

*Discursive Constructions of Consent in the Legal
Process*

Susan Ehrlich, Diana Eades and Janet Ainsworth (eds) (2016)

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Reviewed by Georgina Heydon

Introduction

As secretary of the International Association of Forensic Linguists from 2011 to 2015, I would receive, about once a week, an email that went something like this: ‘Hello! I am studying English literature and I really enjoy seeing how language is used by people. I am also very interested in crime investigations, like in CSI. Please can you tell me how to become a forensic linguist?’

Cursing that I still hadn’t got around to writing a form letter to send back on such occasions, I would set about trying to answer the question and offer some guidance to the student. But almost immediately I would find myself in a quagmire of vague definitions and overlapping categories of linguistics, legal applications of language analysis and the qualifications required to work in the field. I began to suspect that a clear description of forensic linguistics (FL) was impossible, and even the commonly understood dichotomy between FL as expert testimony and FL as research into language and the law seemed misleading. So when I read the latest contribution to our field, *Discursive Constructions of Consent*

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in the *Legal Process* edited by Susan Ehrlich, Diana Eades and Janet Ainsworth, I felt a certain satisfaction that the diverse approaches to FL and the complex relationships between various disciplines that contribute to the study of language in a legal context were just as well represented here as in my rambling responses to hapless students, who had no doubt expected no more than a link to a three-week MOOC.

Summary of argument

The legal framing and enactment of consent is a central feature of justice systems around the world. Like many other legal concepts such as confession, testimony and judgement, consent is realised within the justice system as communicative event. Consent is requested using language, and it is provided, negotiated or withheld using language. This interaction can be verbal, as in police cautions (Ainsworth, Chapter 2, and Rock, Chapter 5), or written, as in contracts (Solan, Chapter 6, and Conley, Cadigan and Davis, Chapter 7). Alternatively, consent can be implicitly required, as in youth justice conferences (Zappavigna, Dwyer and Martin, Chapter 9), negotiated, as in a sting operation (Gaines, Chapter 10), or coerced, also as in police interactions (Eades, Chapter 4, Berk-Seligson, Chapter 11, Van Der Houwen and Jol, Chapter 12, and Stokoe, Edwards and Edwards, Chapter 13), but all of these instances of consent practices are realised through language. It seems entirely appropriate therefore that the phenomenon of consent in legal contexts is addressed through the application of *linguistic* analysis. The present volume makes a very strong argument for systematic analysis of the language of consent. The chapters present clear findings that challenge or extend the theoretical and conceptual assumptions about consent practices in existing justice and legal disciplines, such as law, criminology and forensic psychology. As a set of studies in applied (socio-)linguistics, this book is equally valuable. Each chapter invites the reader to dive into the rich linguistic data generated through the enactment or negotiation of consent in a variety of interactional settings. To any scholar interested in language practices in the law, or language as a social practice more broadly, this book will have great appeal and genuine practical application.

About the authors

Presenting a diverse range of approaches to a problem is always a great strength of an edited collection and, as implied above, this book is no exception. The authors of the 13 chapters bring a wealth of experience from a variety of disciplinary backgrounds, which is primarily reflected in their various conceptualisations of the problem of consent. For those with a broadly sociolinguistic or discourse

analysis background, such as Eades, Derek Edwards, Ehrlich, Gaines, van der Houwen, Martin, Rock, Stokoe and Zappavigna, the problematic nature of consent is situated in its linguistic realisation, and their analyses attempt to shed light on the relationship between these micro-level linguistic negotiations and the social practices or assumptions of the legal context in which they are situated. For the two authors who bring expertise in multilingualism and interpreting, Angermeyer and Berk-Seligson, a major concern is the degradation of justice in legal contexts when consent is negotiated across languages in the absence of professional interpreter services. For those authors with a background in legal practice, such as Ainsworth, Conley, Helen Edwards and Solan, their linguistic analysis of consent tends to target a deeper understanding of the application of the relevant law to judicial or other decision-making. And finally, there are approaches to the linguistic analysis of consent that are perhaps new for FL: social medicine and medical research ethics, represented by authors Cadigan and Davis, and performance studies, represented by Dwyer. These authors work in tandem with their respective linguist co-authors to produce new insights into the legal implications of medical research consent interactions, and the performance of consenting behaviours in youth justice conferencing respectively.

Summary of contents

Chapter 1 by Ehrlich and Eades provides a thoughtful comparative review of each of the chapters, as well as a useful discussion of the broader context of the book's intention. Section 1 is concerned with 'Free and Voluntary Consent', and its three chapters each present case studies in consent as it is construed directly, but also how it is implied or enacted at the institutional level. These chapters make a powerful argument for the systematic treatment of sociolinguistic *context* by legal decision makers. The contexts discussed include the use of swearing by police towards suspects who are subsequently deemed to have consented to an interview (Ainsworth), the power imbalance between police and Aboriginal children later deemed to have consented to accompanying the police to a remote location (Eades), and repeated sexual assault on a victim later deemed to have consented to subsequent sexual acts (Ehrlich). In each case, the legal interpretation of consent seems almost wilfully to ignore the context in which the consent was deemed to have been obtained from a person, and the injustice that proceeds from such a failure of understanding is disquieting. The value of a linguistic analysis that can preserve the context of the language used in legal cases is very well represented in this – and further – chapters.

Section 2 'Informed Consent or Ritualized Consent?' deals with a phenomenon that is likely to be familiar to any of us who have blithely ticked 'agree' to a vast number of unread terms and conditions on a website. Indeed, this is the spe-

cific type of consent that is discussed by Solan in his exploration of transparent and opaque consent in contracts. Rock's preceding chapter on tick-box consent in police interviewing provides a useful explanation of the role of such ritualised consent-giving in closing down the information exchange that would be required for the consent to be 'informed' and therefore voluntary. She finds that an increasing ethical awareness in professional practices has led to greater prevalence of such routinised consent processes but warns that 'ethicization does not guarantee morality' (p. 113). While Rock applies a critical analysis of institutional discourse to the problem, Solan's chapter provides a more technical, legal explanation of a parallel phenomenon in contract law. The third chapter in Section 2 examines the consent process undertaken between medical researchers gathering DNA (blood) samples, and the participants providing the samples. Conley, Cadigan and Davis introduce a useful analysis of the potential for separating 'informed' from 'consent' and present a discursive model of consent that unfolds over time. Importantly, they note that the medical research participants and non-participants (those who declined to give a sample) interviewed by the authors had difficulty engaging with the consent process such that they were informed, because it was not possible to know what would happen to their sample or to them as a result of participating. The authors proposed instead a model of consent request that asks the participants to respond to specific questions about the use of their sample and encourages active engagement as the participants considered their options one by one. Together, these three chapters offer complementary perspectives on ritualised consent, especially useful in light of Rock's observation that our acceptance of such routinised consent has been facilitated by the exponential growth in tick-box consent requests by online service providers. In other words, a person's response to an individual request is influenced by the myriad other requests s/he has responded to on a day-to-day basis.

Section 3 'The Influence of Discursive Practice' presents instances of consent seeking that are embedded in discourse, as the title suggests. Angermeyer, in examining the requests made in a small claims court in New York City, notes the ways in which institutional discursive practices attempt to influence the consent-giving process by strongly encouraging applicants to consent to having their case heard by an arbitrator rather than in a more time-consuming (but potentially fairer) hearing before a judge. He finds that, for non-English speakers, this process is expedited by the lack of translated materials and the discourse practices of court interpreters. The value of linguistic analysis here is twofold: firstly, the consent interaction is unpacked as an interactional event, and secondly, the role of the interpreter is properly explored. A similar argument can be made in the following chapter in which Zappavigna et al. provide a close examination of the interactions in youth justice conferences in New South Wales, Australia, and find

that the young person's legally requested *consent* to the conferencing process can be differentiated from his or her implied *compliance* with the role assigned to him or her. Gaines, in the third and final chapter of Section 3, uses a close analysis of narrative construction in a post-sting police interview to demonstrate that consent (or compliance) can be conceptualised as a dialogic event that is negotiated between the participants using contrasting interpretations or versions of events.

Section 4 of this book brings together three chapters that address a central consideration in the legal understanding of consent: coercion. More specifically, this section addresses the way in which the police caution can become an instrument of coercion under certain circumstances. Berk-Seligson's analysis of the translation of the Miranda warning into Spanish demonstrates the potential for injustice when rights are inadequately communicated across languages. In a context that will be less familiar to most readers, van der Houwen and Jol's discussion of the use of a caution text in Dutch inquisitorial court hearings demonstrates a similar phenomenon at work to that explored by Zappavigna et al. in the Youth Justice Conferences. This is the discursive construction of the suspect's compliant attitude as relevant to their case. In other words, the conflict between maintaining a compliant attitude and upholding one's right to silence undermines the extent to which a suspect can freely be said to consent to the examination in the Dutch examples. A very similar conflict exists in relation to the UK police caution, which is covered here in Stokoe et al.'s chapter on 'no comment' responses. Because the decision not to respond to questions can be held against a defendant later in court, there is a clear element of coercion tied to a suspect's capacity to access their right to silence in police interviews in England and Wales.

Discussion

One of the most important contributions made by this collection is the clear demonstration of the importance of *context* to any understanding of consent as a legal process. More specifically, this book emphasises the power of linguistic context to influence the way in which we interpret the world around us. Furthermore, these studies serve to illustrate the value of linguistic analysis in highlighting and problematising aspects of a legal process that would otherwise remain unrecognised. It is hard to see how else one could identify the institutional, historical, cultural or social pressures at work that, through their discursive powers of influence, can regulate, prompt or downright coerce people to consent.

A second strength of this collection is the explication of consent as a process that unfolds, dialogically, over time. Consent is generally construed by legal texts as an instance, a moment in time, represented by a single word (yes or no) or a signature on a page. These studies demonstrate that consent can only be properly understood as a negotiated, dialogic event that can be influenced and can

change in its nature. This is not only important to legal interpretations of consent, but also to criminological work that examines, for example, victimisation or the engagement of individuals with the legal system.

This last point, however, brings me to a key challenge in this book that was not always adequately addressed. While the diversity of disciplinary traditions across the chapters is welcome, and necessary, it does create some problems of consistency. This is noticeable mainly in the extent to which some chapters engage with other disciplines and draw on other established fields of research and scholarship. While it is clear that individual chapters were well informed by the theoretical frameworks relevant to their analysis, over all, it is not well articulated how forensic linguistic studies, such as these, might engage more directly with existing scholarship in the relevant fields. For example, Zappavigna et al.'s chapter on Youth Justice Conferences (YJCs) demonstrates how existing criminological theories concerning diversionary measures, restorative justice and reintegrative shaming can be drawn on very effectively to provide a theoretical context for the discursive analysis of YJC interactions. The authors' findings will be of considerable relevance to criminologists working in this field, precisely because they will be able to connect the findings to their existing epistemologies. However, many chapters were not aiming to make such cross-disciplinary connections, and it might be difficult for researchers in parallel fields (e.g., forensic psychology, law, criminology, criminal justice administration and interpreting and translating) to locate the analyses in relation to their own disciplines, despite having a common focus on legal processes and, I would go so far as to suggest, a common ideological goal of pursuing equal and fair access to justice. Nonetheless, such cross-disciplinarity is not always achievable given the range of issues and perspectives already being addressed in this volume. Indeed, the current volume might inspire a series of books, each addressing the discursive constructions of consent, or other legal processes, in relation to a specific cognate discipline.

In closing, I will actually turn this contention on its head, because the overwhelming conclusion I draw from this worthy contribution from Ehrlich et al. is not so much that the broader field of law and justice scholarship might enrich our research, but rather that linguistic analysis is demonstrably a critical component currently absent from those cognate fields. As has been the case in relation to a number of other linguistic contributions to legal problems, the main question we might ask ourselves is: Why is it taking so long for linguists to be recognised as best placed to respond to what is so clearly a language issue?