ENGAGING WITH THE FIELD WHILE STUDYING LANGUAGE IN THE LEGAL PROCESS: WINDOWS OF ENGAGEMENT AND NORMATIVE MOORINGS

Sigurd D'hondt, University of Jyväskylä
Alison May, University of Leeds

Abstract: This special issue brings together language and law researchers working on a variety of legal settings, ranging from small claims courts, criminal adjudication and immigration services and transitional justice institutions, in a collective reflection on common issues of positionality, ethics, and engagement that practitioners of this kind of research are facing. This introductory essay identifies two recurrent themes throughout the various contributions: (1) the need to navigate shifting institutional landscapes in order to obtain access and (2) the normative anchoring of one's critical interventions.

Keywords: language and law, fieldwork, positionality, normativity, access

1. Introduction

The mutual imbrications of language and the law are multifaceted and manifold. The latest edition of the *Routledge handbook of forensic linguistics* (Coulthard et al., 2021), for example, presents a highly diversified field covering the full range of 'components' into which linguistics is traditionally divided, ranging from phonetics, syntax, and semantics up to discourse analysis and pragmatics, with side-steps into socio-, corpus-, computational, and psycholinguistics. An often-cited distinction is that between scholars who analyze legal language and others who actively participate in them, assisting triers of fact in deciding cases and reaching particular legal outcomes. For the latter, forensic linguistics is a problem-driven approach, as determining the facts of the case presented before judges and juries requires expertise that only a trained linguist can provide: the authorship of a text, the identification of a voice captured on tape, the comprehensibility of a contractual clause, the country of origin of a particular speaker, etc. (see Tiersma and Solan, 2002; Shuy, 2011 for an overview). The captivating nature of such puzzles notwithstanding, the present collection chooses to explore the first avenue. It brings together scholars analyzing language in the legal process, drawing on a variety of methods and traditions that closely align with discourse analysis and pragmatics (interactional sociolinguistics, ethnomethodology and Conversation Analysis, and linguistic ethnography). As such, they all share the fundamental conviction that law, in addition to being a set of formalized rules ('positive law'), is also a process that unfolds in and through language, a black box that is routinely taken for granted and that precisely for that reason merits critical unpacking.

But binary dichotomies should be treated with caution. For one thing, discourse analysts never abstained from giving expertise in court, elucidating before the judges how the legal process itself relies on processing language. They have done so, and continue to do so, for example, by shedding light on surreptitious recordings entered as evidence (Shuy, 2021), challenging questionable interpretations of suspect statements collected during police

interrogations (Eades, 2021), or establishing that a so-called 'speech crime' was committed, ranging from defamation (Shuy, 2010) to incitation to genocide (Wilson, 2016). Another elephant in the room is the obvious fact that analyzing the legal process itself entails a form of participation in its own right. It is this latter, participatory aspect of language in the legal process research that the present collection focuses on. In the articles that follow, researchers working on a variety of legal settings, ranging from small claims courts and criminal adjudication to immigration services and transitional justice institutions, participate in a collective reflection on common issues of positionality, ethics, and engagement that language and law scholars are facing: How do we position ourselves while we do research? How do we relate to the various actors, constituencies, and institutions that we encounter in the process? In short, how do we engage with the field that we study?

Forensic linguists working as experts have generally been eager to discuss the ethical implications of their involvement in legal proceedings (including how it should be reconciled with the good practices and commitments expected by the scholarly community), evidenced, for example, by a special issue of the *International journal of speech, language and the law* (Shuy, 2009) and culminating in the release of a code of practice by the International Association of Forensic and Legal Linguistics (IAFLL, n.d.; see also Butters, 2012; Stygall, 2009). In this way, forensic linguists have been precursors to a more general concern with research ethics that has recently arisen in fields such as pragmatics and applied linguistics (Sterling and De Costa, 2018; CohenMiller and Boivin, 2021). The present collection extends this concern to critical investigations of language in the legal process. However, unlike a code of practice, the self-reflective explorations presented here deliberately eschew overt normative pretensions. Instead, they should be understood as ethnographic vignettes illustrating what it means, in practical-ethical terms, to critically investigate the role of language and communication in an institutional environment where "advocacy for one side or the other dominates the scene" (Shuy, 2011: 99).

Taken together, these vignettes illustrate context-specific opportunities for, and context-specific modalities of, critical scholarly engagement with language in the legal process, including the various dynamics and tensions to which it is subject. In a way, it is attractive to think of these opportunities and modalities as 'spaces' that open up and/or close in the course of one's research, from the moment one enters the field and is forced to interact with judicial actors/institutions (and negotiate the wider societal arrangements in which they operate). Two kinds of space come to mind here. The first revolves around the necessary 'maneuvering space' required for such research. The papers collected here illustrate that research opportunities critically depend on access granted by host institutions, judicial bodies and government agencies. Moreover, such access fluctuates, shaped as it is by the (perceived) interests of such institutions and by the external conditions under which they function. Researchers are thus navigating a volatile, continually changing landscape, where new windows for doing research open up as others close. The second form of spatiality relates to the critical character of our scholarly efforts and the normative frameworks ('normative spaces') in which critical interventions are anchored–the spatial metaphor is implicit in the notion of anchoring, which in turn evokes the concept of indexicality and the notions of figure and ground (Goodwin and Duranti, 1992). The remainder of this introductory essay reviews how these two notions of spatiality, referred to as 'windows of engagement' and 'normative moorings,' can be tracked in the various contributions to this collection.

2. Windows of engagement

At a fundamental level, structural rather than conjunctural, research windows are shaped by the specifics of the legal system and how these predispose magistrates and other gatekeepers

towards opening up courtrooms. In his contribution on French video-mediated hearings, Licoppe (2021) remarks that the analysis of courtroom talk fared particularly well in Anglo-Saxon contexts, where issues concerning what is permissible in (cross)examination and appropriate questioning formats represent an endogenous concern for trial actors. In the French inquisitorial system, in contrast, judges exercise unchallenged discretionary power in truth-finding; hence, they have been much less attentive to the quality of interaction and much less prone to authorize the recording of trial hearings (2021:363/4). This changed, however, when the justice ministry introduced video technology for remotely examining not physically co-present witnesses and defendants (in criminal courts around 2007-8), a destabilizing factor that forced judges to reconsider their position. Courtroom ecologies were drastically transformed by the affordances of this new technology, and in the absence of official guidelines they turned to interaction scholars for advice on implementation: "this historical event literally opened up the field for interaction-based research in French courtrooms" (2021:364). The magistrates who ordered the research eventually also appropriated its findings as a 'political' resource, both in their negotiations with the ministry and with NGOs and advocacy groups defending the legal interests of asylum seekers (ibid.).

Maryns' and Jacobs' (2021) research on the Belgium asylum procedure illustrates how windows may open and close as legal institutions react to broader societal evolutions. Shortly after the turn of the millennium, it was possible to start a "successful collaboration with the Belgian asylum agencies […] grounded in a congruous research loop: the asylum agencies showed interest in research on the role of language in their everyday practice, which in turn facilitated access to interactional and textual data" (2021:151). Hence, they were able to overcome the intrinsic tension between, on the one hand, the agency's managerial focus on efficiency and uniformity, and on the other, the ethnographer's concern with the local realities that shape bureaucratic paperwork and the discursive conditions under which asylum seekers recount their stories. All this changed, however, around 2015, when rising refugee numbers exposed the agency and its staff to public scrutiny. As a result, the agency's position shifted from relative openness to strict gatekeeping. In response to this new development, the authors embarked on a bottom-up collaboration with an NGO providing legal support in asylum cases, which eventually also forced them to reconsider their own positionality (cf. infra).

There also exist jurisdictions where the windows seem to be open almost permanently. This is the case for those legal institutions that livestream hearings and/or that make footage and records of legal proceedings available in publicly accessible online repositories. Here as well, however, scholars operate within a margin controlled by the host institution, as D'hondt's (2021) contribution on the International Criminal Court (ICC) in The Hague illustrates. First, based on an analysis of the material organization of the ICC court landscape and an (auto)ethnographic account of how the path to the public gallery transforms visitors into 'validating spectators', the paper argues that the ICC's carefully cultivated image of transparency is a staged phenomenon. Second, this staging of transparency extends to the virtual realm, and also applies to the ICC website including the footage, transcripts, and other documents retrievable there. Trial transcripts, it is argued, intricately form part of the ICC's 'transparent' self-staging: they not only render invisible the practical activity involved in their production and the power differential at play (on the latter, see Park and Bucholtz 2009), they also obfuscate the very fact that hearings recruit audiences and, mutatis mutandis, that hearing transcripts position their readers.

3. Normative moorings

Over the last two decades, positionality has become an explicit concern for scholars in applied linguistics (Phipps, 2019), critical sociolinguistics (Heller et al., 2016), and pragmatics more broadly (see, for example, the various calls for a 'postcolonial turn:' Anchimbe, 2018; Ameka and Terkourafi, 2019). For forensic linguists taking up expert duties, reflexive awareness of the modalities of one's courtroom engagements has of course long since formed part of their professional habitus. At one level, this reflects the fact that judicial truth-finding and linguistic analysis evoke conflicting epistemologies and involve different degrees of certainty (Shuy, 2009; see Good, 2007 for a similar argument concerning anthropological expertise). It also relates to the experience–documented by Finegan (2009) and Ainsworth (2009) for common law jurisdictions, but probably also holding for inquisitorial civil law settings–of the expert having to navigate an arena where different parties hold radically opposing stakes in the outcome of the procedure, and by extension, in what the expert is presenting to the court.

The present collection illustrates that linguists who analyze courtroom discourse rather than directly participating in it, do not escape the positionality question either. Opening the black box of the discursive-embodied practices that make the law come alive is often informed, either implicitly or explicitly, by a social justice agenda aimed at destabilizing the justice system's tacit anchoring in hegemonic masculinity (Matoesian, 2001; Ehrlich, 2012) and colonial hierarchy (Eades, 2008). The quest for positionality, it follows, almost automatically translates into a search for normative grounding. "The use of language analysis in improving the delivery of justice" (Grant and MacLeod, 2020:166) requires a benchmark for assessing the potential contribution that linguists can make. As the judicial field is intersected with conflicting interests, it is only natural to ask the question 'improvement for whom' and 'from which perspective?' To put it bluntly, who reaps the benefits of, for example, our inquiries into police interviews? Do we assume the perspective of police officers seeking to hone their interviewing skills, or do we share our findings with lawyers assisting criminal defendants? Do we also consider providing training to climate activists or trade unionists on how to respond to an arrest? In this sense too, there is obviously more than one way to 'engage with the field.'

Issues concerning normative grounding are a recurrent theme throughout the various papers, but the responses to this quest for normativity are far from unequivocal. Pietikäinen's (2016) distinction between emancipatory and ethnographic critique can help to clarify the nuances encountered here. Emancipatory critique is grounded in an enlightenment narrative of progress; applied to language and law research, it typically takes the form of critical inquiries into whether the justice system lives up to its promise of equality before the law. Ethnographic critique, in contrast, tackles "social issues and power relations as they emerge in local or individual practices and experiences, as part of wider patterning of social organization" (Pietikäinen, 2016:270). Informed by a post-structuralist understanding of power as capillary (Newman, 2004) and a practice-centered perspective on social life (Rampton, 2010), it formulates its critique 'from within' the local circumstance as they are 'lived' by the actors involved. As such, ethnographic critique is uniquely placed to "[shed] light on various particular debates about boundaries, the consequences of particular categories, and the ways in which people cope and strategize with them" (Pietikäinen, 2016:272). At the workshop that preceded this special issue, legal anthropologist Miia Halme-Tuomisaari formulated a similar tension between divergent viewpoints on criticality: do we confront the justice system heads-on, in a sweeping gesture aimed at debunking the foundational myths behind the justice system, or do we try to identify potential allies inside the organizations that we study, seizing onto already existing frustrations as a stepstone for

reform? The image that comes to mind is that of two distinct 'normative spaces' in which critical interventions are indexically anchored: one opened up by grand narratives of progress, and a more transient one that is locally negotiated in our interactions with those we encounter in the field.

For sure, many contributions resist unequivocal characterization based on clear-cut distinctions, which suggests that the two modes of critique work in tandem and mutually reinforce one another. Perhaps Angermeyer's paper (2021) comes closest to classic emancipatory critique. Guaranteeing equal access to the law in a context of linguistic and cultural diversity, he argues, does not end with ensuring the intelligibility of propositional content (i.e., providing interpretation). It requires abandoning the ideology of referential transparency (Haviland, 1993; see also Mertz, 2007) and coming to terms with the pragmatic consequences of accommodating difference. Consecutive interpretation, for example, has a chunking effect that undercuts the narrative integrity and coherence of non-English speakers' testimony and makes it vulnerable to interruption, which damages their perceived credibility. Producing a compelling unfragmented narrative can be equally challenging, however, for speakers of non-standard English, even if their speech is deemed not to require interpretation. The direct examination of Rachel Jeantel, a key prosecution witnesses in the 2013 George Zimmermann trial, shows that the credibility of her testimony was not only undermined by the audience's negative bias towards AAVE, but also by "how her speaking rights [were] constrained, how her narration [was] interrupted and sabotaged, and how her credibility [was] implicitly questioned, even by the prosecutor, who [did] not let her speak for herself in her own voice" (Angermeyer, 2021:164).

Angermeyer's analysis in turn raises the question of whether the linguist's task ends with establishing the existence of narrative inequality, or whether we should actively try to rectify it. Two options are available at this point. One is to "formulate principled goals that are not readily achievable without systemic changes" (2021:165). The other is to make recommendations for improving existing practices, but this comes at the cost of "settling for a 'lesser evil' option that stays within the ideological and material constraints of the existing system" (ibid.).

Moorings and positionalities fluctuate in unpredictable ways, exhibiting elements of both stability and change as they are rearticulated by researchers negotiating external contingencies. Earlier we saw how the changing socio-political landscape and the Belgian asylum agency's refusal to enter into new collaborations forced Maryns and Jacobs (2021) to start a bottom-up researcher-practitioner partnership with an NGO providing legal support to asylum seekers. The collaboration with the agency and with the NGO each involved a 'dual mandate' on the researchers' part, i.e., a joint commitment to (a) ethnographic understanding and (b) a social justice agenda aimed at maximizing procedural guarantees for vulnerable refugees. That this double mandate would give rise to tensions with agency's management-focus was to be expected (although eventually these were alleviated through careful negotiation and transparency). But neither did such tensions entirely disappear in their bottom-up collaboration with the NGO, despite them sharing a social justice agenda.

The paper seemingly aligning most closely with Pietikäinen's ethnographic critique is Licoppe's already mentioned contribution on video-mediated courtroom hearings, which draws strongly on Ethnomethodology/Conversation Analysis (EMCA) and Goffman's explorations of the interaction order. It presents an empirical snapshot of the 'audio-visual interaction order' that supports video-mediated courtroom talk, explicating the practical reasoning behind the camera operator's management of on-screen visibility and demonstrating how trial actors orient to this order for calculating how such visibility affects their participation status. Confronting magistrates with these findings, it is argued, may raise awareness of the moral implications of camera decisions and assist judicial bodies in the

development of policy guidelines sensitive to the interactional consequences of camera work and the impact it may have on legal outcomes. For Licoppe, however, the story does not end here. Because this type of analysis is essentially comparative, with mundane conversation as a benchmark (Drew and Heritage, 1992), it accentuates the fact that in judicial settings, unlike in ordinary conversation, the rights to initiate courses of action (or take issue with them) are unevenly distributed among the participants. EMCA can thus also support an explicitly political critique that aligns with an emancipatory narrative, as it "provides […] resources to take a distinctive egalitarian political stance, in which [researchers] push for the renegotiation of interactional resources in order to level the interactional field" (Licoppe, 2021:364)–an unexpected move in view of EMCA's established policy of 'ethnomethodological indifference' (Garfinkel and Sacks, 1970).

The collection concludes with a cogent alternative to the spatial anchoring-metaphor implicit in the foregoing discussion and to the entrenched view of criticality as 'residing in' a text. In a series of ethnographic vignettes, Bens (2021) documents how a blog post with an on-the-fly commentary on the ICC's outreach activities in Northern Uganda started living a life of its own as it was subjected to successive recontextualizations-in-performance involving both fellow academics and institutional actors. Combining the linguistic-anthropological notion of text trajectory with a perspective on affect borrowed from cultural anthropology, as a relational arrangement involving both animate and inanimate bodies, he reconceptualizes critique as part of the 'social life' of a text. Criticality, in this view, does not so much derive from the normative space in which the text is anchored, but is an emergent feature of its embedding (or subsequent recontextualizations) in the affective dynamics of a particular interactional performance. Critique is therefore best approached ethnographically: "Who is touched, moved and affected by what texts in what way, and what are the social and cultural conditions for such affects?" (Bens, 2021: 144). This also extends to the texts produced by academics, forcing us to engage more profoundly with the real-life impact and consequences of the 'critical' interventions we hold so dearly.

4. Where do we go from here?

As ethnographic vignettes documenting how language and law researchers go about when engaging with the field, the papers collected here are much richer than this brief overview of recurrent concerns suggests. Much more is going on than negotiating access and normatively positioning one's interventions. Also, the collection has no ambition whatsoever to be exhaustive. Still, the contributions give a valuable impression of the tensions, dilemmas, and at times contradictory commitments that language and law researchers tend to encounter when engaging with the field. As such, one can only hope it will encourage other scholars to embark on a similar exercise.

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