

Asymmetries in legal practice, asymmetries in analysis?

Recent ethnographies influenced by the studies of work tradition

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***Editor's Note:** The following extended abstract represents the conceptual focus of Dr Max Travers's keynote address, the second Keynote Address of the AIEMCA 2012 Symposium. Other materials are available online via <http://austjourcomm.org>*

Extended Abstract

This short paper gives a summary of a keynote address presented at the Australasian Institute for Ethnomethodology and Conversational Analysis (AIEMCA) conference held in Brisbane in November 2012. I reviewed recent studies about legal practice in the studies of work tradition, reminded the audience about different positions in ethnomethodology/conversation analysis (abbreviated in this paper as ethno/CA), and looked at some data. The main argument was that a communicative act is understood by participants as part of a wider context than the turns at talk that immediately precede and follow the communicative act, even if this cannot be demonstrated in the conversation. To give an example, the language used, even the content of the argument, does not make this paper controversial. The controversial nature of the paper arises from how it is read, and from how we understand and produce the ethnographic context of ethno/CA, or communication studies, as academic fields.

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Legal institutions: Common sense and technical knowledge

Although the studies of work tradition in ethno/CA is much smaller than conversation analysis, it is still producing studies and methodological statements. Ethnomethodologists Dave Randall and Wes Sharrock (2011, pp.17–18) note, when introducing studies of work and technology, that

conversation analysis (CA) ... remains a vibrant enterprise but is not primarily concerned with the issue of 'context' in the way that ethnomethodologists of our persuasion might be. Nor are we especially interested here in what is sometimes referred to as the 'institutional talk program', referring to a preference by some for a largely sequential approach to interaction in work environments. This only because we do not see such pursuits as being the same as ours.

Other ethnomethodologists have advanced methodological arguments in favour of ethnography, either as a supplement to conversation analysis (Moerman, 1988) or a related but different 'pursuit' (Garfinkel, 1996; Sharrock & Anderson, 1986). In Australia, Eric Livingston (2008, p. 258) argues that, when researching any social practice, say, playing chequers, 'in the midst of those doings' the researcher will come to see 'the observability of those doings as the ordinary, practical things that they are for their practitioners'. Anyone can play chequers with a little instruction, and perhaps understanding a move is similar to understanding a turn at talk produced in its local context. But to appreciate more advanced moves arguably requires knowledge of the game. In other words, many human activities draw on both shared common sense knowledge (including our ability to communicate) and local technical knowledge acquired through joining different communities.

Legal institutions continue to provide a 'perspicuous' site for discussion of these issues. In the last ten years, there have been several conversation analytic studies that investigate how shared communicative methods are employed in legal settings (for example, Edwards & Stokoe 2011 on police interrogations). In addition, four ethnographies informed by the studies of work tradition have examined technical knowledge of legal practice. Stacy Burns (2001) examined the work of judicial mediation in American civil disputes while working as a lawyer. Bruno Latour (2002) looked at the nature of legal argument in a French administrative appeals court. Baudouin Dupret (2011) looked at

the procedures in prosecuting offences relating to sexual conduct in Egypt. I have examined sentencing in Australian children's courts (Travers, 2012). Each study uses transcripts to examine the content of legal work, although the findings are presented as a part of an ethnography that seeks an understanding of technical procedures or working knowledge either through fieldwork or documentary analysis, as in Dupret's case. Burns's study describes how lawyers and mediators negotiated settlements through, for example, drawing on their shared local knowledge of how particular judges responded to similar facts: 'As an attorney who practiced civil law, I could understand the mediation interchange in its technical legal terms and as practical, professional practice' (Burns, 2001, p. 228).

My study was concerned with sentencing hearings in which magistrates had considerable discretion in crafting sentences that responded to the circumstances of each offender, including the offending history and also a number of potentially mitigating factors. In this jurisdiction, the reason for the sentence is communicated to the defendant orally during the legal hearing. If you only observed hearings, however, you would not see what was happening in the same way as the professionals:

It was only through learning about this local context over time, that made it possible to appreciate and understand work in this setting...A lawyer who had appeared before different magistrates on many occasions could immediately assess whether a sentencing decision was normal or unusual, or harsh or lenient, for that court. (Travers, 2012, p. 48)

Interviewees also explained how lawyers' arguments used in court were often tailored to particular magistrates, and this was part of competent representation. This practice was largely invisible to me during hearings, and not available from a transcript. Having acquired local technical knowledge was essential in understanding the context and lawyers' action in that context. In a similar way, it was possible to see a defendant crying in court, but not know the circumstances as these were understood by the different professionals. A youth case worker told me that this communicative act was a case of 'crocodile tears'.

Asymmetries in action?

What are the theoretical and methodological implications for communication studies? It seems that the studies of work tradition in ethnomethodology offers a corrective to placing too much emphasis

on language, whether or not this is conceptualised as turn-taking. The term asymmetry as employed in the institutional talk program (ITP henceforth) offers a means of describing the speaking rights of professionals and clients. But it cannot address how practitioners understood a particular crying defendant. This perhaps goes further than Hester and Francis's (2000, p. 405) critique of some ITP analysts (for example, Heritage & Sefi, 1992) for not sufficiently recognising that] 'the intelligibility and recognizability of any interactional activity is a situated accomplishment'. In that paper, they demonstrate how an analyst can see the 'resistance' of a patient towards a doctor, by virtue of employing a concept such as 'asymmetry', when this is not evident from the talk. But one could also argue that it might be possible to identify how the parties understood what was happening if there was more ethnographic context. Did the patient complain to friends or family after the consultation? The ethnographer can agree with the observation that 'any attempt to isolate the sequential dimension from other circumstantial elements, and treat this feature as somehow analytically privileged, cannot but reify form' (Hester & Francis, 2000, p. 405). Reification seems, perhaps, too strong a word, but there is a danger that the speech exchange system becomes viewed as somehow independent from the situated actions that produce it (see Lynch & Bogen, 1994).

The same argument can, perhaps, be made of some ways in which membership categorisation analysis (Lepper, 2000; Sacks, 1995) is employed to identify asymmetries between whole groups but without investigating the actual viewpoints or relationships. In my transcripts, young people say very little, making it possible to characterise them as victims, or to suggest that they do not understand the proceedings. But outside any children's court, you can see young people talking to their advisors and catching up with friends. This may suggest that how they see adults or the legal process, and the categories they use among themselves, have yet to be investigated because of the focus on institutional talk.

Knowledge in action?

There are similar dangers of reification in using the term 'knowledge' as an analyst, without some qualification. Both conversation analysis and ethnomethodological studies of work are concerned, in different ways, with explicating common sense and technical knowledge. The difficulty arises when one considers whether the concept of knowledge adequately addresses or captures what happens in a conversation,

or in some technical activity such as playing chequers or mediating between parties in a civil dispute. The philosophical point made by Schutz (1973), Ryle (1949), and Wittgenstein (1958) is that we mostly act without needing to engage in introspection or consult bodies of knowledge inside our heads (although a lawyer might need to look up a point of law). Rod Watson (2000) argues that, because conversation analysis can make findings without needing a theoretical rationale, there is a risk of 'conceptual seepage' from cognitivism into conversation analysis. This risk applies even more so to the new inclusive discipline of communication studies (Braga, 2012).

What, though, is the problem with cognitivism, and why the need for this constant vigilance? Sharrock and Bob Anderson offer some guidance in their discussion of 'Galilean science':

That programme seeks for similarity and generality, and in order to do so directs attention away from the specificities and particularities of things. The inquiries of ethnomethodology go in a different direction, looking precisely for the distinguishing and identifying features of phenomena. (Sharrock & Anderson, 1986, p. 82)

The unqualified use of concepts such as 'asymmetry' and 'knowledge' can direct attention away from 'the specificities and particularities of things', and imply the need for a general theory, even if this is not intended by the conversation analyst. It also relates to Michael Lynch's and David Bogen's criticism: that conversation analysis seeks to develop a technical, expert type of analysis that has discovered hidden structures or optimistically offers the promise of improving human conduct in the same way as other programs in social science (Lynch & Bogen, 1994). These comments remind us that ethnomethodology is a philosophically-informed and driven pursuit, as much as an empirical discovering science. The aim is to obtain a clear view of social reality as experienced in our everyday lives but which gets lost or distorted when we construct elaborate analytic machineries or search for hidden mechanisms.

There is, of course, the possibility of a *tu quoque* response to ethnomethodology. Harold Garfinkel's writing (for example, 1996) is hard to understand, even if this proposes and demonstrates an alternative to constructive or formal analysis. But ethnomethodology as a demanding intellectual project still offers a useful corrective to the almost inevitable tendency in any academic field to professionalise and

develop a technical language (and in doing so become part of Galilean science). Sacks (1989) admired Chicago School ethnographies because they were based on observations that anyone could make (in a similar way to his 1995 lectures on conversation). An early ethnomethodological study that I admire, supervised by Sacks, is David Sudnow's (1965) study of plea-bargaining. This study uses transcripts to illustrate and examine the practical character of legal work as understood in this setting, without pursuing a technical analysis of language.

Asymmetries in analysis

The four ethnographies of legal practice (Burns, 2001; Dupret, 2011; Latour, 2002; Travers, 2012) introduced earlier in this article, and that were reviewed in more depth in the keynote address, are worth consulting as studies of language-use that employ different methods from conversation analysis. They use a different analytic language, and do not use the concepts of 'asymmetry in action' or 'knowledge in action' when discussing legal practice. In contrast to some conversation analytic studies presented at the conference (see also Stokoe, 2013), they do not claim that analysis has any practical value or will improve professional practice.

One way to understand the two traditions of ethnomethodology and conversation analysis, at least as these have developed in recent years, is that they themselves constitute different language games (cf. Watson, 1992). Even though they have shared foundations and assumptions, as suggested by the term 'ethno/CA', it would be a mistake to believe that they can now be combined easily, and perhaps it even makes little sense to engage in criticism other than as a means of understanding the differences. Nevertheless, they do have much in common when contrasted with ironic traditions in social science, in which the analyst claims to know more about a structural context that is hidden from social actors. For this reason, the term 'asymmetries' seems useful, even as a gloss for the actual differences. Asymmetry suggests being at cross-purposes. This was illustrated during discussions that took place before publication of a review article about the conversation analyst Doug Maynard's *Bad News, Good News* (2003), with replies by the critical sociolinguist John Conley and Doug Maynard (Travers, 2006). For a year before publication of the review article there was an asymmetric discussion between me and others through a mediator. There was, as you might expect, no meeting in the middle, and possibly no mutual understanding, although engaging in this kind of discussion is helpful in understanding different positions. Maynard has argued that

ethnography and discourse analysis have only a 'limited affinity' with conversation analysis. I was not asking conversation analysis to change, but for recognition that there are different approaches and traditions within ethno/CA, and that it might be interesting to consider the nature of these differences.

Although methodological debate can distract from conducting empirical enquiry, it makes it possible to combat both the fragmentation and institutionalisation that happens in academic disciplines, and the confusion that can arise in fields such as communication studies that bring together numerous asymmetrical traditions. Fragmentation within ethno/CA is apparent when reading the recently published *Handbook of Conversation Analysis* (Sidnell & Stivers, 2012) because this does not mention either the studies of work tradition or membership categorisation analysis. However, it should not be forgotten that the main asymmetry arises between ethno/CA researchers and mainstream formal analysis. For example, quantitative criminologists who reviewed papers from my own project on children's courts have complained that ethnography is anecdotal and lacks objectivity, even when analysis of transcripts carefully documenting legal work are included in the manuscript. Other reviewers influenced by the critical tradition in sociology asked me to acknowledge structural factors in shaping outcomes that are not visible in transcripts. Here it seems permissible in a keynote to preach to the congregation, even though we pursue different approaches to researching language. Linguistic ethnographies demonstrate the value in looking at the specifics of legal practice, and how professionals understand their work, without irony. In doing so, they reveal and address what might be called the 'reality of law' (Travers, 1997) that is hidden, distorted, or concealed in many conventional studies.

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