2004, 138), how the events will unfold exactly and along which paths the implications of our own decisions will travel (Katz 1994). Because we can never fully grasp the field's generativity, particularly when decisions have to be made rapidly or at a moment when we feel insufficiently informed,⁹ our situated decision-making is bound to fail (Horton 2008). This should not, however, lead us to 'anything goes' scenarios or back towards a premeditated restriction of one's ethnographic activity to legal domains. Rather, we suggest the cultivation of sensitivities centred around 'preparation in the sense of planning a mode of attack, a style, a form of engagement' (Gilson 2011, 81) that is capable of tracing 'the differential relations, intensities, and singularities that haunt a collective in a moment of perplexity proper to a situation' (Bryant 2011, 41). This development towards immanent evaluation prefigures and transforms along with fieldwork activity. It is informed by an ongoing feedback loop of engagement with our field milieus, research participants, ethics committees, supervisors, colleagues and personal reflections. To task oneself with an unfolding ethics encompassing a multitude of dimensions (of self, participant community, institution, state) can be more tedious or harrowing than a simple equation of the lawful and ethical. Yet, it is perhaps precisely the nonlinear messiness of such a situated ethics that is required for dealing with the ethical complexities of the field.

'After' the field

In preventing contact with my research participants, now named as co-defendants, I am unable to close this research project in an ethical way, which would demand continued consultation with the community on research outputs. (Author two, defence document prepared for solicitor, April 2014)

After building relations between researcher and community, there is often no easy 'after the field', with the field refusing to be spatially and temporally fixed, 'over there', or back in time (Till 2001). Ethical considerations thus commonly stretch beyond the final day 'in the field'. Just as not every ethical eventuality during fieldwork can be pre-conceived, it is also the case that not every eventuality can be planned for, asking us to take seriously a post-fieldwork *situated* ethics in at least two ways.

First, the question of participant confidentiality is of particular relevance to ethnographies of illicit practices. In author two's case it was several years after fieldwork concluded that his data – both in raw form on hard drives and printed texts, and in processed form in a thesis, articles and blog posts – became evidence. There is a history of arrested ethnographers being asked and even forced to foreclose personal data on research participants involved in illegal practices (see Hamm and Ferrell 1998). This raises a vital question: is the decision of a researcher or institution to succumb to pressure from authorities always the most ethical move? In 2009, the AAA and the University of Minnesota supported the graduate student sociologist Scott DeMuth, who was jailed for six months for refusing to give up the names of the radical animal rights groups he worked with.¹⁰ Research participant confidentiality was argued to carry greater ethical weight than codes of legality predicated on ideals of (corporate) private property and economic wealth. Adding to this complexity, it is not always easy to ensure confidentiality or anonymity even where access is not granted. Not all communities desire confidentiality, and some will go to considerable lengths not only to decline anonymity but to destroy any protective cover accorded them (Svalastog and Eriksson 2010). Rather than imposing any clear-cut code of confidentiality practice, the AAA website suggests the ethical researcher will determine what to do in the specific situation.¹¹

Second, for author two, Demuth, and as we will see, Dr Alice Goffman, retention of data is also an ethical issue. Data retention has long been a topic of debate. For many years post-use destruction of ethnographic fieldnotes was considered standard practice and even demanded by

Institutional Review Board (IRB) committees in the USA. More recently, the decision has been left to the researcher, or increasingly to research councils, some of which require not only assurances of data retention, but also its widespread accessibility. For instance, the UK Economic and Social Research Council, while protecting sensitive materials and the need for anonymity, suggests that data must be 'findable, accessible, interoperable, and reusable' (ESRC 2015, 2). In an interview, the anthropologist Alice Goffman, whose research provoked insight into inner city (and often criminal) life in a lower-income neighbourhood in West Philadelphia, revealed that 'she shredded all of her notebooks and disposed of the hard drive that contained all of her files out of fear that she could be subpoenaed and thereby forced to incriminate her subjects' (Neyfakh 2015, np). Though extra-disciplinary agents decried this move as unethical and even illegal, Goffman's actions accorded with AAA guidelines which suggest *de facto* destruction of field data unless a compelling (research-led) reason exists for retention. This calls into question 'common sense' policies of data retention. Similarly, an ethics case study in the AAA handbook explores the dilemma faced when a researcher witnesses a murder. When regional police come to interview her, should she turn her research into evidence, destroy her field notes, when questioned, plead ignorance? The anthropologist hid her fieldnotes and lied to the police. The website does not pass judgement on the decision, but rather advises that we debate data retention from the outset of our project within its social and cultural contexts.

In line with cultivating situated sensitivity for in-field decision-making, both post-fieldwork scenarios point at the ethical potential of ongoing circuits of communication between researcher, research participants and ethics committees. It is clear that in considering the relationship between law and ethics, we must recognise that the law itself can become a violent tool and that blanket 'rules' leading to categorical statements and a shirking of ethical responsibility under the pressure of legal scrutiny can actually be an unethical position. As Cloke *et al.* note, 'to hide behind ethical standards so as to obscure the real-time dilemmas of research' constitutes an unethical way to engage ethnographic work (2000, 251; see also Dyer and Demeritt 2009, 60). Rather, as understood by the AAA and other major ethics bodies, ethics is composed of a series of complex and situated particularities of individual pieces of research that works less with 'standards' and more with 'specifics', and doesn't end at the point of publication.

Conclusion

In this paper, we suggest that an understanding of the *situatedness* of ethics demands careful consideration of

the often uncomfortable relationship between the legal and the ethical. We interrogated this relationship before, during and after ethnographic 'field' engagements. In doing so, we suggested that the inherent excessiveness and particularity of field encounters usefully problematises transcendental ethical judgement *prior* to the occurrence and reoccurrence of research events. We have endeavoured to prompt exploration of what a situated ethics might look like for ethnographies of the illicit where the equalisation of ethics and legality fails and suggested that a situated orientation toward unlawful ethnographic fieldwork requires a receptiveness to excessiveness and process that calls into question the stemming of certain kinds of research, the policing of the actions of the researcher or the mobilisation of research data as 'evidence'.

The practice of illegal ethnographies forces reflection on practising situated ethics, where at the minimum the law is challenged and at times even contravened, with potentially significant consequences for researchers and participants. The relation between the ethical and the lawful is by no means exclusive to ethnographies directly committed to illicit practices, it is a broader question about how we frame our researcher practice. This makes it all the more pressing to experiment with methods for dealing ethically with boundaries of the (il) legal. To this end, there is much to be gained from looking to 'sibling' disciplines such as Criminology, Sociology and Anthropology which have long dealt with these issues, often with very high stakes, where it has long been understood that ethnography and transcendental ethical frameworks are incompatible. Recognising this on a more-than-speculative level, creating a situated ethics that will act as a bulwark to protect project participants, researchers and our institutions has never been more important.

Notes

- 1 Dr Garrett was charged, along with 11 research participants, with 'conspiracy to commit criminal damage' following a multi-year ethnographic project with urban explorers who 'recreationally trespassed' into off-limits architecture (see Garrett 2013, 2014).
- 2 See <https://www.dur.ac.uk/geography/research/ethics/ethicsformchecklist/> Accessed 26 April 2017.
- 3 Subvertising is the illegal act of materially intervening into outdoor advertising spaces through methods of replacement, removal, supplementation, reversal or destruction.
- 4 See <http://criminal-justice.iresearchnet.com/criminology/research-methods/edge-ethnography/> Accessed 27 April 2017.
- 5 See <http://www.americananthro.org/ParticipateAndAdvocate/Content.aspx?ItemNumber=1895> Accessed 26 April 2017.
- 6 Illicit or legally dubious forms of nonviolent direct action, undertaken by geographers, range from performing a fake

identity (Routledge 2002) to protesting in illicit places (Lee 2013) and blockading power plants.

- 7 Pseudonyms are used to protect research participant anonymity.
- 8 As such, Routledge encourages us to reflect on the potentially gendered, racialised, ableist and class-based processes involved in undertaking (and arguably also in desiring to undertake) ethnographies around illicit activity. However, Routledge also emphasises that 'various forms of (dramatic, arrestable) direct action have been undertaken in different contexts by people of differing gender, ableist, class, and ethnic backgrounds' (2002, 485).
- 9 As Markey *et al.* (2010) note, it takes time to build relationships, to become respectful to research contexts and participants, in ways that allow for the performance of an ethical research practice.
- 10 See <https://www.insidehighered.com/news/2009/12/04/demuth> Accessed 26 April 2017.
- 11 See note 5.

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