OXFORD SOCIO-LEGAL STUDIES

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Preface

Hearings in courts involve verbal exchanges which in many respects appear to be organised differently from talk in conversation. The distinctive character of talk in judicial settings is a recurrent theme in studies and discussions of court proceedings by sociologists, lawyers and others. It is frequently treated on the one hand as the source of the 'oppressive' nature of court-room interaction, and on the other as a means of ensuring the efficient and proper conduct of cases. In this book, we are also concerned with the organisation of talk in courts, and with how participants manage the business of courts within the constraints imposed by that organisation. We do not, however, propose to take sides in any debate between the critics and supporters of our legal system. Instead we attempt to describe formal, structural or sequential properties of aspects of the organisation of verbal interaction in courts, and to identify some systematic features of certain sequences, such as those involving blame allocation during the cross-examination of witnesses.

The detailed analyses of empirical materials presented in the middle parts of the book (Chapters 3–5) derive very much from recent work in ethnomethodology and conversational analysis. Chapter 1 is therefore designed not only to show the relationship between our analytic approach and those adopted in other research into court-room interaction, but also to outline the development of ethnomethodology's programmatic concerns and the general aims of conversational analysis. And in Chapter 2 we introduce the model of the organisation of turn-taking for conversation which has been elaborated by conversational analysts, with a view to specifying formal constraints that may operate in examination. The focus then shifts to analyses of the opening sequences in a Coroner's Court hearing (Chapter 3), and blame allocation sequences in a Tribunal of Inquiry (Chapters 4 and 5). In Chapter 6 some issues associated with the analysis of different types of data are considered, with particular reference to the expanded scope for further research that is provided by the availability of tape-recorded trials. A final postscript consists of a number of highly tentative speculations about possible
implications that work of this sort may have for practical debates concerning the design and reform of court procedures (Chapter 7).

While we have co-operated closely in the preparation of this book, the chapters were written separately. Chapters 1, 3, 6 and 7 (by J.M.A.) result from work done as part of a more broadly conceived programme of multi-disciplinary research into the social organisation of judicial procedures, which is one of the projects currently being conducted at the SSRC Centre for Socio-Legal Studies. In developing the studies reported in these chapters, the encouragement and support of colleagues at the Centre have been greatly appreciated, and particular thanks are due to Donald Harris, Keith Hawkins, Doreen McBarnet and Christopher Whelan.

Chapters 2, 4 and 5 (by P.D.) have been very much revised from material originally written up as a Ph.D. thesis in sociology at the University of Lancaster.

We are grateful to Judy Davidson, Robert Dunstan, John Heritage, Anita Pomerantz, Rod Watson, Jeremy White and Tony Wootton for their detailed and helpful comments on earlier drafts of various chapters. While the final versions have benefited from their remarks, it should be emphasised that these colleagues may not agree with all that appears here, and we alone are responsible for what remains.

Transcripts of tape-recorded extracts from criminal trials in Massachusetts derive from a much larger corpus of such data collected under the auspices of a U.S. National Science Foundation Programme in Law and Language at Boston University, and we are indebted to Brenda Danet and Bruce Fraser for making copies of the tapes available to us. We are also grateful to Anita Pomerantz, Barbara Rawlings and Tony Wootton for many of the conversational extracts used in Chapter 2.

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Paul Drew
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I Analysing Court Proceedings: Sociological and Ethnomethodological Approaches

I A NEGLECTED AREA IN SOCIO-LEGAL STUDIES

In a recent sociological study of pre-trial procedures, it was noted that 'in the revised sociology of law the procedures of the legal structure have been curiously ignored' (McBarnet, 1976, p. 172). This remark would appear to be particularly apt in relation to court procedures which, with a few notable exceptions (e.g. Garfinkel, 1956; Linton, 1965; Emerson, 1969; Carlen, 1974, 1975, 1976a, 1976b), have received relatively little detailed attention from social scientists. To an extent this can be seen to be perfectly consistent with the fact that, in purely quantitative terms (amount of time involved, manpower, etc.), court proceedings comprise a very small and diminishing proportion of the total volume of legal activity that takes place in advanced industrial societies. And it is also consistent with the way in which sociology's traditional concern with the problem of social order at the societal or macro-level of analysis implies a view of what goes on in courts as no more than one tiny element of the legal system, which in turn is only a part of the social structure as a whole.

But, while the comparative neglect of court procedures by sociologists in the past may be easy enough to understand, it might reasonably have been expected that more interest in them would have been generated as part of the revival of sociological research into legal issues referred to above. For this has been greatly influenced by other theoretical and methodological developments in sociology which have advocated or displayed a marked shift in focus away from apparently given social facts and structures towards more detailed empirical analyses of the social
processes and interactions which constitute them. Such trends have been manifested in a range of widely acclaimed studies of the 'law in action', although it is noticeable that most of the best known of these (e.g. Sudnow, 1965; Skolnick, 1966; Cicourel, 1968; Ross, 1970) have concentrated primarily on social processes which take place at varying distances away from the courts themselves. Indeed, even in those studies which have been explicitly concerned with what goes on in court-rooms, analyses of actual hearings have tended to feature as only a part or phase of some more general process that is the main topic being investigated. Emerson (1969), and Carlen (1976a), for example, were both primarily concerned with the processes of justice administration in and around the particular courts they studied (American Juvenile and English Magistrates’ Courts respectively), and both arguably relied at least as heavily on data gathered outside the actual court-rooms from officials and others as they did on data derived from the hearings themselves.

That sociologists of law have tended not to attempt detailed empirical analyses of court proceedings, but to regard them merely as part of some more general process, can in one sense be seen as a reflection of the discipline’s long standing assumption that formal appearances or procedures are likely to be essentially misleading to the analyst, and that the ‘reality’ of any situation is available for discovery and documentation by probing ‘behind the appearances’. Indeed, such a view has received specific amplification and support in the theoretical and methodological writings of symbolic interactionism, which have had considerable influence on recent developments in the sociology of law. Thus, from the dramaturgical model associated with the early works of Goffman (e.g. 1959), the lesson can readily be taken that what goes on ‘back stage’ is likely to be more interesting and important than what takes place on it. That studies of the law in action should extend far beyond the courtroom walls is also consistent with some of the central ideas of labelling theory more generally for, while court decisions may be seen as crucially important symbolic points at which labels are formally and officially applied, they can also be viewed as no more than a passing moment in the extended sequences of interaction involved in the labelling process. Similarly, a fundamental idea in the research methodology which has been heralded as providing the key to such areas of social life, namely ethnography or participant observation, is that data should be collected from many different parts of the particular organisation being studied with a view to arriving at some sort of balance between the diverse and often conflicting versions of reality claimed to be oriented to by the subjects involved (e.g. several of the papers in Filstead, 1970).
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Such methodological injunctions not only provide support for a broader research orientation which takes in court-room interaction as one phase among many, but it is probably also the case that the much recommended unstructured techniques of observation are less well suited to the analysis of formal court proceedings than they are to the study of interaction in other settings. Thus, while descriptions of relatively short sequences of interaction or isolated quotations from informants can be fairly easily recorded in the ethnographer's field notes at the end of the day, the data of court hearings are more resistant to such methods of reportage. Sequences of interaction in court are frequently very extended and a single trial may last for days or weeks, and the significance and relevance of some particular utterance, or sequence of utterances, may not become apparent until it is too late for it to be recorded. An obvious solution to this would be to keep a record of the whole proceedings, but social scientists seldom have the technical competence or the stamina to produce a verbatim transcript. The answer may then be to seek access to the official transcripts, or permission to tape-record the proceedings but, while this book argues strongly in favour of such data as an essential requirement for the rigorous empirical analysis of court-room interaction, even these pose very considerable problems for the researcher. The total collection of Scarman Tribunal transcripts on which Chapters 4–5 are based, for example, extends to scores of volumes containing many thousands of words. Similarly, just to listen once to tape recordings of a trial lasting forty hours would take a full working week, which would not, of course, allow time for anything other than the most casual analysis to be done. Nor is it simply a question of time, for there are a range of complex and difficult issues concerning what to listen for, which extracts to select for analytic attention, the grounds on which such selections are made, and how conclusions made about them are to be warranted. These are problems to which the approach adopted in this book has fairly clearly specifiable solutions, which will be dealt with in more detail in later sections. But other sociological approaches remain remarkably vague about how researchers might come to terms with such issues when confronted with the volume and type of data that is generated by court hearings.

In the absence of much in the way of precise guidance as to what to do in the face of such problems, one reaction is to shy away from a detailed examination of the data and to focus analyses on more general issues which can be illustrated or allegedly tested out with reference to selected examples. Clues as to what might be worth selecting are, of course, to be found in various sociological traditions, but symbolic interactionism
and, more recently, Marxism have probably been the major influences to date, so that main emphasis of court-room studies has tended to be on what courts are claimed to do to defendants (e.g. intimidate, bewilder, oppress, alienate, label, stigmatise, etc.) rather than on the details of how they work. Indeed, the fact that courts work at all, and apparently do so rather smoothly, appears to have been regarded as a passing and essentially uninteresting matter of fact. Yet some model of social order and social interaction will inevitably be used by researchers in constructing descriptions and explanations of how court proceedings are experienced in different ways by the participants involved. In other words, existing theories of social order and action have to be invoked and applied as a resource in developing characterisations of court-room interaction and in making them intelligible for others. On the face of it, this may seem perfectly reasonable and unproblematic, but it does raise an important issue about the use of social scientific theories and methods for the study of some substantive area such as court proceedings, namely that the impression can all too readily be given that the knowledge so employed is firmly established, uncontested, definite and valid. It is, in other words, very easy to obscure the fact that there is still profound disagreement within the social sciences in general, and sociology in particular, about fundamental theoretical and methodological problems concerning the nature of social order, and how it is to be studied, described and explained.

One implication of this is that attempts to apply such ‘scientific’ knowledge to the study of some particular area of social life will be as sound (or otherwise) as the knowledge so employed, even though readers of research reports are not always alerted to the shakiness of the foundation on which a study may have been based. Frequently the preliminary or tentative character of a project is concealed by confident sounding conclusions about the ‘real nature’ or the ‘essence’ of some problem in the social world. And, in so far as the decision to embark on one type of research will of necessity have ruled out others, all studies will be more or less polemical about the merits and defects of alternative methodologies. Thus, in its attempts to adapt recent developments in the analysis of naturally occurring talk to the study of court proceedings, this book is clearly not written from a neutral standpoint. But the approach in question and the tradition from which it emerged have given rise to so much controversy within sociology that there is arguably a special need to preface even the preliminary studies which follow with an extended introduction to the logic and character of such work (Chapters 1 and 2).

Before proceeding to this more general discussion, however, one
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feature of the orientation we adopt is worth noting in relation to the past neglect of court proceedings as a topic for sociological analysis. For while it may seem obvious enough that a systematic approach to the study of natural language use is a sensible and even essential starting point for the analysis of data consisting largely of extended verbal exchanges, it is perhaps less widely appreciated that, even in social science disciplines other than sociology, empirical research into language use is still a relatively recent development. The influence of ordinary language philosophy, however, coupled with technological innovations in audio-and video-recording, have stimulated an increasing interest in such research. Psychology has seen the growth of psycho-linguistics as an expanding field, in linguistics there has been some movement away from the traditionally predominant concern with grammar and syntax towards pragmatics and speech act theory, while in anthropology there has been the emergence of the ethnography of communication and componential analysis. Viewed in these terms, then, the development of ethnomethodology and conversational analysis by sociologists can be seen as a trend which is consistent with similar changes in emphasis taking place elsewhere. And, in so far as this multi-disciplinary convergence is a recent phenomenon the products of which are only just becoming available, it is hardly surprising that the organisation of verbal exchanges in courts has yet to be subjected to much in the way of detailed scrutiny.  

Finally, it may be noted that law, or at least jurisprudence, has not remained isolated from this growing interest in language use, the major contribution of H. L. A. Hart (especially 1961) having been to update jurisprudence by locating it within the tradition of ordinary language philosophy. But law and philosophy are disciplines without a tradition of empirical research and, even though these recent developments can be read as proposing the study of speech practices as one way forward (particularly now that technology has rendered the invention of examples for analytic attention a largely obsole and redundant methodological practice), jurisprudence appears to have responded in more predictable ways to the insights of Hart, preferring to remain faithful to its traditional abstract interest in the nature of rules, rights, obligations, etc. (e.g. Twining and Miers, 1977; Hacker and Raz, 1977). Moreover, what empirical reaction has emerged from jurisprudence has tended to argue on behalf of an enthusiastically anticipated emergent sociology of law (e.g. Campbell, 1974) in which studies of language use appear to be accorded as low a priority as jurisprudence itself. In contrast with such recommendations, the sociological orientation adopted in the present
book may well have more in common with Hart's approach to legal philosophy than with most currently available sociologies of law. With these latter, it shares little more than an interest in empirical investigations of social and (by implication) legal order, but it differs fundamentally on how these might be done and particularly on the emphasis given to an adequate understanding of language use as the *sine qua non* of any such endeavour.

The remainder of this chapter, then, consists of a general introduction both to the logic of taking this position in relation to the analysis of court proceedings and to some of the connections between mainstream sociology, ethnomethodology and conversational analysis. A more technical introduction to the turn-taking system for conversation follows in Chapter 2, which focuses also on the relationship between the organisation of conversation and cross-examination.

### II LANGUAGE USE AS TOPIC AND RESOURCE IN UNDERSTANDING COURT PROCEEDINGS

Whatever else may be said about court proceedings, the fact that talk is an all pervasive and highly significant feature can hardly be seriously doubted. As is noted in one of the leading treatises on the law of evidence, 'Perhaps the most important feature of an English trial, civil or criminal, is its "orality".' (Cross, 1974:202). Yet it would seem strange to any competent speaker of English were one to conclude from this that the term 'trial' can therefore be equated with 'people talking'. For any such person could presumably point out that it is clearly *not* 'ordinary talk' that takes place in courts of law, and that there is a sharp distinction to be drawn between the kinds of talk that characterise court proceedings and those which are to be heard in various other contexts. Another complaint about the conclusion which might be raised involves noting that the word 'trial' can be used to refer to contexts where talk does not take place, or at least is not a necessary feature of the setting (e.g. sporting trials, trial examinations, etc.). And an objection available to anyone familiar with the book from which the above quotation was taken would be that such a conclusion is misleading or invalid because the statement from which it was derived was quoted out of context.

It is not intended here to expand on this list of charges, nor to plead innocent to them or otherwise try to refute them. Rather they have been introduced to illustrate two of the themes which are central to the concerns of this book. The first has to do with the ways in which any
speaker of a natural language (i.e. any competent member) can, and continually does, analyse, categorise, evaluate and distinguish between different ways of talking in particular contexts. And this reference to 'context' which, it will have been noted, featured in all three objections listed above, points to the second general theme. For the fact that talk and other social actions are situated in particular contexts has been a perennial problem for all who have ever tried to design some rule or definition for general application, and for those whose task it is to apply them to particular settings. Efforts to resolve such problems, furthermore, are not helped by the ease with which the notion of 'context', or features of specific ones, can be invoked in support of claims that there is something wrong with a rule, or that it does not apply in some particular case. Such issues are, of course, very well known to philosophers, lawyers and social scientists, and no attempt to embark on an exegesis of rival treatments of them is to be started here. Instead of confronting so complex a task, the main point to be considered below is the apparently simple and obvious one that these problems are also well known to other competent members, lay and professional. A neglected and potentially fruitful line of enquiry, therefore, is to examine how such knowledge comprises both the topic and resource in formalising, specifying and analysing court procedures. And central to this is the idea that the professional/expert orientation of lawyers and social scientists to such problems is grounded in their unexplicated everyday abilities to monitor and analyse talk.

This point can be clarified in a preliminary way by considering what is, in comparison with more conventional sociological offerings, a rather less grandiose speculation about the origins of the law (and bureaucratic procedures more generally), namely that the recognition of certain problems associated with more mundane ways of talking may have had much to do with the emergence of law in the first place. In other words, had the workings of more 'ordinary' reasoning procedures (as manifested in, for example, conversational practice) been found to be adequate for settling all manner of disputes, there would presumably have been no call for the design and development of the kinds of special procedures now embodied in the legal systems of different societies. But the open textured character of language (for a recent useful discussion of which, see Heritage, 1978) is such that the more familiar ways in which 'conversational' discourse is organised have proved themselves to be rather inadequate for the practical purposes of, among other things, resolving important disputes, settling matters of fact, allocating blame and responsibility, etc., and for deciding such matters with recognisable
‘definiteness’ and ‘finality’. Yet even when steps are taken to remedy the situation by attempting to specify laws and procedures of implementation, enough of the ‘troublesome’ properties of ordinary talk remain to leave sufficient doubt, ambiguity and scope for competing interpretation to keep a large legal profession in business. That this is so, however, is hardly surprising if it is the case that properties of language use give rise to the problems and topics addressed by the law, cannot be avoided, and are also used either in attempts to remedy them (e.g. by establishing special/legal procedures), or in the process of deciding whether some particular problem or topic falls under the auspices of these special procedures.

Viewed in these terms, then, court procedures can be seen to provide one way of producing decisions which are recognisable to members, for practical purposes, as being more ‘definite’, ‘binding’, and ‘final’ than is often the case with those arrived at in the course of ordinary conversations. The existence of special legal rules of evidence and procedure can thus be regarded as the product of continuing and determined efforts to find principled solutions to identifiable practical problems posed by ordinary discourse. Most rules of evidence are ‘exclusionary’ which means that they seek to prohibit the use in court of various conversational practices which may, in most everyday settings, be perfectly adequate and acceptable methods for discovering and deciding matters of fact, blame, responsibility, and so forth (e.g. statements of opinion, evidence of past conduct, hearsay, etc.). In other words, such rules of evidence can be seen to be oriented to specific features of mundane talk which are perceived as being in some way flawed or inadequate for certain purposes. In so far as they are designed to provide a remedy, or at least improve on these ‘weaknesses’, then, legal rules of procedure can be regarded as the result of a continuing analysis of problems associated with language use in ‘non-legal’ contexts.

Interestingly, however, attempts to specify rules of evidence and procedure, as well as the further ones for putting them into practice or recognising breaches of specific ones, are eventually confounded before arriving at anything like an ultimate solution by the very features of language use (and particularly its open-textured and context-dependent character) which occasioned the design of the rules in the first place. Thus, however thorough legal scholars are in their attempts to spell out the nature and scope of a rule, the demands of accuracy will sooner or later call for some confession such as ‘everything depends on context’, which Cross (1974, p. 200) makes in relation to the problem of how to
recognise a 'leading question'. Similarly, the potential of exhaustive texts as effective aids to understanding legal procedures is sometimes a source of considerable pessimism to lawyers, as is exemplified in the following:

The best way to learn how the courts work is to go and watch them... The rules which govern the process of law enforcement only become comprehensible when they are seen in action: in the abstract, they seem a hopelessly abstruse and confusing muddle.

(Barnard, 1974, p. 1)

And, just as books on legal procedure may in such a way resort to commending the use of ordinary common sense practices (like going to look) as a resource for learning the professional ones, other common sense procedures may even be recommended as good legal practice. Practical manuals on advocacy, for example, may stress special care in how one talks in court and the need for lawyers to speak with clarity, simplicity, succinctness, etc. (e.g. Napley, 1970, p. 57), even though there are no explicit legal rules of procedure designed to achieve such ends.

Although there may in principle be no clear or absolute solution to the problem of how and where a precise line is to be drawn between legal and other styles of talking, there can be little doubt that in practice members are well able to identify and use such a contrast. It is obviously not necessary to be a trained professional lawyer to be able to recognise that there is something distinctive about the kinds of verbal exchanges that take place in courts of law as compared with conversations in more everyday settings, even though it might not be easy to provide an exhaustive specification of the similarities and differences involved. For all practical purposes there is a definite and objective contrast which is plain for all to see, and it is thus not only a fact or topic that is available for inspection, evaluation, preservation or alteration, but it is also a device which can be used as a resource for doing such interpretive work. That contrast can equally well be used to defend or criticise legal procedures. In support of legal procedures, for example, it can be proposed that the existence of such a contrast is a good and necessary thing on the grounds that, were mundane ways of talking left unattended to arrive at decisions on the sorts of matters dealt with by courts, all safeguards against the ad hoc, prejudicial, biased and haphazard resolution of disputes would be lost. In the very ways that they do provide for departures from everyday methods of reasoning, legal procedures are
supposed to overcome, or at least mitigate, problems such as these, which might otherwise arise. With its specialised definitions of everyday conduct (e.g. crimes, torts, contracts, etc.) and of procedures for deciding whether they apply in particular instances, legal language is designed to provide for a higher degree of specificity and standardisation than ordinary discourse.\(^8\) Without a recognition of the contrast between ‘legal’ and ‘ordinary’ procedures, and of the former’s capacity to facilitate some sort of escape from some of the more troublesome features (and possible consequences) of the latter, it would be difficult to make sense both of the meaning of revered legal notions such as ‘due process’, and of the grounds on which their virtues are proclaimed.

The use of a contrast between the organisation of language use in courts and other areas of social life can equally well lead to quite opposite conclusions, which may be highly critical of legal procedures. Sociologists have tended for the most part to take such a line, though the thrust of their critiques differ according to the type of ‘other’ procedures with which the ‘legal’ ones are compared. Compared with those of science, for example, legal procedures can be found to be inferior or out of date:

The legal process of examination, cross-examination and re-examination can hardly be rated highly as an instrument for ascertaining the facts of past history, at least no scientist would expect to extract the truth from opposite distortions . . . No one can fail to be struck by the contrast between the high degree of sophistication attained by forensic science in the detection of crime and the pre-scientific character of the pre-trial process itself.

(Wootton, 1963, pp. 33–4)

This contrast between legal and scientific procedures, which designates the latter as a more recently developed improvement on the former, implies that legal procedures are too like the everyday ones of common sense. It also shares with other pleas for a science of judicial proof a mistaken optimism about the extent to which science can be pressed into the service of deciding moral questions. Certainly science shares with the law a long history of trying to sharpen up and refine its linguistic apparatus. But, whereas the scientist does this in the interests of solving theoretical problems posed by the natural order of things, the lawyer engages in conceptual debate and refinement in order to reach practical solutions to problems of the social and moral order. But, as philosophers, historians and social scientists know only too well, such issues have remained enduringly resistant to ‘scientific’ methods and theoretical
resolving. Indeed, were it the case, as Wootton implies, that a validated set of decontextualised objective and scientific procedures for 'ascertaining the facts of past history' are already available, then the main problems of many disciplines would by now have been solved in a single stroke. Moreover, even to envisage the discovery of such procedures as an attainable possibility involves assuming a social and moral order with little resemblance to the one we know. For the certainty with which such matters could then be resolved would leave little if any scope either for moral and political conflict or for even asking questions like those which have traditionally provided the central focus for philosophy, history, law and the social sciences.

Whereas Wootton and others may have contrasted legal procedures unfavourably with those of science, a more recent tendency has been for sociologists (e.g. Linton, 1965; Emerson, 1969; Carlen, 1974, 1975, 1976a, 1976b) to compare them with common sense everyday procedures, and to exhibit a marked preference for the latter. Such studies have been strongly influenced both by symbolic interactionism in general, and by the dramaturgical perspective of the early Goffman in particular. Accordingly, they involve attempts to see court proceedings 'from the actor's point of view' to locate the 'symbolic meanings' that the 'drama' and its features may have for them and what the consequences and causes of these might be. Generally speaking, defendants are described as being variously baffled, bullied, thwarted, misunderstood, coerced, oppressed, manipulated, etc., all of which can then be readily contrasted adversely with alternative claims about the propriety of legal procedures and the ideals of justice. These unpleasant experiences are depicted as being consequences of the activities and utterances of judicial and court officials and of the way the drama is organised. Such effects are often depicted as being intended by the perpetrators, and the suggestion is sometimes even made that the structure or ceremony itself can actually engage in intended activities:

... the ceremony seeks to impose upon the delinquent the role of wrongdoer and systematically to deny him power or the opportunity to express less than full commitment to this discredited role.

(Emerson, 1969, pp. 172–73)

Given that Emerson has little to say about how such highly critical descriptions are to be empirically warranted, it is perhaps hardly surprising that the ceremonial metaphor gets overworked in this and similar studies.
Compared with Emerson, Carlen's work exhibits a somewhat more sophisticated appreciation of the problems relating to the ties between professional procedures and common sense everyday ones. In one paper, for example, she refers to Emerson's study as one of several 'metaphorical critiques', which have 'all used dramaturgical or game imagery in analysing court room interaction' (Carlen, 1976b, p. 48). But while the critiques in question (which include Garfinkel, 1956; Blumberg, 1967; Emerson, 1969), together with several 'largely reformative' English studies of court practice (which include Hood, 1962; Bottomley, 1970; Dell, 1970; King, 1972) are described as 'immense contributions', a common flaw is attributed to all of them in that:

... (the investigators just listed) have tended to ignore or take for granted other equally consequential dimensions of social control: the coercive structures of dread, awe and uncertainty depicted by Camus and Kafka; the coercive structures of resentment, frustration and absurdity depicted by Lewis Carrol and N. F. Simpson. That the masterly descriptions of a Kafka or a Camus are unlikely to be bettered by sociologists is obvious. The idea, however, that such surrealism and psychic coercion properly belong to the French novel, rather than to the local magistrates' court in the high street is erroneous. In this paper, based on two years' observation of the Metropolitan magistrates' courts, I shall argue that the staging of magistrate's justice in itself infuses the proceedings with a surrealism which atrophies defendants' ability to participate in them.

(Carlen, 1976b, p. 48)

What seems to be implied here is first that sociologists are in the same kind of enterprise as novelists, second that the former are the inferior competitors, and third that such phenomena as 'surrealism' and 'psychic coercion' are nevertheless available for observation and report by sociologists. And, given the second of these points, sociological attempts to explore structures articulated in novels start out with the rather pessimistic prospect of being no better than the original sources. Whether or not such ideas were intended, this passage can be read as an unusually precise and honest statement about where the logic of following through most varieties of interpretive sociology may lead. For they (like more traditional 'positivist' methods) are based on the assumption that sociologists have access to special methods for seeing and describing the social world, which are different in specifiable ways from those available to anyone else (including novelists), and that it is through the
use of those methods that the purportedly superior accuracy, objectivity, etc. of their descriptions can be warranted. Attempts to produce convincing and widely acceptable demonstrations that this is indeed the case have, however, repeatedly failed, in spite of widespread knowledge and concern for the issue. Thus, there are good grounds for believing that an increased awareness of such problems as obstacles standing in the way of quantitative procedures in sociology has yet to be matched by as rapid a growth in the realisation that problems of at least the same order and magnitude may apply equally to the various qualitative/interpretive alternatives.

While these observations have been inferred from what seems to be implicit in much of Carlen’s analysis, it is worth noting that her approach exhibits a more explicit awareness of the close ties between ordinary and professional procedures. It also involves a determined and original attempt to resolve such problems by giving prominence to the way in which ordinary common sense theories are continually referred to and used in the carrying out of legal procedures by all concerned in them. For example, the fact that game and dramatic metaphors are apparently routinely used by court officials to organise and make sense of court procedures is invoked by Carlen to provide the warrant for organising her own study around such metaphors. Thus, the distinction that can be made between one of the metaphors on the one hand (e.g. ‘game’, ‘drama’, etc.) and other available and plausible models on the other (e.g. ‘due process’, ‘just’ and ‘fair’ procedures, etc.), is used to develop a critical or ironic contrast between the official legal models and the alternative common sense metaphors. In other words, by displaying that multiple versions of ‘what is really going on in court’ are available, doubt can be cast on any single version that may be offered as the version, such as, for example, the official legal ones. Alternatively, by stressing the way in which officials regularly use common sense metaphors in the course of doing legal work, it can be implied that they regard such categories as ‘games’ or ‘theatre’ as a literal (or at least the most appropriate) description of ‘what is really going on in court’: whereupon, other categories can be invoked to show how inaccurate and unreasonable these now purportedly ‘actual’ procedures of the court officials are in comparison with other plausible and tenable versions of what is going on. One can, for example, point out that, while it may all be a game to the officials, the court hearing is a serious business for the defendants. And just as commonsensically available metaphors can be used to propose ironic contrasts and assert the impropriety of legal procedures, so the apparatus can be developed in support of more generalised and far-
reaching suggestions via the introduction of one of sociology's favourite metaphors, namely the 'macro' social structure of capitalism:

The court is not a theatre. It is an institutional setting charged with the maintenance and reproduction of existing forms of structural dominance. Court workers, unlike stage actors, have to account not only for the way they interpret their parts but also for the authorship and substance of the scripts. Aware of the written rules of law, court workers often claim that their script has been written elsewhere; proud of a judicial competence, court workers often claim that they write the script themselves; called to account for the mode and substance of their performance, court workers, using the imagery of the theatre, claim that they perennially tell a tale of possible justice. To conserve the rhetoric of justice in a capitalistic society such a tale is as necessary as it is implausible. (Carlen, 1976a, p. 38)

These various critical remarks about the way the commonsensically available contrast between legal and other procedures has been used in previous studies are not intended to indicate that the contrast has no analytic interest or potential. Nor is it the contention that one's everyday members' competences, such as the ability to identify and use contrasts between ways of talking and interacting, should not be used in recognising what seems noticeably 'odd' or 'special' about court procedures. For, if it is accepted that there are no absolutely and unequivocally objective methods for warranting a single description as definitely and uniquely correct, independently of context, then it is difficult to imagine what procedures other than our member's everyday competences could be used for doing such descriptive work. Rather, the core of our critique of other studies is that, having been used to recognise those features of court-room interaction which appear 'odd' in contrast with features of interaction in some 'ordinary' setting, those same 'odd' features are used to establish or confirm the same contrast as a fact or topic for further analysis. In other words, the more instances of 'odd' procedures that can be identified by using the contrast as a resource, the more progressively 'confirmed' as a fact or topic does that contrast appear to become. In this way, a generalised commonsensically available description (i.e. the contrast between the 'legal' and the 'ordinary') is used as a resource in finding and analysing the instances of 'oddness'. Such instances then become a collection of 'factual evidence' subsequently usable in support of the view that the original contrast (or some metaphorical variant of it) now has the status of a scientifically discovered and thereby warranted
‘finding’. The analytic problem subsequently becomes to explain, or make further generalised sense of that ‘finding’ (e.g. by looking for suitable metaphors), and the results of such efforts typically do little more than reproduce and emphasise the same contrasts that were originally used to notice the ‘finding’ in the first place.

Further clarification of the above may be provided by considering the following passage:

Interaction in ‘natural’ settings, between relative equals, proceeds according to norms that by and large protect the interactants from embarrassment, humiliation, and discrediting. The parties cooperate to protect both the encounter and the claims advanced by the other. (Goffman, 1959). In contrast, interaction in the court setting proceeds according to a set of norms characteristic of authority permeated relationships. Thus, during the court room hearing, court officials may disregard many of the conventional norms of face to face interaction. The hearing is conducted on the basis of ‘transformation rules’ (Goffman, 1961), which enable officials to act in ways that in normal interaction would constitute clear violations of appropriate rules of behaviour. (Emerson, 1969, p. 202—our italics)

The main point to be noted about this is the way in which the contrast between the procedures of court-room interaction and ordinary interaction is presented. At the outset a rule is specified which is clearly tied into some specific context (settings between relative equals). Then we get a contrast between the first rule and a generalisation about the rules of court settings. By the time the first italics are reached, the contrast is no longer between situated rules appropriate in particular contexts, but between two (purportedly) generally applicable types of rule, with the references to ‘conventional norms of interaction’ and ‘normal interaction’ implying (a) that it is sensible to regard all situations which might be described as ones where ‘normal interaction’ is taking place as ones governed by some common set of rules, or in other words that they are in an important sense identical, and (b) that sociologists have been able to identify this collection of ‘normal’ rules with such definiteness that their findings can be safely used for inspecting court procedures. By holding the ‘rules of normal interaction’ to be constant across all such contexts, then, the impression is given that the analysis of court procedures can be done with reference to a sound, validated and objective body of knowledge about the structure of everyday ‘normal interaction’. This is done despite profound disagreements within sociology and social psychology.
about which, if any, findings or theories can be regarded as generally acceptable. But, proceeding as if there were some consensus among experts opens the way for almost any possible rule to be extracted from any specific context other than court hearings (e.g. like the proposed one involving ‘relative equals’ at the start of the above quotation) designated as a ‘rule of ordinary interaction’, and then compared as such with some rule of court procedure. This contrastive device can be used to locate more and more instances, which not only appear to ‘validate’ the very contrast which was used to locate them in the first place, but also provide for court procedures to be continually and progressively discredited. For, as the rules on one side of the contrast are described as ‘normal’, variations or absences manifested by rules of court procedure can be displayed as not merely ‘different’, but as ‘abnormal’: or, as in the above extract from Emerson, as ‘violations of appropriate rules of behaviour’ governing ‘normal interaction’.

To an extent, then, the object of such an approach seems to be to develop the commonsensically available contrast between ‘legal’ and ‘ordinary’ procedures into a description which ironicises and/or criti­cises the latter. But one problem this raises is that while it may provide versions of court-room interaction which are convincing and plausible for the practical purpose of mounting radical attacks on the way some hearings are currently conducted, the same method of reasoning used to produce them can be equally well employed to yield exactly opposite conclusions. That is, some rule which it is proposed operates in ‘ordi­nary’ settings could presumably also be claimed to be ‘abnormal’ or a ‘violation’ in comparison with some rule of court procedure. The radical critiques themselves, furthermore, would seem to involve practical implications which can be viewed as being more or less destructive and (at least in terms of some of the remarks made at the beginning of this section) as revealing something of a misunderstanding of some crucial properties of court procedures. For if the main thrust of an analysis is to complain about the ‘special’ legal procedures and to argue in favour of the greater appropriateness of more ‘ordinary’ procedures, then (taking the logic of the argument to its extreme) the most desirable situation would presumably be one in which there were no recognisably ‘special’ procedures at all, but only ‘ordinary’ ones: in which case, the situation itself would presumably no longer be recognisable as anything other than an ‘ordinary’ one. But, if it is the case, as was suggested earlier, that the existence of ‘special’ legal procedures may be related to the notice­able inadequacies of ordinary everyday procedures as effective methods for arriving at decisions which are (for practical purposes) unambigu-
ous, definite and final, then it is not at all clear how such decisions could be reached in recognisably appropriate ways following the elimination of the 'special' legal procedures.

In concluding this section it may be noted that no attempt has been made to present a detailed summary of the studies discussed, or anything approaching an all-encompassing review of the literature on court procedure more generally. Instead, the aim has been to outline some problems which arguably will inevitably arise so long as commonsensically available devices (like the ability of members to contrast the 'legal' with the 'ordinary') are used in an unexplicated way as a resource for analytic purposes, and so long as rules which seem to operate in one specific context are inspected with reference to those associated with other (purportedly more general) ones. That is, an attempt has been made to show how the recognisability and analysability (by members) of different procedures provides both the topic and the resource for analysis. This is not to suggest that researchers like Emerson and Carlen ought not to have used their everyday members' competences to recognise what is 'special' about court procedures, or that they or anyone else could not have done so even had they wanted to. Nor is it to suggest that their detailed ethnographic observations are uninteresting or uninformative about the particular settings observed. Rather the general point is first that, having outlined 'noticeables', their analyses move too quickly towards imposing an order on them with reference to theories (both lay and professional) derived from outside the settings, thereby leaving open the question of what specific problems of the setting such 'special' procedures might resolve. Second, while many of these assertions about the nature of order in court (e.g. that hearings bewilder and confuse defendants) may be recognisable by members as plausible or 'possibly correct', the analyses are mainly directed towards establishing that they actually are 'correct', even though this is in principle not possible. For practical purposes in particular contexts, however, such a task is, of course, perfectly possible (in that members routinely recognise descriptions as correct for the particular purposes at hand and 'for now'), and it is presumably the availability of unexplicated interpretive procedures for doing recognitional work of this sort that enables observers (whether lawyers, professional researchers, or others) to construct such descriptions and have them regarded by others as 'possibly correct'. The main implication of this to be elaborated in the next section is that, if recognisable orderliness is the product of the unexplained and taken for granted procedures of practical reasoning used by members, then it is with the explication of such procedures that the
analysis of social order in general, and order in court more particularly, should begin.

III ETHNOMETHODOLOGY AND THE ANALYSIS OF SOCIAL ORDER

The sorts of problems touched on so far are obviously not confined to the sociology of law, let alone sociological studies of court proceedings. For the confusion which has persisted in the discipline more generally about the nature of the relationship between common sense and professional social scientific reasoning about social order has been central to most of the major theoretical debates in sociology. Conflict and consensus theorists, symbolic interactionists, phenomenologists and the rest all claim to have found the most appropriate model of social order and the most suitable methods for its study. And, in the absence of any recognised procedures for deciding between the competing versions, the various approaches continue to co-exist, and to provide the ‘data’ for yet further theoretical speculation aimed at producing some new synthesis or reconciliation between the alternatives. On at least three issues, however, there is general agreement between the majority of sociologists, irrespective of their particular theoretical persuasion. The first is that (in spite of all the evidence to the contrary) sociology, or the favoured approach to it, is capable of producing descriptions and explanations of social phenomena which correspond with the actual events in the world to which the descriptions and explanations refer. The second point of agreement is the widespread belief that professional sociological accounts of what is going on in the social world, and why it goes on, are of a different (and superior) order to the kinds of descriptions and explanations of social reality available to and routinely used by lay members in making sense of the events around them. And a third closely related theme common to most sociology is the view that the methods of practical reasoning which enable members to engage in descriptive and explanatory work are in some sense ‘flawed’, and hence must be avoided altogether, or at least repaired or modified, for the purposes of doing professional sociology.11

Now it might be thought that to reject any or all of these long-standing assumptions would be to deny the possibility of doing any kind of sociological analysis at all. For, if descriptions do not correspond with events in the world, if the distinctiveness of sociological accounts in comparison with common sense ones cannot be demonstrated, and if
sociologists are unable to escape from or improve on the everyday methods of reasoning over which they had command long before they ever encountered professional sociology, then it is not clear what options remain other than the writing of journalistic reports, fiction, or political propaganda. During the last twenty years, however, ethnomethodology has developed an approach to social research which neither accepts any of these long-standing points of sociological consensus, nor recommends the abandonment of the systematic investigation of social phenomena. Not surprisingly, such an apparently paradoxical position involved a fundamental revision of sociology’s traditional view of social order, of the sorts of question to be asked about it, and of the kind of empirical research to be done. To do justice to the range and complexity of the solutions proposed by Harold Garfinkel (especially 1967) and his associates who founded ethnomethodology is hardly possible here, but a brief summary of some of the main themes may help to locate and clarify the issues addressed in subsequent chapters.

Central to ethnomethodology’s rejection of more traditional conceptions of social order is the idea that they presuppose a social world which simply could not work, or at least could only work in a very different world to the one in which most of us live. Thus, were it the case that descriptions and explanations of social order and particular social phenomena could indeed be arrived at, and empirically validated independently of the settings in which they are used, then there would presumably be not only a much greater degree of certainty in human affairs than appears to be the case, but also little scope for originality, diversity, innovation, conflict, or social change. The facts of any particular situation or event would never be in doubt, its causes would be identifiable with complete precision, and its consequences would be wholly predictable. In short, the dream of Auguste Comte, originator of the word ‘sociology’, of a society organised on an ‘objective’ or ‘scientifically’ warranted basis, and run by sociologist-priests, would long since have become more than a dream. Sociology would by now have succeeded in singling out the ‘correct’ version of social order from the multiplicity of versions which are to be heard in the real world, and the discipline would have achieved a greater degree of consistency and coherence than is suggested by the myriad of competing sociologies currently on offer.

The suggestion that traditional models of social order presuppose a world which could not work is not directed solely at those of the ‘positivist’ tradition in sociology, as might seem to be implied by some of the above remarks. In other words, it might be thought that the
alternative views of social order associated with the 'interpretivist' tradition can be exempted from such a charge. And certainly it is the case that 'positivism' has been widely criticised by sociologists other than ethnomethodologists for having failed to give adequate attention to the 'meaningful' dimensions of social action, the understanding of actors' subjective orientations to action, the 'constructed' character of social reality, and related phenomena. But, in the very way that interpretivist sociologies replace the excessively determined, certain and objective models of positivism with variously indeterminate, uncertain and differentially experienced conceptions of social reality, they too appear to be proposing models of order which could not work. In the kind of world they provide for, the subjectively assessed meanings of actions and events would be so diverse and so utterly ambiguous, that it is difficult to see how members would be able to adhere to a single one for long enough to be able to accomplish anything at all, or how any semblance of order would be possible. Viewed in these terms, then, the two great sociological traditions of positivism and interpretivism can be viewed as having concentrated too exclusively on one or other of two dimensions exhibited by social reality, and have therefore failed to come up with a model of social order which would systematically accommodate both. For an adequate theory of social order would presumably have to provide for the way in which the social world is comprised of unique circumstances which are nevertheless recognisable as instances of generalised types, and is simultaneously flexible and patterned, subjectively experienced and externally objective, uncertain and certain, indescribable and describable. That is, the theory would have to be neither so inflexible or rigid that it lacks any sensitivity to the potentially infinite range of contextual variation in the world, nor so inflexible or loose that nothing at all is held to be general across different contexts. And the ethnomethodological interest in the methods of reasoning routinely used by members, both lay and professional, in finding practical resolutions to the basic theoretical dilemmas that divide positivist and interpretivist sociologies is informed by just such a model of social order.

As far as ethnomethodologists are concerned, then, the confusions of traditional sociology are inevitable so long as the search for descriptions and explanations of the realities underlying the commonsensically available appearances of social order is preferred to an examination of how such appearances are interactionally produced, managed, recognised and used as if they were the facts of the matter by societal members in living their everyday lives. In other words, the appearances of social order are viewed by ethnomethodology as the situated accomplishments
of hitherto unexplicated methods of practical reasoning which professional sociologists, by virtue of their societal membership, have used as a taken for granted resource in pursuing their investigations. According to Garfinkel, 1967, the major implication of this is that this resource should become the topic for sociological analysis, and that empirical research should thus be addressed to an explication of the methodic practices employed by members in the production of social order. The basic theoretical question was no longer to be the obstinately unanswerable one of why 'in principle' social order is as it is (or claimed to be). Rather it was to become that of how 'for practical purposes' are particular manifestations of social order achieved? In combining the terms 'ethno' and 'methodology', then, Garfinkel sought to encapsulate the revised topic for research that was being proposed (on the origins of the word 'ethnomethodology', see Garfinkel, 1974).

Had ethnomethodology been no more than a critique of traditional sociology and as a promise of better things to come, it would no doubt have had little lasting impact on a discipline in which ambitious programmatic claims are commonplace. But, in contrast with most other purportedly new theoretical developments within sociology, ethnomethodology seems to have had an appeal for empirically inclined sociologists, perhaps partly because Garfinkel's writings dealt with problems which researchers will have inevitably encountered, and partly because his solutions pointed to a hitherto largely unexplored domain for investigation. Thus, even by the time Garfinkel published Studies in Ethnomethodology, 1967, he was able to cite a dozen other sociologists whose empirical research, during the ten years prior to that, had been directed by ethnomethodological rather than traditional sociological questions (Garfinkel, 1967, p. vii). And the subsequent decade has seen such work develop and diversify to a point where it is now somewhat misleading to talk as if there were a single homogeneous style of ethnomethodological research. One reason why a diversity of approaches has developed from the earlier ethnomethodological writings may have been in response to the fact that they proposed so difficult a way forward. Thus, while the new domain for investigation looked interesting and exciting, it was not immediately obvious how it could be subjected to systematic empirical study without falling back into some of the old traps from which an escape was being sought. Garfinkel’s stress on the importance for social organisation of taken-for-granted methods of practical reasoning, background expectancies, etc. seemed to suggest that empirical research should be directed towards an examination of the ways in which tacit rules and common sense theories were used by
members in accomplishing the orderliness of particular settings. In pursuing such studies, however, researchers were to operate under a number of analytic constraints or injunctions entailed by such a theoretical programme, most of which related to the analyst's own status as a 'competent member', and the implications of this for the way he was already able (as a 'member') to observe, describe and explain any of the activities he might encounter. Thus, general exhortation to view what seemed to be obvious, mundane and commonplace as 'anthropologically strange' was to be a constant reminder to analysts that obviousness was itself an orderly and methodic product of their members' interpretive competences. To ignore what appeared commonplace and mundane would therefore be to fail to regard the explication of the members' methods of reasoning which rendered them 'obvious' as the topic for analysis, and to rely on them as an unexplicated resource in much the same way as had been done for so long by traditional sociology. How work under such a constraint could actually be done, then, was a major challenge for ethnomethodological research.

A closely related and equally challenging constraint was entailed by the way in which Garfinkel's social actors were viewed as practical rule-using 'analysts', rather than as the pre-programmed rule-governed 'cultural dopes' portrayed by traditional sociological models of man. Thus, the professional analyst's major task was not to stipulate what rules members really were 'following' or 'governed by', but to locate rules to which they might be 'orienting to' and using in producing a recognisable orderliness in some setting. Thus, to find a way of making statements about rules and practices which could warrantably be said to be 'oriented to' by members then was another of the difficult challenges posed by ethnomethodology. For it demanded, among other things, that traditional sociological recommendations about the importance of looking at actors' orientations to actions, and of avoiding the imposition of observers' constructions were to be taken more seriously than in the past. That is, any solution which involved paying lip service to such matters as a prelude to stipulating observers' versions, would be regarded as unacceptable.

IV ETHNOGRAPHY AND CONVERSATIONAL ANALYSIS

To find a way of doing empirical research which would meet the standards entailed by such constraints was, of course, a particularly ambitious and complex task, not least because there were no clear
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precedents as to how such work might proceed. One which did suggest itself, however, was the method that had been used by social anthropologists for several decades in their attempts to understand cultures other than their own, and which had more recently been rediscovered by sociologists who wished to find an alternative to the quantitative methods which had been predominant for so long in empirical research. Thus, most of the early ethnomethodologists made extensive use of ethnography and participant observation in their studies in practical reasoning. Many of the best of these were conducted in legal settings (e.g. Sudnow, 1965; Cicourel, 1968; Zimmerman, 1969a, 1969b; Wieder, 1974; Bittner, 1976a, 1976b), which may have had a special attraction because the kind of work being done there clearly involved members in finding practical and definite solutions to problems which could not be resolved in a principled, abstract or decontextualised way (e.g. deciding the ‘facts of a case’, ‘what actually happened’, who was ‘really to blame’, which general definition or rule held in ‘this particular unique context’, etc.). Indeed, it was during his association with the celebrated Chicago Jury Project that Garfinkel had coined the term ‘ethnomethodology’ (see Garfinkel, 1974) to refer to the phenomena of which the methodic procedures used by jurors to achieve and display their competences as ‘legal’ decision makers were an instance (Garfinkel, 1967, pp. 104–15).

But, as has been suggested elsewhere (Atkinson, 1978, p. 7), these studies often looked very similar to those of symbolic interactionists, who had also made extensive use of ethnographic field research, and it was relatively easy for a case to be made to the effect that there was little difference between ethnomethodology and symbolic interactionism (e.g. Denzin, 1971). Moreover, some of those who had become interested in ethnomethodology, and perhaps particularly those who encountered it later and from a distance (e.g. some British ethnomethodologists), came to doubt how far ethnographic ethnomethodology could come to terms with the sorts of analytic constraints outlined above in as adequate a way as that which appeared to be possible in the developing tradition of conversational analysis.19 Thus, during the same period of the 1960s, when these ethnographic studies were being done, there had also emerged the approach to ethnomethodological research developed by Harvey Sacks, which took as its data tape recordings and transcripts of naturally occurring talk. Quite apart from the exciting possibilities which flow from a realisation that it is only very recently in man’s history that it has been possible to record social interaction and subject it to repeated inspection, the mode of analysis developed by Sacks and his