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ABSTRACT

Much discussion within media ethics has focused on the acceptability of surreptitious tape recording of news sources by media professionals. The most common legal and social arguments supporting secret taping assert that recorders "hear" and "remember" better, are expedient and practical, protect against libel suits, provide historical documentation, and are legal in 78% of the United States. In "Nieman Reports," a prime example of the justificatory rhetoric emerging in the media professionals' journals, Theodore L. Glasser argues that secret taping does not invade privacy, is not necessarily antidemocratic or dangerous, and is different from wire-tapping and entrapment. However, deeper questions about interviewing are raised by the negative arguments, which claim that secret taping: (1) preserves greater intimacy between source and reporters than is assumed by the source; (2) forfeits a source's confidentiality and right to speak "off the record"; (3) decreases trust; (4) is, or should be, illegal; (5) increases eavesdropping potential and source identification; (6) might change the source's behavior; (7) precludes the source's chance for retraction or denial; (8) violates beliefs of certain cultures; (9) exposes vulnerabilities; (10) is associated with wrongful conduct; (11) alters power relations; and (12) implies that ends justify means. Comparative analysis shows that, while surreptitious taping can be justified in both practical and moral terms, dangerous and subtle problems with this practice surface when issues of human dignity, truth, and freedom are considered. Notes are appended. (JD)

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**SURREPTITIOUS TAPING:  
THE ARGUMENTS FOR AND THE ETHICS AGAINST**

by

Thomas W. Cooper  
Emerson College, 1987

Discussions within media ethics frequently emphasize the questions, "Is the surreptitious taping of news sources by media professionals irresponsible?" Phrased differently, the question may emphasize the source rather than the reporter: "Does a news source have the right to be informed that forthcoming conversation with a reporter will be tape recorded?"

Either phrasing of the question places discussion within the context of "rights and responsibilities," an expansive subject within the field of media ethics. However, from another angle of observation, the questions derive appropriately from the issues and literature of invasion of privacy, source confidentiality, and the professional code of ethics. Indirectly, secret taping also pertains to media's obligation to society, government, owners, audience, and advertisers. It is difficult to isolate the question, however stated, from this larger field of issues, literature, and conflicting obligations.

Nevertheless, a recent emphasis within the literature of journalists has sought to tightly focus the inspection of surreptitious recording. Much of the larger context has been stripped away in debate of the more specialized question, "Does the tape recorder, if concealed, alter the ethical nature of the interview?" This rewording, and underlying reemphasis, places the tape recorder, and not the reporter's responsibility, nor

the source's rights, at the center of the moral analysis. The technology per se, to which human behavior is secondary, has been on trial, and frequently found innocent.

Recently, a literature of justification, has emerged within the media professionals' journals. Frequently this literature presents a rationale for acceptance of the hidden tape recorder, and thus for its owner. There are three important recent examples of this literature: Nieman Reports ("On the Morality of Secretly Taped Interviews" by Theodore L. Glasser), Washington Journalism Review ("Causing a Hoopla in Kentucky" by Michael York), and The Quill ("Taping on the Sly" by Frederick Talbott.<sup>1</sup> While all three articles merit discussion, I wish to provide a counterbalance, as well as a tribute, to Glasser's assertions in Nieman Reports.

One reason for the rising number of justifications of hidden taping may relate to the increasing pervasiveness of surreptitious recording.<sup>2</sup> Moreover, the increased pervasiveness is matched by a more sophisticated persuasiveness: Glasser, for example, traces his arguments to Sissela Bok's philosophical literature, develops formal moral suasion, and employs scholarly language and distinctions.

However, the case against covert taping has remained foggy, often poorly articulated through tautological statements, and relatively unsystematic. Moreover, some arguments against hidden taping seem more intuitive and emotional, and thus remain unexpressed or unacknowledged. Finally, while Glasser's case was extremely well argued, equal time for counterpoint should be granted.

GRAB. I.

The purpose of this article is to consider the relative weight of both cases, pro and con, and the scales by which relative weight is determined. While differences between tape recorder and written notes will be considered for ethical implications, human behavior, within the framework of rights and responsibilities, must also be investigated. To ignore the specific technology of tape recording and its effects is to overlook two critical factors. However, to ask if the tape recorder is inherently ethical is to sidestep the larger question of individual human behavior and interpersonal responsibilities.

#### THE CASE FOR HIDDEN TAPING

In writing a 1985 exposé about concealed pay-offs to University of Kentucky basketball players, reporters Jeff Marx and Michael York of the Lexington Herald-Leader had openly taped telephone interviews with many of the players included within their research.<sup>3</sup> Several players, however, were unaware that Marx and York were audiotaping their phone interviews. In this case, York later argued that reasons of expediency and technological superiority supported the choice of the hidden tape recorder (see arguments 1-3 below). In a list of arguments for secret taping below York's reasons are followed by the most common legal and social arguments (4-6). Finally, what will be called Glasser's protective arguments (7-9) complete the list.

- 1) The tape recorder "hears" better: York States, "We wanted to make sure we were completely accurate in our use of quotes."<sup>4</sup> While tape recorders, like human ears, may "hear faintly" or malfunction, tape recorders consume entire conversations, rather than selective excerpts transcribed during continuing narration. Few human beings can concentrate during 100% of a conversation, let alone replay ambiguous words and sentences hours later until meaning is determined.
  
- 2) The tape recorder has better "memory": Marx and York thought that, due to the controversial nature of the story, "there was a good chance some players would develop what Carroll called 'amnesia' after the story appeared."<sup>5</sup> A tape "remembers" a complete interview, or whatever portions were recorded. A human being may forget aspects of the context or specific transitions between particular notes. Witnesses, sources, and other "interviewees" may later develop 'amnesia' or disclaim 'misquoted' statements if an interview proves damaging to themselves or others. The tape, however, if clear, provides full evidence of what was actually said. Indeed the tape may also have recorded preliminary or "off-the-record" remarks, background sounds, voice tones and non-verbal cues which give the reporter a far greater sense of meaning and context than notes, even months or years later. Moreover, unavailable levels of understanding during a first listening may be available during a second or third, due to the "total recall" of mechanical "memory."
  
- 3) The tape recorder is expedient/practical: York states that he and Marx "wanted the tapes and transcripts because of their usefulness in ordering a large amount of material."<sup>6</sup> With computer or sustained patience, transcribed tapes may be organized according to key words, subjects, and topics. Large bodies of material may be stored in a shoe box and transcribed only as relevant. Moreover, during the "in person" interview, the portable tape recorder, unlike the pencil and pad, leaves the reporter free to sustain eye contact, use one or both hands, and to concentrate upon a variety of matters, such as forthcoming questions, apparent contradictions, and where he is walking.

- 4) The tape recorder is protection against libel suits: In "Taping on the Sly" Frederick Talbott claims that "team interviewing or listening can fail miserably compared to taping when provability in a libel action. . . . is at issue." Reporters can use tapes as superior evidence to notes, team listening, and prior documentation, if the reporter's truthfulness or memory is in question. The increasing number and cost of libel suits brought against reporters and their employers makes taping a valuable form of insurance.
- 5) Tapes are historical documentation: Notes often include only fragmentary interpretations of the thoughts of one party within a two-party dialog. While a reporter may accurately (or inaccurately) recall her exact questions, a historian would have to speculatively reconstruct two-way conversation from a reporter's notes. Tape recording, unless erased or edited during the interview, records a close approximation ( $\pm 5\%$ ) of "real time," in which 60 taped seconds approximates "clock" seconds." Thus tapes are accepted as more precise, complete, and direct forms of historical documentation.
- 6) Secret taping is legal in 78% of the United States: "In 39 states and the District of Columbia, it is legal to record a conversation you are a part to without telling the others involved in the conversation that you are doing so."<sup>8</sup> It can be reasoned that if almost four-fifths of the United States authorize secret taping, then a large majority of politically representative voices support concealed taping in some situations.

#### Glasser's Protective Arguments for Hidden Taping

Some of the most sophisticated arguments for concealed taping are delineated by Dr. Theodore Glasser's scholarly apology "On the Morality of Secretly Taped Interviews." Glasser's article, by far the most systematic and imaginative to date, anticipates and rebuts predictable attacks upon secret taping. Thus arguments 7-9, albeit aligned with arguments 1-6 in tone, are more protective (cf. defensive) justifications which disclaim the supposed dangers of secret taping, rather than articulating its virtues.

- 7) Secret taping does not invade privacy: Glasser deduces "rules of privacy focus on roles -- the role of reporter and the role of the source. When a conversation is said to be private, its participants are not 'acting' in their public roles. Accordingly, an individual acting as a reporter and an individual acting as a source are not by definition, engaged in a private conversation."<sup>9</sup> For Glasser, social roles connote social rules; thus a source/reporter relationship differs from the relationship of the same two people when they are "off-duty." Consequently, the rules of source/reporter dialog, as construed by Glasser, discount privacy and its potential invasion.
- 8) Secrecy is not necessarily antidemocratic or dangerous: Glasser appeals to Sissela Bok's argumentation in Secrets that secrecy serves at least four social needs, which "concern protection for 1) what we are, 2) what we intend, 3) what we do, and 4) what we own."<sup>10</sup> Secrecy in taping interviews may evoke more honest or uninhibited response. Potentially, the public, and indeed the spirit of truthfulness, are better served.
- 9) Taping is different from wire-tapping and entrapment: The tendency to falsely associate all hidden taping with Orwell's Big Brother is deceptive. Eavesdropping, whether via wire-tapping (and wire-taping), remote reception, or "bugged" furniture includes and uninvited and disclosed "third" party into an otherwise two-party dialog. Entrapment seduces, through some type of reward system, behavior toward which the entrapped is arguably predisposed. Any source who knowingly engages in dialog with a news reporter consents to different conditions. Only if an outside party secretly taped the interview or if the reporter seduced the source toward illegal activity would questions of "eavesdropping" or "entrapment" arise.

These nine arguments bolster the practice of secret taping (1-6) and negate its potential dangers (7-9). In the sequence below, no attempt will be made to undercut the validity of these statements. Instead, the validity of counter-arguments will be affirmed and a choice will be made as to the stronger case. Ultimately, the nine arguments above, although influential, will be counterbalanced by points which raise deeper questions about the goals and assumptions of interviewing.

## THE CASE AGAINST SECRET TAPING

Statements appear in the literature cited above which imply that objections to secret taping are frequently emotional proclamations, intuitive guesswork, and unsubstantiated opinion. A more formal and clear articulation of objections to hidden taping is necessary. Twelve ethical problems posed by such taping are discussed below.

Admittedly, some of these "problems" arise from "feelings" (cf. emotions) held by interviewees about taping, both secretive and public. But failure to acknowledge human feelings may be inherently unethical, and failure to communicate such feelings clearly may leave the surreptitious reporter in an unfair dominant position. Below a list of dangers, if not violations, to human dignity and privacy has been formulated based upon historical arguments, formal academic/professional dialog, and common sense.

- 1) Taping preserves greater intimacy between source and reporters than is assumed by the source: Sources are led to believe by existing social rules that reporters primarily want information pertinent to "stories." However, hidden taping records other levels of communication -- speech impediments, drunkenness, irrelevant defamatory remarks -- which, if overheard by others, could provide embarrassingly "intimate" information about the source. Such tapes may potentially be used by other parties or replayed months or years later without permission. A degree of intimacy, if not of personal psychological privacy, is automatically invaded due to the potential for replay not present with note-taking. One of the hidden groundrules of

interviews is that the journalist will orchestrate or script the dialog of the interviewee in quotes or paraphrase. Thus thoughts and feelings reach others indirectly in a newspaper or magazine. Taping, however, declares the human personality directly to other human beings. It is as if the source had agreed to pose clothed for a painting but discovers she has been photographed nude instead.

- 2) Secret taping forfeits a source's confidentiality and right to speak "off the record": In a non-taped interview, the interviewed party may speak "off the record" and ask that the reporter not take notes. She may retract a statement, change her mind, and, in general, determine to some degree, what the reporter writes and ignores. A concealed tape recorder, unless monitored, will automatically record all statements without the source's awareness. The reporter may later be tempted to consider or include thoughts, triggered by replay, which would not have been written. Moreover, confiding in a reporter, off the record, during part of the conversation, is meaningless, if the tape is later heard by others, or quoted without regard to source intention. A source may see when a reporter takes notes in person, but cannot observe the hidden tape recorder.
- 3) Secret taping decreases trust: If a reporter hides one item, will he not conceivably hide others? Will not the trustworthiness of the reporter be challenged by the source (and community) when the secret taping is revealed? The act of hiding itself may arouse suspicion and decrease credibility.
- 4) Taping is illegal or should be: In eleven states taping without the consent of both parties is illegal. This number is misleading as the total population of these states exceeds one-third of the U.S. population. More importantly, law is not the same as ethics. For example, most types of lying are not illegal, but most types of lying, in most ethical systems, are unethical. Secret taping should be illegal because the source has not consented to the total preservation and replication of his complete thoughts and speech by another. In television and radio programming, for example, guests must usually sign written releases giving companies the right to tape their comments for replay.

- 5) Secret taping increases eavesdropping potential and source identification: A reporter's notes may be stolen or rifled by others. But, unless the reporter constantly uses a headset, the likelihood of the tape recorder source being identified greatly increases. The source does not intend that his comments be overheard by the reporter's family or colleagues. Rather, the source assumes that only useful information will be printed, and that, in some cases, his identity will be withheld. Thus taping increases the likelihood of (accidentally) overheard conversations and source recognition.
- 6) Taping might change the source's behavior: A person who knows he will be videotaped might be more likely to dress up and comb his hair, to become more presentable. A person who knows he will be audiotaped may be more likely to become presentable in other ways. He may speak slower and more thoughtfully. Slips of the tongue and off-the-cuff comments may be minimized or deleted. If a tape recorder would alter the source's level of formality, confidentiality, and self-revelation, then he should be informed of its presence so as not to violate the dignity of his self-disclosure.
- 7) Secret tapes are non-deniable: Habitually, human beings make statements which may later be denied by other statements such as, "I take that back" or "I was only joking." Taping provides the potential for words spoken in jest or in reckless abandon to be played or even broadcast out of context. Individuals have no guarantee, and no knowledge, that their taped words might (not) later be used against them, whether in court, in other news media, in public, or by the government and its secret agencies. In such instances, tapes have far more authority than reporters' notes.

### The Deeper Concerns

Some concerns are less clear when stated as concepts rather than as percepts, as McLuhan distinguished. Not all impressions or feelings can or should be frozen into beliefs, concepts, or theory. In Jung's terms, there are objects and processes which we may consciously describe in one way but subconsciously identify (cf. intuit or glimpse in another. Consider the following phenomena:

- 8) Some Native Americans and other tribal cultures refused to be taped because "it steals your soul." The machine which rereleases a person's disembodied spirit, which takes without giving (unlike face-to-face dialog), which mechanizes human sounds, still alienates certain personality types. From this viewpoint are not all recording machines, in all circumstances a form of theft, unless the individual freely parts with his "soul"? Even if a majority do not have such feelings, is it not discrimination to discount the minority who do? Have we become thoroughly insensitive to this seemingly remote point of view.
- 9) Taping exposes vulnerabilities: From a psychological standpoint, all human beings may be subconsciously aware that we all lie in subtle ways. By exaggeration, by selective perception, and by overt deception, we each form different patterns of childhood prevarication. One example is our childhood denial of stealing from the cookie jar or refrigerator, which lies we may perpetuate in other ways throughout childhood and beyond. Various personality types carry with them the constant fear of being "found out." Taping, particularly clandestine recording, poses a much deeper threat that the mask of language will be penetrated when the participant is "off guard." If the source is told that she is being taped, she may not be as open but may reduce the amount or degree of prevarication.
- 10) Clandestine taping is associated with wrongful conduct particularly in images created by national news stories: Seen from a distance, secret taping reminds naive onlookers of the deceit behind Watergate, the controversy surrounding ABSCAM, and the police state tactics of totalitarian governments. However innocent the intention (and the intention is not always innocent), hidden taping suggests the opposite of openness, trustworthiness, and respect. Reputation and public cooperation are often earned on the basis of perceived openness and integrity.
- 11) Secret taping alters power relations: If "knowledge is power," then controlled knowledge about others is super-power. If a tape may be used as evidence to show that the interviewed was a) under the influence of drugs or alcohol at the time of the interview, b) unfaithful to a spouse or relative, c) violating a state or federal law, d) delinquent or incompetent in the performance of employment, e) otherwise irresponsible, the tape may later be used as bait for the obtaining of favor or for more serious forms of blackmail. The source becomes the victim.

- 12) Secret taping implies that ends (more accurate news) justify means (covert taping): Many reporters have used some level of falsification or bribery -- assumed identity, feigned friendship, illegitimate press credentials, checkbook journalism, promised headlines -- to obtain a scoop, expose, or exclusive. However, can more "truth" be ultimately obtained through greater dishonesty? On the surface, secret taping appears to be a means for obtaining greater "truth" through accuracy. However, if all meaningful learning is by example, will not a source conceal more from a reporter who by nature also conceals? Conversely, does not an atmosphere of openness inspire reciprocal openness? Finally, from a purely ethical standpoint, can dishonest methods ever be employed in the interest of greater honesty?

### Comparative Analysis

Surreptitious taping can be justified both in practical and moral terms. This justification is well argued by reporters such as York and Marx, and scholars, such as Talbott and particularly Glasser. However, important questions are raised about the nature of 1) surreptitious taping itself, and 2) the assumptions upon which many justifications are founded.

The latter twelve concerns obviously outweigh the former nine in quantity. Quantity however, is secondary to considerations of quality particularly when it is considered that 1) other justifications could be added to either list 2) any number of rationales could be deleted or incorporated into other justifications on the grounds of partial overlap.

Two contradictory premises have been advanced in defense of hidden taping, from which various justifications arise: 1) the tape recorder has no indigenous properties and consequently

simply extends the note-taking process; 2) the tape recorder has many indigenous qualities (expert hearing, perfect memory, etc.); and thus greatly improves the interviewing process. The first argument appears in articles such as Talbott's "Taping on the Sly" (The Quill) and the second in York's "Causing a Hoopla" (Washington Review).

### Against Hidden Taping

Those who defend secret taping cannot "have it both ways." Moreover, if the tape recorder has unique "powers," or improves upon human "powers," its presence should be announced to the interviewer, so that the power relationship (including potential broadcast, blackmail, eavesdropping, replay, or court use) is clear. Moreover, if the tape recorder is simply a "neutral" extension of note-taking by the reporter, its presence should be declared so that honesty and openness will be optimized and reciprocal. How can a reporter who is neither fully honest nor fully open expect his source to be both?

However, there is a far deeper reason for openness. This "percept" is rooted in the observation that most arguments in favor of clandestine taping favor some form of "expediency." Conversely, the arguments against more fully take into account the conditions of "humanity" and particularly those of individual human beings as will be explained below. Another way of stating this contrast is that most "pro" arguments seem to originate within the mind, while the contrapositive arguments emanate from both the mind and the heart.

One way of unveiling a hidden context for recorder advocacy is by applying the insights of Clifford Christians. His eloquent observation about the advent of technological (cf. tape recorder) values brings hidden social forces to the fore:

In Jacques Ellul's perspective, ethics and the new technologies are a contradiction in terms. The modern technological process is governed by a technicized Geist fundamentally impervious to all moral considerations. La technique acts tyrannically as a spiritual guillotine, decapitating other values...as in ancient days men put out the eyes of nightgales in order to make them sing better. Ellul foresees that in the world of technics ethical perspectives will be replaced by cost and time effectiveness, by administrative niceties, faster transmission, and politics.<sup>12</sup>

The predominant arguments for taping seem in alignment with the general spirit of techno--progress. Taping extends, expands, evolves, or improves pencil-and-paper note-taking technology, the latter of which appears to be approaching obsolescence. As Talbott quotes Newsday's Robert Greene, "The tape recorder is the state-of-the-art in taking notes today."<sup>13</sup> Like all new technologies, it is more of or better at something, in this case, more accurate, thorough, and retentive. It expedites the information gathering and storage process. Perhaps someday remote controlled portable recorders, both public and concealed, may replace local reporters and foreign correspondents. Recorders are, after all, more "effective" and "precise."

For Human Dignity

But such a line of thinking, while exposing specific values, conceals the issue of concealment. If emphasis is given to the issue of the tape recorder technology emphasis is thereby displaced from its covert employment. Sources are not news objects dressed to be raped by news starved reporters. They are individual people who are to be served and respected no less than any other members of the "public" to whom the press claims devotion. Hidden technology, with its potential for abuse, and violation of an assumed contract, undermines any professed "respect for" or service to "the public".

Ultimately, a "source," like a "reporter" whether public or private, is a human being. As such, she is part of the public and indeed humanity, and inherits the quality of dignity:

Dignity is not bestowed by one human upon another, nor earned, nor created only by those intending to do so. It is an endowment of humankind. But it can be relinquished, or stripped away by others. Either act, however, in these terms would be judged immoral -- dehumanizing. Man's natural endowment would have been usurped.

Privacy, then, is essential to the protection of dignity, for it allows the opportunity for "undignified action" without public consequence. Violation of privacy -- exposure of such action to a public forum -- is an act violating humanness. In short, it is immoral, that is, unethical. When people betray other's confidences, they do not merely expose secrets, they also invalidate the person betrayed.

Finally, the greater danger of surreptitious taping is not its monstrosity, but rather its subtlety: We have come to expect that incremental improvements in communication are valid whatever their effects upon society, or encroachments upon individual

dignity: The privacy invasions made possible by satellites and computers loom so large that a hidden taping of a mere news "source" seem miniscule, even rational. Therein lies the deeper problem.

Individual choice, personality disclosure, intimate revelations and the "soul" still remain within a personal envelope of individual dignity, which reporters, no less than others, must ask permission to unseal. Permission to publish selected information is fundamentally different than permission to record moments of a person's existence. Only when such permission is granted do the ingenious, but impersonal, arguments of Glasser, and the literature of justification, hold sway.

Unless the source, no less than the reporter, is treated in human terms, rather than as a news object, all justifications will ring hollow. Moreover, unless the source is free to choose, then neither is society. If reporters will conceal from their sources, what will they hide from their public? Finally, unless the source is honestly encountered, neither is humanity nor its news gathering truth tellers.

NOTES

1. Glasser, Theodore, "On the Morality of Secretly Taped Interviews," Nieman Reports, XXXIX (Spring 1985), pp. 17-20. York, Michael, "Causing a Hoopla in Kentucky," Washington Journalism Review, Jan., 1986, pp. 46-49. Talbott, Frederick, "Taping on the Sly," The Quill, June, 1986, pp. 43-48.
2. For example, John Carroll, editor of the Lexington Herald-Leader (Lexington, Kentuck) appeared in June, 1986 on a panel with reporters Jeffrey Marx and Michael York at the Gannett Faculty Workshop, hosted by Dr. Ed Lambeth at the University of Kentuck. All three presented a favorable case for the use of hidden tape recorders in specific types of source interviews.
3. York, p. 48.
4. Ibid., pp. 48-9.
5. Ibid., p. 49.
6. Ibid., p. 48.
7. Talbott, Frederick, "Taping on the Sly," The Quill, June, 1986, p. 45.
8. Ibid., p. 43.
9. Glasser, Theodore L., "On the Morality of Secretly Taped Interviews," Nieman Reports, XXXIX, (spring, 1985), p.
10. Bok, Sissela, Secrecy: On the Revelation and Concealment of Secrets, Pantheon Books, New York, 1982.
11. California, Florida, Georgia, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Oregon, Pennsylvania, and Washington. According to Reporters Committee for the Freedom of the Press.
12. Christians, Clifford, "Preface," Communication, 1986, vol. 9 preference is made to Ellul, Jacques, Presence of the Kingdom, p. 67.
13. Greene, Robert, assistant managing editor of Newsday, is quoted in Talbott, p. 46.
14. Fortner, Robert S., "Physics and Metaphysics in an Information Age: Privacy, Dignity, and Identity," Communication, 1986, vol. 9, p. 157.