Introduction: Law at Work

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LAW AT WORK
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Sociology has traditionally sought to explain law in terms of power relations and domination, of modernity and rationalization, or as the symbolic translation of internalized culture. All these perspectives look at law, its manifestations, associated phenomena, and practices, from the outside. To paraphrase Dworkin, in a totally different sense, this external gaze does not take law seriously in its praxeological dimension. In contrast, ethnomethodological analysis focuses on law as a practical activity. In this volume, we will offer a collection of studies which are inspired by this ethnomethodological way of thinking and dealing with phenomena.

Four major themes help understanding the specific contribution of ethnomethodology to the study of law: the opposition between law in action and law on the books; the "missing what" of law-and-society and statistical legal studies; the problems created by "hyper-explanations"; the re-orientation of research on the legal work. In most socio-legal studies, scholars look for the nature of law and therefore miss the phenomenon of the practice itself. Theory takes the form of a synthesis of applicable legal provisions, whereas practice is represented by narratives and/or statistical data. It means we suffer from a double bind: social actors remain external to the fundamental significance of the law they are practicing; researchers who claim to have access to the meaning of the law have little grasp of its practicalities. This partly proceeds from the scholarly construction of a dichotomy between theory and practice.

Law as a social phenomenon cannot be reduced to the mere provisions of a legal code (law on the books). However, it would be misguiding not to consider that law on the books is an integral part of the practice of law. The Platonist claim that the theory of law is nothing but mere appearances and that it is the task of social scientists to uncover the object lying behind these appearances confounds the analysis because it does not give any credit to the natural

attitude of people who do not experience reality as being purely subjective and law on the books as being purely formal. This is best exemplified with reference to Melvin Pollner's argument against Howard Becker and 'labelling theory' on the question of deviance. Without going into the details, I can just quote the former when saying: "for example, while the community creates the possibility of traffic violations in the sense of making the rules which can be violated and developing the agencies for their detection, from within the court the rules may be treated as definitive of 'real' deviance, as establishing that class of acts that are deviant whether or not they are concretely noticed or responded as such" (p. 39).

By merely opposing theory to practice and legal provisions to the "living law", we fail to fully understand what law is. This has more chances to be properly done through the close description of people's (both professionals and laymen) orientation to, and reification of, legal categories as it emerges from their actual encounter with legal matters, within the constraining framework of institutional settings and with the purpose of accomplishing practical tasks.

The many techniques devised to study law and society broadly eschew addressing law as a practical activity, i.e. investigating the work-specific competencies through which lawyers collaboratively produce and coordinate legal actions. This is what Garfinkel calls the "missing what" problem in the study of work. With regard to legal professions, this means, quoting Mike Lynch, that "sociologists tend to describe various 'social' influences on the growth and development of legal institutions while taking for granted that lawyers write briefs, present cases, interrogate witnesses, and engage in legal reasoning" (1993: 114).

Often, research erases the "here and now" dimension of every case, i.e. it obscures the necessarily situated character of every activity. To paraphrase Michael Moerman, I would say that socio-legal scientists should better describe and analyze the ways in which legal categories are used and not merely take them as self-evident explanations (1974: 68).

Legal work, as a whole, is a practical and daily activity embedded in a local environment, which works as a constraint on what can be achieved in a given situation and as a resource for establishing that good work has been done. According to Max Travers the purpose of an ethnographic ethnomethodological study of law "is to gain some purchase on how these constraints and resources operate in the work of lawyers in a particular occupational setting" (1997: 7). While any studies have tried to capture some aspects of courts activities through ethnographic observation, very few attended closely to what is really done within this

institutional setting. There is a real descriptive failing, which only permits researchers to advance worldviews alternative to actors' or to remain insensitive to legal work as it is understood by its daily practitioners. Travers speaks of a descriptive gap. Bridging the gap or filling the "missing what" means re-orienting to the content of legal work and to its mainly practical character. It involves turning to the technicalities of work, to its situated character, to the mix of commonsense and substantive knowledge it involves, etc. This cannot be done by sitting at the rear of courtrooms, by summarizing cases or by resorting to interviews with the many parties to a case.

This last consideration leads to the question of macro and dualistic explanations, what can be called "hyper-explanations". What makes the difference between hyper-explanation studies and ethnomethodological studies of law is that, whereas the former know in advance that courtrooms are sites for power and domination (… the latter) insist that we must first understand what is happening as a local phenomenon before considering whether other variables may be relevant" (Dingwall 2000). As Emmanuel Schegloff puts it: "However well-intentioned and well-disposed towards the participants (…) there is a kind of theoretical imperialism involved here, a kind of hegemony of the (…) academics (…) whose theoretical apparatus gets to stipulate the terms by reference to which the world is to be understood (…) by those endogenously involved in its very coming to pass" (1997: 167).

Ever since the earliest work of Garfinkel and Sacks, law and justice have held a privileged position, with the practices of different legal actors – lawyers, police, prisoners, juries, judges, etc. – serving as a base for the study of activities and language in context. In this "radical" perspective (de Fornel, Ogien, Quéré, 2001), the point was not so much to identify the shortcomings of these practices by measuring them against an ideal model or a formal rule to which they were supposed to conform. Rather, it was to describe the means of production and reproduction, intelligibility and understanding, structure and public manifestation of law's structured nature and the different activities linked to it. Thus, rather than positing the existence of racial, sexual, psychological, or social factors, ethnomethodology and conversation analysis focused on seeing how activities are organized and how people orient to the structures of these activities, which are intelligible in a largely unproblematic way. As Alain Coulon emphasizes, the sociological hypothesis of norms being internalized, provoking "automatic", "spontaneous" behavior, does not account for the way actors perceive and interpret the world, recognize that which is familiar and construct that which is acceptable, and does not explain how rules govern interactions concretely (1994: 648). As such, social

facts do not impose themselves on individuals as objective realities, but as practical achievements.

Between a rule, or an instruction, or a social norm, and their implementation by individuals, an immense domain of contingency opens up, which is engendered by practice, and which is never the pure application or simple imitation of pre-established models. (*ibid.*)

We must therefore take law seriously, but law does not mean rules maintained in their formal abstraction, nor principles independently of their use context. Rather, it means law as practiced by legal actors, who are engaged on a daily basis in performing law. In other words, it is made up of the practice of legal provisions and their principles of interpretation.

For ethnomethodology and conversation analysis, it is context – the legal context in our case – that provides the elements for its understanding and the action that suits it. Sharrock and Watson (1990: 238) thus give the example of the judge's replies to the remarks of the accused. For the accused, these replies constitute instructions allowing them to determine how to express themselves in court, but they may also instruct spectators as to the way in which the accused must generally behave. The context may thus be "self-explanatory", but it also provides the opportunity for relevance to emerge, in Schütz's words. In Sharrock and Watson's terms, this means that

… the expression of a subsequent utterance manifests the meaning the second speaker gives to the utterances of the first speaker, and the latter can use the normative requirements projected by the former on his own expression to understand and assess the former's. (1990: 240)

Renaud Dulong (1991) arrives at similar conclusions when he shows how references to "official" law can intervene in ordinary interactions and exert a pragmatic effect on enunciation and action, which he calls "the law's reputation".

The attention paid by ethnomethodology and conversation analysis to practices and their context makes it possible to shed light on the nature, which is above all routine, of the formalization work in which law professionals engage. The work of lawyers and magistrates, especially the prosecutor's office, consists essentially of formalizing categories that are mobilized in the narration of facts undertaken by clients, defendants, and witnesses. To the contrary, the work of non-professional parties to a trial often consists of escaping the inference of guilt that results from this characterization work. Thus, as Watson demonstrates, the categorization processes that lie along the way to a legal ruling can be seen as means for

those who are involved to ascribe motives to their actions, and thereby to allocate and negotiate incrimination, guilt, responsibility, and therefore causes for justification and excuse.

Turning now to the characteristic works of ethnomethodological research into law and justice, we seek to present its most important achivements, to develop the tools used in the many contributions to this volume, and to turn attention from ordinary practical reasoning as it may be observed in legal and judiciary interactions to a praxeological concern for legal work as such.

Let us note from the outset that Garfinkel's first works already showed his interest in judiciary activity. In his study of juries, Garfinkel examined the conditions in which practical reasoning is deployed and realized (1974b: 15). He wondered above all how juries knew what they were doing when they did the work of juries. And he stated:

I was interested in such things as jurors' uses of some kind of knowledge of the way in which the organized affairs of the society operated – knowledge that they drew on easily, that they required of each other. At the time that they required it of each other, they did not seem to require this knowledge of each other in the manner of a check-out. They were not acting in their affairs as jurors as if they were scientists in the recognizable sense of scientists. However, they were concerned with such things as adequate accounts, adequate description, and adequate evidence. They wanted not to be 'common-sensical' when they used notions of 'common sensicality'. They wanted to be legal. They would talk of being legal. At the same time, they wanted to be fair. If you pressed them to provide you with what they understood to be legal, then they would immediately become deferential and say, 'Oh, well, I'm not a lawyer. I can't be really expected to know what's legal and tell you what's legal. You're a lawyer after all.' Thus, you have this interesting acceptance, so to speak, of these magnificent methodological things, if you permit me to talk that way, like 'fact' and 'fancy' and 'opinion' and 'my opinion' and 'your opinion' and 'what we're entitled to say' and 'what the evidence shows' and 'what can be demonstrated' and 'what actually he said' as compared with 'what you only think he said' or 'what he seemed to have said'. You have these notions of evidence and demonstration and of matters of relevance, of true and false, of public and private, of methodic procedure, and the rest. At the same time the whole thing was handled by all those concerned as part of the same setting in which they were used by the members, by these jurors, to get the work of delibarations done. That work for them was deadly serious. They were not about to treat those deliberations as if someone had merely set them an 'iffy' kind of task. For example, in the negligence cases they were handling up to $100,000 of somebody's business, and they were continually aware of the relevance of this (*id*.: 16).

In sum, Garfinkel was interested in jury activity because this activity allowed him to study recourse to common sense and its deployments, but also – and this is important – because it revealed how the members of a given social group are simultaneously constrained by the institutional context in which they interact and participants in the creation of this same

context. What Garfinkel called a documentary method of interpretation is that capacity to resort to underlying schemes that produce a shared sense of social reality. Lawrence Wieder's work (1974) constitutes a remarkable example of how this method may be used. Based on a long field study in a halfway house for convicted narcotics offenders, Wieder shows how rules serve as a basis to observe, describe, and explain action. Rules – which he calls the "convict code" – in this case are a vague set of behavioral guidelines identifying a range of activities in which convicts must or must not engage. Wieder examined this code, not in order to judge its explanatory capacity, but to describe the explanatory uses that are made of it. He remarks that the code, as an interpretive system, allows convicts to identify and characterize events in the halfway house. In this manner, they can attach to the events they have qualified all the consequences specific to the event-qualified-as-such. Although the code is a powerful organizer of perceptions and actions for convicts and staff at the halfway house, however, this does not mean it has been incorporated. 'Its maxims did not relate antecedently existing situations to subsequent actions after the fashion required for the the rule-following model, nor did they 'cause' these actions.' (Heritage, 1984: 206) Maxims, rather, are used as means of interpretation that make it possible to ascribe a particular relevance to new situations. They impose themselves not as preexisting rules, but because invoking and actualizing them convince actors of their preexisting nature and their generally constraining power.

Most works inspired by ethnomethodology and focusing on the law emerged from conversation analysis. The first of these studies to date was by Max Atkinson and Paul Drew (1979), who drew their material from transcriptions of court proceedings during an investigation of communal violence in Northern Ireland in the late 1960s. Apart from a couple of theoretical questions and methodological issues, their work deals with questions of interest to conversation analysis, such as turn-taking organization, sequence, and the detailed description of speech acts that are typical of the judicial context: i.e. the way in which accusations are formulated and justifications or excuses presented. Describing turn-taking in the context of judicial procedure against a background of ordinary conversation, the authors identify formal constraints: the limited and predetermined number of parties that can participate in judicial interaction; the predetermined and predefined nature of turn-taking in conversation and the particular status of authorized interruptions (questions from the judge, objections from the lawyers). These specificities do not totally remove the participants' ability to maneuver intellectually, but they limit it drastically and force it to take tortuous paths. The authors also examine the way accusations are formulated in the course of the questions and

answers of the cross-examination that was, until recently, restricted only to common-law legal systems. They emphasize first the fact that accusations are formulated in such a way as to produce strong expectations of denial. The conditional relevance of the second part of an adjacent pair in relation to the first means that its absence is not only remarkable but also inferential. In that sense, an accusation may be conceived in a progressive, prospective manner; its explicit formulation will intervene only at the end of the sequence. At the same time, the persons who are being cross-examined can easily perceive the inferential nature of questions, or in other words the particular force of implicit accusations, and construct their attitudes and responses in relation to that. Atkinson and Drew also concentrate on the production of descriptions of places and actions and categorial systems of membership, as well as on the production of justifications and excuses by witnesses named in a cross-examination.

A second major study of discourse in the judicial context, by Douglas Maynard (1984) deals with plea bargaining, another specificity of common law. Maynard's goal is to describe the criteria implemented by participants in this procedure to determine what is essential in the course of their action. Clearly, Maynard was also seeking to replace normative positions on the benefits and drawbacks of plea bargaining with a detailed study on its modus operandi. To that end, he began by showing how a number of characteristics of plea bargaining are due more to its internal organization than to the effect of major factors external to interaction. Maynard then introduced Goffman's notions of frames of analysis and footing to show how, in plea bargaining – a unique system of verbal exchanges – participants undertake various shifts in alignment that translate the diversity of organizational forms in which they are situated and the breadth of the questions they use to confront the structural constraints of the situation and derive practical benefit from it. Maynard also focuses on the details of the negotiation sequence, which consists schematically of a turn unit where the speaker presents a position, and another turn unit in which the recipient of the first turn manifests his alignment or non-alignment with the first position. The construction of the plea sequence is the opportunity for many activities, such as exchange, compromise, and disagreement, with the common goal of arriving at a reasonable solution. Contrary to a widespread idea, the participants in a plea bargain do not necessarily deal with underlying questions, such as the facts of the case or the protagonists' profiles, before arriving at a mutually acceptable agreement. The fact remains nevertheless that the evaluation of these profiles is an important part of the negotiating sequence, in which it justifies the positions of the various protagonists.

In the United States, research has focused massively on evaluating the impact on decision-making of the defendant's legal and extra-legal attributes, but Maynard pointed out that, in precise, empirically documented contexts, the characteristics attributed to the defendant are always part of a selection carried out in a situated way among a range of potentially ascribable characteristics. They are not "descriptively adequate" in any objective sense, but they are formatted as "facts" in a particular case, contextually, as arguments are produced (Maynard, 1984: 26). Maynard's study shows how the institution of plea-barganing exerts procedural pressures towards a preference for the immediate resolution of a case, over going to trial.

Martha Komter (1998) has looked at interactions between judges and defendants in penal trials in the Netherlands. Her conversation analysis stance looks at the dilemmas and paradoxes that various parties to a penal procedure – accused and magistrates alike – must confront and resolve. Komter shows that the establishment of facts puts the accused in a situation where they have to choose between not contributing to their own incrimination and being perceived as having something to hide. Their interventions are therefore tightly constrained by dilemmas of interest and credibility. On one hand, they must preserve their personal interest by downplaying their specific "agency" in the event. On the other, they must preserve their credibility by showing their willingness to cooperate with the court. The various parties to a trial also face dilemmas of conflict and cooperation. Although the judges seek to obtain information from the suspects, they also imperil the latter' credibility when its aim appears too directly defensive. But suspects also know that appearing excessively defensive can undermine the credibility of their statements. A third type of dilemma – that of blame and sympathy – results from the fact that the production of accounts can be configured in such a way as to imply inferentially a moral condemnation (and therefore to aggravate the sentence) or, on the contrary, to attract sympathy and compassion (and therefore to attenuate the gravity of the case). At the same time, the mobilization of sympathy may be interpreted as being motivated by the intention of obtaining attenuation. Komter also explores what she calls dilemmas of morality and constraint, which the accused face when they seek to reestablish the moral equilibrium that their actions have thrown off kilter. Words generally appear insufficient to repair the harm suffered by the victim, and can additionally be perceived as self-interested, with the accused attempting to make a good impression. The accused is more likely to be taken seriously if he offers substantial compensation, but the spontaneous character of such an offer may be undermined by the persisting suspicion that the court imposed the compensation. As for promises not to repeat the offence, it is particularly

difficult for the accused to convince a judge that such promises are sincere or even realistic, although the judge may sometimes be tempted to pressure the accused to do the honorable thing. In sum, this work, which emphasizes the moral dimension of the judicial game, describes the dilemmas facing the accused, who are encouraged to express remorse, tempted to downplay their responsibility, but also consistently suspected of acting in a self-interested and insincere manner (see also Komter, 1997).

Gregory Matoesian's work is certainly the most sophisticated version of what conversation analysis can produce on judicial interaction. It is simultaneously accompanied by an analysis of domination and patriarchy that appears out of place, at best, and contrary to a conversationalist endeavor inspired by ethnomethodology, at worst (see above). *Reproducing Rape* (1993) examines the language used inside courtrooms during rape trials. Matoesian's starting point is clearly expressed in the book's introduction (1993: 1): 'This study offers a nuts and bolts view of the constitution of power and social structure as they live and unfold during the course of linguistic performance.' Language is therefore the medium through which social reality is interpreted; it is therefore a vehicle of power. Here, in the case of rape trials, power is the power of men over women – the power of patriarchy. Despite the fact that he aspires to provide overhanging interpretations through almost transcendental concepts and active forces that operate without social actors knowing it, Matoesian's work has value in that he focuses mainly on the linguistic details of judicial interaction. In that regard, he is not only a virtuoso, but also proves capable of detaching himself almost completely from this over-interpretive tendency. Thus, he demonstrates how "the facticity of social structure as an objectively constraining social fact stretching across time and space is achieved in mundane ineractions through the categorization, routinization, and normatization of actions, actors, and relationships." (1993: 25)

After having emphasized the fact that the judicial process is not a question of justice or injustice, but rather, for the concerned parties, of winning or losing (1993: 64), and described the turn-taking process in normal conversation, Matoesian provides a detailed analysis of language in the judicial context, that of rape trials in particular. He deals with questions of turn-taking in conversation, reparation sequences, objection sequences, multiple turns and silence, the syntax of question-and-answer sequences, and the linguistic construction and implementation of power. He adopts the same perspective when discussing the Kennedy Smith trial. In *Law and the Language of Identity* (2001) Matoesian endeavors meticulously to deconstruct linguistic interaction in judicial debates during a well-known trial in the U.S. He

starts by asserting that language is not simply a passive vehicle through which law is imposed and transmitted, but rather constitutes and transforms evidence, facts, and rules into relevant objects of legal knowledge (Matoesian, 2001: 3). Then he shows how linguistic ideology operates when it seeks to construct a witness's statements in terms of incoherence. This incoherence in testimony is constituted in interaction, through intertwined grammatical, sequential, and classificatory resources. This logic of incoherence, according to Matoesian, is based on gendered categories articulated on principles of identity and difference. These are organized linguistically through the poetic (meaning creative) properties of language. Matoesian, who is convinced that the social world in general and the legal world in particular is dominated by the male gender, nevertheless wonders through which mechanisms this domination is incarnated in powerful forms of legal-ideological practice, which are decked out in the colors of legal objectivity and rationality. He seeks to analyse the judicial techniques of cross-examination as closely as possible: these techniques consist of "detailing-to-death" and inflating the testimony while controlling it. In this way, Matoesian shows how the defense builds the evidence he wants to produce through the accumulation of successive questions that draw something unusual out of seemingly banal facts. Matoesian takes apart the method of "resumptive repetition" used by the defense lawyer, and shows – paradoxically, given his general thesis – that the outcome of rape trials cannot be analysed from the point of view of patriarchy, or the balance of power between the lawyer and the witnesses, alone. Instead, that outcome must be considered in light of shared knowledge of the relations that link the categories "women" and "rapists". The lawyer must bring this knowledge forward to compare it with the case at hand and draw conclusions from any incongruity (see also Matoesian, 1997). This leads him to caution that it is not sufficient for research to focus on the institutionalized distribution of asymmetrical options, on the characteristics of the cross examination, or even on variations in the format of the questions, as if these were the moving force operating backstage in the process of legal domination (2001: 102). Instead, it must seize the poetic work that is specific to the language of judicial interaction, if one wants to understand the particular force of different techniques mobilized during a trial. Matoesian also looks at two questions that are particularly important for the study of judicial interaction: intertextuality and expert testimony. Regarding the intertextual construction of legal discourse, in which textual events of current reporting and reported speech, he shows how a precise instance of interaction is articulated with a historically situated discourse and gives it its strength. Basing his analysis on Goffman, Bakhtin, and linguistic anthropology, he shows how 'complex interactions among grammar, prosody, and discursive style create a dense

constellation of voices and footings and index multiple social contexts in the legal order.' (Matoesian, 2001: 7) All these interactional resources, through which the parties contextualize or decontextualize words and deeds, allow them to negotiate their own ascribed identities and moral classifications as well as those of others, and the hierarchical organization – and therefore the effectiveness – of textual sources. On the question of expert testimony, Matoesian endeavors to show that the identity and credibility of expertise are also constituted through the mobilization of linguistic resources. Here again, one may observe changes in footing that correspond to the mobilization of different identities and positions of authority, and to the need to solve diverse institutional and discursive dilemmas.

Conversationalist pieces that deal with law and legal interaction are legion. Briefly, we may cite a few contributions brought together in the work edited by Travers and Manzo (1997). Thus, an article by Drew (first published in 1992) examines the methods used by witnesses and lawyers in cross-examinations carried out in the context of rape trials. The close examination of certain exchanges is designed to explain how people resort to methods or devices to present contrasting versions of events. Drew thus offers us a classical demonstration of the ways in which ordinary (i.e. non-professional) skills and resources are used in the courts. Watson's article (first published in 1983) also deals with the way common-sense knowledge and reasoning are used in the penal judicial process. The way in which defendants describe their victim thus makes their motives clear, and occasionally attempts to shift the burden of responsibility, in whole or in part. These descriptive methods are very widely used, whether by the police, lawyers, or juries, to recognize aggressors and victims in a contextual framework. We may also cite two articles published in a special issue of *Droit et Société*. One of them, by Martha Komter (2001), is about the construction of evidence in police interrogations. She looks at the establishment of written reports, which are supposed to reproduce the suspect's words, and compares them to recordings of interrogations in order to show how the police must maneuver between legal requirements, a bureaucratic context, and the rules of ordinary conversation. The result is an elaborate endeavor to construct legal relevance, in which the suspect's voice is altered and the policeman's is obliterated. The other contribution, by Matoesian and Coldren (2001), looks closely at the police on the basis of an excerpt from a conversation about partnership between the police, academia, and neighborhoods. The authors show how general notions, like that of "partnership", cannot be dissociated from the linguistic contexts in which they are used. They also show that the precise study of contextualized verbal interactions makes it possible to show that culture, far

from being a pre-defined explanatory resource, is made up of a multitude of identifiable details to which the parties to the interaction refer even while they contribute to transforming them.

Returning to the study by Atkinson and Drew, it is important to note that it is worthy of rediscovery, in that it lays the foundations of most conversationalist analyses of discourse in the judicial field (Travers, 2001: 358). It is also important to emphasize that it bears some of the major distortions of the methodology. First, there is the idea underlying conversation analysis, that a detailed descriptive study of hearings tells us all there is to know about legal work in context. It is clear that conversation analysis contributed a great deal to our understanding of judicial interaction, but one must still be wary of reducing to the object of study to recorded sequences alone, since all that precedes or follows those sequences may be equally relevant to the analysis of the actions, gestures, words, and orientations of active and passive participants. There is a series of parameters that are simultaneously integral parts of legal activity and external to mere verbal exchanges and what may emerge from those exchanges. Another shortcoming results from the paradigmatic dimension bestowed upon ordinary conversation in relation to turn-taking in institutional contexts. David Bogen (1999: 83-120) rightly critiqued the tendency that causes conversation analysis to risk succumbing to the same foundationalism it denounces in advocates of formal linguistic analysis. Among the most harmful consequences, we may point out the risk of over-interpretation of aural or verbal manifestations, simply because the observer does not have access to the elements preceding the sequence under consideration. There is also a tendency to exaggerate the collaborative dimension of the verbal exchange, to the detriment of its agonistic dimension. In this way – and despite the systematic references to contextuality – conversation analysis is based on postulates it developed without paying sufficient attention to the local production of order, intelligibility, etc. (Bogen, 1999: 120; see ch. 4 on context).

In line with this critique of conversationalist analysis of legal interaction, Lynch and Bogen (1996) analysed the Iran-Contra hearings. Although their book is not about a classical legal context, but rather a political and media episode – it offers a certain number of reflections that are relevant to the study of law in action. One of the interesting sections is related to the "ceremonial of truth". Here, Lynch and Bogen describe how procedural rules, although they never determine the exact course of activities that are supposed to follow their instructions, are nevertheless always relevant, from a practical point of view, for the way these activities are carried out. This is a good example of the idea that the rule cannot be understood outside

of the way in which it is practiced, and, inversely, that no practical application– whether violation, subversion, or instrumentalization – of a rule is possible without prior identification of that rule. The authors also emphasize the importance of preserving the coherence of an affirmation in relation to the establishment of its justice, but this does not correspond to a sort of mystical call to rational coherence, as one might find in Habermas. Rather, it indicates the implementation of a practical ability to produce reasonable, convincing narrative accounts that contest the storyline imposed in an authoritarian way by the accusation. Lynch and Bogen are also interested in the intertextual production of a master narrative/document that provides a basis for subsequent evaluations; this product is an important object of conflict between the concerned parties. Other sections relate to the practical uses of memory in the context of hearings or interrogations. The authors show in a relevant way that disavowals of recall "specivically obstruct an interrogator's attempt to exclude the middle when asking a yes or no question [although] it is often difficult to show unequivocally (or even plausibly) that these utterances reflect a witness's intention to obstruct or evade the operations of the truth-finding engine." (1996: 199)

The evaluation of claims to remember or not to remember occurs at the same time against background expectations of "what any normal person in this situation should remember", with the moral implications that might have with regard to the witness. If it were absolutely necessary to classify this book in a particular genre, one would say that it is a post-analytical conversationalist study, in the sense that it rejects the foundationalist tendency detected in conversation analysis. As the authors emphasize at the end of the work, 'the generic domain of conversation is not the only relevant backdrop against which singular events take on their specificity and sensibility.' (*id*.: 286) At the same time, because it relates to interaction that is methodically produced by the participants, this study is still largely conversationalist. The authors seek to describe the linguistic instantiation of cultural resources, which transcends classical conversationalist ambitions. They remain faithful to their ethnomethodological commitment, and do not attempt to interpret the video material on the basis of any abstract cultural framework, but rather to describe how a panoply of possible resources – legal, cultural, and discursive – were available and were actually used by the parties implicated in the hearings (*id*.: 266).

In a more phenomenological tradition, we have already mentioned Pollner's words. One has only to read the title of his book, *Mundane Reason* (1987), to agree that, like Garfinkel and his study of jury activities, what Pollner is interested in are the practical modes by which

ordinary reasoning is deployed, more than legal activity in and of itself. The fact remains that the uses of mundane reason – among others, the postulates of coherence, determination, and non-contradiction of reality – are subjected to an ethnographic study in the context of American traffic courts. Pollner's analyses thus show that disjunctions in descriptions of the same events are resolved not by adopting a post-modern and relativist point of view, which places multiple "narratives" on equal footing, but by pointing out the "exceptional" conditions for observation that prevailed at the time of the "contested" event. Hester and Eglin (1992: 214) sum up the different examples Pollner gives:

Puzzle: how could a defendant claim that he did not exceed 68 miles an hour and an officer claim that he did? Solution: faulty speedometer. Puzzle: how could a defendant claim that the vehicle in front of him and not his camper held up traffic and an officer claim that it was the camper? Solution: The camper blocked the officer's vision. Puzzle: How could a defendant claim that drag racing did not occur at a specified time and place when an officer claims that it did? Is it possible that drag racing did and did not occur? Is it possible that drag racing did and did not occur at the same time? Are they both right? Solution: The officer was actually referring to a different time.

Furthermore, in his critique of Becker's model of deviance, Pollner points out precisely how difficult it is to take an interactionist position, which would refer to the "hidden face of crime" – people who are not classified as deviants, but who are objectively – and of "false accusation" – people who are classified as deviants, but who are not so objectively. This position is incoherent in the perspective of labeling theories, but it still corresponds to the typology of judges in traffic courts. This is the paradox Pollner identifies. He thus stresses that, for magistrates, violations of traffic regulations that come before them are only one part of the sum total of real violations that go undetected (the "hidden face of crime"). It is also clear that the judge "knows" that the police make errors of judgment, falsely accusing drivers. The judge's work is therefore based on the underlying idea of objective deviance from or conformity with the law. The judge is called upon to evaluate the relation between an alleged crime and "what really happened". What takes place in the courtroom – accusations, denials, testimonies, explanations, excuses, justifications, the search for extenuating circumstances – only has meaning if one admits that guilt and innocence are independent of the methods that make it possible to establish them. In that sense, a police officer may erroneously cite the objectively innocent behavior of a driver, just as a driver who is objectively guilty of a violation may escape police detection (Pollner, 1975; 1979; 1987).

We may place James Holstein's book (1993) about involuntary commitment (the use of legal means to commit a person to psychiatric internment) in the same line as Pollner's work. Holstein clearly states that his book deals with interpretive practices, i.e. procedures through which people represent, organize, and understand reality (1993: 2). The aim of the work is specifically to explore the use of classifications like "mentally ill". At first sight, then, Holstein's perspective is largely interactionist and constructivist, since it sees mental illness as the result of a labeling operation. It departs from these genres, however, because of the attention the author pays to the labeling process. The ethnomethodological dimension of his work therefore, resides in his focus on contextuality and linguistic interaction: "interaction, in general, and, more specifically, talk and language use are not mere ways of conveying meaning [but rather] ways of *doing things with words* to produce meaningful realities and formulate the life world." (*id.*: 6)

In that perspective, Holstein seeks to identify the postulates on which judgments regarding people's mental health are based, as well as the constraints and intentions characteristic of the institution in which these judgments are passed. He thus shows how the examination sequence provides a structure making it possible to organize the questions for commitment hearings into medically informed legal proceedings. Furthermore, these hearings aim to put people on stage, to portray the circumstances specific to each case, and to make the achievement of "legality" and "justice" visible (Holstein, 1993: 87). Regarding legal decisions on psychiatric internment, the author describes the modus operandi of various underlying schemas that concern not only the conditions necessary to life outside a psychiatric institution, but also the various types of mental pathology and their practical consequences. In this way, he reviews a series of procedures that organize people's psychic competence or lack thereof, on the basis of the "normality" of their verbal expression, among other things; or that organize the description of the conditions for the internment of mentally ill individuals; or that organize the specific characteristics of credibility, "good" performance, and "appropriate action" in relations to the circumstances of the affair. In conclusion, Holstein attempts to reconcile his phenomenological-ethnomethodological approach with a Foucauldian vision of micro-controlling processes applying to all social spaces.

Analyzing law through mundane reason provides us with many entrance points to practical methods of reasoning and judgment. At the same time, it does so in a constructivist way, which we may pause to examine. Lynch (1993: 37) points out that Pollner's approach tends to engage the ethnomethodological approach in a self-reflexive endeavor that is part of a radical

constructivist struggle against objectivism. He goes on to say that such an attitude need not necessarily be anti-objectivist, however. In other words, Lynch considers that ultimately, Pollner, like many of those who oppose objectivism, has replaced one abstract foundation by another: "In place of an independent 'mundane world' he installs the 'work of worlding': acts emanating from a subject that produce a world, acts the subject then 'forgets' by presuming the independence of that world." (Lynch, 1993: 37-8)

This type of constructivism bestows a founding status on social, textual, interactive, and rhetorical practices and systems. In consequence, it adopts a representational image of language: its adherents consider that "reality" is separate from language, and then accentuate the founding role of linguistic acts in realizing a simulacrum of reality (Button and Sharock, 1993: 12). They therefore fall back into the corrective trap by merely putting forth yet another sociological theory of reality, that aspires to correct different versions, whether they have been suggested by science or mundane reasoning itself (Button, 2001: 164). Button points out that correctivism hides part of the phenomenon it is supposed to be describing. Taking the example of a bridge that can be described as a means of transportation and a means of discrimination (it was built to prevent a given population from using it, since it is not accessible via mass transport, which is the way this population habitually moves around), he shows that these two readings cannot be carried out in parallel: the description of the bridge as discrimination depends on the description of the bridge as technique. In other words, describing the bridge as an agent of social control is a "re-description", which depends on the first description, of the bridge as bridge, being intelligible (Button, 2001: 168). In sum, to assert that describing the bridge as a means of discrimination is preferable to describing it as a bridge is tantamount to disregarding an essential part of the phenomenon -- that of the bridge; extracting the phenomenon from the social world in which it is inscribed; and arbitrarily selecting elements relevant to the description instead. As for the social actor produced in the process, he is no longer Garfinkel's idiot, but rather a naïf, who believes that an "ordinary world" is normal when analysis repositions that world as the product of "social" practices that are accepted as normal (Lynch, 1993: 153). The immediate consequence is that we are back in the very same position of skepticism that ethnomethodology rejects.

There is an important difference between resorting to legal material to develop our knowledge of interactive language and analyzing legal procedure with the help of ethnomethodology. As Rod Watson points out,

… some of the best ethnomethodology and conversation-analysis studies of law and legal reasoning come from analysts who do not regard themselves as having any special interest in 'the law' as a sociological specialism but instead simply conceive of themselves, like Garfinkel, as doing generic ethnomethodology/conversation analysis: there is a real distinction of focus, here. (personal communication)

Clearly, our method resorts to ethnomethodology and conversation analysis in order to respecify the object of socio-legal studies, but this does not mean that it is irrelevant to ethnomethodology in general – and particularly to the study of routine practices in an institutional context. This attitude corresponds to one of the tendencies prevalent in ethnomethodology: ethnomethodological ethnography, or the ethnomethodology of work. In that perspective, what is at the heart of the analysis is no longer so much the social production of order whatever the context than the study of the practical organization of a professional activity and the specialized production of order. In the legal field, this method finds an anchor in very old works, and is extended through recent research, even though it is necessary to recognize its paucity in quantitative terms.

Aaron Cicourel's research on justice for juveniles, though it is relatively old, emerged from this ethnographical concern, proceeding in a way we could describe as proto-methodological. Compared to the mobilization of the sociological (and particularly statistical) apparatus being carried out at the time, Cicourel (1968) showed marked interest in observing and describing the practices of groups and professionals who were responsible for implementing and administering the rights of juveniles, beyond the simple transcription of recorded verbal exchanges. This technique allowed Cicourel to show how police officers decided to arrest, accuse, or incarcerate juveniles on the basis of interrogation reports, according to organizational constraints and on the basis of a limited range of possibilities. But the truly pioneering study in this method allying ethnomethodological and ethnographic sensibilities was Sudnow's (originally written in 1965) on "normal crimes". Sudnow, who was interested in the process of legal qualification, showed how legal categories, far from being comprehensible exclusively thanks to compendiums of the main juristic principles, must be understood through the process of categorization itself. Sudnow's research was based on several months' continual observation of jurists at work, particularly in their plea bargaining, and he described in detail the methods they used to undertake negotiations starting from what appeared to be a "normal crime". According to Sudnow (1987: 158), formal legal categories are 'the basic conceptual equipment with which such people as judges, lawyers, policemen, and probation workers organize their everyday activities'. This signifies that once these

categories are identified, it is still necessary to examine how people orient to them in practice. Here, Sudnow is establishing a distinction between necessarily included lesser offenses, and routinely included lesser offenses. The former are violations of the law that are implied by definition in the commission of more serious offenses, while the latter are only implied by the effects of the social actors' practices. The practical consequence is that "in searching an instant case to decide what to *reduce it to*, there is no analysis of the statutorily referable elements of the instant case: instead, its membership in a class of events, the features of which cannot be described by the penal code, must be decided." (Sudnow, 1987: 162)

It is precisely this category of events that Sudnow describes as "normal crimes". Normality here refers to the way people deal with a category of persons and events when they are dealing with certain types of criminal acts. Sudnow also shows that, in addition to lesser legal offenses, which are included by definition or situationally in the same category as graver offenses, some offenses are included simply because of the routine practice of professionals, since this routine associates certain offenses, as they are generally committed, according to the social criteria prevailing at a given moment.

Along the same lines, we may cite an article by Sacks (1997; originally written in 1962) about lawyers' work, describing the way jurists are engaged, during their daily activity, in "managing routine" through their contribution to the stability of social life. At the same time, when carrying out their work before the courts, they are engaged in "managing continuity", and, for that reason, they deal with new cases as if they were instances of a prevailing legal category. As a result, non-legal practices are of primary importance in the administration of the law. As for Lynch, he wrote an article (1997; originally written in 1979) dealing with hearings before a Canadian legal tribunal, in which he examined the judge's visible, public work, ranging from the management of procedural constraints to the moral denunciation of the accused at the moment of sentencing. He points out that the public justification for judicial actions that are undertaken, and judicial reasons that are proffered, is an integral part of court hearings, which are therefore not limited to strictly legal procedures. An article by Albert Meehan (1997; originally published in 1988) examines the modes by which the police produce interrogation reports and other documents in the policing of juveniles. Among these documents, he focuses particular attention on the running record, which includes all the knowledge collected about an individual, as well as past places and events, and which is used in sentencing. Maynard and Manzo (1997; originally published in 1993) also produced a detailed article about the way juries reach decisions, in which they show that the result

precedes the decision. They also show that justice, far from being only the abstract notion of philosophers and, to a certain extent, sociologists, is something that exists empirically, i.e. in the words and deeds of ordinary society. Finally, we must cite the work of Stacy Burns (1997; originally published in 1996), which deals with legal education and describes how a teacher may emphasize the specifically practical dimension of a jurist's work. Stacy Burns is one of the rare individuals who followed Garfinkel's advice and sought to combine sociological training with professional qualification (as a lawyer), thus acquiring the double skill set that is ideally necessary to carrying out ethnomethodological research on work. More recently, Luisa Zappulli, to whom we dedicate this volume, also carried out an ethnomethodological study of aspiring magistrates in Italy. In an article (2001) based on her research, she showed how institutional constraints, technical expertise, and ordinary knowledge mingle, as young magistrates are called on to develop their ability to master their new professional environment quickly, in order to start their career in the most advantageous manner.

There is only one monograph specifically devoted to legal work from an ethnomethodological point of view: *The Reality of Law* (Travers, 1997), which examines the activity of a firm specializing in criminal law. In the first part, he deals with the general question of the sociology of law, including its theory, subject, and method; and he tries to show, by way of contrast, what new and useful elements the ethnomethodological approach can offer in this regard. He evokes the "blind spot" in the sociological study of law, to wit, the failure to take into full account the organizational constraints and contingencies that affect lawyers' work. Lawyers must not only take these constraints and contingencies into account, they must also use them as resources to show that they have acted as fully as possible in practice. The ethnomethodological approach to law thus asks how to deal with legal activity as a social phenomenon. Travers then reviews a few ethnomethodological studies of legal activity. The second part of the book is devoted to fieldwork that the author carried out among criminal lawyers in the north of England. After a phenomenological description of the firm, Travers shows how its different nature, which makes this what he calls a "firm of radical lawyers", is made visible by those who work there through their way of speaking about their daily activities (*id*. chapter 3). In that sense, people are not simply members of a group; they are also the links to these categories, which always implies a degree of interpretation that is open to rectification. Furthermore, this membership is also translated by the promotion of a particular type of opinion on professional practice, and a form of self-presentation that highlights one's professionalism in carrying out that practice. The author also broaches the

question of criminal lawyers' work strictly defined (chapter 4), in the specific context of this firm. Travers shows how law and procedure emerge first and foremost from a practical understanding that depends on the type of client, common-sense skills, and knowledge acquired through experience. This is particularly visible when we observe in detail how a lawyer persuades his client to plead guilty (*id.* chapter 5). The ethnomethodological perspective adopted by Travers aims to give weight to people's daily understanding of the social context, developed on the basis of shared methods, rather than adopting an overhanging point of view. Considered from this perspective, the lawyer is no longer only a cynical being who manipulates his client for reasons that have nothing to do with the client's welfare; he is also a professional who can carry out his activities as well as possible in the situation he is facing, using the limited resources available in that context. Travers also looks at the work that goes into preparing a trial for the Crown Court (id. chapter 6). In this part of his study, one sees how important simple routine is. Furthermore, one remarks the methods used to solve problems, among others the use of shop talk. All these methods display "routinized" legal knowledge, which mixes technical vocabulary and practical experience. In conclusion, Travers emphasizes the main advantages of ethnomethodology. He sees law as a social construct (a point on which he agrees with advocates of a realistic, critical vision), and shows why it is useful to analyse in detail all the specific episodes of legal work and the interaction between lawyer and client. He later adds, however, that the study of law in action shows that lawyers' constructivist stance cannot escape from the impact of the constraints they must face. The author agrees here with the critique some lawyers have leveled against legal sociologists, who blame them for not being able to explain the content of legal practice. Law is not an institution that fulfils a certain number of functions in society (like the reproduction of domination, for example), so much as it is a set of social practices that unfold in the context of complex societies. According to Travers, ethnomethodology is not unaware of the questions posed by critics of modernity, but it seeks to answer those questions through an empirical, rather than speculative, method.

This introduction looked at the idea of law in action. We showed what sets the ethnomethodological study of law apart from classical legal sociology. We also identified a propensity to set up a dichotomy between law on the books and law in action, to forget the phenomenology of law and to prefer general interpretations that shed no light on the description of situated legal practices. In contrast with this approach, the ethnomethodological study of law and justice allows for a respecification of the subject of research. In that

perspective, the point is no longer to identify the shortcomings of legal practices in comparison with an ideal model or a formal rule, but rather to describe the modes of production and reproduction, the intelligibility, understanding, structuring, and public manifestation of the structured nature of law and the various activities related to it. This presentation of ethnomethodological research on the topic allowed us to lay the bases of the praxiological approach that is adopted by all the contributors to this volume.