

## Book Review

### **Discursive Constructions of Consent in the Legal Process**

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#### ***Discursive Constructions of Consent in the Legal Process***

Susan Ehrlich, Diana Eades & Janet Ainsworth (eds) (2015)

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Despite the centrality of consent to many areas of the law, there has to date been no precise scholarly attempt to bring together these seemingly only semi-related contexts under this singular unifying theme. This collection represents just that – an endeavour to unite diverse scholarly works, taking a multitude of theoretical approaches in a systematic attempt to critically examine the role of language in constructing and interpreting consent in legal contexts. The authors of the thirteen chapters all share an understanding of consent as being discursively situated and constructed through language, as opposed to it being some internal cognitive concept that is merely expressed through linguistic means. Addressing the issue of consent in contexts as diverse as police searches (Ainsworth), post-penetration rape (Ehrlich) and medical research (Conley, Cadigan and Davis), the contributors draw on a wide range of data types including translated Miranda warnings (Berk-Seligson), recorded telephone calls (Rock), research interviews (Conley *et al.*) and archived federal and state cases (Solan), and apply a wide range of analytical methods encompassing speech act theory (Eades), systemic functional linguistics (Angermeyer), genre analysis (Zappavigna, Dwyer and Martin) and conversation analysis (Gaines; van der Houwen and Jol; Stokoe, Edwards and Edwards).

In keeping with its aim to bridge the gap between the status of consent as one of the core principles of Western law on the one hand, and the relative dearth of scholarship seeking to systematically investigate its manifestation in diverse legal contexts on the other, the volume moves beyond ‘consent’ as traditionally conceived of, for example in the conduct of researchers across scientific disciplines (see Conley *et al.*, p. 140-141). Instead, it understands consent as indeterminate, with a mismatch of understandings between the institution and laypeople in a wide variety of legal contexts. This

problematisation of consent is a recurrent theme throughout the volume, with the dichotomy between lay understandings and official conceptualisations of its nature and significance featuring prominently in every chapter. Solan emphasises the distinction between 'transparent' and 'opaque' understandings of consent (p. 119) while in Eades' terms the institutional preference for decontextualized interpretation, as opposed to one that takes into account the pragmatic context, has serious consequences for the delivery of justice (p. 85). Indeed, Conley *et al.* point out that there has to date been little agreement on how consent should be defined, that it is ambiguous, and that there exists no official definition, either in law or elsewhere.

The volume is organised into four sections according to their primary thematic contributions (Ehrlich and Eades, p. 4), although it should be noted that there is substantial thematic overlap between the chapters. The first section concerns itself with the issue of 'free and voluntary consent', and the chapters here reflect a concern that in particular situations consent is often coerced rather than freely offered, but that courts have systematically ignored this truth, preferring instead to take a decontextualised view of consent, i.e. one that locates meaning solely in linguistic forms, and does not consider the effects of the social and situational context on how consent should be interpreted.

Ainsworth's chapter, for example, examines the potential for police officers' swearing to impact upon the extent to which citizens' consent to police searches can be considered truly voluntary. Against a U.S. socio-cultural backdrop in which citizens apparently regularly consent to searches that result in the discovery of incriminating material, she considers the 'architecture of coercion' (p. 25) underlying such interactions, with a particular focus on officers' use of abusive swearing. This is a contextual factor which, she argues, has the potential to create acquiescence to police authority, through undermining citizens' agency and simultaneously projecting a transgressive identity on the part of the officer. She goes on to cite a number of recent cases in which the US Supreme Court have not seen fit to acknowledge this kind of contextual information, preferring instead to adopt a simplistic and narrow understanding of how consent is attained and expressed. She concludes with recommendations for wider analyses of these occasions, with a broader focus on the context of the interactional encounter.

Ehrlich examines a case study of post-penetration rape, in which consent to sexual intercourse is initially forthcoming, but is withdrawn during the act of intercourse, yet the offending party continues against the other's will. She focuses on the 'referentialist', 'correspondence' or 'decontextualised' linguistic ideology underlying the interpretation of coerced sex as consensual within the legal system. Such an ideology comprises a viewpoint that meaning is encoded merely in linguistic forms, such that regardless of the social context in which they are uttered, their core meaning remains unchanged. Ehrlich draws out, from extracts of U.S. appellate court transcripts, various discursive strategies, including the use of reported speech, the positioning of which highlights the victim's consent while downgrading the importance of the immediate threatening situation in which this was produced. It is in this way that linguistic ideology, much like mythologies around gender and sexuality, have an unquestionable influence on the outcome of rape trials.

From Maryland, U.S., to Queensland, Australia; Eades' chapter uses the case of three Aboriginal teenagers picked up by police and subsequently abandoned on industrial wasteland, to draw out the interconnecting layers of consent, and to explore in detail the

linguistic mechanisms involved in apparently securing these. Like the previous chapters, the preference for ignoring or ‘erasing’ (p. 82) context is identified as a key problem area of the legal construal of consent and Eades stresses the importance of the wider social context of Aboriginal relationships with the police, as well as the immediate local context of the interactional occasion. Echoing the concerns of the other two authors in this section, Eades shows us that subscription to a decontextualized language ideology – an unthinkable position for those of us who engage in sociolinguistic analysis of any kind – has clear potential to have severe negative consequences for the delivery of justice.

Section 2 shifts the focus slightly on to the closely related issue of whether consent can be considered truly ‘informed’ in situations where its provision is considered a ‘mere formality’ (Rock, p. 94) or a matter of ‘going through the motions’ (Rock, p. 112), a ‘mere ceremony’ (Conley *et al.*, p. 155) and in cases where one generally has no real familiarity with that which one is agreeing to (Solan, p. 118). Rendering the issue of consent in this formalistic way can have serious implications for the voluntary nature of consent, given the inherent trivialisation of the matter that goes hand in hand with such renderings.

Noting that lay people are often ill-equipped to assess the import of their consent decisions, Rock begins this section with an examination of exchanges between police and the public in non-emergency phone calls and suspect interviews. Others have identified that in police interviews interviewees do not display the same level of familiarity with the position and significance of the interaction in a wider process as do police personnel (see, for example, Haworth, 2013). Similarly, Rock shows us that members of the public may also struggle with distinguishing the mundane from the consequential given the ‘closed and mysterious’ (p. 93) nature of policing settings. With reference to, *inter alia*, politeness theory, Rock explains that acquiescence to requests often represents the ‘path of least resistance’ (p. 103) but that the pressure to ‘go along with’ routinized consent has the potential to be coercive and far from voluntary or informed.

Starting with the observation that consent is central to contract law and also highly ambiguous, Solan makes the distinction between ‘transparent’ interpretations, i.e. where each of the terms of a contract is specifically agreed to, and ‘opaque’ interpretations, whereby the terms are agreed to *en masse*. Where an individual signs an unread contract, they have provided only opaque consent, and judges in these cases have tended to take the position that, under the ‘duty to read’ rule, the individual had the opportunity to either transparently consent to the terms, or to reject them. This is at odds, however, with the ‘growing judicial reluctance to engage in serious enquiry into the terms of a contract’ (p. 127). Solan advocates a blended approach to transparency in order to mitigate the risk of judicial undermining of the consent process, and suggests legislation might be the way forward in reintroducing transparency to contract law.

Conley *et al.* conducted research interviews with potential contributors to a genetic research programme and, echoing Rock’s sentiment, find that individuals whose consent is required before they can proceed with this process often lack the requisite understanding of what exactly it is to which they are consenting. Often this information becomes available to them only after they have provided their consent. If consent is withheld, the authors further note, the individuals have often already engaged with the process. These two factors, Conley *et al.* argue, would suggest that the process of gaining consent in this context, and the completion of a consent form, are essentially meaningless.

The third section of the book is concerned with the effects of particular discursive patterns on the ways in which laypeople who encounter the legal system are able to access and provide consent. The section begins with Angermeyer focussing on ‘routinized’ or ‘ritualized’ consent procedures (p. 163) as a mechanism used in multilingual small claims courts to direct lay participants towards a preferred course of action – in this case, arbitration as opposed to trial by judge. Like Rock, Angermeyer makes reference to face concerns as a lens through which to view participants’ behaviour, emphasising that the presentation of one particular course of action as a clear preference requests consent in a way that makes resistance an incredibly complex action. The added layer of mediation provided by an interpreter in many cases results in arguably crucial consent briefings being perceived as trivial, and thus skipped over. All of these factors combined have obvious implications for the ‘voluntary’ nature of consent in this setting.

Zappavigna *et al.* consider the provision of consent in face-to-face meetings between young people who have admitted offenses and their victims. These conferences form part of the ‘restorative justice’ reform movement that has gained prominence in many parts of the world, and can be described as a fairly novel ‘macrogenre’ of legal interaction. The authors assert that the young people who find themselves in this setting often struggle to conform to the expectations of the genre since they have no control over it, and yet it is only through successful genre enactment that consent can be codified.

Gaines takes one particular case study of a post-arrest police interview of a high-profile solicitation suspect, and demonstrates the extent to which the interviewee resisted the official police narrative, thus avoiding consenting to this version of events. Through processes of concealment and reformulation, the suspect presents alternative readings of the event in question and of participants’ identities, resulting in what Gaines terms a “tug-of-war” for information (p. 234). The suspect resists consenting to the relevance of the interviewer’s questions and instead attempts to take control of the interaction himself, notably through posing questions of his own. Gaines emphasises the high stakes of the case owing to the profile of the suspect, and reminds us that had he consented instead of resisting to such an extent, the consequences for his career would be dire.

The fourth and final section of the volume takes one particular type of legal-lay interaction, the giving of cautions and invocation of the rights detailed therein, and pays attention to the ways in which these are carried out in a variety of international contexts. Berk-Seligson begins with her examination of Spanish speakers’ experiences with the Miranda warning, the pivotal text in the U.S. for securing consent to being interviewed as a suspect. The author draws on a case study to illustrate myriad problems with the comprehensibility of the warning in Spanish, concluding that voluntary consent cannot possibly be said to have been secured if Miranda has not been properly understood. Provision of the rights in a suspects’ native language does not necessarily guarantee comprehension, and Berk-Seligson stresses the need for cultural factors to be included in any consideration of a suspect’s understanding.

Attention is shifted to Dutch courtrooms in the second chapter of this section, with van der Houwen and Jol’s investigation into how cautions are delivered in criminal trials within this inquisitorial system. Their focus is on the tensions thrown up by the rights contained within the caution, such as between suspects’ right to silence and their desire to be viewed as co-operative participants. This tension, claim the authors, poses

significant challenges for suspects wishing to exercise their right to silence, even in situations where a judge explicitly reminds them of their rights. Without full access to their rights, the question inevitably arises whether or not suspects can be said to be genuinely consenting to the questioning they subsequently undergo.

Finally, Stokoe *et al.* remind us about the 'formulaic' nature of (non) consent, drawing on a corpus of British police-suspect interviews and identifying occurrences of the recognisable and formulaic utterance 'No comment'. The action of uttering 'no comment' in police-suspect interviews is identified as a device suspects use to *affirm their right* to say nothing in accordance with the right to silence, as opposed to merely being a way of saying nothing. This device is normatively recognised as performing this action, and is not interpreted as the suspect taking an uncooperative stance. Occasions when interviewers provide suspects with a 'reminder' that the court may look unfavourably on their refusal to answer leads the authors to conclude with the question 'what use is a right to silence, if silence is potentially to be treated as evidence of guilt?' (p. 312). Thus, they claim, the law itself risks being considered coercive.

As well as the internationally renowned status of the high calibre forensic linguistics and language and law scholars represented by the contributions to this volume, its strength lies in the unprecedented diversity of the legal and criminal contexts discussed in the chapters. Despite their *prima facie* fragmented nature, the chapters are unified by the common theme of problematizing the linguistic ideology that tends to be adhered to by the legal system(s), and of pitting such understandings against the 'ordinary' understandings of laypeople. Illustrating a wide range of analytical tools that have been put to excellent and illuminating use critically unpicking the ways in which consent is unquestioningly treated in the legal system(s), the book might be viewed as a handbook for carrying out critically informed research in the legal context(s). Time and time again the contributors demonstrate the role of linguistic or other ideologies around consent in denying members of the public – whether juveniles, non-native speakers, sexual assault victims, or other vulnerable and non-vulnerable individuals – full, unfettered access to achieving justice.

This exhaustive and timely overview of consent's position within our criminal and civil legal systems in the UK, US, Australia and the Netherlands should serve as something of a call to arms for those of us working in all areas of forensic linguistics and language and law. It is wholly consistent with an understanding of our role as one which seeks to protect human rights and be 'driven by questions of social justice' (Eades, 2010: 422), and sheds further light on how we as linguists can contribute to such an effort.

## References

- Eades, D. (2010). Nationality claims: language analysis and asylum cases. In M. Coulthard e A. Johnson, Orgs., *The Routledge Handbook of Forensic Linguistics*. Abingdon: Routledge, 411–422.
- Haworth, K. (2013). Audience design in the police interview: the interactional and judicial consequences of audience orientation. *Language in Society*, 42(1), 45–69.